



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

**OPINION AND ORDER ON
MOTION IN LIMINE**

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

Synopsis

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

OPINION

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

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

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

In this appeal, the Appellants argue that the NPDES permit should be rescinded for a variety reasons, including because, according to the Appellants, the Department lacked the authority to issue the permit, the permit authorizes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

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

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

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

Tri-County has filed a motion in limine² asking us to preclude Mr. Fisher from testifying about most of the opinions listed in his expert reports.³ Tri-County argues, with one exception,⁴ that Mr. Fisher’s opinions are irrelevant, constitute a collateral attack on a different permit, and are barred by the doctrine of collateral estoppel. The Appellants oppose the motion.

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

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

³ By letter, the Department has concurred in Tri-County’s motion.

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

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

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

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

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

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

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

⁵ Those opinions read as follows:

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

(Fisher Main Report at 2-3.)

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

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

Accordingly, we issue the Order that follows.



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ORDER

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

ENVIRONMENTAL HEARING BOARD

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

DATED: July 29, 2024

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