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PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

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: September 3, 2024**

OPINION AND ORDER ON
MOTION IN LIMINE

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

Synopsis

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

O P I N I O N

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

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

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

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

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

Mootness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Waiver

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

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

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

Accordingly, we issue the Order that follows.

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O R D E R

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

ENVIRONMENTAL HEARING BOARD

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

DATED: September 3, 2024

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