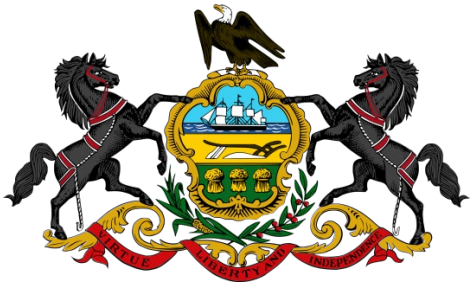
Environmental Hearing Board

Adjudications and Opinions



2024
VOLUME I

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

2024

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

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 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

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 5, 2024**
	:	

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

By Steven C. Beckman, Chief Judge and Chairperson,

Synopsis

The Board upholds the Department's issuance of a compliance order in part addressing a wetlands encroachment as legal and reasonable when issued. The defenses offered by the appellant did not eliminate the requirement for a permit from the Department for the actions that were undertaken by the appellant. However, the circumstances on the ground have changed since the compliance order was issued and the remedy required by the order is no longer necessary or appropriate.

Background

This matter involves the appeal of a compliance order that the Department of Environmental Protection ("the Department") issued to Craig High ("Mr. High"), citing violations arising from work he conducted on his farm property ("the High Farm"). The Department alleged that Mr. High violated certain requirements of Chapter 105 and the Dam Safety and Encroachments Act and ordered him to restore an excavated ditch and to develop and implement an erosion and sediment control plan or conservation plan. The High Farm is located in Anthony Township, Montour County, Pennsylvania at 23 PPL Farm Road, Danville, PA where Mr. High

grows organic produce. At an unspecified time prior to August 20, 2020, Mr. High excavated a ditch through an area of wetlands in order to convey water that was collected in part through a field drainage system. Upon receiving a complaint, the Department conducted several inspections of the High Farm and ultimately, issued a compliance order ("the Compliance Order") on April 20, 2021, pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. § 693.1 et seq.; the Dam Safety and Waterway Management Regulations, 25 Pa. Code § 105.1 et seq.; and the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.1 et seq. The Compliance Order ordered Mr. High to restore the ditch to within ten inches of the pre-existing ground elevation and to develop and implement an erosion and sediment control plan.

Mr. High filed his Notice of Appeal, *pro se*, with the Environmental Hearing Board ("the Board") on May 17, 2021. The Board granted several joint requests for stay and extensions of prehearing deadlines before counsel appeared on behalf of Mr. High on July 25, 2022. Mr. High and the Department submitted their prehearing memorandums on February 6, 2023, and February 27, 2023, respectively. On March 2, 2023, the Department filed a Motion in Limine requesting the Board to preclude the admission of any exhibits that Mr. High intended to introduce into evidence at the hearing. The following day, the Department filed a motion requesting the Board to conduct a site visit of the High Farm. On March 14, 2023, Mr. High submitted a supplemental prehearing memorandum. Mr. High responded to the Department's motion for a site visit on March 17, 2023, essentially arguing that a site visit was not necessary in this matter. On March 20, 2023, Mr. High filed his response to the Department's motion in limine along with a cross motion in limine. After holding a conference call with the parties, the Board issued two orders on March 29, 2023. The first order denied Mr. High's motion in limine and the Department's motion

in limine with exception to Exhibit 10, which was an expert report, as it was consistent with the judge's practice to not admit expert reports in their entirety. The second order granted the Department's motion for a site visit.

On May 16, 2023, the Board visited the High Farm and observed the area that is the subject of this appeal. A two-day hearing was held in this matter on May 17th and 18th of 2023, at the Board's courtroom in Harrisburg. The Department and Mr. High filed their post-hearing briefs on August 11, 2023, and September 15, 2023, respectively. On September 29, 2023, the Department submitted its post-hearing reply brief and a motion to strike exhibits that were attached to Mr. High's post-hearing brief. On October 10, 2023, Mr. High filed his reply to the Department's motion to strike. The Board issued an opinion and order on the motion to strike October 18, 2023, striking all but one of Mr. High's exhibits. The Board granted the Department's motion where two of the exhibits were not introduced at the time of hearing on the merits. The Board held that while the other exhibit was also not introduced at the hearing, the exhibit itself was referenced in the Department's own regulations and post-hearing brief, thereby making it appropriate for the Board to consider in its ruling. This matter is now ripe for decision.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001; 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 Appellant, Craig High ("Mr. High"), owns and resides on property within Anthony Township, Montour County, Pennsylvania at 23 PPL Farm Road, Danville, PA ("the High Farm").

3. The High Farm is located in an agricultural area and it is actively farmed by Mr. High. (T. at 12).

4. The High Farm contains multiple fields, including a field that is located at the southeastern intersection of PPL Farm Road and PPL Road ("Field 14"). (T. at 296; Ex. D-1).

5. The eastern side of Field 14 is bordered by a stretch of land that has a watercourse with a definable bed and bank ("Area 1"). (T. at 96; Ex. D-1).

6. Field 14 slopes to the south and is bordered on its southern edge by a vegetated buffer area ("Area 2"). (T. at 324; Ex. D-1).

7. The western side of Field 14 is bordered by a stretch of land ("Area 3") that runs parallel with PPL Road and contains an unnamed tributary of the Chillisquaue Creek that emanates from a pond on the High Farm, north of PPL Farm Road. (T. at 135; Ex. D-1)[1].

8. The unnamed tributary in Area 3 has a definable bed and bank. (T. at 135).

9. The High Farm contains field drainage systems that were installed prior to Mr. High's ownership. (T. at 297, 387-388).

10. The field drainage system on the High Farm consists of tiles and drainpipes that intercept water to direct it away from the fields. (T. at 299-301, 388).

11. Field 14 has a field drainage system. (T. at 39, 298, 394; Ex. A-12).

[1] One of the difficulties for the Board in evaluating this case is that the Department separated the portions of the High Farm that were impacted by Mr. High's activities into three separate but adjacent areas identified as Areas 1, 2 and 3. The Compliance Order only addressed Area 2. However, the testimony at the hearing involved all three areas and it was not always clear to the Board which area was being referenced at any given time.

12. Area 1 contains three drain outlets and Area 3 contains two drain outlets. Area 2 does not contain any direct drainage lines or outlet points. (T. at 326; Ex. A-12).

13. Prior to Mr. High taking ownership of the High Farm, PP & L, and its successor organization, Talen Energy, owned the High Farm. (T. at 145).

14. The High Farm was leased from PP & L and its successor organization by Mr. Lynn Appelman. (T. at 148).

15. Mr. Appelman enrolled the High Farm in the Pheasants Forever Program from 2009 through 2016. (T. at 149). Under this program, the High Farm was used to grow warm season grasses to provide habitat for pheasants. (T. at 147).

16. At least since 2009, and throughout the remainder of the time that PP & L/Talen Energy owned the High Farm, the High Farm was not used to grow or harvest crops. (T. at 152).

17. Mr. High purchased the High Farm from Talen Energy in September 2017. (T. at 293).

18. At some point prior to August 20, 2020, Mr. High excavated a ditch/channel in the vegetated buffer area contained within Area 2. (T. at 132, 238-9, 329, 334-35).

19. Mr. High performed the excavation work in Area 2 in order to channel water away from Field 14. (T. at 327).

20. Mr. High excavated a ditch in Area 2 that was approximately 20 inches deep. (T. at 329).

21. The ditch in Area 2 receives water from the outlets and stream located in Area 1. The ditch in Area 2 flows east to west. The water conveyed from Area 2 meets the unnamed tributary emanating from Area 3 and then flows underneath PP & L Road. (T. at 350-52; Ex. A-12).

22. Mr. High placed excavated material from the new ditch into the wetlands area of Area 2. (T. at 67; Exs. D-20, D-21).

23. Mr. High never planted crops in or tilled Area 2. (T. at 339).

24. Mr. High did not have a permit in relation to the clearing and excavation work he conducted. (T. at 339).

25. The Department was made aware of the excavation work at the High Property after receiving a complaint. (T. at 12).

26. George Grose ("Mr. Grose") is employed as a senior civil engineer with the Department in its waterways and wetlands program in the northcentral regional office. (T. at 10).

27. Mr. Grose and staff from the Montour County Conservation District visited the High Farm on August 20, 2020 to determine whether any potential violations had occurred. (T. at 11-12).

28. During the August 20th site visit, Mr. Grose observed dredged material on the left side of the bank of the unnamed tributary in Area 1 and the presence of mottled soils and cattail plants. (T. at 13).

29. Mr. Grose believed that Area 2, where the excavation took place, was wetlands. (T. at 53-54).

30. Mr. Grose did not see any crops being grown in Area 2 at the August 2020 site visit. (T. at 20).

31. Following the site visit, Mr. Grose drafted an Inspection Report ("August 20th Report"), listing violations for failure to obtain a Chapter 105 permit and of 25 Pa. Code § 105.46 for failure to implement an erosion and sediment control plan. (T. at 16; D-17).

32. The August 20th Report recommended that no further work be performed at the High Farm until a further assessment of the nature and the extent of the violations could be conducted. (T. at 19; D-17).

33. After failing to contact Mr. High by phone, Mr. Grose mailed the August 20th Report to Mr. High. (T. at 21; D-17).

34. Jared Jacobini ("Mr. Jacobini") is an aquatic biologist employed by the Department and works in the Waterways and Wetland Engineering program. (T. at 208, 209; Ex. D-3).

35. Mr. Jacobini has been a biologist for 19 years and received an Associate's Degree in Wildlife Technology from Pennsylvania State University, and a Bachelor of Science degree from Mansfield University. He has taken graduate courses from Delaware State University including courses related to conservation and restoration biology and habitat management restoration. (T. at 209, 210; Ex. D-3).

36. Mr. Jacobini has participated in several trainings in the identification and delineation of wetlands. (T. at 218, 219; Ex. D-3).

37. Over the last 3 years, Mr. Jacobini has made approximately 25-30 determinations as to the presence or absence of wetlands. (T. at 213).

38. Mr. Jacobini is qualified and is recognized by the Board as an expert in wetland identification. (T. at 223).

39. Mr. Jacobini uses the Federal Manual for Identifying and Delineating Jurisdictional Wetlands when he inspects a site for the presence or absence of a wetland. (T. at 211, 233).

40. Mr. Jacobini's responsibilities at the Department include reviewing permits for waterways and wetlands, conducting inspections, investigating complaints, and confirming the presence or absence of wetlands. (T. at 209, 211; Ex. D-3).

41. On September 23, 2020, Mr. Jacobini accompanied Mr. Grose to the High Farm to conduct a site inspection ("September 2020 Inspection"). (T. at 226).

42. During the September 2020 Inspection, Mr. Jacobini determined that wetlands were present at the High Farm in Area 2. (T. at 227).

43. Mr. Jacobini determined that the wetlands on the High Farm had been encroached upon through unpermitted excavation. (T. at 227).

44. Mr. Grose did not observe any crops being grown in Area 2 at the September 2020 Inspection. (T. at 31).

45. Mr. Jacobini assisted Mr. Grose in drafting the September 23, 2020 Inspection Report ("September 23rd Report") and recommended the ditch be restored to a maximum depth of 10 inches in order to prevent the wetland from being "robbed" of hydrology. (T. at 229; Ex. D-2).

46. The September 23rd Report outlined the wetlands boundary as extending between 20-30 feet from the top of the ditch on the right side and to the existing tree-shrub line on the left side of the excavated ditch in Area 2. (Ex. D-2).

47. The September 23rd Report requested the restoration work be completed in 60 days. (T. at 347; Ex. D-2).

48. Mr. High did not undertake the restoration work requested in the September 23rd Report. (T. at 347).

49. Mr. Grose and Mr. Jacobini did not observe the condition of Area 2 prior to Mr. High's excavation. (T. at 113, 259).

50. Mr. Grose reviewed recent aerial photographs of Area 2 and did not see evidence that there was a definitive ditch. (T. at 113).

51. In an email exchange between Mr. Grose and Mr. Jacobini dated October 2, 2020, Mr. Jacobini recommended that the ditch should be no deeper than 12-inches. (T. at 101, 105; Ex. A-19).

52. During winter, in either late 2020 or early 2021, Mr. Grose drove by the High Farm and observed that no restoration work had been conducted in Area 2. (T. at 34; Ex. D-23).

53. Mr. Grose conducted a visual drive-by of Area 2 on April 19, 2021. (T. at 109; Ex-D-1).

54. The Department issued the Compliance Order on April 20, 2021. (Ex. D-1).

55. The Compliance Order required Mr. High to complete the restoration work by May 31, 2020. (T. at 347; Ex. D-1).

56. On May 6, 2022, Mr. Jacobini returned to the High Farm to conduct a more detailed inspection of Area 2. (T. at 115, 231; Ex. D-4).

57. There are three components considered to establish the presence of a wetland. Those components are hydric soil, hydrology, and hydrophytic plants. (T. at 233).

58. Mr. Jacobini determined all three components for a wetland were present on May 6, 2022 and documented his findings on a U.S. Army Corps of Engineers data sheet. (T. at 236; Ex. D-14).

59. Mr. Jacobini observed encroachment into the wetlands located in Area 2 during his May 6, 2022 inspection and the encroachment was in the same area that he inspected on September 23, 2020. (T. at 237-38).

60. Mr. Jacobini took photographs during his May 6, 2022 inspection, detailing the conditions of Area 2 on that day. The photographs depicted the ditch, the water within the ditch, and vegetation growing in and around the ditch. (Exs. D-5, D-6, D-7, D-8).

61. Mr. High has not undertaken the work specified as required "remedial action" at Paragraphs 3 and 5 of the Department's Compliance Order regarding the implementation of restoration and the submission of a full and complete restoration plan. (Parties' Stipulation of Facts, para. 1).

62. Robert Baines ("Mr. Baines") is a founder of Sovereign Environmental Group in Coatesville, Pennsylvania which primarily focuses on environmental regulations. (T. at 358-59; Ex. A-11).

63. Mr. Baines received a Bachelor of Science in Biology in 1987 from Randolph-Macon College and a Master's Degree in 1989 from Duke University that focused on environmental policy. (T. at 354-55; Ex. A-11).

64. Mr. Baines' experience includes the review of aerial photography, soils, maps, wetland studies, federal, state, and local regulation and regulatory compliance; and Phase I and II environmental site assessments. (T. at 335-39; Ex. A-11).

65. Mr. Baines was recognized by the Board as an expert in the review of historic property uses and the application of guidance, policies, regulations, and law related to environmental property use, including forest environments. (T. at 360-361).

66. Aerial photographs associated with the High Farm were obtained by Mr. Baines from EDR and Historic Aerials. (T. at 362, 372; Exs. A-1, A-22, A-23).

67. Mr. Baines has been involved with approximately 100 properties that contain wetlands over his career. (T. at 361).

68. EDR Aerial photographs from 1938, 1959, 1969, 1977, 1981, 1993, 2005, 2010, 2015, and 2019 depict the High Farm including Field 14, Area 1, Area 2, and Area 3 at these

respective times. The aerial photos show a distinct boundary between Field 14 and Area 2. (Ex. A-1).

69. None of the EDR Aerial photographs show that Area 2 underwent draining, dredging, filling, or leveling, or any other manipulation in order for Area 2 to allow for the production of an agricultural commodity. (Ex. A-1).

70. In reviewing the National Wetland Inventory, Mr. Baines found that it did not indicate that Area 2 contained wetlands. (T. at 386; Ex. A-13).

71. EMap Pennsylvania is a GIS based mapping tool that can be used to identify bodies of water in Pennsylvania. (T. at 384; Ex. A-16).

72. Mr. Baines reviewed FEMA Flood Maps which did not show evidence of a watercourse in Area 2 (T. at 383-84; Ex. A-14).

73. Mr. Baines reviewed three renderings from eMap Pennsylvania which showed a blue line that indicated the unnamed tributary that travels through Area 3. The eMap renderings did not identify any unnamed tributaries in Area 1 or Area 2. (T. at 384-85; Ex. A-16).

74. Chapter 14 Water Management (Drainage) of the Part 650 Engineering Field Handbook ("National Engineering Handbook") provides guidance for the planning and implementation for artificial agricultural drainage practices. The United States Department of Agriculture and the Natural Resources Conservation Service maintain the National Engineering Handbook. (T. at 389; Ex. A-15).

75. The National Engineering Handbook is used in connection to designing, maintaining, and the functioning of field drainage systems. (T. at 390; Ex. A-16).

76. The National Engineering Handbook includes figures that depict elements of field drainage systems. The figures pertaining to different surface draining systems all include an outlet drain. (T. at 396; Ex. A-16).

77. Mr. Baines testified that he has never seen a diagram of a surface draining system without an outlet drain or has observed a functioning field surface draining system that has not included an outlet drain. (T. at 396; Ex. A-16).

DISCUSSION

Legal Standard

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); *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 by a preponderance of the evidence that (1) the facts support the order, (2) its order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion. *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 appellant, however, bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

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).

Analysis

The basic facts of this case are not in dispute. Mr. High purchased a farm property in Montour County from Talen Energy in 2017. The High Farm has multiple farm fields on which Mr. High grows crops. The farm field at issue in this case, which is identified by Mr. High as Field 14, is located at the intersection of PPL Farm Road and PPL Road. Field 14 slopes to the south and is bordered on its southern edge by a vegetated buffer area. At an unidentified date prior to August 20, 2020, Mr. High conducted clearing and excavation work in the vicinity of Field 14 including the excavation of a channel in Area 2 located along the southern edge of Field 14 in the vegetated buffer area. The Department received a complaint about the work conducted by Mr. High and on August 20, 2020, Mr. George Grose, a Department Senior Civil Engineer made an initial inspection of the High Farm. He testified that during his initial inspection he noted, among other observations, that a channel had been trenched in Area 2 in what Mr. Grose identified as wetlands. The Department mailed a copy of the August 20, 2020 Inspection Report to Mr. High and recommended that no additional work be done until a further evaluation of the site could be conducted.

A follow-up inspection was attended by Mr. High, Mr. Grose, and a Department biologist, Jared Jacobini, on September 23, 2020. Mr. Jacobini confirmed that there were wetlands present in Area 2 and that some of the work completed by Mr. High constituted encroachment into wetlands. The Department and Mr. High discussed a potential plan for restoring the impacted area to the satisfaction of the Department and the Department requested in its September 23, 2020 inspection report that the restoration work be completed in 60 days. Mr. High did not undertake

the requested restoration work in the time frame set forth in the Department's September 23rd Report.

On April 20, 2021, the Department issued the Compliance Order to Mr. High that is the subject of his appeal to the Board. The Department argues that its Compliance Order was a legal and reasonable action of the Department. In order to prevail, the Department must show by a preponderance of evidence that the violations on which its Compliance Order rests took place and that the restoration requirements it ordered are legal, reasonable and appropriate under the circumstances of this case. The Compliance Order alleges that the work conducted by Mr. High resulted in two violations that are identified by checked boxes listed on page two of the Compliance Order form. The first checked box lists the violation as "[t]he construction, operation, maintenance, modification, enlargement or abandonment of an encroachment or water obstruction activity without first obtaining a permit or other required authorization in violation of 25 Pa. Code § 105.11(a) and the Dam Safety and Encroachment Act 32 P.S. §§ 693.6 and 693.18." The second marked violation on the Compliance Order is the "[f]ailure to implement Erosion and Sediment Control Plans and/or construction not in accordance with approved plans, maps, profiles, and specifications in violation of 25 Pa. Code § 105.13, 105.46 and 105.44 and the Dam Safety and Encroachment Act 32 P.S. §§ 693.6 and 693.18."

After identifying these two violations, the Compliance Order ordered Mr. High to "[r]estore the excavated ditch through the wetland … by May 31, 2021" and to "[d]evelop and implement an erosion and sediment control (e&s) plan or conservation plan in accordance with Chapter 102.4(a) … by May 31, 2021." Mr. High did not comply with the Compliance Order in the time frame identified within it. In fact, the parties stipulated at the start of the hearing that Mr. High had not performed the remedial action required in the Compliance Order as of the date of the

hearing. A final basic fact in this case on which all parties agree is that Mr. High did not have a permit or authorization to conduct the work he completed in the vegetated buffer area. Mr. High asserts that he was not required to have a permit for the work and, therefore, there were no violations on which the Department could rely in issuing its Compliance Order.

The key issue in this case is whether the Department is correct that Mr. High's excavation activities in Area 2 required a permit or authorization from the Department. Under questioning at the hearing, the principal Department witness, Mr. Grose, acknowledged that the violation for failure to implement an Erosion and Sediment Control plan was secondary and a plan would only be required if a permit was required. In order to determine whether a permit was required, we start with the Dam Safety and Encroachment Act ("DSEA"). The DSEA states that "[n]o person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department." 32 P.S. § 693.6(a). The Department argues that Mr. High's activities constituted the construction, modification and enlargement of an encroachment that required a permit from the Department. An encroachment is defined as "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3. A watercourse is defined as "[a]ny channel of conveyance of water having a defined bed and banks, whether natural or artificial with perennial or intermittent flow." *Id*. A body of water is defined as "[a]ny natural or artificial lake, pond, reservoir, swamp, marsh or wetland." *Id*. Based on these definitions, the Department asserts that a permit was required because Mr. High's excavation of a channel in Area 2 "created an encroachment that changed the cross-section of the wetlands." (Department's Post-Hearing Brief at 18). The Department further argues that Mr. High's actions

in Area 2 also included excavation of a portion of a watercourse which it identified as an unnamed tributary to the west branch of the Chillisquaque Creek. (*Id*., at 21).

We are satisfied that the evidence the Department presented at the hearing demonstrates that the excavation conducted by Mr. High encroached on wetlands located in Area 2 of the High Farm. Mr. Grose testified that during his initial inspection, he identified what he believed to be wetlands in Area 2 based on his years of experience. (T. at 53-54). However, because Mr. Grose did not consider himself to be a wetlands expert, he brought in another Department staff person. On September 23, 2020, Mr. Grose returned to the High Farm with Mr. Jacobini, a Department regional biologist, so that Mr. Jacobini could determine the absence or presence of wetlands. Mr. Jacobini was admitted by the Board as an expert in wetlands identification. (T. at 223, 226). Mr. Jacobini noted the presence of wetlands in Area 2 during his site inspection and stated that he observed excavations in the wetlands. (T. at 227, 238). According to the September 2020 Report, the wetlands boundary line extended between 20-30 feet from the top of the ditch on the right side and to the existing tree/shrub line on the left side of the ditch in Area 2. (Ex. D-2). For reasons that were never made clear to the Board during the hearing, Mr. Jacobini returned to the High Farm to conduct a more detailed wetlands determination on May 6, 2022, more than a year after the issuance of the Compliance Order. Based on his more detailed examination of Area 2 on May 6, 2022, Mr. Jacobini concluded that the area in question met all three parameters for a wetland because it had hydric soil, hydrology and hydrophytic plants. (T. at 233; Exs. D-4, D-14). Mr. Jacobini testified that he observed encroachment into the wetlands located in Area 2 during his May 6, 2022 inspection and that the encroachment was in the same area that he inspected on September 23, 2020.

Mr. High presented testimony from Mr. Baines who was admitted as an expert in the review of historic property uses and the application of guidance, policies, regulations, and law related to environmental property use, including forest environments. (T. at 360). Mr. Baines was not admitted as an expert in wetlands delineation, although he testified that he had been involved in around 100 properties that contained wetlands in his environmental career. (T. at 361). Mr. Baines' only testimony involving the issue of wetlands in Area 2 was in relation to his review of the National Wetland Inventory for the area of the High Farm. (T. 386; Ex. A-13). Mr. Baines stated that there were no wetlands shown on the National Wetlands Inventory in Area 2. However, we find this evidence less convincing than the direct observations of wetlands in Area 2 by the Department's staff. Overall, we conclude that the Department has demonstrated by a preponderance of the evidence that there are wetlands present in Area 2 of the High Farm.

We are less convinced regarding the Department's argument that there was a watercourse located in Area 2 prior to the excavation by Mr. High. Mr. Grose and Mr. Jacobini both testified that they had not directly observed the condition of Area 2 prior to Mr. High's excavation. (T. at 113, 259). Mr. Grose testified that there were definable bed and banks above and below the wetlands area but never clearly testified about a watercourse in Area 2. He was asked about unnamed tributaries and clearly identified an unnamed tributary emanating from the pond north of PPL Farm Road and running through Area 3 but gave unclear testimony regarding the presence of an unnamed tributary in Area 2. He stated "[t]he definable bed and bank above and the area two starting at one and two is also an unnamed tributary." (T. at 135). The follow-up question after this statement was, "[a]nd just so it's clear, what is your position of what the Department is regulating in section two, area two?" Mr. Grose answered "[t]hat would be the wetland area, the actual wetland area." (T. at 135).

Mr. Baines testified that he looked at both FEMA Flood Maps and the eMap Pennsylvania system showing the High Farm, and neither showed evidence of a watercourse in Area 2. (T. at 384; Exs. A-14, A-16). In contrast, the watercourse in Area 3 is identified on the eMap exhibit although not on the FEMA flood maps. On cross-examination by the Department, Mr. Baines was asked whether all unnamed tributaries in the area of High Farm would be depicted on the eMap exhibit and in response he stated that "[t]o the best of DEP's ability to put them on here, yes." (T. at 407).

Based on the testimony presented at the hearing, we find that the Department has not shown by a preponderance of the evidence that a watercourse with definable bed and banks existed in Area 2 prior to the excavation work done by Mr. High. While the lack of an identified floodway or unnamed tributary on the exhibits testified to by Mr. Baines is not definitive, it is suggestive of the absence of a watercourse in Area 2. The existence of watercourses with definable bed and banks in Areas 1 and 3 is reasonable based on the testimony which shows that those areas have sufficient slope to allow the downcutting of a stream channel. In contrast, Area 2 is relatively flat and consists of low-lying wetlands which inhibits the free flow of water. Thus, the absence of enough flow to create a watercourse with definable bed and banks fits the known conditions testified to by both the Department and Mr. Baines.

Mr. High offers two arguments as to why he was not required to have a permit prior to excavating a channel through Area 2. One argument is that the area in question qualifies as prior converted cropland and, therefore, is not a regulated wetland that would require a permit in order to conduct an activity resulting in an encroachment. The second argument is that Mr. High's activity in Area 2 qualified for a permit waiver as the maintenance of a field drainage system or

for plowing, cultivating, seeding or harvesting for crop production. The Department argues that neither of the two permit exemptions relied on by Mr. High apply to the facts of this case.

We will first turn our attention to the parties' arguments regarding whether the prior converted cropland exemption applies to Mr. High's activities. The Department sets forth its policy regarding prior converted cropland in a statement found at 25 Pa. Code § 105.452 which provides as follows:

> (c) Naturally occurring events may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now ''normal circumstances'' of the particular area. The Department recognizes ''prior converted cropland,'' as defined in the National Food Security Act Manual (180-V-NFSAM, Third Edition, March 1994), as ''normal circumstances'' as the term is used in the definition of wetlands in § 105.1 (relating to definitions). These prior converted croplands are not regulated as wetlands under the Commonwealth's Wetland Protection Program contained in this chapter. Prior converted cropland is defined in the National Food Security Act Manual, as wetlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985.
>
> (1) Abandonment is the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:
>
> (i) Wetland criteria are met.
>
> (ii) The area has not been enrolled in a conservation set-aside program.
>
> (iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.
>
> (2) Prior converted cropland may also be considered abandoned if the landowner provides written intent to abandon the area and wetland criteria are met.

25 Pa. Code § 105.452(c).

As we understand this section, land that satisfies these requirements is classified as prior converted cropland and is not regulated as wetlands by the Department. Therefore, no encroachment permit would be required.

Mr. High and the Department spent a great deal of time at the hearing putting forth testimony regarding the requirements for land to be considered prior converted cropland and facts concerning past farming and crop-related activities on the High Farm. However, much of the testimony missed a key fact in this case. The Compliance Order focuses on the status of Area 2 and the activities that took place within Area 2. The testimony regarding prior converted cropland focused almost exclusively on the status and activities that took place within Field 14 which is adjacent to Area 2. Whatever activities took place in Field 14, and whether those activities afford Field 14 prior converted cropland status, have no bearing on the status of Area 2. Even if Field 14 is prior converted cropland, nothing in the testimony or our reading of 25 Pa. Code § 105.452 suggests that the status of Field 14 can somehow stand in for and transfer its prior converted cropland status to Area 2 merely because it is adjoining it[2].

When we narrow our focus to the status of Area 2, it clearly does not satisfy the requirements to be classified as prior converted cropland. The Department's definition of prior converted cropland provides that the wetlands in question must have been "drained, dredged, filled, leveled or otherwise manipulated […] before December 23, 1985 […] for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December, 1985." 25 Pa. Code § 105.452(c). The only evidence we have regarding the conditions of Area 2 prior to

[2] Because it is not necessary for our decision, the Board takes no position on the issue of whether Field 14 of the High Farm would qualify as prior converted cropland.

December 23, 1985, comes from the testimony of Mr. Baines and a series of aerial photos he presented. The oldest aerial photo dates from 1938 and the later are photos dated from 1959, 1969, 1977 and 1981. In his testimony regarding these photos, Mr. Baines pointed out that the area, now known as Field 14, remained in agricultural use. Notably, he did not make the same statement with regards to Area 2. (T. at 364-370). Regarding Area 2, he testified that he believed that throughout the timespan the aerial photos were taken, Area 2 contained drainage ditches although, on cross-examination, he acknowledged it is difficult to distinguish ditches from small streams in aerial photos. (T. at 406). Each of the aerial photos in this time sequence show a distinct boundary between Field 14 and Area 2, and nothing in the photos suggests that Area 2 was a former wetland that was drained, dredged, filled, leveled or otherwise manipulated prior to 1985 in order to allow production of an agricultural commodity. While we don't have any photos that show what took place between 1981 and 1985, the next aerial photo presented by Mr. Baines is from 1993. The 1993 photo is of poor quality, but Mr. Baines' testimony is that it essentially shows no real change from the earlier photos. (T. at 370). In sum, we have no evidence that Area 2 was converted from a wetland to produce an agricultural commodity prior to 1985 or that it was planted or used to produce an agricultural commodity even once prior to December 23, 1985, and, therefore, it fails to satisfy the definition of prior converted cropland.

Furthermore, in order to satisfy the definition of prior converted cropland, the relevant cropland must not have been abandoned as that term is defined. Abandonment is defined as:

>][…] the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:
>
> (i) Wetland criteria are met.
>
> (ii) The area has not been enrolled in a conservation set-aside program.

> (iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

25 Pa Code § 105.452(c)(1).

Even if Area 2 at some point satisfied the criteria for prior converted cropland,[3] we find that the evidence shows that it was abandoned and, therefore, would not be considered prior converted cropland at the time the Compliance Order was issued. Aerial photos from 2005, 2010 and 2015 do not appear to us to show cropping, forage production or management[4] in Area 2. (Ex. A-1). Mr. High has owned the High Farm since November 2017. He testified that he has never planted crops for production or tilled the land in Area 2. (T. at 339). Prior to Mr. High's ownership, the High Farm was leased from PP & L and its successor organization, Talen Energy, by Mr. Lynn Appelman. According to the testimony, Mr. Appelman enrolled the property in the Pheasants Forever Program from 2009 through 2016 and it was used to grow warm season grasses to support use of the area by pheasants. (T. at 149-50). However, none of the evidence regarding Mr. Appelman's activities were specific to Area 2, but more generally discussed the High Farm. The aerial photos during the time the High Farm was part of the Pheasants Forever Program (2010 and 2015) do not show any cropping or forage production in Area 2. Finally, Mr. Grose testified that he saw no evidence that Area 2 had been cropped or was being used for forage production at the time of his initial inspection in August 2020. (T. at 20; Ex. D-21). Even if Area 2 ever satisfied the definition of prior converted cropland, overall, the evidence supports a finding that Area 2 would have also met the definition for abandonment by the time the Compliance Order was issued.

[3] As we discussed, we have no evidence that Area 2 was converted from wetland prior to December 23, 1985, but the aerial photos do contain time gaps, including a gap from 1981 to 1993, so we cannot say with certainty what transpired in Area 2 prior to December 23, 1985.

[4] Management is a broad term and can apply to a wide range of activities. In the context of prior converted cropland and abandonment, we understand that term to mean management to support production of an agricultural commodity.

Mr. High cannot prevail on the idea that Area 2 was prior converted cropland to successfully show that he did not need a permit for his excavation activity in that area.

We next turn our attention to the issue of whether Mr. High's activity in Area 2 qualified for a permit waiver. The DSEA at 32 P.S. § 693.7 allows the establishment of regulations that waive the permit requirement. The permit waiver regulation that was established pursuant to the DSEA is found at 25 Pa. Code § 105.12. It provides that the requirements for a permit are waived for certain structures and activities regardless of when commenced. Among the listed activities that qualify for a permit waiver are maintenance of a field drainage system and plowing, cultivating, seeding or harvesting for crop production[5]. The specific permit waiver provisions are as follows:

> (7) Maintenance of field drainage systems that were constructed and continue to be used for crop production. Crop production includes:
> (i) Plowing, cultivating, seeding, grazing or harvesting.
> (ii) Crop rotation.
> (iii) Government set aside programs.
> (8) Plowing, cultivating, seeding or harvesting for crop production.

25 Pa. Code § 105.12(7) and (8).

Mr. High asserts that his actions in Area 2 qualify for both waivers. It is clear that Mr. High does not qualify for the waiver for plowing, cultivating, seeding or harvesting for crop production. There is no evidence that Mr. High was engaged in any of these listed activities in Area 2 when he conducted the activities therein for which the Department concluded he was required to have a permit. As we set forth in our above discussion of prior converted cropland,

[5] The permit waiver regulation provides that "if the Department upon complaint or investigation finds that a structure or activity which is eligible for a waiver, has a significant effect upon safety or the protection of life, health, property or the environment, the Department may require the owner of the structure to apply for and obtain a permit under this chapter." 25 Pa. Code § 105.12. The testimony on whether the Department was relying on this provision to assert the permit requirement in its Compliance Order was not entirely clear, but we are ultimately satisfied that the Department did not rely on this provision.

there is no evidence that Area 2 has ever been used directly for crop production. Furthermore, Mr. High testified that he never planted any crops or tilled the land in Area 2. (T. at 339).

It is a closer question as to whether Mr. High's actions in Area 2 qualify for a waiver as maintenance of his field drainage system. He argues that they do and, therefore, the requirement for a permit was waived and the Department had no basis for its Compliance Order. The Department sets forth several arguments in its Post-Hearing Brief why the permit waiver for maintenance of a field drainage system does not apply to Mr. High's activities. Among its arguments, the Department asserts that there is no field drainage system in Area 2 and further, because there is no crop production in Area 2, it fails to satisfy the regulatory requisite that requires the continued use for crop production. None of the parties cited to Board cases or Pennsylvania state court cases interpreting the permit waiver that covers maintenance of a field drainage system and we did not find any in our research. As such, this appears to be a question of first impression for the Board. Ultimately, we hold that under the specific facts of this case, Mr. High's activities in Area 2 do not qualify for the field drainage system maintenance waiver for the reasons we discuss below.

There is no question that field drainage systems exist at the High Farm. Mr. High testified that the systems were installed prior to his ownership of the High Farm and that all but one of the fields at the High Farm have field drainage systems. (T. at 297). As described by Mr. High, the system consists of tiles and drainpipes that intercept the water and move it away from the fields. (T. at 299-301). Mr. High's expert, Mr. Baines, testified that he observed drainage tiles, outlets for conduits and associated ditches at the High Farm. (T. at 387-88). Curiously, the Department inspector, Mr. Gross testified that he was not aware that Field 14 had a farm drainage system until the Board and the parties conducted a site visit to the High Farm the day before the hearing in this

case. (T. at 37, 40). The Department conceded at the hearing that there was a field drainage system in that area. (T. at 394).

The issue we must decide then becomes whether the field drainage systems found at the High Farm, including the ones located upgradient in Field 14 and in the field east of Field 14, continue into Area 2, which is the area at issue in the Compliance Order. The Department argues that it does not. Mr. High's Exhibit A-12 is a map showing identified drain lines and the outlets of the subsurface part of the farm drainage system in the fields around Area 2. (T. at 326; Ex. A-12). It identifies five outlet points: three into Area 1 that are located upstream from Area 2, and two into the unnamed tributary located in Area 3. The outlet points in Area 1 appear to be associated with a drainage system in a field east of Field 14. The two outlets in Area 3 appear to be receiving water from the drainage system in Field 14. Significantly, for our purposes, the map shows no drainage lines or outlet points from the farm drainage system directly in Area 2. (Ex. A-12). Mr. High testified that there were no outlet points directly into Area 2. (T. at 326). The below ground portion of a field drainage system, including the outlet points, is not present within Area 2 and it is clear that the activities Mr. High conducted in Area 2 did not include direct maintenance of this part of his field drainage system and does not qualify for the waiver on that basis.

However, that is not the end of our analysis. Mr. Baines presented evidence concerning the general nature of field drainage systems relying in part on a portion of the National Engineering Handbook maintained by the USDA and the Natural Resources Conservation Service. (T. at 389). He noted that a properly designed and functioning field drainage system often includes aboveground ditches and channels that convey both surface water and the discharge from outlet drains away from the farm fields. Area 2 receives water from the field drainage system as it moves

downstream from the discharge in Area 1. If that water was conveyed through Area 2 via a pre-existing ditch or channel, arguably, we could hold that such a ditch or channel was part of the High Farm drainage system and that Mr. High was entitled to maintain it without the need to obtain a permit from the Department. Unfortunately, the evidence regarding the presence of a pre-existing ditch or channel in Area 2 is inconclusive. Neither of the Department inspectors observed Area 2 prior to Mr. High excavating the channel that is shown in Department's Exhibit D-21 and are therefore unable to provide testimony about the pre-existing conditions in Area 2. Based on his review of the aerial photos, Mr. Baines concluded that a conveyance ditch in Area 2, that he identified as the southern ditch, was present over time. (T. at 364-372; Ex. A-1). We find that Mr. Baines was not convincing on this point. During his testimony, it was often unclear exactly what feature on the aerial photos he was referring to as the conveyance ditch in Area 2. Our observation of the aerial photos in question do not support his conclusion. In most of the aerial photos, including all of the more recent ones (2005, 2010, 2015 and 2019), we observe no clear linear features within Area 2 that support Mr. Baines' conclusion that there was a pre-existing ditch or channel that was part of the farm drainage system.[6]

Mr. High, who was in the best position to testify as to the presence of a pre-existing conveyance ditch or channel in Area 2, did not provide clear and consistent testimony and evidence on that point. Mr. High presented no physical evidence such as photos or maps showing the presence of a drainage channel through Area 2 prior to him excavating one. He was neither asked, nor does he directly say that there was a pre-existing ditch in Area 2 that he considered part of his existing field drainage system. There are only two instances in his testimony where he appears to

[6] While scale may be an issue for the ability to observe a small feature such as a ditch, we note that many of the aerial photos clearly show the small tributary/channel that exists in Area 3.

be describing a pre-existing ditch in Area 2. In the first instance, he is asked why he had to do maintenance work in stretch two. The transcript reads as follows:

> A. So, first of all, this maintenance work is done all over the farm every year at some point. But in this particular stretch, I had to do maintenance work to keep the ditch at a sufficient depth to channel the water away from the field.
>
> Q. Were you getting variations in the depth before you did the maintenance work?
>
> A. Yeah. The variations are always changing there. I mean, as we saw when we were out there, I hope everyone saw, drain two is currently under water. Drain one on this diagram is almost under water. And it's a continual maintenance thing. It's - - it constantly needs mowed and it needs serviced.

(T. at 327).

This is as close as Mr. High comes to testifying about a pre-existing channel in Area 2 but, even in this testimony, he appears to be discussing Area 2 along with Area 3 when he mentions drain one and drain two, both of which are located in Area 3. As is evident from the testimony and the aerial photos, there is a clear pre-existing stream channel/ditch in Area 3 and the testimony does not seem to draw a clear distinction. The second instance of testimony regarding a pre-existing channel is limited as follows:

> Q. When you performed your maintenance on the site, did you follow the existing ditch path?
>
> A. Yes.

(T. at 335).

Again, this testimony is unclear whether Mr. High is referring to the ditch in Area 2 or another part of the High Farm site such as Area 3.

We do not find his testimony on the presence of a pre-existing channel in Area 2 as part of his field drainage system to be sufficiently clear to support a permit waiver. In light of the lack

of any physical evidence, like photos and maps, along with our conclusion that the available aerial photos do not show evidence of a pre-existing channel in recent years (including one just a couple of years prior to his ownership and one during his ownership), we are not convinced that Mr. High has demonstrated that there was a channel that should be considered as part of his field drainage system in Area 2. Therefore, Mr. High's failure to obtain a permit to cover his actions in Area 2 cannot be excused by the field drainage maintenance waiver.

Furthermore, even if we concluded that there was a pre-existing channel in Area 2 that was a part of the farm drainage system, we think there are limits to what can be done as maintenance of that system. We are not convinced that the full scope of Mr. High's actions within Area 2 would be covered under the maintenance waiver. The Department was very clear that at least some portion of the channel excavated by Mr. High cut through existing wetlands. Encroaching on and excavating in wetlands is a highly regulated activity. The maintenance waiver arguably would allow Mr. High to work within the boundaries of an existing ditch to clear vegetation and remove built up sediment but would not necessarily cover the lack of a permit for any activities that extended meaningfully beyond the boundaries of the channel. In this case, it appears that at least some portion of the newly excavated channel cut by Mr. High encroached on wetlands adjacent to any pre-existing channel. Further, it is evident from the photographs that Mr. High placed the excavated material into wetlands areas adjacent to the new channel. Those actions would not qualify for the maintenance waiver in our opinion.[7]

[7] Because this appears to be a case of first impression where the Board has been called upon to review the field drainage system maintenance waiver, we want to be clear that we are deciding this case on the specific facts presented by this matter. Nothing we have decided is intended to create an onerous permit requirement for the thousands of Pennsylvania farmers who are routinely required to maintain their field drainage systems. The application of the waiver is clearly fact dependent to the unique circumstances of each farm and farmer.

Finally, we turn our attention to the issue of whether the resolution ordered by the Department in its Compliance Order was lawful and reasonable. The facts of this case support the Compliance Order and the Department clearly has the necessary legal authority to require that the violations identified in this case be corrected. However, we must also consider whether the Compliance Order represents a reasonable exercise of the Department's discretion. The Department carries the burden to prove that all the elements of its order are reasonable, including the ordered remedial measures. *Schaffer v. DEP*, 2006 EHB 1013, 1025; *Strubinger v. DEP*, 2003 EHB 247, 252-53.

We find that the proposed resolution of the violations was a reasonable approach at the time the Compliance Order was issued. The Department testified that a deeper channel had the potential to allow excess water to flow out of the wetlands and into the channel where it would be conveyed downstream. The Department requested that Mr. High restore the excavated channel through the wetland to a depth of no more than 10 inches below the pre-existing ground elevations and stabilize the disturbed area with a wetland seed mix and straw mulch. The Department explained that a channel of this depth would allow it to continue to convey some water flow through Area 2 without adversely affecting the water saturation levels necessary to maintain the wetlands. The Department offered a reasonable resolution of the matter that it concluded would still provide some benefit to Mr. High while ensuring the continued viability of the adjacent wetlands.

However, the passage of time since the excavation took place and the testimony concerning the current conditions in Area 2 raise a question about whether the proposed remediation work required by the Compliance Order is still necessary and appropriate. Mr. High's excavation in Area 2 occurred prior to August 20, 2020, the Compliance Order was issued in April of 2021, and

the hearing in this matter before this Board was held in May of 2023. There has been a considerable amount of time between the original excavation and the issuance of the Order to evaluate any negative impacts the channel has had on the wetland in Area 2 and whether the remedial measures remain reasonable in light of new facts that have occurred since the Order's issuance. We review appeals *de novo*, and as such, we can consider evidence that was not presented to the Department when it made the decision currently under appeal. *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; *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). Therefore, the Board can consider evidence of the impacts to the wetland since the Department issued its Order.

In May 2022, when the Department conducted an evaluation of the wetlands in Area 2 more than a year after the issuance of the Compliance Order, Mr. Jacobini determined that Area 2 remained a wetland because hydrophytic vegetation, hydric soil, and hydrology, the three essential factors evaluated to identify a wetland, remained present. The photos taken by Mr. Jacobini during his May 2022 inspection (Exs. D-5 through D-8) show that the wetland is intact and that it is in the process of revegetation. We also look to the testimony of Mr. Grose concerning the current state of Area 2. When asked on cross-examination whether the current status of the ditch was acceptable, Mr. Grose answered that it was acceptable. (T. at 39). On redirect, the Department followed up on the question of acceptability with Mr. Grose. He replied as follows:

> [I]t was two years, eight months. It was almost three years in the past. Mother nature, mother nature heals herself very well. She can adapt and overcome and that happens on a regular basis. I see that every day, you know, for these types of activities and so that's why. She has healed herself and established the swale that we were trying to promote and have in there.

(T. at 131).

In light of the evidence presented at the hearing, we find that requiring Mr. High to restore the channel to a depth of 10 inches at this point as called for in the Compliance Order is no longer reasonable and appropriate. It is not difficult to conclude that allowing more excavation or filling involving the channel in Area 2 would be a net negative for what appears to be a situation that has now been stabilized, with the wetlands of concern intact and functioning properly.

In summary, we find that the Department has shown that its Compliance Order was legal and reasonable when issued. Mr. High's action involving excavation of a channel in a wetland in Area 2 encroached in that body of water by undertaking an activity that changed the course, current, or cross-section of that wetland. Under Section 693.6 of the DSEA, such an activity requires a permit from the Department, and Mr. High did not have one nor did he have the required Erosion and Sedimentation Control Plan. We further find that the situation has stabilized, and the restoration called for in the Compliance Order is no longer necessary or appropriate. We conclude that the best course at this point is for all parties to take no further actions regarding the Compliance Order and Area 2. If Mr. High desires to undertake any future activities in Area 2, he should discuss them with the Conservation District and/or the Department to determine what, if any, requirements apply and if any permits are necessary.

Therefore, we issue the following Order:

CONCLUSIONS OF LAW

1. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *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; *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).

2. The Department may issue such orders as are necessary to aid in the enforcement of the provisions of the Dam Safety and Encroachments Act. 32 P.S. § 693.20.

3. In an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion.

4. The Department must prove that all aspects of its order are reasonable, including the remedial action being ordered. *Strubinger v. DEP,* 2003 EHB 247, 252-53.

5. Area 2 of the High Farm contains wetlands. 25 Pa. Code § 105.1.

6. The wetlands on the High Farm constitute a body of water. 25 Pa. Code § 105.1.

7. Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), provides that, "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [D]epartment."

8. 25 Pa. Code § 105.11(a), provides that, "A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department."

9. The excavation that Mr. High conducted in the wetlands constitutes an encroachment. 32 P.S. § 693.3.

10. Mr. High's excavation of a ditch in the wetlands without having first obtained a permit from the Department constituted a violation of the law. 32 P.S. §§ 693.6(a), 693.18, and; 25 Pa. Code § 105.11(a).

11. The Department has satisfied its burden of proving that Mr. High acted unlawfully but has failed to satisfy its burden of proving that the restoration of the excavated ditch required by the Compliance Order is reasonable.

12. Mr. High bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

13. Mr. High has failed to prove that Area 2 contains the prerequisites to qualify for status as Prior Converted Cropland.

14. Mr. High has failed to prove that his excavation activities constituted maintenance of a field drainage system. Therefore, he is not exempt from permitting requirements.

15. Mr. High did not meet his burden of proof on the affirmative defenses he raised.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of January, 2024, it is hereby ORDERED that Mr. High's appeal of the Department's Compliance Order is **denied in part** and **granted in part**. The appeal is granted as to the restoration required in the Compliance Order. The Department's Compliance Order is revised to delete the requirements that Mr. High (1) restore the excavated ditch through the wetland to the pre-existing ground elevation less 10 inches with a material of ML or CL classification to match existing conditions, stabilize the disturbed area with a wetland seed mix and straw mulch and; (2) develop and implement an erosion and sediment control plan or conservation plan in accordance with Chapter 102.4(a). The appeal is denied in all other parts.

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: January 5, 2024

c: **DEP, General Law Division:**
Attention: Maria Tolentino
9th Floor, RCSOB
(via electronic mail)

For the Commonwealth of PA, DEP:
David Chuprinski, Esquire
Amanda Chaplin, Esquire
(via electronic filing system)

For Appellant:
Philip Hinerman, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: January 8, 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 a township and citizens group's appeal of a major modification to a solid waste disposal permit for the operation of a municipal waste landfill. The appellants have not met their burden of proof to show that the Department erred in determining that the benefits of the proposed project outweigh the known and potential harms. The threat to a nearby airport posed by birds being attracted to the landfill has been mitigated by the permittee's comprehensive bird control plan. The appellants did not establish that any other of the landfill's harms should have caused the Department to deny the application for a major permit modification.

Procedural History

Liberty Township and CEASRA (the "Appellants") have appealed the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to

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

Tri-County Landfill's ("Tri-County's") solid waste management permit (Permit No. 101678).[1] The permit authorizes Tri-County to operate a municipal waste landfill on 99 acres in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated from 1950 to 1990, a portion of that time by one of Tri-County's related companies, Tri-County Industries. Tri-County currently operates a waste transfer station at the landfill site.

On October 27, 2022, the Board granted in part motions for partial summary judgment filed by the Department and Tri-County, which entered summary judgment against the Appellants with respect to certain objections raised in their amended notice of appeal. *Liberty Twp. v. DEP*, 2022 EHB 324. On February 2, 2023, this appeal was transferred to Board Member and Judge Bernard A. Labuskes, Jr. for primary handling upon the retirement of Chief Judge Thomas W. Renwand, who previously handled the appeal. In advance of the hearing on the merits, the Appellants and Tri-County filed numerous pre-trial motions, including eight motions in limine filed by Tri-County. Those motions were addressed in Orders and Opinions and Orders issued between March 22, 2023 and April 3, 2023.[2] The parties have not preserved any challenges to our pre-trial rulings in their post-hearing briefs. On March 31, 2023, the

[1] Other parties that were part of the appeal when it was filed, including Pine Township, withdrew their participation during the course of this appeal.

[2] *See* Order Denying Tri-County's Motion in Limine to Preclude Issues Not Raised in the Amended Notice of Appeal (Issued Mar. 22, 2023); Order Denying Tri-County's Motion in Limine to Preclude Issues Relating to its Wetlands Permit (Issued Mar. 22, 2023); Opinion and Order on Motion in Limine to Preclude Issues Resolved on Summary Judgment (Issued Mar. 27, 2023); Opinion and Order on Motion in Limine to Preclude Testimony and Evidence Regarding Violations Pre-Dating those Addressed by 25 Pa. Code § 271.125 (Issued Mar. 28, 2023); Order Granting Appellants' Motion to Strike (Issued Mar. 28, 2023); Opinion and Order on Motions to Recuse/Disqualify/Reassign Board Member (Issued Mar. 30, 2023); Opinion and Order on Motion in Limine to Preclude Evidence and Argument on Potential Discharges of Leachate (Issued Mar. 30, 2023); Opinion and Order on Appellants' Joint Motion in Limine Directed at Tri-County Landfill (Issued Mar. 30, 2023); Opinion and Order on Motion in Limine to Strike and Preclude Testimony on Portion of Appellants' Exhibit 60 and Expert Opinion Testimony of Stephen Shields (Issued Mar. 30, 2023); Opinion and Order on Motion in Limine to Preclude Evidence and Arguments that Require Expert Testimony (Issued Mar. 31, 2023); Order on Appellants' Motion in Limine Regarding Department Expert Witness (Issued Mar. 31, 2023); Opinion and Order on Tri-County Landfill's Motion in Limine to Preclude Appellants from Calling Tri-County's Experts as Witnesses and/or Introducing Their Expert Reports in Their Case-in-Chief (Issued Apr. 3, 2023).

Appellants also filed a petition for supersedeas and an application for temporary supersedeas, which we later denied.[3] The hearing on the merits occurred over the course of 12 days between April 5, 2023 and April 28, 2023. The Appellants filed their post-hearing brief on July 6, 2023, and the Department and Tri-County, after requesting an unopposed extension, filed their post-hearing briefs on September 15, 2023. The Appellants filed their reply brief on October 16, 2023.

Since we issued our Order on May 8, 2023 establishing the post-hearing briefing schedule in this appeal, there have been numerous other filings from the parties. On May 23, the Appellants filed a motion for the Board and parties to conduct a site view, which we denied in an Opinion and Order issued on June 28 because there had already been extensive visual evidence presented at the merits hearing. On August 10, Tri-County filed an unopposed motion to extend the deadline for the filing of its post-hearing brief, which we granted. On August 15, Tri-County filed a "corrected" unopposed motion to extend the post-hearing brief deadline for the Department as well, which we also granted. On September 26, the Appellants filed a petition to reopen the record to include evidence of a bird strike that they alleged happened at the Grove City Airport, which we denied in an Opinion and Order issued on October 13 because the Appellants made no effort to authenticate the documents for which they sought to reopen the record, and because the documents constituted inadmissible hearsay and contained unattributed expert opinion statements. On October 12, Grove City Aviation, LLC filed a motion for leave to file an amicus brief. We denied the motion in an Opinion and Order issued on October 18 because the motion was filed so late in the proceedings and Grove City Aviation indicated that it

[3] *See* Order Denying Application for Temporary Supersedeas (Issued Apr. 12, 2023); Opinion in Support of Order on Application for Temporary Supersedeas (Issued Apr. 17, 2023); Opinion and Order on Petition for Supersedeas (Issued Jun. 20, 2023). The parties agreed that the Department and Tri-County would file their responses to the petition for supersedeas by May 24, 2023, after the conclusion of the merits hearing.

would address largely factual issues instead of purely legal argument. On November 7, the Department filed a motion to strike portions of the Appellants' post-hearing reply brief. We denied the motion in an Order issued on November 22. On November 27, the Appellants filed another petition to reopen the record to include what they said was evidence of additional compliance violations by Seneca Landfill that were not included on the compliance history exhibit introduced by Tri-County at the merits hearing. We deny that motion for the reasons explained *infra*.

FINDINGS OF FACT

I. The Parties

1. Citizens Environmental Association of Slippery Rock Area, Inc. ("CEASRA") is a Pennsylvania non-profit corporation with approximately 80 members whose mission is to protect the environment, air, land, water, and the habitat of the community. (Parties' Stipulation of Facts No. ("Stip.") 1; Transcript of Hearing Testimony Page No. ("T.") 17-18.)

2. Liberty Township is a township in Mercer County, Pennsylvania and together with CEASRA, the "Appellants" in this matter. (Stip. 2.)

3. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and responsibility to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003; 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, including Title 25, Chapters 271 and 273 of the Pennsylvania Code. (Stip. 7.)

4. Tri-County Landfill, Inc. ("Tri-County") is a Pennsylvania corporation that is a subsidiary of Tri-County Industries, Inc., which is a subsidiary of Vogel Holding, Inc. (Stip. 4, 5.)

5. Tri-County Industries, Inc. collects waste from individuals, municipalities, and commercial and institutional generators principally in Northwestern Pennsylvania. Vogel Disposal Service, Inc., a related company, collects waste from individuals, municipalities, and commercial and institutional generators in Western and Southwestern Pennsylvania. (Stip. 6.)

II. Permitting Background

6. Tri-County owns a site in Pine and Liberty Townships where a landfill previously operated and was permitted and where a waste transfer station has operated since 1990 by Tri-County Industries, Inc. (Stip. 11, 13, 17.)

7. A landfill was established at the Tri-County site around 1950. (Stip. 10.)

8. The landfill was purchased by Segaty Incorporated from Robert B. Marshall on September 13, 1950. (Stip. 9.)

9. Edward and Margaret Vogel purchased the Landfill in 1975 from Segaty Incorporated. (Stip. 11.)

10. Edward Vogel is the vice president of Tri-County Landfill, Inc. (T. 1498; Parties' Joint Exhibit No. ("Jt. Ex.") 2, Vol. 1 (at DEP000220).)

11. On September 3, 1985, the Department issued to Tri-County Industries, Inc. Permit No. 101295 under the provisions of the Solid Waste Management Act for the development and operation of the Tri-County Landfill located in Pine, Liberty, and Springfield Townships, Mercer County ("Permit No. 101295"). (Stip. 13; T. 1822; Tri-County Landfill Exhibit No. ("TC Ex.") 3.)

12. Permit No. 101295 did not identify the precise boundaries of the permitted area because permits issued before the promulgation of comprehensive municipal waste regulations in 1988 only identified the areas where waste would be disposed, and not ancillary areas, such as borrow areas, sedimentation control ponds, erosion controls, haul and access roads, office structures, and groundwater monitoring wells. (T. 1778-79, 1897, 1904-07, 1910; TC Ex. 3.) However, the application for the 1985 permit identified 49.2 acres for the proposed permit area and 212.6 acres for the total acreage of the property. (TC Ex. 3.)

13. Permit No. 101295 did not identify a date on which the permit would expire. (T. 1823, 1967-68; Appellants' Exhibit No. ("App. Ex.") 16; TC Ex. 3.)

14. On August 26, 1988, the Department issued a modification to Permit No. 101295, approving a lateral expansion to dispose of waste in certain areas and providing that the authorization to dispose of waste would expire on April 9, 1990, or with the completion of fill, whichever occurred first. (Stip. 15; T. 1969; TC Ex. 4.)

15. On November 14, 1988, the Department issued a modification to Permit No. 101295 for another lateral expansion for where waste could be disposed. (TC Ex. 5.)

16. On April 9, 1988, the Environmental Quality Board ("EQB") amended the Department's regulations governing solid waste at 25 Pa. Code Chapter 75 by promulgating municipal waste regulations at 25 Pa. Code Chapters 271, 272 and 273. 18 Pa.B. 1681 (Apr. 9, 1988). (Stip. 14.)

17. One of the new regulations required entities possessing permits issued prior to April 9, 1988 to submit either a closure plan or a preliminary application for permit modification describing the differences between their existing permit and the new requirements in the regulations, followed by a complete application to correct any differences between the two. 18

Pa.B. 1709 (Apr. 9, 1988). (TC Ex. 7.) The regulations provided that entities would not be allowed to process or dispose of any waste as of April 9, 1990 unless they had submitted a complete application for permit modification. *Id.*

18. Tri-County submitted a preliminary application for permit modification on June 21, 1988, and it then submitted a complete Phase I and Phase II application to repermit the landfill under the new regulations in August 1989. (T. 1805; TC Ex. 8.)

19. On November 20, 1989, the Department denied the repermitting application because the Department determined it was administratively incomplete, and Tri-County Industries then appealed that denial, EHB Docket No. 1989-607-E. (TC Ex. 9, 9a.)

20. That appeal was resolved in a Consent Order and Adjudication entered into among the parties on April 3, 1990 and issued by the Board on April 17, 1990. (TC Ex. 9a.) The Consent Order and Adjudication provided that Tri-County Industries would submit a new permit application to the Department and the Department would render a decision by July 1, 1990. If the Department denied the application, Tri-County Industries would implement a closure plan and stop accepting new waste by September 1, 1990. (TC Ex. 9a.)

21. On May 1, 1990, the Department approved Tri-County Industries' closure plan with modifications, which Tri-County Industries then appealed, EHB Docket No. 90-215-E. (TC Ex. 10.)

22. On June 29, 1990, the Department denied the repermitting application that had been submitted under the April 1990 Consent Order and Adjudication. (App. Ex. 19.)

23. On November 21, 1990, Tri-County Industries and the Department entered into a settlement agreement and Consent Order and Adjudication to resolve Tri-County's appeal of the closure plan. (TC Ex. 10.) The settlement provided that Tri-County would submit a repermitting

application by February 1, 1991 to reopen and operate the landfill. (*Id.* at ¶ G.) The settlement also provided that Tri-County would begin implementing the closure plan if the Department denied the repermitting application but that the closure order would terminate if the Department issued a permit to reopen and operate the landfill. (TC Ex. 10 at ¶¶ 3a, 8.)

24. On February 1, 1991, Tri-County Landfill, Inc. submitted a revised repermitting application for both Phases I and II with a proposed permit area of 218 acres of land. (TC Ex. 11, 12.)

25. Through the repermitting application, Tri-County Landfill, Inc. notified the Department that it was changing the name of the facility and that it would be the entity responsible for the permit, as opposed to Tri-County Industries. (TC Ex. 11.)

26. On January 25, 1997, the EQB promulgated amendments to the regulations governing sewage sludge, municipal waste and residual waste, 27 Pa.B. 521 (Jan. 25, 1997), which included a new prohibitory setback provision at 25 Pa. Code § 273.202(c) that provided that, except for areas that were permitted prior to January 25, 1997, a municipal waste landfill could not be operated within 10,000 feet of an airport runway that is or will be used by turbine-powered aircraft, 27 Pa.B. 558-59. The setback regulation that existed at 25 Pa. Code § 273.202(c) is now located at 25 Pa. Code § 273.202(a)(15).

27. On August 6, 1997, the Department denied Tri-County's 1991 repermitting application based upon the newly promulgated setback regulation because the 218-acre proposed permit area was within 10,000 feet of the runway at the Grove City Airport and only some, but not all, of the proposed 218-acre permit area had been permitted by the Department before January 25, 1997. (Stip. 19, 20; TC Ex. 12.)

28. Tri-County appealed the denial, EHB Docket No. 1997-189-R, and on March 30, 2000, the Department, Tri-County Industries, and Tri-County Landfill entered into a settlement agreement, which included a provision that identified 99 acres of the proposed landfill as being permitted prior to January 25, 1997 and therefore excepted from the airport setback regulation. (Stip. 20, 21; TC Ex. 12.) In other words, the Department determined nearly 24 years ago that the airport setback provision in 25 Pa. Code § 273.202 did not apply to 99 of the acres at the landfill site. (*Id.*)

29. The 99-acre area included the areas where disposal activities had occurred as authorized under the 1985 permit and permit modifications thereto, and other areas where the land was disturbed as a result of or incidental to operation of the landfill such as support facilities, borrow areas, offices, equipment sheds, monitoring wells, access roads, water pollution control systems, survey control monuments, permitted closure and postclosure care and maintenance activities, and other areas where the land surface had been disturbed before January 25, 1997 as a result of or incidental to operation of the landfill. (T. 1778-80, 1904-07; TC Ex. 12.)

30. The Department withdrew its August 6, 1997 letter denying Tri-County's repermitting application and Tri-County agreed to submit a complete substitute application for permit modification that would request a permit for no greater than the approximately 99 acres previously permitted as a municipal waste landfill, and which the Department would consider to be an amendment to the earlier repermitting application. (TC Ex. 12.)

31. In July 2000, Tri-County submitted a substitute repermitting application under Permit No. 101295 seeking a permit for the 99 acres that was determined to have been previously permitted and not subject to the airport setback in 25 Pa. Code § 273.202. (Stip. 22.)

32. On October 4, 2001, the Department denied the application on the basis that the potential harms posed by the landfill did not outweigh the benefits under the newly promulgated harms-benefits regulation at 25 Pa. Code § 271.127 because Tri-County had not sufficiently proposed a method for mitigating the potential for the landfill to attract an increased amount of birds and thus the hazard to air navigation for planes traveling to and from the nearby Grove City Airport. (Stip. 24; T. 1751-53, 1789-90; App. Ex. 25; Department Exhibit No. ("DEP Ex.") 11.)

33. The Department concluded that, "if it were not for the airport safety issue, the benefits would clearly outweigh the remaining known or potential environmental harms provided under this project." (T. 1789-90; DEP Ex. 11 (at 18).)

34. Tri-County appealed the Department's October 4, 2001 denial to the Board, EHB Docket No. 2001-252-R. (Stip. 25; T. 1753.)

35. While appellate proceedings were playing out over the Board's denial of a motion for summary judgment filed by Tri-County, in July 2004 Tri-County submitted a modified permit application, which included a bird control plan to address the Department's reason for the Department's October 4, 2001 denial. (Stip. 25, 26, 27; T. 1790-91; TC Ex. 18.)

36. The 2004 application was yet another in a series of applications to reopen the existing landfill. (T. 1894, 1897-99, 1901-02.)

37. Given the proliferation of application materials between 1988 and 2004, the Department decided to assign a new permit number to the 2004 application (Permit No. 101678) for administrative purposes to avoid confusion over the different applications to repermit the landfill submitted in the past. (T. 1894-95; DEP Ex. 12.)

38. On November 1, 2006, the Department denied the 2004 application because the Department could not conclude, based on the information that it had received as of that date, that

the potential harm of an increase in bird/aircraft strike hazard would be sufficiently mitigated; therefore, the Department determined that Tri-County had not demonstrated that the benefits of the project clearly outweighed the known and potential environmental harms. (Stip. 28; T. 1754, 1793-94; DEP Ex. 12.)

39. The Department also determined that, even if it concluded that there was no likelihood of an increased risk in bird/aircraft strike, Tri-County Landfill could not demonstrate it would comply with the revised bird control plan based upon the history of compliance violations at two of Tri-County's related companies, Seneca Landfill, Inc. and Vogel Disposal Service, Inc. (DEP Ex. 12.)

40. Tri-County filed an appeal of the Department's November 1, 2006 denial of its application, EHB Docket No. 2006-267-R. (T. 1754; DEP Ex. 13.)

41. During the course of that appeal, Tri-County provided additional information regarding Tri-County's proposed mitigation measures to control any birds that would be on site. Based on those materials, the Department concluded in September 2008 that Tri-County had mitigated the risk of bird strikes and that the benefits of the landfill would outweigh the known and potential harms. (DEP Ex. 13; T. 1755-56.) The Department said it would proceed to its Phase II technical review of the permit application. (DEP Ex. 13; T. 1758, 1796.)

42. The September 9, 2008 settlement between the Department and Tri-County replaced the Department's November 1, 2006 denial letter and modified the Department's October 31, 2006 Environmental Assessment Review/Harms-Benefits Analysis to incorporate the Department's updated conclusions. (T. 1795-96; DEP Ex. 13.)

43. On September 19, 2013, the Department denied the 2004 application because the height of the proposed landfill did not comply with local zoning restrictions imposing a 40-foot

height limit on structures in Pine and Liberty Townships, and because the Department concluded that Tri-County and other related waste companies under the same corporate ownership had a documented history of non-compliance with Department-administered laws and regulations. (Stip. 29; T. 1758-59; App. Ex. 26.)

44. The Department's 2013 denial was not based on any potential hazard to aircraft from birds. (T. 1759; App. Ex. 26.)

45. Tri-County appealed the Department's September 19, 2013 denial of the 2004 application to the Board, EHB Docket No. 2013-185-L. (Stip. 30; DEP Ex. 15.)

46. Tri-County and the Department entered into a settlement of the appeal at EHB Docket No. 2013-185-L on January 26, 2016, which provided that Tri-County could submit another permit application, that would replace the permit application denied by the Department on September 19, 2013, with a modified design of the landfill that conformed to the local zoning requirement of 40 feet in height. (Stip. 37; DEP Ex. 15.)

47. The Tri-County landfill area was permitted prior to January 25, 1997. (Stip. 10, 13, 20, 21; T. 1778-80, 1822, 1902, 1904-07; TC Ex. 3, 12.)

48. Since 1988, Tri-County has continuously had an application pending for review by the Department or has been engaged in litigation with the Department in an attempt to obtain a permit modification that would allow Tri-County to repermit the site and accept additional waste. (Stip. 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 37; T. 1753, 1754, 1755-56, 1758-59, 1790-91, 1795-96, 1805, 1809, 1894-95, 1897-99; App. Ex. 7.1, 19, 25, 26; DEP Ex. 11, 12, 13, 15; TC Ex. 8, 9, 9a, 10, 11, 12, 18.)

49. During this time, Tri-County has never abandoned the landfill site. (T. 1605-06, 1964-65, 1967-68.)

50. The landfill site has never closed. (T. 1605-06, 1964-65.)

51. Tri-County has continued performing maintenance at the site and has conducted groundwater monitoring, submitting quarterly groundwater monitoring reports to the Department. (T. 1605-06, 1964, 1970-71; TCL Ex. 79.)

52. Tri-County Industries, Inc. has operated a municipal waste transfer station at the location of the landfill since 1990 under Solid Waste Disposal and/or Processing Facility Permit 101592. Waste collected by Tri-County Industries, Inc. is brought to the transfer station and then trucked to Seneca Landfill. (Stip. 17.)

III. 2020 Major Permit Modification

53. On December 17, 2018, Tri-County Landfill submitted to the Department a Major Permit Modification to a Municipal Waste Landfill Permit or a Residual Waste Landfill or Impoundment Permit using Permit No. 101678. (Stip. 39, 40; Jt. Ex. 2.)

54. The 2018 application proposed to operate a municipal waste landfill within the confines of the approximately 99-acre permit boundary located in Pine and Liberty Townships encompassing the area permitted as a municipal waste landfill prior to January 25, 1997. (Jt. Ex. 2, Vol. 1 (at DEP000137).)

55. The 99-acre area that is the subject of the 2018 permit application is in Pine Township and Liberty Township and no portion of the permitted area is in Springfield Township. (Jt. Ex. 2, Vol. 2 (at DEP001698-99), Jt. Ex. 2, Vol. 8.1 (at 094D001A, 094D001B, 094D001C, 094D001D).)

56. Notice of Tri-County's permit application was published in The Herald, a newspaper of general circulation in Mercer County, on December 22, 24, and 31, 2018. (Jt. Ex. 2, Vol. 1 (DEP000187-90).)

57. On August 28, 2019, the Department notified Tri-County that the Department had completed its environmental assessment and harms-benefits analysis and determined that the benefits of the proposed facility to the public clearly outweighed the known and potential environmental harms that would remain after the proposed mitigation measures and that the Department would proceed with the technical review of the application. (Stip. 53; Jt. Ex. 1, Environmental Assessment ("Envtl. Assess.").)

58. The Department published its harms-benefits analysis in a document dated August 2019. (Stip. 54; Jt. Ex. 1, Envtl. Assess.)

59. The Department held a public meeting on the permit application on October 16, 2019 and received comments, either at the hearing, via mail, or via email. (Stip. 55; T. 1772; App. Ex. 15.)

60. The public comments centered around airport concerns, traffic concerns, health concerns, compliance history, location objections, property values, height/zoning, the type of waste accepted, fracking wastes, daily cover, relocation of old waste, outdated information in the application, groundwater, general nuisances, the Eastern Massasauga Rattlesnake, landfill duration, financial responsibility, leachate treatment, waste to energy plant, quarterly drinking water testing, rainfall runoff, economic issues, livability, public input, and out of state waste. (Stip. 56; T. 1772-75; App. Ex. 15.)

61. The Department accepted written comments on the permit application up until the time that a decision was made on the permit. (T. 1772-73.)

62. The Department sent a technical deficiency letter to Tri-County on December 11, 2019. (Stip. 57; App. Ex. 27.)

63. Tri-County submitted a response to the technical deficiency letter to the Department on February 10, 2020. (Stip. 58.)

64. The Department issued a Comment and Response Document on March 6, 2020 addressing the comments received from the public, both at the public hearing and in writing. (Stip. 60; T. 1772-75; Jt. Ex. 2, Vol. 1 (at DEP000082-100); App. Ex. 15; DEP Ex. 18.)

65. The Department concluded that the 2018 permit application met all regulatory, statutory, and constitutional requirements. (T. 1741-42, 1962-63, 1981, 2000-01; Jt. Ex. 1, Envtl. Assess.; DEP Ex. 18.)

66. On December 28, 2020, the Department approved the application and issued Permit No. 101678. (Stip. 72; Jt. Ex. 1, Permit.) This is the Department action that is the subject of this appeal.

67. The permit was issued to Tri-County Landfill for 99 acres with a facility boundary and a waste disposal boundary as delineated on Sheets 094D010 of the design plans dated August 17, 2018. (Stip. 73; T. 1777; Jt. Ex. 1, Permit.)

68. The permit has a term of ten years through December 28, 2030. (Stip. 74; T. 1932, 1934, 1936; Jt. Ex. 1, Permit.)

69. The permit sets the maximum final elevation of the landfill at 1,353.4 feet in Liberty Township and 1,360 feet in Pine Township. (Stip. 76; Jt. Ex. 1, Permit (at 2).)

70. The permit allows Tri-County to accept new waste with a maximum and average daily volume of 4,000 tons/day. (Stip. 77; T. 2003; Jt. Ex. 1, Permit (at 5).)

71. The total waste capacity of the landfill is 7,276,000 cubic yards. (Stip. 78; Jt. Ex. 1, Envtl. Assess. (at 2-3).)

72. The permit authorizes the landfill to receive waste 24 hours a day, 6 days per week. (Stip. 79; Jt. Ex. 1, Permit (at 6).)

IV. The Harms-Benefits Analysis

73. The harms-benefits analysis is required for municipal waste landfills under 25 Pa. Code §§ 271.126 and 271.127. Section 271.127(c) requires the applicant "to demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms." 25 Pa. Code § 271.127(c). (T. 1743-44.)

74. The Department when conducting its environmental assessment determines whether a harm or adverse impact will be fully mitigated as a result of mitigation plans submitted by the applicant. 25 Pa. Code § 271.127. (T. 1743-44, 1770, 1982; DEP Ex. 20.)

75. A harm or impact that will be fully mitigated does not need to be balanced against the benefits of the project as part of the Department's environmental assessment. 25 Pa. Code § 271.127. (T. 1743-44, 1770, 1982; DEP Ex. 20.)

76. For social and economic harms, the Department evaluated Tri-County Landfill's visual and aesthetic impacts and its impact on property values and determined that some harm would remain. (T. 1746-47; Jt. Ex. 1, Envtl. Assess. (at 5-6).)

77. The Department considered the social and economic benefits of local employment, tax revenue, various state and municipal fees, and Tri-County's purchase of goods and services from local businesses. (T. 1769-70; Jt. Ex. 1, Envtl. Assess. (at 13-15).)

78. The Department rejected disposal capacity as a benefit. (T. 1885, 1891-92.)

79. The Department evaluated the following environmental harms: odors, dust, and air quality impacts; noise; litter; vectors (e.g. rodents, wild animals, and mosquitos); truck traffic;

loss of wetlands; stormwater runoff; and aircraft safety due to the propensity of landfills to attract birds. (T. 1747-52; Jt. Ex. 1, Envtl. Assess. (at 7-13).)

80. The Department found the following environmental benefits of the landfill: relocation of the waste disposed of at the landfill between 1950 and 1990 onto a lined area; creation of additional acres of wetlands; and a free disposal and spring cleanup program for the local community. (T. 1768-69, 1771, 1934-35; Jt. Ex. 1, Envtl. Assess. (at 13).)

81. The Department found that there are harms remaining that have not been fully mitigated, such as odors, litter, noise, vectors, traffic, and impact on property values, but the Department determined that those harms are never fully mitigated and would be minimal and potentially occur only on an infrequent basis. (T. 1770, 1811-12, 1958-62.)

82. The Department determined that the harms from the Tri-County landfill were typical of the harms that would result from any landfill, and that Tri-County's mitigation measures for noise, litter, and vectors are standard in the industry. (T. 1811, 1983.)

83. Nevertheless, in balancing the harms remaining after mitigation against the benefits of the project, the Department concluded that the benefits of the proposed project clearly outweighed the known and potential harms. (T. 1770, 1958-62, 1984; Jt. Ex. 1, Envtl. Assess.)

84. The mitigation measures proposed by Tri-County and the benefits provided by Tri-County are an enforceable condition of the permit. (Jt. Ex. 1, Permit (at 28).)

A. Birds

85. Municipal waste landfills such as the Tri-County landfill have a tendency to attract some species of birds at numbers that are higher than background, which is the number and type of birds that would be present at the site in the absence of the landfill. (T. 803-04, 812-13, 821, 984-85, 1049-50.)

86. The primary species of concern are gulls, turkey vultures, starlings, and crows. (T. 733-35, 885, 893-94, 923.)

87. The birds are attracted to putrescible waste (i.e. waste containing organic matter that is liable to decay) disposed at the landfill because that type of waste serves as a source of food for them. (Stip. 44; Jt. Ex. 2, Vol. 6 (at DEP006703).)

88. The old waste being relocated onto a lined area at the Tri-County landfill has been decomposing for decades and is not likely to attract birds. (T. 838, 1003-04, 1443-44, 1847-48.)

89. The primary bird species of concern do not tend to feed at night. (T. 792, 885, 960.)

90. The tendency of a municipal waste landfill to attract a greater number of some species of birds than background levels is considered a known or potential environmental harm and/or adverse impact on the public health and safety when the Department conducts its environmental assessment as part of the permit application review process. (Stip. 24, 28, 53, 54; T. 1751-54, 1789-90; Jt. Ex. 1, Envtl. Assess. (at 11-13); DEP Ex. 11, 12.)

91. The potential harm and adverse impact is accentuated if the landfill is near an airport because the presence of more birds in the area equates to a greater likelihood of collisions between birds and aircraft using the airport, also known as bird strikes. (T. 705-10, 749-50; Jt. Ex. 1, Envtl. Assess. (at 11-13).)

92. Tri-County prepared a mitigation plan, known as the bird control plan, to address the known propensity of birds to be attracted to the landfill. (Jt. Ex. 2, Vol 6 (at DEP006876-6900).)

93. The Department, after extensive, years-long review, determined that Tri-County's mitigation plan will be sufficient to fully mitigate the tendency of the landfill to attract some bird

species to the area at greater numbers than background and the greater potential for bird strikes that can occur as a result. It concluded that the public safety will be adequately protected. (T. 1755-57, 1771-72, 1794-95, 1798-1805, 1844.)

94. Because the adverse impact/harm was fully mitigated, the Department did not need to weigh the potential for bird strikes against the benefits of the project. 25 Pa. Code § 271.127. (Jt. Ex. 1, Envtl. Assess. (at 16-18).)

95. The Department included several conditions in Tri-County's permit that require Tri-County to implement its bird control plan. (Jt. Ex. 1, Permit (at 14-15, Operating Conditions 28-31).)

96. The Grove City Airport is owned by Grove City Borough and managed by Grove City Aviation. (T. 414-16.)

97. The airport was constructed around 50 years ago. (T. 444.)

98. The Grove City Airport has one runway, which is 4,500 feet long. Pilots consider it two runways depending upon which direction they are coming from. (T. 424-26, 450, 538-39.)

99. The runway at the airport is about 6,200 feet (1.3 miles) from the Tri-County landfill permit boundary. (T. 677, 683-84, 771; Jt. Ex. 2, Vol. 2 (at DEP001441, DEP001459).)

100. The airport does not have a tower or an air traffic controller. It is a small general aviation airport as defined by the Federal Aviation Administration (FAA). (T. 427, 558, 697, 786, 1856; TC Ex. 75 (at 15), 76 (at 14).)

101. The Grove City Airport does not have regularly scheduled flights of aircraft designed for 60 passengers or less. (T. 453-54.)

102. The record does not support a finding that the Grove City Airport has received any federal grants under the Airport and Airway Improvement Act, 49 U.S.C. §§ 47101 – 47131. (*See* T. 417-18, 703-04.)

103. The approach path to the runway, when coming from one direction, travels over the landfill. (T. 425, 433, 450, 550-51, 560-61, 677; App. Ex. 60.)

104. Aircraft are about 360 to 410 feet above ground level (AGL) when they are over the landfill. (T. 431, 433, 552-55, 565, 586-87, 778-79; App. Ex. 60.)

105. Most bird strikes occur during descent and landing, followed by takeoff and climb out. (T. 708-09, 716, 747-48, 1049.)

106. Even without landfilling, there are wildlife attractants in the area of the airport and at the airport itself that bring in birds and mammals. (T. 462-64, 474-75, 572, 776-77, 794, 895, 929.)

107. If it were not for Tri-County's bird control plan, the landfill would create an unacceptable risk to public safety due to potential bird strikes because of its proximity to the Grove City Airport, made worse by the landfill's location on one of the airport's flight paths. (T. 949-51, 968-69.)

108. The goal of the bird control plan is primarily to prevent birds from coming to the landfill in the first place, and secondarily to chase them away immediately if they do visit, with the ultimate goal being to ensure there is no increase in the bird hazard risk. (T. 952, 1050.)

109. A bird control plan must be based on sufficient studies that identify, analyze, and quantify the bird hazard. *Jefferson Cnty. Comm'rs v. DEP*, 2002 EHB 132, 184, 192-94.

110. Rolph Davis, Ph.D., a highly qualified expert on bird strikes, performed the bird studies for Tri-County and prepared its bird control plan. (T. 763, 825-872; TC Ex. 128.) The Board credits Dr. Davis's expert opinions in this case.

111. Dr. Davis and his firm have exhaustively studied the birds over several years in the area of the landfill, such that the potential bird hazard posed by the reopening of the landfill has been sufficiently identified, analyzed, and quantified. Enough study has been completed to fully support the evaluation of the hazard, and to allow for the reasoned development of the mitigation and monitoring plans submitted in support of the permit application. (T. 895-901, 903, 929, 932-33, 940-53, 1019, 1757-58, 1844; Jt. Ex. 2, Vol. 2 (at DEP001412-1639); DEP Ex. 24, 25; TC Ex. 68, 69, 70.)

112. The background level of birds in the area (the existing risk) has been sufficiently identified, analyzed, and quantified. (T. 895-97, 922-23, 952; Jt. Ex. 2, Vol. 2 (at DEP001412, DEP001488-1543).)

113. Importantly, the bird studies included nearby active landfills. (T. 903-04, 910-11, 921-22, 934, 940-43, 951; Jt. Ex. 2, Vol. 2 (at DEP001462-1506).)

114. After conducting a 12-month study of birds, Dr. Davis conducted follow-up surveys in 2004, 2005, 2006, 2021, and 2022, all of which confirmed the results of the previous studies. (T. 898-903, 941-49; DEP Ex. 24, 25; TC Ex. 68, 69, 70.)

115. Tri-County's bird control plan has expanded over the years partly due to comments and questions posed by the Department's and the FAA's reviews. (T. 1754-57, 1797-1805; Jt. Ex. 2, Vol. 2 (at DEP001601-05, DEP001628-30); DEP Ex. 13.)

116. Tri-County's bird control plan is a comprehensive and advanced bird control plan for landfill bird hazard mitigation. (T. 1005-06; Jt. Ex. 2, Vol. 2 (at DEP001632-33).)

117. The bird control plan includes the following elements: (1) putrescible waste, including mixed loads of putrescible and non-putrescible waste, will only be disposed of between one hour after sunset and one hour prior to sunrise; (2) putrescible waste will be completely covered every day; (3) the landfill will operate 24 hours a day, 6 days a week excluding holidays; (4) the site will be designed to reduce its attractiveness to gulls; (5) pyrotechnics will be used as required; (6) Tri-County will employ, train, and have bird controllers at the site including a well-qualified chief bird controller with primary responsibility for implementing the bird control plan, as well as an assistant bird controller; (7) there will be multiple daily surveys of birds (including one survey on Sundays); (8) there will be a long-term monitoring program to ensure the bird control plan is working; (9) there will be extensive record keeping and reporting, including comprehensive quarterly reports to be distributed to the regulatory agencies and the airport; (10) there will be oversight by Dr. Davis and his firm; and (11) an oversight committee will be formed which will include airport representatives to review quarterly reports. (Stip. 45, 46; T. 883-87, 939, 953-57, 965-98, 1800-04; Jt. Ex. 1, Permit (at 14-15), Jt. Ex. 2, Vol. 2 (at DEP001413-14, DEP001468-73, DEP001481-86, DEP001545-58, DEP001625-30), Jt. Ex 2, Vol. 6 (at DEP006702-05, DEP006876-006900).)

118. The four key elements of the bird control plan are: (1) putrescible waste will only be disposed at night (when the birds of concern do not tend to feed) and covered before dawn; (2) continuous daytime operations; (3) pyrotechnics; and (4) a monitoring and reporting program (e.g. five daily surveys Monday - Friday, one on Sunday). (T. 885-86, 953-57, 965-66, 968-69, 972-74, 979-81, 989-90, 992-93; Jt. Ex. 2, Vol. 2 (at DEP001413-14, DEP001468-73, DEP 001481-86), Jt. Ex. 2, Vol. 6 (at DEP006876-6900).)

119. The bird control plan contains levels of redundancy such that, if one control fails, others are in place and will prevent bird infestation. (T. 887, 954-55, 1000-02.)

120. The bird control plan will deter birds from landing at the landfill and chase them away quickly in the event that they do land. (T. 885-86, 965-70, 992-93.)

121. Third-party hauling vehicles (those not owned by Vogel Holding, Inc.) containing putrescible waste will not be allowed to enter the facility prior to nighttime operation hours unless using the transfer station. (Jt. Ex. 2, Vol. 2 (at DEP006703).)

122. Tri-County Industries trucks and other trucks owned by Vogel Holdings may utilize the existing parking area associated with the hauling company. No more than 20 Vogel/Tri-County trucks will be staged in the parking area during the day until nighttime disposal can occur. If any waste is unloaded at the transfer station, it will be loaded into trailers and tarped rather than stockpiled within the transfer station. Two hundred tons or less of putrescible waste may be accumulated in the transfer station without restriction. (Jt. Ex. 2, Vol. 2 (at DEP006703).)

123. Tri-County's bird control plan is patterned after the plan developed by Dr. Davis for the Atlantic County Utilities Authority (ACUA) municipal waste landfill located in Atlantic City, New Jersey, which is located less than 10,000 feet from the Atlantic City International Airport, and that plan has been successful in preventing birds from lingering at the landfill. (T. 843-46, 888, 958-64, 1006-10; Jt. Ex. Vol. 2 (at DEP001468-69, DEP001628-30); TC Ex. 94, 95.)

124. There is no record evidence that the ACUA landfill has attracted birds that have contributed to any bird strikes at the Atlantic City International Airport. (T. 960-64, 1006-10; Jt. Ex., Vol. 2 (at DEP001628-30), Jt. Ex. 2, Vol. 6 (at DEP006884); TC Ex. 94, 95.)

125. Dr. Davis credibly testified that, due to its bird control plan, the ACUA landfill has not caused an increase in the risk of bird strikes. (T. 1006-10.)

126. A key feature of the ACUA landfill bird control plan is, like the Tri-County plan, putrescible waste may only be landfilled at night. (T. 960; Jt. Ex. 2, Vol. 2 (at DEP001468-69).)

127. The average number of gulls at the ACUA landfill has remained within background levels. (T. 1007-09; TC Ex. 94, 95.) Bird strikes have actually decreased since ACUA has been disposing of putrescible waste only at night. (T. 1008-10.)

128. Operating Condition 29 of the permit requires Tri-County to submit a plan to the Department and the FAA before disposal operations begin for review and approval "describing the maximum number of each species of concern that shall be permitted to be within the landfill permit boundary." (T. 994-996; Jt. Ex. 1, Permit (at 14).)

129. Operating Condition 30 of the permit requires Tri-County to submit to the Department and the FAA for approval the criteria to be used to determine the success of the bird control plan with recommendations regarding whether modifications are needed. (T. 996; Jt. Ex. 1, Permit (at 15).)

130. Operating Condition 31 of the permit requires Tri-County to establish an oversight committee to determine whether the bird control plan is operating effectively, and to invite members of the Grove City Airport, the Department, and the FAA to join Tri-County and an independent professional biologist. (T. 996-97; Jt. Ex. 1, Permit (at 15), Jt. Ex. 2, Vol. 6 (at DEP006888).)

131. The oversight committee requirement in the bird control plan is structured after a similar committee that has been used successfully at the Atlantic City International Airport. (T. 997-98.)

132. PennDOT's Bureau of Aviation advised early on that it had no objection to reopening the landfill. (TC Ex. 116 (at PDF pg. 17).) PennDOT did not respond to Tri-County or the Department regarding updated bird control/aviation information supplied to it in 2019. (T. 1654-55.)

133. The Department conferred with the FAA and relied in part on the FAA's communications, including its no-hazard determinations, but reached its own independent conclusion that the bird strike risk had been sufficiently mitigated. (T. 1771-72, 1782-85, 1786-88, 1803-05, 1813, 1838-39, 1841, 1844, 1853, 1858.)

134. In letters in 2004 and 2005, the FAA listed certain conditions it suggested be followed, and it said, so long as those conditions were met, the landfill and the airport "can safely co-exist and operate." It stated, "FAA does not object to the modification to the Operating Permit for Tri-County Landfill." It acknowledged that its suggestion that there be an independent one-year wildlife study had already been met. (T. 1782-84; Jt. Ex. 2, Vol. 2 (at DEP001442-47); TC Ex. 116.)

135. After a series of communications between Tri-County, the Department, and FAA National Wildlife Biologist Amy L. Anderson and FAA employees, Brian Gearhart and Guillermo Felix in 2019 and 2020, which included the submission of an updated FAA Form 7460-1 (relating to proposed construction), the FAA issued multiple Determinations of No Hazard to Air Navigation. Mr. Felix said, "I have no objection to the construction of the landfill." No one at the FAA at any time has ever objected to the landfill reopening. (Stip. 61; T. 1011, 1015-17, 1060-61, 1645-68, 1671-80, 1759-64, 1784-88; Jt. Ex. 2, Vol 1 (at DEP000053-80, DEP000118); TC Ex. 60, 61, 63, 65, 66, 116.)

136. On November 5, 2021, Tri-County requested and the FAA agreed to an extension of the no-hazard determination. (T. 1579; TCL 67.)

137. On July 1, 2022, about one and one half years *after* the permit had been issued, Ricky Harner, an FAA employee not previously involved in the review of the landfill, and who did not testify, sent a letter to the Department asking for an update. The letter did not withdraw the FAA's earlier determinations or object to the landfill. It included certain "recommendations" regarding Tri-County's operations going forward. (T. 1681; App. Ex. 55.)

138. The Department responded by letter on July 14, 2022. It reminded Mr. Harner of the FAA's extensive prior involvement, provided all updated information (including new bird surveys) and forms, and noted that, based on FAA's prior involvement, the Department had added several conditions to the permit (e.g. Operating Conditions 23, 24, 28, 29, 30, 31.) The Department invited Mr. Harner to reach out with any questions, but Mr. Harner never did so. (T. 1764-66; DEP Ex. 28.)

139. Tri-County's bird control plan if fully implemented will adequately protect the public safety. It will allow the landfill to operate without increasing the risk of bird strikes above background conditions. The known and potential harm and adverse impact associated with increased bird strikes above background has been fully mitigated. (T. 882-84, 954-57, 959-60, 966-70, 993, 1000-02, 1760-64, 1771-72, 1794, 1798-1805, 1844, 1846-47; Jt. Ex. 1, Envtl. Assess. (at 11-13).)

B. Relocation of Existing Waste

140. The permit requires Tri-County to excavate approximately 1,551,000 cubic yards of historic waste that was disposed of at the Tri-County landfill site between 1950 and 1990 on an unlined area and to relocate that waste onto the newly constructed lined area of the landfill

within the 10-year term of its permit. (Stip. 80; T. 1932, 1934, 1936, 2005; Jt. Ex. 1, Permit (at 12), Envtl. Assess. (at 13).)

141. Relocation of the existing waste can be conducted 24 hours a day, 7 days per week, but it will be limited in inclement weather. (Stip. 81; T. 1847, 1993-94; Jt. Ex. 1, Permit (at 6).)

142. The existing waste at the landfill sits above a groundwater aquifer and it is assumed that the waste might be in contact with groundwater or that water in contact with the waste might seep into groundwater as leachate. (T. 1127, 1129-30, 1152, 1164, 1891, 2017; Jt. Ex. 2, Vol. 2 (at DEP001653), Jt. Ex. 2, Vol. 5 (at DEP006435-36).)

143. The landfill has a network of monitoring wells that monitor groundwater both upgradient and downgradient of the existing waste, and these wells have been sampled quarterly since 1988, with the results submitted to and reviewed by the Department. (T. 1157-58, 1161-63; TC Ex. 79.)

144. Over the years, some of the monitoring wells have shown detections of various organic compounds, including phenols; however, some of these detections have occurred in monitoring wells that are upgradient of the existing waste. (T. 1131-32, 1134-38, 1158-59, 1864-65, 1868-69, 1871, 1954; Jt. Ex. 2, Vol. 5 (at DEP005265-66); App. Ex. 158.)

145. None of the concentrations of those regulated substances detected in any monitoring well at Tri-County exceeded any applicable standard for groundwater, except for one exceedance of a statewide drinking water standard for arsenic in an upgradient well. (T. 1146, 1160-61.)

146. There is no evidence that the existing waste is contaminating any public or private water supplies. (T. 1143, 1158, 1858-59, 1900, 1933.)

147. Tri-County developed a waste relocation plan that proposes to excavate the existing waste, segregate any suspicious or special handling waste, remove and sample any leachate-impacted soils, and deposit the waste onto the same newly-constructed, double-lined landfill cells that will be used for the new waste to be accepted at the landfill. (T. 1694-96, 1705, 1885, 2006, 2012; J. Ex. 2, Vol. 6 (at DEP006770-83); DEP Ex. 18 (at DEP012596).)

148. Tri-County's waste relocation plan involves "source removal" of the source of potential contamination—excavating the existing waste unprotected by a liner and relocating that waste into lined cells—which is the "gold standard" for the remediation of an unlined landfill. (T. 1692, 1697.)

149. Excavation and relocation of the existing waste as proposed by Tri-County will greatly reduce if not eliminate the risk of pollution of groundwater from the existing waste. (T. 1164, 1691-92, 1696-98, 1707-08, 1709, 1710-11, 1712-13, 1768-69, 1983; Jt. Ex. 1, Envtl. Assess. (at 13, 17).)

150. The liner that will be used at Tri-County will be comprised of two composite liners with a leachate detection system. (T. 1699; Jt. Ex. 2, Vol. 6 (at DEP006710).)

151. The primary liner will consist of an aggregate leachate collection layer underlain by a geotextile, a 60-mil geomembrane, and a geosynthetic bentonite clay liner that swells when it becomes wet to plug any leaks. (T. 1699-1700.)

152. Below the primary liner is a leachate detection zone with a drainage net of geocomposite with a geotextile. (T. 1700.)

153. The secondary liner that is below the leachate detection zone also consists of a 60-mil geomembrane and a geosynthetic clay liner. (T. 1700.)

154. The landfill subgrade will be placed at least eight feet above the regional groundwater table. 25 Pa. Code § 273.252(b). (T. 1156, 1159-60; Jt. Ex. 2, Vol. 2 (at DEP001854); DEP Ex. 18 (at DEP0012617).)

155. The double composite liner system that Tri-County will install is more stringent than Pennsylvania's municipal waste landfill regulations, which require that only one of those liners be a geosynthetic composite liner, and is equal to what is required in Pennsylvania for a hazardous waste landfill. (T. 1698-99, 1710-11.)

156. Before Tri-County is allowed to place waste in a new landfill cell, Tri-County is required to perform various tests on every layer of the liner system and have a third party engineer inspect the liner and send a report to the Department, which must then send an acceptance letter allowing waste to be deposited into the cell. (T. 1998-99, 2020-21.)

157. The materials selected for the liner have undergone extensive testing for compatibility with leachate generated by the waste disposed of at landfills. (T. 1701-03.)

158. The compatibility testing for the liner system is not outdated. (T. 1701-03.)

159. The chemical compatibility for the liners to be used by Tri-County are the same as the liners that are used for hazardous waste facilities. (T. 1710-11.)

160. The Department concluded that the relocation of the existing waste was an environmental benefit of moderate degree and long term in duration because the relocation of the waste could eliminate the future potential of groundwater contamination from the existing waste in unlined areas. (T. 1768-69, 1771, 1934-35; Jt. Ex. 1, Envtl. Assess. (at 13, 17).)

161. Tri-County will construct a new landfill cell over the area from which the old waste is removed, which will essentially cap the area by way of the liner system and reduce infiltration into groundwater. (T. 1707-08, 1709.)

162. Relocating the 1.5 million cubic yards of waste in the manner proposed by Tri-County is a clear benefit to the environment, and a benefit that will persist even after waste disposal operations have concluded. (T. 1164, 1696-97, 1768-69, 1771, 1934-35, 1983, 2003-04; Jt. Ex. 1, Envtl. Assess. (at 13, 17).)

C. Wetlands

163. As part of the landfill operation, Tri-County will fill in 5.94 acres of wetlands at the site to make way for waste disposal cells and it will then create 9.49 acres of replacement wetlands on the site. (Stip. 68.)

164. Several smaller wetlands will be filled in and one larger wetland will be created to replace those wetlands. (T. 1750-51, 1915-16; Jt. Ex 1, Envtl. Assess. (at 10-11).)

165. This work is authorized by a Chapter 105 permit that was separately issued to Tri-County and not appealed by the Appellants. (Stip. 68, 69.)

166. The Department accepted the wetland replacement as appropriate mitigation for the environmental harm and correctly found that the additional wetland acreage created under the project would enhance existing wetland benefits and functions, create an additional habitat that does not currently exist in the area, and would be a minor environmental benefit. (T. 1750-51, 1915-16; Jt. Ex. 1, Envtl. Assess. (at 10-11, 13, 17).)

167. There is no evidence that the wetlands to be replaced by Tri-County are exceptional value wetlands, 25 Pa. Code § 105.17(1). (*See* T. 392, 1916-17, 1960, 1965-66; Jt. Ex. 2, Vol. 2 (at DEP001727).)

168. There is no credible evidence that the wetlands to be replaced by Tri-County are a habitat for the Massasauga rattlesnake or are hydrologically connected to or within ½ mile of any

wetlands that do serve as a Massasauga rattlesnake habitat. (*See* T. 344-45, 385-86, 392-93; Jt. Ex. 2, Vol. 2 (at DEP001842-46).).

169. The Pennsylvania Natural Diversity Index (PNDI) search conducted by Tri-County concluded that no impact is anticipated to threatened and endangered species and/or special concern species and resources as a result of the wetlands replacement project. (Jt. Ex. 2, Vol. 2 (at DEP001842-46).).

D. Noise

170. The Department's harms-benefits analysis concluded that the landfill's operations will create additional noise in the area that would not exist but for the operation of the landfill, even though Tri-County had mitigated the noise to the largest extent possible. (T. 1990; Jt. Ex. 1, Envtl. Assess. (at 7-8).)

171. Tri-County proposes to mitigate the noise from the landfill by properly maintaining the engines on its mechanical equipment, encasing those engines, ensuring that the machinery operates at 85 decibels or less using handheld meters, and using lights instead of backup beepers on trucks and equipment at night. (T. 1747-48, 1959, 1990; Jt. Ex. 1, Envtl. Assess. (at 7-8), Jt. Ex. 2, Vol. 6 (at DEP006725).)

172. Tri-County conducted two noise studies that were included in its permit application, one from February 1991 containing measurements of noise at numerous locations at the landfill and in the area, and one from April 2001 monitoring noise at several locations at Tri-County's facility and in the surrounding area during the day and at night, as well as studying the noise levels at two other active landfills, Seneca Landfill and Valley Landfill. (Jt. Ex. 2, Vol. 6 (at DEP006738-68).)

173. The noise studies concluded that the intensity of the noise generated by the landfill will diminish sufficiently before it reaches the surrounding community and that noise levels at the monitoring points will be similar to the existing ambient background noise levels. (Jt. Ex. 1, Envtl. Assess. (at 7-8), Jt. Ex. 2, Vol. 6 (at DEP006738-68).)

174. The permit requires Tri-County to perform another background noise study prior to operating the site and to submit that study to the Department. (T. 2022; Jt. Ex. 1, Permit (at 14).)

175. Residents living within ½ mile of the landfill currently hear noise from Tri-County's transfer station as well as from the airplanes and helicopters using the Grove City Airport. (T. 262-63, 267, 270-71, 368-69, 380.)

E. Traffic

176. In June 2019, Tri-County conducted an updated traffic impact study to assess the additional traffic that would be generated from the landfill. (T. 1749-50; Jt. Ex. 1, Envtl. Assess. (at 9-10), Jt. Ex. 2, Vol. 3 (at DEP002751-2857); App. Ex. 15.)

177. The traffic study analyzed the impact of the truck trips generated from the landfill and/or the transfer station accepting, in combination, a maximum volume of 4,000 tons of waste per day. (Jt. Ex. 1, Envtl. Assess. (at 9-10).)

178. The study estimated that 332 truck trips will be generated from accepting 4,000 tons of waste per day, which represents an increase of 218 trips over what the transfer station currently generates. (Jt. Ex. 1, Envtl. Assess. (at 9-10).)

179. Tri-County proposes to mitigate the harm from the trucks by tarping and sweeping the trucks, performing routine inspections and maintenance, and distributing the truck

volume over the course of the day to alleviate congestion during typical rush hours. (Jt. Ex. 1, Envtl. Assess. (at 9-10).)

180. The Department concluded that there would be some inevitable environmental harm from the traffic that could not be completely mitigated all the time. (Jt. Ex. 1, Envtl. Assess. (at 9-10).)

181. The study was submitted to PennDOT for review and PennDOT concluded that the added traffic volume would not have an impact on the intersection of SR 0208 and TCI Park Drive. (T. 1749-50; Jt. Ex. 2, Vol. 3 (at DEP002751).)

182. The Department agreed with PennDOT's conclusion that the increased traffic from the landfill would not impact levels of service on the roadways. (T. 1750, 1773-74.)

V. Series 800 Wastes

183. The permit authorizes Tri-County Landfill to accept Residual Waste Code 800 (Series 800) waste resulting from oil and gas operations. (T. 1081, 1249; Jt. Ex. 1, Vol. 1 (at DEP000021).)

184. Series 800 waste is classified by the Department as residual waste, not hazardous waste. (T. 1121-22.)

185. Tri-County will not accept liquids for direct disposal. (T. 1573.) Waste accepted for disposal may not exceed a certain moisture content. (T. 1573.)

186. The shales in which oil and gas are found contain naturally occurring radioactive material or "NORM." (T. 1253.)

187. When a process is performed to remove the oil and gas from the rock, the result is technically enhanced NORM or "TENORM." (T. 1253, 1333-34.)

188. TENORM is NORM that is extracted or concentrated. (T. 1333.)

189. Oil and gas operations are one source of TENORM in Pennsylvania. (T. 1334.)

190. Although landfills are not required to obtain a license from the Department's Bureau of Radiation Protection, the Department monitors and regulates the handling of radioactive materials at landfills. (T. 1335-36.)

191. TENORM waste is regulated by the Department's waste program, but the Bureau of Radiation is often consulted in the analysis of radiological components and their impact on the environment and public. (T. 1335.)

192. The radiation levels at landfills "have not gotten close to" and are "nowhere approaching" the levels detected at facilities licensed by the Bureau of Radiation. (T. 1336, 1348, 1350.)

193. Tri-County was required to complete a Waste Analysis and Classification Plan, known as Form R, for the screening, acceptance and management of non-hazardous residual and special handling waste for disposal at the landfill. (T. 1085, 1939-40; Jt. Ex. 2, Vol. 1 (at DEP001150-1210).)

194. Form R was reviewed by the Department, which determined that the initial form submitted by Tri-County was out of date. (T. 1080.)

195. The Department recommended that Tri-County update and resubmit its Form R and use Seneca Landfill's more updated Form R as a model. Tri-County resubmitted an updated form and it was approved. (T. 1084-85, 1118.)

196. Before Tri-County can accept any Series 800 waste, it is required to submit a Form U and obtain approval from the Department. (T. 1401, 1570-71.) This allows the Department to analyze the waste stream and determine whether the waste is appropriate for disposal at the landfill. (T. 1089-90, 1337.)

197. Tri-County's permit contains a Radiation Protection Plan. (T. 1521; Jt. Ex. 2, Vol. 1 (at DEP001211-001302).)

198. Even though Tri-County's Radiation Protection Plan was 15 years old at the time of submission, it was reviewed and evaluated against the Department's current guidance and standards. (T. 1369-70.)

199. When waste enters the site, it will be screened for radioactive material. (T. 1452-53.)

200. When radioactive material is part of a load entering the site, an alarm is triggered. (T. 1521)

201. When the alarm is triggered, there is a corresponding printout with a graph showing where on the vehicle the alarm was triggered. (T. 1522.)

202. The printout is reviewed by one of the landfill's environmental and health safety specialists to determine if it is an actual alarm. (T. 1522.)

203. The load is examined with a handheld radiation detector that identifies the isotope and dose of radiation. (T. 1524.)

204. Once the isotope is identified, the person inspecting the load refers to a radiation detection action plan to determine if the item can be accepted under the landfill's plan. (T. 1524.)

205. The information is entered into a Department spreadsheet that tracks TENORM loads, and the calculations indicate whether there is enough allocation left for the load to be accepted. (T. 1525-26, 1621.)

206. When there is no allocation left, the landfill must notify the Department, which will then determine whether the landfill can be given a permit for the item to be shipped offsite or whether the item must be returned to the generator. (T. 1526-27.)

207. The Department's May 2016 TENORM study analyzed the leachate at 51 landfills across Pennsylvania. (T. 1342; App. Ex. 77.)

208. Additional sampling was done at nine of the landfills in the study that were determined by the Department to have received the most TENORM for disposal in the year prior to the study. (T. 1342.)

209. The TENORM study showed that none of the leachate from any of the landfills exceeded 600 picocuries per liter, which is the limit for radium going to a wastewater treatment facility. (T. 1346-47.)

210. The TENORM study did not show a statistical difference in the radium detected in the leachate of landfills that received oil and gas waste and those that did not. (T. 1349, 1351.)

211. The TENORM study does not suggest a risk to human health or the environment due to radiation from landfills. (T. 1351.)

VI. Compliance History

212. On September 19, 2013, the Department denied Tri-County's 2004 permit application because the height of the proposed landfill did not comply with local zoning restrictions, and because it concluded that Tri-County and other related waste companies under the same corporate ownership had a documented history of non-compliance with Department-administered laws and regulations. (Stip. 29.)

213. Tri-County appealed the Department's September 19, 2013 denial of the 2004 permit application to the Board. (Stip. 30.)

214. A 2016 settlement agreement between the Department and Tri-County provided that Tri-County could submit a "complete application for a municipal landfill permit that replaces the permit application that was denied by the Department on September 19, 2013 [the

2004 permit application].” (Stip. 37; DEP Ex. 15.) Tri-County submitted a new application on December 17, 2018. (Stip. 39, 40.)

215. The 2016 Settlement Agreement noted that, by three separate consent orders and agreements executed the same date, the Department was resolving civil penalty assessments against three Vogel Holding, Inc. direct and indirect subsidiaries: Seneca Landfill, Inc., a subsidiary of Vogel Disposal Service, Inc.; Vogel Disposal Service, Inc.; and Tri-County Industries, Inc. (DEP Ex. 15.)

216. Each of the consent orders required the company to engage a third-party consultant to conduct comprehensive site environmental systems reviews and audits of the companies’ facilities, which were referred to as “environmental audits.” (T. 1527-28, 1530-31, 1775-76; TC Ex. 35, 36, 38.)

217. For Seneca Landfill, the environmental audits were to be performed annually for the first five years, and biennially thereafter for two additional audits. For Tri-County Industries and Vogel Disposal Service, the environmental audits were to be performed biennially for six years. (T. 1532-33; TC Ex. 35, 36, 38.)

218. The third-party consultant was required to submit a report for each of the environmental audits to the companies and the Department, which identified conditions that did not comply with environmental laws and regulations and a plan on how the company would come into compliance. (T. 1535-37; TC Ex. 35, 36, 38.)

219. The companies retained independent consultants and the consultants conducted the comprehensive audits and submitted their reports. They did not uncover significant compliance issues that were not already being addressed. (T. 1528-39; TC Ex. 39-46.)

220. The companies prepared a compliance tracker form for submission to the Department in accordance with the consent orders listing each item identified by the auditor, stating the recommended action, the resolution of the issue, and the date the corrective action was due and when completed. (T. 1535-37, 1543-46; TC Ex. 39-46.) The Department never disapproved. (T. 1538.)

221. The staff at the Vogel Holding companies began holding biweekly calls with the Department's solid waste permitting and compliance staff. Issues were discussed with the Department during these regularly scheduled calls, which initially occurred every two weeks and then occurred monthly. (T. 1546-47.)

222. The 2018 permit application contained Compliance History Form MRW-C, Identification of Interests & Compliance History for Tri-County. (Stip. 49; Jt. Ex. 2, Vol. 1 (at DEP000332-367).)

223. Exhibit E-1 of Form MRW-C listed permits issued to various subsidiaries of Vogel Holding, Inc., including but not limited to Seneca Landfill, Inc., Tri-County Industries, Inc., Tri-County (Transfer Station), and Vogel Disposal Services, Inc. (Stip. 50.)

224. Seneca Landfill, Inc. operates a municipal waste landfill known as Seneca Landfill located in Lancaster and Jackson Townships, Butler County, PA, and a municipal waste transfer station located in Jackson Township, Butler County, PA. (Stip. 51.)

225. The compliance history form is updated as required and is submitted to the Department annually as part of the annual operations report or whenever a permit application is submitted. (T. 1558.)

226. The compliance history form for Vogel Holding Companies as of December 31, 2022, the most recent such form as of the date of the hearing, addressed the previous ten year

period and showed no enforcement actions at Seneca Landfill or the Seneca Landfill Transfer Station since 2016, one violation since 2018 at Tri-County Industries involving the lack of a waste transportation sticker on the driver's side of the truck, and only two violations for Vogel Disposal Service since 2018, one involving a leaking load and the other due to a missing Act 90 cab card required to be in the vehicle. (T. 1559-1561; TC Ex. 47.)

227. Vogel also hired additional compliance personnel after the 2013 permit denial, including Elizabeth Bertha, the Environmental Health and Safety Director of the Vogel Holding entities, including Seneca Landfill and Tri-County Landfill. Ms. Bertha oversees all of the environmental permitting, reporting, recordkeeping, and compliance for the six transfer stations, six hauling companies, one municipal waste landfill (Seneca Landfill), one recycling facility, one materials recycling facility, and one wood waste processing facility operated by the Vogel Holding companies, as well as the safety program for those entities' 700 employees. (T. 1488-90, 1508, 1775-76.)

228. Ms. Bertha supervises five environmental health and safety specialists that perform much of the day-to-day environmental and safety related compliance issues. (T. 1489.)

229. Ms. Bertha overhauled and operates the companies' environmental management system, a customized software program that Vogel acquired from a consultant to track compliance tasks. (T. 1499-1507.)

230. Prior to the hearing, the Department ran an updated compliance history audit for Tri-County and its related companies. The compliance status of Tri-County and its related companies had not changed since the positive compliance history was run as part of the permit review. (T. 1999-2000.)

231. Tri-County and its related companies have a compliance history over the past decade that is equal to or better than other landfills in the Commonwealth. (T. 1550-62, 1759, 1774-76, 1957-58, 1999-2000; Jt. Ex. 2, Vol. 1 (at DEP000085).)

232. Tri-County and related companies have the personnel, systems, and corporate policy in place to secure future environmental compliance. (T. 1495-1504, 1516-18, 1533-62, 1775-76, 1999-2000; TC Ex. 35, 36, 38-47.)

VII. Bonding

233. The initial bond calculated for the entire 35 acres of disposal area for the life of the landfill was approximately $9.59 million assuming the full 35 acres and all ten disposal cells would be open at any one time. (T. 1176-80, 1832-34.)

234. Tri-County submitted a revised bond estimate on May 22, 2020 that reduced the bond to approximately $4.32 million to reflect the cost to close the acreage that would be open for the first two cells to be constructed, amounting to 14.3 acres. (Stip. 62; T. 1176-80, 1832-34, 1998; Jt. Ex. 2, Vol. 6 (at DEP007440).)

235. The Department approved Tri-County's reduced bond amount because Tri-County would not be building ten cells at once. (T. 1176-80, 1833; App. Ex. 191.)

236. The amount of Tri-County's bond will be reviewed each year to ensure that Tri-County has proper bond amounts to cover the cost to clean up the site. (T. 1178-79, 1833; App. Ex. 191.)

237. Tri-County must obtain the Department's approval to open additional cells at the landfill, which requires the submission of additional bonding to cover the added acreage to be affected before the Department authorizes construction of a new cell. (T. 1832-34, 1998-99.)

238. The bond conformed to all regulatory requirements. (T. 1832-34.)

DISCUSSION

As third parties appealing the Department's issuance of the major permit modification to Tri-County, the Appellants bear the burden of proof for their claims. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47. They must show 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. 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)).

To carry their burden of proof, the Appellants must prove their case by a preponderance of the evidence, meaning the Appellants must show that the evidence in favor of their proposition is greater than that opposed to it. *Telegraphis v. DEP*, 2021 EHB 279, 288; *United Refining Co. v. DEP*, 2016 EHB 442, 448-49, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780). In other words, the Appellants' evidence challenging the Department's approval of Tri-County's permit modification must be greater than the evidence supporting the Department's determination that the permit modification was reasonable, appropriate, and in accordance with applicable law. *Stocker*, 2022 EHB at 364; *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473.

A third-party appellant who wishes to succeed may not simply come forward with a laundry list of potential problems and then rest its case. *Benner Twp. Water Auth. v. DEP*, 2019

EHB 594, 633. As we have held before, an appellant may not simply raise an issue and then speculate that all types of calamities may occur. *Del. Riverkeeper Network*, 2018 EHB at 473; *United Ref. Co.*, 2016 EHB at 449; *Ritter v. DEP*, 2017 EHB 729, 741; *Shuey*, 2005 EHB at 711. Instead, an appellant must prove by a preponderance of the evidence that the problems the appellant alleges are likely to occur. *Benner Twp.*, 2019 EHB at 633. When a party raises technical issues, it must come forward with technical evidence to support its challenge, which many times will require competent and appropriate expert witness testimony. *Liddick v. DEP*, 2018 EHB 207, 216; *Prizm Asset Mgmt. Co. v. DEP*, 2005 EHB 819, 844.

The Airport Setback Regulation

The Appellants argue that the landfill cannot be reopened because it is within 10,000 feet of the Grove City Airport. They rely on 25 Pa. Code § 273.202(a)(15), which provides as follows:

> Except as provided in subsections (b) and (c), a municipal waste landfill may not be operated as follows:
> ….
> (15) *Airport*. **Except for areas that were permitted prior to January 25, 1997**, a municipal waste landfill may not be operated as follows:
>
> (i) Within 10,000 feet—or 3,048 meters—of an airport runway that is or will be used by turbine-powered aircraft during the life of disposal operations under the permit.
>
> (ii) Within 5,000 feet—or 1,524 meters—of an airport runway that is or will be used by piston-type aircraft during the life of disposal operations under the permit.

25 Pa. Code § 273.202(a)(15) (emphasis added). The Appellants say that the Tri-County landfill is not in an area that was permitted prior to January 25, 1997, so the exception to the setback does not apply.

The Department determined 24 years ago that the exception applies. A March 30, 2000 settlement agreement between the Department and Tri-County provided:

> Based on the Department's review and analysis of the materials referred to in the preceding paragraph, the Department has concluded, and Tri-County agrees, that the phrase "areas that were permitted prior to January 25, 1997" encompasses, with respect to the Landfill, a number of specific areas, the size of which is approximately 99 acres, where the following occurred or were used by Tri-County: Department-permitted disposal activities; support facilities; borrow areas; offices; equipment sheds; monitoring wells; water pollution control systems; access roads; survey control monuments; Department-permitted closure and postclosure care and maintenance activities; and other areas in which the land surface had been disturbed before January 25, 1997 as a result of or incidental to operation of the Landfill.

(TC Ex. 12 at ¶ N; Stip. 21.) A map depicting the 99-acre area was attached to the settlement as Exhibit A. The parties to the settlement agreed that "[t]he approximate 99 acre area depicted on Exhibit A is a municipal waste landfill authorized by the Department pursuant to (a) Solid Waste Management Permit No. 101295 issued in 1985 and (b) the municipal waste regulations promulgated in April, 1988 set forth in Chapters 271 and 273 of 25 Pa. Code." (TC Ex. 12 at ¶ 1.) No one appealed this Department determination. That settlement authorized Tri-County to submit a "complete substitute application for permit modification" seeking a permit for a landfill no greater than the 99-acre area, which the Department would "consider…to be an amendment of the old re-permitting application." (*Id.* at ¶¶ 4, 5.) Similarly, 13 years later in a 2013 review memorandum, the Department stated, "The old disposal area at the Landfill was permitted prior to 1997…. The permit application seeks a permit for that formerly permitted area. Therefore, the proposed municipal waste landfill is not prohibited by 25 Pa. Code 271.202(15)." (App. Ex. 26 (at DEP0012656).) Joel Fair, the Department's permitting chief for the waste management program from 2006 until his retirement in 2022, testified repeatedly that the 99-acre area was the area that had been permitted prior to January 25, 1997. (T. 1779-80, 1897-98, 1902, 1910.)

The Appellants would have us upend these determinations from decades ago as well as all of the permitting activity that has occurred since, but we see no basis for doing so. Indeed,

we do not understand how one could argue that the landfill is not in an area that was permitted prior to January 25, 1997. The landfill has actually been permitted since 1985. (Stip. 13; TC Ex. 3.) The permit was modified twice in 1988. (Stip. 15; TC Ex. 4, 5.) There may have been some question about the exact boundaries of the permitted area (T. 1907), but that issue was resolved in 2000 and the Appellants have not shown that 99 acres was not the correct number of acres.

The Appellants say the permit may have expired somewhere along the way, which is incorrect, but even if it were true, it would not change the simple fact that the area was permitted before January 25, 1997. The regulation does not say that the permit must remain in place continuously until the present day. It does not say there must have been an active permit or an active application for a permit in place on January 25, 1997 for the exception to apply. It does not say that an application must be continuously in the works for some period of time before and/or after 1997 for the exception to apply. The regulation is not that complicated. There is nothing in the language of the regulation to support the notion that the right to develop a landfill in an area that was permitted before 1997 can be abandoned through inactivity or for some other reason. *Joseph J. Brunner, Inc. v. Dep't of Envtl. Prot.*, 869 A.2d 1172, 1174 (Pa. Cmwlth. 2005) (courts may not supply words omitted by the legislature in interpreting provisions of a statute); *Presock v. Dep't of Military & Veterans Affairs*, 855 A.2d 928, 931 (Pa. Cmwlth. 2004) (same, applying that precept to a regulation); *Matthews Int'l Corp. v. DEP*, 2011 EHB 402, 409 (words cannot be added by the Board under the guise of interpreting a statute, same rules apply to interpreting regulations); *Tri County Waste Water Mgmt., Inc. v. DEP*, 2011 EHB 256, 262 (Board may not add words to a clear and unambiguous statute that are not there).

Assuming for purposes of discussion only that it matters whether Tri-County's permit "expired" somewhere along the way, Tri-County's permit has never in fact expired. Landfill

permits do not really expire. (T. 1967-68.) Although the right to dispose of waste may end (i.e. the permit term for disposal), the permit itself effectively continues in place indefinitely:

> No municipal waste may be disposed, processed or beneficially used under a permit after the expiration of the permit term for disposal, processing or beneficial use. Expiration of the permit term does not limit the operator's responsibility for complying with closure and postclosure requirements and all other requirements under the act, the environmental protection acts, regulations thereunder or the terms or conditions of its permit.

25 Pa. Code § 271.211(c). Tri-County has in fact continuously maintained the site in accordance with its extant permit to the present day.[4]

Although this case presents what must undoubtedly be the most protracted, convoluted permit application process in the history of the Commonwealth, (*see* Finding of Fact No. ("FOF") 18-46, 53-66), the bottom line is that Tri-County has with the Department's acquiescence been continuously and without any material interruption pursuing the permit needed to reopen the landfill. It has never taken its finger off of the chess piece. Regardless of whether the parties have assigned different identification numbers to the applications along the way, or referred to them as repermitting, renewal, amendment, new, or modification applications, or charged new permitting fees, or how the Department has characterized the permit in previous filings in other Board appeals that are in no way binding on us, we see no error in the Department's issuance of the permit modification based on anything that occurred in the administrative processing of Tri-County's applications. When we focus on substance instead of semantics and form, we see no grounds for rescinding or remanding the permit due to any supposed administrative process decisions allegedly made over the last 35 years. The important

[4] The Appellants say Tri-County has not complied with its closure requirements. However, Tri-County's closure obligations have been repeatedly stayed by the Department pending review of its applications. (TC Ex. 10, 12, 17.) Now that the permit modification has been issued, the closure obligations for the existing waste have been superseded by the waste relocation plan.

point is that the Department's decision to issue the modification of a permit for an area clearly permitted before January 25, 1997 was lawful, reasonable, and supported by the facts.

Relatedly, the Appellants next question whether Tri-County Landfill, Inc. has the right to operate the landfill under the permit as opposed to Tri-County Industries, Inc., the entity that received the original permit for the landfill in 1985. The Appellants argue that Tri-County was required to apply for a permit reissuance under 25 Pa. Code § 271.221, which provides that a "transfer, assignment or sale of rights granted under a permit may not be made without obtaining permit reissuance." 25 Pa. Code § 271.221(a).

Tri-County argues in response that the permit reissuance regulations are limited to situations where there has been a change to the entity that will be in control of the facility under the existing permit terms and conditions. Tri-County says that, on the other hand, when there are any changes to permit terms or conditions or facility operations, a permit modification is required under 25 Pa. Code § 271.222, which is what it always has been seeking. Tri-County also points out that a permit modification was required under the 1988 regulatory changes. Tri-County adds that nothing in the regulations precludes a permit modification from being issued to a new entity that otherwise meets the requirements for a permit modification.

In its 1991 application for a permit modification, Tri-County notified the Department that it had changed its name:

> As the facility was formerly permitted as Tri-County Industries, Inc. (I.D. #101295) this application reflects a change in the name of the site to Tri-County Landfill, Inc. All pertinent documents reflect the name change. These include Forms A, C, E, contracts, waivers, rights-of-way, and agreements. In addition, an attempt has been made to change the name in the text of all supporting narratives. In the event a reference to Tri-County Industries, Inc. may remain, it can be assumed to mean Tri-County Landfill, Inc.

(TC Ex. 11.) The Appellants say this was not good enough.

We find nothing improper about Tri-County Landfill, Inc. being the entity identified in the 1991 permit application and all subsequent permit applications submitted to the Department. The Appellants do not provide any support for the notion that a permit reissuance must be made before an entity can seek a permit modification, or that an entity cannot obtain a change in the name of the operator by means of a permit modification, especially if changes to other aspects of the permit are also sought. Joel Fair testified that, although a change to the name of a permittee would be typically accomplished through a permit reissuance, in this instance it was done through the application process. (T. 1944-45.) By submitting several applications for a permit modification that clearly identify the owner and operator of the site as Tri-County Landfill, Tri-County has effectively satisfied the pertinent requirements of the reissuance regulation at 25 Pa. Code § 271.221(b). Indeed, one of the ways a person can satisfy the permit reissuance documentation requirements is to submit an entirely new application. 25 Pa. Code § 271.221(b)(3)(i). Tri-County has submitted several applications. There is no question that Tri-County Landfill, Inc., having finally received the permit modification, assumes liability for operation, maintenance, pollution, closure, postclosure maintenance, final cover, and responsibility for all terms and conditions in the permit, which the permit reissuance regulation appears designed to ensure. This strikes us as a form over substance argument that does not justify rescinding the permit modification.

Further, this is not an instance where the permit has been issued to the wrong entity, an entity that is not responsible for the operation and management of the landfill, or an entity that is not a legally recognized person. *See Borough of St. Clair v. DEP*, 2014 EHB 76, 113 (Department issued landfill permit to a non-legal entity under 25 Pa. Code § 271.201 instead of the permit applicant). This is also not a situation where a permit is being transferred to a

completely unassociated entity. Tri-County Landfill, Inc. is a subsidiary of Tri-County Industries, Inc., which in turn is a subsidiary of Vogel Holding, Inc. (Stip. 5.) The Appellants have provided no reason why the name of the permittee cannot be altered by way of a major permit modification, as was done here.

Harms-Benefits Analysis

Many of the Appellants' substantive arguments challenge the conclusions of the Department's harms-benefits analysis. Under 25 Pa. Code §§ 271.126 and 271.127, an applicant for a municipal waste landfill must demonstrate that the benefits of a proposed project to the public clearly outweigh the known and potential harms. A permit applicant must prepare an environmental assessment with a detailed analysis of the potential impact of the proposed facility on the public health and safety, as well as a description of the known and potential environmental harms of the facility. 25 Pa. Code § 271.127(a) and (b). The assessment must then include a written mitigation plan that explains how the applicant plans to mitigate each known and potential environmental harm. 25 Pa. Code § 271.127(b). The Department must review the mitigation plans to see if the known and potential environmental harms have been fully mitigated. That is to say, it must ensure that the mitigation measures, individually and collectively, will "adequately protect the environment and the public health, safety and welfare." *Id*. The Department's review is known as the harms-benefits analysis. The harms-benefits analysis also takes into account any social and economic benefits that remain after accounting for the known and potential social and economic harms. 25 Pa. Code § 271.127(c). If a harm has been fully mitigated, it does not factor into the harms-benefits balancing.

The harms-benefits regulation at 25 Pa. Code § 271.127 provides in pertinent part:

> (a) *Impacts*. Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility

on the environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses, land use and municipal waste plans. The applicant shall consider features such as scenic rivers, recreational river corridors, local parks, State and Federal forests and parks, the Appalachian Trail, historic and archaeological sites, National wildlife refuges, State natural areas, National landmarks, farmland, wetland, special protection watersheds designated under Chapter 93 (relating to water quality standards), airports, public water supplies and other features deemed appropriate by the Department or the applicant. The permit application shall also include all correspondence received by the applicant from any State or Federal agency contacted as part of the environmental assessment.

(b) *Harms*. The environmental assessment shall describe the known and potential environmental harms of the proposed project. The applicant shall provide the Department with a written mitigation plan which explains how the applicant plans to mitigate each known or potential environmental harm identified and which describes any known and potential environmental harms not mitigated. The Department will review the assessment and mitigation plans to determine whether there are additional harms and whether all known and potential environmental harms will be mitigated. In conducting its review, the Department will evaluate each mitigation measure and will collectively review mitigation measures to ensure that individually and collectively they adequately protect the environment and the public health, safety and welfare.

(c) *Municipal waste landfills, construction/demolition waste landfills and resource recovery facilities*. If the application is for the proposed operation of a municipal waste landfill, construction/demolition waste landfill or resource recovery facility, the applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.

25 Pa. Code § 271.127(a)-(c).

We have held that, when a party challenges the Department's conclusion regarding the harms-benefits balancing test, it is not sufficient to simply have a different opinion about how the balancing could have been done; rather, the party must show that the Department acted unreasonably or violated the law in deciding the result of the harms-benefits balance. *Borough of St. Clair*, 2014 EHB at 96 (citing *Exeter Citizens Action Comm., Inc. v. DEP*, 2005 EHB 306,

328). We have also noted that 25 Pa. Code § 271.127(c) does not require that a landfill cause no harm. *Id.*

For social and economic harms, the Department evaluated the Tri-County landfill's visual and aesthetic impacts and its impact on property values. (Jt. Ex. 1, Envtl. Assess.) The Department considered the social and economic benefits of local employment, tax revenue, various state and municipal fees, and Tri-County's purchase of goods and services from local businesses. The Department evaluated the following environmental harms: odors, dust, and air quality impacts; noise; litter; vectors (e.g. rodents, wild animals, and mosquitos); truck traffic; loss of wetlands; stormwater runoff; and aircraft safety due to the propensity of landfills to attract birds. The Department found the following environmental benefits of the landfill: relocation of the waste disposed of at the landfill between 1950 and 1990 onto a lined area; creation of additional acres of wetlands; and a free disposal and spring cleanup program for the local community. The Department concluded that the benefits of the proposed project clearly outweighed the known and potential harms. Although the Department found that some harms would remain after mitigation, such as noise, litter, and traffic, it determined that they would be minimal and potentially occur only on an infrequent basis. (T. 1961.) The Department determined that the harms from the Tri-County landfill were pretty typical of the harms that would result from any landfill, with the relocation of the historic waste being a more novel benefit. (T. 1983.)

The Appellants contend that the Department erred in its harms-benefits analysis. They primarily focus on aircraft safety, which is unquestionably the most significant substantive issue in this appeal, arguing that the landfill should not be reopened when it is in such close proximity to the Grove City Airport because the risk of a bird strike is too great. They also contest the

relocation of the existing waste on the site as an environmental benefit and instead claim it is really a harm because they say it will exacerbate existing groundwater contamination at the site. The Appellants have not shown by a preponderance of the evidence that the Department acted unreasonably or violated the law with respect to any of the harms or benefits associated with the Tri-County landfill.[5]

A. Birds

The Appellants contend that the Department erred by permitting the landfill modification within 10,000 feet of the Grove City Airport. They say the landfill will present a significant hazard to public safety because it will attract birds. They believe the large number of birds in the vicinity of the airport will create an unacceptable risk of collisions between aircraft using the airport and those birds, i.e. bird strikes. In their view, given the landfill's proximity to the airport, there is nothing Tri-County could possibly do to mitigate this risk. Therefore, the permit must be rescinded according to the Appellants.

As with every aspect of the case, we review the Department's decision to issue the permit modification in spite of the bird issue to assess whether the decision was consistent with the law, supported by the facts, and constituted an otherwise reasonable exercise of the Department's discretion.

The Department's issuance of the permit modification was consistent with the law. The Appellants' primary argument that the permit issuance was not consistent with the law is that the

[5] The Appellants do not provide any meaningful argument in their briefs with respect to visual impacts, property values, odors, dust, air quality, litter, vectors, or stormwater runoff. Nor did these topics receive much attention during the 12-day merits hearing. To the extent the Appellants have preserved any arguments with respect to these issues in the harms-benefits analysis, the Appellants have not produced evidence necessary to meet their burden of proof that the Department acted unreasonably or violated the law in deciding the result of the harms-benefits analysis or that the permit modification issuance was unreasonable or unlawful because of these harms. We find that the Department properly accounted for these harms in its analysis.

landfill violates the exclusionary criterion set forth in the regulations at 25 Pa. Code § 273.202(a)(15) prohibiting a landfill within 10,000 feet of an airport runway.[6] As discussed in detail above, the currently permitted area of the landfill is "an area that was permitted prior to January 25, 1997." Therefore, the exclusionary criterion related to airports set forth in 25 Pa. Code § 273.202(a)(15) does not apply. The Department was not precluded from permitting the modification of the Tri-County landfill by Section 273.202(a)(15).

Aside from the regulation at 25 Pa Code § 273.202, the regulation at 25 Pa. Code § 273.136 requires a permit applicant to submit a nuisance minimization and control plan, but that regulation does not mention bird control. Tri-County's submission of its bird control plan certainly satisfied the requirement that a nuisance control plan be submitted with respect to birds, to the extent the regulation may be said to deal with bird control. The Appellants have not suggested otherwise. The regulation at 25 Pa. Code § 273.121 requires the permit applicant for any landfill within six miles of an airport runway to give notice of its application to PennDOT's Bureau of Aviation, the Federal Aviation Administration, and the airport, which Tri-County did.

The Department and Tri-County have at times referenced the *federal* regulation set forth at 40 CFR 258.10(a) relating to the permitting of landfills near airports. That regulation reads as follows:

> Owners or operators of new MSWLF [municipal solid waste landfill] units, existing MSWLF units, and lateral expansions that are located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft must demonstrate that the units are designed and operated so that the MSWLF unit does not pose a bird hazard to aircraft.

[6] The Appellants also briefly argue that the landfill is prohibited under the exclusionary criteria for *residual* waste landfills. *See e.g.*, 25 Pa. Code §§ 288.422, 288.522, 288.622. However, the Tri-County landfill is a *municipal* waste landfill, not a residual waste landfill. 25 Pa. Code §§ 287.1, 288.1. Therefore, 25 Pa. Code §§ 288.422, 288.522, and 288.622 do not apply.

40 CFR 258.10(a). However, that regulation does not apply here because Pennsylvania has obtained primacy over the regulation of municipal waste landfills. *See* 35 P.S. §§ 6018.101 – 6018.1003. *See also Novak v. DER*, 1987 EHB 680, 705.

In the absence of any other regulation on point, the Department was left to evaluate the bird-strike issue in the context of the environmental assessment required under 25 Pa. Code §§ 271.126 and 271.127.[7] If a harm is not fully mitigated, the Department must weigh the harm against the benefits of the project. 25 Pa. Code § 271.127(c). However, balancing never came into play with respect to the bird issue in this case because the Department determined that the bird-strike hazard had been fully mitigated.

There is no dispute that the increased potential for bird/aircraft collisions around a landfill is a known and potential adverse impact and environmental harm of the facility. *Jefferson Cnty. Comm'rs v. DEP and Leatherwood, Inc. ("Leatherwood")*, 2002 EHB 132, 183. As a result, Tri-County was required to submit a plan on how it would mitigate those effects. The bird control plan is the mitigation plan in this context. Thus, the key issue in this case is whether Tri-County's bird control plan will "adequately protect the environment and the public health, safety and welfare." 25 Pa. Code § 271.127(b). We must decide whether Tri-County's implementation of its mitigation plan may be counted on to prevent an increase in the likelihood of bird strikes that would have otherwise obtained if Tri-County did not have its plan.[8]

[7] Of course, the Department must also ensure that its action comports with Article I Section 27 of the Pennsylvania Constitution, PA. CONST. art. 1, § 27. That issue is discussed *infra*.

[8] To the extent the Department referred to the federal standard set forth in 40 CFR 258.10(a) as nonbinding guidance, we detect no material differences between saying the public safety has been "adequately protected" under 25 Pa. Code § 271.127(b) and the standard in 40 CFR 258.10(a), which says that a municipal solid waste facility may be permitted in proximity to certain airports if the facility "does not pose a bird hazard to aircraft." *Id*. A "bird hazard" is "an increase in the likelihood of bird/aircraft collisions that may cause damage to the aircraft or injury to occupants." 40 CFR 258.10(d)(2).

Birds are, of course, everywhere. Birds are present at and near the airport now and will continue to be around after the landfill begins operations. (T. 421-25, 440, 463-66, 468, 474-79, 510, 989-90.) There is a pre-existing, i.e. baseline, risk of bird/aircraft collisions. Unfortunately, there will always be a risk of bird/aircraft collisions. A landfill cannot be expected to eliminate *all* risk of bird strikes. However, it can and must be expected not to elevate that risk above the point where the public safety is no longer adequately protected as a result of the presence of the landfill. The Department has reasonably interpreted this to mean that the number and character of birds present must not be materially increased or changed above background or baseline levels, i.e. the number and character of birds present before landfill operations. These are the standards and principles that the Department applied, and it committed no error of law in doing so. The key criterion for assessing risk is not whether there are *any* birds around, but whether the landfill has increased the risk beyond that which is adequately protective of public safety by drawing more and/or different birds into the area. The Department correctly evaluated Tri-County's bird control plan with this standard in mind.

The Appellants have raised a few other concerns regarding the Department's legal analysis. The Appellants maintained earlier in the proceeding that the Department committed an error of law by permitting the landfill modification due to Section 503 of the Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 44718(d). It is not clear that they have maintained this argument in their post-hearing brief. (*See* App. Brief at 117.) All issues previously raised in an appeal but not included in the post-hearing brief are waived. 25 Pa. Code § 1021.131(c); *Morrison*, 2021 EHB at 221 (citing *Benner Twp.*, 2019 EHB at 635; *New Hope Crushed Stone & Lime Co. v. DEP*, 2017 EHB 1005, 1021). To the extent the issue has not been waived, the Department committed no error in this regard. The Ford Act limits the construction

of landfills within six miles of airports that, among other things, have "regularly scheduled flights of aircraft designed for 60 passengers or less." 49 U.S.C. § 44718(d)(1). The Grove City Airport does not have regularly scheduled flights. (T. 452-53.) The Ford Act also does not apply unless the airport is the recipient of certain federal grants. 49 U.S.C. § 44718(d)(1). The record does not support a finding that the Grove City Airport has received any such grants. Finally, the Act only applies to landfills established after 2000. 49 U.S.C. § 44718(d)(1) and (d)(2). The Tri-County landfill was established well before then.

In maintaining that the Department committed errors of law, the Appellants have drawn our attention to the participation of the Federal Aviation Administration (FAA) in the review of Tri-County's permit application. The Appellants argue that the permit modification is not consistent with various requirements and communications originating from the FAA throughout its lengthy involvement. Tri-County and the Department respond that they have worked hand in hand with the FAA throughout the entire process, and in the final analysis, FAA approved of the reopening of the landfill.

The FAA has indeed been extensively involved in the review of Tri-County's permit application for roughly the last twenty years, starting in at least 2004. A few general observations are in order before we turn to the details. First, no one from the FAA testified. Virtually everything that we have in the record regarding the FAA is hearsay. Some of it was admissible, but it was still hearsay, entered into the record without the benefit of declarant testimony. We weigh the evidence accordingly. We largely discount any testimony regarding what FAA employees may have said orally, except to note that there is no evidence that any FAA employee has ever objected to reopening the landfill. Second, we are here focused on the FAA's input regarding bird control. There can be no dispute that the FAA's earlier concerns

regarding the height of the landfill have been satisfactorily resolved. (Jt. Ex. 2, Vol. 2 (at DEP001442-44).) Third, the FAA's limited role must be kept in perspective. The FAA's Advisory Circulars, for example, relied upon so heavily by the Appellants, are nonbinding guidance documents that seek voluntary compliance with the recommendations contained therein. (T. 783, 788, 1020, 1857; App. Ex. 66.) The circulars in large part do not by their own terms apply to landfills. (T. 698-700, 816.) Similarly, the FAA's various letters in this case merely contained recommendations, not requirements. Although it might have been unreasonable or ill-advised not to follow the FAA's recommendations, the Department was not legally required to defer to that federal agency with respect to the bird-strike concern. To the contrary, it was required to conduct its own analysis and reach its own independent conclusions.

Having said that, the Department is to be commended for consulting closely with the FAA throughout the permit review process. It is difficult to imagine that either the Department or this Board would have issued or upheld the permit had the FAA objected to it, even though those objections would have been nonbinding. As it happens, it has not. No FAA witness testified against the landfill. Although the FAA's letters and emails are something less than a model of perfect clarity and consistency, in the final analysis, they contain no objection to the landfill reopening. They contain various recommendations, but critically, no objections to reopening.[9]

In letters in 2004 and 2005, the FAA asked that certain conditions be followed, noted that one had already been followed, and concluded, subject to those conditions, that the FAA had no objection to the landfill reopening. In a lengthy series of communications in 2019 and 2020, the FAA again determined that no hazard existed and expressed no objection to the landfill

[9] PennDOT's Bureau of Aviation has been informed of the landfill reopening and it has offered no comments or objections. (T. 1654-55; TC Ex. 116 (at PDF pg. 17).)

reopening. Our review shows that all of the FAA's conditions expressed in its various letters have been addressed satisfactorily and/or must be addressed going forward pursuant to the conditions of the permit.

The Appellants say the 2004 and 2005 communications are stale and should not be relied upon. This criticism is not well taken given all of the subsequent communications from the FAA through 2021 expressing no objection to the project.

The Appellants point to a letter dated July 1, 2022, (App. Ex. 55), which was sent about one and one-half years *after* the permit was issued, by an FAA employee not previously involved in the project. The Appellants argue that the FAA's 2022 letter throws the previously issued permit into question. The Appellants' argument is not exactly clear from an administrative law perspective. They seem to argue that the Department erred by not unilaterally rescinding the permit when it received the letter, but it is not clear that the Board in this appeal could review the Department's nonaction regarding the status of the permit modification in response to the letter. *Glahn v. Dep't of Envtl. Prot.*, 298 A.3d 455 (Pa. Cmwlth. 2023) (Board has no jurisdiction over Departmental inaction). If the Appellants are arguing that this Board should exercise its *de novo* review and either modify the permit or remand the permit on our own based on the letter, the argument has no merit.

The letter in question inquired as to the status of landfill construction. The letter at its heart merely seeks an update given that the permit has been issued and the FAA had not heard anything. It makes no attempt to withdraw the FAA's prior determinations. There is nothing to suggest the FAA's earlier positive communications are no longer valid. The letter does not express any objection to the landfill reopening. Its recommendations either have been followed

or will be followed in short order. There are no material inconsistencies between the letter's recommendations and the permit.

The letter did not object to the landfill's construction but it included certain recommendations going forward. For example, the Appellants point to a recommendation in the letter that a "qualified airport wildlife biologist" should prepare a 12-month wildlife assessment. This recommendation, aside from being nonbinding, evinces no understanding of all of the previous work at the site. It actually contradicts the FAA's earlier letters finding that such studies by qualified persons had already been performed and were acceptable. (Jt. Ex. 2, Vol. 2 (at DEP001442-44).) The Appellants' bird strike expert acknowledged that what is important is that the work be performed by a biologist with experience and training on bird strikes, (T. 918-20), and there can be no question that Tri-County's bird strike expert, Rolph Davis, Ph.D., qualifies as such a biologist. As it happens, birds in the area have already been studied *ad nauseum* by highly trained experts. Another study would add no value. Birds will be studied again extensively once landfilling begins to ensure compliance.

The Department responded to the *ex post facto* letter with an explanation of prior activity, including the fact that the Department had already added permit conditions to address the FAA's comments. (DEP Ex. 28.) The Department invited the FAA employee to respond with any additional questions, which he never did. To repeat, the bottom line is that the FAA has never expressed any objection to reopening the landfill.

Having concluded that the Department committed no errors of law, we now must decide whether the Department's issuance of the permit notification in light of the bird issue was supported by the facts and was otherwise reasonable. The Department determined that implementation of Tri-County's mitigation plan (i.e. bird control plan) would fully mitigate the

risk of increased bird strikes, such that the public safety would be adequately protected, because there would in fact be no increase in the risk of bird strikes as a result of the landfill. This determination is fully supported by the facts and was otherwise reasonable.

Somewhat remarkably, the Appellants did not present any testimony on the critical point of the effectiveness of Tri-County's bird control plan. They first presented the testimony of pilots who have flown into and out of the airport, including Michael Baun, who owns and operates Grove City Aviation, which manages the airport. The pilots understandably have a generalized concern regarding bird strikes, but they do not have any particular knowledge or expertise regarding the association between landfills and bird strikes. The pilots did not and indeed could not opine as experts regarding the effectiveness of Tri-County's bird control plan. They could not contribute in a meaningful way to our assessment of whether Tri-County's bird control measures will be adequately protective of the public safety. Indeed, they may not even have been aware of its existence. (T. 470-72.)

The Appellants presented the testimony of Russell DeFusco, Ph.D., a well-qualified, (T. 632-71; App. Ex. 46), expert on bird strikes. However, Dr. DeFusco did not take any position on Tri-County's bird control plan. In fact, he did not bother to review it, or most of the studies that led up to its preparation. (T. 745, 774, 801.) He simply did not care what the bird control plan said because, in his view, it does not matter what it says: the fact that the landfill is as close as it is to the airport and directly on one of the flight paths to the airport, in and of itself, creates too great of a risk to public safety to allow the landfill to be permitted. The risk cannot under any circumstances be adequately mitigated in his view. His opinion is the Tri-County landfill should not be permitted regardless of any mitigation plans, for the sole reason that it is too close to the airport, full stop.

To the extent Dr. DeFusco is attempting to offer a legal opinion, we, of course, do not recognize such opinions. It would be error to do so. *Rhodes v. DEP*, 2009 EHB 237. *See also Nat'l Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 276. For example, Dr. DeFusco's opinions impermissibly extended into such matters as the legal interpretation of whether the exclusionary criterion in 25 Pa. Code § 273.202(a)(15) applied to the landfill. (T. 800.) Aside from being an impermissible legal opinion, we have no indication that Dr. DeFusco has any understanding whatsoever regarding the complex history of the landfill's permitting process.

As to Dr. DeFusco's opinion that the bird strike risk posed by the landfill cannot possibly or under any imaginable circumstances be adequately mitigated regardless of the specifics of the plan, we do not credit his opinion for several reasons. First, the fact that the regulations on their face allow for the possibility of permitting a landfill within 10,000 feet of an airport cannot be ignored. Dr. DeFusco is essentially trying to rewrite the regulation by eliminating the exception for landfills permitted before the regulation was promulgated (January 25, 1997). This he may not do.

Second, Dr. DeFusco's absolute position on direct did not hold up well upon cross-examination. Indeed, he at one point conceded that it is at least possible to permit a landfill with the bird strike risk at an acceptable level within 10,000 feet of an airport. (T. 766.)

Dr. DeFusco has taken a less than absolute position in the past. Although each situation is unique, he did author a paper entitled "The Successful Case Study Bird Control Program of Waste Management Outer Loop Recycling and Disposal Facility, Louisville KY." (T. 769-70.) He stated in that report:

> By implementing a comprehensive state-of-the-art bird control program with a detailed program of measuring, WMK, Waste Management of Kentucky, has demonstrated that the two land uses are not necessarily incompatible. The results of the first two years of the program show that by employing various passive and

> active bird management and control techniques, OLDRF, Outer Loop Disposal and Recycling Facility, bird activity is being maintained at or below background levels.

(T. 770-71.) Third, Dr. DeFusco relied heavily on FAA letters and guidance documents, yet he conceded that the FAA has no authority to restrict the landfill based on bird-strike related issues, and in any event, the FAA has repeatedly stated that it has no objection to the reopening of the landfill if its conditions are followed, which they have been.

Finally, we credit the contrary opinion of Tri-County's well qualified expert on bird strikes, Dr. Davis. Dr. Davis credibly opined that the bird strike hazard can be successfully mitigated to the point that the public safety is adequately protected; full mitigation can be achieved with implementation of the bird control plan. As proof, Dr. Davis described the bird control plan that is being implemented successfully at the Atlantic County Utilities Authority (ACUA) landfill, which is less than 10,000 feet from the Atlantic City International Airport. Extensive monitoring conducted over many years has shown that the bird control plan has kept the average number of birds at the landfill to background levels. There is no record support for the proposition that the landfill has contributed to bird strikes at the airport. The ACUA bird control plan is essentially identical to the plan approved by the Department for use at the Tri-County landfill. The most salient feature of both plans is the limitation on the disposal of putrescible waste during daylight hours. We credit Dr. Davis's opinion that the success of ACUA plan shows that Tri-County's substantially similar plan will be successful as well.

Dr. DeFusco testified that the ACUA landfill is a "very different situation" than the Tri-County landfill, but that testimony was based in part on his mistaken belief that the ACUA landfill was more than four miles away from the airport. He conceded his mistake on cross-examination. (T. 751, 771, 806.) Dr. DeFusco did not otherwise convince us that ACUA's

experience is not probative here. He testified that the ACUA landfill is not under the main flight path to the airport, which is true, but that relates to the danger posed by birds already loitering at the landfill and has nothing to do with how many birds will be attracted to and remain at the landfill in the first place. He testified that the ACUA needs to deal with many more birds and different gull species than Tri-County, but that actually strengthens Tri-County's case that, if it works at Atlantic City, it will work at Tri-County where there are lower resident bird populations and less aggressive gulls. (T. 958.) The Grove City Airport is much less active than the Atlantic City Airport, but again, this fact weighs in favor of Tri-County's position, not against it when it comes to minimizing the threat of bird strikes. Where Dr. Davis relied on empirical studies, Dr. DeFusco conjectured without any support that there is "no doubt" that "some" of the strikes that have occurred at the Atlantic City airport were with birds that were directed to the landfill. Notwithstanding Dr. DeFusco's testimony, we accept the ACUA experience as persuasive evidence that the implementation of Tri-County's bird control plan in full accordance with its terms will keep the birds at bay.

Given Dr. DeFusco's categorical opinion that Tri-County's bird control plan is irrelevant, and because he believes that no plan could possibly be acceptable, an opinion which we do not credit, we are left with the uncontradicted, credible opinion of Dr. Davis that the bird control plan that he designed for Tri-County will result in a landfill that will not pose a bird hazard to aircraft. As described in the Findings of Fact, the bird control plan contains numerous components to ensure that the landfill will not result in an increase in the bird hazard above background. The most important component is limiting landfilling of putrescible waste to nighttime hours. The birds of concern in the area of the Tri-County landfill do not tend to feed at night, a fact upon which Dr. DeFusco agreed. (T. 792, 885, 960.) Other components include

having trained bird controllers on site, multiple daily surveys and long-term monitoring to ensure compliance, continuous daytime operations, and pyrotechnics as necessary. To repeat, none of the Appellants' witnesses offered any criticisms of the details of this plan or offered suggestions on how it could be improved or exactly why it could not be counted on to work.

If Tri-County's bird control plan were deemed to be insufficient, then it is unlikely that *any* bird control plan could ever be deemed to be sufficient at any landfill anywhere because Tri-County's bird control plan appears to include virtually everything that possibly *can* be done at the landfill to mitigate the bird hazard to aircraft. (T. 987-91.) It is fairly characterized as state of the art.

Despite the lack of expert support for their positions, the Appellants have lodged several criticisms of Tri-County's plan and the Department's review thereof in their post-hearing brief. Although the Appellants' lack of expert testimony on this key point is fatal to their position, *see Snyder Twp. Residents for Adequate Water Supplies v. DER*, 1988 EHB 1202, 1216 (where mitigation is approved, "expert testimony is required to show that it is inadequate"), we will nevertheless address these criticisms. First, they attempted to impeach Dr. Davis by pointing out that he was previously retained by the Department in connection with an earlier version of Tri-County's permit application. (Stip. 43.) Dr. Davis was apparently critical of an earlier bird control plan prepared by another firm, although his report on that earlier plan was not admitted into evidence. (T. 889.) Importantly, Dr. Davis did *not* opine at that time that it was impossible to mitigate the hazard potential. He instead was dissatisfied with the proposed plan, and the studies that led up to the plan. Based on his concerns, the Department denied Tri-County's application, citing the lack of an adequate bird control plan. (Stip. 24; T. 1751-53, 1789.) Much litigation ensued. Tri-County then hired Dr. Davis to prepare an adequate bird control plan. (T.

891.) In 2004, Tri-County submitted a revised application based on a lot more study with a better bird control plan with the key feature being nighttime disposal of putrescible waste. (T. 937-39, 1790-91.) The Department was still not satisfied that the plan was good enough and again denied the application in 2006. (T. 1754.) The Department added that it did not think Tri-County could be trusted to implement the plan given the compliance history of the two related companies, Seneca Landfill, Inc. and Vogel Disposal Service, Inc. (Stip. 28.) More litigation ensued. During the time that litigation was progressing, Tri-County provided still further information to the Department in support of its plan. (T. 1755.) The Department was at last satisfied and concluded that the plan was adequate. (T. 1756.) More permit review and litigation followed, and the Department again denied the application in 2013, however, this time *not* because of the bird strike issue. (Stip. 29; T. 1759.)

The about-faces of Dr. Davis and the Department would have been enough to give us pause if it were not for the extensive additional study and multiple improvements in the bird control plan over time. Agreeing to dispose of putrescible waste only at night, especially in the summer when there is such a limited window of darkness, was obviously an important improvement. In addition, Tri-County corrected earlier shortcomings, such as only surveying a 15-mile area, not surveying large nearby lakes, and relying too heavily on pyrotechnics. This is not a case where the same plan was suddenly and inexplicably deemed to be acceptable. It is also not a case where multiple problems with the application suddenly disappeared at the same time. The bird control issue was actually resolved back in 2008, while other concerns remained. (T. 1755-59.) The change in position of the Department and Dr. Davis has been sufficiently explained. Dr. Davis's opinion from the start that the bird control plan will require constant

vigilance and close attention to detail is undisputed and has never changed. Indeed, Tri-County's ability to continue operations in the future depends on it.

The Appellants next charge that the bird control plan is based on inadequate study. This criticism lacks merit. To the extent Dr. DeFusco made this charge, it did not help his credibility because he conceded he did not read most of Dr. Davis's studies. (T. 745, 772-74, 801.) In truth, no amount of study could have satisfied him. He also did no study of his own beyond a brief site view. (T. 780.) Again, this is not surprising given his position that no mitigation is possible. Given his view, studies were, therefore, essentially useless. This does not strike us as a particularly viable scientific opinion.

In truth, birds in the area have been studied *ad nauseum*. Dr. Davis visited the area 78 times. (T. 903.) The studies went out a considerable distance and included active nearby landfills, which seems particularly important because studying the currently empty fields at the Tri-County site can only provide so much value in predicting events after active waste disposal begins. The studies showed that the data and conclusions were repeatable. We credit Dr. Davis's opinion that no further study preliminary to the landfill opening is necessary or warranted. As just stated, the bird control plan is state of the art, so further study could not possibly add anything for the simple reason that there is nothing else of any substance that could be added.[10]

The Appellants direct our attention to the Carbon Limestone Landfill in Poland, Ohio, which was one of the landfills included in Dr. Davis's studies. The studies showed that the landfill attracted large numbers of birds. However, putting aside that Dr. Davis conducted studies much closer to Tri-County Landfill, the Carbon Limestone Landfill findings merely stand

[10] Tri-County does not plan to have a full-time bird controller on the site on Sundays, when it is closed and the waste is covered. This may need to change but we have no basis for imposing such a condition now.

for the proposition that, absent controls, birds are likely to be attracted to a landfill. This point has not been disputed. We accept that the landfill would present a material risk absent mitigation. Pinpointing the number of birds that hypothetically would be attracted to the landfill after operations begin in the absence of a bird control plan strikes us as an academic exercise that serves no purpose. It does not help establish background bird conditions at the Tri-County site. As we have already said, the issue in this case is not whether birds would be attracted absent control, it is whether that known and potential nuisance/harm has been fully mitigated. If we had evidence that the Carbon Landfill had large numbers of birds on site despite implementing a bird control plan like Tri-County's, that would have been of interest, but the Carbon Landfill had no bird controls such as nighttime disposal, (T. 949-50), so it really tells us little about the key issue in this case.

Along the same lines, the Appellants criticize Dr. Davis's studies for using smaller landfills than the Tri-County landfill as a basis for comparison. However, the only other landfill brought to our attention that utilizes nighttime disposal is the Atlantic City Landfill. To repeat, there is no dispute that landfills, regardless of their size, tend to attract birds. Any number of birds above background is worthy of concern. The Appellants' contention that this landfill or that landfill attracts more or less birds given all the possible variables between landfills and airports is not particularly helpful. For example, without further explanation, we see little value in comparing one of the world's busiest airports, the Atlanta International Airport, with the Grove City Airport, as the Appellants do.

The Appellants, yet again without expert support, accuse Dr. Davis generally of skewing his studies of other landfills if the data did not fit Tri-County's narrative regarding the risk posed by the Tri-County landfill. We are not sure how many times one needs to study a landfill to

know it attracts a lot of birds, but in any event, we hardly have the impression that Tri-County or the Department discounted the risk posed by the landfill during the permitting process. To the contrary, Tri-County and the Department have devoted a rather enormous level of work and attention to addressing this serious risk. Neither Tri-County nor the Department has maintained that this work and attention was not necessary because of a lack of risk or potential harm. Tri-County has acknowledged the risk and worked, admittedly at the Department's insistence, to do everything possible to fully mitigate it. To the extent Tri-County has attempted to minimize the risk in its arguments before the Board (e.g. Grove City Airport is a small airport, bird strikes are very rare, bird strikes causing fatalities are more rare still, etc.), we have paid those attempts no heed. Indeed, like the Department, we have taken the risk of bird strikes very seriously in adjudicating this appeal. This landfill, given its location, would have posed too great a risk absent the bird control plan. Implicit in the permit conditions is a determination that the landfill will be unable to continue operating if the bird control plan proves to be unsuccessful. (*See, e.g.* Operating Condition 30.) The Department was well advised to include such conditions in the permit.

The Appellants complain that there has been insufficient study of the landfill site itself under active operating conditions. In other words, the landfill should not be permitted to operate without a bird study under active landfilling conditions, but such a study cannot be conducted unless a permit is issued. Obviously, the Department's actions cannot be based on such a Catch 22. Dr. DeFusco conceded that complying with such a requirement would be impossible. (T. 803.) Most environmental permits are necessarily based upon predictions of what will occur before the project starts. Here, Tri-County did the next best thing by studying bird behavior at nearby active landfills using similar bird control plans, and other landfills as well.

The Appellants complain that daytime relocation of the old trash will attract birds, but the only expert opinion we have on the record is that it will not. Dr. Davis's opinion is supported by the testimony that such old waste does not serve as a good food source for birds. (T. 838, 1003-04, 1443-44, 1847-48.)

The Appellants say Tri-County has not adequately accounted for other wildlife besides birds, but we have no indication on the record that the landfill will increase the presence of any such wildlife or elevate any hypothetical dangers associated with any such wildlife above background. The Appellants do not explain why the presence of, e.g., deer, beavers, or other animals more than a mile away from the airport deserve further study. Even Dr. DeFusco testified that he is not concerned about wildlife on the ground, only wildlife in the air. (T. 715-16.)

The Appellants say features of the landfill other than the disposal of waste will attract birds, the point presumably being that even the measures Tri-County is taking with respect to actual waste disposal (e.g. nighttime disposal, daily cover, etc.) are not enough to mitigate the risk. For example, they point to stormwater controls on the site that may have standing water, which they say will attract waterfowl. (Tri-County makes a similar point when it argues that the airport itself is also a bird attractant.)

Many thousands of sites throughout the Commonwealth have stormwater controls or other features that might attract birds. We are not aware of any regulatory requirement regarding bird controls for such features on projects near airports. Putting aside the fact that it is the actual waste disposal at a landfill that justifies the demanding harms-benefits analysis mandated in 25 Pa. Code §§ 271.126 and 271.127, not the risk that birds might be attracted to standing water in a sedimentation basin, we conclude based on the expert testimony that Tri-County's bird control

plan is designed to and will, if fully implemented, adequately mitigate any incremental risk associated with the features on the site that may attract birds other than the actual disposal areas. (Jt. Ex. 2, Vol. 6 (at DEP006883).)

The Appellants say that Tri-County cannot be trusted to implement the bird control plan. For the reasons discussed in connection with the Appellant's criticism of Tri-County's compliance history *infra*, the record does not support this concern. Aside from its general improvement in compliance, after twenty years of trying to obtain a permit modification, much of which was spent addressing the bird issue, Tri-County must surely understand just how high the stakes are for ensuring that the bird control plan is fully implemented. Constant monitoring, reporting, and oversight by the regulators as well as a specially formed oversight committee, which includes representatives of the airport, will help ensure full compliance.

The Appellants criticize the Department for deferring the requirement to pick an actual number of individuals of a bird species that are to be allowed within the permit boundary, presumably before Tri-County brings pyrotechnics to bear, and to serve as a basis for deciding whether background has been exceeded and to help assess whether the bird control plan is being implemented successfully. As with most of their other criticisms, the Appellants offer no expert support for the criticism.

This requirement originated with the FAA, which suggested 40. Although neither Tri-County nor the Department questioned the value of some trigger levels, Dr. Davis cautioned against an overly simplistic approach of picking arbitrary numbers as the sole measure of success. For example, we credit Dr. Davis's statement that the FAA's suggestion of 40 birds would not be appropriately protective if it applied to turkey vultures. (T. 491.) More generally, having up to 40 birds on site is not consistent with Dr. Davis's assurances that *no* birds will be

allowed to linger. We see some merit in not having included some arbitrary number of birds in the permit.

Nevertheless, the Appellants argue based on *Leatherwood, supra*, that the permit should be rescinded, remanded, or modified by us because actual numbers were not assigned for, e.g., the number of vultures allowed on site, before permit issuance and incorporated into the permit. However, in *Leatherwood*, an entire bird control plan supported by adequate studies was missing. Unlike *Leatherwood*, Tri-County performed an intensive and complete site-specific assessment of the landfill, the Grove City Airport, three other operating landfills including Seneca Landfill, and other uses in a 35-40 mile radius of Tri-County to quantify the bird hazard and address whether operating the landfill would "increase the risk of occurrence of a bird/aircraft strike over existing conditions." *Leatherwood*, 2002 EHB at 184. Unlike the situation in *Leatherwood*, the Tri-County environmental assessment identified and assessed the bird hazard, including a review of the landfill site, the airport, and a 30-mile radius of birds and gull roosts. Unlike *Leatherwood*, where the FAA and PennDOT Bureau of Aviation opposed permitting the landfill, here, the FAA reviewed the operation and the bird control plan repeatedly and stated no objection to Tri-County operating as long as the bird control plan is implemented, and PennDOT has also expressed no objection. Unlike *Leatherwood*, here, the parties were able to point to another landfill (Atlantic City) as support for the finding that the bird control plan would work. Here, the relatively minor detail of picking actual bird numbers is all that is missing. The overall validity of the bird studies and the bird control plan are not materially impacted by the absence of trigger levels and evaluation criteria.

To the extent we assume *arguendo* the Department erred by not including actual bird numbers, the error is harmless. Trigger levels will be established in short order anyway, so a

remand would serve no practical purpose. Transparency will be maintained given the active role to be played by the oversight committee provided for in the permit, together with Permit Operating Condition 30, which requires constant reassessment of whether the bird control plan is working the way it is supposed to be working. The plan describing the maximum number of birds allowed at the landfill must be approved before disposal operations begin. (T. 994-96.)

In conclusion, to say that the Department has insisted on rigorous study and strict mitigation of the bird strike hazard would be an understatement. The extreme care it has taken was entirely justified given the public safety concerns involved. We reject Dr. DeFusco's view that none of this matters. The Department's decision to issue the permit because the bird hazard will be fully mitigated is consistent with the law, supported by the facts, and otherwise reasonable.

B. Relocation of the Existing Waste

Waste was disposed at the landfill on an unlined area between 1950 and 1990. (Jt. Ex. 2, Vol. 6 (at DEP006773).) There was some testimony that waste was deposited into old strip mine cuts, (T. 321-23, 1130; *see also* Jt. Ex. 2, Vol. 1 (at DEP000240)), and the application for Tri-County's 1985 permit identifies that the facility is located in a coal mine, (TC Ex. 3 (at DEP012481)). Although no hydrogeologist testified in this case, and we have no expert opinions on which to rely as a result, the parties seem to agree that the existing waste may be in communication with the groundwater underneath it, and that leachate may seep into the groundwater from that waste. The permit requires Tri-County to relocate the existing waste, consisting of approximately 1.5 million cubic yards, to newly constructed lined cells within the 10-year permit term in accordance with the waste relocation plan contained in Tri-County's permit application. (Jt. Ex. 1, Permit (at 12), Jt. Ex. 2, Vol. 6 (at DEP006773-83).) Generally,

Tri-County's waste relocation plan proposes to excavate the existing waste, segregate any suspicious or special handling waste, remove and sample any leachate-impacted soils, and then deposit the waste onto the same newly constructed, double-lined landfill cells that will be used for the new waste to be accepted at the landfill. (Jt. Ex. 2, Vol. 6 (at DEP006770-83).) Unlike the night-landfilling of new waste, the existing waste can be relocated at any time of the day or night. (T. 1847.)

The Department considered the relocation of the existing waste to be a benefit of the project in its harms-benefits analysis. The Department believes that the existing waste will continue to generate leachate as long as the waste remains in its current location. (T. 2017.) The Department reasoned that removing the existing waste and relocating it to lined cells would eliminate the potential for any groundwater contamination from the existing waste. (T. 1768-69, 1771, 1934-35; Jt. Ex. 1, Envtl. Assess. (at 13).) The Department viewed the waste relocation as a long-term benefit in the sense that the relocation of the waste will be a positive impact even after operations at the landfill have ended. (T. 1983, 2003-04.)

The Appellants argue that the relocation of the existing waste is not a benefit, but rather it is a potential environmental harm. The Appellants speculate that the existing waste is polluting the groundwater in the area and it poses a risk to human health and the environment and that relocating the waste might worsen any existing groundwater contamination. They assert that the permit allows Tri-County to relocate the waste without fully testing it to see what is really in it. The Appellants say that, without knowing what is in the waste, no one can determine whether the waste is appropriate to remove and whether it is compatible with the landfill liner system. The Appellants also contend that Tri-County's soil testing protocol is too limited because Tri-County will only test the soils underneath the existing waste for five parameters.

The Appellants did not have any expert witness testify in support of these allegations. They had no expert in hydrogeology or landfill design and engineering testify on their behalf. The Appellants have not put forth any credible evidence that it would be better to leave the waste in place or that some other, undefined remediation effort would be better for the environment than removing the waste. "Parties who do not put on expert testimony usually have a difficult time meeting their burden of proof in an appeal such as this one involving technical issues. Cases before the Board often involve complex, technical, and scientific issues that hinge on expert evidence." *Brockway Borough Mun. Auth.*, 2015 EHB at 238. *See also Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016) ("Expert testimony is required where the issues require scientific or specialized knowledge or experience to understand." (citing *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 828-29 (Pa. Cmwlth. 2010))). Although an appellant proceeding without expert testimony can make out its case through cross-examination, assertions of untoward harm in highly technical areas without appropriate expert support often amount to little more than conjecture. *Brockway Borough Mun. Auth.*, 2015 EHB at 239. *See also Marshall*, 2020 EHB at 83 ("Although expert testimony is not a necessary requirement to prosecute an appeal before the Board, it is often an uphill battle to proceed without one." (citing *Morrison v. DEP*, 2016 EHB 717, 722-23; *Casey v. DEP*, 2014 EHB 439, 453)).

Although no hydrogeologist testified for any party in this case, even if we assume that the existing waste is in communication with groundwater, all of the credible evidence adduced at the hearing suggests that excavating the existing waste and transferring it to a new, lined disposal area is the best way to ensure that the waste does not present a problem in terms of any potential groundwater contamination, which is precisely what Tri-County proposes to do. Rick Buffalini,

P.E., is an expert who designs landfills and landfill liner systems. He reviewed Tri-County's proposed plans for relocating the waste and testified on behalf of Tri-County. He has worked on several projects involving relocating waste from an unlined area to a lined area. (T. 1704-05.) Buffalini credibly testified that excavation and relocation of the existing waste to a lined area is the "gold standard" for remediation of an unlined landfill because it removes the source of any contamination. (T. 1692, 1697.) He testified that there are other possible ways of remediating a site like this, such as with slurry walls or groundwater collection trenches, but those methods do not remove the source of any contamination like waste relocation does. (T. 1697.) In other words, at the risk of oversimplification, the best way to ensure that the waste is no longer in communication with groundwater is to remove the waste that is in communication with groundwater.

The liner that will be used at Tri-County will all but guarantee the relocated waste and any leachate will have no effect on groundwater. The liner will be comprised of two composite liners with a leachate detection system. The primary liner will consist of an aggregate leachate collection layer underlain by a geotextile, a 60-mil geomembrane, and a geosynthetic bentonite clay liner that swells when it becomes wet to plug any leaks. (T. 1699-1700.) Below the primary liner is a leachate detection zone with a drainage net of geocomposite with a geotextile. (T. 1700.) The secondary liner that is below the leachate detection zone also consists of a 60-mil geomembrane and a geosynthetic clay liner. (T. 1700.) All of this is over a compacted subbase that is required to be separated from the regional groundwater aquifer by eight feet, 25 Pa. Code § 273.252(b). (T. 1156, 1159-60, 1700-01.) This liner system exceeds what is required in Pennsylvania for municipal waste landfills. (T. 1698, 1701.) In fact, a double composite liner

system like Tri-County will implement is actually what is required in Pennsylvania for hazardous waste landfills. (T. 1695-99.)

Buffalini testified that new, lined landfill cells will eventually be built on top of the area where the existing waste will have been excavated, effectively serving as a cap on that area and preventing any further infiltration through soil and into groundwater. (T. 1707-08, 1709.) He credibly testified that excavating the 1.5 million cubic yards of existing waste and relocating it to a double lined area of the landfill will eliminate any future groundwater impacts. (T. 1694-96, 1697-98.)

We have no reason to doubt or question Buffalini's opinions that relocating the waste in the manner proposed by Tri-County will be a benefit to the environment. Buffalini is highly qualified in landfill design and engineering, with more than 40 years of experience in the field. (TC Ex. 130.) He has worked on many waste relocation projects in the past and has designed landfill liner systems. (T. 1704-05.) We also credit the fact that Buffalini was not involved in the permit application or in developing Tri-County's waste relocation plan or liner system. Rather, Buffalini was brought in by Tri-County after the fact to offer his opinion on the proposed liner system and waste relocation plan and concurred in Tri-County's approach, calling it a detailed and thorough plan. (T. 1695.)

Buffalini's testimony was entirely unrebutted. The Appellants did not present any expert witness qualified in landfill design or engineering or landfill liner systems or the remediation of sites with historic waste on unlined areas. Nor did the Appellants elicit any concessions from Buffalini on cross-examination or otherwise make us call into question his opinions or credibility. There is simply nothing in the record that would support the Appellants' claims that the relocation of waste will be a harm and not a net benefit to the environment.

The Appellants argue that no one has done testing to see whether the existing waste is compatible with the liner. Although not fully explained in their briefs, the Appellants seem to fear that something in the existing waste will react with the liner or perhaps degrade the liner and compromise its integrity. There is absolutely no evidence to support that claim. Buffalini credibly testified that the proposed liner system was adequate to handle whatever was in the existing waste. He credibly testified that the materials selected for the liner have undergone testing for compatibility with landfill leachate. (T. 1701-03.) The Appellants say that the liner compatibility tests in the application are old, from 1996, but Buffalini explained that manufacturers met EPA's testing standards when those standards were established and manufacturers have only continued to improve their liner materials since then. (T. 1701-03.) The materials that make up a liner are the same for a hazardous waste landfill as for a municipal waste landfill. (T. 1710-11.) Buffalini further credibly opined that the liner system is also perfectly capable of protecting the groundwater from the new waste the landfill proposes to accept, even if that waste contains some oil and gas waste. (T. 1710-11, 1712-13.)

The Appellants contend that relocating the existing waste could worsen any existing groundwater contamination, but the Appellants never offer a credible explanation of how that is likely to occur. To repeat, the Appellants did not have an expert opine that Tri-County's plan would likely worsen the situation. The Appellants merely point to a statement in the permit application that says the relocation of the existing waste may increase the potential for leachate breakouts and the monitoring wells that are installed around the area of the existing waste may be too distant to allow for early detection and rapid response. (T. 1145; Jt. Ex. 2, Vol. 5 (at DEP005287).) However, that same part of the application says that temporary monitoring wells will be installed to monitor the waste relocation for this purpose. (Jt. Ex. 2, Vol. 5 (at

DEP005287-88).) The Appellants have not shown that, even if a leachate breakout does occur, that it cannot be adequately addressed by the monitoring measures put forth in Tri-County's waste relocation plan. The Appellants have not shown that the monitoring wells are insufficient to address any leachate issues that arise during the waste relocation process. The Appellants also note the proximity of private drinking water supplies identified in the application. However, there is no testimony on behalf of the Appellants establishing any risk of impact on private water supplies from the relocation of the waste. With respect to the parameters that will be tested in the existing waste, the Appellants have not established with any evidence that these parameter are unreasonable, not stringent enough, or that different or additional substances should be tested.

Related to the Appellants' argument that the relocation of the waste is not a benefit is their argument that the existing waste is causing pollution to groundwater, and that, on its own, should have prevented the permit from being issued. The Appellants point to 25 Pa. Code § 271.201, which requires a permit applicant to affirmatively demonstrate that it will comply with the environmental protection statutes and that municipal waste management operations will not cause surface or groundwater pollution. 25 Pa. Code § 271.201(3), (5). The Appellants contend that, since Tri-County is already causing groundwater pollution, Tri-County could not have made the required demonstration to obtain a permit. The Appellants also point to 25 Pa. Code § 273.241, which requires that a landfill be operated so that it does not cause surface or groundwater pollution within or outside of the site.

The Appellants also criticize Tri-County for not preparing groundwater assessment and abatement plans.[11] A groundwater assessment plan must generally describe the measures that an

[11] Under the regulations, an operator of a municipal waste landfill must prepare a groundwater assessment plan within 60 days of one of the following:

operator will take to characterize the existence, location, and extent of any groundwater degradation, the rate and direction of any contaminant migration, and the sampling and analysis protocols. 25 Pa. Code § 273.286(c). An operator must prepare an abatement plan when the assessment plan shows groundwater degradation and that an abatement standard will not be met, or when monitoring by the Department or operator shows the presence of an abatement standard exceedance from one or more compliance points. 25 Pa. Code § 273.287(a).

As we have now repeatedly stated, the record, devoid of helpful expert opinion, does not support a finding on our part that the old waste is in fact causing groundwater degradation. The Appellants point to Monitoring Well 15, which the Department split sampled in May 2019 and had a sample showing Total Phenols at 5.45 micrograms per liter (ug/L). (App. Ex. 158.) The Appellants also point out that some of the monitoring wells at the site have occasionally shown elevated parameters for organic compounds. (T. 1133-38; App. Ex. 158.) The application shows detections of various organic compounds in monitoring wells in the 1980s and 1990s. (J. Ex. 2, Vol. 5 (at DEP 005265-67).) However, we have no real context for these sample results. No one even testified what phenols are. (*See* T. 168.) Some of the results seem to be from wells that are upgradient of the previously disposed waste, (T. 1146, 1868-69, 1871; App. Ex. 158), but we are operating in the dark here given the Appellants' lack of any proof of a connection.

More importantly, there is nothing in the record to support a finding that operations at the landfill going forward will cause any groundwater pollution. On the contrary, as explained in

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> (1) Data obtained from monitoring by the Department or the operator indicates groundwater degradation at any monitoring point for parameters other than chemical oxygen demand, pH, specific conductance, total organic carbon, turbidity, total alkalinity, calcium, magnesium and iron.
>
> (2) Laboratory analysis of one or more public or private water supplies shows the presence of degradation that could reasonably be attributed to the facility.

25 Pa. Code § 273.286(a)(1)-(2).

detail above, the permit requires Tri-County to relocate the existing waste, which the unrebutted testimony establishes will eliminate any potential groundwater pollution from the existing waste. The waste will be on a lined area isolated from the groundwater. Any leachate that is generated will be collected and trucked offsite for treatment or treated onsite if Tri-County constructs a leachate treatment plant. (T. 2017-18; Jt. Ex. 1, Permit (at 14).)

The same regulation cited by the Appellants barring a facility from causing groundwater pollution provides an exception that "the Department may approve an application for permit modification to control or abate groundwater pollution under a new or modified groundwater collection or treatment facility." 25 Pa. Code § 271.201(5). As discussed above, the Department's approval of Tri-County's permit modification essentially effectuates the abatement of that pollution through the relocation of the existing waste.

The Appellants raise some additional water-related issues in their briefs, but they have not met their burden of proof on any of them. For instance, although not addressed in the argument section of their briefs, the Appellants contend in proposed findings of fact that the information contained in the application regarding private water supplies is outdated. However, the Appellants do not explain how the information is outdated or identify any private water supplies that should have been included in Tri-County's application. The Appellants also assert that there are "documented seeps" that Tri-County has never addressed, but they provide no evidence of that or explain why that means the permit modification should have been denied. The Appellants criticize the Department for not determining the cause of impairment for the unnamed tributary to Black Run that runs near the site. The Appellants seem to suggest that Tri-County must be the cause of the impairment, but they do not establish that with any evidence.

The Appellants did not present any credible evidence that the landfill is impairing an unnamed tributary to Black Run or any other surface waters.

C. Wetlands

As part of the landfill operation, Tri-County will fill in 5.94 acres of wetlands at the site to make way for waste disposal cells and it will then create 9.49 acres of replacement wetlands on the site. (Stip. 68.) Several smaller wetlands will be filled in and one larger wetland will be created to replace those wetlands. (T. 1915-16.) This work is authorized by a Chapter 105 permit that was separately issued to Tri-County and not appealed by the Appellants. (Stip. 68, 69.) However, the Department still considered the wetlands as part of its harms-benefits analysis for the landfill permit, where it concluded that there would be a minor environmental benefit from the replacement wetlands.

The Appellants say that the additional acreage of wetlands that is created is an environmental harm because the wetlands will attract birds and wildlife, which could pose a threat to the safety of aircraft. The Appellants point to a statement by Dr. Davis that the wetlands will be included in Tri-County's five daily surveys of the site in accordance with the bird control plan. Like with the Appellants' arguments with respect to birds more generally, and as discussed above, they have not established that, even if the wetlands do attract birds, the bird control plan will be insufficient to control those birds or deter them from landing on site.

The Appellants also say that other wetlands near the landfill site are a habitat for the threatened species of the Massasauga rattlesnake and they assert the Department did not properly consider this in their review of the permit application. The Appellants rely on the testimony of Eric Rydbom, who owns a property of about 50 acres approximately ¼ mile away from the landfill site. He testified that, when he was seeking to build structures on his own property for

his equestrian business, an employee from the Department told him that there was a Massasauga rattlesnake nesting area to the south of Rydbom's property. (T. 344-45.) Although an opposing party's statement is not explicitly hearsay, Pa.R.E. 803(25), the Appellants did not otherwise substantiate this claim with any evidence. More importantly, the Appellants did not present any expert evidence that any of the wetlands that will be removed as part of Tri-County's operation serve as a habitat for the Massasauga rattlesnake, or that they are hydrologically connected to any wetlands that do serve as a habitat for that species, or that they are within ½ mile of any wetlands that serve as a Massasauga rattlesnake habitat. *See* 25 Pa. Code § 105.17(1)(i) and (ii). Tri-County's August 2018 search of the Pennsylvania Natural Diversity Inventory (PNDI), which included the areas associated with the wetland mitigation, supports the finding that there would be no known impacts to threatened, endangered, or special concern species and resources within the project area. (Jt. Ex. 2, Vol. 2 (at DEP001842).)

The Appellants speculate without record support that the wetlands may actually be exceptional value wetlands due to their proximity to private water supplies. *See* 25 Pa. Code § 105.17(1)(iv). They have simply not established that the wetlands on the landfill site qualify as exceptional value wetlands under any of the relevant criteria. *See* 25 Pa. Code § 105.17(1). The Appellants did not present any testimony from anyone who has done a field assessment of the wetlands or have anyone testify who would be qualified to perform such an assessment. The Appellants have not met their burden of showing that the Department erred in its harms-benefits balancing due to any issue related to wetlands on the site.

D. Noise

Noise was considered in the Department's harms-benefits analysis to be a harm that could not be fully mitigated. Tri-County proposes to mitigate the noise from the landfill by

properly maintaining the engines on its mechanical equipment, encasing those engines, and using lights instead of backup beepers on trucks and equipment at night. (T. 1747-48, 1959, 1990; Jt. Ex. 1, Envtl. Assess. (at 7-8), Jt. Ex. 2, Vol. 6 (at DEP006725).) The Department concluded that, although Tri-County had mitigated the noise to the largest extent possible, the landfill's operations will create additional noise in the area that would not exist but for the operation of the landfill. (T. 1990; Jt. Ex. 1, Envtl. Assess. (at 7-8, 17).)

Some residents who live within a half-mile of the landfill testified about the noise they currently experience from Tri-County's waste transfer station. They testified that they hear beeping from the trucks backing up on site, as well as alarms, and the banging of metal. (T. 262, 271, 368-69, 380.) One resident who lives particularly close testified that she could even hear people at the transfer station talking if the conditions were right. (T. 271.) These residents also generally testified about hearing planes, helicopters, and other aircraft depart and land at the Grove City Airport. (T. 263, 267, 270.) The Appellants have not shown that any noise generated by the landfill operations will be an unreasonable increase over the background conditions that these residents currently experience.

The Appellants criticize Tri-County's noise studies as being dated, having been performed in 1991 and 2001. However, the Appellants never explain why either of the noise studies is inappropriate, inadequate, or no longer valid. The Appellants do not offer any specific critiques of either of these studies or the information contained therein, just an insinuation that because they are older they must be illegitimate. Obviously this is insufficient to sustain one's burden of proof. It is worth noting that, although the 2001 noise study was performed when the landfill was inactive and assessed noise at Tri-County's waste transfer station, it also studied the

noise at two other landfills, the Seneca and Valley Landfills, which were active. (Jt. Ex. 2, Vol. 6 (at DEP006743-64).)

Although the Appellants are not satisfied with Tri-County's older noise studies, they also criticize Operating Condition 25 of the permit, which requires Tri-County to complete a new background noise study prior to opening and operating the site and to submit that study to the Department. (T. 2022; Jt. Ex. 1, Permit (at 14).) The Appellants say that an updated noise study should have been conducted and submitted with the permit application. We typically frown upon the Department allowing permittees to submit required plans after a facility is in operation. *See Borough of St. Clair*, 2014 EHB at 108-13 (Board remanded permit because Department allowed permittee to submit required mine subsidence plan later for review and approval). However, Tri-County included a nuisance minimization and control plan within its operations plan in the permit application that addresses noise as required by the regulations, and which the Department approved as part of its review of the application. 25 Pa. Code §§ 273.136 and 273.218. (J. Ex. 2, Vol. 6 (at DEP006721-25).) Tri-County has already performed two noise studies. Although we think it is reasonable for the Department to require Tri-County to do an updated study, we are not sure what additional value there is to another study of background conditions before the landfill is operating, or how that might change what noise mitigation measures Tri-County will implement.

The Appellants cite Findings of Fact made in the Board's Adjudication in *Chimel v. DEP*, 2014 EHB 957, concerning the operation of a surface mine that stated the Department considers a continuous volume reading of over 68 decibels during the day and over 65 decibels at night at the property line to be a public nuisance. *Id.* at 971. The Appellants say that Tri-County proposes to keep noise at 85 decibels and only at night. This is simply not accurate. Tri-County

proposes to monitor all equipment with a hand-held decibel meter and maintain that equipment at a level of 85 decibels or less at all times. The noise levels at issue in *Chimel* were made with monitors at the fence line for the site, not at the equipment itself as is the case here. The Appellants have not produced their own noise study or any evidence at all indicating that the noise level at the Tri-County property line or at any other point beyond the property line would be unreasonable. They have not shown that equipment running at 85 decibels would amount to a nuisance to nearby residents. The Appellants do not provide any evidence to suggest Tri-County's mitigation measures will not reduce the noise to tolerable levels or identify any mitigation measures they think would be more appropriate.

We conclude that the Department properly weighed the harm of noise from the landfill that will remain after mitigation. The Appellants have not shown that any remaining noise harm rises to the level to alter the balancing of the harms-benefits analysis or otherwise require denial of the permit or any modifications to the permit.

E. Traffic

Tri-County developed a traffic impact study that assesses the trucks that would be associated with handling 4,000 tons per day of waste. (Jt. Ex. 1, Envtl. Assess. (at 10).) That volume of waste represents the combined total between the landfill and Tri-County's transfer station, meaning any increase in volume at the transfer station results in a reduction in volume at the landfill, and vice versa. The 4,000 ton per day volume equates to a total of 332 truck trips, or an addition of 218 trips considering the trips already being generated by the transfer station. The study was submitted to PennDOT for review and PennDOT concluded that the added traffic volume would not have an impact on the intersection of SR 0208 and TCI Park Drive. Joel Fair testified that the Department agreed with PennDOT's conclusion that the increased traffic from

the landfill would not impact levels of service on the roadways. (T. 1750; Jt. Ex. 2, Vol. 3 (at DEP002751).) Tri-County proposes to mitigate the harm from the trucks by tarping and sweeping the trucks, performing routine inspections and maintenance, and distributing the truck volume over the course of the day to alleviate congestion during typical rush hours. The Department concluded that there would be some inevitable environmental harm from the traffic that could not be completely mitigated all the time.

There was very little substantive focus on vehicular traffic during testimony at the merits hearing. (*See* T. 307, 1749-50, 1773-74, 1960.) The Appellants' briefs contain proposed findings of fact that describe aspects of Tri-County's traffic impact study, but there is little to no argument about the traffic harm, other than noting that the Department determined it to be a harm that cannot be completely mitigated, and therefore some environmental harm remains. The Appellants include a proposed finding of fact that criticizes Tri-County's traffic studies as being "stale and inaccurate," (App. Proposed FOF 780), but the Appellants have not substantiated that claim with any argument in their briefs. Tri-County submitted an updated traffic impact study in 2019 that accounted for the trucks associated with both the landfill and the transfer station accepting a combined 4,000 tons of waste per day. The Department agreed that the amount of vehicular traffic would not have a significant impact on traffic. The Appellants presented no evidence of their own to contest the conclusions of Tri-County's traffic impact study, or the Department's evaluation of that study in its harms-benefits analysis. They did not substantiate any claim of material harm or show why any harm from truck traffic should change the conclusion of the harms-benefits analysis or the decision to issue the permit modification.

Series 800 Wastes

The Appellants next argue that disposal of waste from oil and gas operations known as Series 800 residual waste at the landfill will harm the environment and pose a risk to human health. Series 800 waste includes such things as flowback resulting from hydraulic fracturing, produced fluids resulting from wells in production, drilling fluids and mud, sludge and solids produced during the processing of oil and gas related wastewater, synthetic liners used in storage structures or impoundments, drill cuttings, lubricant waste, and soil contaminated by oil and gas spills. (T. 1249-60.) Although Series 800 includes various types of liquid waste, according to the testimony of Tri-County's Environmental Health and Safety Director, Elizabeth Bertha, the landfill will not accept liquids for direct disposal. The Appellants' concern stems from the fact that the oil and gas waste, in addition to other unspecified "chemicals," can contain technologically enhanced naturally occurring radioactive material (TENORM). Although they are not entirely clear on the routes of exposure that give rise to their concern, they appear to be worried that the radioactivity will make its way into treated leachate discharged from the landfill, and/or into the groundwater, and perhaps otherwise result in untoward exposure to the public or the environment through unspecified pathways.

The initial difficulty we are having with the Appellants' case on this issue is they never really explain what they would have this Board do in light of their concerns. At the end of a lengthy discussion regarding the dangers of radiation, they conclude that "[t]he Landfill should not be reopened to accept disposal of any TENORM waste…." (App. Brief at 134.) If the Appellants are suggesting that the permit should be overturned in its entirety because it authorizes the disposal of TENORM waste, they have not justified such an extreme remedy. Nor could they. Only two percent of the landfill's total waste can be composed of TENORM waste.

(T. 1358-59.) Even if all the Appellants' arguments were valid, it would only justify prohibiting the disposal of that two percent. It would certainly not justify a rescission of the permit in its entirety. Although they have not asked us to modify the permit, it would seem that would be the most they could logically hope for as a remedy to address their radiation issue.

However, they have not made a case for such a permit modification limiting the disposal of TENORM waste from oil and gas operations. The Appellants first say, without any expert or other support, that there will not be enough controls at the landfill to regulate incoming levels of radioactive materials. This is simply not true. As part of its permit application, Tri-County was required to prepare a Waste Analysis and Classification Plan, known as Form R. This form sets forth criteria for the screening, acceptance, and management of residual and special handling waste, including oil and gas waste. The Department's Deborah Morvay, an environmental chemist, reviewed Tri-County's initial Form R submission and determined that it was outdated. She recommended that Tri-County update the form, using as a model the Form R approved for Seneca Landfill, which, like Tri-County, is a subsidiary of Vogel Holdings. Tri-County submitted an updated Form R and it was approved.

Tri-County is required to have a Radiation Protection Plan setting forth the process it will follow to ensure that it does not accept radioactive waste beyond the limit set by its permit. The landfill is required to monitor each incoming load of waste for radiation. This process was described in detail by Elizabeth Bertha, who is also the Environmental Health and Safety Director for Vogel Holdings and Seneca Landfill. The process that is currently in place at Seneca Landfill will be implemented at Tri-County Landfill and consists of the following steps: Each incoming load of waste is monitored for radiation. If an alarm indicates potential radiation, an employee uses a handheld radiation detector to further test the load. If radiation is identified,

it is recorded in the Department's TENORM allocation spreadsheet which confirms whether the load may be accepted based on the limits in place. If the landfill cannot accept the load because it is over the radiation limit, the load will be isolated and the Department will be notified in order to determine what further steps must be taken.

The Department's Bryan Werner explained that, although landfills are not required to obtain a license from the Department's Bureau of Radiation Protection, they are still monitored by the Department for the handling of radioactive materials through the implementation of the landfill's Radiation Protection Plan. The Department monitors landfills to ensure that they do not expose the public to a greater dose of radiation than that permitted by licensed facilities.

At a fundamental level, the Appellants have failed to carry their burden of proving that disposal of Series 800 waste at the landfill will harm the environment or pose a risk to public health and safety. In support of their claim, the Appellants presented the expert testimony of Dr. John Stolz, Professor of Biological Sciences and Director of the Center for Environmental Research and Education at Duquesne University, who was recognized by the Board as an expert in microbiology and the radioactivity of oil and gas waste. Unfortunately, Dr. Stolz's testimony was not particularly helpful. Distilled to its essence, Dr. Stolz believes that no oil and gas waste should ever under any circumstances be disposed at *any* municipal waste landfill. It is his opinion that oil and gas waste should be disposed at a hazardous waste landfill or, in the case of liquids, in a Class 2 injection well. Reminiscent of Dr. DeFusco on the bird issue, Dr. Stolz would have us throw out the entire regulatory program regarding the disposal of oil and gas wastes at municipal waste landfills. Aside from the fact that we have no such authority, Dr. Stolz offered very little to support what amounts to not much more than a personal opinion. Dr. Stolz has done some limited work comparing leachate from two other landfills. He asserted that

leachate from the landfill accepting oil and gas waste was higher in radioactivity compared to a landfill not accepting such wastes. We were not given enough information to credit this work as a basis for expert opinion. We also find it damaging to Dr. Stolz's credibility in general that he would rely on such work as apparently the primary basis for opining a causative connection between the disposal of oil and gas waste at one landfill and radioactivity seen in the leachate, notwithstanding the myriad of other variables that would seem to need to be considered.

In contrast to Dr. Stolz's work, Bryan Werner, the Department's well qualified expert on radiological issues, presented findings of the Department's larger, more comprehensive May 2016 TENORM study. In the TENORM study, pretreatment leachate was sampled at all 51 landfills across Pennsylvania; additional sampling was conducted at nine of the landfills determined to have received the most TENORM for disposal in the year prior to the study. The study found "no statistical difference" in radium levels between the landfills that accepted oil and gas waste and those that did not. (T. 1349, 1351.) The study further found that radium levels of the leachate tested at all the landfills were within limits acceptable to the Department's Bureau of Radiation. Mr. Werner explained that the radium limit for liquid waste going to a wastewater treatment facility is 600 picocuries per liter. The TENORM study showed that none of the leachate from the 51 landfills, including those that accepted the most oil and gas waste, exceeded or even approached 600 picocuries per liter. Finally, the study also showed that workers' exposure to radiation at landfills was "very, very low." (T. 1350.) This comprehensive TENORM study is more persuasive than the comparison of two landfills made by Dr. Stolz. According to Mr. Werner, the values seen at landfills are far lower than the limits set for facilities licensed by the Bureau of Radiation. For example, a licensed facility may not exceed a radiation dose of 100 millirem per year to a member of the public, and Mr. Werner testified that

landfills "have not gotten close" to exceeding that limit. (T. 1336.) Moreover, Dr. Stolz did not challenge the results of the TENORM study; he simply disagreed with its conclusion that the disposal of TENORM waste did not present a risk to the public or environment.

While Dr. Stolz explained in general terms the radioactive properties of oil and gas waste, his testimony did not extend to identifying specific risks to the environment or human health posed by Tri-County Landfill. For example, he did not express an opinion on the impact of oil and gas waste to be disposed at the landfill on area groundwater or drinking water. (T. 1291.) He readily admitted that he is not familiar with the operation of landfills. He did not know, for example, that the Tri-County landfill will have a double liner. (T. 1303-04.) Although he believes that oil and gas waste should go to what he referred to as a hazardous waste landfill, he is not aware of the differences between a modern municipal waste landfill and a hazardous waste landfill. He did not identify a pathway from the landfill to any body of water. (T. 1228.) Nor did he express an opinion about any interaction between discharged treated wastewater and groundwater. (T. 1290.) He acknowledged that he did not know how the landfill will treat leachate and, therefore, he did not express an opinion as to the resulting properties of wastewater treated at the site. (T. 1288, 1290.)

In short, Dr. Stolz's testimony offered nothing to credibly support the Appellants' claim that TENORM waste disposed at the landfill will result in any harm to the environment or the public health and safety. There is nothing else in the record that supports modification of the permit to prohibit the disposal of such wastes.

No one in this matter has disputed that oil and gas waste must be properly handled, stored, and disposed of. The evidence demonstrates that the permit contains adequate safeguards for the proper disposal of oil and gas waste and that the disposal of such waste does not present a

risk of harm to the public and the environment. We find that the Appellants have not met their burden of demonstrating that the Department erred in authorizing the acceptance of Series 800 oil and gas waste at Tri-County Landfill.

Before Tri-County may begin the actual disposal of Series 800 waste, it will also be required to provide a Form U which contains information from the generator of the waste. The Appellants are generally critical of the Form U process, saying it is chock full of holes and cannot provide any comfort regarding TENORM waste. Once again, the criticisms are based on the argument of counsel rather than the well-supported testimony of any knowledgeable witness. For example, the Appellants claim in their brief that the Form U does not require adequate testing, but there is nothing in the record to adequately support that claim. The criticisms are general in nature and offered with nothing in the record to provide adequate support for the claims. Further, the Appellants do not explain how those criticisms, even if valid, could lead to any action on our part regarding the permit. We cannot find that the Form U process is flawed, and therefore, the permit under review must be rescinded. It does not follow. The Appellants' criticisms of the Form U process provide no basis for modifying the permit to prohibit the disposal of TENORM waste. The Appellants' argument is perhaps better directed to the Environmental Quality Board.

The Appellants cite Liberty Township's Hazardous Waste Facility Ordinance as support for their argument that Tri-County Landfill should not be permitted to accept oil and gas waste. Township Supervisor Bob Pebbles testified that the purpose of the ordinance is to protect the community with regard to the disposal of hazardous waste. (T. 301.) The ordinance incorporates the definitions of waste set forth in the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.108 (SWMA), and the underlying regulations.

(App. Ex. 172.) Although the Appellants argue that oil and gas waste should be treated as hazardous waste, the waste regulations provide that such waste is not hazardous waste, and therefore, the ordinance has no applicability here. 25 Pa. Code § 261a.1 (incorporating by reference 40 CFR Part 261); 40 CFR 261.4(b)(5) (drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil and natural gas are not hazardous waste). (T. 1121-22.)

Moreover, it is well settled that the SWMA preempts a local ordinance that attempts to regulate the disposal of waste. *See Southeastern Chester Cnty. Refuse Auth. v. Zoning Hearing Bd. of London Grove Twp.*, 898 A.2d 680, 686 (Pa. Cmwlth. 2006) ("[T]he SWMA preempts a local ordinance regulating the operation of a landfill") (citing *Municipality of Monroeville v. Chambers Development Corp.*, 491 A.2d 307 (Pa. Cmwlth. 1985)); *Pa. Independent Waste Haulers Ass'n v. County of Northumberland*, 885 A.2d 1106, 1109 (Pa. Cmwlth. 2005), *appeal denied*, 917 A.2d 316 (Pa. 2006) ("The Pennsylvania legislature preempted municipal power and responsibility to regulate the transportation, processing, treatment and disposal of solid waste through the Solid Waste Management Act…."). Nor have the Appellants demonstrated that the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art. 1, § 27, imbues Liberty Township with any special power to preempt the SWMA. In *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677, 697 (Pa. Cmwlth. 2018), the Commonwealth Court considered the question of a township's authority and duties under Article I, Section 27 following the Pennsylvania Supreme Court's holdings in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson Township II*), and *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*). The Court stated:

> Moreover, *Robinson Township II* did not give municipalities the power to act beyond the bounds of their enabling legislation. Municipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies. Neither [*PEDF II*] nor *Robinson Township II* has altered these fundamental principles of Pennsylvania's system of state and local governance.

Frederick, 196 A.3d at 697 (footnote omitted) (cited in *Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.,* No. 2609 C.D. 2015, 2019 Pa. Commw. Unpub. LEXIS 356 at *38-39 (Pa. Cmwlth. June 26, 2019)), *appeal denied*, 208 A.3d 462 (Pa. 2019). Therefore, Liberty Township's ordinance cannot override the Department's authority to regulate the disposal of Series 800 waste under the SWMA.

Compliance History

The Appellants argue that Tri-County's permit should be rescinded because of what they refer to as its egregious compliance history. Section 503(c) of the Solid Waste Management Act, 35 P.S. § 6018.503(c), provides the Department with the authority to deny a permit to any applicant if the Department finds that the applicant has failed or continues to fail to comply with the Solid Waste Management Act or any other environmental statutes or regulations, or the applicant has shown a lack of ability or intention to comply with the environmental statutes, regulations, or orders of the Department, as evidenced by past or continuing violations. Section 503(d) requires the Department to deny any permit or license required under the Act where the person or related entities have engaged in unlawful conduct "unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected." 35 P.S. § 6018.503(d). The regulation at 25 Pa. Code § 271.125 lists the compliance information to be contained in the permit application.

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. We consider the totality of the permittee's compliance history to assess whether the party's conduct shows that it cannot be trusted with the permit. *O'Reilly v. DEP*, 2001 EHB 19, 44-45. We consider such factors as the number, duration, and severity of the violations, harm to the environment caused by the violations, and the applicant's efforts to correct the violations. *Id*., 2001 EHB at 44-46; *Belitskus v. DEP*, 1998 EHB 846, 868-70. 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. Section 503 vests the Department with the vital power to screen out bad actors. *Concerned Citizens of Earl Twp. v. DER*, 1994 EHB 1525, 1619.

Where we have remanded a permit for further consideration of compliance history, it has generally been because the Department did not conduct a thorough review. *See, e.g. Colbert, supra*. The Department certainly cannot be said to have conducted anything less than a thorough review of Tri-County and its related parties. To the contrary, the Department appears to have maintained a laser focus on this issue, going so far as to deny an earlier version of the permit application in 2013. That focus has continued up to the present, with such measures as regular conference calls between Vogel and the Department to discuss any current issues. (T. 2000.)

The Appellants have failed to meet the burden of proving that Tri-County cannot be trusted with the permit. With respect to Section 503(c), the Appellants have not shown that Tri-County has a lack of ability or intention to comply with the law going forward as evidenced by past or continuing violations. All of the evidence leads to the opposite conclusion. The Vogel companies are having environmental audits performed by independent consultants. Those audits have not uncovered any major violations or uncorrected minor violations. The last audit is scheduled to be completed by June 2024. (T. 1533.) The Department has never disagreed with any corrective actions listed in the audits. (T. 1538.) The companies have an in-house environmental compliance staff and they implement a stringent environmental management system. These measures have been shown to be working over the last several years and we have not been given any reason to doubt that they will continue to work in the future. In addition, they have all the extra measures listed in the bird control plan (e.g. chief bird controller, daily monitoring, regular reporting, oversight committees) to secure compliance in that area.

We credit Department employees Joel Fair and Clem Delattre's observation that the Vogel companies' compliance record over the last decade is equal to or better than that of other waste companies in the state. For example, the last compliance form update done before the hearing showed that there had been no violations from 2017 through 2022 at the Seneca Landfill and the Seneca Landfill Transfer Station; no violations for Tri-County Landfill and Tri-County Landfill transfer station since May 1, 2013, a span of nine years; one violation since 2018 at Tri-County Industries involving the lack of a waste transportation sticker on a driver's side of the truck; and two violations for Vogel Disposal Service for the four years between 2018 through 2022, one involving a leaking load and the other due to a missing Act 90 cab card required to be in the vehicle. (TC Ex. 47.)

The Appellants point to Vogel's poor compliance history before 2013. That point has not been disputed in this case. (*See e.g.* TC Brief at 317.) However, it would seem to have dawned on the companies that they would not get a permit to reopen the Tri-County landfill unless they cleaned up their act, and this is exactly what they have done. The key question now is whether this new respect for environmental compliance will continue now that the permit is in hand. With the public safety at stake due to the bird strike concern, it is all the more important that this question be answered in the affirmative. The Department reasonably concluded based on the related companies' compliance over the last decade that Tri-County can be trusted with the permit. In short, they have the people, the systems, and the corporate policy in place to secure future environmental compliance.

The Board had the benefit of videos depicting operations at the Seneca Landfill. (TC Ex. 108, 109.) There will be a substantial overlap between the personnel managing the Seneca and Tri-County landfills. The videos depicted a modern municipal waste disposal facility that appeared to be operating in accordance with best management practices and the law.

The Appellants have lodged other accusations regarding Tri-County's compliance history that do not support overturning the permit. For example, they point to the violations uncovered in the audits. However, perfect compliance is not the standard for deciding whether a permit should be blocked for noncompliance. The Appellants presented no evidence regarding the specifics of any violations, leaving us to rely instead on written reports. The violations in those reports, however, appear to have been relatively minor, and the important point is that they were quickly corrected. Rather than show that Tri-County will not comply with the law, they actually show the opposite. The same could be said about the violations that did not make their way into Notices of Violation (NOVs). The Vogel companies have consistently demonstrated a

commitment to quickly correct any and all regulatory excursions. We detect no resistance to doing so.

The Appellants say there have probably been other violations that were not reported or uncovered. (*E.g.* App. Brief at 63, 137.) There is nothing in the record to support this speculative allegation. We cannot imagine a scenario where we would overturn a permit based on compliance history because there probably have been other violations that were not memorialized in NOVs or orders, with no independent proof that such violations occurred. Indeed, the record here shows that the Department has been quite diligent in policing Tri-County's compliance with the law. *Compare Friends of Lackawanna*, 2017 EHB at 1183 ("The record does not demonstrate that it [the Department] has consistently exercised vigorous oversight of the landfill consistent with its regulatory and constitutional responsibilities with just as much concern about the rights of the landfill's neighbors as the rights of the landfill.").

The Appellants cite a number of violations that have been recorded since 2013, but counting up entries without further elucidation is not particularly helpful. We see no resistance to correcting violations with all appropriate speed and attention as they are uncovered. We see no pattern of repeated, uncorrected problems. There is no showing of significant environmental harm. Years have gone by at the various entities with no violations at all, which is noteworthy in a group of companies with 700 employees. There is simply nothing to suggest that the related companies lack the ability or intention to comply with the law going forward.

Turning to Section 503(d), the permit block for ongoing unlawful conduct, there are various allegations scattered throughout the Appellants' briefs, but the primary allegation appears to be that Tri-County is in violation because the landfill is polluting the groundwater in violation of the laws and regulations prohibiting such pollution, such as 25 Pa. Code §§

273.241(b) (landfill to be operated to prevent and control surface and groundwater pollution) and 273.241(c) (operator may not cause or allow water pollution within or outside the site from operation of the facility). However, as addressed above, the Appellants failed to present any expert testimony on this issue or otherwise prove that the landfill is in fact causing pollution. The Appellants have not supported their allegation that Tri-County's compliance with its groundwater monitoring has been "spotty, deficient, and willfully ignorant of the existing and ongoing pollution." (App. Brief at 104.) To the contrary, Tri-County has continued monitoring of its groundwater monitoring wells in accordance with its permit. (T. 1605-06.) Furthermore, the Department interprets Section 503(d) to allow it to lift a permit bar if the permittee/applicant is making satisfactory progress toward compliance. *See Lower Windsor Twp. v. DER*, 1993 EHB 1305, 1361-63 (groundwater contamination). Even if we assume that the landfill is polluting the groundwater, the permit under appeal requires the relocation of the old waste at the site, which is the gold standard for correcting the problem, if it does exist. (FOF 148.)

Finally, to the extent the Appellants assert that there is an ongoing violation of the duty regarding closure of the landfill pending the repermitting/reopening process, the record does not support the assertion. A settlement agreement approved by the Board on December 18, 1990 essentially stayed the pertinent closure requirement pending the repermitting process. (TC Ex. 10.) It would be wasteful for Tri-County to apply a final cap and vegetation to 6.7 acres if the waste in that area would be excavated and relocated into new modern cells. In sum, there is no support for the Appellants' claim that ongoing unlawful conduct should result in a ban of Tri-County's permit.

On November 27, 2023, the Appellants filed a second petition to reopen the record to introduce what they assert is evidence of additional violations from a company related to Tri-

County Landfill. The violations allegedly were two "self-reported discharge" violations, one from December 2022 and one from February 2023. The Appellants say they discovered this evidence during a file review more than two months earlier on September 19, 2023, and they then took a month to "review and discuss" what they found during the file review. The Department and Tri-County filed responses in opposition to the petition on December 12, 2023.

Our Rule on reopening the record prior to adjudication for "recently discovered evidence" provides:

> (b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b). A petition to reopen the record must (1) identify the evidence the petitioner seeks to add to the record, (2) describe the efforts the petitioner made to discover the evidence prior to the close of the record, and (3) explain how the evidence was discovered after the close of the record. 25 Pa. Code § 1021.133(d). The petition must also be verified. 25 Pa. Code § 1021.133(d)(3).

The Appellants do not explain how the evidence for which they seek to reopen the record is not cumulative of the voluminous evidence on the compliance history of Tri-County and its related companies that was adduced at the hearing. The proffered evidence does not establish any material fact or contradict a material fact assumed or stipulated by the parties to be true. 25 Pa. Code § 1021.133(b)(1). It is undisputed that Tri-County and its related companies have had violations over the years. Even if we were to reopen the record to consider these "new"

violations, there is nothing in those violations that would prompt us to conclude that Tri-County has an inability or lacks intent on complying with the law. The alleged violations appear to have been corrected. The violations do not show a pattern of noncompliance or otherwise dramatically alter the wealth of compliance evidence already admitted into the record in this matter. Although the Appellants make much of the fact that the violations occurred before the merits hearing, they do not explain why any party had any duty to disclose the violations to the Appellants. The violations were not included on Tri-County's compliance history form it submitted with its application because they occurred after the form was submitted.

Reopening the record is a decision within the discretion of the presiding judge. *Friends of Lackawanna v. DEP*, 2017 EHB 664, 666 (citing *Wheeling-Pittsburgh Steel Corp. v. Dep't of Envtl. Prot.*, 979 A.2d 931, 943 (Pa. Cmwlth. 2009); *Al Hamilton Contractor Co. v. Dep't of Envtl. Res.*, 659 A.2d 31, 35 (Pa. Cmwlth. 1995)). We find that the Appellants have not appropriately justified their request to reopen the record.

Bonding

In their post-hearing brief, the Appellants make reference to the fact that the Department reduced the bond amount for the landfill. The bond was reduced from approximately $9.59 million to $4.32 million, following a request from Tri-County and the submission of a revised bond calculation worksheet in May 2020. (Stip. 62.) The Department testified at the hearing that the bond amount was reduced to account only for the initial, active cells of the landfill that would be constructed, as opposed to the entire 35-acre disposal area. (T. 1833-34, 1998.) Tri-County reduced the open acreage to 14.3 acres, which accounts for the first two cells of the landfill that will be developed. The Department reasoned that Tri-County was only permitted to operate two cells so that, if closure and capping were required for those cells, the bond would adequately

cover the cost. (T. 1998.) The bond was reduced because Tri-County will not build out all ten cells of the landfill at one time. (T. 1177-79, 1180; App. Ex. 191.) The Department testified that Tri-County needs to seek approval from the Department before waste can be deposited into any newly constructed cells. (T. 1998-99.) If Tri-County seeks to open up additional cells at the landfill, the bond amount will need to be increased by Tri-County. (T. 1833-34, 1999.) This is also a condition of Tri-County's permit. (Jt. Ex. 1, Permit (at 14, Operating Condition 27).) The bond will be recalculated every year as operations change at the site. (T. 1833.)

The Appellants have not provided an argument in their brief as to why the bond reduction was inappropriate or unlawful. They have not explained why the bond was otherwise improperly calculated. The Appellants have not shown why the bond is not consistent with the regulations, which require the bond amount to cover areas where waste disposal or processing activities are conducted. 25 Pa. Code § 271.331(d) ("The bond and trust corpus amount shall cover areas where municipal waste disposal or processing activities are to be conducted.").

The Appellants criticize the Department and Tri-County for not including bonding money for monitoring and sampling of private water wells beyond the permit boundary. (*See* Jt. Ex. 2, Vol. 6 (at DEP007416-17).) However, the Appellants have not established that it is necessary. Their position seems to be linked to their claim that the landfill is polluting the groundwater. But as laid out above, the Appellants have not established that there is any groundwater pollution being caused by the landfill that would necessitate any offsite groundwater monitoring to be covered by the bond.

The Appellants also say that the public should have been informed of the reduced bond amount. The Appellants do not cite any provisions of law that require a change in bond amount during the permit application review process to be re-noticed. Indeed, it does not appear that the

bond amount needs to be included at all in the public notice of the permit application. *See* 25 Pa. Code §§ 271.141, 271.142. Requests for bond releases are subject to public notice, but that is not at issue here. *See* 25 Pa. Code § 271.341(e). Of course, the permit application and any revisions during the review process remain available for public inspection at the Department's offices at any time. 25 Pa. Code § 271.5(a). To the extent the Appellants contend that the Department abused its discretion in not requiring public notice of the change in bond amount, 25 Pa. Code § 271.144(c), they have simply not provided sufficient evidence or argument to support that claim. In short, the Appellants have not met their burden of proof with respect to any showing that the bond is inadequate or improperly calculated.

Need for the Landfill

The Appellants say there is no real need for the landfill. They point to 25 Pa. Code § 271.127(f), which says that an environmental assessment may include an explanation for the need for a facility, although adding new capacity does not establish need. However, the Commonwealth Court has emphasized that any discussion of need for a landfill is optional. *Dep't of Envtl. Prot. v. Clearfield Cnty.*, 283 A.3d 1275, 1286 (Pa. Cmwlth. 2022). Indeed, the Department rejected disposal capacity as a purported benefit of the Tri-County landfill. (T. 1885, 1891-92.) While the Department may still in its discretion consider the need for a facility, need is not a regulatory requirement. The Appellants have not shown that any alleged lack of need for this facility would justify denial of the permit modification.

Whether the Permit Application is Outdated

The Appellants spent a significant amount of time at the beginning of the hearing identifying portions of the application that they believed to be outdated. (*See* T. 38-102; App. Ex. 3.) The Appellants make much of the dates of certain information contained within the permit

application, saying that the application is stale and needs to be updated. However, the Appellants have not taken the necessary step further to show how any of that information is outdated, or why, even if it is old, it is no longer accurate or otherwise makes a difference one way or the other in terms of the Department's decision to issue the permit modification.

For instance, the Appellants criticize the survey of public and private water supplies as being outdated, but they never identify a public or private water supply that should have been identified but was omitted from the survey in the permit application. The Appellants similarly say the list of property owners adjacent to the landfill site is old, but they again do not identify any adjacent property owner that is different than what is listed in the application.

The Appellants also say a 2016 settlement required Tri-County to update certain information in its application as part of the design change for the landfill to comply with Pine and Liberty Townships' 40-foot height limitation, and that Tri-County failed to do this. (*See* DEP Ex. 15 (at 4).) But the testimony from Joel Fair indicates that Tri-County did update all of the forms and information required by the 2016 settlement agreement. (T. 1776-77.) It is simply not true that all of the information in the permit application is outdated. Tri-County updated several forms in the application. (T. 1777; DEP Ex. 15.) As a few examples, Tri-County conducted an updated traffic study in 2019. It conducted updated bird surveys in 2021 and 2022. The environmental assessment was updated in June 2020. (T. 189-90.)

We have held that critiques of information in a permit application need to be tied into a showing of why any errors in the application have continuing relevance and warrant action regarding the final permit. *O'Reilly*, 2001 EHB at 51. In *Stedge v. DEP*, 2015 EHB 577, we faulted the appellants' approach, which is similar to the one the Appellants here have taken, of

claiming that information in an application did not satisfy certain requirements but not actually showing how those requirements were not satisfied:

> 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. The Appellants never presented any evidence demonstrating that any of these setbacks were not in fact met with respect to the Lamb's Farm facility. The Appellants never demonstrated that, even if all setback requirements were met, it is still unreasonable to permit the Lamb's Farm facility at this location in Smithfield Township.

Id. at 612. The Appellants have not shown that any of the information they claim is outdated has a material impact on the permit modification that was ultimately issued. They have not shown that any allegedly outdated information requires any action on our part or any correction by Tri-County or the Department.

Article I, Section 27

The Appellants argue that the issuance of the permit violates Article I, Section 27 of the Pennsylvania Constitution, which 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, 2022 EHB at 371 (quoting *Del. Riverkeeper Network*, 2018 EHB at 493 (citing *Ctr. for Coalfield Justice*, 2017 EHB at 858-59, 862; *Friends of Lackawanna*, 2017 EHB at 1163)). "The burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan*, 2018 EHB at 115 (citing *Stedge*, 2015 EHB at 617; *Brockway Borough Mun. Auth.*, 2015 EHB at 250).

The Appellants first assert that the Department did not specifically evaluate Tri-County's permit application in terms of the rights, values, and duties set forth in Article I, Section 27. They point to an excerpt of testimony from Joel Fair on cross-examination in which he stated that the Department's review pursuant to Article I, Section 27 is encompassed by its environmental assessment review, as well as the implementation of the Solid Waste Management Act and corresponding regulations. (T. 1924-25.) The Appellants believe that this alone requires the Department's decision to issue the permit modification to be rescinded.

The Appellants say that the Department had an obligation to do a "constitutional harms/benefit analysis." (App. Brief at 141.) The Appellants do not explain what a constitutional harms-benefits analysis is or what it should have included that the regulatory harms-benefits analysis did not. Many of the Appellants' Article I, Section 27 arguments are simply restyled versions of their merits arguments. The Appellants say that the Department's waste management program should have involved the oil and gas program to assess TENORM waste, but as noted above, the Appellants have failed to establish that there is anything improper about the permit with respect to TENORM waste. They say the Department should have requested a groundwater assessment plan and order abatement and remediation for what the

Appellants say is ongoing pollution of the groundwater, but again, the Appellants have not produced any evidence of what constitutes "groundwater degradation" within the meaning of the regulations, and in any event, the permit's waste relocation requirement will achieve remediation of the site.

As part of their Article I, Section 27 argument, the Appellants have paraphrased language from our decision in *New Hanover Township v. DEP*, 2020 EHB 124, 195, (App. Brief at 142), that the Department cannot permit a "source that would worsen active groundwater migration without a full understanding of the consequences of that migration," but none of that evidence is in the record in *this* case. The Appellants put on no hydrogeologic evidence regarding any migration of any groundwater contamination, or the effect of the landfill on any contamination. Indeed, as explained above, the only testimony in the record is that the relocation of existing waste to a lined area will have a benefit on the groundwater.

The Appellants also say the Department's regulatory harms-benefits analysis was improper, and presumably unconstitutional in their view, but the burden remains on the Appellants to establish that the Department's ultimate decision is contrary to Article I, Section 27, as with any other claim that they raise. It is true that compliance with statutes and regulations is not necessarily coextensive with the fulfillment of the duties laid out in Article I, Section 27. *Friends of Lackawanna*, 2017 EHB at 1161; *Center for Coalfield Justice*, 2017 EHB at 860. However, the Department's harms-benefits analysis allows it to consider environmental issues that are not explicitly set forth in the Solid Waste Management Act or the regulations. The relocation of the existing waste is a primary example of an issue that falls outside of the discrete confines of the regulatory provisions but was nevertheless evaluated to determine its effect on the Commonwealth's natural resources. The Appellants must show that the

Department did not consider the environmental effects of the action under appeal, that the action will result in an unreasonable degradation, diminution, depletion or deterioration of the environment, or that the Department did not satisfy its trustee duties. The Appellants have not done that.

The Appellants argue that Appellant Liberty Township is also a trustee under Article I, Section 27 and that Liberty Township deserves to be afforded, but was not afforded, a certain amount of respect in the Department's permitting decision. There is absolutely no evidence of any disrespect—whatever that means—by the Department toward the Township, including the Township's pursuit of this appeal over the last two years. We do not think respect means the Township has unilateral veto authority over the Department's permitting decision. While Liberty Township and the Department both have roles to play in upholding their trustee duties under Article I, Section 27, there is no support for the notion that the Township's role supersedes the Department's. The Appellants cite no law that allows one trustee to override another trustee's decisions. *See Frederick, supra*, 196 A.3d at 697 ("Municipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies. Neither [*PEDF II*, 161 A.3d 911 (Pa. 2017)] nor *Robinson Township II* [83 A.3d 901 (Pa. 2013)] has altered these fundamental principles of Pennsylvania's system of state and local governance." (footnote omitted)).

The caselaw in Pennsylvania recognizes that Article I, Section 27 "imposes fiduciary duties on the Commonwealth and all state, county and local agencies…." *Peifer v. Colerain Twp. Zoning Hearing Bd.*, 302 A.3d 811, 816 (Pa. Cmwlth. 2023). But while many trustees may exist, they have discrete roles to play consistent with the balance between state and local government. *Id.* at 819 ("While it is true that a municipality in passing a zoning ordinance is bound by the

ERA [Environmental Rights Amendment (Article I, Section 27)] and must consider all of the attendant protected rights, [Chester Water Authority]'s primary purpose is to ensure the quality of the water in the Octoraro Reservoir and provide adequate and safe drinking water. Consequently, even though all three entities must abide by the ERA, their respective decisions as to how to do so may take different forms and not manifest in the same way." (footnote omitted)). Nothing that the Department has done in this case has interfered with the Township's independent trustee obligations.[12]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 6018.108; 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.

[12] 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))).

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. 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.

7. 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).

8. "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)).

9. An applicant for a municipal waste landfill must demonstrate that the benefits of a proposed project to the public clearly outweigh the known and potential harms. 25 Pa. Code §§ 271.126 and 271.127.

10. The Appellants have not shown that the Department acted unreasonably or violated the law in deciding the result of the harms-benefits balance. *Borough of St. Clair*, 2014 EHB 76, 96 (citing *Exeter Citizens Action Comm., Inc. v. DEP*, 2005 EHB 306, 328).

11. The Department properly concluded that the benefits of the Tri-County landfill clearly outweigh the known and potential harms. 25 Pa. Code §§ 271.126 and 271.127.

12. The 99-acre Tri-County Landfill site is an area that was permitted prior to January 25, 1997. 25 Pa. Code § 271.202(a)(15).

13. The permit modification was properly issued to Tri-County Landfill, Inc. without a prior permit reissuance. 25 Pa. Code §§ 271.221, 271.222.

14. The operations at Tri-County Landfill, through the implementation of its bird control plan, will not increase the occurrence of bird/aircraft strikes over existing conditions. *Jefferson Cnty. Comm'rs v. DEP and Leatherwood, Inc.*, 2002 EHB 132.

15. The Department properly evaluated the compliance history of Tri-County Landfill and its related companies. 35 P.S. § 6018.503(c) and (d); 25 Pa. Code § 271.125.

16. 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. § 6018.503(c) and (d); *O'Reilly v. DEP*, 2001 EHB 19, 44-45; *Belitskus v. DEP*, 1998 EHB 846, 868-70.

17. The Appellants have not shown that the bond amount established for the Tri-County landfill is unreasonable or contrary to the law. 25 Pa. Code § 271.331.

18. The Appellants have not shown that any errors or information contained in the permit application have any continuing relevance that would require action with respect to the

permit modification issued by the Department. *See Stedge v. DEP*, 2015 EHB 577, 612; *O'Reilly v. DEP*, 2001 EHB 19, 51.

19. The Appellants have not justified their request to reopen the record in this matter. 25 Pa. Code § 1021.133; *Friends of Lackawanna v. DEP*, 2017 EHB 664, 666 (citing *Wheeling-Pittsburgh Steel Corp. v. Dep't of Envtl. Prot.*, 979 A.2d 931, 943 (Pa. Cmwlth. 2009); *Al Hamilton Contractor Co. v. Dep't of Envtl. Res.*, 659 A.2d 31, 35 (Pa. Cmwlth. 1995)).

20. 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 modification. 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).

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

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

O R D E R

AND NOW, this 8th day of January, 2024, it is hereby ordered that the Appellants' appeal is **dismissed**. The Appellants' petition to reopen the record is **denied**.

ENVIRONMENTAL HEARING BOARD

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

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: January 8, 2024

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

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: January 9, 2024**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Synopsis

The Board denies a permittee's motion for partial summary judgment asserting collateral estoppel where the appellant makes clear in its response to the motion that it is not attempting to relitigate issues from an earlier appeal, notwithstanding its expert report that might have suggested otherwise. The motion is also denied with respect to the permittee's arguments on issues upon which the Board has already ruled.

O P I N I O N

Friends of Lackawanna ("FOL") has appealed the Department of Environmental Protection's (the "Department's") issuance of a major modification to Keystone Sanitary Landfill, Inc.'s ("Keystone's") solid waste disposal permit (Permit No. 101247) for its municipal waste landfill located in the boroughs of Dunmore and Throop, Lackawanna County. The major permit modification authorizes Keystone's Phase III vertical expansion at the landfill. The Sierra Club has intervened in FOL's appeal. The hearing on the merits in this appeal is scheduled to begin on April 22, 2024.

FOL previously appealed from the renewal of Keystone's solid waste management permit ("Renewal Appeal"). *See Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L. In the Renewal Appeal, FOL challenged, among other things, Keystone's characterization of the geologic and hydrogeologic setting of the landfill property and the adequacy of the monitoring well network at the landfill. The Board, following 18 days of hearing, replete with extensive expert testimony, for the most part rejected those challenges. *See Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1170. The exception was groundwater degradation being detected in a monitoring well designated as MW-15. We insisted that Keystone prepare a groundwater assessment of the groundwater degradation that was being detected in MW-15, and we revised the permit to contain a condition to that effect. *Id.* at 1193-94.

FOL's notice of appeal of the Phase III permit once again asserts that Keystone "has inaccurately or insufficiently characterized the aquifer system on site." (Appeal at ¶ 57.) FOL, in support of that contention, has served an expert report by Thomas Gillespie, P.G., wherein Mr. Gillespie has offered some rather broad opinions regarding the conceptualization of the hydrogeologic conditions below the Keystone Landfill site. Keystone complains that it should not be required to relitigate the characterization of the hydrogeologic setting of the landfill site and the adequacy of its monitoring well network. It has filed a motion for partial summary judgment asking the Board to hold that FOL is collaterally estopped from relitigating those issues. The Department has filed a memorandum in support of Keystone's motion on this issue.

It would appear that Keystone's concern is unwarranted. In its response to the motion, FOL says no less than 11 times that, in this appeal, it is only focused on the "nature and condition of groundwater in and around MW-15." Notwithstanding the rather broad language in FOL's expert report, FOL only intends to focus on the area in and around MW-15. FOL is now bound

by this self-imposed limitation in the presentation of its case at the merits hearing. Keystone concedes in its reply brief that the groundwater issue in the area of MW-15 is fair game. Accordingly, there is no need to address any further Keystone's collateral estoppel argument.

Keystone next argues that it is entitled to summary judgment because FOL and the Sierra Club, as corporate entities, lack standing to assert claims under Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art I, § 27. Keystone says in its reply brief that it is not attempting to relitigate the facts related to the standing issue; it merely wishes to re-raise the legal issue. (Reply Brief at 6.) Keystone recognizes that we have already rejected this argument in the Renewal Appeal and other cases, but it seeks to "preserve its rights." We decline the invitation to revisit the issue here. This issue is preserved.

Next, again in an effort to preserve its rights and/or convince the Board to overrule its previous jurisprudence on Article I, Section 27 more generally, Keystone seeks a ruling on summary judgment that FOL's and the Sierra Club's claims that the issuance of the permit violates that constitutional provision must be rejected as a matter of law for a panoply of reasons (e.g. the issuance of the permit is not a state action, the provision is not self-executing, the provision does not go beyond the environmental protection statutes, the Commonwealth's trustee obligations do not apply to the private use of private property). It does not appear that Keystone is arguing anything new that has not already been addressed by the prior case law of this Board and the appellate courts. We decline the invitation to revisit any of those issues here.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 9th day of January, 2024, it is hereby ordered that Keystone's motion for partial summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 9, 2024

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

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
David Stull, Esquire
(*via electronic filing system*)

For Appellant:
Mark L. Freed, Esquire
Theresa M. Golding, Esquire
(*via electronic filing system*)

For Permittee:
Christopher R. Nestor, Esquire
David R. Overstreet, Esquire
Jeffrey Belardi, Esquire
(*via electronic filing system*)

For Sierra Club:
J. Michael Becher, Esquire
Elizabeth A. Bower, Esquire
Sarah E. Winner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-025-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: January 10, 2024**

OPINION AND ORDER ON
MOTION TO DISMISS APPEAL AS MOOT

By MaryAnne Wesdock, Judge

Synopsis

The Board denies a motion to dismiss for mootness where the action that is the subject of the appeal is capable of repetition yet evading review.

O P I N I O N

Background

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 development of 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 (the Metis Wells) on February 9, 2023. Protect PT filed its appeal on March 10, 2023, asserting that the Department's issuance of the permits violates Article I, Section 27 of the Pennsylvania Constitution because it fails to take into account Olympus' compliance history; 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. In its appeal, Protect

PT asks the Board to vacate the permits or, in the alternative, to substitute its discretion for that of the Department and impose additional terms and conditions in the permits.

According to the parties' filings, from August 22, 2023 to September 5, 2023, Olympus drilled and hydraulically fractured the Metis Wells. On September 15, 2023, flowback commenced for the Metis 2M Well, and on September 19, 2023, flowback commenced for the Metis 4M Well. On or about October 11, 2023, Olympus provided the Department with Completion Reports for the Metis Wells. As of October 13, 2023, all drilling and completion activities had been completed for the Metis Wells.

On October 20, 2023, Olympus filed a Motion to Dismiss Appeal as Moot (motion), asserting that because Olympus has completed all drilling, hydraulic fracturing and completion activities in connection with the Metis Wells, the Board is unable to grant any meaningful relief. On November 2, 2023, the Department filed a memorandum of law supporting the motion. On November 20, 2023, Protect PT filed a response in opposition to the motion, to which Olympus and the Department replied on December 5, 2023.

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*, EHB Docket No. 2023-043-B, *slip op*. at 4-5 (Opinion and Order on Partial Motion to Dismiss issued October 6, 2023); *Ongaco v. DEP*, EHB Docket No. 2023-022-CS, *slip op*. at 3 (Opinion and Order on Motion to Dismiss issued July 25, 2023); *Scott*

v. DEP, EHB Docket No. 2022-075-B, *slip op*. at 2-3 (Opinion and Order on Motion to Dismiss issued May 15, 2023); *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol*, 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. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570.

Mootness

Olympus seeks to dismiss this appeal on the basis of mootness, arguing that because the Metis 2M and 4M Wells have already been drilled and hydraulically fractured there is no meaningful relief that the Board can provide with regard to the claims set forth in the appeal. The Department supports dismissal of the appeal on the basis of mootness and points out that Protect PT's objections are limited to well development, which has already occurred, and do not involve other aspects of the wells such as plugging or well site restoration. Both Olympus and the Department cite the Board's decision in *Alice Water Protection v. DEP*, 1997 EHB 447, in support of their position that this matter is moot. In *Alice Water,* the appellant contested the Department's issuance of a surface mining permit. During the course of the appeal, the mine operator completed the mining of coal and was in the process of reclaiming the site. The Board dismissed the appeal as moot, finding:

> Even if we were to find that the Department abused its discretion in issuing the mining permit, [the Permittee] Amerikohl has already gained the benefit of the permit. Its obligation would be the same as it is now--to reclaim the site.

Id. at 448.

Similarly, in *Brumage v. DEP*, 2002 EHB 496, the owners of a natural gas well appealed from the Department's issuance of a permit that authorized a mine operator to remove coal from

the vicinity of the well. While the appeal was pending, the mine operator completed the mining around the well in accordance with the permit. Based on this factor, the mine operator moved for the Board to dismiss the appeal as moot. The Board granted the motion, and in doing so, explained that it could not provide effective relief to the well owners because the authorized mining activity had already occurred, observing as follows:

> At this stage of the proceeding, the only relief the Board could grant would be to opine whether the Department made a mistake in granting the pillar permit. As stated in *Kilmer v. DEP*, 1999 EHB 846, 849, that is the essence of the mootness doctrine.

2002 EHB at 498.

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)).

Protect PT concedes that the Metis 2M and 4M Wells have been drilled and hydraulically fractured, "effectively rendering the case moot." (Protect PT Response, p. 1.) However, Protect PT argues that this case should be allowed to proceed under exceptions to the mootness doctrine, namely, that the action involved in this appeal is capable of repetition but likely to evade review and, second, that the issues involve matters of public importance. As to the first exception, Protect PT asserts that the issues involved in this appeal have been raised previously but continue to evade review "in a time period that is effectively too short to appeal the issue." (*Id*.) As to the second exception, Protect PT asserts that the issues are important to the public interest and should be decided on the merits because they apply not just to the wells at issue in this appeal but to the manner in which the Department approves all such wells across the Commonwealth.

Based upon a review of the parties' filings, we believe this case falls within the first exception to the mootness doctrine, i.e., conduct that is capable of repetition yet likely to evade review. In reaching this conclusion, we apply the guidelines set forth by the Commonwealth Court in *Consol Pennsylvania Coal Co. v. Department of Environmental Protection*, 129 A.3d 28 (Pa. Cmwlth. 2015): In order for this mootness exception to apply, "(1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be a reasonable expectation that the complaining party will be subjected to the same action again." *Id.* at 42 (quoting *Philadelphia Public School Notebook v. School District of Philadelphia*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012)); *Driscoll v. Zoning Board of Adjustment,* 201 A.3d 265, 269 (Pa. Cmwlth. 2018); *Sludge Free*, 2015 EHB at 891-92.

We believe this test has been met. As to the first prong, based on the timeline provided by Olympus it is apparent that the wells are capable of being drilled within a short period of time, prior to the completion of discovery and/or the scheduling of a hearing on the merits.[1] As to the second prong, we need not determine whether there is a "reasonable expectation" of repetition; we need only look at the very history of this case. In June 2022, Protect PT appealed the Department's issuance of permits for the 3M, 5M and 7M well pads at the Metis Well Site.[2] Protect PT states that in January 2023 it was alerted by Olympus that the wells at issue had been drilled and hydraulically fractured in September and October of 2022.[3] (Protect PT's Response, p. 3.) According to Protect PT, based on the fact that the 3M, 5M and 7M wells had been drilled, it made the decision to withdraw its appeal. (*Id.*) Protect PT subsequently appealed the permits issued for the 2M and 4M wells, which is the appeal now subject to the Motion to Dismiss. There is nothing in any of the parties' filings to suggest that future wells will not continue to be drilled. With the matter now having occurred twice without reaching the merits of the case, Protect PT urges the Board to allow this case to proceed.

Olympus and the Department contend that Protect PT could have sought a supersedeas to prevent the drilling and completion of the wells until such time as its request for relief could be addressed. Protect PT strongly opposes this suggestion, asserting as follows:

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[1] In its reply, Olympus counters, "The amount of time that elapses between issuance of a permit for a gas well and when the well is drilled varies widely by gas well, and is dependent on a variety of factors, including geologic and economic factors and the permittee's overall plan for developing its gas interests. In fact, under the Oil and Gas Act, the permittee can wait up to one year after the permit is issued to begin drilling the well, without the permit expiring. 58 Pa.C.S. § 3211(i)." (Olympus Reply, p. 3-4.) While we have no doubt that the timeframe for drilling wells can vary, as explained by Olympus, the wells at issue in this matter were drilled within a relatively short timeframe.

[2] That appeal was docketed at EHB Docket No. 2022-037-B.

[3] According to the reply filed by the Department, the wells were drilled and hydraulically fractured from May 26, 2022 to October 31, 2022. (Department's Reply, p. 5) (citing Olympus' Motion to Dismiss filed at EHB Docket No. 2022-037-B, para. 5).

> Given the facts and circumstances of this case, it would be exceedingly difficult, if not impossible, to make a non-speculative determination on the chance of success on the merits. Appellant *needs* to have access to discovery to gain knowledge of the chemicals that are being deemed "proprietary" in order for their assertions to be validly assessed. Without knowledge of the types of proprietary chemicals used, it is impossible for Appellant to provide anything but speculation as to 1) the types of chemicals being used, 2) the dangers of those chemicals to health and the environment, and 3) the likelihood that they might be released into the environment. Given those constraints, a petition for supersedeas is almost certainly doomed to fail.

(Protect PT's Response, p. 6) (emphasis in original).

Protect PT makes a persuasive argument. The standard for obtaining a supersedeas is high. *Hopewell Township Board of Supervisors v. DEP*, 2011 EHB 732, 737. As the Board has stated, "A supersedeas is an *extraordinary remedy* that places a *heavy burden* on the petitioners to make a clear showing of need." *Liberty Township v. DEP*, EHB Docket No. 2023-036-L, *slip op*. at 9 (Opinion and Order on Petition for Supersedeas issued June 13, 2023) (emphasis added) (quoting *Center for Coalfield Justice v. DEP*, 2018 EHB at 764). Among the factors that must be demonstrated by the petitioner are the following: (1) irreparable harm to the petitioner in the absence of a supersedeas, (2) the likelihood of success on the merits, and (3) whether there will be injury to the public or other parties, such as the permittee in third party appeals. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). A petitioner generally must make a credible showing on each of these factors, with a strong showing of a likelihood of success on the merits, *Teska v. DEP*, 2016 EHB 541, 544, and must be able to demonstrate that its chance of success on the merits is more than speculative. *Global Eco-Logical Services., Inc. v. DEP*, 2000 EHB 829, 831. Protect PT states that it would be nearly impossible to meet this burden without the ability to go through the prehearing discovery phase of the appeal.

Although Olympus is correct that parties may engage in limited discovery prior to a supersedeas hearing, 25 Pa. Code § 1021.61(d), we do not believe that the ability to conduct limited discovery resolves the issue here.[4] The standard that must be met in order to obtain a supersedeas is higher than that for succeeding at a hearing on the merits. As such, a supersedeas hearing does not take the place of a merits hearing. As we explained in *Center for Coalfield Justice*:

> [A] supersedeas hearing, by its very nature, is truncated and conducted without the normal safeguards of a full hearing on the merits and, as such, it cannot take the place of a hearing on the merits. A supersedeas is an extraordinary remedy that places a heavy burden on the petitioners to make a clear showing of need. *Emerald Contura, LLC v. DEP*, 2017 EHB 670, 672-73. A hearing on a supersedeas petition is held expeditiously – where feasible, within two weeks of the filing of the petition. 25 Pa. Code § 1021.61(c). Supersedeas hearings are limited in time and format and the parties are generally required to proceed without the opportunity for discovery. *Id.* at § 1021.61(d). In order to obtain a supersedeas, a petitioner must show not only that he or she is likely to prevail on the merits (at a future hearing on the merits) but also that he or she will suffer irreparable harm if the supersedeas is not granted. *Id.* at § 1021.63(a). As we have held many times, "a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal." *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 41, 44 (citing *Weaver v. DEP*, 2013 EHB 486, 489; *Tinicum Township v. DEP*, 2008 EHB 123, 127). Given the higher burden that must be met, it is possible that a party may be unsuccessful in obtaining a supersedeas yet meet its burden at a hearing on the merits.

2018 EHB at 764-65.

Requiring Protect PT to obtain a supersedeas in order to reach the merits of its appeal seems to us an unfair and inappropriate burden under the facts of this case. As we recognized in *Center*

[4] Olympus and the Department also point out that Protect PT could have sought an expedited hearing on the merits. Our Rules of Practice and Procedure allow parties to request an expedited hearing pursuant to 25 Pa. Code § 1021.96a, and the Board encourages parties to take advantage of this rule under appropriate circumstances. In determining whether an expedited hearing is appropriate, the Board will consider the factors set forth in § 1021.96a(c). Based on the facts of this case and the issues in dispute, it is not clear whether an expedited merits hearing could have been held in the timeframe at issue here.

for Coalfield Justice, given the higher burden of a supersedeas hearing, it is possible that Protect PT could be unsuccessful in obtaining a supersedeas yet able to meet its burden at a hearing on the merits. For the reasons set forth herein, we find that Protect PT has demonstrated that this matter falls within "the capable of repetition, yet evading review" exception to the mootness doctrine and should not be dismissed.

We further find that the appeal raises questions of public importance that should be allowed to proceed to a hearing. As we have previously noted, "the 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." *Center for Coalfield Justice*, 2017 EHB at 720. *See Lower Milford Township v. DEP*, 2006 EHB 387, 394 (Questions of important public interest should be preserved for review.) As the Board stated in *Sludge Free*:

> We should hesitate before depriving a party of its right to due process before the only forum that can provide an opportunity to be heard at what may be the only time that party will have that opportunity. Our case law advises that we should exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt, at least in the context of a motion to dismiss [citations omitted].

2015 EHB at 897.

For the reasons set forth herein, we do not believe that this matter should be dismissed on the basis of mootness. Accordingly, we enter the order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 10th day of January, 2024, it is hereby ordered that the Motion to Dismiss Appeal as Moot is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: January 10, 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
Anthony Holtzman, Esquire
Maureen O'Dea Brill, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEECH MOUNTAIN LAKES ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2022-053-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH MAURER, Permittee	:	**Issued: January 18, 2024**

OPINION AND ORDER ON
APPLICATION FOR FEES AND COSTS

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

Synopsis

The Board denies a permittee's application to recover attorney's fees and costs from an appellant under Section 307(b) of the Clean Streams Law because the appellant's appeal of the Department's approval of coverage under a general permit for a small floating dock does not qualify as a proceeding pursuant to the Clean Streams Law.

O P I N I O N

Beech Mountain Lakes Association, Inc. ("BMLA") appealed the Department of Environmental Protection's (the "Department's") approval of Permittee Seth Maurer's registration of a small floating dock under General Permit BWEW-GP-2, Small Docks and Boat Launching Ramps, for the construction of a 15-foot by 15-foot floating dock on the Lake of the Four Seasons in Butler Township, Luzerne County. On July 18, 2023, we issued an Opinion and Order denying a motion for summary judgment filed by BMLA and granting a motion for summary judgment filed by the Department and Maurer and dismissing this appeal. We found in our Opinion and Order that BMLA's overall appeal was concerned with whether or not the Maurers were allowed to use the lake into which their dock would extend and other attendant property issues, and whether

Maurer provided the Department with enough information concerning property rights when the Department approved coverage under the general permit. We determined that the general permit did not grant or convey any property rights and that BMLA did not produce any facts sufficient to establish its cause of action in response to the joint motion for summary judgment filed by the Department and Maurer.

On August 17, 2023, Seth Maurer, the permittee, filed an application for fees and costs pursuant to the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, seeking to recover $4,418.00 from BMLA, the appellant, for 16.5 hours of work by counsel.[1] Maurer argues that BMLA's appeal was meritless, unsupported by evidence, and filed in bad faith. BMLA filed a response to the application arguing that its appeal was not filed pursuant to the Clean Streams Law, but rather the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, which does not contain a provision for fee recovery, and therefore, the application should be denied. We held a conference call with the parties on September 26, 2023. During the call, the Department expressed its position that it was not taking an active role in the fees proceedings. Maurer and BMLA agreed that neither a hearing nor discovery was needed to resolve the application. Maurer and BMLA expressed a desire to file briefs on the application. We issued an Order accordingly. Maurer filed a brief in support of the application on October 26, 2023. BMLA filed a brief in opposition to the application on November 27, 2023. Maurer was permitted but chose not to file a reply brief. The Department did not participate in the briefing.

[1] In a footnote at the end of his brief in support of the application for fees and costs, counsel for Maurer says Maurer has now been billed $5,900.00, which includes the fees generated in conjunction with work done on the fee application. The brief does not attach any updated billing records for this work.

The Clean Streams Law allows any party to recover costs and attorney's fees that have been reasonably incurred in **proceedings pursuant to the Clean Streams Law**. Section 307(b) of the Clean Streams Law provides in relevant part:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act.

35 P.S. § 691.307(b). The threshold issue in Maurer's request for attorney's fees is whether this appeal of the Department's authorization of coverage under a general permit issued pursuant to the Dam Safety and Encroachments Act constitutes proceedings pursuant to the Clean Streams Law.

There are some appeals in which the Clean Streams Law issues are obvious on their face, but this is not one of them. However, even though the permit authorization granted by the Department for the construction of a small dock was issued under the Dam Safety and Encroachments Act and not the Clean Streams Law, this is not necessarily dispositive for our inquiry in determining whether a proceeding can be said to be pursuant to the Clean Streams Law under Section 307(b). Instead, we consider factors such as the reason the appeal was filed and the purpose of the litigation, whether the notice of appeal raised objections under the Clean Streams Law, whether the Clean Streams Law objections were pursued throughout the appeal, whether the regulations at the center of controversy were promulgated pursuant to the Clean Streams Law, and whether the case implicates the discharge of pollutants to the waters of the Commonwealth. *Gerhart v. DEP*, 2020 EHB 1, 6, *rev'd on other grounds*, *Clean Air Council v. Commonwealth*, 289 A.3d 928 (Pa. 2023); *Wilson v. DEP*, 2010 EHB 911, 914-15.

Overall, the important point is whether issues that can be fairly characterized as Clean Streams Law issues were involved in the appeal. Thus, we have previously found appeals of

actions that ostensibly arise out of other statutes can still be, at least in part, proceedings pursuant to the Clean Streams Law because of the issues that were litigated during the course of the appeal. *See, e.g.*, *Friends of Lackawanna v. DEP*, 2018 EHB 401, 405-06 (finding that an appeal of a permit renewal for a landfill under the Solid Waste Management Act was still partially a proceeding pursuant to the Clean Streams Law because the appellant pursued issues of groundwater contamination throughout the appeal); *Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 237 (finding an appeal of a sewage facilities planning module issued under the Sewage Facilities Act was a Clean Streams Law proceeding where the appellant focused on the planning module's impact on Exceptional Value waters and the antidegradation requirements).

Where the action underlying an appeal is derivative of authority other than the Clean Streams Law, it is particularly important that a party seeking fees comes forward and explains what issues implicate the purposes and values of the Clean Streams Law. For instance, in the sewage planning context, a party seeking fees needs to explain how the appeal implicated Clean Streams Law issues instead of issues more appropriately characterized as issues under the Sewage Facilities Act, which, like the Dam Safety and Encroachments Act, has no fee recovery provision. *Compare Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 705 (awarding fees in planning module appeal for issues that focused on water quality), *with Longenecker v. DEP*, 2016 EHB 872 (denying fees because a few cursory references to the Clean Streams Law in a lengthy notice of appeal concerning an approval of a sewage faculties plan not sufficient to make appeal a Clean Streams Law proceeding), *and Borough of Kutztown v. DEP*, 2016 EHB 189 (denying fees in appeal of approval of exemption from requirement to revise sewage facilities plan focused on a certification of capacity under the sewage planning regulations, not anything about water quality).

Neither BMLA's appeal nor Maurer's defense of his permit involved issues that can fairly be characterized as Clean Streams Law issues. As previously mentioned, this appeal was all about whether Maurer had the necessary property rights to install the dock. There are no objections in the notice of appeal that can be said to raise concerns about the pollution of the lake. BMLA did not raise any such objections as the appeal proceeded, and the contest over summary judgment, like the appeal itself, centered on property rights. Maurer's permit defense did nothing to advance the purposes and values of the Clean Streams Law. Our Opinion and Order granting summary judgment did not mention or raise any issues regarding the Clean Streams Law. Instead, our rationale for dismissing this case was that the Department has a limited role in assessing property rights in the context of a general permit authorization for a small dock. This case simply has none of the markers that render it a Clean Streams Law proceeding.

This appeal stands in contrast with *Lyons v. DEP*, 2011 EHB 447, where we dealt with a similar factual scenario involving the issuance of a permit for a small dock under the Dam Safety and Encroachments Act. In *Lyons*, although we ultimately denied the application for fees, we found that the appeal was a proceeding pursuant to the Clean Streams Law, at least in part. There, unlike here, the appellant throughout the case and at the merits hearing "presented argument and testimony that the project violated the Clean Streams Law and regulations promulgated thereunder because of the adverse effect the dock would allegedly have on the water quality of the lake and the creatures that live therein." *Id.* at 448. We noted that the appellant sincerely wished to protect the lake and believed, albeit incorrectly, that the dock would have an adverse impact on the lake's environment. *Id.* at 449-50. The appellant presented expert testimony that use of the dock could cause environmental harm because of the shallowness of the water around the dock. *Id.* at 450. To repeat, no such issues or concerns were raised or pursued in BMLA's case.

Maurer argues that the Dam Safety and Encroachments Act authorizes the Environmental Quality Board (EQB) to promulgate regulations, 32 P.S. § 693.5, and when the EQB promulgated those regulations at Chapter 105 of Title 25 of the Pennsylvania Code, it listed the Clean Streams Law among the authority for developing those regulations, in addition to the Dam Safety and Encroachments Act (as well as the Administrative Code of 1929 and the Floodplain Management Act). However, we are fairly sure that every environmental regulation in Pennsylvania has been promulgated in part pursuant to the Clean Streams Law. "It is a long reach to say that an appeal is a proceeding pursuant to the Clean Streams Law simply because it cites a regulation which names the Clean Streams Law as one of a number of promulgating authorities." *Angela Cres Trust v. DEP*, 2013 EHB 130, 139. *See also Borough of Kutztown v. DEP*, 2016 EHB 189, 194 ("While it is true that the Clean Streams Law is listed among the sources of authority for the regulation, the important point is that the regulation does not relate to water quality in any material way.").

Citing the Pennsylvania Supreme Court's recent Opinion in *Clean Air Council v. Commonwealth*, 289 A.3d 928 (Pa. 2023), Maurer says that the Board must liberally employ the fee shifting provision in the Clean Streams Law. *Id.* at 954. Although our Supreme Court has certainly provided us with the direction to construe fee applications broadly, it has also directed us to look to the reasons why the Clean Streams Law exists, finding that the "express legislative goal" of the Clean Streams Law "is clean water." *Clean Air Council*, 289 A.3d at 954. The Court did not provide us with the latitude to allow parties to transmogrify appeals that had nothing to do with upholding the purposes and values espoused by the Clean Streams Law so that those parties can recover fees.

Because establishing that a proceeding is pursuant to the Clean Streams Law "is essentially akin to a jurisdictional requirement" for fee requests under Section 307(b), *Gerhart*, 2020 EHB at 6, we need not evaluate Maurer's application any further.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEECH MOUNTAIN LAKES ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2022-053-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH MAURER, Permittee	:	

O R D E R

AND NOW, this 18th day of January, 2024, it is hereby ordered that the Permittee's application for fees and costs is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven 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

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

DATED: January 18, 2024

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

For the Commonwealth of PA, DEP:
Michael T. Ferrence, Esquire
(*via electronic filing system*)

For Appellants:
John K. Lisman, Esquire
William L. Byrne, Esquire
(*via electronic filing system*)

For Permittee:
Brett Woodburn, Esquire
Christine Line, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF JESSUP	:	
	:	
v.	:	**EHB Docket No. 2023-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA ENERGY CENTER, LLC, Permittee	:	**Issued: January 25, 2024**

OPINION AND ORDER ON
MOTION TO DISMISS IN PART

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

Synopsis

The Board denies a permittee's motion to dismiss certain objections raised in an appellant's notice of appeal concerning the relation of local zoning matters to the Department's issuance of the permittee's Title V operating permit. The Department considered the zoning matters during its permit review, so it is appropriate for the Board to evaluate on appeal.

O P I N I O N

The Borough of Jessup (the "Borough") has filed an appeal of the Department of Environmental Protection's (the "Department's") issuance of Title V Operating Permit No. 35-00069 to Lackawanna Energy Center LLC ("LEC") for the operation of a natural gas-fired power plant in Jessup Borough, Lackawanna County. The Title V permit was issued under the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, and it regulates the air emissions generated by LEC's facility. The Borough asserts in its notice of appeal, among other things, that the Title V permit is "inconsistent" with a January 2016 decision of the Jessup Borough Council approving LEC's facility as a conditional use in the Borough (the "Conditional Use Decision") and with an agreement between the Borough and LEC called the Host Community Agreement.

LEC has moved to dismiss this part of the Borough's appeal. LEC argues that the Borough's Conditional Use Decision and the Host Community Agreement are local zoning decisions that are irrelevant to this appeal of LEC's Title V permit. LEC contends that the Board does not have jurisdiction to consider these objections. The Department has filed memoranda in support of LEC's motion. Both LEC and the Department also argue that the Borough's objections should be dismissed because they say the objections are not specific enough in describing how the Title V permit is inconsistent with the Conditional Use Decision and the Host Community Agreement.

The Borough opposes the motion. The Borough points out that the Department has acknowledged considering the Conditional Use Decision before issuing the Title V permit. The Borough says its appeal merely asserts that the Department did not consider that decision properly. Regardless, the Borough argues that its claims are properly before the Board because portions of the Municipalities Planning Code require state agencies like the Department to consider local zoning ordinances when reviewing permit applications. *See* 53 P.S. §§ 11105(a)(2) and 10619.2. The Borough adds that it is also appropriate for the Board to evaluate the claims under Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art I, § 27.[1]

The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly 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, Jan.

[1] 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.

10, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. For purposes of resolving motions to dismiss, the Board accepts the nonmoving party's version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570. This same standard applies to motions for partial dismissal like the one before us here. *Latkanich v. DEP*, EHB Docket No. 2023-043-B, slip op. at 5 (Opinion and Order, Oct. 6, 2023).

In its memoranda in support of LEC's motion the Department admits that it considered the Borough's Conditional Use Decision in rendering its own decision on the Title V permit. (DEP Resp. Memo. at 5 n.2; DEP Reply Memo. at 5-7.) The Department tells us that it referenced the Conditional Use Decision at least 19 times in the Department's response to public comments document. (*See* LEC Ex. 1.) That fact alone is enough to warrant denial of the motion to dismiss. "If the Department considered an issue in its evaluation of a permit then it is likewise appropriate for us to review the same issue." *Marshall v. DEP*, 2020 EHB 60, 71. *See also 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."). If the Department relied on the Conditional Use Decision in making its permitting decision, then we must decide whether it erred in doing so (which is not argued) or whether it did so correctly. Under certain circumstances, where a potential zoning conflict is brought to the Department's attention during the permit review process, the Department must decide how to proceed in light of that information, which is then, of course, reviewable by this Board. *See Snyder v. DEP*, 2015 EHB 857, 876-80.

LEC says that the Host Community Agreement explicitly provides that any litigation involving the agreement filed by one party to the agreement against another party to the agreement

must occur in the Court of Common Pleas of Lackawanna County, and that the terms of the agreement therefore preclude the Board from hearing the Borough's claims. This appeal of the Department's decision to issue a Title V permit is not litigation over the Host Community Agreement. We are not reviewing any party's compliance with the Host Community Agreement or the Conditional Use Decision. We are reviewing the permit itself as we and only we obviously must. We do not detect any attempt by the Borough to challenge any provision of the Host Community Agreement or Conditional Use Decision. The Borough maintains that it is not seeking to have the Board decide any zoning issues. Our focus is on the permit under appeal and any decision on the merits by this Board will be addressed to the permit.

The positions laid out by LEC and the Department in their initial memoranda and reply memoranda morph from arguments that the Board does not have jurisdiction over any claims relating to zoning and land use matters to assertions that the Borough's claims should be dismissed because the claims are not, in their words, specific enough. LEC and the Department say we must dismiss these objections because the Borough has not sufficiently detailed *how* the Title V permit is "inconsistent" with the Conditional Use Decision, and because the Borough has not identified "any legally significant inconsistency" between the permit and the Conditional Use Decision, (LEC Reply Memo. at 4). However, these arguments have more to do with whether there is adequate support for a claim, not whether the Board can entertain a claim at all on its face. An evaluation of the merits is not something that comes into play in deciding a motion to dismiss. The standard of review for motions to dismiss requires us to accept the Borough's version of events as true. *Downingtown Area Regional Auth., supra*. In other words, for purposes of evaluating this motion, we presume the Title V permit is in fact "inconsistent" with the Conditional Use Decision

and Host Community Agreement, as the Borough claims in its appeal. In the context of a motion to dismiss, the arguments advanced by LEC and the Department are entirely premature.

Whether a party bearing the burden of proof has adequately supported a particular claim or made out a *prima facie* case for a claim is more appropriately suited for a summary judgment motion after the parties have conducted adequate discovery, not in a motion to dismiss.

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

Consol Pa. Coal Co. v. DEP, 2015 EHB 48, 54 (emphasis in original). "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*, EHB Docket No. 2022-072-B, slip op. at 8 (Opinion and Order, June 29, 2023) (quoting *Consol Pa. Coal*, 2015 EHB at 55).

Discovery in this appeal is far from over. In accordance with a joint case management schedule submitted by the parties in November 2023 and approved by the Board, all written discovery must be served by April 15, 2024 and all fact discovery must be completed by May 15, 2024, with the exchange of expert reports continuing through August 2024. Dispositive motions are to be filed by September 13, 2024. Under the current schedule agreed to by the parties, there is ample opportunity for LEC and the Department to seek clarity on the Borough's objections or ascertain its support for those objections. Indeed, the Borough says that LEC has already served discovery on the Borough seeking the bases for the objections in the notice of appeal.

In *Protect PT, supra*, (Opinion and Order, June 29, 2023), we denied a motion to dismiss that argued that certain claims pertaining to the use of PFAS were speculative in an appeal of

unconventional gas well permits. We found the motion to dismiss was premature because discovery was continuing: "We cannot simply assume in the context of a motion to dismiss that an appellant's claims are speculative where discovery is still ongoing." *Id.*, slip op. at 8. The same is true here. LEC and the Department do not provide any legal support for the notion that we should be dismissing an appellant's objections before the completion of discovery because those objections are allegedly too vague.[2]

Accordingly, we issue the Order that follows.

[2] LEC also argues that the Borough's notice of appeal does not comply with 25 Pa. Code § 1021.51(e), which requires an appellant to set forth its objections to the challenged Department action in separately numbered paragraphs. Although the Borough's notice of appeal contains 31 numbered paragraphs, LEC complains that it cannot differentiate which of these paragraphs might be providing background information and which contain actual objections to the permit. LEC says it cannot figure out the scope of the Borough's appeal. LEC's complaint, to the extent it has any merit at all here, elevates form over substance and does not provide a basis for the dismissal of any part of this appeal. *Jake v. DEP*, 2012 EHB 477 (denying motion to dismiss premised on alleged noncompliance with 25 Pa. Code § 1021.51(e) and finding that "the Department has not cited, nor are we independently aware, of any instance where the Board has dismissed an appeal for such a minor procedural defect").

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF JESSUP	:	
	:	
v.	:	**EHB Docket No. 2023-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA ENERGY CENTER, LLC, Permittee	:	

O R D E R

AND NOW, this 25th day of January, 2024, it is hereby ordered that the Permittee's motion to dismiss in part is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 25, 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:
Mark L. Freed, Esquire
Brendan W. Flynn, Esquire
(*via electronic filing system*)

For Permittee:
Harry Weiss, Esquire
Ronald M. Varnum, Esquire
Erin M. Carter, Esquire
Wesley S. Stevenson, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURA M. TIGHE AND MATTHEW A. TIGHE	:	
v.	:	**EHB Docket No. 2023-046-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 7, 2024**

OPINION AND ORDER ON
MOTION TO QUASH/PROTECTIVE ORDER

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants the non-parties' motion to quash subpoenas issued by the appellants. In order to be subject to discovery, the information sought must be relevant to the issues under appeal or reasonably calculated to lead to discovery of admissible evidence. The information sought by appellants from the non-parties does not satisfy this requirement because it is not relevant to the narrow legal questions before the Board in this appeal and is not likely to lead to the discovery of admissible evidence.

O P I N I O N

Laura and Matthew Tighe ("the Appellants") filed an appeal with the Environmental Hearing Board ("the Board") of a letter issued by the Department of Environmental Protection ("the Department") following an informal hearing held by the Department pursuant to 25 Pa. Code § 102.32(c). 25 Pa. Code § 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.

The conservation district action that was the basis for the informal hearing in this case was a Chapter 102 inspection report dated March 3, 2023 ("March 2023 Report") that documented a February 24, 2023 inspection (February 2023 Inspection") conducted by the Erie County Conservation District. The February 2023 Inspection was conducted at the Lovett's Mobile Home Park ("LMHP") in Washington Township, Erie County. Following the informal hearing, the Department set forth its final determination in a letter to the Appellants dated April 19, 2023 ("the Determination Letter"). The Determination Letter set forth the following determination: "The Department has determined that the Inspection Report is informative in nature and merely records the inspector's observations. The Inspection Report is descriptive and advisory and not prescriptive or imperative. Accordingly, the Inspection Report is not a challengeable action." (Notice of Appeal at 8).

The Appellants' appeal of the Determination Letter was filed with the Board on May 18, 2023. The parties have been proceeding with discovery in this case. The Appellants have issued several subpoenas to parties and non-parties as part of their discovery efforts. On January 8, 2024, the Appellants issued subpoenas to the engineer of Washington Township, Steve Halmi ("Mr. Halmi"), and Washington Township's manager, Norm Willow ("Mr. Willow") (collectively, "the Movants") both of whom are non-parties in this action. The subpoenas sought to depose the Movants on January 26, 2024 at the Department's Meadville office. The subpoenas further directed Mr. Halmi to bring all engineering records, invoices, and correspondence regarding LMHP from 2006 to the present and for Mr. Willow to bring "all documents provided to council members since 2016 regarding the Lovett's Mobile Home Park […] and all Right-to-Know

requests and responses involving the Lovett's Mobile Home Park […] since 2005." (Movants' Motion to Quash, Ex. B).

On January 12, 2024, the Movants filed a Motion to Quash/Request for Protective Order ("Motion to Quash"). Following the Motion to Quash, the Board received two additional motions requesting that it quash additional subpoenas issued by the Appellants. The Board conducted a conference call with the Appellants and the Department on January 23, 2024, and following the call, issued an order setting deadlines for responses to the Motion to Quash and further ordered that all depositions of any persons that were subject to the Motion to Quash were stayed until the Board ruled on the Motion to Quash and the other pending motions[1]. The Appellants filed their Opposition to the Motion to Quash and Brief in support thereof on January 30, 2024 and filed several supplements in the forms of photos and exhibits the next day. This matter is now ripe for decision.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Since it can 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 & Gas Corp*., 2016 EHB 20, 24; *Parks v. DEP*, 2007 EHB 57. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense to the

[1] Along with the Motion to Quash discussed herein, the Board's January 23rd Order also applied to the Department's motion for a protective order and another non-party's motion to quash/protective order.

person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

The Board authorizes parties to serve subpoenas in accordance with the applicable Pennsylvania Rules. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a non-party any documents that are normally within the scope of discovery under Rules 4003.1 - 4003.6. Pa.R.C.P. No. 4009.1(a). A person who is the subject of a subpoena may move for a protective order under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney v. DEP*, 2014 EHB 293, 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. "[I]n evaluating whether discovery regarding a matter should be permitted, we must first determine whether it will lead to information that is relevant to the subject matter involved in [the] appeal. If the matter being inquired into is not likely to lead to the discovery of relevant evidence, that is the end of our inquiry. The discovery is not permitted." *Cabot Oil & Gas Corp*., 2016 EHB 20, 26.

In ruling on the Movants' Motion to Quash, we first must assess whether there is a reasonable potential that their testimony and the documents that the Appellants are requesting will lead to evidence relevant to this appeal. The Movants argue that they have no relevant evidence to offer in this case as they did not participate in the February 2023 Inspection, or in the preparation of the March 2023 Report. They state that they were not present at the informal hearing and played no role in the Department's determination set forth in the Determination Letter that is under appeal.

They further assert that "the subpoenas are nothing more than an impermissible fishing expedition meant to cause unreasonable annoyance, oppression burden or expense upon Washington Township[…]" (Movants' Motion to Quash at 3). The Appellants naturally disagree but offer no evidence that contradicts the facts set forth regarding the Movants' lack of involvement in the February 2023 Inspection and March 2023 Report or in the informal hearing. Instead, the Appellants argue that "[a]lthough the Movants were not asked to participate in any inspection, they do have some knowledge of the violations that should have been noted on the February 24, 2023 inspection report." (Appellants' Brief in Opposition to Motion to Quash at 11).

In paragraph 5 of their Opposition to the Motion to Quash, the Appellants describe that they are appealing "the findings in the Department's 102 Inspection Report" and go on to clarify that they are also appealing "[the March 2023 Report's] directive therein to 'continue work as per approved plans' and the Department's findings in other inspection reports regarding earth moving activities from 2012, and the action to permit developer to '[c]ontinue to follow E/S plan & permit conditions including temporary stabilization, & operation & maintenance of E/S BMP's' of 01/30/2024, the report dated March 24, 2022 to the developer of Lovett's Mobile Home Park as well as every inspection report prior to the report under appeal given their interrelated nature. The Appellants' Appeal is also from the Department's decision not to act on certain findings noted in Department's Chapter 102 Inspection Report, and also its failure to act on the Appellants' complaint to resolve the issues contained in the letter to ECCD dated June 5, 2017 regarding the GP-7 permit issued October 1, 2012 by the ECCD (i.e. GP072512637) to the developer of Lovett's Mobile Home Park that was signed by all the neighboring property owners." (Appellants' Opposition to Motion to Quash at 7-8). The problem for the Appellants is that the list of actions they assert are part of their appeal, and which form the basis for the subpoenas directed to the

Movants, are not the Department action that they ultimately appealed. Those concerns are not before us in this case. The Board has jurisdiction over final actions of the Department. *Jake v. DEP*, 2014 EHB 38, 59. In this case, the Department's "final action" under appeal is very limited and involves only the determination that the Department outlined in the Determination Letter it issued after the informal hearing took place. Despite the Appellants desire to challenge past inspection reports, past permits, past earthmoving activities and Department inaction, those issues are not on appeal here. This appeal involves a discrete action – the determinations contained in the Department's Determination Letter which are that the March 2023 Report (1) was informative in nature and merely recorded the inspector's observations; (2) was descriptive and advisory and not prescriptive or imperative and; (3) is not a challengeable action. The appeal is limited to challenging those three determinations.

Given the limited nature of the action under appeal, we find that the information sought through the subpoenas issued to the Movants is not relevant to the subject matter under appeal and is not likely to lead to the discovery of admissible evidence. The Appellants failed to provide any persuasive evidence that the Movants had direct involvement in the Department's determination or in any of the actions of the conservation district (the February 2023 Inspection and the March 2023 Report) that were the actions leading to the informal hearing. In addition to the lack of relevancy to the action under appeal, the document requests set out in the subpoenas seek documents dating back almost twenty years including council documents, right to know requests, engineering records, invoices and LMHP correspondence. These requests are clearly overly burdensome to the Movants and appear to be principally related to issues that are not part of the pending appeal. In conclusion, we find that the subpoenas directed at Mr. Halmi and Mr. Willow should be quashed as requested.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 7th day of February, 2024, it is hereby ORDERED that Movants Steve Halmi's and Norm Willow's Motion to Quash/Request for Protective Order is **granted**.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 7, 2024

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
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)

For Movants:
Andrew M. Schmidt, Esquire
(via electronic mail)

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: February 7, 2024**

OPINION AND ORDER ON
PERMITTEE'S MOTION FOR PARTIAL DISMISSAL

By MaryAnne Wesdock, Judge

Synopsis

A permittee's motion for partial dismissal is 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. 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. Where the wells have not been drilled and the renewal simply extended the date of the permits, the scope of the appeal is limited. However, where the record before us contains factual disputes and it is unclear what information was considered by the Department in renewing the permits, the motion must be denied in part.

O P I N I O N

Background

This matter is a consolidated appeal brought by Protect PT challenging two unconventional gas well permits issued to Apex Energy (PA), LLC (Apex) by the Department of Environmental Protection (Department) for the Drakulic well site in Penn Township, Westmoreland County.

Protect PT is a grassroots nonprofit organization "formed in December of 2014 to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development." (Notice of Appeal, Docket No. 2022-072-W, para. 7.) Protect PT appealed the issuance of the permits in 2022 and the renewal of the permits one year later in 2023. The appeals have been consolidated.

The matter pending before the Board is a Motion for Partial Dismissal (motion) filed by Apex, seeking to dismiss several of the objections raised in the appeal of the permit renewal. The Department filed a memorandum of law in support of the motion, and Protect PT filed a response in opposition. Both the Department and Apex have filed replies, and the motion is ripe for review. Based on the parties' filings, a more detailed history of this matter is set forth below.

On August 17, 2022, the Department issued permits to Apex for the Drakulic 1H and 7H wells. On September 19, 2022, Protect PT appealed the issuance of the permits, and the appeal was docketed at Docket No. 2022-072-B. In its motion Apex states that it 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] In the interim, Protect PT filed a substitution of counsel. On September 14, 2023, Protect PT appealed the renewal of the permits, and the appeal was docketed at 2023-074-B. On September 19, 2023, both appeals were consolidated at the latter docket number. On December 28, 2023, the consolidated appeal was reassigned and docketed at Docket No. 2023-074-W.

Standard of Review

[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).

"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*, EHB Docket No. 2023-043-B, *slip op*. at 4-5 (Opinion and Order on Partial Motion to Dismiss issued October 6, 2023); *Ongaco v. DEP*, EHB Docket No. 2023-022-CS, *slip op*. at 3 (Opinion and Order on Motion to Dismiss issued July 25, 2023); *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op*. at 2-3 (Opinion and Order on Motion to Dismiss issued May 15, 2023); *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol*, 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. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570. The standard for motions to dismiss also applies to motions for partial dismissal. *Borough of Jessup v. DEP*, EHB Docket No. 2023-068-L, *slip op.* at 3 (Opinion and Order on Motion to Dismiss in Part issued January 25, 2024); *Latkanich, slip op*. at 5; *Popovich v. DEP*, EHB Docket No. 2021-082-B (Opinion and Order on Motion to Dismiss Certain of Appellants' Objections issued March 22, 2023).

Discussion

This matter involves a consolidation of two appeals from the following actions: the issuance of the well permits for the Drakulic 1H and 7H wells (the Initial Appeal) and the renewal

of those permits (the Renewal Appeal). Apex seeks to dismiss a number of objections raised in the Renewal Appeal as being beyond the scope of the appeal.

We turn first to an analysis of the Board's case law on this subject.

Scope of Renewal Appeal

It is well-established that an appellant may not use an appeal of a permit renewal to challenge the issuance of the permit in the first place. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134 ("An appellant may not use the occasion of an action that takes the form of a change, renewal, or update to challenge whether the original permit should have been issued in the first place.") *See also*, *Friends of Lackawanna*, 2017 EHB 1123, 1163-64; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 248, *aff'd,* 131 A.3d 578 (Pa. Cmwlth. 2016); *Love v. DEP*, 2010 EHB 523, 525; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359. In an appeal of a permit renewal, "an appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed." *Solebury Township v. DEP*, 2004 EHB 95, 112-13.

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*, 2004 EHB 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. In *Friends of Lackawanna*, the Board considered an appeal of a renewal of a landfill permit. Writing for the Board, Judge Labuskes explained the Board's scope of review:

> Defining the precise boundaries of what should be evaluated in a permit renewal can undoubtedly be challenging. Permit "renewals require something more than the mindless application of a rubber stamp but something less than a reexamination of the merits of any earlier permitting decisions regarding the landfill." *Friends of Lackawanna [v. DEP]*, 2016 EHB 815, 819. Our review of a permit

> renewal, of course, is not whether the landfill should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *See Sierra Club v. DEP*, [2017 EHB 685]. A party may not use an appeal from a later Department action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action. *Love v. DEP*, 2010 EHB 523, 525. However, we have repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so.

Friends of Lackawanna, 2017 EHB at 1163-64. Thus, the Board's scope of review in considering an appeal of a permit renewal is to ensure that the *continuation* of the permitted activity is appropriate.

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 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.

Much of the Board's jurisprudence addressing the question of the appropriate scope of review in the appeal of a permit renewal has involved an appellant who has not appealed the original permit but has appealed a permit renewal or reissuance down the road, or where the Department is charged with periodic review of the permit. For example, in *Friends of Lackawanna*, at the time of the appeal of the permit renewal the landfill in question had been operating for more than 30 years and had gone through several other renewals and modifications. The Board took into consideration the fact that under the municipal waste regulations the

Department was periodically required to evaluate the landfill permit "to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices." 2017 EHB at 1164 (quoting 25 Pa. Code § 271.211(d)). Similarly in *Sierra Club*, 2017 EHB 685, the appellant appealed a 2015 reissuance, renewal and modification of a landfill permit that had been issued decades earlier and was subject to a major modification in 2009. The Board noted that the renewal, reissuance and modification was an opportune time to ensure that the operation was being conducted in accordance with the law, especially since the modification allowed the disposal of waste from a new source. *Id.* at 690-91. Likewise, *PQ Corporation* involved a Title V permit that had been issued in 2000. The permit had been renewed once and amended three times before a subsequent renewal was appealed in 2016 by the holder of the permit who claimed that emissions data from the operation of the facility warranted a change in one of the permit's limits. The Board rejected the Department's argument that the permit limits could not be challenged because the permit was administratively final, stating, "[W]hether PQ should be permitted to continue to operate its furnace for another five years, and if so, pursuant to what terms and conditions, is a perfectly legitimate and appropriate inquiry for the Department to make and for us to review." 2017 EHB at 875.

In those cases, the Board recognized that "Departmental permits…last a long time. They need to be reviewed and possibly updated or modified over time." *Wheatland Tube*, 2004 EHB at 133-34. The occasion of a permit renewal provides just such an opportunity "to ensure that an operation is being run in accordance with the law." *Sierra Club*, 2017 EHB at 690 (quoting *Rausch Creek,* 2011 EHB 708, 727).

However, unlike the permits at issue in *Friends of Lackawanna*, *Sierra Club* and *PQ Corporation*, here there is no ongoing operation that may be reviewed to ensure that it "is being

run in accordance with the law." Apex's permit was issued in August 2022 and extended only one year later in August 2023. The wells have not been drilled during the pendency of this litigation. There is no "continued operation" to evaluate.

Protect PT acknowledges that the scope of an appeal of a permit renewal is more limited than an appeal of the original permit, but it asks us to take a more expansive view in this case. It directs our attention to *Brockway Borough Municipal Authority* as support for its position. In that case, like here, the appellant appealed both the issuance of an unconventional gas well permit and the permit renewal, and the cases were consolidated. The appeal of the renewal included a challenge brought under Article I, § 27 of the Pennsylvania Constitution that had not been raised in the appeal of the original permit. In its adjudication of the matter, the Board took into consideration the particular facts of the case – specifically, 1) the appellant had appealed both the permit and the renewal, 2) neither the original permit nor the renewal were final due to the appeals, 3) the appeals were consolidated, and 4) the permittee had not yet drilled the well – and determined, "Under these circumstances there is no occasion to apply some diminished version of the Article I, Section 27 analysis because a renewal is involved." *Brockway Borough Municipal Authority*, 2015 EHB at 248.

Protect PT points out that the circumstances of this case are similar to what occurred in *Brockway* – i.e., Protect PT has appealed both the issuance of the permits and the renewals, the permits and renewals are not final, the appeals have been consolidated and Apex has not drilled the wells – and, therefore, argues the Board should not "apply some diminished version of an analysis. . .of Appellant's objections because a renewal is involved." (Notice of Appeal, Docket No. 2023-074-W, para. 12.)

However, while Protect PT is correct that many of the facts in *Brockway* parallel the facts of this case, there are some important differences. Notably, in *Brockway* there was no dispute among the parties over what issues were properly included in the appeal of the permit renewal. The parties agreed that the Article I, Section 27 challenge was part of the renewal appeal. The question facing the Board was not whether the Article I, Section 27 claim should be permitted within the scope of the renewal appeal, but whether the Board's analysis under Article I, Section 27 was limited because a renewal was involved.[2] *Brockway* does not stand for the proposition that the scope of a permit renewal appeal is broadened when the initial permit is also appealed. The Board's case law remains clear that 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.

Apex's Motion

We turn now to the specific objections in the Renewal Appeal that Apex asserts should be dismissed. They may be summarized as follows: 1) Paragraphs 25-29 – claims regarding the use, generation and discharge of hazardous chemicals; 2) Paragraphs 30-42 – claims regarding the failure to limit, disclose or properly manage TENORM;[3] 3) Paragraphs 43-52 – claims regarding climate destabilization; 4) Paragraphs 53-69 – claims regarding endangerment and impact to human health and vulnerable populations and threats to ambient air quality, as well as claims that the Department failed to take into account cumulative impact or perform a harms/benefits analysis;

[2] We note that Protect PT has raised a number of Article I, Section 27 claims in both its Initial Appeal and its Renewal Appeal (paragraphs 19-24) which have not been challenged by Apex in its motion and which will be evaluated by the Board.

[3] TENORM is "technically enhanced naturally occurring radioactive material." *Liberty Township v. DEP*, EHB Docket No. 2021-007-L, *slip op* at Findings of Fact 186-188 (Adjudication issued January 8, 2024).

5) Paragraphs 70-73 – claims regarding the failure to consider public input, perform a holistic review, or take into account the cumulative effect of surrounding sources of pollution; 6) Paragraphs 74-75 – claims regarding 25 Pa. Code § 127.14(8)(38c) (which pertains to exemptions to plan approvals for sources of air emissions); 7) Paragraphs 76-86 – claims regarding deficiencies of the Preparedness, Prevention, and Contingency Plan (PPC plan); and 8) Paragraphs 96-106 – claims regarding the Section 503 permit block provision of the Clean Streams Law, 35 P.S. § 691.503.[4]

Some of the claims pertain to the issuance of the initial permits (Initial Permits) and alleged deficiencies in the applications for the Initial Permits. As we have stated, challenges to the Initial Permits are outside the scope of the Renewal Appeal. Accordingly, those objections pertaining to the Initial Permits are dismissed. We turn our attention to the remaining objections, which we shall refer to as the "Renewal Objections."

Both Apex and the Department contend that the Renewal Objections are an attempt to expand the scope of the Initial Appeal.[5] They point out that the Renewal Appeal raises a number

[4] This paragraph provides a summary of the objections challenged by Apex. The actual objections that Apex seeks to dismiss are those set forth in paragraphs 25-86 and 96-106 of the Renewal Appeal. (Apex Motion, p. 5 and Proposed Order to Motion.)

[5] The Initial Appeal set forth 10 objections that may be summarized as follows: 1) Paragraph 66 -The issuance of the well permits constitutes a public nuisance due to Apex's compliance history and violates the Department's obligations under 71 P.S. § 510-17 and Article I, Section 27 of the Pennsylvania Constitution (Article I, Section 27); 2) Paragraph 67 - The permits authorize the introduction of PFAS, PFOA and other related chemicals into the environment through hydraulic fracturing in violation of the Department's duty under Article I, Section 27; 3) Paragraph 68 - The permits 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 duty under Article I, Section 27; and 4) Paragraphs 69-73 and 75 - Apex's emergency response plan fails to comply with various subsections of 25 Pa. Code Chapter 78a.55 (dealing with emergency response for unconventional wells). (Notice of Appeal, para. 66-73, 75.) The Initial Appeal also alleged that the Department failed to adequately address impacts to threatened and endangered species habitat, but this objection was subsequently withdrawn. (Notice of Appeal, para. 74; Order issued by the Board on June

of new objections that were not raised in the Initial Appeal. In support of this contention, Apex provides a comparison between the Initial Appeal and the Renewal Appeal which it says demonstrates that the majority of the Renewal Appeal contains new material as compared to the Initial Appeal. (Exhibit F to Motion.) The Department argues that any attempt to raise issues that were not in the Initial Appeal must be done by means of a motion to amend the Initial Appeal, not by raising the issues as part of the Renewal Appeal.

However, in determining what is the proper scope of the Renewal Appeal, our inquiry is not whether the objections set forth in the Renewal Appeal correspond to or differ from objections set forth in the Initial Appeal. The Initial Appeal and the Renewal Appeal are two separate appeals of two separate actions, each with its own scope of review. As we noted earlier, the circumstances here differ from most of the Board's previous cases addressing the appropriate scope of review of an appeal of a permit renewal. Those cases involved an appeal of a permit renewal where there had been no appeal of the issuance of the permit in the first place. Here, Protect PT has appealed both the issuance of the permits and the renewal of those permits, and the appeals have been consolidated at the joint request of the parties. However, the consolidation of the appeals does not change the standard for determining the proper scope of review.

Consolidation is governed by 25 Pa. Code § 1021.82(a), which provides: "The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings." The typical consolidation involves multiple appeals from the same Department

15, 2023, striking paragraph 74 of the Notice of Appeal pursuant to the request of Protect PT, consented to by the Department and Apex.)

action. *Bucks County Water & Sewage Authority v. DEP*, 2013 EHB 203. Here, we have two separate, though related, actions by the Department that have been appealed by the same party, involving the same permits. We also have two different appeals, where certain issues raised in the Renewal Appeal were not raised in the Initial Appeal, and where certain issues raised in the Renewal Appeal were clearly raised in the Initial Appeal.

As the Board said in *Bucks County*, "[c]onsolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements." 2013 EHB at 205 (citing *Borough of Danville v. DEP,* 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23). The Board has broad discretion to manage its cases, specifically with regard to consolidation. *Borough of Danville v. DEP*, 2008 EHB at 378.

In *Barshinger v. DEP*, 1996 EHB 1021, the Board declined to consolidate where it found that there were not sufficient common issues of law and fact. That case, as here, involved two appeals filed by the same appellants, of two separate Department actions, both relating to the same project. The Board found that certain issues raised in one appeal were not part of the other appeal. In cases where issues are drastically different, proceeding with separate appeals may make sense. For example, where the Department has undertaken a very different analysis in deciding to renew a permit than it did in issuing the permit in the first instance, it may be more appropriate to pursue the renewal appeal as a separate matter.

In this case, we have determined that consolidation of the two appeals is appropriate for the sake of judicial economy and the convenience of the parties. However, it is important to keep in mind that, although this is one "case" for purposes of managing the docket, conducting

discovery and engaging in other prehearing matters, 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 not whether they are related to objections raised in the Initial Appeal but whether they relate to the renewal of the permits.

We begin our analysis by reviewing what the Department considered when it made the decision to renew the Drakulic 1H and 7H well permits. *Friends of Lackawanna*, 2017 EHB at 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.") Here, both Apex and the Department assert that the renewal of the permits was in essence a ministerial action. They point to Section 78a.17(b) of the regulations which sets forth the application requirements for the renewal of an unconventional gas well permit. The process simply requires the payment of a fee and surcharge and an affidavit stating that the original application remains accurate and complete. 25 Pa. Code § 78a.17(b). The record demonstrates that Apex submitted to the Department the necessary affidavits attesting to the fact that the information in the applications for the Initial Permits was still accurate and complete. (Exhibit A to Department's Memorandum). According to the Department, "[t]his limited submission and review process results in a very narrow Department action, which only turns upon whether the original application is still accurate and complete." (Department Memorandum in Support of Partial Motion, p. 5.)

However, according to the Department's record of decision, provided as a link in Apex's Memorandum of Law in Support of its Motion, the Department conducted not only a completeness review but also a technical review.[6] The technical review indicates that water supply information

[6] eFACTS on the Web (pa.gov)

was updated and that certain other information was considered.[7] The decision record states, "DEP concludes based on its review that public natural resources will be protected, conserved, and maintained, while allowing for the development of natural gas on the Drakulic well site."[8]

The record of decision 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.

Accordingly, we enter the following order:

[7] August 7, 2023 Memo from Andrea Mullin, Licensed Professional Geologist, DEP Office of Oil and Gas Management, to Thomas E. Donahue, P.G., Environmental Program Manager, DEP Office of Oil and Gas Management, through Heather Campbell, Professional Geologist Manager, DEP Office of Oil and Gas Management Microsoft Word - Renewal ROD Drakulic FINAL (pa.gov)

[8] *Id*. at p. 5.

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 7th day of February, 2024, it is hereby ordered as follows:

1) Apex's Motion for Partial Dismissal is *granted in part*.

2) Paragraphs 27, 29, 32, 36, 37, 38, 70, 71, 74, 81, 86 and 103 and portions of Paragraphs 52, 67 and 96 of the Renewal Appeal constitute challenges to the Initial Permits and therefore they are **dismissed** for the reasons set forth in this Opinion.

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: February 7, 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

LAURA M. TIGHE AND MATTHEW A. TIGHE	:	
v.	:	**EHB Docket No. 2023-046-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 8, 2024**

OPINION AND ORDER ON
MOTION TO QUASH/PROTECTIVE ORDER

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

O P I N I O N

Laura and Matthew Tighe ("the Appellants") filed an appeal with the Environmental Hearing Board ("the Board") of a letter issued by the Department of Environmental Protection ("the Department") following an informal hearing ("Informal Hearing") held by the Department pursuant to 25 Pa. Code § 102.32(c). 25 Pa. Code § 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.

The conservation district action that was the basis for the informal hearing in this case was a Chapter 102 inspection report dated March 3, 2023 ("March 2023 Report") that documented a February 24, 2023 inspection (February 2023 Inspection") conducted by the Erie County Conservation District ("ECCD"). The February 2023 Inspection was conducted at the Lovett's

Mobile Home Park ("LMHP") in Washington Township, Erie County. Following the Informal Hearing, which was held on April 13, 2023, the Department set forth its final determination in a letter to the Appellants dated April 19, 2023 ("the Determination Letter"). The Determination Letter set forth the following determination: "The Department has determined that the Inspection Report is informative in nature and merely records the inspector's observations. The Inspection Report is descriptive and advisory and not prescriptive or imperative. Accordingly, the Inspection Report is not a challengeable action." (Notice of Appeal at 8).

The Appellants' appeal of the Determination Letter was filed with the Board on May 18, 2023. The parties have been proceeding with discovery in this case. The Appellants have issued several subpoenas to parties and non-parties as part of their discovery efforts. At some point prior to January 16, 2024, the Appellants issued a subpoena to Gene Clemente ("Mr. Clemente"), a former ECCD employee, who is non-party in this action. The subpoena sought to depose Mr. Clemente on January 26, 2024 at the Department's Meadville office and did not direct him to provide any documents. (Mr. Clemente's Motion to Quash, Ex. A).

On January 16, 2024, Mr. Clemente filed a Motion to Quash/Request for Protective Order ("Motion to Quash"). In addition to Mr. Clemente's Motion to Quash, the Board received two other motions requesting that it quash additional subpoenas issued by the Appellants. The Board conducted a conference call with the Appellants and the Department on January 23, 2024, and following the call, issued an order setting the deadline for a response to the Motion to Quash and further stayed the deposition of Mr. Clemente until the Board ruled on the Motion to Quash and the other pending motions[1]. The Appellants filed their Opposition to the Motion to Quash and

[1] Along with the Motion to Quash discussed herein, the Board's January 23rd Order also applied to the Department's motion for a protective order and other non-parties' motions to quash/protective order.

Brief in Support thereof on January 30, 2024 and filed several supplements in the form of exhibits the next day. This matter is now ripe for decision.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Since it can 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 & Gas Corp*., 2016 EHB 20, 24; *Parks v. DEP*, 2007 EHB 57. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

The Board authorizes parties to serve subpoenas in accordance with the applicable Pennsylvania Rules. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a non-party any documents that are normally within the scope of discovery under Rules 4003.1 - 4003.6. Pa.R.C.P. No. 4009.1(a). A person who is the subject of a subpoena may move for a protective order under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney v. DEP*, 2014 EHB 293, 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. “[I]n

evaluating whether discovery regarding a matter should be permitted, we must first determine whether it will lead to information that is relevant to the subject matter involved in [the] appeal. If the matter being inquired into is not likely to lead to the discovery of relevant evidence, that is the end of our inquiry. The discovery is not permitted." *Cabot Oil & Gas Corp*., 2016 EHB 20, 26.

In ruling on Mr. Clemente's Motion to Quash, we first must assess whether there is a reasonable potential that his testimony will lead to evidence relevant to this appeal. Mr. Clemente asserts that he is not in possession of relevant information pertaining to this appeal. In support of that assertion, Mr. Clemente points to the fact that his employment ended with the ECCD in September of 2022. As such, he had no personal involvement in the ECCD's February 2023 Inspection, or in the preparation of the March 2023 Report, and has no knowledge of the Informal Hearing. While the Appellants do not dispute that Mr. Clemente was not involved in the February 2023 Inspection or March 2023 Report, they argue that Mr. Clemente has information relevant to their appeal. The Appellants state that "[t]he report of February 24, 2023 was the second in sequence of two related reports. The first report was conducted by the movant, Mr. Clemente, (Exhibit 3), on March 24, 2022 […]" (Appellant's Brief in Support of Opposition at 2; see, Appellants' Supplements to Brief, Ex. 3). The Appellants also produced two additional inspection reports (an earth disturbance inspection report and a water obstruction or encroachment report) of LMHP that both took place in 2022. (See, Appellants' Supplements to Brief, Exs. 3, 4, at Docket No. 30).

In this case, the Department action that is under appeal is the Determination Letter. The generation of the Determination Letter essentially arose from three separate but related occurrences – the February 2023 Inspection, the March 2023 Report, and the Informal Hearing.

While Mr. Clemente did not directly participate in any of those three actions, we find that the evidence produced by the Appellants creates a sufficient connection between Mr. Clemente and those actions that demonstrates that Mr. Clemente's testimony has the potential to produce relevant evidence to the matter under appeal. The March 2023 Report indicates that the ECCD's February 2023 Inspection was a follow-up to an earlier ECCD inspection pertaining to earth disturbance which was conducted by Mr. Clemente on March 24, 2022. Because the follow-up February 2023 Inspection necessarily flowed from the inspection Mr. Clemente conducted in March 2022 and from the subsequent inspection report he authored, his involvement is sufficiently related to the relevant ECCD actions that ultimately lead to this appeal. Further, Mr. Clemente was present on May 13, 2022 during a Department inspection of LMHP pertaining to water obstructions/encroachments. The exact relationship of this inspection to ECCD's later February 2023 Inspection is unclear, but given the timing and the participation in the inspection by ECCD staff, we find that the facts surrounding the May 2022 inspection are a proper line of inquiry in discovery as part of the developing record in this case. Although Mr. Clemente did not conduct the May 2022 inspection, his attendance makes him a person who can attest to first-hand information in relation to that inspection. In interpreting the relevance requirement broadly as we should, we find that there is a reasonable potential that Mr. Clemente's testimony could lead to relevant information.

Mr. Clemente further asserts that "[r]equiring [his] appearance and testimony at a deposition would be unreasonable and burdensome […], requiring time away from his current employment, travel to another county, and related expenses." (Mr. Clemente's Motion to Quash at 2). We are mindful that any discovery is governed by a proportionality standard and one of the factors we must consider is the cost, burden, and delay that may be imposed on the parties to deal

with the information. *Cabot Oil & Gas Corp*., 2016 EHB 20, 26; *Friends of Lackawanna v. DEP*, 2015 EHB 785, 787. Hence, even material that is likely to lead to relevant evidence may not be available in discovery if the burdens associated with producing it outweigh its value. When we consider the facts presented, we hold that the burden on Mr. Clemente does not outweigh the potential value of his testimony, particularly considering the restriction on the duration of the deposition we are putting in place. The Appellants have not requested for Mr. Clemente to produce any documents and the record demonstrates that his deposition will take both limited time and travel on his part. A separate motion for a protective order filed by the Department included an email from the Appellants to Department counsel, where Appellants state that the deposition of Mr. Clemente would take less than one hour. See, Department's Response to Appellants' Letter in the Nature of a Motion for Protective Order, Ex. 2 at Docket No. 21. In light of that declaration by the Appellants, we are restricting the time of the deposition to not exceed 1.0 hour. In conclusion, we find that the information sought in the subpoena served on Mr. Clemente has the potential to provide relevant information and that providing that information does not impose an unreasonable burden on him. We hold that the Motion to Quash should not be granted and that discovery sought by the subpoena directed at Mr. Clemente is permitted.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 8th day of February, 2024, it is hereby ORDERED that Gene Clemente's Motion to Quash/Request for Protective Order is **denied**. Mr. Clemente may be deposed by Appellants at a time and location mutually agreed to by Mr. Clemente and the parties. The length of the deposition may not exceed 1.0 hour.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 8, 2024

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
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)

For Movant:
Gene R. Clemente
gr.clemente0710@gmail.com
(via electronic mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURA M. TIGHE AND MATTHEW A. TIGHE	:	
v.	:	**EHB Docket No. 2023-046-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 9, 2024**

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies the Department's motion for a protective order where the individuals who the Appellants seek to depose have reasonable potential of producing relevant information pertaining to the issues in the appeal. The Board exercises its responsibility to oversee discovery and limits the length of the depositions and the scope of the subjects that the Appellants may raise in their questioning.

O P I N I O N

Laura and Matthew Tighe ("the Appellants") filed an appeal with the Environmental Hearing Board ("the Board") of a letter issued by the Department of Environmental Protection ("the Department") following an informal hearing ("Informal Hearing") held by the Department pursuant to 25 Pa. Code § 102.32(c). 25 Pa. Code § 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.

The conservation district action that was the basis for the informal hearing in this case was a Chapter 102 inspection report dated March 3, 2023 ("March 2023 Report") that documented a February 24, 2023 inspection (February 2023 Inspection") conducted by the Erie County Conservation District ("ECCD"). The February 2023 Inspection was conducted at the Lovett's Mobile Home Park ("LMHP") in Washington Township, Erie County. Following the Informal Hearing, which was held on April 13, 2023, the Department set forth its final determination in a letter to the Appellants dated April 19, 2023 ("the Determination Letter"). The Determination Letter set forth the following determination: "The Department has determined that the Inspection Report is informative in nature and merely records the inspector's observations. The Inspection Report is descriptive and advisory and not prescriptive or imperative. Accordingly, the Inspection Report is not a challengeable action." (Notice of Appeal at 8).

The Appellants' appeal of the Determination Letter was filed with the Board on May 18, 2023. The parties have been proceeding with discovery in this case. The Appellants have issued several subpoenas to parties and non-parties as part of their discovery efforts. On December 29, 2023, the Appellants served Notices of Depositions to the Department for the depositions of Pete Schuster ("Mr. Shuster"), the Department's Northwest Regional Waterways and Wetlands aquatic biologist, and Tom Revak ("Mr. Revak"), an ECCD employee.

On January 12, 2024, the Appellants filed a letter with the Board, requesting a "judicial conference" to address a discovery dispute between the Department and Appellants that involved the Department's objections to the Appellants' deposition requests. The Department filed a Response to Appellant's Letter in the Nature of a Motion for Protective Order ("the Motion") on January 18, 2024, requesting the Board to preclude the Appellants from deposing Mr. Shuster and

Mr. Revak. In addition to the Department's Motion, the Board received two other motions requesting that it quash additional subpoenas issued by the Appellants. The Board conducted a conference call with the Appellants and the Department on January 23, 2024, and following the call, issued an order setting the deadline for a response to the Motion and further stayed the depositions of Mr. Schuster and Mr. Revak until the Board ruled on the Motion and the other pending motions[1]. The Appellants filed their Opposition to the Motion and Brief in Support thereof on January 30, 2024 and filed several supplements in the form of exhibits the next day. This matter is now ripe for decision.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Since it can 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 & Gas Corp*., 2016 EHB 20, 24; *Parks v. DEP*, 2007 EHB 57. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

[1] Along with the Motion discussed herein, the Board's January 23rd Order also applied to other non-parties' motions to quash/request for protective orders.

The Board authorizes parties to serve subpoenas in accordance with the applicable Pennsylvania Rules. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a non-party any documents that are normally within the scope of discovery under Rules 4003.1 - 4003.6. Pa.R.C.P. No. 4009.1(a). A person who is the subject of a subpoena may move for a protective order under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney v. DEP*, 2014 EHB 293, 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. "[I]n evaluating whether discovery regarding a matter should be permitted, we must first determine whether it will lead to information that is relevant to the subject matter involved in [the] appeal. If the matter being inquired into is not likely to lead to the discovery of relevant evidence, that is the end of our inquiry. The discovery is not permitted." *Cabot Oil & Gas Corp*., 2016 EHB 20, 26.

In ruling on the Department's Motion, we first must assess whether there is a reasonable potential that either Mr. Shuster's or Mr. Revak's testimony will lead to evidence relevant to this appeal. Looking first at the notice of deposition for Mr. Schuster, the Department argues that "Mr. Schuster has no material knowledge of the Informal Hearing, the [March 2023 Report], or the [February 2023 Inspection] and, accordingly, possesses no information that would be in any way relevant to this appeal" making it unlikely that his testimony would lead to admissible evidence. (Department's Motion at 5). In this case, the Department action that is under appeal is the Determination Letter. The generation of the Determination Letter essentially arose from three separate but related occurrences – the February 2023 Inspection, the March 2023 Report, and the Informal Hearing. While the Appellants do not dispute that Mr. Schuster did not directly

participate in any of those three actions, the Appellants maintain that Mr. Schuster has information that is relevant to this appeal. It appears that the February 2023 Inspection was a follow-up to an earlier ECCD inspection that took place in March 2022. Following the March 2022 inspection, Mr. Schuster, accompanied by two ECCD staff, conducted a water obstruction/encroachment inspection at LMHP on May 12, 2022. Mr. Schuster then authored the accompanying inspection report on May 24, 2022. The exact relationship between the inspection conducted by Mr. Schuster and the ECCD's later February 2023 Inspection is unclear, but given the close timing between the March 2022 inspection and the May 2022 inspection, and the participation in the May 2022 inspection by ECCD staff, we find that the facts surrounding the May 2022 inspection are a proper line of inquiry in discovery as part of the developing record in this case. As the person who conducted the May 2022 inspection and author of the accompanying report, Mr. Schuster is in the best position to attest to any potentially relevant information pertaining to that inspection. In interpreting the relevance requirement broadly as we should, we find that there is a reasonable potential that Mr. Schuster's testimony could lead to relevant information.

As for Mr. Revak, the Department asserts that Mr. Revak has limited knowledge of the matter. The Department argues that while Mr. Revak was present during the February 2023 Inspection and prepared the first draft of the March 2023 Report, he was merely shadowing the actual inspector, Tom McClure ("Mr. McClure"), as a trainee and that Mr. Revak's preparation of the first draft was only a training exercise. The Department argues that rather than Mr. Revak, Mr. McClure is in a better position to provide relevant information because it was Mr. McClure who conducted the February 2023 Inspection, authored the final March 2023 Report, and was training Mr. Revak at the time of the February 2023 Inspection and, as such, Mr. Revak's testimony would only be duplicative to Mr. McClure's resulting in unnecessary cost, burden, and delay in reaching

a resolution of this matter. We disagree. Even if it turns out that Mr. McClure's testimony is more illuminating than the information that Mr. Revak can provide, that is not a sufficient reason to prevent the Appellants from deposing Mr. Revak. He can provide first-hand testimony surrounding the February 2023 Inspection and the creation of the March 2023 Report. Even if his knowledge is limited as the Department claims, Appellants should be permitted to hear his version of those key events in which he was an active participant, and which are clearly relevant to this appeal.

However, it appears the Appellants also wish to question Mr. Revak regarding several past work-related projects he was involved in pertaining to LMHP while he was employed by an engineering firm. The projects potentially date back as far as 2006. The Appellants assert that "[t]his appeal is a complex effort to show the Department that the inspection of February 24, 2023, was improper, did not address the issues raised in the complaint, and involves several different government agencies." (Appellants' Opposition to Motion at 16). In actuality, the scope of this appeal is much narrower than what the Appellants believe it to be. The Board has jurisdiction over final actions of the Department. *Jake v. DEP*, 2014 EHB 38, 59. In this case, the Department's "final action" under appeal is very limited and involves only the determination that the Department outlined in the Determination Letter it issued after the Informal Hearing took place. Questioning Mr. Revak about his past work involvement at LMHP is not a line of inquiry that is likely to produce relevant evidence that will inform us regarding the narrow issues in this appeal, which are whether or not the March 2023 Report (1) is informative in nature and merely recorded the inspector's observations; (2) is descriptive and advisory and not prescriptive or imperative, and; (3) is a challengeable action. Therefore, the deposition of Mr. Revak is restricted to inquiries

regarding his knowledge pertaining to the February 2023 Inspection, the March 2023 Report, and the Informal Hearing while employed by the ECCD.

In its motion, the Department expressed concern that "[it] has reason to believe Appellants will spend significant time attempting to go far beyond the scope of this appeal in any deposition, as was evidenced during third party depositions that were already taken in this matter where Appellants posed several hours of questions regarding a host of irrelevant information dating back to approximately 2004." (Department's Motion at 5-6). Attached to the Department's Motion is an email from the Appellants to Department counsel where Appellants state that the deposition of Mr. Schuster would take less than one hour and Mr. Revek's deposition would take one and a half hours. (See, Department's Motion, Ex. 2). Additionally, in their Opposition to the Motion, the Appellants state that they "anticipate being able to elicit more relevant testimony and information from Mr. Revak than Mr. McClure, which is why the Appellants anticipate that they need him to testify for ½ hour longer than Mr. McClure." (Appellants Opposition to Motion at 15). Presumably, the additional information the Appellants anticipated they could elicit from Mr. Revak was in relation to his past work activities involving LMHP. In light of the declaration by the Appellants in the email sent to the Department, and of the restrictions we are placing on the scope of the inquiries the Appellants may pose to Mr. Schuster and Mr. Revak, we are limiting the time of their depositions to not exceed 1.0 hour each. In conclusion, we find that the notice of depositions served to Mr. Schuster and Mr. Revak have the potential to provide relevant information and hold that the Department's Motion should not be granted to the extent the depositions conform to the Board's restrictions.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 9th day of February, 2024, it is hereby ORDERED that the Department's Motion for a Protective Order is **denied** in accordance with the foregoing Opinion. Mr. Schuster and Mr. Revak may be deposed by Appellants at a time and location mutually agreed to by the parties. The length of Mr. Schuster's deposition may not exceed 1.0 hour. The length of Mr. Revak's deposition may not exceed 1.0 hour and is limited as to subject matter as set forth in the Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 9, 2024

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
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

JOHN AND ROSE MATHEWS	:	
	:	
v.	:	**EHB Docket No. 2023-061-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Intervenor	:	**Issued: February 20, 2024**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Sarah L. Clark, Judge

Synopsis

The Board grants the Department's and Intervenor's Motions to Dismiss where the *pro se* appellants have evidenced a demonstrable disinterest in pursuing their appeal.

O P I N I O N

This matter concerns a *pro se* appeal filed by John and Rose Mathews ("Mathewses"), seemingly to the Department of Environmental Protection's ("Department") June 30, 2023 approval of Sunoco Pipeline, L.P.'s ("Sunoco") Land Recycling and Environmental Standards Act 2 Final Report for Groundwater following remediation of a pinhole release of refined petroleum products from a 12-inch pipeline owned by Sunoco that occurred near the Mathewses' property on April 10, 2015.

On August 3, 2023, the Board docketed a Notice of Appeal received by mail from John and Rose Mathews. While the Notice of Appeal form was included in the filing, the only information provided on the form were the names and contact information of the Appellants, and

the signature page, which was signed and dated July 29, 2023. Attached to the mostly blank form was a single page, which, following contact information, stated in its entirety:

> SUB: Notice of Appeal. (Oil spill, injury to person property, 1423 Grady Ville Road Glen Mills Pa. 19342)
> Before this approval,
> Is this oil spill is [sic] whose fault, my fault or oil pipe line company?
> How this pipeline oil spillage took place?
> How long and how many barrels of oil is leaked?
> How much land area, wet land and water way is flooded with this oil spill?
> Estimate a Total area contamination?
> Affected streams and nearby water systems including my drinking water sources affected?
> I think, it is a state crime, and the state is responsible to answer my con [sic]
> Due to all of these un answered [sic] and in conclusive [sic] work conducted so far,
> I *request your good office to not approve the order*.

Notice of Appeal at 1, (emphasis in original). The following day, August 4, 2023, the Board issued its standard Pre-Hearing Order No. 1 and an Order to Perfect the appeal, directing the Mathewses to send a copy of the Department action being appealed, the name of the Department officer who took the action, the date they received notice of the Department's action, and clear objections to the Department's action by August 23, 2023. After the Mathewses failed to respond by the 23rd, the Board issued an Order to Comply with Order to Perfect, giving the Mathewses until September 12, 2023 to provide the information requested in the Order to Perfect.

In early September, Board staff communicated extensively with Mr. Mathews via phone and email. In these communications, Board staff explained that their Notice of Appeal initiated a legal proceeding in which the Mathewses' continued and active participation would be required, and that certain information and general compliance with Board orders and deadlines were necessary to maintain their appeal. Board staff further explained that, while the Mathewses were entitled to proceed *pro se*, their *pro se* status would not excuse them from this compliance, and it is generally recommended that appellants in front of the Board seek legal counsel. Board staff

then provided Mr. Mathews with the Citizens Guide to Practice Before the Environmental Hearing Board via email and indicated the pages wherein he could find information on how to obtain legal counsel, *pro bono* or otherwise. Mr. Mathews indicated his understanding and enrolled in efiling; however, across several phone calls, Mr. Mathews vehemently denied the need for counsel, to which Board staff repeated that the choice was theirs, that Board staff cannot provide legal advice, and that engaging counsel is always suggested.

On September 8, 2023, the Board received a fax from the Mathewses which included the Department's June 30, 2023 letter approving the Act 2 Final Report for Groundwater and a one-page affidavit. While this filing was somewhat responsive to the Board's Order to Perfect the appeal remained incomplete, and the Board issued an Order for Date of Notice on September 12, 2023 – the date the Response was docketed – giving the Mathewses until September 19, 2023 to provide the date they received notice of the Department's action. Following further phone conversations with Mr. Mathews on the afternoon of the 19th, the Board received an email from the Mathewses just before 5 pm that day stating that they received notice on July 7, 2023.

Two days later, on September 21, 2023, nearly a month outside of the twenty-day amendment by right window granted by 25 Pa. Code § 1021.53(a), the Board received a single-page filing entitled "Amended notice of appeal Appellant John Rose Mathews Appellee Pennsylvania environmental protection Board Amendment of Notice of Appeal." This filing was accompanied by neither a request for leave to amend the appeal nor supporting affidavits as required by 25 Pa. Code § 1021.53(a)-(c). This filing was the last communication that the Board has received from the Mathewses to date.

During this nearly two-month long back and forth between the Mathewses and Board staff, Sunoco filed a Petition to Intervene on August 16, 2023. After receiving no responses from the

Mathewses or the Department, the Board granted that Petition on September 6, 2023. On November 9, 2023, the Department filed a Motion to Dismiss, or in the alternative, Motion to Strike ("DEP Motion"), and on November 13, 2023, Sunoco joined in that Motion and filed its own separate Motion to Dismiss ("Sunoco Motion") as well. When the Mathewses did not file a response to either of those Motions within the 30-day response period provided by regulation, the Board issued a Rule to Show Cause as to why the Board should not dismiss the appeal as a sanction pursuant to 25 Pa. Code § 1021.161, which would be discharged if the Mathewses filed a response to the Motions on or before January 17, 2024. The Mathewses were further cautioned that failure to respond may result in dismissal of their appeal. The Mathewses did not file a response or otherwise contact the Board in any way, and the Motions are now ripe for decision.

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 Jan. 10, 2024); *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op*. at 2 (Opinion and Order on Motion to Dismiss issued May 15, 2023) (citing *Muth v. DEP*, 2022 EHB 262, 264); *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, EHB Docket No. 2022-093-C, *slip op*. at 4 (Opinion and Order on Motion to Dismiss issued July 14, 2023) (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Thus, "[a]s a practical matter, whether or not there are 'factual disputes' on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the nonmoving party states is true, can – or should – the Board hear the appeal?" *Consol v. DEP*, 2015 EHB 48, 55. Where the non-moving party does not file a response to a motion to dismiss, the Board "will

deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.91(f); *Burnside Twp. v. DEP*, 2002 EHB 700, 701. The rules further provide that failure to respond may result in the motion to dismiss being granted. 25 Pa. Code 1021.94(f).

Through their Motions, the Department and Sunoco make several arguments as to why this appeal should be dismissed. While the arguments made by the Department and Sunoco here may very well have merit, we decline to take them up and engage in "empty chair litigation" where the Appellants have opted not to respond. *Pirolli v. DEP*, 2003 EHB 514, 518. Instead, as we cautioned in our most recent order, we dismiss the appeal as a sanction pursuant to 25 Pa. Code § 1021.161:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

While dismissal is a harsh sanction, it is appropriate where the appellant has seemingly abandoned their appeal. *Slater v. DEP*, 2016 EHB 380, 381 ("The Board has repeatedly held that where a party has evidenced a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate."); *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113 ("The repeated indifference to the Board's orders and Rules affects the integrity of the appeal process before the Board."); *Casey v. DEP*, 2014 EHB 908, 910-11 ("Although dismissing a party's appeal is a drastic sanction, we have often held that it is appropriate in circumstances where a party has evinced an intention to no longer continue with its appeal.").

We are cognizant that the Mathewses have opted to proceed without counsel and still find dismissal to be appropriate. The Board takes the rights of *pro se* appellants very seriously, as we

do the rights of all parties appearing before us. *See Perrin v. DEP*, 2008 EHB 78. While *pro se* appellants are not given special consideration, Board staff often go out of their way, as they did here, to provide *pro se* appellants with the procedural information they require to sustain their appeals. *Schlafke v. DEP*, 2013 EHB 733 ("[*P*]*ro se* appellants are not excused from following the Board's rules of procedure. It must also be noted that during the course of this appeal, Ms. Schlafke participated in multiple telephone conversations with assistant counsel for the Board regarding the practices and procedures of the Board and the requirements for compliance with both.") While the Board may assist in this way, particularly when an appeal is in the process of being perfected, it is the responsibility of the parties – *pro se* or not – to meet deadlines and generally follow Board rules. *Perrin* at 81 ("We have also observed that although individuals have a constitutional right to proceed *pro se*, they still must comply with the same legal requirements that govern proceedings involving parties represented by counsel. Proceeding without counsel often is the legal equivalent of performing a medical operation on yourself."); *Green v. Harmony House North 15 Street Housing Association, Inc.*, 684 A.2d 1112, 1114-1115 (Pa. Cmwlth. 1996) ("The fact that Green decided to be her own lawyer does not excuse her from failing to follow the rules of civil and/or appellate procedure. 'The right of self-representation is not a license…not to comply with relevant rules of procedure and substantive law.'") (quoting *Faretta v. California*, 422 U.S. 806, 834 n. 6 (1975)).

Here, the Mathewses filed their appeal and failed to respond to the first Order to Perfect issued by the Board. While they did respond to the Order to Comply with Order to Perfect, they did so only after Board staff made phone contact with Mr. Mathews and explained that more information was required to sustain their appeal. Further, when the Mathewses did respond to the Order to Comply with Order to Perfect, they only provided a partial response, and the Board was

compelled to issue another order relating to the perfection of the appeal. Once again, the Mathewses only responded after yet another phone call with Board staff. Throughout these interactions, Board staff stressed the importance of following Board orders and rules and specifically cautioned Mr. Mathews that their choice not to engage representation meant that they were responsible for keeping track of deadlines, being responsive to orders issued by the Board and filings made by opposing parties, and understanding and complying with the rules that govern this adjudicatory process. Specifically, Board staff informed Mr. Mathews that he must check his mail regularly, and then when he signed up for efiling, that he must check his email – including his junk folder – regularly, and that the Mathewses could not simply presume that Board staff would reach out each and every time something was required of them to sustain their appeal because as a party to this litigation, that is their responsibility. Throughout these communications, Board staff also supplied Mr. Mathews with information on how to acquire counsel and encouraged him to do so. Despite these efforts by Board staff, the Mathewses have only ever responded to Board orders when chased down and prompted to do so in addition to receiving standard service, and none of their filings have conformed to Board rules. Now, they have failed to respond to both the Department's Motion and Sunoco's Motion within the regulation's response period and have further ignored the Board's Rule to Show Cause ordering them to respond to those Motions. Taken together, these facts evidence a demonstrable disinterest in proceeding with their appeal, and therefore dismissal is appropriate.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN AND ROSE MATHEWS	:	
	:	
v.	:	**EHB Docket No. 2023-061-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Intervenor	:	

O R D E R

AND NOW, this 20th day of February, 2024, it is hereby ordered that the Department's and Intervenor's Motions to Dismiss are **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: February 20, 2024

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

For the Commonwealth of PA, DEP:
William H. Gelles, Esquire
(via electronic filing system)

For Appellant:
John and Rose Mathews
(via electronic filing system)

For Intervenor:
Diana Amaral Silva, Esquire
(via electronic filing system)

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	:	**Issued: February 21, 2024**

OPINION AND ORDER ON
MOTION IN LIMINE

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

Synopsis

The Board grants in part a permittee's motion in limine where one of the appellants' expert reports addresses an issue that has no relation to the objections raised in the notice of appeal. The remainder of the motion is denied.

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. Discovery is completed in this matter and the parties

are currently in the midst of exchanging expert reports. Any dispositive motions are to be filed by March 28, 2024.

Transco has filed a motion in limine seeking to preclude the Appellants from offering any evidence with respect to three issues that have been addressed to some degree by two expert reports from the Appellants. Transco argues that the issues are beyond the scope of the Appellants' notice of appeal. Transco asserts that an expert report authored by Paul Cooper discusses potential impacts related to horizontal directional drilling as well as what Transco calls "third-party compliance history," both of which Transco argues are not included in the notice of appeal. Transco also argues that a report authored by Schmid & Company, Inc. discusses protections for bats and seasonal use restrictions, which are also not contained in or related to any objections in the Appellants' notice of appeal.

The Appellants argue in response that a motion in limine, at this juncture in the appeal, is entirely premature. The Appellants say the proper time for a motion in limine is after the parties have begun to file their pre-hearing memoranda, which has not happened in this appeal because as of now no hearing has been scheduled. The Appellants say this alone is reason enough to deny the motion. Alternatively, the Appellants assert that all of the topics that Transco seeks to preclude are properly within the genre of the water quality issues raised in their notice of appeal. The Department has filed a letter indicating that it does not oppose Transco's motion or the relief requested in the motion.

Initially, we do not agree that Transco's motion is necessarily premature, as argued by the Appellants. The pre-hearing schedule proposed by the parties and accepted by the Board provides for the exchange of expert reports and rebuttal expert reports over the course of two and a half months, so it is not particularly surprising that some potential evidentiary issues have been

identified in the reports in advance of any scheduled merits hearing or pre-hearing memoranda. It is true that a more typical motion in limine is filed close to the eve of a merits hearing. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. Indeed, the purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. However, while having the parties' pre-hearing memoranda in hand can be helpful to the Board for purposes of evaluating a motion in limine, to the extent deferring ruling on Transco's motion could require Transco to expend time and resources retaining an expert on an issue that has no relation to the notice of appeal filed by the Appellants, the motion is not necessarily premature.

Turning to the scope of the Appellants' notice of appeal, we have held that 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.

The six substantive paragraphs of the Appellants' notice of appeal all relate in some way to water quality and the potential impacts to waters of the Commonwealth from Transco's project. For instance, the Appellants contend that the permit terms and conditions allow for the degradation of certain high quality and exceptional value streams and wetlands. (Appeal at ¶¶ 1-3.) They say that Transco failed to demonstrate that its erosion and sedimentation controls and post-construction stormwater management best management practices will prevent thermal, sedimentation, and runoff impacts to streams and wetlands. (Appeal at ¶ 4.) They also say the permits do not contain sufficient monitoring and documentation requirements to ensure that water quality will be maintained and protected consistent with the regulatory antidegradation requirements. (Appeal at ¶ 5.)

Transco challenges the Cooper Report's references to horizontal directional drilling as outside the scope of these objections. However, the statements in the Cooper Report appear to be tied to concerns over impacts from the potential inadvertent return of drilling fluids in streams and wetlands during the horizontal directional drilling process. (*See* Motion, Ex. A at 2.) At least at this point in the proceedings, it appears that this issue has a tangible relationship to the water quality concerns expressed by the Appellants in their notice of appeal.

Transco next characterizes the Cooper Report's references to other pipeline projects and alleged problems with those projects as "third-party compliance history." Transco argues that, under Section 609 of the Clean Streams Law, 35 P.S. § 691.609, it is exclusively "the applicant's" compliance history that is relevant, and any discussion of whatever has happened with other operators or other non-Transco pipeline projects is unfairly prejudicial to Transco under Pennsylvania Rule of Evidence 403, Pa.R.E. 403. Putting aside the fact that Section 609 is also concerned with any "partner, associate, officer, parent corporation, subsidiary corporation,

contractor or subcontractor" of an applicant that has engaged in unlawful conduct, we do not read the Cooper Report as raising issues with "third-party compliance history." It looks to be more of a discussion by way of context of environmental impacts that could potentially be associated with pipeline projects, including impacts to streams and wetlands. We are, of course, focused in this proceeding on the permits under appeal and the Transco project authorized by those permits. The relevance of any other pipeline project to this appeal may be limited. However, we think it is premature to issue a blanket preclusion on any such discussion. We cannot say at this point that the issue is outside of the genre of the issues contained in the Appellants' notice of appeal.

Transco also directs our attention to the Schmid Report. (Motion, Ex. B.) The report generally assesses the effects from the Transco project on aquatic resources. However, Transco highlights portions of the report that discuss the protection of bats. For instance:

> Both Chapter 102 (XII.E. and F.) and Chapter 105 (RR.1. and 2., UU., and VV. in Monroe County; SS.1. and 2., WW., and XX. in Luzerne County) permit approval conditions address the protection of endangered bats. But the requirements of the application table cited in the permits are contradictory and leave bats along the pipelines unprotected. Areas where bat seasonal restrictions apply are nowhere shown on site plans….
>
> Most surface construction activities---trenching, blasting, pipe installation---are to be done in "summer" defined as 1 April through 15 November. But tree clearing can seriously disrupt roosting during the breeding season, so clearing must be done in "winter," 16 November through 31 March, when bats are hibernating underground. Work close to known hibernacula or acoustic record locations is restricted, but no such areas are identified on project drawings. (In contrast, the drawings do list out the various seasonal restrictions on disturbance allowed in each stream across the proposed pipeline corridors intended to protect fish.)
>
> ….
>
> If trees are cut at the wrong season, protected rare species of bats may be impacted. This should be rectified by drawings that show segments of ROW where construction is seasonally restricted because of bats, with clear directives as to what should and should not be done, where, and when.

(Ex. B at 27-28.)

We struggle to see how bat roosting and potential impacts to rare species of bats relate to the water quality objections expressed in the notice of appeal. The Appellants never explain how bat protections relate to their concerns over water quality. In response to the motion in limine, the Appellants offer nothing more than the blanket statement that all of the evidence Transco objects to, including bats, "fall[s] within the genre of risks to water quality." (Resp. Memo. at 4.) There is nothing specific in the response on how protections of bats and their roosting habitats relate to water quality. Even under the most permissive of standards there is nothing we can find in the Appellants' notice of appeal about bats. Therefore, Transco's motion is granted with respect to bat protections and seasonal use restrictions.

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 21st day of February, 2024, it is hereby ordered that the Permittee's motion in limine is **granted in part and denied in part**. The Appellants are precluded from offering evidence on bat protections and seasonal use restrictions.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 21, 2024

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

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
Sean L. Robbins, Esquire
Curtis C. Sullivan, Esquire
Margaret O. Murphy, Esquire
Robert A. Reiley, Esquire
(*via electronic filing system*)

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

For Appellants, Maya K. van Rossum, the Delaware Riverkeeper, and Delaware Riverkeeper Network:
Kacy C. Manahan, Esquire
(*via electronic filing system*)

For Permittee:
Andrew T. Bockis, Esquire
John R. Dixon, Esquire
Elizabeth U. Witmer, Esquire
Pamela S. Goodwin, 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: March 8, 2024**

OPINION AND ORDER ON
MOTIONS TO DISMISS AND MOTION TO STRIKE

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

Synopsis

The Board denies a motion to dismiss an appeal of an internal Department memorandum where the Department was required by stipulation of the parties to make the decision contained within the memorandum. The Board denies an appellant's motion to dismiss a third party from the appeal where the appellant has not shown as a matter of law that the third party lacks standing or that the failure to strictly adhere to the Board's rules on intervention warrants dismissing the party at this point in the proceedings. The appellant's motion to strike is denied.

O P I N I O N

Montgomery Township Friends of Family Farms ("Montgomery Friends") has appealed an August 14, 2020 memorandum written by a professional engineer at the Department of Environmental Protection (the "Department"). The memorandum appears to be internal to the Department. It memorializes an evaluation of information provided by Herbruck's Poultry Ranch, Inc. ("Herbruck's") assessing air emissions for what was then a proposed egg laying and processing farm in Montgomery Township, Franklin County. We are told the egg laying and

processing farm is currently 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) of the Air Pollution Control Act, 35 P.S. § 4004.1(b), and thus qualifies for an exemption under Section 4.1(a), 35 P.S. § 4004.1(a).[1] The effect of qualifying for the exemption, according to the memorandum, is that Herbruck's does not need to apply for a plan approval or a permit under the Air Pollution Control Act for the air emissions generated by its facility.

The history leading up to this memorandum extends back to an earlier appeal filed by Montgomery Friends in 2017 and docketed at EHB Docket No. 2017-080-R. In that appeal, Montgomery Friends 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 Concentrated Animal Feeding Operations. The dispute in that appeal 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 Montgomery Friends 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

[1] The Department memorandum twice cites 35 P.S. § 7004.1, which is not a provision of the Air Pollution Control Act. Section 4.1(a) of the Air Pollution Control Act provides:

> (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).

air emissions from its operation. Montgomery Friends alleged in that appeal that this was an error and that the Herbruck's operation would likely generate significant emissions of particulate matter and volatile organic compounds.

In the course of the first round of dispositive motions filed in 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 Montgomery Friends). 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 Title V 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, Montgomery Friends, and the Department filed with the Board a joint stipulation of settlement in EHB Docket No. 2017-080-R. Relevant to the memorandum 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 in Section 4.1 of the Air Pollution Control Act, and the Department would review that information and make a determination on the applicability of the exemption to the Herbruck's facility:

> 1. Herbruck's will submit to the Department, within a reasonable period of time after the execution of this Stipulation, sufficient information to allow the Department to determine whether Herbruck's can avail itself of the exemption provided in Section 4.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. §

> 4004.l, or should apply for an air quality plan approval or permit under the Pennsylvania Air Pollution Control Act;
>
> **2. The Department will review the information submitted and come to its conclusion within a reasonable period of time after Herbruck's submits sufficient information;**
>
> 3. Except for information which may be determined by the Department to be confidential business information under the Air Pollution Control Act, the Department will provide a copy to Appellant [Montgomery Township Friends of Family Farms] of the information Herbruck's submits to the Department pursuant to Paragraph 1, above, and the Department will provide a copy to Appellant of any written comments or requests for additional information the Department sends to Herbruck's in response to Herbruck's submission.

(EHB Docket No. 2017-080-R, Docket Entry 65 (emphasis added).) 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.)

According to the parties' papers in the instant motions under consideration, in March 2020, the Department provided Montgomery Friends with a redacted copy of Herbruck's assessment of air emissions. In July 2020, Herbruck's submitted to the Department an assessment by Herbruck's concluding that its facility qualified for the production of agricultural commodities exemption in the Air Pollution Control Act. On August 14, 2020, the Department prepared the memorandum that is currently under appeal memorializing the determination required by the stipulation. In the current appeal, Montgomery Friends disagrees with the conclusion that the Herbruck's facility is exempt from the permitting and plan approval process. Montgomery Friends asserts that the agricultural commodities exemption does not apply to operations that are a major source of pollutants under the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q.

Now, three and a half years after this appeal was filed, Herbruck's has moved to dismiss the appeal, and Montgomery Friends has moved to strike Herbruck's motion to dismiss while also arguing that Herbruck's has never been a proper party to this appeal and Herbruck's lacks standing.

Herbruck's argues in its motion that the Department's memorandum is not an appealable action. Herbruck's says that, when the Department merely expresses agreement that a facility meets statutory or regulatory definitions qualifying for an exemption from permitting, it is not a decision that affects any party's rights, duties, or obligations under the law. Montgomery Friends opposes Herbruck's motion to dismiss. The Department has not expressed any agreement in Herbruck's motion. The Department has simply filed a letter stating it would not be filing a response to the motion.

In its own motion, Montgomery Friends argues that (1) Herbruck's never properly intervened in the appeal under the Board's rules and is not a proper party in the appeal, and (2) Herbruck's transferred its interest in the facility property by way of deed and it no longer has standing. Montgomery Friends says that, because Herbruck's is not an appropriate party in this appeal, Herbruck's motion to dismiss should be stricken and Herbruck's itself should be dismissed from the appeal. Both Herbruck's and the Department oppose Montgomery Friends' motion.

For the reasons explained below, we deny the parties' motions.

Herbruck's Motion to Dismiss

The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly 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, Jan. 10, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. For purposes of resolving motions to dismiss, the Board accepts the nonmoving party's version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Twp. v. DEP*, 2008 EHB 563, 570.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Monroe Cnty. Clean Streams Coalition v. DEP*, 2018 EHB 798, 800; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Glahn v. DEP*, 2021 EHB 322, 326, *recon. denied*, 2021 EHB 347; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB at 1121.

In determining whether a Departmental document constitutes a final, appealable action, we generally consider: the wording of the document; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the document; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Hordis v. DEP*, 2020 EHB 383, 388 (citing *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB at 858-59; *Kutztown*, 2001 EHB at 1121). In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2; *Clean Air Council v. DEP*, EHB Docket No. 2022-093-C, slip op. at 5 (Opinion and Order, July 14, 2023).

Herbruck's relies heavily on cases where we have found that a Department determination that a certain facility does not need to obtain a permit is not an appealable action. For instance, Herbruck's cites *Clean Air Council, supra*, a case where we granted a motion to dismiss an appeal of a Department letter stating that a facility qualified as an "advanced recycling facility" under the definitions in the Solid Waste Management Act. In *Clean Air Council*, we relied on a line of cases

holding that Department letters or communications are generally not appealable actions when they indicate that a proposed facility or activity meets a certain statutory or regulatory definition and does not require a permit under the law. *See Borough of Glendon v. DEP*, 2014 EHB 201; *Gordon-Watson v. DEP*, 2005 EHB 812; *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174.

However, importantly for our purposes here, in *Clean Air Council* we contrasted that situation to ones where we have found a Department action to be appealable due to the Department being required to make a determination one way or the other, typically by way of statute or regulation. For instance, in *Love v. DEP*, 2010 EHB 523, we denied a motion to dismiss an appeal of the Department's refusal to process a subsidence damage claim under the Bituminous Mine Subsidence and Land Conservation Act where, under the Act, the Department has a mandatory duty to process such claims and make a decision on them one way or the other. *See* 52 P.S. § 1406.5e; 25 Pa. Code § 89.143a. We applied the same logic in *Kiskadden v. DEP*, 2012 EHB 171, where, under the Oil and Gas Act, the Department is required to investigate a claim of water supply contamination and make a determination whether or not an oil and gas operator is responsible for any contamination. In *Kiskadden*, we denied a motion to dismiss an appeal where the Department, following its investigation, found an operator was not responsible for any contamination to the appellant's water supply. We also found the situation in *Clean Air Council* different than ones where the Department follows a defined regulatory process for determining the applicability of an exception or exemption. *See Winner v. DEP*, 2014 EHB 135 (denying motion to dismiss where Department is required to act within 30 days of a sewage facilities planning exception request under 25 Pa. Code § 71.55); *Stern v. DEP*, 2001 EHB 628 (denying motion to dismiss appeal of Department letter granting an exemption from full sewage facilities planning pursuant to the regulatory process established in 25 Pa. Code § 71.51(b)).

We fail to see any meaningful difference between the Department being required to make a determination by statute or regulation and the Department being required to make a determination under the provisions of a joint stipulation for the settlement of an appeal before this Board. By stipulation of the same parties to the current appeal, the Department was *required* to make a determination one way or the other on the applicability of the exemption based on air emissions information *required* to be submitted by Herbruck's. The Department committed to making a determination under a stipulation that was signed off on by the Board. That determination is contained in the memorandum that Montgomery Friends has appealed. Herbruck's motion to dismiss is inconsistent with the stipulation to which Herbruck's itself agreed and presumably helped draft. Notably, the Department has said it would not file a response to Herbruck's motion, which signals that the Department does not endorse Herbruck's position, as it should not. The situation here falls in line with *Love*, *Kiskadden*, *Winner*, and *Stern*. As in those cases, we deny Herbruck's motion to dismiss.

Montgomery Friends' Motion to Strike / Motion to Dismiss

Montgomery Friends' motion to strike does not only seek to strike Herbruck's now-denied motion to dismiss. Montgomery Friends' motion challenges both Herbruck's standing and whether the proper procedures were followed under our rules for Herbruck's to become a party to this appeal. Montgomery Friends first argues that Herbruck's never properly intervened in this appeal. For certain types of appeals, some persons are designated under our rules as a party to an appeal and other persons may become a party to an appeal without needing to petition to intervene. This process begins with an appellant serving a copy of its notice of appeal on certain classes of persons (other than the Department) as required by our rules. In cases where an appellant is appealing a "permit, license, approval, certification or order" that was issued to someone other

than the appellant, the appellant must serve its notice of appeal on the recipient of that Department action. 25 Pa. Code § 1021.51(f)(1)(iv) and 1021.51(h)(1). Service of the notice of appeal upon the recipient of a permit, license, approval, certification, or order then "subject[s] the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene…." 25 Pa. Code § 1021.51(i). The Board commonly refers to these recipients as "permittees" and adds them to the caption at the beginning of a case.

The Board's rules also require service of the notice of appeal on certain other entities whose interests may be affected by an appeal. For instance, in appeals of decisions under Sections 5 or 7 of the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.5 and 750.7, service is required on any affected municipality, municipal authority, or the proponent of the decision. 25 Pa. Code § 1021.51(h)(2). In appeals involving a claim of subsidence damage, water loss, or contamination, service is required on any mining company, well operator, or owner or operator of a storage tank. 25 Pa. Code § 1021.51(h)(3). Those entities, as well as any other interested party as ordered by the Board, 25 Pa. Code § 1021.51(h)(4), may intervene in the appeal as a matter of course within 30 days of service of the notice of appeal by simply filing a notice of appearance instead of a petition to intervene. 25 Pa. Code § 1021.51(j). Those entities are not added as a party to the appeal until they file a notice of appearance.

Montgomery Friends identified Herbruck's as a permittee in the caption of its notice of appeal and served a copy of the notice of appeal on Herbruck's. Two days after the appeal was filed, Herbruck's prior counsel entered his appearance in this matter. Approximately one and a half months after the appeal was filed, Montgomery Friends, the Department, and Herbruck's jointly filed a statement averring that they had conferred about settlement of the appeal on October

26, 2020 and that they would continue to consider the issues raised in the appeal and would promptly notify the Board if the appeal, or a portion thereof, had been resolved. In that joint statement, the parties also informed the Board that the name the Board used for Herbruck's in the caption, Herbruck's Poultry Farm, was incorrect and it should refer to Herbruck's Poultry Ranch, Inc. The Board issued an Order on the same day correcting the caption. Now, three and a half years later, Montgomery Friends says that it only served Herbruck's a copy of the notice of appeal and identified Herbruck's as a permittee in the caption of the notice of appeal as a mere courtesy.

As far as we can tell, Herbruck's is not the recipient of the internal Department memorandum under appeal. Nor is it clearly within the parties who get to participate in the appeal by filing a notice of appearance. However, our rules are to be interpreted to reach a just result. 25 Pa. Code § 1021.4. Herbruck's has participated in this appeal for more than three years without Montgomery Friends raising any issue with Herbruck's participation. During this time the parties have jointly filed nearly 20 documents providing the Board with status reports or requesting extensions. Herbruck's says Montgomery Friends has conducted extensive discovery on Herbruck's. This appeal is now scheduled for a merits hearing later this year. To the extent the styling of Montgomery Friends' notice of appeal caused the Board to misinterpret Herbruck's as a "permittee" when the appeal was filed and Herbruck's did not follow the appropriate procedures to intervene, we nevertheless have no difficulty concluding now that Herbruck's has been an interested party in this appeal within the meaning of 25 Pa. Code § 1021.51(h)(4) and thus a proper party to this appeal.

Turning to Herbruck's standing, Montgomery Friends attaches to its motion a deed dated January 7, 2021 between Herbruck's Poultry Ranch, Inc. (the party to this appeal) and Herbruck's of Pennsylvania, LLC that conveys the property of the site at issue from Herbruck's Poultry Ranch,

Inc. to Herbruck's of Pennsylvania, LLC. Devoting a single paragraph of its memorandum of law to addressing Herbruck's standing, Montgomery Friends summarily concludes that Herbruck's Poultry Ranch no longer has an ownership or operational interest in the facility and therefore Herbruck's does not have standing. In response, Herbruck's points to a portion of the deed that says the current owner of the property, Herbruck's of Pennsylvania LLC, is a partially owned subsidiary of Herbruck's Poultry Ranch, Inc. Herbruck's says, therefore, it continues to have a substantial, direct, and immediate interest in the appeal sufficient to confer standing.

In a reply brief Montgomery Friends has filed in support of its motion to strike / motion to dismiss, Montgomery Friends says the Herbruck's entity that currently owns the site is a separate legal entity from the Herbruck's entity that has participated in this appeal, and that Herbruck's Poultry Ranch has not done enough to establish its continued standing. Montgomery Friends never contested the standing of Herbruck's Poultry Ranch when it apparently still owned the property at issue. There is no allegation in Montgomery Friends' motion that Herbruck's did not have standing in this appeal prior to the transfer of property interest. Standing among the Herbruck's entities is not an either-or affair. Both Herbruck's Poultry Ranch, Inc. and Herbruck's of Pennsylvania, LLC may potentially have standing in this appeal. Even if there is a need to substitute parties, *see* 25 Pa. Code § 1021.83 (substitution of parties), which has not been established by Montgomery Friends, we can overlook a departure from our rules given Herbruck's original standing.

Further, to the extent that Montgomery Friends' motion to strike is really just window dressing for its motion to dismiss Herbruck's, in evaluating a motion to dismiss based on standing we accept as true all of the non-moving party's allegations. *See Ritsick*, 2022 EHB at 285 (citing *Giordano v. DEP*, 2000 EHB 1184, 1187). The onus is on Montgomery Friends, as the moving party, to make a colorable case that Herbruck's does not have standing. The bottom line is that

Montgomery Friends has not provided us with sufficient information to conclude that Herbruck's Poultry Ranch no longer has standing in this appeal or shown in its motion that Montgomery Friends is entitled to judgment as a matter of law on the issue of Herbruck's standing.

Accordingly, we issue the Order that follows.

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 8th day of March, 2024, it is hereby ordered as follows:

1. Herbruck's Poultry Ranch, Inc's Motion to Dismiss is **denied**.

2. Montgomery Township Friends of Family Farms' Motion to Dismiss is **denied**.

3. Montgomery Township Friends of Family Farms' Motion to Strike is **denied**.

ENVIRONMENTAL HEARING BOARD

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

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

DATED: March 8, 2024

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

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

For Appellant:
William J. Cluck, Esquire
(*via electronic filing system*)

For Permittee:
Robert D. Fox, Esquire
Carol F. McCabe, Esquire
Jessica D. Hunt, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT and SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2022-032-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PPG INDUSTRIES, INC., Permittee	:	**Issued: April 9, 2024**

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

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies an appeal of the Department's approval of a financial assurance document in the amount of $12,363,864 to cover the operation, monitoring, and maintenance costs of a waste site remedy in perpetuity upon default by the remediating corporation. The appellants have not met their burden of proof to show that the Department acted unreasonably or in violation of applicable statutes, regulations or Article 1, Section 27 of the Pennsylvania Constitution. The amount of the financial assurance is sufficient to sustain the remedy in perpetuity and in the event conditions change and more funds are required, the Department can adjust the amount of the financial assurance on an annual basis. The appellants additional claims are moot.

Background

On May 10, 2022, Sierra Club and PennEnvironment ("Sierra Club") appealed the Department of Environmental Protection's ("the Department's") approval of the financial assurance proposal submitted by PPG Industries, Inc. ("PPG") for the remedy at PPG's Ford City waste site ("PPG Waste Site"). The PPG Waste Site is in Armstrong County, Pennsylvania and was used by PPG from approximately 1953 to 1970, to dispose of glass polishing slurry waste and

solid waste from its facility in Ford City, Pennsylvania. The purpose of the financial assurance is to ensure enough funds are available to pay for the ongoing operation, monitoring, and maintenance and replacement costs of the remedy, and if necessary, a revision of a remedy at the PPG Waste Site, in perpetuity. Prior to the current matter before the Board, Sierra Club and PPG were engaged in federal litigation that ultimately led to an agreement between the Department and PPG known as the First Amendment. Sierra Club was active in drafting the language and negotiating the terms of the First Amendment which laid the groundwork of the matter before us.

On April 6, 2023, the Board denied both the Sierra Club's motion for summary judgment and the Department's cross-motion for summary judgment holding that the case presented complex issues of fact and law thereby making summary judgment inappropriate. On April 25, 2023, the parties filed a stipulation of partial settlement. Prior to the hearing on the merits, PPG filed two motions in limine. The first requested the preclusion of an expert report and expert testimony pertaining to the report and the second motion sought to preclude Sierra Club from introducing certain evidence that PPG contended lacked relevance and would result in a waste of time. On September 11, 2023, the Board issued Orders denying PPG's motions in limine without prejudice. A three-day hearing on this matter was conducted at the Board's Pittsburgh Office starting on September 18, 2023 and ending on September 20, 2023. Sierra Club filed its post-hearing brief on October 31, 2023, and the Department and PPG filed their post-hearing briefs on December 1, 2023. Sierra Club filed its reply brief on December 15, 2023.

FINDINGS OF FACT

I. The Parties

1. The Commonwealth of Pennsylvania Department of Environmental Protection is a Pennsylvania agency with the duty and authority to administer and enforce the Pennsylvania Clean

Streams Law (CSL), 35 P.S. §§ 691.1-691.1001, the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1389, the Pennsylvania Environmental Rights Amendment, Pa. Const. art. I § 27, and the rules and regulations promulgated thereunder, including the duty and authority to issue National Pollution Discharge Elimination System (NPDES) permits in compliance with the Clean Water Act, 25 Pa. Code § 92a.1. (Stipulations ¶ 2).

2. The Department is also the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S.§§ 6018.101 – 6018.1003 ("SWMA"); the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§ 6026.101 – 6026.909 ("Act 2"); 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. (Stipulations ¶ 3).

3. PPG Industries, Inc. (PPG) is a corporation organized under the laws of Pennsylvania, headquartered in Pittsburgh. (Stipulations ¶ 4).

4. PennEnvironment is a non-profit corporation organized under the laws of Pennsylvania, with offices in both Philadelphia and Pittsburgh. PennEnvironment is a statewide environmental advocacy group that is actively engaged in education, research, lobbying, litigation, and citizen organizing to encourage conservation and environmental protections. (Stipulations ¶ 5).

5. Sierra Club is a nationwide non-profit environmental membership organization, incorporated in California, with its headquarters and principal place of business in San Francisco. Sierra Club has more than 23,000 members living in Pennsylvania. (Stipulations ¶ 6).

6. Sierra Club is the plaintiff in a citizen suit ("the Federal Litigation") regarding the PPG Waste Site filed against PPG in the United States District Court for the Western District of Pennsylvania under the federal Clean Water Act ("CWA"), the Pennsylvania Clean Streams Law ("CSL"), and the federal Resource Conservation and Recovery Act ("RCRA"). The Federal Litigation is ongoing, although some issues were resolved in a settlement in 2021, which relates to the issues in this appeal. (Stipulations ¶ 7; SC Ex. 15).

II. The Site

7. The site that is the subject of this appeal, the PPG Waste Site, is in Armstrong County, Pennsylvania. From approximately 1953 to 1970, PPG used the PPG Waste Site to dispose of glass polishing slurry waste and solid waste from its facility in Ford City, Pennsylvania. (Stipulations ¶ 8).

8. Two areas of the PPG Waste Site are primarily relevant to this appeal: the Slurry Lagoon Area ("SLA") and the Solid Waste Disposal Area ("SWDA"). (Stipulations ¶ 9).

9. The SLA is a former sandstone quarry in which PPG built three unlined lagoons covering an approximately 77-acre area of the PPG Waste Site and into which PPG deposited waste that it transported via a slurry pipe across the Allegheny River from its Ford City glass manufacturing plant. (Stipulations ¶ 10; SC Ex. 3).

10. The SLA is bordered on the north by State Route 128, on the west by Glade Run, a tributary of the Allegheny River, on the east by the SWDA, and on the south by the Allegheny River. A railroad track runs along the Allegheny River between the SLA and the Allegheny River. (SC Exs. 3, 83).

11. When infiltrating precipitation and upgradient groundwater contacts the waste disposed in the SLA, a high pH leachate is formed. (Transcript of Hearing Testimony Page No. ("T.") 249, 263-64).

12. The high pH leachate seeps out of the SLA along the southern edge to the Allegheny River and along the eastern and western banks of the PPG Waste Site. (Halloran Written Testimony at Page No. ("W.T.") 3; T. 248-50).

13. PPG deposited solid waste in the SWDA. (Stipulations ¶ 11; SC Ex. 3).

14. The fenced portion of the SWDA is approximately 15 acres in size. Adjacent to the SWDA is the area known as the SWDA Annex which is approximately 3 acres in size. Both the SWDA and SWDA Annex have areas that will be remediated. (Stipulations ¶ 12).

III. The Federal Litigation

15. In 2012, Sierra Club filed the Federal Litigation alleging violations of several federal environmental statutes. Sierra Club obtained a preliminary injunction requiring PPG to apply for an NPDES permit. (T. 257; *see also PennEnvironment v. PPG Industries, Inc. (PPG III)*, No. 12-342, WL 6982461 (W.D. Pa. Dec. 10, 2014).

16. On October 10, 2018, the Department approved a site-wide remedy for the PPG Waste Site (the "Site-Wide Remedy"). (PPG Ex. 4).

17. PPG and the Department executed a Consent Order and Agreement covering the remediation at the PPG Waste Site on April 2, 2019 (the "2019 COA"). (Halloran W.T, page 4; SC Ex. 3).

18. Sierra Club and PPG engaged in settlement negotiations regarding most of the claims in the Federal Litigation, culminating in a consent order that was entered by the federal court on March 29, 2021 (the "Federal Consent Order"). (Stipulations ¶ 13; SC Ex. 15).

19. The Federal Consent Order includes several additions and enhancements to the 2019 COA. In conjunction with their negotiation of the Federal Consent Order, Sierra Club and PPG negotiated an amendment to the 2019 COA ("the First Amendment") to reflect those additions and enhancements, which included, among other things, a provision for the establishment of financial assurances. The First Amendment was proposed to the Department and, following some changes, including some to the proposed financial assurances provision, it was executed by the Department and PPG on November 4, 2020. (Stipulations ¶ 14; SC Ex. 10).

20. As proposed by Sierra Club and PPG and agreed to by the Department, the financial assurances provision added by the First Amendment required "an irrevocable letter(s) of credit and a standby trust in favor of the Department that conforms to the requirements of 25 PA Code Section 287, Subchapter E and/or letter of credit and standby trust provisions established by 40 CFR 264.143(d) and 264.145(d)." (Stipulations ¶ 15; SC Ex. 10).

21. The language as to the amount of the financial assurances requires the amount be "sufficient to secure the implementation and post-closure care, including without limitation long-term monitoring, operation and maintenance and replacement costs necessary to effectuate and maintain the remedy required by the 2019 Consent Order and Agreement and this First Amendment, or a revision of the remedy should the original fail, in perpetuity." (Stipulations ¶ 15; SC Ex. 10).

IV. The Remedy

22. The Site-Wide Remedy was incorporated into cleanup plans submitted by PPG under Pennsylvania's Land Recycling and Environmental Remediation Standards Act, 35 Pa. Stat. and Cons. Stat. Ann. §§ 6026.101 et seq. ("Act 2"). (Halloran W.T. at 4–5; Martel W.T. at 2).

23. The cleanup plan for the SLA consists principally of capturing and treating the high pH leachate to lower its pH prior to discharge of the treated leachate to the Allegheny River. (Halloran W.T. at 4–5).

24. The cleanup plan for the SWDA consists principally of installing a geomembrane cap in areas where waste is exposed and then installing and maintaining a soil cap over the SWDA and SWDA Annex. (Halloran W.T. at 5).

25. Cullen Flanders ("Mr. Flanders") is a Professional Engineer who holds a Bachelor of Science degree in Environmental Resource Management and a Master of Science degree in Environmental Engineering, both from the Pennsylvania State University. (T. 533–34).

26. Mr. Flanders is licensed as a Professional Engineer in Connecticut, Delaware, the District of Columbia, Mississippi, New York, Ohio, Pennsylvania, and Virginia. (T. 534).

27. Mr. Flanders is currently employed by GHD, an engineering consulting company, as its Environmental Engineering Design Lead for North America, and was previously employed by Arcadis. (T. 535–37).

28. Mr. Flanders has been involved with PPG's remedial work at the PPG Waste Site in his capacity as a Professional Engineer for approximately a decade. (T. 538).

29. Mr. Flanders designed the portion of the Site-Wide Remedy addressing the SLA while employed at Arcadis. (T. 538–39).

30. Mr. Flanders was involved with all aspects of development, design, and implementation of the SLA remedy, including reviewing initial geological investigations and modeling, overseeing contractors installing the SLA remedy, and overseeing pilot testing of the installed enhanced collection and treatment system. (T. 539).

31. As part of the design process for the SLA remedy, a hydrogeologist conducted groundwater monitoring and testing. (T. 543-44; PPG Ex. 1).

32. The main component of the SLA remedy is the Enhanced Collection and Treatment System, which comprises a series of trenches around all four sides of the SLA to collect leachate and transport it to a wastewater treatment facility prior to discharge to the Allegheny River. Additional aspects of the SLA remedy include installation of a precipitation drainage system installed on the surface and as-needed repair of the soil cap to reduce surface infiltration. (Halloran W.T. 4; Martel W.T. 2; PPG Ex. 18).

33. A portion of the SLA remedy is a trench that runs along the southern border of the PPG Waste Site, parallel to the railroad tracks ("the Deep Trench"). (T. 51-53).

34. The Deep Trench is three-feet wide and 3,100-feet long, and its depth ranges from 20 to 40 feet. (T. 544-46).

35. The Deep Trench is deepest (40 feet) at the southeast corner of the PPG Waste Site; it slopes from the north to the south along the eastern side of the Site and from the west to the east along the southern side of the PPG Waste Site. (T. at 547).

36. The Deep Trench is filled with pea gravel. The pea gravel functions to hold the trench open and serves as the conveyance mechanism for the leachate being collected for treatment by the system. (T. 547; PPG Ex. 18 at C-008 to C-013 (as-built drawings for Deep Trench)).

37. The Deep Trench features a series of wells drilled five feet into the bedrock to ensure water that collects within the pea gravel drains to the sumps, each equipped with a sump pump. (T. 548–49).

38. The system is designed to allow leachate to flow by gravity through the pea gravel in the Deep Trench to the trench sumps that convey the leachate via subsurface conveyance pipe

to the wastewater treatment facility for treatment. (T. 548-50; PPG Ex. 18 at C-005, C-006, C-020, C-021).

39. The Deep Trench pipe serves as a "cleanout" mechanism for the Deep Trench collection system in the event the primary conveyance mechanism—the pea gravel—becomes clogged by sediment. (T. 547).

40. When the Deep Trench was being dug out, the excavator cleared all weathered bedrock and reached competent bedrock. (T. 546–47). Mr. Flanders' team tested rock core borings and confirmed that the bedrock is competent sandstone throughout the location of the Deep Trench. (T. 546).

41. The design team for the SLA remedy selected component parts that were designed for corrosive environments and are compatible with high pH water. (T. 549–550; Martel W.T. 12).

42. The HDPE pipe used for the Deep Trench pipe is made of highly durable material and is designed for corrosive environments. (T. 512–13, 579).

43. The Deep Trench pipe was constructed so that it can be slip-lined and replaced from the surface in the event of deterioration. (T. 579).

44. The SLA remedy has been constructed and is fully operational as of October 2022. (T. 453, 559-60).

45. Based on observation of some seeps after the system became operational in October 2022, PPG was in the process of installing an additional trench along the northwest side of the PPG Waste Site at the time of the hearing. (T. 576-77).

46. The SWDA remedy consists of capping the SWDA and the SWDA Annex with a geomembrane and soil layer to minimize both infiltration from precipitation and direct contact with the waste, as well as installation of additional perimeter fencing. (Martel W.T. 2; T. 590).

47. As of the third day of the hearing in this matter, PPG had just received the final two permits necessary for the SWDA remedy construction. (T. 526).

48. Construction of the SWDA remedy must begin within 270 days of PPG's receipt of those permits. (T. 526).

49. Operating costs for the SWDA remedy include monitoring and sampling of stormwater outfalls, and maintenance costs include inspection and repair of the soil cap, as needed. (Halloran W.T. 5).

50. Operating costs for the SLA portion of the PPG Waste Site include the operation of the enhanced collection and treatment system and wastewater treatment system; outfall monitoring and sampling; the purchase of acid and defoamer to adjust the leachate's pH level; and electrical costs to operate the pumps and the wastewater treatment plant. (Halloran W.T. 5; Martell W.T. 3).

51. Maintenance costs include periodic maintenance and cleaning of the sumps and pumps; periodic cleaning of the conveyance piping, outfalls, and tanks; periodic cleaning and redevelopment of extraction wells; building maintenance for the wastewater treatment facility; and general site maintenance, such as fence repairs, lawn mowing, and road maintenance. (Martel W.T. 2-3).

52. Replacement costs will include periodic replacement of component parts such as pumps, hoses, piping, electrical panels, and fencing, and components of the wastewater treatment system as needed. (Martel W.T. 3, 11-12; Halloran W.T. 5.)

Financial Assurances

53. The First Amendment to the 2019 COA requires that:

> Within thirty (30) days of the execution of this First Amendment, PPG shall submit documentation for the provision of financial

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

(SC Ex. 10).

54. Paragraph 13 of the First Amendment establishes the requirements for the financial assurances for the PPG Waste Site. (T. 527).

55. Under paragraph 13, the financial assurances for the PPG Waste Site are required to consist of a letter or letters of credit and a standby trust. (SC Ex. 10; T. 151).

56. A letter of credit is a financial instrument provided by an institution that guarantees provision of a specified amount of money if the applicant for the letter of credit fails to discharge its specified obligations. (T. 151).

57. PPG was required to make its financial assurances submission within thirty days of the November 4, 2020 execution of the First Amendment. (SC Ex. 10).

58. PPG submitted its financial-assurances proposal to the Department on December 2, 2020. (SC Ex. 11.)

59. The proposal contemplated three letters of credit: one for the construction costs for the SLA remedy in the amount of $11,265,231; a second for the construction costs for the SWDA remedy in the amount of $1,946,616; and a third for the operation, monitoring, maintenance and replacement ("OMM") costs of the PPG Waste Site in the amount of $12,363,864. (See SC Ex. 11 at 2; DEP Ex. 7; Halloran W.T. at 6).

60. PPG arrived at the proposed amount of financial assurance for the OMM costs by using engineering cost estimates in conjunction with the Department's Bonding Worksheets for Municipal/Residual Waste Processing and Disposal Facilities (the "Bonding Worksheets"). (SC Exs. 9, 11).

61. Specifically, the proposal included (1) a cost estimate prepared by Arcadis outlining capital construction and operations of the SLA remedy, and (2) maintenance costs for the Enhanced Collection and Treatment System, and a cost estimate prepared by Key Environmental, the design engineering firm responsible for the SWDA remedy and site-wide monitoring, outlining costs for capital construction of the SWDA remedy, operation and maintenance of the interim abatement system, and site-wide monitoring. (SC Ex. 11; see also *Id*. Apps. A, B.)

62. Arcadis's operations and maintenance cost estimate for the SLA remedy included six major components: Deep Trench maintenance; northwest and southern trench maintenance; western slope collection system maintenance; extraction wells maintenance; outfall maintenance, and treatment system operation and maintenance. (SC Ex. 11., App. A at 8-9.)

63. The cost estimates included costs for regularly scheduled cleaning and component-part replacement. (SC Ex. 11).

64. The cost estimate also included costs for annual wetland monitoring and maintenance as a separate line item. (SC Ex. 11.)

65. In preparing its cost estimates, Arcadis considered the types of components that would need to be replaced and their anticipated costs. (T. 572). Arcadis's engineers spoke with equipment vendors to obtain quotes for materials. (*Id*.).

66. PPG's financial assurance proposal for the OMM costs did not include a separate line item for revision or wholesale replacement of the SLA remedy (T. 335-36).

67. Key Environmental's estimate for site-wide monitoring included annual inspection of various components, operation of the interim abatement system through its planned decommission, outfall monitoring in accordance with the NPDES permit, and seep reconnaissance and supplemental monitoring, in addition to the routine monitoring required by the NPDES permit. (See SC Ex. 11, App. B at 6.)

68. Robert Hubbard ("Mr. Hubbard") is a senior project manager and risk assessor with Key Environmental. (T. 588).

69. Mr. Hubbard holds a Bachelor of Science degree in chemical engineering and is a Professional Engineer licensed in Pennsylvania. (T. 588).

70. Mr. Hubbard is responsible for the operation and maintenance of both the SLA and the SWDA remedies. (T. 590).

71. Mr. Hubbard assisted in compiling the cost estimates for the operation and maintenance for the SLA and SWDA remedies. (T. 590-91).

72. Mr. Hubbard reviewed and approved the cost estimates prepared by Key Environmental in conjunction with PPG's financial assurance proposal for OMM costs. (T. 591).

73. Key Environmental conducted a comprehensive review of multiple considerations in arriving at its cost estimate, including soliciting quotes from environmental laboratories, collecting construction cost estimates, and reviewing historical costs associated with the prior treatment system, the interim abatement system ("IAS"). (T. 591–92).

74. Mr. Hubbard concluded that PPG's financial assurance proposal for OMM costs was conservative[1] because (1) PPG routinely has come in under budget for operation and

[1] In the record of this case, all of the parties at some point use the term "conservative" but assign that term opposite meanings. When describing conservative cost estimates, Sierra Club's witness, Dr. Sahu, explained that he used the term to mean that the estimated costs were likely to be

monitoring of the IAS and (2) the estimate included conservative sampling and analysis costs, a "big component" of the OMM cost, in an attempt to anticipate costs associated with yet-unidentified seeps. (T. 592–93).

75. At the time of the hearing, PPG's actual cost for OMM of the PPG Waste Site remedies have been under the cost estimates. (T. 593-94).

76. The actual OMM costs for 2022 were approximately $110,000 below the projected cost estimate and for 2023, through the week of the hearing in this matter, actual OMM costs were approximately 30 to 35% below budget. (T. 794).

77. PPG incorporated its cost estimates into the Bonding Worksheets to calculate the amount of financial assurance it proposed for the OMM costs. (SC Ex. 11 at 2, App. C).

78. The Bonding Worksheets use a 30-year time frame as a proxy for perpetuity in calculating financial assurances. (SC Ex. 9; T. 330, 332; Halloran W.T. 8; Martel W.T. 5).

79. It is the Department's standard practice to use a 30-year time frame for calculating costs of maintaining a remedy in perpetuity. (T. 330-31, 467; Martel W.T. 8).

80. Periodic review of the PPG Waste Site conditions are requirements under 25 Pa. Code Chapter 287, Subchapter E. (Halloran W.T. 11-12; Martel W.T. 8-10).

81. The Department can adjust the bond amount with each periodic review. (Halloran W.T. 11-12; Martel W.T. 8-10).

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exceeded by the actual costs. (T. 37). Alternatively, PPG and the Department use the term "conservative" to denote that the selection of the estimated costs was done in an exercise of caution in order to develop financial assurances that would be above the actual cost amounts. For the sake of clarity, the term "conservative" as it appears in this adjudication is given the meaning that PPG and the Department used.

82. The 30-year timeframe provided for in the Bonding Worksheets and used by PPG to calculate the proposed amount of the financial assurances renews every year with each periodic review, thereby moving the 30-year window forward in time. (T. 467).

83. The Bonding Worksheets calculate an inflation rate over the three years preceding the Worksheets' preparation, determined from the United States Commerce Department's Implicit Price Deflator for Gross National Product. (SC Ex. 9 at 2.)

84. In this case, that inflation rate was 6.1%. (Halloran W.T. 8; Martel W.T. 6; T. 503).

85. The Bonding Worksheets also require additional allowances of 5% each for administrative fees, project-management fees, and contingencies respectively. (See SC Ex. 9 at 2–3; Halloran W.T. 8; Martel W.T. 6; T. 502–503).

86. The Bonding Worksheets account for inflation but do not account for a rate of return. (Halloran W.T. 8; Martel W.T. 6).

87. Running the cost estimates prepared by Arcadis and Key Environmental through the Department's Bonding Worksheets resulted in a proposed amount of financial assurance to cover OMM costs of $12,363,864. (See SC Ex. 11 at 2.)

V. Department Review/Approval

88. Denis Strittmatter ("Mr. Strittmatter"), a former environmental engineer with the Department, was the principal reviewer for PPG's OMM financial assurance proposal. (Halloran W.T. 6).

89. On January 14, 2021, Mr. Strittmatter submitted a memorandum to Kevin Halloran ("Mr. Halloran") regarding his initial review of PPG's financial assurance proposal. (SC Ex. 13)

90. In the January 14, 2021 memorandum, Mr. Strittmatter expressed reservations about approving PPG's proposal without additional documentation supporting PPG's OMM cost estimates. (Halloran W.T. 7; SC Ex. 13).

91. The Department requested that PPG submit additional documentation supporting its projected OMM costs for the PPG Waste Site. (See Halloran W.T. 7).

92. On February 11, 2021, Sierra Club submitted comments to the Department regarding concerns related to PPG's financial assurances proposal. (DEP Ex. 12).

93. PPG submitted additional documentation to the Department on February 23, 2021 supporting the estimated costs it provided in the December 2020 financial assurance proposal. (SC Ex. 14; Halloran W.T. 7).

94. Mr. Strittmatter reviewed the additional documentation PPG submitted and advised Mr. Halloran via email on March 31, 2021, that he was satisfied from the additional documentation that PPG's OMM cost estimates were reliable and that PPG's proposed financial assurance was sufficient to maintain the Site-Wide Remedy in perpetuity. (See Halloran W.T. 7; Martel W.T. 4; SC Ex. 16).

95. Mr. Strittmatter retired in late 2021 and Robert Martel ("Mr. Martel"), another environmental engineer with the Department, assumed responsibility for reviewing PPG's proposed financial assurances and reviewed Mr. Strittmatter's assessment of the proposal. (Halloran W.T. 6; Martel W.T. 4).

96. The Department conducted its review based on the 30-year proxy for perpetuity recommended in the Bonding Worksheets. (Halloran W.T. 12).

97. On the Department's behalf, Mr. Halloran approved PPG's proposed financial assurances, including PPG's proposed OMM letter of credit in the amount of $12,363,864 on April 7, 2022. (SC Exs. 46, 47; Halloran W.T. 9).

98. On April 27, 2022, PPG provided the Department with three letters of credit including a letter of credit in the amount of $12,363,864 for the OMM costs (the "OMM Letter of Credit"). (SC Ex. 48).

99. Two of the three letters of credit were drafted incorrectly. All three letters of credit provided for "post-construction operation, maintenance and monitoring" when two should have been issued for the capital construction costs of the SLA and SWDA remedies. (T. 377-78; SC Ex. 48).

100. Mr. Halloran did not notice the drafting errors when he received the letters of credit. (T. 378).

101. Sierra Club and the Department's bonding staff in Harrisburg informed Mr. Halloran's staff about the errors in the letters of credit. (T. 378).

102. Corrected letters of credit were issued and sent to the Department on April 17, 2023. (T. 378-379; PPG Exs. 15, 16 and 17)[2].

103. The financial assurances approved by the Department did not include a standby trust. (T. 371; SC Ex. 47).

[2] In this adjudication, we refer to both the initial letter of credit for OMM costs approved by the Department and submitted by PPG on April 27, 2022 and the corrected letter of credit for OMM costs sent to the Department by PPG on April 17, 2023 as the OMM Letter of Credit. The amount of the initial letter of credit and the corrected letter of credit is an identical $12,363,864 and there was no testimony showing that any substantive dispute arose for the substitution of the corrected letter of credit for the initial letter of credit. Since the focus of the appeal and our decision is on the amount of the letter of credit, we believe that referring to these as the OMM Letter of Credit will create less confusion in the reader. We recognize that at the time of the hearing, the operative OMM Letter of Credit was the one sent by PPG in April 2023 and found at PPG Ex. 17.

104. Absent a standby trust, the funds from the letter of credit would be deposited in the solid waste abatement fund. (T. 383).

105. In November 2022, a standby trust was executed by PPG and PNC Bank. (T. 371, 531; PPG Ex. 14).

106. It took approximately 16-months from the time the Department received PPG's initial financial assurance proposal to the time it approved the proposal. (Halloran W.T. 16; Martel W.T. 12).

VI. Terms of the OMM Letter of Credit

107. By its terms, the OMM Letter of Credit creates an irrevocable standby letter of credit in an amount up to $12,363,864 in favor of the Department in connection with PPG's commitment to conduct post-construction operation, maintenance and monitoring pursuant to the terms of the 2019 COA as amended by the First Amendment. (PPG Ex. 17).

108. The OMM Letter of Credit is valid until April 18, 2024, and will be automatically extended for additional one year terms unless the issuing company gives written notice ninety (90) days before the expiration date that it intends to terminate the letter of credit at the end of the current term (PPG Ex. 17).

109. If the issuing company elects to terminate and PPG fails to replace the OMM Letter of Credit with other financial guarantees acceptable to the Department, the Department can draw on the OMM Letter of Credit thirty (30) days after the termination notice is issued. (PPG Ex. 17).

110. The Department can draw on the OMM Letter of Credit by requesting a draft and sending a statement certifying that the Department is entitled to the amount of the draw. (PPG Ex. 17; T. 151).

111. Upon default by PPG, the funds from the letter(s) of credit are to be deposited into a standby trust. (SC Ex. 10; PPG Exs. 15, 16, 17; T. 152-53).

112. By virtue of being deposited in the standby trust, the funds are reserved for the purpose of sustaining the PPG Waste Site remedy. (T. 153).

113. The standby trust ensures the funds from the letter(s) of credit cannot be spent on other projects. (T. 153).

114. If, after default, funds from the letter of credit were not directed to a standby trust but were directed elsewhere and spent on other projects, that reduces the monies available from the financial assurances to support the PPG Waste Site remedy over its required lifespan. (T. 153, 688).

115. Once the funds have been deposited in the standby trust, they will be invested by the trustee. (T. 153-54).

116. Over time, that investment growth will generate additional monies to support the Department's operation of the remedy over its required lifespan. (T. 153-54).

117. Prior to the funds being deposited into the standby trust—i.e., prior to default—no interest or investment growth occurs. (T. 154, 689).

VII. Expert Assessment

118. PPG presented testimony from Raymond L. Bummer, Jr. ("Mr. Bummer"), CPA, ABV, CFF, CFA, CFE, a financial analyst and the managing director of Gleason & Associates, a financial forensics company. (T. 605, 610).

119. Mr. Bummer holds a Bachelor of Science Degree with a dual concentration in finance and accounting from the Wharton School of Business at the University of Pennsylvania. (T. 604-605).

120. Mr. Bummer is licensed as a Certified Public Accountant and holds multiple professional certifications, designations, and accreditations, including Chartered Financial Analyst, Certified Fraud Examiner, Accreditation in Business Valuation, and Certification in Financial Forensics. (T. 610).

121. Mr. Bummer was qualified and admitted as an expert in this matter in the fields of financial and economic analysis. (T. 611).

122. Sierra Club presented testimony from Mark Buckley, Ph.D ("Dr. Buckley"). (T. 136).

123. Dr. Buckley received a bachelor's degree in economics from Davidson College. (T. 139; SC Ex. 72A). His Ph.D. work at the University of California, Santa Cruz focused on economics and environmental science and how to use science more effectively with economic tools. (T. 140; SC Ex. 72A). Dr. Buckley also did post-doctoral work at the University of Montana focusing on the economics of landscape scale restoration. (T. 140).

124. Dr. Buckley is an environmental economist. (T. 137). He leads the natural resources practice at ECONorthwest, a large economics consulting firm. (*Id*.). His work focuses on the economic analysis of natural resource management decisions, including benefit/cost analysis, financial analysis, and economic impact analysis. (T. 137; See also generally SC Ex. 72A).

125. Dr. Buckley performs much of this work on behalf of federal and state agencies, including the United States Environmental Protection Agency. (T. 137-38). He has served as an expert witness for the United States Department of Justice and Environmental Protection Agency on Clean Water Act matters. (T. at 139).

126. Dr. Buckley was qualified and admitted in this matter as an expert with regard to the economic aspects of environmental remediations. (T. 141-42).

127. Both Dr. Buckley and Mr. Bummer used a present value calculation to produce their respective estimates as to how much money would be needed for the OMM Letter of Credit to fund OMM costs of the Site-Wide-Remedy in perpetuity. (T. 156, 620).

128. The industry-standard formula for calculating net present value is the future value multiplied by one divided by one plus the discount rate, raised to the power of the number of years. (T. 613-14).

129. The present value analysis requires identifying the costs required to implement and sustain the remedy and the frequency with which those costs would in general be called upon. (T. 154).

130. Dr. Buckley used three key inputs in his present value analysis: (1) the average annual cost; (2) a real discount rate and; (3) a timeframe. (T. 156).

131. In calculating his annual average cost, Dr Buckley included the costs of the annual operation, maintenance, and monitoring, and the capital replacement costs for both the SLA and SWDA remedies. (T. 157).

132. Dr. Buckley used the replacement costs provided by Ranajit Sahu, Ph.D ("Dr. Sahu") to generate, in part, the average annual cost input. (T. 155, 158).

133. Sierra Club presented testimony from Dr. Sahu who the Board admitted as an expert in environmental engineering. (T. 32-33).

134. Dr. Sahu evaluated the cost estimates contained in PPG's financial assurance proposal. (T. 34, 44).

135. Dr. Sahu presented different cost categories of both the SLA and SWDA in a series of six tables. (T. 72, SC Ex. 88).

136. Table 2 depicted Dr. Sahu's projections of annual equipment replacement costs of the SLA and Table 3 showed his projections of annual equipment replacement costs of the SWDA. (T. 73, SC Ex. 88).

137. Dr. Buckley calculated an initial sum of $711,053 for the average annual costs. (T. 158).

138. Some costs that Dr. Buckley used to calculate the average annual cost were in 2020 and 2021 dollars. Dr. Buckley adjusted those costs to 2022 dollars and calculated an adjusted average annual cost of $934,606. (T. 158).

139. Dr. Buckley used a producer price index for nonresidential construction to adjust the costs from 2020 and 2021 dollars to 2022 dollars. (T. 159).

140. After adjusting for inflation, the annual average annual cost input that Dr. Buckley used in his present value calculations was $934,606. (T. 158, 185).

141. In selecting a real discount rate, Dr. Buckley assumed a 3.5% inflation rate and a 5.5% return on investment to determine a real discount rate of 2%. (T. 161).

142. Assuming a real discount rate of 2%, Dr. Buckley predicted that on average the standby trust would grow the assets 2% annually above and beyond the impact of inflation. (T. 162).

143. Dr. Buckley selected 300-years as his timeframe input. (T. 164).

144. Dr. Buckley has seen a 300-year timeframe used in reputable applications and has also used that timeframe in work he has done for federal agencies on natural resource damage assessment to develop economic methods tailored for tribal context. (T. 165-66).

145. Using the three key inputs – average annual cost ($934,606), real discount rate (2%), and timeframe (300 years) – Dr. Buckley calculated a present value total of $47.5 million. (T. 171).

146. Dr. Buckley additionally accounted for the cost of a revision of the remedy in the amount of $10 million. (T. 174).

147. Adding the present value amount ($47.5 million) to the cost of a revision of the remedy ($10 million), Dr. Buckley determined that the amount the letter of credit required in order to provide financial assurance for the OMM costs in perpetuity was $57.5 million. (T. 174).

148. Mr. Bummer followed a five-step process for calculating the net present value of estimated OMM costs in order to determine the adequacy of the amount of the OMM Letter of Credit approved by the Department. (T. 625-26).

149. At step one, Mr. Bummer compiled the expected cash outflows for OMM costs for the PPG Waste Site for a 30-year timeframe using the cost estimates provided by Key Environmental and Arcadis contained in the December 2020 financial assurance proposal. (T. 627-32).

150. Dr. Bummer also spoke with two individuals from the engineering and consulting firms to establish a level of comfort with the cost information and to know how to use it appropriately across time. (T. 632, 650-51).

151. Mr. Bummer prepared a spreadsheet breaking down PPG's estimated costs for each of the categories identified by the engineering estimates and submitted in the bonding worksheets, per year, across a 30-year proxy period. (PPG Ex. 22).

152. In addition, Mr. Bummer also prepared a price index for supporting the review and understanding of this data by the engineering category codes. (PPG. Ex. 23).

153. Mr. Bummer calculated that the highest OMM annual cost over a 30-year timeframe was $585,422 and the lowest was $289,117. Mr. Bummer calculated the total OMM costs for a 30-year period as $9,969,631. (PPG Ex. 22; T. 629-32).

154. At step two, Mr. Bummer incorporated an estimated inflation rate of 3.5% to the estimated future OMM costs. (T. 633-35).

155. Mr. Bummer reviewed the range of inflation over the proceeding six years, documents submitted by Sierra Club, and Commonwealth policy guidance suggesting a baseline inflation rate of 3.1% in determining an appropriate inflation rate. (T. 634-35).

156. After applying the 3.5% inflation rate to $9,969,631, the estimated total OMM costs over a 30-year period, Mr. Bummer determined the total adjusted annual OMM costs over 30 years to be $16,358,413. (T. 636-37; PPG Ex. 24).

157. At step three, Mr. Bummer applied a rate of return to the total adjusted annual OMM costs calculated at step two, to discount the inflated future dollars back to their present value. (T. 637-38).

158. Mr. Bummer selected a 6.51% rate of return which he took from Moody's highest-rated AAA corporate bonds. (T. 620-22).

159. Mr. Bummer applied the present-value discount factor to the adjusted annual OMM costs of $16,358,413 which resulted in net-present-value OMM costs of $6,890,188. (T. 638; PPG Ex. 24).

160. At step four, Mr. Bummer checked the reasonableness of his net-present-value calculation by running his numbers through a hypothetical standby trust. (PPG Ex. 25; T. 641-42).

161. The results of Mr. Bummer's hypothetical standby trust exercise indicated that the investment growth of the funds in the standby trust would outpace inflation-adjusted costs over time. (PPG Ex. 34; T. 624-44).

162. At step five, Mr. Bummer incorporated the 5% administrative fee, the 5% project management fee, and the 5% contingency fee called for in the bonding worksheets, in the hypothetical standby trust. (PPG Exs. 26, 37; T. 645-46, 648).

163. Mr. Bummer accounted for these additional fees called for in the bonding worksheets by spreading them evenly across Years 1 through 10 when their net present value is the highest. (T. 647-50).

164. After incorporating these additional fees, Mr. Bummer determined a net present value of $8,025,857. (T. 650).

165. Mr. Bummer used a 30-year timeframe for calculating the net present value of adequate OMM financial assurance because 30 years is an industry-standard proxy for estimating costs in perpetuity. (T. 639-40).

DISCUSSION

Legal Standard

As a third-party appealing the Department's approval of PPG's financial assurances, Sierra Club bears the burden of proof for its claims. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47. In order to prevail on its claims, Sierra Club must show by a preponderance of the evidence that the Department acted unreasonably or in violation of applicable statutes, regulations, and case law, or contrary to its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Stocker v. DEP*, 2022 EHB 351, 363 (citing *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822). The Board defines "preponderance of the

evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Telegraphis v. DEP,* 2021 EHB 279, 288*; Clancy v. DEP*, 2013 EHB 554, 572. Hence, Sierra Club's evidence challenging the Department's approval of PPG's financial assurances must be greater than the evidence supporting the Department's determination that the financial assurances it approved were reasonable, appropriate, and in accordance with applicable law. *Stocker v. DEP*, 2022 EHB at 364.; *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. The Board's review is *de novo* and we can admit/consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *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.

"A third-party appellant who wishes to succeed may not simply come forward with a laundry list of potential problems and then rest its case. *Benner Twp. Water Auth. v. DEP*, 2019 42 EHB 594, 633. As we have held before, an appellant may not simply raise an issue and then speculate that all types of calamities may occur. *Del. Riverkeeper Network*, 2018 EHB at 473; *United* Ref. Co., 2016 EHB at 449; *Ritter v. DEP*, 2017 EHB 729, 741; *Shuey v. DEP*, 2005 EHB 657 at 711. Instead, an appellant must prove by a preponderance of the evidence that the problems the appellant alleges are likely to occur. *Benner Twp*., 2019 EHB at 633. When a party raises technical issues, it must come forward with technical evidence to support its challenge, which many times will require competent and appropriate expert witness testimony. *Liddick v. DEP*, 2018 EHB 207, 216; *Prizm Asset Mgmt. Co. v. DEP*, 2005 EHB 819, 844.

Introduction

The issues in this case narrowed as the matter progressed in front of the Board. In its post-hearing brief, Sierra Club argues four distinct issues where it asserts the Department's actions failed to meet its obligations.[3] First, Sierra Club asserts that the Department violated its obligations under the First Amendment, the Clean Streams Law ("CSL") and the Environmental Rights Amendment ("ERA") by failing to obtain adequate financial assurance from PPG. The focus of the majority of the testimony at the hearing, and the main issue in this case is whether the amount of the financial assurance document that the Department approved to cover the OMM costs of the SLA and SWDA remedies is adequate to fund those activities in perpetuity. The second issue raised by Sierra Club is that the Department acted unreasonably and unlawfully by approving financial assurances without the standby trust required by the First Amendment. Third, Sierra Club argues that the Department violated its obligations under the CSL and the ERA by failing to ensure that letters of credit were available to construct the SLA and SWDA remedies. The final issue set forth in Sierra Club's post-hearing brief is that the Department violated its obligations under the ERA because it failed to render a timely decision on PPG's financial assurance proposal. PPG and the Department, of course, argue that the Department's actions were reasonable, lawful and met the obligations set forth under the First Amendment, the CSL and the ERA, and/or that these issues are otherwise moot at this point in the proceeding.

[3] Sierra Club also raised an issue that the Department failed to adequately consider PPG's compliance history at the PPG Waste Site when evaluating the financial assurance proposal as required under Subchapter E. Mr. Halloran testified that he did consider PPG's compliance history and acknowledged that PPG could have been more proactive in addressing conditions at the PPG Waste Site early on in the process. (Halloran, W.T. 12; T. 343). However, he testified that PPG had been very proactive in working with the Department since the 2019 COA was executed. He determined that PPG's compliance history did not warrant changing the amount of the financial assurances and was satisfied that PPG was going to perform that required remedy. (T. 342-343). The Department did consider compliance history and the evidence supports the Department's conclusions regarding PPG's compliance history in the context of determining the proper financial assurances.

All four of the issues raised by Sierra Club either arise from or involve PPG's proposed financial assurances that were ultimately approved by the Department pursuant to the First Amendment, specifically, Paragraph 13 of the First Amendment. To understand this case, it is helpful to know the context of how the First Amendment and Paragraph 13 came into existence.

First Amendment and Federal Consent Order

Paragraph 13 reads as follows:

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

The First Amendment is more completely identified as the First Amendment to the 2019 COA. The 2019 COA was executed between PPG and the Department on April 2, 2019 and essentially sets forth PPG's remedial obligations at the PPG Waste Site and made those obligations enforceable by the Department. (DEP Ex. 4). It includes a recital of PPG's past actions and compliance issues at the PPG Waste Site and included a civil penalty of $1.2 million dollars for past violations of the CSL and stipulated penalties for future violations. The 2019 COA language did not require PPG to provide any form of financial assurance either to ensure it would complete the remedial work the 2019 COA required, or that PPG would continue to properly operate, maintain and monitor the remediation in the future.

Concurrent with the negotiations leading to the 2019 COA, Sierra Club and PPG were engaged in federal litigation regarding the environmental conditions at the PPG Waste Site.

Settlement negotiations in the Federal Litigation led to Sierra Club and PPG drafting the language that became the First Amendment. That language was presented to the Department for its consideration and, after review, the First Amendment was executed by PPG and the Department on November 4, 2020. Although it actively negotiated and drafted the language of the First Amendment, Sierra Club is not a party to the First Amendment or the 2019 COA.

Sierra Club and PPG executed a Federal Consent Order in the Federal Litigation that required PPG to put in place the financial assurances required by Paragraph 13 of the First Amendment. The Federal Consent Order gives Sierra Club the right to receive the initial financial assurance documentation along with future information about the financial assurance documents. Sierra Club also has the right to challenge certain potential changes and decisions regarding the financial assurances going forward. (DEP Ex. 6, ¶ 22). Paragraph 22 of the Federal Consent Order makes clear that the financial assurance documents are subject to a review process to ensure that the ongoing PPG Waste Site costs are considered on an annual basis concurrent with the renewal, replacement, or substitution of the financial instrument which, in this case, is the letter of credit. Taken together, the 2019 COA, the First Amendment and the Federal Consent Order created a process in which Sierra Club, PPG and the Department all played a role in putting in place the initial financial assurance documents that are the basis of the appeal in this case. Having summarized the historical legal context that led to the current matter, we start by addressing the three less prominent issued raised by Sierra Club before moving onto the major issue of this case.

Standby Trust

We begin with Sierra Club's concern regarding the Department's initial approval of PPG's financial assurance proposal without requiring PPG to establish a standby trust. The First Amendment executed between the Department and PPG specifically provides that the financial

assurances shall consist of letter(s) of credit and a standby trust in favor of the Department that conforms to the requirements of 25 PA Code Section 287, Subchapter E and/or letter of credit and standby trust provisions established by 40 CFR 264.143(d) and 264.145(d). (SC Ex. 10, ¶ 13). The purpose of the standby trust is to ensure that if the Department were required to call on a letter of credit, the funds would be placed in a trust that can only be used to address the PPG Waste Site remediation. Mr. Halloran testified that absent the standby trust, the funds from the letter of credit "would end up in the solid waste abatement fund, which is used for other things." (T. 383). The Department approved PPG's financial assurance proposal on April 7, 2022 without requiring a standby trust because it concluded that doing so was contrary to the requirements of 25 PA Code Section 287, Subchapter E and would in fact delay access to the funds in the letter of credit. (DEP Ex.13; T. 382-83). The Department eventually agreed to the establishment of a standby trust and it was executed by PPG and PNC Bank in November 2022. (T. 383; PPG Ex. 14).

We hold that the plain language of the First Amendment required the Department to have a standby trust in place as part of the financial assurance process. The clear intent of the drafters of the First Amendment was that a trust, separate and distinct from the solid waste abatement fund, is where funds from the letters of credit should be held if PPG were to default in the future. If the Department concluded that such an arrangement was contrary to the requirements of 25 PA Code Section 287, Subchapter E, the time to raise that issue was during the negotiations of the language of Paragraph 13 and not after it had executed the document. However, the Department's initial failure to establish a standby trust at the time the Department approved PPG's financial assurance proposal is now moot. A standby trust that is apparently satisfactory to all parties, was established in November 2022 and remained in place at the time of the hearing. No further relief can be granted at this point. See *Consol Pa. Coal Co. v. DEP* 2015 EHB 117, 119, citing *Horsehead Res.*

Dev. Co. v. DEP, 1998 EHB 1101, 1103, aff'd, 780 A.2d 856 (Pa. Cmwlth. 2001), (stating that "[a] matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome.").

Letter of Credit Errors

The next item Sierra Club raises is that the Department violated its obligations under the CSL and the ERA by failing to ensure that letters of credit were available to construct remedies for the SLA or the SWDA. This challenge arose from an apparent mistake made by PPG when it first obtained the letters of credit. On April 7, 2022, Mr. Halloran sent a letter to PPG confirming the Department's approval of letters of credit as follows: SLA ($22,206,800), SWDA and Annex ($1,946,616), and post-construction OMM ($12,363,864) and also requested that the letters of credit be delivered to him within 30 days. (DEP Ex. 13). On April 27, 2022, PPG submitted three letters of credit to the Department in response to Mr. Halloran's letter. (SC Ex. 48). While it appears the intent was to have two of the letters of credit cover the costs associated with the construction of the SLA and the SWDA remedies, each the letters of credit stated that it was issued "in connection with PPG's commitment to conduct post-construction operation, maintenance and monitoring […]" (T. 376-78; SC Ex. 48). The record does not make clear when and how the Department and PPG first became aware of this mistake in the letters of credit.[4] Mr. Halloran acknowledged that he did not notice the error when he received the letters of credit from PPG in late April 2022. (T. 378). According to Mr. Halloran, the Department's bonding staff in Harrisburg communicated to his staff that language in the letters of credit needed correcting and

[4] Sierra Club asserts in its Post-Hearing Brief that it pointed out the mistake to the Department in July 2022, but that date is not supported by the reference to the transcript cited in the brief. (SC's Post-Hearing Brief, FoF # 196).

that Sierra Club also pointed out the errors, although he could not recall whether that took place before, concurrent with, or after the bonding staff contacted his staff. (*Id*.). Corrected letters of credit were issued and sent to the Department on April 17, 2023. (PPG Exs. 15, 16, 17).

Sierra Club argues that the Department's failure to catch the mistake in the first instance and its failure to promptly correct the mistake once it was identified, constitute a violation of the Department's obligations under the CSL and the ERA. Sierra Club notes that the construction of the SLA and SWDA remedies lacked the required financial assurances until the letters of credit were amended in April 2023. Clearly, this mistake should not have occurred, and a more thorough review should have been conducted when the letters of credit were initially submitted. We do not know when the mistake was identified by the Department relative to when it was corrected so it is difficult to evaluate whether the one-year time frame, starting at the time of submittal and ending at the time the mistake was corrected, represents either a delay in identifying the error or a delay in correcting the error. Regardless, at the time of the hearing, the errors in the two letters of credit had been corrected for several months and no party identified any issues that arose in the implementation of the SLA and SWDA remedies as a result of the error. Therefore, we hold that this issue is moot and further, that the Department's mistake does not rise to a violation of the CSL or the ERA. Again, no further relief can be granted at this point.

Timeliness of Department's Approval

The last issue we address before turning to the main question in this case is Sierra Club's assertion that the amount of time that the Department took to reach its decision on PPG's financial assurance proposal violated the Department's obligations under the ERA. The First Amendment required PPG to submit financial assurance documents to the Department within 30 days of execution. (SC Ex. 10). PPG met the 30-day requirement and submitted its initial documentation

for provision of financial assurances on December 2, 2020. (SC Ex. 11). The Department did not grant final approval of the financial assurance documents until the April 7, 2022 approval letter from Mr. Halloran. (DEP Ex. 13). The Sierra Club argues that the 16 months the Department took to approve the financial assurance documents was unreasonable and unnecessary and did not comport with the Department's obligations under the ERA. The Department argues that it needed the time it took to conduct a thorough review and that several issues existed in PPG's initial proposal that required further responses from PPG before the Department could make a final decision.

Similar to the discussion regarding the error in the letters of credit, Sierra Club's main concern seems to be that the Department's delay left the remedial work at the PPG Waste Site without adequate financial assurance for a period of time. The First Amendment contained timeline requirements both for PPG to submit the financial assurance documents (30 days from execution) and for PPG to submit the letters of credit (30 days from the Department's approval of PPG's documentation), but it did not set forth a timeframe for the Department to approve the proposal. (SC Ex. 10). While not a party to the First Amendment, the testimony at the hearing clearly showed that Sierra Club was directly involved in drafting the language of Paragraph 13 and in the negotiations over its terms that preceded the execution by the Department and PPG. If Sierra Club had concerns about the length of time between submittal and approval, it could have sought to have a timeframe inserted as a requirement in the agreement, but no testimony was presented showing that it attempted to do so. In addition, there was no evidence presented at the hearing that any issues arose in the implementation of the SLA and SWDA remedies during the 16 months it took the Department to approve the letters of credit. We find, again, that this issue is moot, as the eventual approval took place long before the hearing on the merits was held, and there was no

evidence introduced at the hearing showing that the Department's alleged delay created any issues with the construction of the SLA or SWDA remedies. As a trustee under the ERA, it may have been better if the Department had acted more promptly to obtain the financial assurances, but it is equally important that the review of those documents be done in a thorough and professional manner. We do not find that the Department's actions arise to the level of a violation of the ERA. We further note that once again, given that the Department's approval was made well prior to the hearing, there is no further relief that can be granted at this point.

OMM Letter of Credit

The main issue in this case is whether the monetary amount the Department approved for the OMM Letter of Credit satisfies the terms of the First Amendment and the Department's obligations under the CSL and the ERA.[5] Sierra Club asserts that the OMM Letter of Credit does not meet the requirements either of Paragraph 13 or the Department's legal obligations because the dollar amount, $12,363,864, is inadequate to ensure that the Commonwealth will have sufficient funds to continue the required OMM for the PPG Waste Site in perpetuity. Sierra Club contends that the amount of the OMM Letter of Credit is inadequate because it fails "(1) to provide monies for replacement of certain remedy components; (2) to provide monies for revision of the remedy; and (3) to provide the monies to secure the site remedy in perpetuity." (SC Post-Hearing Brief, at 21, FoF #93). Sierra Club's expert, Dr. Buckley, determined that $57.5 million is needed to sufficiently fund the OMM expenses in perpetuity. If PPG defaults, Sierra Club is concerned that the Department's failure to require a letter of credit in an adequate amount will result in either

[5] When Sierra Club initially filed its Notice of Appeal, it challenged the adequacy of all three letters of credit. Prior to the hearing, the challenges to the letters of credit for the construction of the SLA remedy and the SWDA and SWDA Annex remedy were resolved by the parties and those challenges were withdrawn from the case.

(1) the Commonwealth taxpayers being required to provide additional money to operate and maintain the necessary remedy or (2) the remedy will fail, thereby resulting in the resumption of pollution at the PPG Waste Site. According to Sierra Club, because neither of these results comport with the Department's obligations under the CSL and the ERA, the Department's decision to approve the amount of the OMM Letter of Credit was unreasonable, unlawful and not in accordance with the Department's statutory or constitutional duties.

Alternatively, PPG and the Department argue that the amount of the OMM Letter of Credit is more than adequate to address the OMM expenses at the PPG Waste Site in perpetuity. PPG's financial expert, Mr. Bummer, testified that the proper amount of the initial OMM letter of credit should in fact be $6,890,188, and that the actual amount the Department approved ($12,363,864) is conservative and more than enough to cover the OMM expenses in perpetuity. In defending the amount of the OMM Letter of Credit, the Department and PPG argue that the process used to calculate $12,363,864, comports with the requirements set forth in Paragraph 13 of the First Amendment. In addition, both PPG and the Department repeatedly point out that the amount of the OMM Letter of Credit is not static and, per the Subchapter E regulations and Paragraph 22 of the Federal Consent Order, can be adjusted following the annual review of conditions and expenses at the PPG Waste Site. Based on our review of the evidence in this case, we hold that the Sierra Club has not shown by a preponderance of the evidence that the Department's decision to approve an initial letter of credit in the amount of $12,363,864 to fund the OMM costs at the PPG Waste Site in perpetuity was unreasonable, contrary to the law, unsupported by the facts or inconsistent with the Department's obligations under the Pennsylvania Constitution.

In order to understand the parties' arguments surrounding the issues this case presents, it is helpful to be acquainted with the basics of the OMM Letter of Credit. As such, we begin by

looking at the terms of the OMM Letter of Credit and how it functions as financial assurance for the PPG Waste Site. There was general agreement about this among the parties. PPG presented the OMM Letter of Credit into evidence at the hearing as PPG Exhibit 17. By its terms, the OMM Letter of Credit creates an irrevocable standby letter of credit in an amount up to $12,363,864 in favor of the Department in connection with PPG's commitment to conduct post-construction operation, maintenance and monitoring pursuant to the terms of the 2019 COA as amended by the First Amendment. The Department can draw on the OMM Letter of Credit by requesting a draft and sending a statement certifying that the Department is entitled to the amount of the draw. The OMM Letter of Credit explicitly provides that the proceeds of the draft shall be placed directly into a standby trust identified in the OMM Letter of Credit.

The current OMM Letter of Credit is valid until April 18, 2024, and will be automatically extended for additional one year terms unless the issuing company gives written notice ninety (90) days before the expiration date that it intends to terminate the letter of credit at the end of the current term. If the issuing company elects to terminate and PPG fails to replace the OMM Letter of Credit with other financial guarantees acceptable to the Department, the Department can draw on the OMM Letter of Credit thirty (30) days after the termination notice is issued. Our understanding of the process is that if the Department is required to draw on the OMM Letter of Credit prior to April 18, 2024 for whatever reason (i.e. financial concerns regarding PPG, PPG's unwillingness to maintain the remedies, etc.), the maximum amount it would have available to create the standby trust would be the full value of the OMM Letter of Credit, which is currently $12,363,864. Future OMM letters of credit could potentially be for greater or lesser amounts but the amount of money that would go into the standby trust as the "seed money" is set at the time of the draw by the Department. The balance of the standby trust at any given time will be the amount

of the seed money received from the then existing OMM letter of credit plus any investment returns on the money in the trust, minus any funds expended to conduct the OMM at the site. Having outlined the terms and the operating provisions of the OMM Letter of Credit, we turn our attention to the bonding worksheets that the Department used to establish the dollar amount of the OMM Letter of Credit.

A. Bonding Worksheets

The Department requested that PPG calculate the dollar amount using the Department's bonding worksheets developed by the Department's waste management program. PPG submitted its initial financial assurance proposal to the Department in early December 2020 ("December 2020 Proposal"). (SC Ex. 11). The December 2020 Proposal included spreadsheets detailing engineering cost estimates for both the construction of the remedies at the PPG Waste Site and the OMM costs associated with the remedies. These cost estimates were inserted into the Department's bonding worksheets to calculate the required dollar amounts for three letters of credit including the letter of credit for OMM costs. In addition to the engineering cost estimates, the bonding worksheets provide for the inclusion of an inflation factor, fees for administration and project management, and a contingency fund. As part of the December 2020 Proposal, PPG submitted its summary cost worksheet for OMM, which totaled the OMM costs at $12,363,864 for a 30-year period. (SC Ex. 11, Bates No. DEP_EHB 000392). This amount never changed in the subsequent months of Department review and became the exact amount of the OMM Letter of Credit that the Department ultimately approved in April 2022.

Sierra Club argues that the Department's insistence on using the bonding worksheets in determining the amount of the OMM Letter of Credit introduced a fundamental error in the calculation that resulted in the approval of an inadequate amount of financial assurance. The error,

as Sierra Club sees it, is that the bonding worksheets use a 30-year timeframe for calculating OMM expenses and, therefore, relying on the bonding worksheets to calculate the correct amount of financial assurance does not comply with the Paragraph 13 requirement that the funds be sufficient to fund the OMM in perpetuity. PPG and the Department acknowledge that 30 years is not perpetuity but point out that Paragraph 13 also requires that the letter of credit conform to the requirements of 25 PA Code § 287, Subchapter E ("Subchapter E"). The Subchapter E regulations provide a process for calculating a financial assurance amount in a section that is entitled "Bond Amount." 25 PA Code § 287.331.[6] Section 287.331(b)(4) provides that the written cost estimate for developing the amount of the bond "shall be submitted to the Department on a form developed by the Department." 25 PA Code § 287.331(b)(4). The form developed by the Department pursuant to this regulation is the bonding worksheet(s), which is the form it required PPG to submit for its proposal. Therefore, the Department argues, its use of the bonding worksheet is entirely consistent with the language of the First Amendment that requires PPG's letter of credit to conform to the requirements of Subchapter E. We find that the Department's use of the bonding worksheets was lawful, reasonable and in compliance with its obligations under the First Amendment. However, we still need to evaluate whether the amount approved by the Department using the bonding worksheets satisfies the Department's broader obligations, specifically, ensuring the financial assurance amount provided for in the OMM Letter of Credit is sufficient to cover the OMM expenses at the PPG Waste Site in perpetuity.

B. Present Value Inputs

[6] Department staff and witnesses repeatedly referred to the financial assurance documents in this case as bonds but acknowledged that the actual documents were letters of credit which are different financial instruments than a bond. The use of the term "bond" by Department personnel appears to reflect the Department's familiarity and use of the language of Subchapter E.

In evaluating the question of what amount of financial assurance is needed in order to sustain the OMM of the SLA and SWDA remedies in perpetuity, the parties offer three very different answers for our consideration. First, the Department stands by the approved amount of $12,363,864, that was generated from its bonding worksheets. The second amount, calculated by Dr. Buckley and which Sierra Club advocates for, is $57,500,000. Finally, PPG presents a third amount of $6,890,188 that was put forward by its expert, Dr. Bummer. Both Sierra Club's and PPG's experts arrived at their respective OMM estimates by using a present value ("PV") calculation. This differs from the method the Department used, i.e., the bonding worksheets. The methodology that the experts used for their PV calculations was generally the same and relied on basic financial formulas well recognized in their profession. Present value is "the value, as of a specified date, of future cash inflows less all cash outflows … calculated using an appropriate discount rate." (See PPG Ex. Demo 1). Mr. Bummer testified that the formula used for calculating present value is the future value multiplied by one divided by one plus the discount rate, raised to the power of the number of years. (T. 614). Dr. Buckley explained that in his present value analysis, he used three key inputs: 1) the average annual cost of OMM expenses; 2) the interest rate that is the real discount rate (also known as the real rate of return); and 3) a timeframe to allocate the costs over. (T. 156). Sierra Club's and PPG's differing numbers are largely a result of their experts selecting different input values in the PV equation.

Beyond the different input values the experts used, there is another factor that contributes to the vastly different numbers they present. The parties have a fundamental disagreement about how the Board should consider the requirement that the Department and PPG conduct an annual evaluation of the conditions at the PPG Waste Site and, if necessary, adjust the amount of future OMM letters of credit. Sierra Club is skeptical that the adjustments will take place and/or that

PPG will be in the position to provide the additional funds that may be required. Therefore, Sierra Club believes that rather than relying on the ability to adjust the value of the future OMM letters of credit, the Department should have ensured sufficient funds right from the start by requiring a higher amount in the OMM Letter of Credit, including the full cost of revising the entire remedy at some future date. The Department and PPG argue that the review and adjustment process is a requirement of Subchapter E, the 2019 COA and First Amendment and the Federal Consent Order and it will ensure that PPG provides the necessary funds in perpetuity. The Department asserts that under the specific requirements set out in the agreements between the parties as well as the requirements in the Subchapter E regulations, it will be able to ensure adequate funding for the OMM expenses in perpetuity.

i. The Cost Input

As mentioned above, both PPG's and Sierra Club's experts used a present value calculation to estimate the proper value of the letter of credit necessary to ensure that the OMM costs of the PPG Waste Site are funded in perpetuity. Although the Department arrived at its amount differently than PPG and Sierra Club, according to the testimony at the hearing, each party's starting point was the cost estimates developed by PPG's engineering and consulting firms included in the December 2020 Proposal. (SC Ex. 11). We start by evaluating how each of the parties used the consulting firms' cost information to determine their respective OMM cost estimates.

The Department's bonding worksheets are somewhat opaque and do not provide enough detail for us to determine exactly how the cost estimates provided in the December 2020 Proposal flow through to the amount of the OMM Letter of Credit. It appears that the cost estimates provided by PPG's engineers and consultants were generally multiplied by 30 years and the

resulting numbers were totaled to arrive at the overall OMM costs. Some costs, such as wetlands monitoring, that are not required to be completed annually for the entire 30-year timeframe provided for in the bonding worksheet, were accounted for by multiplying those costs by a lesser number of years. The costs were summed in accordance with the procedures shown on the bonding worksheets and the projected OMM costs for a 30-year period totaled $10,209,632. (SC Ex. 11, Bates No. DEP_EHB 000392). In addition to these costs, the Department's bonding worksheets require supplemental funds to cover inflation costs, administrative fees, project management fees and contingency costs. These additional costs and fees totaled $2,154,234. (*Id*.). Following the December 2020 Proposal, additional information was requested and exchanged between the Department and PPG before the Department ultimately approved the amounts for the letters of credit. However, as discussed above, the exact dollar amount of the OMM expenses plus the additional fees and costs that appeared in the bonding worksheets in the initial December 2020 Proposal ($12,363,864) was not revised as a result of any additional information provided by PPG and ultimately became the amount of the OMM Letter of Credit.

For his PV calculations, Dr. Buckley relied on cost estimates that were generated by Sierra Club's witness Dr. Sahu. Dr. Sahu was admitted as an expert in the field of environmental engineering and provided testimony on the topic of OMM costs at the PPG Waste Site. Dr. Sahu testified that he reviewed the design documents of the planned remedies for the entire PPG Waste Site, as well as the as-built drawings for the SLA remedy. (T. 34). He also reviewed the cost information generated by PPG's consultants contained in the December 2020 Proposal. (T. 34-35). Based on his review of this information, Dr. Sahu set forth his cost estimates for ongoing OMM at the PPG Waste Site in a series of tables found in SC Ex. 88B.[7] The cost estimates

[7] The tables presented in this exhibit were developed by Sierra Club's prior expert, Dr. Bell, who unfortunately passed away prior to the hearing. Dr. Sahu testified that he had reviewed Dr. Bell's

provided for in the five tables are as follows: Table 2-SLA Major Equipment Replacement Costs ($113,316); Table 3-SWDA Replacement Costs ($68,864); Table 4-SLA Annual O&M Costs (including minor replacement parts) ($290,244); Table 5-SWDA O&M Costs ($30,769) and Table 6-Site-Wide Sampling, Analysis, Reporting, and Permitting ($207,860). Adding together the costs outlined in the five tables, Dr. Sahu concluded that the OMM cost in Year 1[8] would total $711,053. Dr. Buckley used Dr. Sahu's Year 1 cost of $711,053 as the starting point for his present value calculation. (T. 158).

Mr. Bummer also relied on the cost information provided in the December 2020 Proposal. He testified that in addition to reviewing this information, he also spoke with two individuals from the engineering and consulting firms to ensure he felt comfortable with the information and to also understand how to use it appropriately across time. (T. 632). Mr. Bummer presented the cost inputs he relied on in his PV calculation in two charts designated as PPG Exhibits 22 and 23. The cost categories depicted in those exhibits correspond to the costs PPG submitted in the bonding worksheets. Mr. Bummer's estimated OMM cost in Year 1 totaled $552,849. (PPG Ex. 22). Additionally, he plotted the ongoing OMM costs for every year over a 30-year period. The annual costs varied from a high of $585,422 in Year 4 to a low of $289,117, which is the cost in the majority of the years starting with Year 11. According to Mr. Bummer, the entire OMM costs for a 30-year period total $9,969,631.

information and adopted the opinions of Dr. Bell because he agreed with what Dr. Bell had provided as his opinions. (T. 36-37).

[8] Year 1 is not a specific year such as 2025 but instead is the first year that the Department is required to rely on the letter of credit/standby trust to fund OMM activities at the PPG Waste Site. Neither the Board nor any of the parties can confidently state when year 1 will take place, if at all, since it will only happen when PPG is no longer willing or able to continue the required OMM activities.

The bonding worksheets do not provide us with enough detail to compare the Department's yearly OMM cost amounts to the annual OMM cost amounts used by Dr. Buckley and Mr. Bummer. However, it is apparent when comparing the Department's final OMM cost estimates to PPG's estimates, each used the same cost inputs and generally used them in the same fashion. The total OMM expenses over the 30-year time period set forth in the Department's bonding worksheet totals $10,209,632. Comparing that value with PPG's equivalent number of $9,969,631 calculated by Mr. Bummer, there is just over a 2% difference between the Department's and PPG's total estimated OMM costs for a 30-year timeframe.

Because Dr. Buckley and Mr. Bummer both provided an estimation of the Year 1 costs for OMM and information regarding subsequent annual OMM costs, we can directly compare Sierra Club's cost inputs to PPG's inputs. PPG's Mr. Bummer put the Year 1 OMM costs at $552,849 in comparison to Sierra Club's Dr. Buckley, who put the Year 1 OMM costs at $711,180. The difference between the experts' Year 1 cost projections is mostly attributable to Dr. Buckley's inclusion of "major replacement costs" in his Year 1 total. The major replacement costs were generated by Dr. Sahu and are shown in his Table 2 ($113,316) and Table 3 ($30,769). (SC Ex. 88B). With Dr. Sahu's major replacement costs removed, Dr. Buckley's Year 1 OMM cost input would be reduced to $528,873, which is actually 4.5% less than the Year 1 OMM costs that Mr. Bummer determined.

Sierra Club argues that the replacement costs put forth by Dr. Sahu should be included in the OMM financial assurance because as a practical matter, equipment replacement will be required to ensure perpetual operation of the remedy and, additionally, including the replacement costs is legally required under the language in Paragraph 13 that provides the letter of credit should be "in an amount sufficient to secure the implementation and post-closure care, including without

limitation long-term monitoring, operation and maintenance and **replacement costs**, […]". (emphasis added). We agree with Sierra Club that replacement costs must be accounted for in some measure as part of determining the amount of the financial assurance as both a practical matter as well as a requirement under Paragraph 13. Given the timeframe involved here, perpetuity, it is reasonable to conclude that some equipment will wear out and need to be replaced at some point and that those costs need to be considered in determining the amount of financial assurance that is required.

The issue is whether to include the major replacement costs cited by Sierra Club and, if so, how to account for them. The parties all acknowledge that the cost estimates provided by PPG's consultants, which they all used in their respective calculations, already account for certain equipment replacement costs. (T. 59, 73-74, 485, 549, 665; SC 88B – Table 4). Dr. Sahu testified that based on his experience and understanding of the high pH environment at the PPG Waste Site, there would come a point at which the replacement of larger portions of the remedy would need to be considered. (T. 59-61, 99). To account for equipment replacement in the financial assurance documents, Dr. Sahu divided the capital cost of those items contained in the December 2020 Proposal by a useful life number to arrive at the annual costs that were listed in Table 2 and 3. (T. 107-108). Dr. Sahu's specific testimony regarding the need to replace major equipment, largely focused on the replacement of what has been dubbed "the Deep Trench" and the perforated pipe within the trench. The replacement of these two components alone accounted for about two-thirds of the costs in Table 2. He expressed his concern for the way the Deep Trench had been constructed as it would require replacement of "maybe a segment" and went on to discuss the process of replacing the Deep Trench piping. (T. 61-63). He also briefly discussed the need to maintain operations of the treatment system for the SLA and maintaining the cap of the SWDA.

Replacement of these two items (treatment system and cap) are the other two major components of the replacement costs listed by Dr. Sahu in Tables 2 and 3.

The Department and PPG raised several challenges to Dr. Sahu's testimony regarding the major equipment replacement costs. PPG argued that Dr. Sahu was mistaken about the need to replace major equipment pieces like the Deep Trench and that to the extent equipment would need replaced, it was already accounted for in the cost spreadsheets of the December 2020 Proposal. In support of this position, PPG presented testimony from two professional engineers who were directly involved in the design of the remedies and in putting together the cost estimates. Mr. Flanders designed the SLA remedy that includes the Deep Trench and the wastewater treatment system. (T. 539). He stated that when he designed the SLA remedy, he specifically accounted for the need for replacements and chose materials that would last in the high pH environment. (T. 549). Mr. Flanders testified that Dr. Sahu was incorrect in his understanding of how the Deep Trench functioned and that he also believed, based on his experience with similar systems, that the Deep Trench would not need to be replaced in whole. (T. 551, 578). PPG's other witness, Mr. Hubbard, is a senior project manager and risk assessor for Key Environmental. He is responsible for the operation and maintenance of both the SLA and the SWDA remedies. (T. 590). Mr. Hubbard assisted in putting together the cost estimates and signed off on the costs for the construction of the SWDA remedy and the OMM costs for the entire PPG Waste Site included in the December 2020 Proposal. While Mr. Hubbard did not directly testify on the replacement of portions of the SWDA remedy, he did testify that the capital costs of the SWDA remedy were put together by very conservative civil engineering staff at his company. (T. 593).

After reviewing the testimony, we conclude that Sierra Club did not provide sufficient evidence to support the inclusion of the specific replacement costs set out in Tables 2 and 3 in the

average annual OMM costs, thereby rendering Dr. Buckley's average annual cost input of $711,053 overstated. There are a number of points that we find important in our determination. First, as we said, we agree that some consideration of replacement costs is necessary in determining the amount of the OMM Letter of Credit as a required by Paragraph 13 and as a matter of good operational practice. The testimony made clear that both PPG and the Department were aware of the need for equipment replacement and those costs were part of the calculations that were included in the bonding worksheets. We found the testimony of PPG's witnesses, particularly the testimony offered by Mr. Flanders, more persuasive than Dr. Sahu's testimony as to the conditions and operations at the PPG Waste Site and on the issue of the need for equipment replacement and the associated costs. Except for the discussion regarding the Deep Trench, Dr. Sahu provided no meaningful testimony to support his opinion that the items listed in Tables 2 and 3 would need replaced. He offered no testimony explaining his basis for the useful life figures used in the tables. For instance, Dr. Sahu concluded that the perimeter fence at the SWDA would need to be entirely replaced every 15 years, as shown in Table 3, but we heard no testimony from him supporting this conclusion.

As mentioned above, most of Dr. Sahu's testimony was focused around the Deep Trench. When asked about the SLA equipment that would need replaced over time, Dr. Sahu responded that he was most worried about the perforations in the piping in the Deep Trench becoming clogged. (T. 59-60). He explained that the pipe had been laid on bedrock rather than pea gravel, making the perforations more prone to clogging, which in turn would impact the pipe's ability to collect leachate. (T. 41-42). Dr. Sahu's stated concern regarding the eventual need for the replacement of the Deep Trench was primarily based on his understanding of the purpose (conveyance and collection of leachate) of the perforated pipe and the way that it functioned (the

perforations serve to collect leachate in the pipe) as part of the SLA remedy. Mr. Flanders, the designer of the SLA remedy, testified that Dr. Sahu was wrong in his understanding of how the SLA remedy operated. (T. 542). He explained that the purpose of the perforated pipe is not for the collection or conveyance of leachate as Dr. Sahu believed, but rather it functions as a cleanout mechanism to remove sediment that could accumulate in the pea gravel. The pea gravel is the conveyance mechanism that leads the leachate via gravity to extraction wells. (T. 547-48). Mr. Flanders also contradicted Dr. Sahu's arguments concerning the means and costs that would be involved if the perforated pipe in the deep trench ever needed to be replaced. Dr. Sahu testified that this would be a costly exercise and would require a significant effort. Mr. Flanders testified that the perforated pipe was designed to allow it to be slip-lined with new piping, a process that would be much less involved than the repair scenarios discussed by Dr. Sahu and therefore, significantly less costly. Dr. Sahu also testified that during his review of PPG's revised treatment plan report, it concerned him that there was no indication that hydrogeological testing had taken place at the PPG Waste Site prior to designing the SLA remedy. However, Mr. Flanders identified the specific sections of the treatment plan report that contained the findings of the hydrogeologic studies conducted at the PPG Waste Site. (See PPG Ex. 1, section 5, page 52-63). Dr. Sahu's fundamental misunderstanding concerning key components of the design and construction of the remedy, particularly the Deep Trench, calls into question the reliability of his conclusions pertaining to the SLA remedy and future costs. We are also concerned with how the costs shown in Tables 2 and 3 were derived. Dr. Sahu used the projected capital costs from the December 2020 Proposal but did not update them to reflect actual costs of portions of the project that were completed prior to the hearing[9]. Overall, we credit Mr. Flanders' testimony concerning the SLA

[9] PPG's witness Hadley Stamm ("Ms. Stamm"), a senior remediation project manager for PPG, offered testimony regarding the actual construction cost of the SLA as a whole. (T. 520, 529). Ms. Stamm testified

remedy and what OMM costs will be necessary to operate and maintain it into the future. Finally, we conclude that the annual review and revision process will adequately address the need for any major equipment replacements that may arise in the future.

As discussed above, we conclude Dr. Buckley's Year 1 cost of $711,053, that relied in part on Dr. Sahu's conclusions, is overstated. In addition to including replacement costs, there is another issue with the cost input used by Dr. Buckley in his PV calculations. Dr. Buckley used $711,053, his Year 1 OMM expenses, as the starting number for all subsequent years in his PV calculations. However, the cost spreadsheets in the December 2020 Proposal show that the OMM costs vary from year to year due to certain OMM requirements changing overtime. Even Dr. Sahu's tables show that the Year 1 OMM expenses include costs for activities that will be concluded at an identified point in time in the future and/or do not occur on an annual basis. (See SC Ex. 86B Tables 4 and 6). Two examples of this are the costs associated with the operation of the interim abatement system and with the NPDES permit. As shown in Table 4, the cost of operating the interim abatement system, $82,908, is included in the Year 1 OMM costs. However, the note in Table 4 associated with that cost states that the interim abatement system will run for only two years before it ceases operation. Therefore, Dr. Buckley obviously should not have included $82,908 in the OMM costs for Year 3 and all subsequent years. The same is true for the NPDES permit renewal cost of $5,000 shown in Table 6. This cost occurs once every five years. Dr. Buckley included this permit cost in the Year 1 costs which is acceptable since it is unknown

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that the letter of credit for the SLA construction costs was approximately $22 million but the actual construction of the SLA was completed for approximately $12.5 million. While the record does not make clear the actual costs of construction for specific portions of the SLA, including the Deep Trench, the fact that the SLA as a whole was constructed for roughly $9.5 million below the estimated construction costs suggests the $7.65 million (the estimated cost to construct the Deep Trench) that Dr. Sahu used to calculate the replacement costs of the Deep Trench was likely significantly higher than the actual cost of its construction, thereby making his projected costs for its replacement overstated.

when Year 1 will take place and the possibility exists that the NPDES renewal cost may be incurred in that year. However, the permit renewal cost will not occur each subsequent year but only every five years (i.e., Year 6, Year 11, etc.). Therefore, including that cost in the OMM expenses every year results in a false increase of the average annual costs in the years that those intermittent costs are not incurred. Unlike Dr. Buckley who used a static number for his average annual cost, PPG's expert calculated the present value by using a specific cost input each year. Mr. Bummer addressed the variable OMM costs by creating a spreadsheet that set out all the individual categories of OMM costs and only included the specific costs in the OMM expenses in the years that they would occur. (See PPG Exs. 22 and 23). As a result, the annual cost inputs that Mr. Bummer used fluctuated over the 30-year timeframe and better reflect the actual OMM costs than the static number that Dr. Buckley used.

Dr. Buckley's next step in his PV calculations only compounds the issue created by the already overstated average annual cost input. Dr. Buckley adjusted his Year 1 cost of $711,053 by applying inflation factors ranging from 14.9% to 34.57% based on the nonresidential building construction price index. The purpose of applying the inflation factor was to adjust some of the costs in the December 2020 Proposal that were in 2020 and 2021 dollars to 2022 dollars for the PV calculations. (T. 158-59). After adjusting for inflation, the annual average cost input that Dr. Buckley used in his PV calculations was $934,606, resulting in an extra $223,553 being added to the cost input, which he acknowledged was roughly an overall increase of approximately 32% to the cost input value. (T. 185). We understand the rational for adjusting costs to account for inflation but, as should be apparent, if the cost ($711,053 in this case) to which you apply the inflation adjustment is already overstated as we have found, the resulting inflation adjusted cost will be further overstated. We also question Dr. Buckley's use of an inflation value derived from

the nonresidential building construction price index. Use of this index makes some sense when looking at the letters of credit involving the construction of the SLA and the SDWA remedy. However, the bulk of the OMM costs at issue in determining the amount of the OMM Letter of Credit are non-construction activities such as inspections, water sampling, equipment cleaning/maintenance, monitoring and reporting. On its face, the index Dr. Buckley applied seems a poor fit for these activities and we were not given any testimony as to why it was an appropriate index in this situation. Finally, we take judicial notice of the fact that 2020 through 2022 was the height of the Covid-19 pandemic and construction related costs were greatly inflated during this time period as result of labor and material shortages.

To summarize, Dr. Buckley included the replacement costs generated by Dr. Sahu in his average annual cost input. For the reasons set forth above, Dr. Sahu's replacement costs are unsubstantiated and, therefore, cannot be included in the average annual OMM costs. In addition, rather than adjusting the annual average OMM costs to account for the costs that are not incurred yearly, Dr. Buckley included those intermittent OMM costs in his calculations for each year. Finally, applying an inflation value to an already overstated cost, as Dr. Buckley did, resulted in an adjusted cost that is even further overstated. In sum, the $935,606 amount that Dr. Buckley used in his calculations, overstates the average annual costs for OMM, one of his three key inputs in determining the PV. The overstated value carries through and contributes to our conclusion that Sierra Club's assertion that the amount of the OMM Letter of Credit is too low is not supported by the evidence.

As a final note on the discussion of the OMM costs, there is testimony that allows us, on at least a limited basis, to fact check our conclusion that the average annual OMM cost that Dr. Buckley used is overstated. Because the SLA remedy has been in operation since early October

2022, some of the OMM activities had begun prior to the hearing. Mr. Hubbard, the engineer responsible for overseeing OMM at the PPG Waste Site, testified that OMM costs were running year to date roughly 30 to 35% below the costs provided in the December 2020 Proposal. We are hesitant to put too much emphasis on these figures since there are several factors that are likely contributing to the lower than expected costs. First, the SWDA remedy was not yet constructed, so clearly that eliminated certain OMM costs related to that portion of the site. Also, as the construction that has been completed is brand new, we would not expect that it would require significant routine maintenance and replacement in the first years of operation. At the same time, the fact that the actual OMM costs incurred are coming in well below the costs in the December 2020 Proposal, suggests that inflation has not significantly impacted these costs in the 2020-2022 time period as Dr. Buckley argued. It also supports Mr. Hubbard's testimony that the costs provided in the December 2020 Proposal were conservative and likely overstated the costs as opposed to understating them.

ii. Real Discount Rate/Real Rate of Return Input

Dr. Buckley identified the interest rate as the second key input in his PV calculations. He testified that he used a 2% real discount rate. (T. 161). He described the real discount rate as the equivalent of having a 3.5% inflation rate and a 5.5% return on investment over time, explaining that this meant on average, the standby trust would grow the assets 2% annually above and beyond the impact of inflation. (T. 162). Dr. Buckley acknowledged that it was challenging to provide a precise projection as to how inflation or investment opportunities could change over time but asserted that his approach was standard when looking at a long time period.

In comparison, PPG's expert, Mr. Bummer, used a separate inflation rate and a separate rate of return on investment in his calculations. Based on his review of several sources, he applied

an inflation rate of 3.5%. (T. 634-35). He used a return on investment rate of 6.51% derived from the long-term average Moody's AAA corporate bond yield that he described as very conservative. (T. 621-22). By subtracting his 3.5% inflation rate from his 6.5% rate of return, Mr. Bummer arrived at a 3% real rate of return. Mr. Bummer testified that the "apples-to-apples" comparison between his input and Dr. Buckley's input is Dr. Buckley's real discount rate of 2% and his real rate of return of 3%. (T. 668, 693). Mr. Bummer testified that the higher the rate of return is, the less seed money is needed in the standby trust to cover a given level of expenses and, vice versa, a lower rate of return would require more seed money in the standby trust to cover the same level of expenses. (T. 625, 689). Therefore, Dr. Buckley's use of a 2% real discount rate necessitates a larger letter of credit amount to cover OMM costs when compared to Mr. Bummer's use of a 3% real rate of return, which would require a smaller letter of credit to cover the same costs.

Sierra Club and PPG each criticize the rate selected by the other side's expert. Mr. Bummer testified that he believed that Dr. Buckley's 2% real discount rate "was inconsistent or unsupported." (T. 655). Sierra Club questioned Mr. Bummer about the selection of his rate of return and noted that if he had used a different time period than the one he selected to arrive at his rate, then his 6.51% return rate would be lower in the examples presented. (T. 693, 696). In response, Mr. Bummer explained that it was incorrect to look at a rate of return independent of the inflation rate since the two rates walk in tandem. (T. 694). He testified that historically when return rates are lower, inflation is also usually lower. (T. 692-694). Following our review of the testimony, we find no reason to question the rates used by either of the experts. Each appears to have attempted to generate a reasonable number for the rate that would apply to a future standby trust as part of their PV calculations. Future inflation rates and investment returns are a prediction based on assumptions that may or may not be correct regarding future economic circumstances.

(T. 169). None of the participants in the hearing can possibly know with any certainty what the real rate of return will be on a standby trust that could potentially come into existence 50 or 100 years from now. Ultimately, we find that each of their respective rates is reasonable and we understand how their selected rates work in their ultimate determinations about the proper amount of the OMM Letter of Credit. That understanding is sufficient information on this key input for us to adequately factor the rate issue into our final decision.

iii. The Timeframe Input

Dr. Buckley's third key input in determining the proper PV of the OMM Letter of Credit is the timeframe in which to allocate those costs. (T. 156). Paragraph 13 requires that the financial assurance is in an amount sufficient to cover the costs in perpetuity. Dr. Buckley stated that he understood perpetuity to mean that the financial assurance has no particular closing date in terms of when performance would no longer be necessary. (T. 148). Dr. Buckley chose to use a 300-year timeframe. The Department, relying on the bonding worksheets, used a 30-year timeframe. Mr. Bummer also used a 30-year timeframe but testified that he settled on that timeframe independent of the bonding worksheets. The significant difference between the 30-year timeframe that the Department and PPG used in their calculations, and the 300-year timeframe Sierra Club used in its calculations, plays a large role in the different amounts of financial assurance for the OMM costs advocated for by the parties.

Dr. Buckley testified that he selected a 300-year timeframe for several reasons. He stated that he wanted something that was very far into the future because he had heard from a source, whom he did not identify, that "the pollutant could take 800 years to be fully released." (T. 164-65). He also testified that he had seen a 300-year timeframe used in very reputable applications and gave as an example a report involving long term costs and investment returns in the context

of climate change. He also noted that he had used a 300-year timeframe in work he had done for federal agencies on natural resource damage assessment to develop economic methods tailored for tribal context. His final point was that as a practical matter, extending the timeframe beyond 300 years would have limited impact on the PV calculation, since the amount of money that is required to fund additional time beyond 300 years becomes insignificantly small as part of the overall PV number. (T. 166). Dr. Buckley criticized the use of a 30-year timeframe stating that "30 years will be far from adequate" to address costs that will be expected to extend to perpetuity. (T. 177).

Mr. Halloran testified that the Department typically uses a 30-year timeframe when looking at long term OMM costs. (T. 302, 304). Mr. Martel confirmed Mr. Halloran's statement and testified he had not used a timeframe other than 30 years for any landfills[10] and did not know of any facilities where a timeframe greater than 30 years was used. (T. 466-67). The Department's use of this timeframe is spelled out in the Subchapter E regulations and the bonding worksheets. Mr. Halloran stated that, in the Department's view, the 30-year timeframe is enough because the Department can review the remedial situation and can adjust the amount of funds in the OMM Letter of Credit moving forward. Mr. Martel noted that the 30-year timeframe does not shrink over time, but rather is a continual 30 years that moves forward in time and remains in place until the site is fully remediated. (T. 467). Mr. Halloran acknowledged that the language in Paragraph 13 used the term "perpetuity" but repeatedly stated that the Department believed that it had received sufficient funds in the OMM Letter of Credit to carry out the required work in perpetuity. (T. 305). He further stated that "when we look at financial assurances, we use that 30-year timeframe so we can have real costs for those 30 years and not some arbitrary 300 years in the

[10] Mr. Martel stated that he treated the PPG Waste Site as a landfill for purpose of determining the number of years for setting the financial assurance because it "is what was most appropriate." (T. 466).

future, where we can't come up with costs. Then we look at that number throughout the life of the remedy and adjust as necessary. That is where the perpetuity is, the life of the remedy." (T. 305-306). Mr. Halloran testified that when Sierra Club provided written comments regarding the December 2020 Proposal, including Dr. Buckley's proposed substitution of a 300-year timeframe for perpetuity, the Department concluded that the extended timeframe "seemed speculative and arbitrary." (Halloran W.T. at 10).

PPG's expert, Mr. Bummer, stated that he did not choose a 30-year period in his PV calculation based on the Department's use of a 30-year timeframe in the bonding worksheets. (T. 639). He agreed that 30 years is not the same as perpetuity but offered two reasons for using the 30-year timeframe. (T. 639, 641). The first reason as we understand it, is his reliance on the principle that the discounted cash flows diminish significantly as time passes. This is the same idea expressed by Dr. Buckley although he argued that the proper cutoff point came after 300 years. Mr. Bummer's second point was his assertion that, so long as you build in a certain degree of financial conservatism into your situation by providing for contingencies in the numbers and also had a mechanism in place to check your assumptions going forward and then adjust them when necessary, you could be comfortable and adequately protected when using 30 years as a proxy for perpetuity. (T. 640-41). Mr. Bummer did not directly criticize Dr. Buckley's use of a 300-year timeframe beyond a general criticism of Dr. Buckley ignoring what Mr. Bummer described as, "the fundamental risk mitigation that comes and flows from the annual certification process." (T. 655).

Neither 30 years nor 300 years is "in perpetuity". Each of the parties used their respective finite number of years as a proxy for perpetuity. Based on our reading of Paragraph 13 and on the testimony provided in this case, we conclude the phrase "in perpetuity" as used in Paragraph 13

was intended to create a performance-based standard for measuring the necessary amount of the OMM Letter of Credit. When considering the two selected timeframes, the real question is whether Mr. Bummer's claim, that 30 years is adequate so that "you have sufficiency in that [letter of credit]" (T. 640) is correct or, whether Dr. Buckley is correct that "30 years will be far from adequate" to address the costs that will extend into perpetuity. (T. 177). We cannot address that issue in the abstract by simply focusing on the question of what the proper timeframe is to serve as a proxy for perpetuity, but it instead requires us to consider the actual value of the OMM Letter of Credit that the Department approved and the PV amounts the experts determined.

iv. Revision Cost

One additional factor apart from the three key inputs identified by Dr. Buckley contributed to the difference between Sierra Club's and PPG's PV figures. The language in Paragraph 13 requires consideration of the cost of "a revision of the remedy should the original fail." Dr. Buckley added $10 million to his PV total to account for the cost of a potential revision of the remedy. (T. 174). He determined the revision amount by taking the 2022 engineering capital costs for construction of the SLA remedy ($8.7 million) and applying the same inflation index adjustment he used on the other costs to arrive at $10 million. He acknowledged that he was using the capital costs of the SLA remedy as a proxy for the range of future capital revision costs. He also stated that his number was used to "represent frankly some uncertain revision." (T. 192).

Mr. Halloran and Mr. Martel both stated that the expenses that led to the OMM Letter of Credit amount did not include a specific line item for the cost of a revision of the remedy. (T. 336, 489). Mr. Martel described predicting the cost of any future revision as difficult and testified that any resulting number would be pure speculation. (T. 489). Mr. Bummer also did not provide a separate line item for revision of the remedy in his PV calculations. (T. 696-97). He testified that

it was his understanding that those costs were embedded in the engineering estimates provided by Mr. Hubbard and Mr. Flanders along with the addition of the $1.5 million in contingencies and fees included in the amount of the OMM Letter of Credit as a result of the calculations on the Department's bonding worksheet. (T. 696-97). The Department and PPG both argued that any need to account for the cost of a potential wholesale revision of the remedy would be best addressed through the periodic review process. Now that we have looked closely at the key inputs each party used in their PV calculations, we turn to reviewing the calculations themselves and the final numbers advocated for by the parties.

C. Adequacy of the OMM Letter of Credit

Mr. Bummer testified that he followed a five-step process in evaluating the adequacy of the OMM Letter of Credit amount. (T. 626). Development of the annual cost inputs previously discussed comprised his first step and totaled $9,969,631. (See PPG Exs. 22, 23). Step two involved determining an inflation rate and applying it to the OMM costs that he developed in step one. Mr. Bummer settled on an inflation rate of 3.5% after reviewing several sources. His inflation adjusted cost for 30 years of OMM at the PPG Waste Site totaled $16,358,413. (T. 637; PPG Ex. 24). In step three, he calculated the present value to determine how much money would be needed in the standby trust today to cover $16,358,413, which again is the total cost of 30 years of OMM when adjusted for inflation. He calculated a PV of $6,890,188. (T. 637-638; PPG Ex. 24).

In his fourth step, Mr. Bummer tested his calculations by looking at a hypothetical standby trust. He began by placing the amount of the current OMM Letter of Credit ($12,363,864) into the trust and applied an investment return of 6.51% and subtracted the annual inflation adjusted OMM costs he calculated in step two. Because the returns on investment outpace the costs on an annual basis, he determined that after 30 years, the hypothetical trust balance would total

$37,725,745 and would continue to increase in subsequent years. (T. 641-42; PPG Exs. 25, 35). Mr. Bummer testified that his use of the hypothetical standby trust convinced him that so long as the OMM Letter of Credit is updated each year with the latest estimates of engineering costs, the seed money will be more than sufficient to cover the expected future cash flows for not just 30 years, but in perpetuity. (T. 645).

His fifth step incorporated the fees for administration, project management and contingency from the Department's bonding worksheets into his PV calculations. These fees totaled $1,531,446 on the bonding worksheets. Mr. Bummer testified that including these additional items in his PV value created an additional safety net because based on his review and discussions with Mr. Flanders and Mr. Hubbard, the engineering costs already included these contingencies in their estimated costs. In a further nod to what he asserted was a conservative financial approach, Mr. Bummer front loaded these fees into the first ten (10) years of his PV calculations. Meaning, he calculated the PV of the contingencies as $1,135,669 and then added that to his PV for engineering costs ($6,899,188) to arrive at a PV for engineering costs and additional fees that totaled $8,025,857. (PPG Ex. 26). By frontloading the contingency costs in the first 10 years, the present value of those costs is higher. Mr. Bummer testified that even including the fees found in the Department's bonding worksheets, the current amount of the OMM Letter of Credit ($12,363,864) is still well in excess of the amount of money his calculations show are necessary to cover the OMM expenses at the PPG Waste Site in perpetuity.

Dr. Buckley's PV calculations followed a slightly different path than the five steps outlined by Mr. Bummer. As discussed, Dr. Buckley relied on the costs listed in Dr. Sahu's tables to calculate an annual average cost based on the engineering reports included with the bonding worksheets and then applied an inflation factor to bring those amounts to 2022 dollars. He

determined the annual OMM and capital replacement cost would be $934,006 which we find to be overstated for the reasons we have previously identified. His first-year amount of $934,066 was identified as year 0. He next applied a discount value to calculate the present value of $934,006 in each subsequent year for 299 years and totaled his year 0 value with the 299 discounted values to arrive at a total of $47,539,566 that he labeled the cumulative discounted total. (T. 171-72; SC Ex. 72B). Dr. Buckley next added $10 million dollars to this amount to address the need to potentially revise the remedy in the future. He testified that the PV of a letter of credit needed to secure the OMM costs if PPG defaulted is $57.5 million. (T. 174). Dr. Buckley's PV amount is well in excess of the amount of the OMM Letter of Credit approved by the Department.

In evaluating the two experts PV numbers, we conclude that PPG's expert, Mr. Bummer, arrived at a more realistic PV amount that is reflective of the facts in this case. We are satisfied that his calculations demonstrate that even at the current value of the OMM Letter of Credit, the Department will have sufficient funds to take over the OMM at the PPG Waste Site and complete the required work in perpetuity if PPG were to default at this time. In fact, the Department's amount of $12,363,864, exceeds what Mr. Bummer determined was necessary by approximately $5,473,676, providing a sizeable cushion to address any needs not fully accounted for in his numbers. Our conclusion is reinforced by the requirement that the Department and PPG, with oversight by Sierra Club, must review the OMM costs at the PPG Waste Site on an annual basis and adjust the amounts of future OMM letters of credit accordingly to reflect any changes to the funds required. We acknowledge Sierra Club's concern that if/when PPG defaults, requiring the Department to draw on the then current OMM letter of credit, the amount of seed money deposited into the standby trust will be at a set amount without the possibility for future adjustment. If the Department and PPG fail to diligently conduct the annual review and adjust the amount of future

OMM letters of credit when necessary, including any future need for a wholesale revision, the possibility does exist that the funds available may prove to be insufficient to fully cover the costs at the PPG Waste Site. However, we find that it would be inappropriate for us to speculate that the Department will not take the required actions to ensure that this does not happen. We are also confident that Sierra Club will maintain a watchful eye on the work at the PPG Waste Site and if it concludes that the Department's annual review and approval process is not adequately accounting for activities and costs at the PPG Waste Site, it will take action to address those concerns.

Conclusion

In conclusion, we hold that Sierra Club has not met its burden to show by a preponderance of the evidence that the Department's action approving the OMM Letter of Credit in the amount of $12,363,864 was unreasonable, unlawful and not in accordance with the Department's statutory or constitutional duties. The facts and testimony in this matter demonstrate that the amount of the OMM Letter of Credit is enough to cover the OMM costs at the PPG Waste Site in perpetuity. The review and approval process in place between the Department and PPG will permit them to review progress at the PPG Waste Site and adjust the amount of future OMM letters of credit to reflect changing conditions and requirements. We also hold that the more minor issues raised by Sierra Club had been adequately addressed by the time of the hearing to render them moot for our purposes since we could provide no remedy to those issues.

CONCLUSIONS OF LAW

1. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *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; *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).

2. The plain language of the First Amendment required the Department to have a standby trust in place as part of the financial assurance process.

3. Where the standby trust has been established, the issue that Sierra Club raised when it first filed its appeal regarding the Department's failure to establish a standby at the time the Department approved PPG's financial assurance proposal is moot.

4. The Department's failure to identify the drafting errors in the letters of credit sent by Sierra Club in the first instance and its failure to promptly correct the mistake once it was identified does not rise to a violation of the Clean Streams Law or the Environmental Rights Amendment.

5. Where the drafting errors have been corrected in the letters of credit, the issue that Sierra Club raised when it first filed its appeal regarding the Department's failure to identify and promptly correct the errors in the letters of credit is moot.

6. The Department's delay in taking 16 months to approve PPG's financial assurance proposal does not arise to the level of a violation of the Environmental Rights Amendment.

7. Sierra Club's claim concerning the alleged approval delay is moot as the approval had taken place long before the hearing on the merits was held, and there was no evidence introduced at the hearing showing that the Department's delay caused any harm to the construction of the SLA or SWDA remedies.

8. Sierra Club has not met its burden to show by a preponderance of the evidence that the Department's action approving the OMM Letter of Credit in the amount of $12,363,864 was inconsistent with or contrary to the terms of Paragraph 13 of the First Amendment.

9. Sierra Club has not met its burden to show by a preponderance of the evidence that the Department's action approving the OMM Letter of Credit in the amount of $12,363,864 was unreasonable, unlawful and not in accordance with the Department's statutory or constitutional duties.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 9th day of April, 2024, it is hereby ordered that the Appellants' 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: April 9, 2024

c: **DEP, General Law Division:**
Attention: Maria Tolentino
9th Floor, RCSOB
(via electronic mail)

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLAS SCOTT and LINDA MARIE SCOTT	:	
v.	:	**EHB Docket No. 2022-075-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RICE DRILLING B, LLC, Permittee	:	**Issued: April 29, 2024**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By MaryAnne Wesdock, Judge

Synopsis

Summary judgment is granted to the Department of Environmental Protection and the Permittee on the question of whether the Department's issuance of gas well permits constitutes a taking of the Appellants' property. Neither the applicable law nor the facts of this case support the Appellants' claim that a taking has occurred. Additionally, the Appellants' remaining claims in this matter which were not dismissed in the prior Opinion denying the Permittee's motion to dismiss on the basis of mootness are hereby dismissed.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Douglas Scott and Linda Marie Scott (the Scotts) challenging the Department of Environmental Protection's (Department's) issuance of unconventional gas well permits to Rice Drilling B, LLC. The permits authorize the drilling of gas wells through coal seams owned by the Scotts on property located in Franklin Township, Greene County. The parties have filed motions for summary

judgment on the question of whether the Department's action constitutes a taking. On March 18, 2024, following a conference call with the Board, additional materials were submitted by the parties for inclusion in the summary judgment record.[1] This matter is ready for review.

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. *Amerikohl Mining, Inc. v. DEP*, 2023 EHB 348, 351-52 (citing Pa.R.Civ.P. 1035.1-1035.2); *Pileggi v. DEP*, 2023 EHB 288, 290-91. Summary judgment may also be available under the following scenario:

> if, 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.

Id. at 290 (citing Pa.R.C.P. No. 1035.2(2)).

In *Marshall v DEP*, 2019 EHB 352, the Board explained: "Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a prima facie case." *Id.* at 353 (citing Note to Pa.R.C.P. No. 1035.2).

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Id*. (citing *Stedge v. DEP*, 2015 EHB 31, 33). All doubts as to whether genuine

[1]These materials include the Appellants' Stipulation of Facts (Appellants' Stipulation) and the Joint Stipulation of Facts filed on Behalf of the Department and Rice (Joint Stipulation of Department and Rice) (sometimes collectively referred to herein as "Stipulations"), as well as exhibits thereto.

issues of material fact remain must be resolved against the moving party. *Sierra Club v. DEP*, 2023 EHB 97, 99; *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406).

Factual and Procedural History

The Scotts own two parcels of land in Franklin Township, Greene County, Pennsylvania (the property). Their ownership interest includes the oil and gas estate and all underlying coal seams except for the Pittsburgh coal seam which had been previously severed. Based on the parties' Statements of Undisputed Material Facts (SUMF), responses thereto, Stipulations, and other documents in the record, we piece together the rather complicated history of this matter which originates in 1917 when the Scotts' predecessor-in-interest entered into an oil and gas lease with Peoples Natural Gas Company (the Gas Lease). (Permittee's SUMF 3; Appellants' Response to Permittee's SUMF 3; Ex. B to Permittee's Motion.) Mr. Scott purchased the property in 2002 and entered into an Amendment and Ratification of the Gas Lease in 2013. (Permittee's SUMF 5; Appellants' Response to Permittee's SUMF 5; Ex. C to Permittee's Motion.)

At some point between 2013 and 2019, EQT Production Company (EQT) became the Lessee under the Gas Lease. Litigation ensued between EQT and the Scotts, and on May 23, 2019, the Scotts and EQT entered into a Settlement Agreement under which EQT agreed to withdraw its lawsuit and pay the Scotts the sum of $260,000. (Ex. H and I to Permittee's Motion.) In turn, the Scotts agreed that EQT could enter their property to begin construction of a well pad. (*Id.*) As part of the Settlement Agreement, the Scotts executed an Amendment and Ratification of the Gas Lease (the 2019 Amendment) and a Coal Owner Permission to Drill (Permission to Drill). (Ex. D and E to Permittee's Motion.) The Permission to Drill granted permission to Rice Drilling B, LLC

(Rice)[2] to drill wells on the Scotts' property in 14 locations specified therein.[3] (Ex. D to Permittee's Motion.)

Shortly after the execution of these documents in 2019, the first group of wells were drilled on the Scotts' property: These wells were the Corsair 2H, 4H, 6H, 8H, 10H and 12H wells. (Ex. F to Permittee's Motion at 28:24-25 and 29:2; Permittee's SUMF 9; Appellants' Response to SUMF 9.) In April 2022, Rice applied for permits to drill the next set of Corsair wells: the 1H, 3H, 5H, 7H and 9H wells (the 2022 wells). (Permittee's SUMF 10; Appellants' Response to SUMF 10.) Notice was sent to the Scotts, including plats identifying the planned locations of the wells. (*Id*. at 12.) The location of the Corsair 1H, 3H, 5H, 7H and 9H wells was within 1,000 feet of a conventional well and involved drilling through coal seams owned by the Scotts. (Appellants' SUMF 3; Permittee's Response to SUMF 3.)

By letter to the Department dated April 22, 2022, the Scotts stated they objected to the issuance of the permits for the 2022 wells, claiming that Rice had "Failed to Request or Obtain a Waiver Under 58 P.S. § 507." This provision requires written consent when a well will be located within 1,000 feet of another well which penetrates a workable coal seam. The Scotts' letter stated:

> Douglas Scott is the owner of workable seams of coal that RICE's proposed wells will penetrate. These wells are located within 500' of an operating oil and gas well as shown on Exhibit 1 identified as well numbered 059-01229. RICE has neither requested nor obtained a waiver to space their wells closer than 1000' to this well. Scott has given waiver to a previous set of drilling permits on this location,

[2] According to the parties' Stipulations, Rice is a subsidiary of EQT. (Appellants' Stipulation, para. 3; Joint Stipulation of Department and Rice, para. 3.) Rice is the permittee in this appeal.

[3] The well locations agreed to by the Scotts in the Permission to Drill include the locations where the wells at issue in this appeal were permitted and subsequently drilled. (Ex. D to Permittee's Motion; Ex. F to Permittee's Motion at 50:7-13; Joint Stipulation of Department and Rice, para. 8; Appellants' Stipulation, para. 9.)

> filed in or about 2019. Scott has not given waiver to these current Permit Applications and hereby revokes any and all waivers.

(Ex. B to Attachment 1 of Notice of Appeal.)

Following the submission of information by Rice and the Scotts, the Department concluded that the Scotts' coal seams were not workable and, therefore, consent was not required under 58 P.S. § 507. (Ex. D and K to Attachment 1 of Notice of Appeal.) On August 23, 2022, the Department issued the well permits, and the Scotts filed this appeal. The Scotts did not seek a supersedeas of the permits.

On February 16, 2023, Rice filed a Motion to Dismiss, arguing that the appeal was moot since the 2022 wells had been drilled between August to October 2022 and there was no effective relief that the Board could grant. The Board denied the motion, finding that the matter was not moot since the Scotts had raised a takings claim in their Notice of Appeal. *Scott v. DEP and Rice Drilling B, LLC*, 2023 EHB 138. The Board held:

> While we agree with Rice that the Board cannot award damages in this matter, nonetheless "[i]t is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking." *Marshall v. DEP*, 2019 EHB 352, 354 (citing *Domiano v. Department of Environmental Protection*., 713 A.2d 713 (Pa. Cmwlth. 1998).

2023 EHB at 143 (additional citations omitted). Because the Board found that the takings claim prevented the appeal from being dismissed on grounds of mootness, the case was allowed to proceed. On December 28, 2023, this matter was reassigned to Docket No. 2022-075-W.

Discussion

All three of the parties have filed motions for summary judgment on the question of whether the Department's actions in this matter constitute a taking. The Scotts' takings argument is twofold: 1) the issuance of the well permits without their consent caused a physical taking of

their property by authorizing drilling through their coal seams and the sterilization of approximately 72,139 tons of coal, and 2) the Department's determination that their coal seams were not workable deprived them of the economically beneficial use of their coal. The Department disputes that a taking has occurred, arguing that the permits conveyed no property rights and, therefore, there can be no basis for the Scotts' claim that the permits resulted in a taking. Rice supports the Department's position and further argues that a taking could not have occurred because Rice was legally entitled to drill through the Scotts' coal by virtue of the Gas Lease, the 2019 Amendment thereto, and the Permission to Drill.

Viewing the record in the light most favorable to the Scotts, even if we assume that their coal is workable and their consent was required, they have failed to set forth the essential elements of a takings claim. Neither the facts nor the law support the Scotts' position that the Department's actions in this matter constitute a taking. For the reasons set forth below, we find that the Department and Rice are entitled to summary judgment on this issue.

Takings Analysis

The United States Constitution prohibits private property from being taken for public use without just compensation. U.S. CONST. Amend. V. Similarly, the Pennsylvania Constitution provides: "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. Art. I, § 10. Simply stated, a taking occurs when a governmental body takes private property for public use without just compensation.

In *People United to Save Homes (PUSH) v. Department of Environmental Protection*, 789 A.2d 319 (Pa. Cmwlth. 2001), the Commonwealth Court described a taking as follows:

> A taking occurs when the entity clothed with the power substantially deprives an owner of the use and enjoyment of his property...A

> taking may also occur if a regulation enacted for a public purpose under the government's police powers prevents the landowner from using his land.

Id. at 326-27 (citing *Machipongo Land & Coal Co. v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998)). A party claiming that a taking has occurred "has a heavy burden to develop the necessary facts and law to support such a claim." *M&M Stone Co. v. DEP*, 2008 EHB 24, 74.

The Scotts assert that the Department's issuance of the well permits to Rice and the designation of their coal as non-workable constitutes a taking for which they should be compensated. In reviewing their argument, we believe the Scotts have misconstrued what a taking is. Although we recognize that there is "no magic formula" that enables a court to determine whether a given government interference with property is a taking, *PBS Coals, Inc. v. Department of Transportation*, 244 A.3d 386, 398 (Pa. 2021), *cert. denied sub nom. PBS Coals, Inc. v. Pennsylvania Department of Transportation*, 142 S. Ct. 224 (2021), at a minimum, the action in question must meet the definition of a taking – i.e., private property taken for *public use* without just compensation. U.S. CONST. Amend. V; PA. CONST. Art. I, § 10. A taking occurs when a governmental action "goes too far" and "forces 'some people alone to bear *public burdens* which in all fairness and justice should be borne by the public as a whole.'" *Machipongo Land and Coal Co. v. Department of Environmental Protection*, 799 A.2d 751, 765 (Pa. 2002) (emphasis added) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 2458 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563 (1960)); *Davailus*, 2003 EHB 101, 121. *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978) (The Fifth Amendment's guarantee is designed to bar the government from forcing some people alone to bear public burdens.)

Here, there has been no taking of the Scotts' property for a public use. The Scotts have not been forced to bear any burdens that should in all fairness and justice be borne by the public. The Department's issuance of well permits to a private party – Rice – for the drilling of wells on the Scotts' property cannot be considered a "taking" in the constitutional sense. While the Scotts may believe that the Department erred or abused its discretion in issuing the permits and designating their coal as non-workable, there is no basis for their claim that the Department has "taken" their coal.

The cases cited by the Scotts in support of their proposition that a taking has occurred are not analogous to this matter. For example, the landmark case of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), relied upon extensively by the Scotts, involved the enactment of a statute aimed at protecting South Carolina's coastal zone that had the effect of preventing the petitioner from erecting habitable structures on his property. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 102 S. Ct. 3164 (1982) involved the adoption of a regulation that required landlords to allow cable companies to place cable facilities in their apartment buildings. These cases clearly involved actions taken by a governmental body for the purpose of benefiting the public.

In contrast to the cases cited by the Scotts, the Board has held on several occasions that the issuance of a permit to a private party has not resulted in the taking of another's property. In *Abod v. DEP*, 1997 EHB 872, the appellant landowners claimed that the Department's issuance of a permit allowing the construction of a dock and boathouse by a third-party constituted a taking of the appellants' property. Similar to the Scotts' argument, the appellants in *Abod* argued that, by granting the permit, the Department gave the permittees an interest in the appellants' land which they would not have had but for the permit. In rejecting the appellants' takings claim, the Board

held, "The issuance of a permit conveys the Department's decision that the proposed project satisfies the public's concern for safety, navigation and environmental conservation…*It goes no further*." *Id.* at 884 (emphasis added) (citing *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, 243). The Board continued:

> Assuming, based on the facts presented, that Appellants may lose the use and enjoyment of a portion of the property they now claim to own, that loss or deprivation is not "the direct and necessary consequence" of the Department's issuance of the permit. It is the direct consequence of Permittees' desire to place a dock on a site where ownership is in dispute.

Id. As with the 2022 well permits here, "the Department did not intend the scope of the permit to convey property rights or to settle any dispute on land ownership." *Id.* at 885.

Likewise, in *Bernie Enterprises*, the Department issued permits to a third-party for the repair and installation of surface water drainage facilities in connection with the repair of a storm sewer pipe. The appellant owned the land on which the drainage facilities were to be installed in connection with the project. Similar to the argument made by the Scotts, the appellant claimed that it never consented to the use of its land for these purposes and asserted that the Department had no legal right to issue the permits without the consent of the landowner. The Board dismissed the appeal and, in doing so, pointed out that the permits did not convey property rights or authorize any injury to property or invasion of rights. The Board determined that any right the permittee had to enter onto the appellant's property and engage in the activity authorized by the permits "must be established independent of the Permits. That issue is properly left to the Court of Common Pleas…." 1996 EHB at 243. Similarly, any right Rice had to enter the property for the purpose of drilling was established independent of the permits issued by the Department. That

matter is not before the Board; as in *Bernie Enterprises*, it is properly left to the Court of Common Pleas.[4]

We recognize that both *Abod* and *Bernie Enterprises* involved permits issued under the Dam Safety and Encroachments Act, which the Board acknowledged provided for a limited review by the Department. The permits here were issued under Pennsylvania's oil and gas laws which involve a very different set of permitting considerations. Therefore, we turn our attention to *Foundation Coal Resources Corp. v. DEP and Penneco Oil Co*., 2009 EHB 49, where, like here, the Board considered a challenge by a coal owner to the Department's issuance of oil and gas well permits. Although the adjudication of that matter did not involve a takings claim, the Board considered the question of whether the Department's issuance of oil and gas well permits interfered with the property rights of the appellant coal owner.

The facts of that matter are somewhat analogous to the present appeal in that the appellant, Foundation, was the owner of coal reserves in Greene County that were not being mined but which it claimed could be mined at some point in the future.[5] Foundation objected to the Department's issuance of oil and gas well permits to Penneco which it said would impact the operation of its future mine.[6] Following the filing of numerous motions and a hearing on the merits, the Board dismissed the appeal of the coal company on the basis that the Department had properly issued the permits for the drilling of oil and gas wells in accordance with the applicable laws. Although the coal owner did not pursue a takings claim, the Board did consider the question of property rights

[4] According to the parties' filings, there is litigation pending before the Courts of Common Pleas of both Allegheny County and Greene County between the Scotts and Rice/EQT over the payment of royalties and the latter's right to drill on the Scotts' property.

[5] Unlike the Scotts, Foundation claimed that the mines were projected and platted but not yet operational. The Board rejected this claim.

[6] Foundation did not raise a takings claim. Rather, it requested that certain conditions be added to the oil and gas permits to ensure the safe operation of its future mine.

and determined that permits for the drilling of oil and gas wells do **not** convey property rights to the oil and gas driller nor do they deprive the coal owner of its property rights. The Board held, "The issuance of the well permits by the Department constitutes an administrative action. *It is well established that well permits have no effect on the mining company's property rights or common law rights*." *Id.* at 52 (emphasis added).

Likewise, the permits issued to Rice for the drilling of the 2022 wells do not convey any property rights to Rice nor do they "take" any property rights from the Scotts. The permits are simply an authorization by the Department to conduct gas drilling in accordance with Pennsylvania's oil and gas laws and regulations. We agree with the following well-articulated statement by the Department:

> Here, it is undisputed that the Department granted Permittee permits to drill through Appellants' coal. However, like the dock-builder in *Abod*, or the stormwater permittee in *Bernie*, or the miner in *Foundation*, the permits are simply authorizations to do or build a thing in accord with Pennsylvania statutes...Property rights to drill are regulated by private deeds, leases, and contracts under the general jurisdiction of Pennsylvania's Courts of Common Pleas.

(Brief in Support of Department's Motion, p. 8-9) (citing *Machipongo,* 719 A.2d at 28; 42 Pa. C.S. § 931 (Original jurisdiction and venue)). The permits issued by the Department simply authorized Rice to conduct drilling in accordance with the applicable statutes and regulations; they did not grant any property rights to Rice. Nor did the permits deprive the Scotts of the use of their coal for a public benefit, such as that described in *Lucas* or *Loretto*.

Under the Scotts' theory, virtually all permitting actions of the Department could be subject to a takings claim if they involve a dispute over private property. We agree with Rice's analysis that the public policy implications of adopting the Scotts' position are far-reaching and unworkable:

> If the Scotts were correct, DEP would be subject to nearly endless claims of takings because DEP is not and cannot be the arbiter of property rights disputes that exist adjacent to its role as the agency responsible for issuing environmental and regulatory permits.

(Permittee's Brief in Opposition to Appellants' Motion, p. 7-8) (citing *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587, 600, and *Abod*, 1997 EHB at 885-86.) It is well-established that the Department may not resolve contract disputes or questions of title. *Rausch Creek*, 2013 EHB at 600 (citing *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229; *Coolspring Stone Supply v. DEP*, 1998 EHB 209, 213). Additionally, the existence of a dispute does not in and of itself preclude the Department from issuing a permit as a matter of law. *Id.* (citing *Columbia Gas Transmission Corporation v. DEP,* 2003 EHB 676, 698; *Coolspring Stone Supply*, 1998 EHB at 213-14; *Chestnut Ridge*, 1998 EHB at 229-30).

The Scotts also argue that the Department's determination that their coal is non-workable constitutes a taking because it deprives them of all economically beneficial use of their coal. Again, as we have already stated, the Scotts have not been deprived of the use of their coal for a public benefit, which is an essential element of a takings claim. The Department has not come in and prevented the Scotts from mining their coal so that the land can be used for a purpose serving the greater good. The Scotts themselves do not identify any public purpose that has been served by the alleged taking of their coal. Rather, this matter boils down to a private dispute between the Scotts and Rice/EQT over royalty payments and the latter's right to enter the Scotts' property for the purpose of gas drilling. The Department's determination that the Scotts' coal was non-workable was not done for any public benefit, but for the purpose of determining whether the Scotts' consent was required under Section 7 of the Coal and Gas Resource Coordination Act (the Coordination Act), Act of December 18, 1984, P.L. 1069, *as amended*, 58 P.S. §§ 501-518, at § 507, before Rice could begin drilling. That statutory provision states as follows:

> (a) No permit for a gas well covered by this act may be issued to drill a new gas well…unless the proposed gas well is located not less than 1,000 feet from any other well. For the purpose of this section, "other well" shall not include any:
>
> (1) Oil or gas well or injection well which does not penetrate a workable coal seam.
>
> *****
>
> (b) The department shall, upon request of the permit applicant or the owner of the workable coal seam which underlies the proposed gas well, grant an exception from the minimum 1,000 feet distance requirement of subsection (a), where the permit applicant and the owner of the workable coal seam consent in writing.

58 P.S. § 507(a) and (b) (emphasis added). Where the coal seams are not workable, consent of the coal owner is not required. Coal seams are "workable" if, "in the judgment of the Department," they "can reasonably be expected to be mined." Id. at § 502. Thus, in determining whether the Scotts' coal seams were workable, the Department was simply exercising its discretion pursuant to Section 2 of the Coordination Act. While the Scotts may disagree with the Department's finding of non-workability, the Department's decision did not result in a taking.

The Scotts rely heavily on *Gardner v. DEP*, 1995 EHB 1150. However, those facts differ greatly from the situation here. In *Gardner*, a predecessor agency of the Department, the Department of Forests and Waters (the DFW), filed a declaration of taking of the appellants' land for the purpose of using that tract of land for Moraine State Park. At the time, the DFW declared it did not intend to deprive the owners of the right to surface mine their coal. Subsequently, the Surface Mining Conservation and Reclamation Act was revised to prohibit surface mining within 300 feet of a public park. Following a remand from the Commonwealth Court, the Board found

that the statutory prohibition, in conjunction with the Department's[7] refusal to grant a variance, resulted in a taking of the appellants' property.

In contrast, in the Scotts' case there is no statute that has denied them the ability to mine their coal, nor a request for a variance that has been denied. The Department has not declared their coal unworkable for the purpose of establishing a public park. Rather, the Scotts entered into a private agreement with EQT and Rice for the drilling of gas wells on their property, which necessarily impacted their ability to mine their coal (assuming it is mineable).[8] The Department's determination that their coal was not workable was undertaken simply as part of the statutory process established for regulating that drilling. It was not a taking.

We believe that adopting the Scotts' theory that the Department's actions in this case constitute a taking "would stretch the concept of a constitutional taking far beyond the notion [that] property owners should be reimbursed when they are forced to sacrifice the property for the *public good*." *Sedat*, 2000 EHB 927, 949 (emphasis added). What lies at the heart of this case is a contract dispute between two private parties - the Scotts and Rice/EQT - over the right to drill through the Scotts' coal and the payment of royalties for their gas. The Department's designation of the Scotts' coal as non-workable brings no benefit to the public. In evaluating the Scotts' claim, we ask the following question: Were the Scotts "treated so unfairly that the *public* should reimburse [them]?" *Id.* (emphasis added). The facts of this case do not lead us to that conclusion.

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[7] The variance denial was made by the Department's immediate predecessor, the Department of Environmental Resources.

[8] We understand that the Scotts claim to have revoked the Permission to Drill. However, to the extent that the Gas Lease, as ratified and amended, remains in effect, we simply point out that the Scotts cannot benefit from the drilling of gas on their property while at the same time claim they have been deprived of the ability to mine the coal impacted by the drilling of that gas.

We need not reach the question of whether the Scotts' coal is workable or whether their consent was required under the Coordination Act. Even if the Scotts are able to prove both of these issues, they have not demonstrated the legal elements of a takings claim. For the reasons set forth above, we find that the Department and Rice are entitled to summary judgment on the question of whether the Department's issuance of the 2022 well permits and determination of non-workability of the Scotts' coal seams constitutes a taking in violation of the U.S. Constitution and Pennsylvania Constitution.

Other Objections Raised in the Notice of Appeal

The Scotts also argue in their appeal that the Department's actions in issuing the permits and designating the Scotts' coal seams as non-workable were "arbitrary and capricious, contrary to the law and evidence, and constituted a deprivation of due process." (Appellants' Memorandum in Opposition to Department's Motion, p. 18) (See also, Attachment 1 to Notice of Appeal, para. 2.) The Department and Rice assert that the Board's Opinion and Order on Rice's Motion to Dismiss for mootness (the Mootness Opinion), issued on May 15, 2023, 2023 EHB 138, identified the Scotts' takings claim as the sole remaining issue in this matter and dismissed all other issues as moot. That is an incorrect reading of the opinion. The Mootness Opinion held that the appeal could not be dismissed as moot because the Scotts had raised a takings claim. It was not necessary to address each of the objections individually since the takings claim prevented dismissal of the appeal. The Mootness Opinion did not dismiss the other objections raised in the appeal, nor could it have done so since it was a single-judge opinion. Dismissal of all or part of an appeal requires the concurrence of a majority of the Board. 25 Pa. Code § 1021.116 (All final decisions shall be decisions of the Board decided by majority vote); 1 Pa. Code § 35.226; 1 Pa. Code § 31.3 (Definition of "agency head" includes "a quorum of an…independent board.") Because we are

dismissing the takings claim, we take this opportunity to address the Scotts' remaining objections and the arguments made by Rice in its Motion to Dismiss and the Scotts in their response.

First, the Scotts assert that they were deprived of due process by the Department during the permit review. Contrary to the Scotts' assertion, the record demonstrates that the Department kept them apprised during the permit review process and sought input from them. This is evident from the Scotts' own exhibits. (See, e.g., Ex. G, H, I to Attachment 1 of Notice of Appeal.) The Scotts were aware of their right to convene a panel to select a location for the wells, but they chose not to avail themselves of it while withholding their consent. (Ex. L to Permittee's Motion.) The record is clear that they were provided with notice and an opportunity to be heard throughout the permitting process. Moreover, it is well-established that "a party's right to due process is met by the opportunity to appeal a Department decision to the Board." *U.S. Trinity Services, LLC d/b/a Trinity Energy Services v. DEP*, 2023 EHB 128 (citing *Kiskadden v. DEP*, 2015 EHB 377, 427-28; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 247; *Kiskadden v. DEP*, 2014 EHB 642, 643-44). Therefore, we find there is no merit to the Scotts' claim that their due process rights were violated.

Second, the Scotts claim that the Department's issuance of the permits and designation of their coal as non-workable was an abuse of discretion and error of law. (Memorandum of Law in Opposition to Department's Motion, p. 18-20.) Rice contends that this claim is moot because the wells have been drilled. "It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131 (quoting *In re Glancey*, 518 Pa. 276, 282 (1988)). We agree that this issue is moot. Even if the Board were to find in favor of the Scotts on the question of whether the Department erred or abused its discretion in designating their coal as

non-workable, the coal has been drilled and the surrounding coal is sanitized. There is no relief that the Board can grant, including monetary damages.

The Scotts argue that this issue continues to present a live controversy. They contend that a finding by the Board that their coal seams are workable will impose additional obligations on Rice under the Coordination Act and the Oil and Gas Act with regard to the operation of its wells. However, the Scotts do not identify how any of these additional obligations affect them. Moreover, Rice is already subject to such requirements based on the workability of the Pittsburgh coal seam, which was also drilled at the same time as the Scotts' coal. (Exhibit K to Attachment 1 of Notice of Appeal.)

Additionally, the Scotts argue that this case presents exceptions to the mootness doctrine. They argue, first, that this matter is capable of repetition, yet evading review because of the speed with which gas drillers may begin drilling after the issuance of a permit. They argue that they should not have been required to file a petition for supersedeas to have their case heard. Given the higher burden that must be met in order to obtain a supersedeas, the Board has recognized that the ability to petition for a supersedeas may not necessarily resolve the "capable of repetition, yet evading review" exception to mootness. *Protect PT v. DEP*, EHB Docket No. 2023-025-W, *slip op.* at 8-9 (Opinion and Order on Motion to Dismiss issued January 10, 2024); *Center for Coalfield Justice v. DEP,* 2018 EHB 758, 764-65. However, here none of the parties have indicated that any additional drilling will be done on the Scotts' property or that the unique circumstances of this case – i.e., drilling within 1,000 feet of another well, thus triggering the Coordination Act – will be repeated.[9] Instead, the Scotts focus on the Department's permitting process in general. They state:

[9] The Permission to Drill lists 14 locations for the drilling of wells by Rice on the Scotts' property. (Ex. D to Permittee's Motion.) However, the Scotts claim to have revoked this agreement and, therefore, it is

> [T]he challenged Department conduct and alleged inadequacy of the Department's statutory well permitting process, non-coal determinations, and enforcement of consent requirements are unquestionably conduct that is repeatedly carried out by the Department as it concerns the numerous well permit applications submitted to the Department each year.

(Appellants' Memorandum in Opposition to Permittee's Motion to Dismiss, p. 22.) This general concern about future permitting actions not necessarily involving the Scotts is not a basis for finding an exception to the mootness doctrine.

The Scotts also argue that this matter involves issues of great public importance, and a decision by the Board could impact future DEP conduct. In particular, the Scotts assert that the Board should rule on the question of what information should be used by the Department in making a determination of whether a coal seam is workable. They state:

> Such a finding could significantly impact the Department's evaluation of future permits and coal seam assessments, and may preclude the Department from using such outdated and imprecise data in the future—particularly where significant property interests are at stake. Further, the Board could find that the Department treats the Technical Guidance Document, not merely as a guidance tool, but as an improper regulatory standard in coal determinations and the issuance of well permits, which could limit or preclude the Department's prospective use of the Guidance Document. This may prevent the Department from creating similar conditions in the future.

(Appellants' Memorandum in Opposition to Permittee's Motion to Dismiss, p. 17.)

The public interest exception to the mootness doctrine is granted only in the rarest of circumstances. *Tinicum Township v. DEP*, 2003 EHB 493, 497 (citing *Pequea Township v. DER*, 1994 EHB 755, 765. The Board has declined in the past to rule on a matter that is otherwise moot

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unclear whether any additional drilling will be conducted. It should also be noted that it is the Department's position that its determination regarding the workability of the Scotts' coal seams was limited to the area where the 2022 wells would be drilled. (Joint Stipulation of Department and Rice, para. 12.)

simply because it might impact future behavior by the Department. In *Consol Pa. Coal Co. v. DEP*, 2015 EHB 49, the appellant argued that a claim should fall under the "matter of great public importance" exception to the mootness doctrine where the challenged action - in that case the Department's application of its Technical Guidance - involves the Department exceeding its lawful authority. In rejecting this argument, the Board held:

> Nearly every single appeal filed with the Board contains an allegation that the Department acted unlawfully and/or arbitrarily and capriciously, i.e., in a manner exceeding its lawful authority. An exception as broad as [the appellant] desires would completely swallow the mootness doctrine…[E]ven if the manner in which [the Department's] decision was reached involved the use of the [Technical] Guidance, by itself, does not create a matter of great public importance and is insufficient rationale for the Board to allow a moot appeal to proceed."

Id. at 64.

Finally, the Scotts argue that if their coal is deemed workable, the Board could halt Rice's operations "until Rice and the Scotts resolve the dispute [over royalties] and the Scotts provide written consent to the permits." (Memorandum in Support of Appellants' Opposition to Permittee's Motion to Dismiss, p. 16.) Much of the Scotts' grievance is with Rice and EQT over property rights and royalty payments. That is not a matter that the Board can resolve. *Pond Reclamation v. DEP*, 1997 EHB 468, 474. Just because there is a continuing controversy between the Scotts and Rice/EQT over the right to drill on the Scotts' property, that does not prevent the appeal before the Board from being moot. *Moriniere v. DER*, 1995 EHB 395, 400.

Because we have determined that these issues are moot, the Board does not reach the question of whether the Scotts' coal seams are workable. We take no position on the Department's determination of non-workability.

We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 29th day of April, 2024, it is hereby ordered as follows

1. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that the Department's issuance of the permits and designation of their coal as non-workable constitutes a taking.
2. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that they were deprived of due process.
3. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that the Department acted contrary to law and abused its discretion by issuing the permits and determining that the Scotts' coal seams that were impacted by the drilling of the 2022 wells were not workable because we have determined that these issues are moot.
4. This 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: April 29, 2024

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

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD P. QUIGLEY, SR.	:	
	:	
v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO AND KATHLEEN G. SHEEHAN VELLO, Intervenors	:	**Issued: May 6, 2024**

OPINION AND ORDER ON
APPELLANT'S MOTION TO DISMISS INTERVENORS

By MaryAnne Wesdock, Judge

Synopsis

The Appellant's Motion to Dismiss Intervenors for lack of standing is granted where the Intervenors' changed circumstances cause them no longer to have a substantial, direct and immediate interest in the subject matter of the appeal.

O P I N I O N

Introduction

This matter involves an appeal of an Order issued by the Pennsylvania Department of Environmental Protection (Department) to Richard P. Quigley, Sr, his son, and Let's Cut a Deal Services, LLC, alleging multiple violations of the Solid Waste Management Act. The Order alleges that the violations occurred in connection with a tree trimming and removal service operated on property that Mr. Quigley owned jointly with his son until August 25, 2022 (the

Quigley site). Mr. Quigley filed this appeal with the Environmental Hearing Board (Board) on December 9, 2022.[1]

Shortly thereafter, on December 22, 2022, Matthew Vello and Kathleen G. Sheehan Vello (the Vellos) filed a Petition to Intervene (petition). The Vellos sought to intervene in this appeal as adjacent landowners to the Quigley site. (Petition, para. 10.) Their petition documents numerous complaints that they filed with the Department and the Allegheny County Conservation District regarding operations conducted on the Quigley site, including the alleged disposal of solid waste that caused sediment to enter a stream flowing through the Vellos' property. After providing an opportunity for the parties to respond to the petition and receiving no objections, the Board granted intervention by order dated January 23, 2023. On December 28, 2023 this matter was reassigned to Docket No. 2022-104-W.

On February 10, 2024, Mr. Quigley filed a Motion to Dismiss Intervenors (motion), seeking to dismiss the Vellos as intervenors. According to the motion, the Vellos no longer own the property adjacent to the Quigley site. The Vellos concede that they no longer own the property adjacent to the Quigley site but assert that they continue to have standing.

Mr. Quigley's motion was not accompanied by a memorandum of law, and this prompted the Vellos to file a letter entitled "Interim Response and Request for Guidance" (Interim Response) seeking clarification from the Board on how to proceed since the Board's Rules of Practice and Procedure set forth different requirements and response times depending on the type of motion filed. 25 Pa. Code §§ 1021.91-95. The Department advised the Board that it took no position on the motion but reserved the right to challenge the Vellos' standing. In response to the Vellos'

[1] A separate appeal was filed by Mr. Quigley's son and Let's Cut a Deal Services and that appeal is docketed at 2022-105-W.

Interim Response, the presiding judge issued an order on February 21, 2024 which recognized that the Motion to Dismiss Intervenors did not clearly fit into any of the specific categories of motion covered by the Board's Rules of Practice and Procedure at 25 Pa. Code §§ 1021.92-1021.94a, and, therefore, appeared to be a miscellaneous motion governed by 25 Pa. Code § 1021.95. The order set a deadline of March 15, 2024 for the filing of a memorandum of law in support of the motion. Mr. Quigley did not file a memorandum of law, and on March 26, 2024, the presiding judge issued an order directing the Vellos to file an answer to the motion. The order also provided the Department with an opportunity to respond if it chose to do so. By letter dated March 26, 2024, the Department again stated that it did not intend to respond to the motion. The Vellos filed an answer to the motion on April 9, 2024 in which they admit that they no longer own the property adjacent to the Quigley site.

Procedural Challenges to Motion to Dismiss Intervenors

Before turning to the substance of Mr. Quigley's motion, we first address the Vellos' procedural challenges. The Vellos first argue that Mr. Quigley's challenge to their standing is untimely. They assert that Mr. Quigley "has had ample opportunity—over 14 months—to challenge Vellos' intervention but has failed to do so." (Intervenors' Answer, para. 10.) However, as the Board has held on numerous occasions, a challenge to standing may be raised at any time. *Matthews International Corp. v. DEP*, 2011 EHB 402, 404, n. 2; *Highridge Water Authority v. DEP*, 1999 EHB 1, 7; *Del-Aware Unlimited, Inc. v. DER*, 1990 EHB 759, 785. *See also Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555 (Board upheld an objection to standing following a hearing on the merits.) Therefore, there is no basis for dismissing Mr. Quigley's motion on the grounds that it is untimely.

Next, the Vellos challenge the Board's ability to consider Mr. Quigley's motion due to his failure to file a supporting memorandum of law. They contend they have been hampered by having to guess at the basis for the motion and they entreat the Board to dismiss it outright. They further assert that the Board may not raise the issue of standing *sua sponte*. (Intervenors' Answer, n. 5.)[2]

While the motion is not a model of clarity, it is apparent that Mr. Quigley has raised a challenge to the Vellos' standing based on their changed circumstances. The motion avers that the Vellos no longer own the property adjacent to the Quigley site and, therefore, "there is no basis for them to continue as Intervenors in this action." (Motion, para. 5-6.) The Board directed the Vellos to file an answer to Mr. Quigley's motion in order to provide them with an opportunity to address the averments made therein and to aid the Board in ruling on the motion, including the question of whether the motion should be dismissed.

While we agree with the Vellos that it is troublesome that Mr. Quigley chose not to file a memorandum of law in support of his motion, we do not believe that the lack of a memorandum compels us to dismiss the motion, particularly where it raises a challenge to the Vellos' standing to participate in this appeal. Although a memorandum of law should have been filed pursuant to 25 Pa. Code § 1021.95, we do not believe that the Vellos have been hindered in responding to the

[2] The case cited by the Vellos in support of their argument that the Board may not raise the issue of an intervenor's standing *sua sponte* did not involve an intervenor. *In re Nomination Petition of DeYoung*, 588 Pa. 194 (2006), involved a petition to set aside a political candidate's statement of financial interest. The Commonwealth Court dismissed the petition on the grounds that the objector lacked standing to bring the challenge. The Supreme Court reversed, holding that the lower court had erred by raising the issue of standing *sua sponte*. This is a very different set of facts than the situation we are faced with here, where an intervenor's standing has been challenged by the person who brought the appeal. We do acknowledge that the Board has held on at least one occasion that standing may not be raised *sua sponte*: In *Thomas v. DER*, 1995 EHB 880, 886 (emphasis added), the Board stated, "This Board is not empowered to *sua sponte* decide an *appellant* lacks standing and dismiss an appeal." However, as with *deYoung*, the holding pertained to the standing of the party bringing the action, not an intervenor.

motion by the lack of a memorandum. Section 4 of the Board's Rules of Practice and Procedure states:

> The rules in this chapter shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. *The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties*.

25 Pa. Code § 1021.4 (emphasis added).

The Vellos have been given an opportunity to respond to the motion, including the ability to raise new matter that they wish the Board to consider. They have been given an opportunity to counter Mr. Quigley's challenge to their standing to participate in this proceeding and to demonstrate to the Board why they believe they have standing despite their changed circumstances. They have not been deprived of due process or their substantive rights. While we do not condone Mr. Quigley's failure to file a memorandum of law nor his disregard of the Board's order, we prefer to decide this matter on the merits and we do not believe that Mr. Quigley's procedural failure prevents us from doing so. As we stated in *Neville Chemical Co. v. DEP*, 2003 EHB 530, "the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected." *Id.* at 532 (quoting *Kleissler v. DEP*, 2002 EHB 737, 739). *See also Starr v. DEP*, 2002 EHB 799, 815, n. 12 (The Board chose to consider the merits of a motion to amend an appeal despite its failure to comply with the Board's rule). In *DEP v. Danfelt*, 2011 EHB 519, the Board elected to consider a defendant's miscellaneous motion (a Motion to Compel Amended Complaint) even though it was not accompanied by a memorandum of law as required by 25 Pa. Code § 1021.95 and contained "little legal support." *Id.* at 520. The Board considered the motion "[d]espite these procedural errors." *Id.* In *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, the Board

declined to deem facts admitted where a party filed a memorandum of law but no response to a motion to dismiss. The Board determined that "the parties' factual disputes and arguments are readily discernible [from the memorandum of law] and the Board finds the error to be *de minimus*.") *Id*. at 840, n. 3.

Likewise, here the parties' factual statements and arguments are readily discernible from Mr. Quigley's motion and the Vellos' answer. We believe it is in the best interest of the parties and the Board to ensure that the parties in this case have the necessary standing to pursue this matter. We therefore decline to dismiss the motion on purely procedural grounds.[3] Rather, we will consider the merits of Mr. Quigley's motion and the Vellos' answer.

Substantive Challenge to Intervenors' Standing

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) ("*BFI*"). 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 (emphasis added) (quoting *P.H Glatfelter v. DEP*, 2000 EHB 1204 (quoting *Giordano v. DEP*, 2000 EHB 1154, 1155-1156)).[4]

[3] This decision should not be seen as condoning a party's failure to comply with the Board's Rules of Practice and Procedure and the Board's orders.

[4] The opinion also quotes *Conners v. State Conservation Commission*, 1999 EHB 669, 670-71 (citing *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23).

In considering whether a person has standing to intervene, we must determine whether that person "would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision." *Consol*, 2002 EHB at 881 (quoting *Glatfelter, supra*). A person has standing if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975)).[5] The harm suffered by the would-be intervenor must be greater than that of the population at large – that is, it must be "substantial." *Id*. (citing *William Penn*, *supra*). Additionally, there must be a "direct" and "immediate" connection between the action under appeal and the person's alleged harm - in other words, there must be causation in fact and proximate cause. *Id.* It is within the Board's discretion whether to grant or deny intervention in accordance with the standard of Section 4(e) of the Environmental Hearing Board Act. *BFI,* 598 A.2d at 1060.

The Vellos were permitted to intervene in this matter based on their status as adjacent landowners to the Quigley site. Their petition outlined the ways in which the alleged violations at the Quigley site interfered with the use and enjoyment of their property. As adjacent property owners, they had a substantial, direct and immediate interest in the appeal of the Department's order directing the Quigleys to correct the alleged violations on their site.

Mr. Quigley has now raised a challenge to the Vellos' standing to continue as intervenors in this matter. In their answer to the motion, the Vellos admit that they sold their property on August 25, 2023 and they no longer live adjacent to the Quigley site. (Intervenors' Answer, para.

[5] *See also Muth v. Department of Environmental Protection*, No. 1346 C.D. 2022 (Pa. Cmwlth. April 16, 2024) (A person seeking to challenge an action of an administrative agency must have a direct interest.)

5.) The Vellos claim, however, that they continue to have standing based on their status as *former* owners of the adjacent property because 1) they have relevant information about activities conducted at the Quigley site and 2) the harm they suffered while residing next to the Quigley site provides them with continued standing.

The Vellos argue that they have standing because they "are in the unique position of having directly observed the activities at [the Quigley site] and have unique evidence relative to the illegal activity," as well as "valuable evidence relative to the direct involvement of Appellant Quigley Sr." (Intervenors' Answer, para. 8.) While the Vellos' knowledge of activities at the Quigley site may qualify them to be witnesses at a hearing on the merits, it does not provide them with standing to participate as a party in the appeal. As we have stated, standing requires a substantial, direct and immediate interest in the matter on appeal, not simply a knowledge of the facts. A witness to a vehicular accident may have important information to provide at trial, but it does not mean they should be a party to the case. Likewise, the Vellos' knowledge of activities at the Quigley site does not provide them with standing to proceed as an intervenor.

The Vellos also argue that the harms they have allegedly suffered as a result of activities on the Quigley site provide them with a continued interest in this matter. They rely on the case of *Giordano v. DEP*, 2000 EHB 1184, as support for their position that harm suffered in the past may provide a person with the necessary standing to intervene in an appeal. In that case, landowners who lived approximately two miles from a landfill appealed a major modification to the landfill's permit. Their standing was challenged by the permittee. In articulating the standard that must be met by the appellants to establish standing, the Board stated:

> In order to establish standing, appellants must prove that (1) the action being appealed *has had* - or there is an objectively reasonable threat that it will have- adverse effects, and (2) the appellants are

> among those who *have been* - or are likely to be - adversely affected in a substantial, direct, and immediate way.

Id. at 1185-86 (emphasis added) (citing *Friends of the Earth,* 120 S. Ct. at 704-05; *William Penn*, 346 A.2d at 280-83).

Relying on this language, the Vellos assert:

> The Board's intentional usage of the past tenses throughout the *Giordana* [sic] opinion when referring to the "harm suffered" undermines any perceived notion by Appellant that simply because the harms suffered by the Vellos occurred in the past the Vellos do not continue to have a direct, substantial, and immediate connection between the action under appeal and the harms they suffered and those harms placed upon the community.

(Intervenors' Answer, para. 19.)

We disagree with the Vellos' interpretation of the Board's language in *Giordano*. First of all, because the landfill in the *Giordano* case had been operating under its new permit for approximately one year at the time of the hearing, it made sense for the Giordanos to present evidence of harm they had suffered during its operation. Second, although we agree that a party before the Board may demonstrate standing based on past harm, there still must be a continuing nexus to the action complained of. In the case of the Giordanos, they continued to live in the vicinity of the landfill at the time of the appeal. In the case of the Vellos, they no longer live next to the site that is the subject of the Department's order and, therefore, any ruling on the Department's order will have no effect on them – past harm without any threat of future harm is not enough to establish standing.

Notably, after the language quoted by the Vellos, the Board in *Giordano* went on to state:

> The first question [that the action being appealed has had or will have an objectively reasonable threat] expresses the Board's gatekeeper function; *the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of any harm to anybody and, therefore, no legitimate case or controversy*.

> The appellants are not required to prove their case on the merits, but they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects occurring is not merely speculative. *Ziviello v. DEP*, [2000 EHB 999, 1005]. The second question [that the appellants are among those that have been or are likely to be adversely affected] focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because *they personally have something to gain or lose as a result of the Board's decision.*

2000 EHB at 1186 (emphasis added).

Here, there is no credible threat of ongoing or future harm to the Vellos and, therefore, no legitimate case or controversy. The Vellos nonetheless implore the Board to recognize that the sale of their property "does not magically vitiate the approximately three years of harm suffered" while the adjacent site was "under Appellant Quigley Sr.'s control." (Intervenors' Answer, para. 20.) We understand their frustration and do not make light of any harm they may have experienced in the past. However, as we have discussed, that is not enough to establish standing. The Vellos have not demonstrated that they have anything to gain or lose as a result of the Board's decision in this matter other than a general interest in seeing Mr. Quigley obey the law. Whether the Board upholds the Department's order to Mr. Quigley or overturns it, there will be no tangible effect on the Vellos. While we recognize that the Vellos may have a desire to see this matter through, that alone does not create a basis for standing.

When a party's standing is put at issue, that party must be able to show that they do in fact have standing. *Giordano*, 2000 EHB at 1187. Here, the material facts are not in dispute – the Vellos admit that they no longer live next to the Quigley site. They have not articulated how they are likely to be adversely affected by the outcome of this appeal in a substantial, direct, and immediate way; they have not shown that they personally have anything to gain or lose as a result of the Board's decision. As former owners of the property adjacent to the Quigley site, they have

not demonstrated that their interest in this matter is any greater than that of the general public. They no longer have a personal stake in the outcome of this appeal. Even viewing the motion in the light most favorable to the Vellos as the non-moving party and accepting their allegations as true, there is simply no basis for finding that the Vellos have standing to intervene in this matter. They are not "interested parties" as required by Section 4(e) of the Environmental Hearing Board Act.

We hasten to point out that it is likely to be a rare occurrence for an intervenor to lose standing once they have been admitted to a case. However, the particular facts of this case lead us to the conclusion that the Vellos no longer have standing as intervenors. Because we find that the Vellos do not have standing to intervene in this matter, we enter the following order dismissing them from the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD P. QUIGLEY, SR.	:	
	:	
v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO AND KATHLEEN G. SHEEHAN VELLO, Intervenors	:	

O R D E R

AND NOW, this 6th day of May, 2024, it is hereby ordered that the Appellant's Motion to Dismiss Intervenors is **granted**. Henceforth, the caption shall read:

RICHARD P. QUIGLEY, SR.	:	
	:	
v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

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: May 6, 2024

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

For the Commonwealth of PA:
John H. Herman, Esquire
Christopher Ryder, Esquire
Melanie Seigel, esquire
(*via electronic filing system*)

For Appellant:
Richard F. Kronz, Esquire
(*via electronic filing system*)

For Intervenors:
Kathleen G. Sheehan Vello, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-025-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: May 15, 2024**

OPINION AND ORDER ON PERMITTEE'S MOTION TO STRIKE EXPERT REPORTS AND PRECLUDE EXPERT TESTIMONY

By MaryAnne Wesdock, Judge

Synopsis

The Permittee's motion to strike the Appellant's expert reports and preclude expert testimony is denied. The challenges relate more to the weight to be given the expert testimony than to its admissibility.

O P I N I O N

Background

Protect PT filed this appeal on March 10, 2023, challenging the issuance of permits by the Department of Environmental Protection (Department) for the drilling and operation of two unconventional gas wells, the Metis 2M and 4M. The permits were issued to Olympus Energy, LLC (Olympus) in connection with the Metis Well Site in Penn Township, Westmoreland County. In its appeal, Protect PT asserts that the Department's issuance of the permits allows the introduction of PFAS, PFOA and other chemicals into the environment through hydraulic

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

The matter now before the Board is Olympus' motion to strike the expert reports and testimony of Protect PT's experts, Dusty Horwitt, J.D. and Dr. Carla Ng, PhD. Olympus states that it has filed the motion in an effort to streamline this matter and to remove uncertainty over the extent to which Olympus and the Department must prepare to cross-examine Protect PT's experts and present reports of their own. Protect PT opposes the motion and asks the Board to allow the reports and testimony of Mr. Horwitt and Dr. Ng.

Standard

A motion to strike an expert report or expert testimony is generally treated as a motion in limine. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161; *Pine Creek Valley Watershed Association v. DEP ("Pine Creek I")*, 2011 EHB 90, 92; *Township of Paradise v. DEP*, 2002 EHB 68. As we said in *Delaware Riverkeeper*:

> A party may obtain a ruling on evidentiary issues by filing a motion in limine pursuant to 25 Pa. Code § 1021.121. A motion in limine is the proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Kiskadden v. DEP*, 2014 EHB 634, 635 (citations omitted). 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. Whether to accept expert testimony is within the discretion of the Board, and the Board's decision will not be disturbed on appeal unless it is clearly erroneous. *Rhodes v. DEP*, 2009 EHB 237, 238 (citing *Grady v. Frito-Lay*, 839 A.2d 1038, 1046 (Pa. 2003)).

2016 EHB at 161.

[1] The notice of appeal also challenged Olympus' compliance history, but on May 6, 2024 the parties filed a Stipulation stating that Protect PT had withdrawn its objections relating to compliance history and this appeal solely involves the "PFAS related objections." (Stipulation, para. 1-3.)

Discussion

Dusty Horwitt holds a J.D. and is a consultant with Physicians for Social Responsibility. His report discusses the use of PFAS in oil and gas operations and Pennsylvania's regulatory framework regarding the disclosure of hydraulic fracturing chemicals. (Exhibit A to Olympus Motion.) Carla Ng, Ph.D. is an Associate Professor in the University of Pittsburgh's Department of Civil and Environmental Engineering with secondary appointments in the Department of Chemical and Biological Engineering and Department of Environmental and Occupational Health. Her report discusses PFAS, including exposure, toxicology and potential linkage to the oil and gas industry. (Exhibit B to Olympus Motion.) Olympus has moved to strike both reports on the grounds they are 1) mere summations of research by other parties, 2) not based on generally accepted scientific methodology, 3) speculative and 4) not relevant to the gas wells that are the subject of this appeal.

Generally Accepted Scientific Methodology – *Frye* Challenge

We first address Olympus' argument that Dr. Ng's and Mr. Horwitt's reports and proffered testimony are not based on generally accepted scientific methodology. When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania courts have adopted the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Grady v. Frito-Lay, Inc*., 839 A.2d 1038, 1043-44 (Pa. 2003); *Kiskadden v. DEP*, 2014 EHB 618, 619; *Pine Creek Valley Watershed Association v. DEP* ("*Pine Creek II*"), 2011 EHB 761, 777; *Pine Creek I*, 2011 EHB at 92. Under *Frye,* "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady*, 839 A.2d at 1043-44 (citing *Commonwealth v. Blasioli*, 713 A.2d 1117, 1119 (Pa. 1998); *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 68, 69. "The requirement of general acceptance

in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." *Kiskadden*, 2014 EHB at 619-20 (citing *Commonwealth v. Topa*, 369 A.2d 1277, 1282 (Pa. 1977) (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)); *Range*, 2022 EHB at 70.

A *Frye* challenge goes to the expert's *methodology*: It is the methodology that must be generally accepted in the field, not necessarily the expert's conclusions. *Kiskadden,* 2014 EHB at 620. Here, Olympus does not take issue with any particular methodology employed by Dr. Ng and Mr. Horwitt; rather, its argument is that the reports do *not* contain a methodology and are simply a collection of data. It asserts that the "reports, in short, are devoid of any express or implied methodology for their opinions." (Olympus Memorandum, p. 11.) Protect PT disagrees; it argues that Dr. Ng's and Mr. Horwitt's reports draw conclusions based on a litany of peer-reviewed work which is an acceptable methodology in their field. It asserts that the reports contain "citations to 190+ publications, including [Dr. Ng's and Mr. Horwitt's] own research, peer reviewed publications, publications authored by experts in their relevant fields, and studies with thoroughly explained methodology and robust data," and, as such, "fall well within the type of scientific rigor envisioned by Pennsylvania when implementing the *Frye* standard." (Protect PT Response, p. 8.)

The purpose of the *Frye* test is to prevent the trier of fact from having to hear opinions founded upon scientific theories that amount to "junk science." *Range*, 2022 EHB at 71; *Kiskadden*, 2014 EHB at 623. Olympus has not demonstrated that is the case here. Moreover, the Board has recognized the limited application of the *Frye* test in Board proceedings. In *Kiskadden*, we held:

> The *Frye* test is designed to ensure that opinions based upon unaccepted science are not presented to impressionable jurors. *Blum*

> *v. Merrell Dow Pharmaceuticals, Inc*., 705 A.2d 1314, 1317 (Pa.Super. 1997), *aff'd*, 764 A.2d 1 (Pa. 2000). However, the Board "operates in a nonjury setting. We deal with scientific theories every day." [*Pine Creek II*], 2011 EHB at 778-79. The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility should be given to expert testimony presented at trial.

2014 EHB at 623. Similarly, in *Pine Creek I*, we stated:

> There is a fine line between methodology and conclusions. Indeed, the entire construct is somewhat artificial. The fundamental job of a court is to ensure that bogus opinions based upon junk science are not presented to what some people fear might be impressionable jurors. *Blum* [705 A.2d at 1317]. Although the Members of this Board are, perhaps, not quite as impressionable, bogus opinions obviously waste time and do not aid us in our search for the truth. *In a setting such as ours, questions regarding the methods used by an expert may go more to the weight of the opinions than their admissibility*. The weight to be given to an expert's opinion depends upon many factors and "as the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties." *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007) (*en banc*), citing *Bethayres [v. DER]*, 1990 EHB [570] at 580.

2011 EHB at 93-94 (emphasis added).

Thus, the *Frye* test plays a more important role where a jury is the factfinder; in that situation, the court must be proactive in ensuring that the jury is not swayed by improper expert testimony. In non-jury trials, this is less of a concern. This is especially so in matters before the Board, which is specialized and skilled in dealing with expert testimony. Moreover, unlike a jury, the Board issues a written adjudication following a hearing that explains the basis of its decision.

The Board has recognized that "[t]he *Frye* standard 'is an exclusionary rule of evidence. As such it must be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for truth.'" *Pine Creek I*, 2011 EHB at 94 (quoting *Trach v. Fellin*, 817 A.2d 1102, 1104 (Pa. Super. 2003)). In both *Pine Creek I* and *Kiskadden*, the Board declined to grant a *Frye* motion, finding that it was more prudent to address the questions raised by the

motion at a hearing. Here too we believe that Olympus' criticism is more appropriately addressed through cross-examination and not as a *Frye* challenge.

Pa. R.E. 703, Comment

Similar to Olympus' *Frye* challenge is its assertion that the reports of Mr. Horwitt and Dr. Ng are simply "literature reviews" that recite what others have stated in their publications without exercising any expertise, experience or judgment to establish an independent opinion. Olympus contends that the reports of Mr. Horwitt and Dr. Ng fail to comply with the comment to Pennsylvania Rule of Evidence 703, which states, "An expert witness cannot be a mere conduit for the opinion of another. An expert witness may not relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it in forming the witness's own opinion." See *Commonwealth v. Towles*, 106 A.3d 591, 606 (Pa. 2014) (An expert may not act as a mere conduit of hearsay). Olympus directs our attention to various sections of the expert reports where it contends that Mr. Horwitt and Dr. Ng discuss a particular study or report but do not stake out any expert opinion of their own. Protect PT disagrees with Olympus' characterization and argues that the reports of Dr. Ng and Mr. Horwitt present a summation of existing science that includes the application of their specialized expertise.

The Board addressed this issue in *Pine Creek II*:

> While an expert may rely on other experts in forming his own opinion, in the end it must be *his* opinion. *Allegheny Energy Supply Co. v. Greene County*, 788 A.2d 1085, 1096 (Pa. Cmwlth. 2001.) An expert may not simply regurgitate the opinion of another expert, particularly one who does not testify. *Primavera v. Celotex Corp*., 608 A.2d 515, 521 (Pa Super. 1992) (expert should not be permitted to simply repeat another's opinion or data without bringing to bear his own expertise or judgment).

2011 EHB at 784.

We do not believe that Dr. Ng's and Mr. Horwitt's expert reports conflict with the standard set forth in the comment to Pa. R.E. 703. While Dr. Ng's and Mr. Horwitt's reports cite a number of sources, they are not simply parroting others' opinions. Rather, they rely on those sources in reaching their own conclusions. Pursuant to the comment to Pa. R.E. 703, an expert witness may relate the opinion of a non-testifying expert when the witness has reasonably relied upon it in forming the witness's *own* opinion. We believe the expert reports of Dr. Ng and Mr. Horwitt meet this standard. Additionally, as with Olympus' *Frye* challenge, we believe this is a matter more appropriately addressed through cross-examination at a hearing.

Relevance and Specificity

Finally, Olympus argues that the reports of Dr. Ng and Mr. Horwitt are speculative and fail to address matters specifically related to the particular well site in question in this appeal. Olympus points to the use of conjectural language in the expert reports. For example, at one point Mr. Horwitt states, "PFAS-tainted wastewater from oil and gas wells *could* be injected into underground disposal wells where it *could* flow to the surface and break out into groundwater through nearby abandoned oil and gas wells…" (Ex. A to Olympus Motion, p. 11.) Likewise, Dr. Ng states, "it is clear that a variety of PFAS *may have been* used historically and *may still be used* now in gas extraction." (Exhibit B to Olympus Motion, p. 15.) Olympus argues:

> Notably, neither expert has considered the question of whether the hydraulic fracturing activities that were conducted pursuant to the Well Permits at issue could have allowed the introduction of PFAS into the environment, never mind opined with reasonable certainty that the activities "did" or "would have" allowed it.

(Olympus Memorandum, p. 9.) It further argues:

> Neither report contains a single fact, data point, or opinion specific to the Wells or anything else that is specific to this appeal, let alone any information regarding the Metis Well Site or even Olympus's activities generally. Even though there are thousands of different

> PFAS chemicals, Mr. Horwitt and Dr. Ng do not identify any particular PFAS chemical that Olympus has used or explain how or why, in relation to the Wells, a release of some quantity of that chemical has occurred, or will occur, leading to some particular type of harm. The reports, in fact, are devoid of any references to Olympus.

(Olympus Memorandum, p. 7.) Based on the above, Olympus argues that Dr. Ng's and Mr. Horwitt's testimony is irrelevant and inadmissible.

Protect PT counters that any lack of specificity in its reports is not reflective of a deficiency in the experts' analyses, but, rather, Olympus' inability or refusal to provide information that would allow Protect PT's experts to draw more case-specific conclusions. Protect PT asserts that it must work in terms of generalities due to trade secret laws and regulations that prevent the disclosure of many substances used in the hydraulic fracturing process, including operations at Olympus' site. Protect PT responds to Olympus' argument as follows:

> [I]ndeed, the experts in question tend to reference PFAS and PFOAS impacts generally, rather than impacts of the specific wells at issue here, but there are deliberate reasons for this type of generality. As Dusty Horwitt's report demonstrates, trade secrets laws and regulations surrounding Material Safety Data Sheets prevent the disclosure of exact chemical identities of many substances used in fracking. Horwitt Report at p. 5. Since Olympus has not or cannot disclose the identity of the substances it has used in the fracking process, our experts cannot make any more specific statements about such wells, and instead have to speak about PFAS chemicals more broadly.

(Protect PT Response, p. 9-10.)

Protect PT points out that it has served a subpoena on Olympus' chemical supplier to obtain the identities of the chemicals used in its hydraulic fracturing process. Olympus filed objections to the subpoena which were overruled on April 15, 2024. Protect PT asserts that, until it obtains this information, its experts have no choice but to speak generally. It adds that Olympus itself

could clear up any uncertainty by simply providing the specific identity of the chemicals used in its hydraulic fracturing process.

Olympus references Pennsylvania Rule of Evidence 403 which states that relevant evidence may be excluded if its probative value is outweighed by a danger of unfair prejudice. It contends that "the prejudicial effect of Mr. Horwitt's and Dr. Ng's proffered testimony that something 'could' or 'might' happen at an oil or gas well far outweighs whatever probative value their speculative, non-Olympus-specific testimony might carry." (Olympus Memorandum, p. 10.) Protect PT disputes that there is any prejudice to Olympus and makes the following argument:

> [T]he words "could" or "might" should not be seen as weak conclusions, but rather, the measured responses of experts trying to be as accurate as possible while being denied essential facts to their analysis, such as the chemical identities of the substances used by Olympus in fracturing processes.

(Protect PT Response, p. 11.)

Protect PT relies on the Board's decision in *Blythe Twp. v. DEP*, 2011 EHB 433, 436, which held that "[e]xpert opinion regarding increased risk and the likelihood of something occurring are routinely admitted, so long as the opinion does more than describe mere possibilities." However, that is precisely Olympus' point – that the reports of Dr. Ng and Mr. Horwitt describe "mere possibilities" by their use of terms such as "may" and "could." Protect PT disagrees and makes the following argument:

> Language like "could" and "might" is acceptable to describe likelihood and increased risk, and in the present case, is the most accurate way to describe elevated risks of using an entire class of chemicals, since the experts in question have been blocked from knowing identities of the chemicals in question within that class. Until Olympus claims that they do not use any dangerous chemicals in their fracking process, both [sic] Protect PT will be forced to use the allegedly "prejudicial" language of "could" and "might" in order to give the most honest reports.

> Further, although Olympus claims that the expert reports offer only speculative conclusions that were "deduced by surmise" and unsupported by any confirming evidence, as discussed above, our expert's analysis is cabined by Olympus's failure to disclose the exact chemical identity of the substance(s) in question, so words like "probably" and "likely" are needed to accurately describe the effects of substances the exact nature of which remain unknown. However, the experts are able to draw strong conclusions supported by evidence in regard to the impacts of PFAS more generally.

(Protect PT Response, p. 11-12.)

Both Olympus and Protect PT make strong arguments in support of their respective positions. Olympus is correct that expert opinion must consist of more than mere guesswork in order to be helpful to the trier of fact. However, Protect PT has sufficiently explained why its experts cannot proceed with a higher level of certainty due to barriers that prevent the disclosure of much of the information it seeks. We note that discovery is still ongoing in this matter. While Olympus and the Department have had Protect PT's expert reports since August 2023, they have not yet produced their own reports. Although Olympus filed this motion for the purpose of removing uncertainty, it is possible that the production of Olympus' expert reports may clear up some of that very uncertainty. Additionally, as noted earlier, Protect PT has only recently had the opportunity to subpoena Olympus' supplier for information related to the substances used by Olympus in the hydraulic fracturing process at the Metis site. Amid this backdrop, there is no basis for taking the drastic step of striking Protect PT's expert reports and expert testimony. Additionally, to the extent that Olympus contends that Protect PT's expert reports are not specific enough, this criticism goes to the weight and credibility to be afforded Protect PT's experts, not the admissibility of their expert testimony. *Blythe Township*, 2011 EHB at 436.

Accordingly, we enter the order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 15th day of May, 2024, it is hereby ordered that Olympus' Motion to Strike Expert Reports and Preclude Expert Testimony Based on the Reports is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: May 15, 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
Anthony Holtzman, Esquire
Maureen O'Dea Brill, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NANCY KING	:	
	:	
v.	:	**EHB Docket No. 2021-059-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 16, 2024**
	:	

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

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board finds that appellant has not met her burden of proving by a preponderance of the evidence that a mine subsidence induced landslide caused the damage to her property or that the Department erred when it concluded that mine subsidence was not the cause of the alleged damage and denied her claim.

Background

Dr. Nancy King ("Dr. King") owns property located at 35 Orchard Lane, Monongahela, PA 15063, Carroll Township, Washington County (the "Property"). On November 4, 2020, Dr. King filed a Mine Subsidence Insurance Fund Damage Claim Notice (the "2020 Claim") with the Fund alleging damage to the house and attached garage located on the Property. The alleged damages in the 2020 Claim included cracks throughout the interior and exterior of the house, a twisted right house wall, the displacement of a basement window and damage to the floors and walls of the garage. By letter dated May 3, 2021, the Department of Environmental Protection (the "Department") denied the 2020 Claim ("Denial Letter"), concluding the alleged damage was not covered by her insurance because the damage was not caused by mine subsidence.

Dr. King appealed the Denial Letter to the Environmental Hearing Board ("the Board") on June 11, 2021. Over the course of discovery which was extended several times throughout the proceeding at the request of the parties, the Department filed two motions to compel. The Department filed three motions in limine, asking the Board to exclude: 1) the testimony of Brian Pfister and a report that he authored; 2) photographs that were not included in Dr. King's pre-hearing memorandum and; 3) the technical report of Dr. Yi Luo ("the Luo Report"). The Board denied the Department's motions pertaining to Brian Pfister and the Luo Report without prejudice to the Department's right to raise the issues addressed in the motions at the hearing and permitted the introduction of segments of the Luo Report insofar as Dr. King's expert relied on it in arriving at his own expert opinion. The Board granted the Department's second motion, limiting Dr. King to introducing into evidence only photographs that were attached to her pre-hearing memorandum. On October 11, 2023, a one-day hearing was held in the Board's Hearing Room in Pittsburgh. Dr. King filed her post-hearing brief on January 2, 2024; the Department filed its post-hearing brief on February 23, 2024 and; Dr. King submitted a reply letter in place of a brief on March 15, 2024, that concluded the briefing in this matter which is now ripe for decision.

FINDINGS OF FACT

Parties

1. On behalf of the Insurance Board, the Department administers the Coal and Clay Mine Subsidence Insurance ("MSI") Fund Law, Act of August 23, 1961, P.L. 1068, *as amended*, 52 P.S. §§ 3201 – 3226 ("MSI Fund Law"), and the rules and regulations promulgated thereunder, 25 Pa. Code Chapter 401, and acts on behalf of the Coal and Clay MSI Fund ("Fund"). (Joint Stipulation of Facts No. ("Jt. Stip.") 1).

2. Dr. King owns the real property located at 35 Orchard Lane, Monongahela, PA 15063, Carroll Township, Washington County, which includes a residential house with an attached garage ("Structure" or "King Structure") that was added after original construction. (Jt. Stip. 2).

Underground Mining Activities and Subsidence

3. The Property is located between the Maple Creek Mine and the abandoned Dunkirk Mine. (Jt. Stip. 17; Transcripts of Hearing Testimony Page No. ("T.") 172).

4. Union Coal and Coke Company's Dunkirk Mine conducted room and pillar mining operations in the Pittsburgh coal seam at a vertical depth of cover of approximately 380 feet. (Jt. Stip.10; T. 172).

5. The Dunkirk Mine was closed and abandoned around 1920. (Jt. Stip. 12; T. 171).

6. It is unknown if the Dunkirk Mine is flooded. (T. 76).

7. No mine subsidence insurance claims have been submitted or supported with respect to the Dunkirk Mine. (T. 77, 217, 225).

8. Maple Creek Mining, Inc 's Maple Creek Mine conducted room and pillar mining operations with partial coal extraction in the Pittsburgh coal seam at a vertical depth of cover of approximately 380 feet. Solid coal pillars were left in place to support the surface. (Jt. Stip. 3).

9. The Maple Creek Mine is adjacent to the Dunkirk Mine. (T. 76).

10. The Maple Creek Mine is being pumped of water. (T. 186).

11. Pothole subsidence, otherwise known as sinkhole subsidence, is a type of localized mine subsidence. (T. 46, 47, 157, 161).

12. The diameter of sinkhole subsidence is generally 15 feet or less. (T. 161).

13. Sinkhole subsidence generally occurs when there is 50 feet or less of cover from the coal seam to the surface. (T. 161).

14. Trough subsidence is broad and is configured in a circular or elliptical depression that forms on the surface. (T. 158).

15. The size of a subsidence trough is directly related to the depth of cover. (T. 158).

16. The diameter of a trough is typically one and a half the depth of the cover but can be as large as five times the depth of cover. (T. 158).

17. In the event of trough subsidence, surface features such as houses, fences and sidewalks, show a common pattern of movement towards the center of the trough. (T. 159).

18. Utilities, such as water, gas and sewer lines, are often impacted by trough subsidence. (T. 159).

19. Ground cracks, soil separation, and structures displaced out of level often occur in the event of trough subsidence. (T. 160).

20. Trough subsidence generally occurs when there is 50 feet or more of cover from the coal seam to the surface. (T. 158).

21. The Dunkirk Mine is most likely to experience a trough-type subsidence event. (T. 55, 158).

King Property and Structure

22. The house on the Property was built in 1948; the attached garage and patio were added in approximately 1961. (T. 118-19).

23. No coal extraction occurred below the King Structure and the entire Property is underlain by solid coal. (Jt. Stip. 16; T. 172).

24. The depth to the Pittsburgh coal seam under the Property (cover) is approximately 380 feet. (Jt. Stip. 14; T. 172).

25. The closest room and pillar mining in the Maple Creek Mine is approximately 175 feet west of the King Structure. (Jt. Stip. 4).

26. The closest room and pillar mining in the Dunkirk Mine is approximately 80 feet east of the King Structure. (Jt. Stip. 15; T. 172).

27. The backyard of the Property is comprised of a hill with an approximate slope of 4:1, meaning that it drops one foot vertically for every four feet horizontal. (T. 37-38).

28. At approximately three-quarters down the backyard slope, there is a flattened area running perpendicular to the slope that is generally uniform in shape ("the Rolling Feature"). (T. 32, 200; Ex. C-10h and K-2).

29. The neighboring property to the right of Dr. King's Property contains a similar feature to the Rolling Feature. (T. 200; Exs. C-13, C-14).

30. There is a fence near the bottom of the slope of Dr. King's backyard. (T. 198; Exs. C-10h and K-2).

31. The fence was installed at some time between 2019 and 2021. (T. 199).

32. There is an area with trees growing downslope or toward the rear of the fence at the end of the backyard. (T. 199; Ex. C-10h).

The Subsidence Claims

33. The mine subsidence insurance program was established in the early 1960s and provides homeowners the opportunity to obtain insurance to protect their structures from mine subsidence. (T. 144).

34. In 2017, the Fund issued an MSI policy for the Structure. (T. 154).

35. The Fund insuring agreement sets forth the policy coverage for the Structure and defines "mine subsidence" as "the movement of the ground surface as a result of the collapse of underground coal or clay mine workings." (Jt. Stip. 24, 26).

36. On June 28, 2019, the Department received a Subsidence Damage Claim Form dated June 24, 2019 from Cecelia Tonecha ("Ms. Tonecha"), who is Dr. King's late mother and predecessor in title of the Property. (Jt. Stip. 5).

37. On July 29, 2019, after completing an investigation under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §§ 1406.1—1406.21, and the regulations promulgated thereunder, the Department denied Ms. Tonecha's claim. (Jt. Stip. 6).

38. On August 29, 2019, Ms. Tonecha appealed the denial of her claim to the Board at EHB Docket No. 2019-104-B. During the pendency of the appeal, Ms. Tonecha passed away, and Dr. King, as Successor in Interest, was substituted as the appellant. (Jt. Stip. 7).

39. Because the experts identified by each of the parties concluded that Maple Creek Mining Inc's mining did not cause the damage to Dr. King's Structure, the parties executed a Settlement Agreement whereby Dr. King would withdraw her appeal at EHB Docket No 2019-104-B and would pursue a claim pursuant to the MSI Fund Law. (Jt. Stip. 8).

40. By Order dated October 28, 2020, the Board terminated the appeal and marked EHB Docket No. 2019-104-B as settled. (Jt. Stip. 9).

41. On or about November 4, 2020, Dr. King filed her 2020 Claim with the Fund. (Jt. Stip. 19).

42. Dr. King noticed the damages to the Structure over an eight-month timespan beginning in the middle of 2018. (T. 166; Ex. C-4).

43. The damages listed on the 2020 Claim include: damage to garage floors and walls, cracks in basement walls, cracks in guard walls on deck, twisted right house wall, displacement of basement window, cracks above back door, cracks in interior walls and ceiling, and landslide in back. (T. 166-67; Ex. C-4).

44. No nearby landowners have filed mine subsidence insurance claims. (T. 212).

45. The Department concluded that the damages set forth in the 2020 Claim were not covered by the terms of the Fund insuring agreement because the claimed damages were not caused by mine subsidence from the Dunkirk Mine. (Jt. Stip. 21).

46. In a letter dated May 3, 2021, the Department informed Dr. King that her 2020 Claim had been denied. (Jt. Stip. 22).

Dr. King

47. Dr. King moved into the house on the Property in 1953 when she was a few months old. (T. 118).

48. Dr. King played and went sledding in the backyard of the Property as a child. (T. 120).

49. Dr. King mowed the yard at the Property growing up. (T. 120).

50. The bulge (also referenced as the Rolling Feature) was not present in the backyard of the Property when Dr. King was a child. (T. 121).

51. Dr. King attended graduate school starting in 2000 and took a break from mowing the yard at the Property at that time. (T. 121).

52. Dr. King resumed mowing the yard at the Property in 2007/2008 at which point she noticed the big hump (Rolling Feature) in the backyard. (T. 122).

53. Dr. King has observed wide cracks in dirt near the house running perpendicular to the slope of the yard. (T. 127-129).

54. Dr. King first noticed the cracks in her yard around her house in 2018 and they have reappeared in her yard every summer since that time. (T. 129, 133).

The Department's Investigation

55. Michael T. Bodnar, P.E. ("Mr. Bodnar") was one of the Department staff that conducted the investigation of Ms. Tonecha's subsidence claim and of Dr. King's 2020 Claim. (T. 152-153).

56. Mr. Bodnar has been a licensed Professional Engineer in the Commonwealth of Pennsylvania since 2006. (T. 143; Ex. C-1).

57. Mr. Bodnar is employed as a Mining Engineer Consultant with the Department's Bureau of District Mining Operations, Mine Subsidence Section in the California District Mining Office. (T. 141-142; Ex. C-1).

58. Mr. Bodnar has been employed by the Department for twenty-three (23) years, and the bulk of his time with the Department involved mine subsidence. (T. 144; Ex. C-1).

59. Mr. Bodnar either conducted or supervised more than 700 mine subsidence investigations, all of which generated accompanying reports. (T. 150, 247-249).

60. Mr. Bodnar has observed more than 200 structures that have been damaged by mine subsidence. (T. 150, 247-249).

61. The Board accepted Mr. Bodnar as an expert witness in mine subsidence, the effects of mine subsidence and civil engineering. (T. 152-153).

62. Mr. Bodnar has been to the King Structure three times: June 2019, July 2019, and March 2021. (T. 173, 196).

63. Prior to conducting a site visit in a mine subsidence investigation, Mr. Bodnar reviews the damage claim notice, other subsidence events or investigations in the area, if any, information on the structure from previous visits, and available mapping information including mine maps. (T. 162).

64. During the course of a site visit, Mr. Bodnar speaks with the homeowners, obtains background information about the structure and damages, and has the homeowner show him the damages they are concerned about. (T. 163).

65. During the investigation of a structure, the Department photographs any observed damages and checks for levelness and plumbness of the interior and exterior of the home with a four-foot carpenter level and/or laser level. (T. 163-164).

66. Mr. Bodnar looks for differential settlement, ground cracks, soil separation, and any suspicious damages that could be indicative of mine subsidence during a site visit. (T. 164).

67. The Department considers adjacent properties in its investigations by searching for visible damages on the exteriors and measuring their levelness by using a laser level. (T. 164).

68. On March 1, 2021, Mr. Bodnar, along with other Department staff, conducted a site visit in the course of investigating the 2020 Claim. (Jt. Stip. 20).

69. Prior to March 1, 2021 site visit to the Property, Mr. Bodnar reviewed Dr. King's 2020 Claim, other claims of subsidence and investigation within the area, the previous information provided in Ms. Tonecha's claim, and mapping, including aerial mapping, USGS topographic mapping, a portion of the final mine map from Maple Creek Mine and an overlaid map that included a portion of the mine map from the Dunkirk mine. (T. 165, 167-170; Exs. C-5, C-6, C-7, and C-8).

70. Dr. King showed Mr. Bodnar the damages at the site visit and photographs were taken of the damages. (T. 178).

71. During the site visit, the Department used a four-foot carpenter's level on the first floor and the basement to measure the Structure's interior for levelness and plumbness. (T. 178-179).

72. The measurements show that some of the Structure's walls are plumb and some are out of plumb and some floors are level and some are out of level. (T. 178). The I-beam, the Structure's main support beam, is level. (T. 179).

73. The measurements indicated there is no pattern of movement that exists inside the Structure. (178-179).

74. The Department took measurements of the interior of the garage which showed there was no pattern of movement within the garage. (T. 179).

75. The front of the Structure is approximately one-half inch lower than the rear of it. (T. 184).

76. The King Structure is generally level and does not exhibit signs of a pattern of movement. (T. 185; Ex. C-9).

77. Mr. Bodnar observed dark staining on the exterior garage walls which he considered indicative of water flowing from the patio down along the foundation walls to the ground. (T. 192-194; Exs. C-10b and C-10d).

78. The Department measured the top of the footings of the garage which showed the tops sit between 12 and 18 inches below the ground surface. (T. 193).

79. The garage's shallow footings and the walls resting on those footings are susceptible to movement from frost heave or from soil drying. (T. 194).

80. Mr. Bodnar did not observe any physical evidence of a landslide in the backyard behind the Structure. (T. 198).

81. Mr. Bodnar observed that the trees growing off the edge of the backyard of the Property beyond the fence did not appear to be either tilted or bowed which he would have expected to see if there was a landslide. (T. 199, 201-202; Ex. C-10i).

82. The Department took laser level measurements of the exterior of the Structure and of 33 Orchard Lane (the house to the left of the Structure), 39 Orchard Lane (the house directly to the right of the Structure), and 47 Orchard Lane (the house that is two houses down to the right of the Structure). (T. 181, 206-210; Exs. C-9, C-10j, C-10k, and C-101).

83. The houses adjacent to the Structure that the Department took laser level measurements of were generally level and did not show a pattern of movement. (T. 209-211, 217; Ex. C-9).

84. Mr. Bodnar did not observe any impacts from mine subsidence to the adjacent houses or to associated roads, sidewalks, driveways, or utilities such as water lines. (T. 212).

85. Mr. Bodnar did not observe any evidence of a landslide at any of the adjacent properties. (T. 212).

Landslide Characteristics and Observations

86. Typical landslides have a circular configuration with a head scarp at the top and a toe bulge at the base. (T. 32, 34-35).

87. The head scarp, situated at the top of a landslide, consists of displaced soil that has moved both horizontally and vertically downward. (T. 37, 161).

88. Generally, at the head scarp, bare earth is exposed where material has moved and vegetative areas are adjacent to the bare area. (T. 161-162). The head scarp usually has a near vertical open soil that appears like a cut slope in a bank. (T. 37).

89. A landslide typically has a heave of material at its base, known as a toe bulge. (T. 161). A toe bulge is formed by the landslide pushing the soil upward. (T. 34).

90. Tension cracks are indicators of a landslide and are formed when the soil separates due to it moving laterally. (T. 34). Tension cracks can fill up over time. (T. 34, 239).

91. Hummocky or uneven ground is consistent with the occurrence of a landslide. (T. 34).

92. Intermediate cracks, scarps, and/or heaves within the material that has moved on a slope are characteristics of landslides. (T. 161).

93. Landslides can cause trees to grow in a tilted or bowed fashion. (T. 40, 201-202).

94. The risk of a landslide is a relationship between the slope and the internal friction of the soil. (T. 38).

95. If a slope has strong soil, the steeper the slope can be without a landslide occurring. If a slope has weak soil, the flatter the slope can be for a landslide to occur. (T. 38).

96. Mine subsidence can initiate a landslide. (T. 21).

97. It is rare for mine subsidence to cause a landslide that affects a structure. (T. 83).

98. Most landslides are caused by excessive precipitation. (T. 86).

Fact Witness Brian Pfister

99. Brian Pfister ("Mr. Pfister") is a licensed public insurance adjuster with 16 years of experience and represents the insured against the insurer. (T. 96-97).

100. In the course of his job duties, Mr. Pfister inspects homes for damages and, to a certain extent, must make conclusions surrounding the cause of the damages. (T. 97).

101. Insurance policies generally exclude coverage for damages caused by earth movement so insurers will deny claims for that type of damage. (T. 97-98).

102. Earth movement can cause cracks to form in a house but things other than land movement can also cause cracks. (T. 103, 106).

103. Mr. Pfister acknowledged that he is not an engineer and is not educated in determining why earth may have moved. (T. 98).

104. Mr. Pfister inspected the King Structure on July 1, 2022 and March 27, 2023 and took photographs of the cracking throughout the interior and exterior of the King Structure. (T. 99-100, 104; Ex. K-7).

105. Mr. Pfister observed new cracking as well as worsening/widening of many of the cracks between his inspection on July 1, 2022 and his follow-up inspection on March 27, 2023. (T. 107-116).

Expert Witness Burton Holt, P.E.

106. Burton Holt, P.E. (Mr. Holt) is a geotechnical engineer who is the technical operations manager of Ackenheil Engineers. (T. 13-14; Ex. K-1).

107. Mr. Holt is a licensed professional engineer in both Pennsylvania and West Virginia. (T. 14; Ex. K-1).

108. A geotechnical engineer evaluates how structures will interact with the ground and provide recommendations based on those evaluations. (T. 14).

109. Mr. Holt has 30 years of mine subsidence experience in the Pittsburgh area which involves evaluating how subsidence may impact a new structure and whether damage to an existing structure was caused by mine subsidence or another ground event. (T. 14-15).

110. Mr. Holt has evaluated approximately 50 structures for mine subsidence damage. (T. 15).

111. The Board accepted Mr. Holt as an expert witness in geotechnical engineering with experience in evaluating mine subsidence. (T. 17, 26).

112. On February 24, 2023, Mr. Holt conducted a site visit at the King Property to investigate the cause of the damage to the Structure. (T. 26).

113. Prior to the site visit, Mr. Holt reviewed the Luo Report and the information contained in the Department's Denial Letter. (T. 28, 63).

114. Mr. Holt inspected the exterior of the Structure and the outside of the Property down to the fence at the bottom of Dr. King's backyard. Mr. Holt did not inspect the interior of the Structure. (T. 26-27).

115. Mr. Holt observed split blocks and stair step cracking of the concrete block walls of the Structure. (T. 27).

116. Lateral soil movement can cause cracks in the walls of a structure's foundation. (T. 31).

117. Earthquakes, excess moisture and landslides can cause lateral soil movement. (T. 32).

118. Mr. Holt observed the Rolling Feature during his site visit. (T. 32-33).

119. Mr. Holt did not observe a head scarp during his site visit. (T. 37).

120. Mr. Holt observed uneven soils/hummocky ground during the site visit. (T. 34, 40).

121. Mr. Holt did not observe any tension cracks during the site visit. (T. 34).

122. Mr. Holt observed trees that were straight and trees that were slightly bowed during his site visit. (T. 40).

123. Mr. Holt did not observe any wet spots, springs, or erosion on the Property during his site visit. (T. 39).

124. Mr. Holt did not collect any soil samples or perform any soil tests of the Property's soil. (T. 66-67).

DISCUSSION

Legal Standard

Under our rules, Dr. King bears the burden of proof. *See* 25 Pa. Code § 1021.122(c); *Rohanna v. DEP and Emerald Contura, LLC*, 2019 EHB 193, 209. In order to prevail on her appeal, Dr. King 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 its actions are inconsistent with the Department's obligations under the Pennsylvania Constitution. *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. The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Telegraphis v. DEP,* 2021 EHB 279, 288*; Clancy v. DEP*, 2013 EHB 554, 572. Hence, Dr. King's evidence challenging the Department's denial of her 2020 Claim must be greater than the evidence supporting the Department's determination that the damage to the Structure was not caused by

mine subsidence. *Stocker v. DEP*, 2022 EHB at 364; *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449. The Board's 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. *United Refining, supra*.; see also *Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res*. 341 A.2d 556 (Pa. Cmwlth. 1975).

Analysis

The primary issue the Board must decide in this case is whether Dr. King has met her burden and demonstrated by a preponderance of the evidence that the Department erroneously denied her 2020 Claim based on its conclusion that the claimed damages to the Structure were not a result of mine subsidence and, therefore, were not covered under her mine subsidence insurance. The parties are generally in agreement as to the existence of the identified damages to the Structure but fundamentally disagree as to the cause of the damages. Unlike most mine subsidence claims before the Board where the appellants assert that their damages were directly caused by mine subsidence, Dr. King argues that the damages to her Structure were indirectly caused by mine subsidence. Specifically, she asserts that a landslide that was triggered by localized mine subsidence damaged the Structure. The Department argues that there is no evidence of mine subsidence, localized or otherwise, at or near the Property. The Department also disputes Dr. King's assertion that a landslide took place on the Property and that the alleged landslide was caused by mine subsidence resulting in the damages observed at the Structure.

The Damages

Dr. King's house was built in 1948 and an attached garage with a rooftop patio/deck was added in approximately 1961. The house is brick and has a cement block foundation. The attached garage is constructed of cement block and has a concrete patio/deck on top surrounded by a brick guard wall. On the Claim Notice, Dr. King described the damages as follows: "Damage to garage floors and walls; cracks in basement walls; cracks in guard walls on deck; twisted right house wall; displacement of basement window; cracks above back door; cracks in interior walls and ceiling; landslide in back." (Ex. C-4). Dr. King first noticed damage to the Structure in the spring or summer of 2018. She testified that the garage window was split, her patio door became difficult to open, a crack had formed in the brick exterior outside of the patio, and cracks appeared in the interior walls.

The Board heard limited testimony from Mr. Pfister, an insurance adjuster, who visited the King Structure on at least two occasions and presented photographs he took during those visits. The photos included depictions of cracks running throughout the walls and ceilings inside the Structure, separating bricks and cracked mortar between bricks on the exterior, and cracked blocks in the basement. Mr. Pfister testified that inspecting homes for damages is a part of his work and that to a certain extent he must make conclusions as to what caused those damages. He believed that the damage that he observed at the King Structure was due to earth movement, explaining that cracks which occur within the first year of a home being built are attributable to the home settling, but cracking that occurs beyond that timeframe indicates that the earth has moved underneath of it. Mr. Pfister did not testify as to what caused the earth movement and stated that he was not an engineer and had not been educated in determining what may have caused any earth movement at the Property. Mr. Pfister also testified that he observed both new cracks and the widening or

worsening of many of the existing cracks between his inspection in July 2022 and his follow-up inspection nine months later in March 2023.

Dr King's expert witness, Mr. Holt, a geotechnical engineer, provided testimony regarding the damages he observed at the King Structure. Mr. Holt inspected the exterior of the King Structure and the yard at the Property on February 24, 2023 but did not inspect the interior of the Structure. He testified that the main damage he observed on the exterior of the structure was "stair step cracking of the concrete block walls of the structure, and gaps in those stair step cracks." (T. 27). He explained that stairstep cracking is when the cracks follow the mortar between the blocks and, that in severe cases, the block itself could also crack, which he observed at the King Structure. In addition to his own observations, Mr. Holt reviewed the photographs contained in the Luo Report[1] which depicted distress to the foundation of the King Structure and showed damage inside the Structure. While Mr. Holt did not go inside of the King Structure, he stated that the main focus of his work involves observing a building's foundation and the soils surrounding it. Mr. Holt stated that the damage he observed during his site visit and in the photos within the Luo Report were "consistent with lateral movement of the soils that are supporting the foundation of the structure." (T. 31).

The Department's witness, Mr. Bodnar provided limited testimony concerning the damages to the Structure. He testified that Dr. King showed him the damages inside and outside the Structure. He observed deterioration and spalling of the brick wall above the garage and of the patio/deck located on top of the garage. He also noted cracking of various portions of brick work

[1] The Luo Report was authored by Dr. King's prior expert, Dr. Luo, who unfortunately passed away prior to the hearing. Mr. Holt testified that he had reviewed the Luo Report and relied on photographs within it to inform his expert opinion. The Board did not admit the Luo Report in its entirety and limited its admission to the segments that Mr. Holt testified to.

and that there had been repairs to the garage floor along with replacement of some of the blocks in the foundation walls. The photographs put into evidence by the Department are consistent with the damages testified to by Mr. Bodnar. While the Department's testimony seems to acknowledge that there are damages to the Structure, the Department did not explicitly address what it believed caused the damages. Most of the Department's evidence regarding the Structure's damages largely focused on showing that they were not the direct result of mine subsidence. At several points in his testimony, while discussing photographs of the garage and patio/deck area, Mr. Bodnar pointed out water stains on those portions of the Structure and stated that the staining appeared to be the result of water flowing down the foundation walls and onto ground adjacent to the garage. (T. 192-194). Mr. Bodnar identified what he considered to be shallow footings of the garage and testified that the shallow footings make the garage susceptible to movement from frost heave or from soil drying. He also described a water discharge runoff in the rear yard from an interior sump pump for a French drain that discharged multiple times while he was on the Property. He stated that surface runoff can saturate soils and weaken them. Taken altogether, the Department appears to attribute at least some of the observed damage to general deterioration due to age, direct water damage and saturated soils that are sufficiently weakened so that they fail to adequately support the house and garage. It also is worth noting that the Department did not offer much, if any evidence, contradicting Mr. Holt's testimony that the Structure's damages are consistent with the type of damages that would result from lateral earth movement.

Overall, as we said, we do not think that there is any real dispute among the parties as to the fact that the Structure shows some damage. The pictures and testimony satisfactorily evidence that there are cracks on the interior walls and ceilings of the house, cracks in the basement and foundation walls, as well as in the bricks that make up the exterior walls of the house and garage.

We find that the damages testified to during the hearing were generally consistent with the damages to the Structure set forth by Dr. King in her 2020 Claim. We also do not think that there is any real dispute about the damages resulting at least in part from the weakening of the supporting soils and/or movement of the soils beneath and surrounding the Structure. Both Mr. Holt and Mr. Pfister attributed the damages to earth movement and the Department's testimony does not significantly challenge that conclusion and partially supports the likelihood that at least some of the damages are the result of soil instability.

Causation

The central issue is of course what caused the soil movement/instability that resulted in the damages to the Structure set forth in the 2020 Claim. Dr. King's expert, Mr. Holt, concluded that a mine subsidence event triggered a landslide that damaged the King Structure. He arrived at his conclusion largely by working backwards from the observed damages, eliminating other possibilities and finding what he identified as evidence of a landslide on the Property. He then attributes the cause of the landslide to mine subsidence in the Dunkirk Mine. The Department argues that there is no evidence of a landslide occurring on the Property and there is also no evidence of mine subsidence in the Dunkirk Mine that could have triggered the alleged landslide.

Mr. Holt testified that there are three things that cause soils to move laterally: "an earthquake, a piping caused by a spring or some kind of excessive moisture, or a landslide;[…]" (T. 32). After ruling out an earthquake and excessive moisture as the cause for soil movement, and upon observing what he considered physical evidence that a landslide had occurred at the Property, Mr. Holt ultimately determined that a landslide caused the soil to move laterally, thereby causing the damage to the Structure. During his site visit, Mr. Holt observed the Rolling Feature in the backyard of the Property, which he described as "a flattened area of the slope" and concluded

the Rolling Feature was evidence of a landslide. (T. 32). He explained that a landslide has a circular configuration, consisting of a head scarp at the top of the landslide and a toe bulge at the base. Mr. Holt testified that a toe bulge is formed at the base of a slide plain where the landslide pushes soil upwards, causing material to bulge at the bottom, and that the Rolling Feature he observed in Dr. King's backyard was "consistent with a toe bulge from a shallow landslide." (T. 32-33).

During his testimony Mr. Holt also discussed several other indicators of a landslide: uneven/hummocky ground, tension cracks, bowed trees, and, as mentioned above, a head scarp. While inspecting the Property, Mr. Holt observed uneven ground and hummocky soil that he described as being consistent with a landslide. He also stated that he did not see open tension cracks which can occur when soil separates due to tension caused by lateral movement but went on to explain that tension cracks "tend to fill up over time." (T. 34). Additionally, Mr. Holt testified that during his site visit he observed some trees not on the Property that exhibited signs of bowing but that there were also adjacent trees that were straight. Because the presence of both straight and bowed trees provided contradictory evidence, Mr. Holt considered his observations surrounding the trees as a net-neutral and did not attribute this information any significance in arriving at his conclusion that a landslide occurred. Finally, Mr. Holt did not see a head scarp but testified that he believed the head of the landslide was located underneath the King Structure and therefore it could not be seen.

In contrast to the testimony of Mr. Holt, Mr. Bodnar testified that he did not see any physical evidence of a landslide at the Property. In support of his position, he testified that he had previously investigated a few claims involving landslides that were alleged to have been triggered by mine subsidence and that he had viewed numerous slips or landslides over longwall mining

areas. Some of the features Mr. Bodnar said were characteristic of landslides line up well with those identified by Mr. Holt. Both agree that there is typically a noticeable scarp or soil displacement at the top of a landslide as well as a toe bulge at the bottom of a landslide. Additionally, both experts identified tension cracks/intermediate cracks within displaced material, as well as bowed trees as further evidence that a landslide took place. Mr. Bodnar simply did not observe any of those characteristics present in Dr. King's yard or the surrounding areas.

Mr. Holt's conclusion that there was a landslide at the Property is not supported by a preponderance of the evidence. The first step in his conclusion that a landslide caused the lateral soil movement is the elimination of the two other possibilities he identified as causes of soil movement, earthquakes and excessive moisture. Neither party put forth any evidence of an earthquake, so we think that possibility is reasonably eliminated but we are not convinced that Mr. Holt adequately considered excessive moisture as a possible cause and reasonably ruled it out. He claimed to have ruled out the possibility of excess moisture as a cause for soil movement because he did not observe any wet spots, springs, or erosion during his one visit to the Property. He did not interview Dr. King to garner information regarding moisture conditions at the Property beyond the day he inspected the Property. Mr. Holt did not collect any soil samples or perform any soil testing which could have provided more conclusive/accurate results of the soils hydrology, instead of purely relying on one-time observations. In contrast, the Department presented unrebutted evidence in support of the assertion that the Property may in fact have issues with excess moisture. For instance, Mr. Bodnar testified that there is uncontrolled runoff from the patio which flows down the foundation and into the backyard. He also observed a sump pump in the Structure's basement that he testified discharged water into the backyard several times during his investigation. The Department also presented photographs that depicted dark staining that began

at the patio above the garage and traveled down the garage wall to the ground. (Exs. C-10b, C-10d, C-10e). Mr. Bodnar testified the dark marks were indicative of water staining due to runoff from the patio. He also noted that the foundation of the garage was shallow which would make it susceptible to frost heave and changing moisture conditions. Considering the evidence presented, we are not convinced that excessive moisture should have been eliminated as a possible cause of the soil movement/instability that resulted in the damages.

Even if we were to accept Mr. Holt's position that excessive moisture was not a factor in the damages, the evidence he presented in support of his landslide theory is not convincing. It relies heavily on his conclusion that the Rolling Feature he observed in Dr. King's yard is the toe bulge of a landslide. In the photographs and testimony presented regarding the Rolling Feature, it appeared to be a generally flat area with a uniform character. Mr. Holt testified that he concluded, at least in part, that the Rolling Feature was a toe bulge because he believed it was not manmade. He conceded that the Rolling Feature's appearance could suggest it was a road, but he ultimately concluded it was not manmade because he did not see any evidence that the Rolling Feature extended beyond Dr. King's Property. Alternatively, Mr. Bodnar disputed that the Rolling Feature was a toe bulge and testified that he believed it was manmade because of its uniform shape, along with the fact that it sits perpendicular to the slope, and because there is a similar rolling feature in the neighbor's backyard. (T. 200). The Department also offered three exhibits contradicting Mr. Holt's testimony that show the backyard neighboring the King Property contains a physical attribute similar to the Rolling Feature as it appears flattened, runs perpendicular to the slope, and is generally uniform in shape. (See Exs. C-13 and C-14). This evidence disputes the basis on which Mr. Holt concluded the feature could not have been manmade and that it was a toe bulge.

The other physical evidence of a landslide is also not compelling. Both experts in this case testified that they did not see the head scarp of the alleged landslide. Mr. Holt argued that he believed the head of landslide was situated underneath the King Structure, thereby making it impossible to view. Mr. Holt acknowledged that he did not observe any tension cracks that would be indicative of a landslide but again, dismissed their absence by saying that they generally fill up over time. Dr. King did testify that she observed some soil cracking near the structure but stated that the cracking reappeared on an annual basis which would appear to be inconsistent with tension cracks from a landslide. The presence or absence of bowed trees was also discussed, and Mr. Holt noted that he observed some trees not on the Property that exhibited signs of bowing but that there were also adjacent trees that were straight. Mr. Holt did not provide any photographs supporting his observation of at least some bowed trees. The Department, in contrast, presented a photograph of a line of trees just downhill from the Rolling Feature beyond the fence that were not bowed. The only other physical evidence mentioned by Mr. Holt was the presence of uneven ground and hummocky soil. Again, we did not see any photographic evidence of these ground conditions and in conjunction with the lack of other physical evidence, we find the testimony on this point insufficient to support the landslide theory.

In addition to the general lack of physical evidence supporting the landslide theory, we also note that there appears to be a timing issue concerning when the alleged landslide occurred relative to when Dr. King noticed damages to the Structure. Dr. King first observed the Rolling Feature in the backyard in either 2007 or 2008. Additionally, on cross-examination, the Department presented Mr. Holt with aerial images of the Property from Google Earth from 2008, 2015, and 2016. Mr. Holt acknowledged that the Rolling Feature was present in all three images. Mr. Bodnar testified that based on his observations of landslides, the observable physical characteristics of the

landslide such as the head scarp, the toe bulge and intermediate cracks typically appeared suddenly. If the Rolling Feature is in fact a toe bulge, it follows then that the landslide, at the latest, occurred in 2008 as is evidenced by Dr. King's testimony and the Google Earth images. However, Dr. King did not observe damages to the Structure until 2018. Therefore, the damages, that were first observed in 2018, did not occur until at least 10 years after the alleged landslide. This seems unlikely to us although we did not receive any evidence or testimony addressing this discrepancy. Mr. Holt was neither asked about nor offered an opinion as to when the landslide occurred.[2] No evidence was introduced concerning whether damages resulting from a landslide can arise years after its occurrence. The lack of any testimony explaining how a landslide that took place no later than 2008 caused damage to the Structure that reportedly began in 2018 fails to support Dr. King's claim and further undercuts Mr. Holt's argument that the Rolling Feature is a toe bulge created by the alleged landslide. When looking at all the evidence and testimony, we find that the preponderance of the evidence does not support the conclusion that a landslide took place on the Property.

Mine Subsidence

Even if Dr. King had been able to prove a landslide occurred on her Property, she still would not prevail on her claim because she failed to produce sufficient evidence linking the alleged landslide to mine subsidence. Both the Maple Creek Mine and the Dunkirk Mine are in the vicinity of the King Structure. Both mines conducted room and pillar mining operations in the Pittsburgh coal seam and both have a vertical depth of cover of 380 feet. The Maple Creek Mine is adjacent

[2] In its post-hearing brief, the Department asserts that Mr. Holt concluded that "a mine subsidence-induced landslide occurred in 2018[…]" This is a mischaracterization of Mr. Holt's testimony. While he acknowledged that the damages to the Structure were not observed until 2018, he did not testify as to the year he believed the landslide occurred.

to the Dunkirk Mine and is approximately 175 feet west of the Structure. The Dunkirk mine was closed and abandoned around 1920 and is approximately 80 feet east of the Structure. Dr. King's Property is situated between the Maple Creek Mine and the Dunkirk Mine. The Property was not undermined and is underlain by solid coal.

Prior to the current appeal, Dr. King's mother and predecessor in title of the Property, Cecelia Tonecha, filed a subsidence damage claim form in June 2019 which was denied by the Department. Ms. Tonecha appealed the denial to the Board at EHB Docket No. 2019-104-B. During the appeal, Ms. Tonecha passed away and Dr. King, as Successor in Interest, was substituted as the appellant. After the experts identified by each of the parties concluded that subsidence from the Maple Creek Mine did not damage the Structure, Dr. King withdrew the former appeal and pursued the 2020 Claim under the MSI Policy. In this matter, Dr. King does not argue that the subsidence took place in the Maple Creek Mine but instead asserts that a subsidence event occurred in the Dunkirk Mine.

Mr. Holt concluded that mine subsidence triggered the alleged landslide. He arrived at this conclusion by ruling out other possibilities that could have initiated a landslide and because the Dunkirk Mine is within 80 feet of the King Structure. Subsidence can take several forms including trough subsidence which is broad and is configured in a circular or elliptical depression that forms on the surface. Because Mr. Holt did not see evidence that trough subsidence had taken place and since damage was limited to the King Structure, he concluded that pothole subsidence, a more localized type of subsidence, had occurred. Although he did not provide any direct evidence of subsidence in the Dunkirk Mine, he offered a theory that the alleged subsidence was attributable to a partial roof fall and pillar collapse. Mr. Holt described the details of his subsidence theory as follows:

> The kinds of subsidence what would lead to a localized subsidence event, like my opinion that occurred here, would be that a portion of the room started to collapse, the rock right above the room collapsed, the pillars was weakened over time and collapsed, the pillar that is between the mine and King collapsed to some extent, and that that collapsing rock at some point just continues to propagate up to the – not to the surface, but to the top of the rock that is below the soil on her slope.
>
> That collapses, which removes the support from the soil, removes the soil support, causing the soil to move.

(T. 52).

We do not find support for Mr. Holt's theory that a roof fall or pillar failure took place in the Dunkirk Mine resulting in a localized subsidence. Mr. Holt's testimony describing the sequence of roof fall and pillar failure consisted entirely of conjecture on his part. He offered little testimony about what could have potentially caused a roof fall or pillar failure in the Dunkirk Mine other than stating that given the type of sedimentary rock that exists in the region, all mines, which includes the Dunkirk Mine, would eventually subside. He stated that both ventilation and flooding are factors that impact a mine's deterioration rate but also said that flooding is not essential for subsidence to occur. While those statements may be true, Mr. Holt failed to present any evidence pertaining to the particular conditions of the Dunkirk Mine. He provided no testimony about the Dunkirk Mine's ventilation, state of deterioration, or pillar integrity and also admitted that he did not know whether the Dunkirk Mine was flooded even though he testified that flooding exacerbates the rate of a mine's deterioration. Further, he did not identify in his expert report where the pillar collapse occurred and conceded on cross examination that he did not know. The only evidence he offered in support of a subsidence occurrence was indirect, reasoning that the alleged landslide was proof in of itself of mine subsidence. He reasoned that because a landslide was the only possible explanation that could account for the lateral soil movement (since he ruled out earthquakes and excess moisture as causes) and because the Property's slope was gentle and

therefore at a low-risk for a landslide, a triggering event was required to set a landslide into motion, and concluded that mine subsidence acted as the necessary trigger. Not only do we find this theory tenuous on its own, but we have already found that the evidence does not support the occurrence of a landslide and therefore the alleged landslide cannot support a finding of pillar collapse in the Dunkirk Mine. Overall, we find Mr. Holt's assertion that a partial pillar collapse caused localized subsidence highly speculative.

In contrast to Mr. Holt's speculative theory about mine subsidence triggering a landslide, the Department presented testimony from Mr. Bodnar who has extensive experience with mine subsidence claims and investigations. Mr. Bodnar disputed Mr. Holt's assertion that pothole subsidence occurred in the Dunkirk Mine. He testified that pothole or sinkhole subsidence generally occurs when there is 50 feet or less of cover and that when a mine's cover is greater than 50 feet, any subsidence would generally be trough type subsidence. The depth of cover in the Dunkirk Mine is 380 feet, well in excess of the typical cover depth for pothole subsidence. Further, Mr. Holt agreed with Mr. Bodnar, and testified that trough subsidence was the most likely type of subsidence to occur at the Dunkirk Mine because of its depth of cover. Mr. Holt did not offer any testimony or evidence contradicting Mr. Bodnar's claim that pothole subsidence is very unlikely to occur at depths of cover that are greater than 50 feet.

Additionally, the record demonstrates that the Department carried out a thorough investigation of Dr. King's 2020 Claim and found no direct evidence of mine subsidence at the Property or in the immediate surrounding area. Prior to the March 1, 2021 site visit, Mr. Bodnar, along with other Department staff, reviewed the 2020 Claim, various sources of mapping of the Property and of the surrounding mine, and the information the Department acquired on the previous claim for the King Structure. Mr. Bodnar observed the inside damages of the Structure

and determined the cracks did not exhibit a common pattern of movement. A carpenter level and laser level were used on the inside and the outside of the Structure, respectively, to measure its levelness. The Structure was mostly level with the front of the house sitting approximately one half of an inch lower that the back of it. The laser level was also used to measure the levelness of three other homes, two of which were on either side of the King Structure. All three were found to be mostly level. The Department photographed the damages and documented the conditions of the Property including the Rolling Feature in the backyard. Mr. Bodnar did not observe any of the tell-tale signs that subsidence occurred such as an elliptical depression on the ground, a common pattern of displacement of surface features, damaged utilities or impacts on other buildings within the vicinity of the King Structure. Mr. Bodnar walked the neighborhood to inspect for any of these signs and observed none. We find Mr. Bodnar's testimony credible and that his conclusion that mine subsidence did not take place either at the Property or in the immediate neighborhood, is well supported by the evidence.

Conclusion

Dr. King bears the burden of proof to show by a preponderance of the evidence that the Department erred in finding that mine subsidence was not the cause of the damages set out in her 2020 Claim. Upon consideration of the testimony and evidence presented in this matter, we hold that Dr. King has failed to meet her burden and her appeal should be dismissed.

CONCLUSIONS OF LAW

1. Dr. King bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(a).

2. In order to meet her burden of proof, Dr. King must show by a preponderance of the evidence that the Department erred when it determined that mine subsidence was not the cause of the damages to the Structure.

3. The preponderance of the evidence standard requires that the evidence in favor of the proposition is greater than the evidence opposed to it and that the evidence is sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449.

4. Dr. King failed to show by a preponderance of the evidence that the Department erred in determining that mine subsidence was not the cause of the damages to the Structure at the Property alleged in her 2020 Claim.

5. The Mine Subsidence Insurance Fund Insuring Agreement ("Insuring Agreement") sets forth the coverage for Dr. King's Mine Subsidence Policy and only covers loss to the King Structure when the loss is caused by mine subsidence.

6. The Insuring Agreement defines "mine subsidence" as "the movement of the ground surface as a result of the collapse of underground coal or clay mine workings."

7. The Department properly denied Dr. King's 2020 Claim as the damages to her Structure were not caused by mine subsidence and were therefore outside the coverage of the Insuring Agreement.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NANCY KING	:	
	:	
v.	:	**EHB Docket No. 2021-059-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of May, 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.
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: May 16, 2024

c: DEP, General Law Division:
Attention: Maria Tolentino

(via electronic mail)

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

For Appellant:
David M. Kobylinski, Esquire
Peter T. Kobylinski, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAROQUIER COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2024-007-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 17, 2024**

OPINION AND ORDER ON
FAILURE TO OBTAIN COUNSEL

By Paul J. Bruder, Jr., Judge

Synopsis

The Board dismisses as a sanction an appeal filed *pro se* by a company that is required by Board rules to be represented by counsel but has failed to comply with Board Orders to obtain representation.

O P I N I O N

Background

This matter concerns a *pro se* appeal filed by Waroquier Coal Company ("Waroquier") on January 11, 2024 contesting the Department of Environmental Protection's ("Department") suspension of Permit No. 17080111 for failure to comply with the Surface Mining Act, the Clean Streams Law, and, more generally, the Department's rules and regulations.

Under our rules, "[p]arties, 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). Because Waroquier is not an individual appearing on its own behalf, on February 2, 2024 this Board issued an Order to Obtain

Counsel that required either an attorney to enter an appearance on behalf of Waroquier, or, in the alternative, that Waroquier file a statement addressing its progress toward obtaining counsel by March 4, 2024. That Order went unanswered. The Board followed that Order with two Rules to Show Cause requiring the same dated March 19, 2024 and April 26, 2024 with respective response deadlines of March 29, 2024 and May 8, 2024, both of which have also been ignored.

On March 18, 2024, the deadline set by Pre-hearing Order No. 1 to file a required joint statement certifying that the parties have conferred about settlement, Department Counsel filed a Status Report addressing Waroquier's failure to comply with the Board's Order to Obtain Counsel and informing the Board that due to that failure, the parties had not yet conferred on settlement, but that Department Counsel would seek to do so as soon as an attorney entered an appearance on Waroquier's behalf. To date, no attorney has entered an appearance on Waroquier's behalf.

Between April 1, 2024 and April 22, 2024, Board staff exchanged emails with Waroquier on the subject of obtaining counsel and the fact that doing so is a requirement when it is a company – rather than an individual – pursuing the appeal. While Joseph Waroquier, Jr. indicated via email that Waroquier had secured representation on April 5, 2024, no attorney has entered an appearance on Waroquier's behalf despite Board staff's continued attempts to communicate the necessity of having an attorney enter an appearance, all of which have gone unanswered.

Discussion

This Board may impose sanctions – including dismissal of the appeal – for failure to comply with our orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Dismissal is warranted where the Appellant clearly demonstrates a lack of intent to pursue the appeal by failing to comply with Board orders. *Blackwood v. DEP*, 2020 EHB 442; *Scottie Walker v.* DEP, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628; (citing

Bishop v. DEP, 2009 EHB 260; *Miles v. DEP*, 2009 EHB 179; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 396; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). The Board has imposed dismissal as a sanction when entities required to be represented by an attorney in good standing have failed to retain counsel. *Mann Realty v. DEP*, 2015 EHB 110; *Falcon Coal &Construction Co. v. DEP*, 2009 EHB 209.

While it seems that initially Waroquier may have been interested in pursuing this appeal, communications from Waroquier have ceased as of April 22, 2024, and Waroquier has failed to respond to our initial Order to Obtain Counsel and two following Rules to Show Cause, demonstrating a lack of intent to pursue this appeal.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAROQUIER COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2024-007-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of May, 2024, following Appellant's failure to comply with Board orders, and pursuant to 25 Pa. Code § 1021.161, it is hereby ordered that the appeal in the above-referenced matter is terminated. The docket will be marked as **closed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: May 17, 2024

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

For the Commonwealth of PA, DEP:
Daniel Schramm, Esquire
David N. Smith, Esquire
(via electronic filing system)

For Appellant:
Waroquier Coal Company
Attn: Joseph L. Waroquier, Jr.
P.O. Box 128
Clearfield, PA 16830
(via first class U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT WILKINSON d/b/a WILKINSON CONTRACTING	:	
v.	:	**EHB Docket No. 2024-058-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 17, 2024**

OPINION AND ORDER ON
FAILURE TO PERFECT APPEAL

By Paul J. Bruder, Jr., Judge

Synopsis

The Board dismisses an appeal as a sanction pursuant to 25 Pa. Code § 1021.161 where the Appellant has not responded to Board Orders to perfect the appeal.

O P I N I O N

Background

This matter concerns a *pro se* appeal filed by Robert Wilkinson d/b/a Wilkinson Contracting ("Wilkinson") contesting a Compliance Order of the Department of Environmental Protection ("Department") issued January 25, 2024. This appeal was docketed on February 26, 2024, and while it included a partial copy of the Department's action being appealed, on February 27, 2024 and pursuant to 25 Pa. Code §§ 1021.51(d) and 1021.51(f)(2)(vi)(A)-(B), this Board issued an Order to Perfect requiring that Wilkinson file the Department's action being appealed in full as well as proof of service upon the Department's Office of Chief Counsel and the Department officer who took the action being appealed by March 18, 2024.

When Wilkinson did not file the required information by that date, the Board issued a Rule to Show Cause requiring compliance with the Order to Perfect by April 3, 2024. When that Rule went unanswered, Board staff attempted to contact Wilkinson by phone – no email address was included in the Notice of Appeal – and finally spoke to Wilkinson on April 12, 2024. Board staff explained Wilkinson's responsibility to respond to Orders of this Board, obtained Wilkinson's email address, and sent an email explaining the same that included links to all prior Orders as well as the Docket Sheet for this matter and our Citizens Guide to Practice Before the Environmental Hearing Board. Wilkinson assured Board staff that the required information would be filed by Friday, April 19, 2024. Nothing was filed by that date, and the Board issued an Order to Comply with Order to Perfect on April 26, 2024 with a final deadline of May 8, 2024 to perfect the appeal. There have been no further filings or communications of any kind from Wilkinson to the Board.

Discussion

This Board may impose sanctions – including dismissal of the appeal – for failure to comply with our orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Dismissal is warranted where the Appellant clearly demonstrates a lack of intent to pursue the appeal by failing to comply with Board orders. *Blackwood v. DEP*, 2020 EHB 442; *Scottie Walker v.* DEP, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628; (citing *Bishop v. DEP*, 2009 EHB 260; *Miles v. DEP*, 2009 EHB 179; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 396; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54).

While Wilkinson initially appeared interested in pursuing this appeal, our Orders have not been complied with and Wilkinson's communications to Board staff have ceased, and the appeal

remains unperfected three months after it was filed, demonstrating a lack of intent to pursue the matter.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT WILKINSON d/b/a WILKINSON CONTRACTING	:	
v.	:	**EHB Docket No. 2024-058-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of May, 2024, following Appellant's failure to comply with Board orders, and pursuant to 25 Pa. Code § 1021.161, it is hereby **ordered** that the appeal in the above-referenced matter is terminated. The docket will be marked as **closed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: May 17, 2024

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

For the Commonwealth of PA, DEP:
Robyn Katzman Bowman, Esquire
David N. Smith, Esquire
(via electronic filing system)

For Appellant:
Robert Wilkinson
d/b/a Wilkinson Contracting
P.O. Box 356
Athens, PA 18810
(via first class U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M REALTY PARTNERS, L.P.	:	
	:	
v.	:	**EHB Docket No. 2023-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PARADISE TOWNSHIP, Intervenor	:	**Issued: June 10, 2024**

OPINION AND ORDER ON
MOTION TO DISMISS

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

Synopsis

The Board denies a motion to dismiss an appeal of a Department letter where it is not clear and free from doubt that the letter is not an appealable action.

O P I N I O N

M&M Realty Partners, L.P. ("M&M Realty") filed this appeal from a September 20, 2023 letter that counsel for the Department of Environmental Protection (the "Department") sent to the solicitor of the Paradise Township Board of Supervisors (the "Township"). The Township has intervened in the appeal.

According to the parties, M&M Realty operates a long-term stay motel in the Township. Some of the motel buildings are served by on-lot sewage disposal systems that have been malfunctioning. M&M Realty apparently has been attempting to resolve the sewage issues at its motel buildings with the Township and the Department. The aforesaid letter provides, in its entirety:

> Per your request, this is to advise the Paradise Township Board of Supervisors ("Township") that the Commonwealth of Pennsylvania, Department of

> Environmental Protection ("Department") has determined that resolution of the sewage disposal issues at M&M Realty Partners L.P.'s ("M&M Realty") properties located at 6315 Paradise Valley Road, Mount Pocono, Pennsylvania are required to be resolved through 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") and The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L.1535, *as amended*, 35 P.S. § 750.1-750.20 ("Sewage Facilities Act") and underlying regulations. **Specifically, the Department has determined that M&M Realty must do planning for the entirety of their properties and that a repair permit from the Township is not appropriate for addressing the sewage issues.** Planning has never been done and while M&M Realty believes a repair permit is all that is required, the Department disagrees and has asserted the need for planning. As such, while the Township has a role in the process, it is the Department who will oversee and approve the various submissions required under the Sewage Facilities Act and underlying regulations.
>
> As you are aware, M&M Realty has filed an appeal of the Department's mailer, since amended, to the Pennsylvania Environmental Hearing Board ("EHB"), docketed at 2023-67-L ("Appeal"). The Township has been joined in the Appeal as a "necessary party". Prior to filing said Appeal with the EHB, the Department and M&M Realty were in discussions regarding resolution of the matter. The Department is currently in process of drafting a Consent Order and Agreement ("CO&A") between all parties to the appeal in order to resolve the matter. The CO&A is intended to ensure proper planning is completed and to allow for repair/replacement of the malfunctioning systems.
>
> Should you have any questions regarding this correspondence, please do not hesitate to contact me at your convenience.

(Notice of Appeal, Ex. 1 (emphasis added).) It is not clear what request the Township may have made to prompt this letter from the Department.

The Township has now moved to dismiss this appeal.[1] The Township asserts that the letter does not embody an appealable action. The Department has filed a memorandum and a reply brief in support of the Township's motion. M&M Realty opposes the motion.

[1] The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L, slip op. at 5 (Opinion and Order, Mar. 8, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. For purposes of resolving motions to dismiss, the Board accepts the nonmoving party's version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Twp. v. DEP*, 2008 EHB 563, 570.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Monroe Cnty. Clean Streams Coalition v. DEP*, 2018 EHB 798, 800; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Glahn v. DEP*, 2021 EHB 322, 326, *recon. denied*, 2021 EHB 347, *aff'd*, 298 A.3d 455 (Pa. Cmwlth. 2023); *Dobbin v. DEP*, 2010 EHB 852, 858; *Borough of Kutztown*, 2001 EHB at 1121. In determining whether a Departmental document constitutes a final, appealable action, we generally consider: the wording of the document; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the document; what relief, if any, the Board can provide; and any other indicia of the impact upon a person's personal or property rights. *Hordis v. DEP*, 2020 EHB 383, 388 (citing *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB at 858-59; *Borough of Kutztown*, 2001 EHB at 1121). In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2; *Clean Air Council v. DEP*, 2023 EHB 203, 207. Importantly, we generally abhor piecemeal review of the various intermittent decisions made along the way during the Department's review process, even if some of those decisions may bear some of the hallmarks of finality. *Monroe Cnty. Clean Streams*, 2018 EHB at 809-10; *Lower Salford Twp. Mun. Auth. v. DEP*, 2011 EHB 333, 338-39; *United Refining Co. v. DEP*, 2000 EHB 132, 133-34; *Phoenix Res., Inc. v. DER*, 1991 EHB 1681, 1684.

The Township recites the Board's general standard for determining whether a Department letter is an appealable action, but it does not spend much time actually addressing the factors that make up the standard. It never explains in a straightforward manner whether a Department letter stating that sewage planning is required for a particular situation can ever be a final action despite having the appearance of being something that would embroil the Board in piecemeal review. Instead, the Township's position is heavily reliant on an administrative finality argument. The Township says that the letter is not an appealable action because it merely reiterates what was established in earlier Department communications. The Township highlights at least three prior communications from the Department, which it claims informed M&M Realty that planning would be required. We are hesitant to believe that the parties' tortuous correspondence history could transmute an otherwise unappealable action into an appealable one, but putting that aside, the Township has failed to provide enough context and documentation to resolve all doubts in its favor to adequately support its motion to dismiss on this ground. Even if we assume *arguendo* that the Township's fundamental premise about the effect of the earlier correspondence has merit, we tend to agree with M&M Realty that it is not at all clear that the earlier correspondence did in fact mandate that sewage planning would be required.

The Township also points out that M&M Realty filed a separate appeal of one of the earlier letters at EHB Docket No. 2023-067-L. The Township says that M&M Realty's notice of appeal for that letter originally included objections to the alleged requirement for M&M Realty to conduct sewage planning, and that when M&M Realty amended its appeal, it removed those objections, leaving only objections to an alleged requirement to conduct a preliminary hydrogeologic study remaining. The Township reasons that this means M&M Realty abandoned any objection to the requirement to conduct sewage planning and that, since the appeal at EHB Docket No. 2023-067-

L has since settled and been closed, the planning requirement is now final and cannot be collaterally attacked through this appeal.[2] We cannot conclude that M&M Realty's appeal of the earlier letter and subsequent withdrawal of objections has any effect on the appealability of the letter under appeal here.

In instances where there is clear doubt, a motion to dismiss must be denied. *See Kopko v. DEP*, 2019 EHB 179 (denying motion to dismiss where "considerable doubt" remained based on the incomplete record before the Board). The Township's motion and the Department's memoranda in support thereof leave us in doubt whether the letter under appeal embodies an appealable action.

Accordingly, we issue the Order that follows.

[2] We are not entirely sure of the Department's position regarding this letter. In the Stipulation of Settlement filed in the 2023-067-L appeal, the Department stipulated that the letter's request to perform a preliminary hydrogeologic study was not a final, appealable action, but now it apparently supports the Township's position that the letter's supposed requirement to conduct planning was a final action.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M REALTY PARTNERS, L.P.	:	
	:	
v.	:	**EHB Docket No. 2023-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PARADISE TOWNSHIP, Intervenor	:	

O R D E R

AND NOW, this 10th day of June, 2024, it is hereby ordered that Paradise Township's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 10, 2024

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

For the Commonwealth of PA, DEP:
Michael T. Ferrence, Esquire
(*via electronic filing system*)

For Appellant:
Martin R. Siegel, Esquire
Katelyn E. Rohrbaugh, Esquire
(*via electronic filing system*)

For Intervenor:
Scott A. Gould, Esquire
Errin T. McCaulley, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD QUIGLEY, JR. and LET'S CUT A DEAL SERVICES, LLC.	:	
v.	:	**EHB Docket No. 2022-105-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO and KATHLEEN G. SHEEHAN VELLO, Intervenors	:	**Issued: June 24, 2024**

OPINION AND ORDER DISMISSING APPEAL

By MaryAnne Wesdock, Judge

Synopsis

The appeal of an estate and business is dismissed for lack of representation as required by 25 Pa. Code § 1021.21.

O P I N I O N

This matter involves an appeal of an order issued by the Pennsylvania Department of Environmental Protection (Department) alleging violations of the Solid Waste Management Act. The appeal was originated by Richard Quigley, Jr. and Let's Cut a Deal Services, LLC through their attorneys, Eckert Seamans Cherin & Mellott, LLC (Eckert). During the pendency of the appeal, Mr. Quigley, Jr. died, and his father, Richard P. Quigley, Sr. was appointed as Administrator of his son's estate.[1] Mr. Quigley, Sr. advised Eckert that he was unable to retain them to represent the estate and business in this matter. Eckert filed a Motion to Withdraw as

[1] Mr. Quigley, Sr. was also a recipient of the Department's order, and a separate appeal was filed by him at Docket No. 2022-104-W.

Counsel which was subsequently granted by the Board. The Department filed a response to the Motion to Withdraw in which it asked the Board to issue a rule to show cause as to why the appeal should not be dismissed for lack of representation pursuant to 25 Pa. Code § 1021.21.

The Board's rule at 25 Pa. Code § 1021.21(a) requires parties, other than individuals appearing on their own behalf, to be represented by an attorney. This requirement applies both to corporations, *id.* at § 1021.21(b), and estates, *Gary Graham, Executor of the Estate of Robert B. Graham v. DEP*, 2023 EHB 30, 31-32.

Prior to Eckert's departure from the case, the Board referred Mr. Quigley, Sr. to the *Pro Bono* Committee of the Pennsylvania Bar Association Environmental and Energy Law Section to determine whether *pro bono* counsel was available to represent the business and the estate in this matter. Unfortunately, despite the best efforts of the Committee, that search was not fruitful. The presiding judge then sent a letter to Mr. Quigley, Sr., explaining as follows:

> Under the Environmental Hearing Board's rules, incorporated businesses and estates are not allowed to proceed without an attorney. If you would like to proceed with this appeal, as the Administrator of your son's estate, an attorney will need to represent your son's estate and Let's Cut a Deal Services. If you choose not to retain an attorney on behalf of the estate and/or business, you may not be able to proceed any further in the appeal of *Richard Quigley, Jr. and Let's Cut a Deal Services, LLC v. DEP*, Docket No. 2022-105-W.

(EHB Docket No. 2022-105-W, Entry No. 45.)

The letter further stated that if Mr. Quigley, Sr. intended to have the appeal go forward, he should have an attorney notify the Board by May 2, 2024 that they were representing his son's estate and business in this proceeding, and a lack of response would indicate to the Board that he did not wish to proceed with the appeal. Neither Mr. Quigley, Sr. nor an attorney representing the estate and business contacted the Board by May 2, 2024, and the Department renewed its earlier

request for a rule to show cause why the case should not be dismissed. In lieu of a rule to show cause, the Board issued an order on May 22, 2024 giving Mr. Quigley, Sr. until June 14, 2024 to demonstrate why the appeal at Docket No. 2022-105-W should not be dismissed for non-compliance with 25 Pa. Code § 1021.21(a) and (b). The order further advised him that if no response were received the appeal would be dismissed. No response was received, and we understand this lack of response to mean that Mr. Quigley, Sr. does not wish to proceed with the appeal at Docket No. 2022-105-W. The dismissal of this appeal in no way affects Mr. Quigley, Sr.'s appeal at Docket No. 2022-104-W.

Therefore, the Board enters the following order:

.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD QUIGLEY, JR. and LET'S CUT A DEAL SERVICES, LLC.	:	
v.	:	**EHB Docket No. 2022-105-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO and KATHLEEN G. SHEEHAN VELLO, Intervenors	:	

O R D E R

AND NOW, this 24th day of June, 2024, it is ordered that the appeal of Richard Quigley, Jr. and Let's Cut a Deal Services, LLC, Environmental Hearing Board Docket No. 2022-105-W, is dismissed for non-compliance with 25 Pa. Code § 1021.21(a) and (b).

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: June 24, 2024

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

For the Commonwealth of PA:
John H. Herman, Esquire
Christopher Ryder, Esquire
Melanie Seigel, esquire
(*via electronic filing system*)

For Appellant:
Richard P. Quigley, Sr., Administrator
(via US mail)

For Intervenors:
Kathleen G. Sheehan Vello, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUG REED AND NANCY REED	:	
	:	
v.	:	**EHB Docket No. 2022-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENEWABLE NATURAL PRODUCTS, LLC	:	**Issued: June 25, 2024**

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

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board finds that appellants have not met their burden of proving by a preponderance of the evidence the Department acted unreasonably or contrary to the law when it issued an individual NPDES permit for the discharge of industrial stormwater to permittee. The appellants have not demonstrated that the Department erred by failing to include certain permit requirements/site-specific conditions or effluent limitations in the permit.

Background

On September 30, 2022, the Pennsylvania Department of Environmental Protection ("the Department") issued NPDES Permit No. PA0290548 ("Permit") to Renewable Natural Products ("Renewable") located at 4053 Pike Road, Henderson Township, Pennsylvania ("Site"). Renewable is engaged in timber industry activities at the Site. The Permit authorizes the discharge of industrial stormwater to an unnamed tributary to Stump Creek. Doug Reed ("Mr. Reed") and Nancy Reed ("Ms. Reed") (collectively, "the Reeds" or "Appellants") own and reside at a property adjacent to the Site with an address of 4165 Pike Road, Henderson Township, Pennsylvania (the "Reed Property" or the "Property"). On October 30, 2022, the Reeds filed a Notice of Appeal with

the Environmental Hearing Board ("the Board") challenging the Department's issuance of the Permit. In general, the Reeds asserted that Renewable's activities at the Site created environmental issues on the Reed Property and objected that the terms of the Permit lacked sufficient requirements to address their concerns.

The matter proceeded through discovery and the filing of prehearing memoranda. The Department filed two motions in limine, one to exclude previously unidentified expert witnesses and one to exclude previously unidentified fact witnesses. The Board granted the Department's motion as to expert witnesses and denied the Department's motion as to fact witnesses. On December 12, 2023, a one-day hearing was held in the Board's Hearing Room in Erie, Pennsylvania. The Reeds filed their post-hearing brief on February 14, 2024 and the Department and Renewable filed post-hearing briefs on March 7, 2024. The Reeds did not file a reply brief.

FINDINGS OF FACT

Parties

1. The 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 ("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 ("Regulations"). (Parties Joint Stipulation Regarding Facts No. "Stip." 1).

2. Appellants, Doug Reed and Nancy Adams, a/k/a Nancy Reed, reside at property located at 4165 Pike Road, Henderson Township, Pennsylvania ("the Property" or "the Reed Property"). (Stip. 3).

3. Permittee, Renewable Natural Products, Inc. ("Renewable") is a Pennsylvania corporation with a mailing address of 350 Main Street, Kersey, PA 15846. (Jt. Stip. 4) and is engaged in the timber industry. (Transcripts of Hearing Testimony Page No. ("T.") 167).

The Renewable Site

4. Renewable conducts its timber operations at 4053 Pike Road, Henderson Township, Jefferson County (the "Site" or the "Renewable Site"). (T. 140).

5. Pike Road is a dirt road where it bisects the Site. (Stip. 22).

6. The Site is located on both the north and south sides of Pike Road. (Stip. 19).

7. From approximately the years 2000-2010 there was no industrial activity on the Site. (T. 17-18).

8. At some time beginning 2010, industrial operations began and gradually expanded at the Site. (T. 19, 21, 25, 77).

9. For approximately 10 years, industrial sawmill activities were conducted at the Site by operators other than Renewable. (T. 91).

10. Prior to Renewable, D&F Lumber conducted operations at the Site. (T. 141-42).

11. Renewable began its operations at the Site in the Spring of 2022. (T. 141).

12. George Heigel ("Mr. Heigel") is the owner and operator of Renewable. (T. 140).

13. Renewable primarily uses the Site as a log yard where it grades white oak logs and redistributes the logs to other entities which manufacture those logs at other sites. Renewable also sends logs to be processed into boards off site. Once the logs have been processed into boards, they are returned to the Site where Renewable processes the boards into trim and floor pieces. (T. 143).

14. Renewable does not apply chemicals or preservatives to wood at the Site. (T. 185).

15. The Site includes a berm that surrounds the south, east, and north sides of the Site and extends a bit to the west. (T. 122-23).

16. The berm at the Site was preexisting but was raised in certain spots by Mr. Heigel to make it a level 3 feet. (T. 151).

17. The Site has two outfalls, known as Outfall 001 and Outfall 002. (R-Ex. 1). Outfall 001 is located on the North side of Pike Road at the western side of the Site. (*Id*.). Outfall 002 is located on the South side of Pike Road towards the western side of the Site. (*Id*.).

18. The Site is graded to encourage sheet flow to the outfall locations. (T. 123).

19. The Site contains a sediment pond for catching stormwater runoff. (T. 168, 192).

20. The Site slopes to the north and the west. (T. 122).

The Reed Property

21. The Reeds own the Property which surrounds and abuts the Site. (Stip. 20).

22. The Reed Property is on both the north and south sides of Pike Road. (R-Ex. 1). The Property consists of three parcels that total approximately 155 to 160 acres. (T. 8).

23. The Reeds reside on the Property on the north side of Pike Road. (Stip. 21).

24. The Reeds keep cattle on the Property and grow and harvest hay on the Property. (T. 14, 38, 79-80).

25. The Property contains two water wells and a pond. (T. 12-13; R-Ex. 1).

26. The Property sits at a lower elevation than the Renewable Site. (T. 89-90, 122).

NPDES Permits

27. All entities that discharge pollutants into waters of the Commonwealth must first obtain a National Pollutant Discharge Elimination System ("NPDES") permit for their discharges,

as required by the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., and the Clean Streams Law. (Stip. 2).

28. An NPDES permit for industrial stormwater regulates the discharge of stormwater from an industrial facility. (T. 209).

29. Federal regulations require facilities that fall into specific classifications to obtain an NPDES permit for the discharge of stormwater if the industrial activity is exposed to stormwater. These permits are designed to ensure that proper Best Management Practices ("BMPs") are installed and managed and that the receiving waters uses are protected from the stormwater discharge. (T. 209).

30. The PAG-03 general permit is issued to the Commonwealth by the EPA allowing the Department to issue coverage to all facilities across the Commonwealth that meet certain criteria under the general permit. (T. 210-12).

31. The PAG-03 general permit contains different appendices that are associated with specific industrial activities to ensure the conditions and requirements of the coverage of a facility are tailored to the specific type of industrial activity it conducts. (T. 212).

32. Coverage conditions under the PAG-03 general permit do not vary from facility to facility that fall within a specific industrial activity category. (T. 212).

Permit Application Review

33. On March 18, 2022, Renewable submitted a permit application ("Application") to the Department for the discharge of industrial stormwater from the Site. (Stip. 5).

34. The Application proposed to discharge industrial stormwater to an unnamed tributary to Stump Run at two outfall locations. (Stip. 7).

35. Stump Run is designated and protected for Cold Water Fishes under 25 Pa. Code § 93.9s. (Stip. 8).

36. By the time of the Application's submission, the Department's statewide General Permit for the Discharge of Industrial Stormwater ("PAG-03") had expired on September 23, 2021. (Stip. 9).

37. The Application was considered under the NPDES individual permit plan due to PAG-03's expiration. Had PAG-03 not been expired, the Application would have been reviewed under the general permit plan. (T. 210).

38. Adam Pesek ("Mr. Pesek") is employed with the Department in the Clean Water Program of the Northwest Regional Office as an environmental engineer. (T. 157).

39. Mr. Pesek conducted an administrative completeness and technical review of the Application for the Permit and drafted the Permit. (T. 166, 174-175).

40. Different industry categories have different permitting requirements or effluent limitation guidelines in industrial stormwater permits. (T. 166-167).

41. Renewable's proposed industrial activity was primarily timber industry activity. (T. 167).

42. Pollutants typically found in industrial stormwater from a timber facility are total suspended solids, pH and chemical oxygen demand (T. 167).

43. Mr. Pesek referred to the PAG-03 in drafting the Permit and considered the appendix applicable to the timber industry in establishing the parameters of the Permit (T. 172-73, 185).

44. Mr. Pesek was able to eliminate certain parameters in the permit because Renewable did not propose to utilize treatment chemicals/preservatives in its industrial activities. (T. 185).

45. Mr. Pesek research showed that there were not any applicable federal effluent limit guidelines ("ELGs") for stormwater for the timber industry. (T. 185).

46. Mr. Pesek reviewed Renewable's compliance history and did not find any open violations. (T. 182).

47. Mr. Pesek's review included consideration of the designated use of Stump Creek, specifically that it was not a special protection watershed and therefore the Permit did not require a more stringent criterion. (T. 183).

48. Mr. Pesek considered past sampling results that were submitted from the former D&F Lumber facility which showed effluent concentration from the outfalls were well below the most stringent state water quality criteria. (T. 185-86).

49. As part of his technical review, Mr. Pesek conducted a site visit of the Renewable Site in the summer of 2022 to observe the layout of the Site and to evaluate the implementation/installments of the proposed BMPs. (T. at 167-68).

50. During the site visit, Mr. Pesek observed cleanup occurring, berms in place around the perimeter of the facility, a sediment pond on the southern side of the facility for catching runoff water, a baghouse in place to collect sawdust and a secondary containment for a diesel tank on the Site (T. 168).

51. On June 17, 2022, the Department provided a copy of the draft NPDES Permit to the Reeds via email. (Stip. 10).

52. On July 9, 2023, the Department published notice of the draft NPDES Permit in the Pennsylvania Bulletin. (Stip. 11).

53. On August 8, 2022, the Department received written comments on the draft NPDES Permit from the Reeds, through their counsel. (Stip. 12).

54. The Department reviewed the Reeds' comments and prepared a Fact Sheet Addendum to address their comments. (T. 179; Ex. D-9).

55. On September 30, 2022, the Department issued individual NPDES Permit No. PA0290548 to Renewable authorizing the discharge of industrial stormwater to an unnamed tributary to Stump Creek for a period of five years. (Stip. 13).

56. The Permit incorporates the monitoring requirements and benchmark values from the PAG-03. (Stip. 14).

57. The Permit set monitoring requirements for Outfalls 001 and 002 for pH, Chemical Oxygen Demand, and Total Suspended Solids. (Stip. 15, T. 184).

58. The Permit set benchmark values of 120 mg/L for Chemical Oxygen Demand and 100 mg/L for Total Suspended Solids. (Stip. 16; T. 186-87).

59. In addition to the monitoring requirements and benchmark values, other conditions were incorporated into the Permit, including best management practices to manage stormwater at the site (e.g. berming storage, secondary containment, minimizing wood residue piles, baghouses and closing dumpster lids). (T. 189-191).

60. The Permit does not contain any effluent limitations for specific parameters. (Stip. 17; T. 188).

61. The subject facility in this matter does not treat wastewater or sewage, which would typically be associated with numeric effluent limitations. (T. 217-18).

62. The PAG-03 did not include numeric effluent limitations for the type of timber activity proposed. (T. 216-217).

63. Industrial stormwater permits generally do not include numeric limits unless they fall under an ELG. (T. 216).

64. The Permit does not contain any site-specific conditions. (T. 206).

65. On October 30, 2022, Appellants filed an appeal of the Permit. (Stip. 18).

The Reeds' Environmental and Health Issues

66. After heavy rain events, the Reeds have observed soil movement/erosion and debris on the Property. (T. 14-15).

67. The Reeds have observed sawdust covering various surfaces on their property and on Pike Road. (T. 30; R-Ex.1).

68. The Reeds do not drink the well water and only use it to wash clothes, bathe and to water their cows. (T. 29).

69. Due to their environmental and personal health concerns, at some time in or around 2015 or 2016, Appellant Nancy Reed contacted the Department's Knox Office for assistance (T. 30-31).

70. In or around that time, Department representative Vince King visited the Appellants' property and collected a water sample. (T. 48-49).

71. Appellants installed a filtration system for their well water and regularly treat the water with Clorox (T. 39, 49, 103, 105).

DISCUSSION

Legal Standard

This matter involves a third-party appeal filed by the Reeds of the Permit the Department issued to Renewable. In a third-party permit appeal, in order to be successful, the party challenging the Department's permit decision 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. *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. The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Telegraphis v. DEP,* 2021 EHB 279, 288*; Clancy v. DEP*, 2013 EHB 554, 572. Hence, the Reeds' evidence challenging the Department's issuance of the Permit must be greater than the evidence supporting the Department's decision to issue the Permit. *Stocker v. DEP*, 2022 EHB at 364; *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. The party challenging the permit issuance may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United Refining*, 2016 EHB at 449 citing *Shuey v. DEP & Quality Aggregates, Inc*., 2005 EHB 657, 711. The Board's 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. *United Refining*, supra.; see also *Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res*., 341 A.2d 556 (Pa. Cmwlth. 1975). Where the issues in an appeal require scientific or specialized knowledge or experience to understand, expert testimony is required. *Liddick v. DEP*, 2018 EHB 207, 216. Further, if an appellant challenging a

Department action raises a technical issue, they must come forward with technical evidence. *Id*.; *Prizm Asset. Mgmt. Co. v. DEP*, 2005 EHB 819, 844.

Analysis

In order to prevail in their challenge of the Department's permitting decision in this case, the Reeds must show by a preponderance of the evidence that the Department's decision to issue the Permit to Renewable was unreasonable, contrary to law, unsupported by the facts or in violation of the Pennsylvania Constitution. The Reeds' post-hearing brief set forth two lines of argument in support of their position that the Board should rule in their favor. First, the Reeds argue that the Department abused its discretion by failing to include site-specific considerations for the impact of stormwater discharges that they allege flow onto their Property. Secondly, they argue that the Department failed to include specific effluent limitations for Outfalls 001 and 002 at the Site. The Department and Renewable dispute each of these arguments. The Department asserts that it complied with its statutory and regulatory obligations and that it conducted a full technical review of Renewable's Application. As part of the review process, the Department states that it considered the comments provided by the Reeds prior to issuing the Permit. In addition, the Department argues that the Permit adequately regulates industrial stormwater that is discharged from the Site, ensuring that the receiving water, Stump Creek, is protected from pollution.

One of the unusual aspects of this case is that it involves an individual NPDES permit for discharging stormwater associated with industrial activities as opposed to a general permit. Certain classifications of facilities are required under federal regulation to obtain NPDES coverage for the discharge of stormwater if the industrial activities at the facility are exposed to stormwater. These permits are intended to ensure that proper BMPs are installed and managed and that the uses of the receiving waters are protected. The Department issues both general and individual permits

governing the discharge of stormwater under its NPDES permitting program. The general permit is a statewide permit that allows the Department to issue coverage for all facilities across the state that meet certain criteria. The PAG-03 general permit contains different appendices associated with certain industrial categories to tailor the requirements of the permit toward the particular industrial activity of the facility seeking coverage. Renewable's activities at the Site would be covered under Appendix D which is the category for timber product facilities. The conditions for general permit coverage do not vary from facility to facility within a specific industrial activity category. Most industrial facilities qualify for coverage under the general permit for the discharge of stormwater unless the facility is located in a special protection watershed, in which case, that facility would need to file for an individual NPDES permit. Renewable's Site is not located in a special protection watershed.

Justin Dickey ("Mr. Dickey") is the program manager for the Clean Water Program at the Department's North Regional Office and was the individual who issued the Permit. When asked why Renewable's Application was considered under the individual permit program rather than the general, Mr. Dickey, testified that at the time Renewable sought permit coverage, the PAG-03 general permit was expired and the Department could not issue new coverage under the general permit until it was renewed. Mr. Dickey stated that had the general permit been in effect when Renewable submitted its application, Renewable would have qualified for coverage under the general permit. The fact that Renewable was required to obtain an individual NPDES permit in this case resulted in the Department more closely scrutinizing the Application and provided the Reeds with opportunities for review and comment that would not have existed with a general permit. Despite that, the Reeds believe that the Department failed to properly consider specific

aspects of the Renewable Site and assert it did not include requirements in the Permit to address the impact of Renewable's activities on them and their Property.

At the hearing, both Mr. and Ms. Reed presented testimony concerning the activities at the Site and the impacts they assert those activities have had on them and their Property. While the timeline of events is not always clear from the Reeds' testimony, it appears to the Board that much of the Reeds' arguments stem from their experience of living at the Property over time. The Reeds testified to numerous issues and challenges they have experienced that they say started in or around 2010 when sawmill activities, conducted by operators other than Renewable, began at the Site. The Reeds' testimony was expansive in both the topics and timeframe it covered, much of which predated the Permit at issue and Renewable's activities at the Site which did not begin until 2022. However, as we noted above, the Reeds narrowed their arguments in their post-hearing brief to the Permit that is on appeal. In their first line of argument, they assert that the Permit does not contain any site-specific conditions to account for any impact to their Property, including specific BMPs to control site runoff or manage stormwater they allege flows onto their Property. The Reeds cite to 25 Pa. Code § 92a.46, entitled "site-specific permit conditions" which provides as follows:

> The Department may establish and include in an NPDES permit, any permit condition, as needed on a case-by-case basis, to assure protection of surface waters. These conditions may include a requirement to identify and implement the following:
>
> (1) BMPs reasonably necessary to achieve effluent limitations or standards or to carry out the purpose and intent of the Federal Act.
>
> (2) Toxic reduction activities, effluent limitations based on WETT, and other measures that eliminate, or substantially reduce releases of pollutants at their source.

25 Pa. Code § 92a.46.

The Reeds contend that the Department should have included site-specific permit conditions and stricter BMPs in the Permit and that the Department's failure to do so constituted

an abuse of discretion. The Reeds failed to convince us that the Department abused its discretion in issuing the Permit without site-specific permit conditions or stricter BMPs. First, it is not clear to the Board what the Reeds precisely mean by their assertion that the Permit should have included site-specific conditions. Although the Reeds assert that the Permit should include site-specific conditions, neither their testimony at the hearing nor the arguments in their post-hearing brief identified any specific conditions or BMPs they believe should have been included in the Permit. Mr. Pesek, the principal Department staffer responsible for the Permit, testified that he thoroughly reviewed the Application which included conducting a visit to the Renewable Site for the purpose of viewing the layout and to determine which BMPs were installed and/or being implemented at the Site. (See T. 167-68). He included the BMPs in the Permit that he determined were adequate to protect the water quality of Stump Creek. It seems that one of the Reeds' concerns with the Permit's BMPs is that they are similar to those that are in the PAG-03 general permit and, therefore, in their opinion, have not been tailored to the Site. Mr. Pesek stated that he considered the BMPs in the general permit as a starting point for his review but that he went beyond that in his analysis and considered the uses of Stump Creek, the location of the stormwater discharge, the nature of the activities that Renewable intended to conduct at the Site and if there were any applicable federal ELGs from Renewable's type of activities.

In the absence of proposing any additional permit conditions or BMPs, the Reeds appear to rely on their factual testimony to persuade the Board that the Permit conditions and BMPs in the Permit are inadequate because of the alleged impacts on them. However, our review of the factual record does not support the Reeds' position. As we understand it, the primary purpose of the Permit in this case is to protect the water quality of Stump Creek. The Reeds provided no evidence whatsoever, such as water samples or test results, demonstrating that the Permit's

conditions failed to protect Stump Creek. The only water sampling evidence discussed during the hearing was provided by Ms. Reed who testified that the Department collected a water sample from a pond on the Property in approximately 2016, long before Renewable was present at the Site or the Permit in question was issued.[1] The lack of any technical evidence demonstrating water quality issues in Stump Creek undercuts the Reeds' appeal.

The record clearly establishes that the Site generally sits topographically higher than Stump Creek and the Reed Property. Because the Reeds' Property is situated between the Site and Stump Creek, it is at least arguable that if the Permit fails to adequately address the stormwater discharged from the Site, the runoff that flows onto the Property has the potential to impact Stump Creek. However, the evidence the Reeds' presented at the hearing either does not support their allegations that the stormwater from Renewable's Site impacts their Property or, in the alternative, is rebutted by credible testimony from other witnesses. In their proposed findings of fact in their post-hearing brief, under a section entitled "Post-Individual NPDES Impacts to Appellants' Property," the Reeds list the ways in which Renewable's stormwater discharges have supposedly negatively affected them as follows: 1) the stormwater runoff accumulates around their house and Property; 2) the runoff picks up surface materials like sawdust which discharges through the Site's berms and onto the Property; 3) the outfalls do not collect or stop discharges from the Site; and 4) their well-water appears murky and has visible sediment. (See Reeds' Post-Hearing Brief, Proposed FoFs Nos. 68-71, at 9). The Reeds exclusively cite to portions of their testimony and to photographs that they provided at the hearing to support their factual proposals. After carefully reviewing the Reeds' testimony and evidence, we find that the Reeds' assertion that the post-permit

[1] Ms. Reed testified to these water samples, but no documentation of these tests or of their results was presented at the hearing.

stormwater runoff from the Site is the cause of the above-mentioned impacts to their Property, is not supported by a preponderance of the evidence.

The first issue with the testimony concerns the timing of many of the allegations. As we said before, the timeline of the Reeds' testimony was at times difficult to follow and many of their allegations involve activities that took place before Renewable was at the Site and/or prior to the Permit issuance. The cited testimony largely pertained to several photographs that made up Reed Exhibit 19. The first photograph was of a jar of water that Ms. Reed testified was collected on January 25, 2020 which was more than two years before the Permit issuance. Additionally, Ms. Reed showed the Board two samples of murky water during the hearing which she testified was collected by her from her kitchen sink in October 2023 and December 2023. The jar of water depicted in the photograph in Reed Exhibit 19 resembled the jars of water Ms. Reed presented at the hearing. We did not receive any substantive information about the well construction or maintenance. Nor did we receive information about whether the samples were collected before or after the filtration system that Reeds testified was installed on their well, and if it was after, why the system did not remove the sediment from the water samples presented at the hearing. Further, the Reeds failed to offer any explanation as to how the murkiness of their well-water is the result of Renewable's stormwater discharge. Not only did the Reeds offer no sampling evidence that could connect the Site's runoff to their well-water quality, but they failed to address the obvious timing issue that their well-water was murky more than two years before Renewable obtained its Permit to discharge as is evidenced by the January 2020 photograph. Without any further explanation from the Reeds, the evidence crucially undermines their assertion that the murky well-water is a consequence of Renewable's stormwater runoff. The next series of photos in Exhibit 19 show dead calves. Mr. Reed testified that the photographs of the dead calves were taken

between approximately 2017 and 2020. (See T. 100-101). Not only do these photographs predate the Permit on appeal but, like the discussion above pertaining to the well-water, the Reeds fail to explain how calves that died well before Renewable began activities at the Site are connected to Renewable's operations.

The final series of photos depict either water on and/or alongside the ditches of Pike Road or sawdust on and around Pike Road. Again, it is not clear exactly when these pictures were taken but Ms. Reed stated that they were after Renewable began operations at the Site. In this sequence of photos, the Renewable Site can only be seen in the first two pictures. In addition to the Site, these two photos show water on Pike Road and in the roadway ditches. It is difficult to discern from these photos where the water on Pike Road is originating from and, more importantly, the photographs do not make clear that Renewable is the source of this water. None of the Reeds' photographs contained in their Exhibit 19 clearly show water leaving the Site and entering their Property. As to photos that depict the sawdust, it is again unclear whether Renewable is the source of the sawdust.

At the hearing, Renewable presented testimony from its environmental consultant, Mr. Long, who was admitted as an expert in the fields of environmental science and engineering. As to the actual topography, Mr. Long testified that "[t]he Renewable [S]ite does set at a higher elevation, but it slopes to the north and the west, which would be away from the Reeds' [P]roperty." (T. 122). Mr. Long also viewed the photographs in the Reeds' Exhibit 19 that depict water on Pike Road and testified as follows:

> Based on those pictures, what I see is some engineering design flaws with the township, I don't see proper roadway ditches that have been constructed, sloped, or maintained and I see the water running out into the roadway on that. There is approximately a hundred acres plus that drains to that area.

> So during heavy storm events, it is possible that water from the surrounding contributing watershed could reach the road, which is what was visible in those pictures.

(T. 128).

The Reeds did not offer any evidence rebutting Mr. Long's testimony regarding the northwesterly slope of the Renewable Site or of the poor design and maintenance of the Township's roadway ditches. Additionally, Mr. Heigel, Renewable's owner and operator, testified to the stormwater management at the Site. Mr. Heigel improved the berms that had been in place, building up the low areas and grading the berms so that they were level. The Site also has a sediment pond that collects stormwater. Mr. Heigel stated that he has witnessed the stormwater pooling into the sediment pond and permeating into the ground and noted that the water does not even reach the outfalls. Mr. Heigel also stated that Renewable's operations could not be responsible for the sawdust along Pike Road because all of Renewable's machines are equipped with a dust collection system. He further provided that the Amish farmers in the area use sawdust for animal bedding and frequently haul sawdust in open vehicles on Pike Road. He stated that he does not haul sawdust on Pike Road past the Reeds' house because of the concerns that they expressed about sawdust from Renewable. Mr. Heigel testified that he believes the sawdust in the pictures presented by Ms. Reed do not come from Renewable and that the Amish farmers hauling animal bedding are the likely source.

In sum, the Reeds have not shown by a preponderance of the evidence that the Department abused its discretion by not including site-specific conditions in the Permit. The Reeds did not present convincing evidence showing that the stormwater discharged from the Site is impacting their Property or that it contains any contaminates or pollutants requiring additional permit conditions or stricter BMPs to protect the designated use of Stump Creek or the Commonwealth's surface waters. The Reeds' testimony and their photographs do not establish a causal connection

between the impacts they allege and the stormwater discharge from the Site, especially when the record is clear that these issues predate Renewable's operations by years.

In their second argument, the Reeds assert that the Department did not include specific effluent limitations for Outfalls 001 and 002 for the Renewable Site which neither the Department nor Renewable disputes. The Permit requires Renewable to monitor for total suspended solids, pH and chemical oxygen demand and contains benchmark values for suspended solids and chemical oxygen demand. Mr. Pesek testified that the monitoring requirements and benchmark values in the Permit were based off of the parameters set forth in the PAG-03 general permit. Mr. Pesek stated that there was nothing in the application or in his review that suggested that more stringent benchmark values or effluent limitations for other parameters were needed in the Permit.

The primary basis for the Reeds' argument that the Department should have included parameters with effluent limits is that the prior Site operator, D&F Lumber, was subject to effluent criteria in its PAG-03 permit requirements. The Reeds contend that even if there are slight differences between Renewable's and D&F Lumber's operations, their activities are functionally equivalent to one another. They argue that as such, the fact that the Department omitted effluent limitations from the parameters in Renewable's Permit that D&F Lumber was subject to "should strike the Board as incongruous." (Reeds' Post-Hearing Brief at 17). It is worth mentioning that the previous NPDES stormwater discharge permit that was issued to D&F Lumber was not offered into evidence. Hence, we have not seen or reviewed that permit or know what the alleged past prescribed effluent limitations were. No one from D&F Lumber was at the hearing to testify to the nature of its operations or to what extent those operations differed from or were similar to Renewable's activities at the Site. Merely pointing out that the previous operator's permit

contained effluent criteria and that Renewable's Permit does not, is not sufficient to establish that the Department abused its discretion in omitting specific effluent limits from the Permit.

Mr. Pesek testified that he had considered past sampling results that were submitted from the former D&F Lumber facility in his analysis. Those results showed that the effluent concentration from Outfalls 001 and 002 were well below the most stringent state water quality criteria and as such, he decided not to include those parameters in Renewable's Permit. (See T. 185-86). Based on this testimony, the Department clearly considered the effluent limitations that D&F Lumber's permit provided for and reasonably concluded that those effluent limitations were unnecessary in this Permit. Mr. Pesek further testified that total suspended solids, pH and chemical oxygen demand are the types of pollutants he would expect to find in industrial stormwater from a timber facility and that the Permit requires Renewable to monitor for all three. As the Board stated in *O'Reilley v. DEP*, 2001 EHB 19,

> 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. 25 Pa. Code § 92.3. It would not be practical for any given permit to contain limitations on every conceivable pollutant known to man. Each permit must focus upon pollutants that are likely to be contained in the discharge considering the nature of the activity that is involved. The regulatory agencies study each discharging activity either as a class or individually to assess what pollutants will typically be discharged by that activity, and permits for discharges associated with that activity will contain limitations on the discharge of those pollutants. See generally 25 Pa. Code § 92.31 (effluent standards).

at 32-33. Our words in *O'Reilley* ring true here. Renewable's operations involve timber industrial activity and the typical pollutants associated with that type of operation are total suspended solids, pH and chemical oxygen demand which the Department accounted for accordingly in the Permit to ensure the protection of Stump Creek.

As a final note, both of the Reeds' arguments raised concerns regarding the technical aspects of the Permit. When an appellant raises a technical allegation, they must come forward with technical evidence to prove such an allegation by a preponderance of the evidence. The Reeds' objections asserting that more stringent conditions are required for the Site, such as site-specific BMPs and effluent limitation parameters, are the kinds of assertions that require scientific, technical or specialized knowledge to assist the trier of fact in making an informed determination surrounding such issues. Pa. R. E. 702; 25 Pa. Code §§ 1021.123(a). The Reeds failed to call any expert witnesses at the hearing to support their position that their technical objections are valid ones. The Reeds' case might have been more compelling had they proposed what they believed the site-specific conditions and effluent limits should have been and provided a justifiable and scientific basis for those conditions. The Reeds did not offer any technical evidence demonstrating that the alleged water issues they have experienced through the years are the result of Renewable's stormwater discharge. They did not produce medical or expert technical evidence that the physical health conditions and environmental problems they alleged were related to the activities at Renewable and its stormwater discharge. This alleged link was only supported by their own testimony and several photographs that were in evidence at the hearing. The evidence presented is not sufficient to meet their burden to show by a preponderance of the evidence that the Permit issued by the Department was unreasonable, contrary to the law, not supported by the facts or inconsistent with the Department's obligations under the Pennsylvania Constitution.

Conclusion

The Reeds have not shown by a preponderance of the evidence that the Department acted unreasonably or contrary to the law by not including site-specific conditions or effluent limitations in Renewable's Permit. The evidence and testimony the Reeds presented did not support a finding

of the impacts they allege are due to Renewable's stormwater discharge and their assertions were rebutted by credible expert testimony from both the Department and Renewable. Additionally, both of the Reeds' objections are technical arguments and therefore, require technical evidence which the Reeds failed to provide.

CONCLUSIONS OF LAW

1. The 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 ("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.

2. In third party appeals of Department actions, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. As the appellant in this case, the Reeds must show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution. *United Refining Company v. DEP*, 2016 EHB 442, 448; *aff'd, United Refining Company v. Dep't. of Envtl. Prot*., 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot*., 131 A.3d 578, 587 (Pa. Cmwlth. Ct. 2016).

4. The preponderance of the evidence standard requires that the Reeds meet their burden by showing that the evidence in favor of their proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. The Reeds' evidence must be greater than the evidence that Renewable's Discharge Permit was appropriate or in accordance with the applicable law. The Reeds may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United*

Refining Company v. DEP, 2016 EHB 442, 449; *aff'd, United Refining Company v. Dep't. of Envtl. Prot*., 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017).

5. The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action challenged by the Reeds, the issuance of the Discharge Permit, was reasonable, lawful and supported by our de novo review of the facts. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1192.

6. The Reeds failed to prove by a preponderance of the evidence that the Department's decision to issue the Permit without certain permit requirements/conditions or effluent limitations that they believed should have been included was in error or not supported by the facts.

7. The Reeds failed to show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the Permit. *See generally, Joshi v. DEP*, 2019 EHB 356.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUG REED AND NANCY REED	:	
	:	
v.	:	**EHB Docket No. 2022-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENEWABLE NATURAL PRODUCTS, LLC	:	

O R D E R

AND NOW, this 25th day of June, 2024, it is hereby ORDERED that the Appellants' 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: June 25, 2024

c: DEP, General Law Division:
Attention: Maria Tolentino

(via electronic mail)

For the Commonwealth of PA, DEP:
Angela N. Erde, Esquire
Dearald Shuffstall, Esquire
Paul J. Strobel, Esquire
(via electronic filing system)

For Appellant:
Jeffrey T. Olup, Esquire
(via electronic filing system)