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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES and BARBARA ULLOM	:	
	:	
v.	:	**EHB Docket No. 2024-114-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CNX GAS COMPANY, LLC, Intervenor	:	**Issued: February 3, 2026**

OPINION AND ORDER ON
INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

By MaryAnne Wesdock, Judge

Synopsis

The Board denies the Intervenor's motion for summary judgment where the Appellants have met their burden of establishing a prima facie case. To survive a motion for summary judgment, the responding party need not prove that it will eventually be successful with respect to a given argument.

O P I N I O N

Introduction

This matter involves an appeal filed by James and Barbara Ullom (the Ulloms) challenging a Negative Determination issued by the Department of Environmental Protection (Department) under Section 3218 of the Oil and Gas Act, 58 Pa. C.S. § 3218, in connection with an investigation of water loss at the Ulloms' property. On November 3, 2023,[1] the Ulloms made a water loss complaint to CNX Gas Company, LLC (CNX) in connection with operations at CNX's NV110 oil and gas well pad in East Finley Township, Washington County. CNX submitted the complaint to

[1] The date set forth in the Department's Negative Determination is November 3, 2024, but, based on the entire record before the Board, we believe this was an error and should read "2023."

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the Department, which conducted an investigation pursuant to Section 3218 of the Oil and Gas Act, which provides that a landowner who suffers diminution or pollution of a water supply because of the drilling or operation of an oil or gas well may request an investigation by the Department. 25 Pa. Code § 3218(b). On June 28, 2024, the Department issued the results of its investigation, stating, "Based on the sample results and other information obtained to date, the Department cannot conclude that the Water Supply was adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well." (Exhibit to Response to Order to Perfect: Docket No. 2024-114-W, entry no. 5.) On July 26, 2024, the Ulloms filed this appeal of the Department's Negative Determination to the Environmental Hearing Board (Board). A hearing in this matter has been scheduled for April 13–17, 2026.

The matter now before the Board is a motion for summary judgment (motion) filed by CNX on November 13, 2025. The Ulloms filed a response in opposition to the motion on December 13, 2025, and CNX filed a reply on December 30, 2025. The Department did not weigh in on the motion.

Factual Background

Based on the Statement of Undisputed Material Facts filed by CNX in support of its motion and the response thereto filed by the Ulloms, we find the factual background of this matter to be as follows: CNX owns and operates the NV110 oil and gas well pad, which includes seven Marcellus Shale wells, in East Finley Township, Washington County. Drilling of the wells occurred between February 17, 2023 and June 8, 2023, and fracturing occurred between June 20, 2023 and August 8, 2023. Water used by CNX in the fracturing of the NV110 wells was obtained from two primary sources: 1) water storage facilities where CNX stores fluids produced from its natural gas wells in the area and 2) the Washington Reservoir #4, located approximately eight

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miles from the Ulloms' property. Each source provided approximately equal portions of the water used during the fracturing process.

On November 3, 2023, the Ulloms contacted CNX and reported that they had experienced a total loss of water from a water well on their property designated as well W2. According to CNX, well W2 is approximately 890 feet east of the nearest gas well on the NV110 pad. (CNX Statement of Undisputed Material Facts, para. 7 and Ex. 2, p. 3; CNX Brief in Support of Motion, n. 1.)[2] CNX immediately reported the complaint to the Department, as required by 25 Pa. Code § 78a.51(h).[3]

The Department commenced an investigation, including inspecting water sources on November 13, 2023 and taking water samples for testing on November 27, 2023. In connection with the investigation, the Department produced a 20-page Investigative Memorandum which included a history of the water sources on the Ulloms' property, pre-drilling and post-drilling water testing results, an examination of the drilling records associated with the NV110 well pad, gas well mapping, information on plugged oil and gas wells on or near the Ulloms' property, and information on the F-14 longwall of the Enlow Fork Mine, which sits directly under the Ulloms' property. Longwall mining occurred under the area at issue between 2006 and 2008.

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[2] The Ulloms deny paragraph 7 of CNX's Statement of Undisputed Material Facts wherein CNX states that well W2 is located approximately 890 feet from the nearest gas well on the NV110 pad. However, the Ulloms provide no alternate measurement of the distance of the water well from the gas well in their response to CNX's Statement of Undisputed Material Facts. Moreover, in reviewing their response, it appears that the Ulloms are not disputing the distance between their water well and the gas well, but, rather, disputing the remainder of paragraph 7 stating that well W1 went dry in June 2022, about seven months before CNX commenced drilling activities at the NV110 pad.

[3] That section states:

> (h) A well operator who receives notice from a landowner, water purveyor or affected person that a water supply has been affected by pollution or diminution shall report receipt of notice from an affected person to the Department within 24 hours of receiving the notice. Notice shall be provided electronically to the Department through its web site.

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On June 28, 2024, the Department issued a Negative Determination stating that it could not conclude that the Ulloms' water supply was adversely affected by oil and gas activities. The Ulloms appealed the Department's Negative Determination to the Board. In their notice of appeal, the Ulloms, proceeding *pro se*, made the following averments: 1) the Department incorrectly stated the date that W1, another well on the Ullom property, lost water; 2) the water loss is related to vibrations caused by CNX drilling through a longwall panel located below the Ulloms' property; 3) the Department failed to establish that CNX was not responsible for the water loss; 4) CNX should be subject to a rebuttable presumption of liability; and 5) the Ulloms received alleged verbal assurances from a representative of CNX that CNX would make them whole in the event of water loss.

Two months after the filing of their appeal, the Ulloms obtained legal counsel, who sought leave to amend the notice of appeal. In an Opinion issued on June 11, 2025, the Board determined that the Ulloms met the standard set forth in 25 Pa. Code § 1021.53 to amend their appeal and granted leave to amend. *See Ullom v. DEP*, 2025 EHB 501. The amended appeal clarified claims made in the initial appeal, alleged that the Department did not conduct an adequate investigation, provided more detailed information as to why the Ulloms believe CNX is responsible for their water loss, and withdrew the claim that the Department had incorrectly stated the date of water loss of well W1. The amended appeal also expanded upon the Ulloms' argument that the Department should have found a rebuttable presumption of liability on the part of CNX on the basis of various legal theories.

We turn to CNX's motion for summary judgment.

Standard of Review

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A motion for summary judgment may be granted when the pleadings, depositions, answers to interrogatories, admissions, and other related documents show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1–1035.2(1); 25 Pa. Code § 1021.94a(a), (b)(iv), (d), (i); *Protect PT v. DEP*, 2025 EHB 626, 627; *Barr Farms, LLC v. DEP*, 2025 EHB 256, 257–58. "[T]he Board [will] review the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubts as to the presence of a genuine issue of material fact against the moving party." *Diehl v. DEP*, 2018 EHB 18, 23 (citing *Paul Lynch Investments*, *Inc. v. DEP*, 2016 EHB 845, 847 (quoting *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81)).

Summary judgment is also available "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." *Yoder*, 2025 EHB 613, 615 (citing Pa.R.Civ.P. 1035.2(2); *Whitehall Twp. v. DEP*, 2017 EHB 160, 163). "In other words, the party bearing the burden of proof must make out a *prima facie* case for its claims." *Id*. (citing *Longenecker v. DEP*, 2016 EHB 552, 554; *Morrison v. DEP*, 2016 EHB 717, 720); *Lananger v. DEP*, 2025 EHB 546, 548.

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. *Diehl*, 2018 EHB at 24. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Barr Farms,* 2025 EHB at 258.

CNX asserts that it is entitled to summary judgment under the second scenario set forth above because the Ulloms, as the party bearing the burden of proof in this matter, have failed to

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make a prima facie case. It argues that, in order for the Ulloms to meet their burden of proof, they must demonstrate that CNX's oil and gas operations at the NV110 well pad caused their water loss. CNX contends that the Ulloms have failed to come forward with sufficient facts or expert testimony to meet this burden.

Expert Opinion

In its brief in support of its motion, CNX states that in appeals such as this, "involving complex issues such as the intricacies of oil and gas drilling and the science of hydrogeology," a party will generally require expert testimony to meet their burden of proof. Here, CNX argues that the Ulloms have failed to come forward with sufficient expert testimony to meet their burden. The Ulloms have produced an expert report addressing the water loss at their property, which was prepared by Andrew M. Herrmann, LPG, Senior Manager and Geologist, and Christopher S. Abel, CHMM, Director and Senior Environmental Chemist, both with August Mack Environmental (the Herrmann/Abel report). CNX argues that the opinions provided in the report are speculative and do not establish that CNX's oil and gas operations caused diminution of well W2.[4] CNX asserts that the Herrmann/Abel report never definitively states that CNX's oil and gas operations at the NV110 well pad caused the loss of water at well W2 but simply opines as to ways in which the water loss could have occurred.

In response, the Ulloms argue that CNX conflates the standard for what is required to survive a summary judgment motion with the standard necessary to succeed at a hearing on the merits. They argue that, in order to prevail against a motion for summary judgment, an appellant need not prove every detail of its case by a preponderance of the evidence but need only put forth

[4] In a separate motion filed concurrently with its motion for summary judgment, CNX sought to exclude the expert opinions and expert report of Mr. Herrmann and Mr. Abel. The motion was denied by the Board on December 29, 2025. *Ullom v. DEP*, 2025 EHB 749.

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sufficient facts to make a prima facie case. In this case, the Ulloms assert that they have provided enough evidence to withstand CNX's motion and move to a hearing. While the Ulloms agree with CNX that causation is one of the elements of this case, they argue that causation is a complex issue, and where there are genuine issues of fact and opposing expert testimony, it is the Board's practice to deny summary judgment so that the matter may be decided on a fully developed record. They assert that a determination of the validity of the evidence and expert testimony should be made by the Board at a hearing, rather than through prehearing motions.

In its reply, CNX denies that there are any disputed issues of fact but, rather, an *absence* of facts in support of the Ulloms' claims. It reiterates its contention that the Ulloms have failed to come forward with facts sufficient to prove that CNX's oil and gas operations at the NV110 well pad caused the diminution of well W2.

In support of their position, the Ulloms rely on the Board's decision in *Barr Farms, LLC v. DEP*, 2025 EHB 256, which involved an appeal of a water supply replacement notification and administrative order issued in connection with the Department's finding that the appellants' activities had resulted in contaminated well water of area residents. The appellants moved for summary judgment on the grounds that the Department had not made a prima facie case. Similar to CNX's argument here, the appellants in *Barr Farms* argued that the Department had not established causation because it relied on an expert report that contained language such as "could have," "possibly," and "more likely than not." The Board disagreed and denied the motion, finding that an overall reading of the expert report led to the conclusion that there was sufficient factual evidence supporting the expert report and the Department's prima facie case. The Board held, "As to the ultimate outcome, it would be best for the Board to hear testimony from the parties' experts before making any decisions on this issue [of causation]." *Id*. at 264.

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Likewise, here, we believe that an overall reading of the Herrmann/Abel expert report sets forth a sufficient basis for the Ulloms to establish a prima facie case. The report includes a discussion of the "regional geology/hydrogeology" and provides factual assertions in support of each of the report's conclusions. Although CNX argues that the Herrmann/Abel report lacks the requisite scientific certainty that CNX's operations at the NV110 well pad caused water loss in well W2, that is not the standard to be applied here. As the Board has previously held when examining a motion for summary judgment brought under Pa.R.Civ.P. 1035.2(2), "The Board will not gauge the quality of evidence in a motion for summary judgment, but will simply determine whether there is enough evidence to form a *prima facie* case." *Diehl*, 2018 EHB at 24. *See also Lananger,* 2025 EHB at 549 (citing *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43, 51). Here, we find that there is.

CNX, however, disputes a number of the factual assertions on which the Herrmann/Abel report relies. For example, the report opines that one possible cause of the loss of water in well W2 is the potential use or removal by CNX of "nearby groundwater and surface water resources" in connection with the fracturing of the NV110 wells. (CNX Motion, Ex. 12, p. 9, 11–13.) However, CNX points out that the Ulloms have admitted that the water used in the fracturing of the NV110 wells came from either produced water stored in CNX's water storage facilities or the Washington Reservoir #4, and not "groundwater and surface water resources" as suggested by the Ulloms' experts.

While CNX may disagree with some of the factual assertions made in the Herrmann/Abel report, there are a number of other factual assertions that have not been disputed. We believe that the report, as a whole, provides a sufficient basis for the Ulloms to move forward to a hearing on their appeal. As Judge Bruder recently explained in *Yoder*:

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> In order to establish a *prima facie* case, the [party with the burden of proof is] only required to put forward sufficient evidence of facts essential to their cause of action that would justify moving forward to a hearing. [citations omitted] This burden of proof is contrasting to the standard at a hearing on the merits….

Yoder, 2025 EHB at 621.

As the Board has further noted:

> In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument. *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 734. Instead, the party need only "point to enough record evidence to show that it can make out a *prima facie* case. " *Id.*

Diehl, 2018 EHB at 25.

CNX relies on the Board's adjudication in *Kiskadden v. DEP,* 2015 EHB 377, *aff'd*, 149 A.3d 380 (Pa. Cmwlth. 2016) for its argument that in order to overcome the motion for summary judgment, the Ulloms must have expert evidence that conclusively establishes that CNX's operations caused the water loss in well W2. However, as the Board pointed out in *Diehl,* when faced with a similar argument:

> [T]he *Kiskadden* opinion is not a ruling on a motion for summary judgment. Instead, it is the culmination of twenty days of trial that included exhibits and testimony from multiple experts. We do not think the record before the Board in a motion for summary judgment is analogous to the record before the Board in *Kiskadden*.

Diehl, 2018 EHB at 24.

As to CNX's concern that the report does not definitely establish causation, as in *Barr Farms* we believe "it would be best for the Board to hear testimony from the parties' experts" before deciding this issue. *Barr Farms*, 2025 EHB at 264. Furthermore, "[t]o the extent that CNX contends that the Herrmann/Abel report and expert opinions are not specific enough, 'this criticism goes to the weight and credibility to be afforded to [the Ulloms'] experts . . . .'" *Ullom v. DEP,*

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2025 EHB 749, 758 (quoting *Protect PT v. DEP*, 2024 EHB 352, 361 (citing *Blythe Township*, 2011 EHB 433, 436)).

Claim of Inadequate Investigation

CNX takes issue with the Ulloms' claim that the Department failed to conduct an adequate investigation. In particular, one of the opinions set forth in the Herrmann/Abel report is that the Department "did not adequately evaluate the potential for CNX installation activities to cause a loss of water at the affected wells on the Property." (CNX Motion, Ex. 12, p. 12.) CNX argues that it is simply not enough for the Ulloms to contend that the Department conducted an inadequate investigation; rather, argues CNX, the Ulloms must come forth with their own evidence demonstrating that CNX *caused* their water loss.

In support of its argument, CNX relies on the Board's decision in *O'Reilly v. DEP*, 2001 EHB 19, for the proposition that "it is normally not enough for the Appellant to argue that the Department has conducted an inadequate investigation." (CNX Brief in Support of Motion, p. 7.) We note, initially, that *O'Reilly* was an adjudication, issued after a hearing on the merits. Moreover, *O'Reilly* dealt with a third-party appellant's challenge to the Department's issuance of a permit, not a challenge to a water supply investigation. In that case, the appellant's claim had to do with whether the Department had adequately considered the permittee's compliance history before issuing the permit. The actual language that the Board used in addressing this issue was:

> [I]t is generally not enough for a third-party appellant to simply argue that there has been *an inadequate compliance history investigation* and expect a remand. Rather, the appellant must convince this Board acting in its *de novo* capacity that, based on the record evidence developed in the Board proceeding, the permittee's *compliance history* is in fact enough of a concern to justify vacating the permit.

O'Reilly, 2001 EHB at 45.

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CNX also directs us to the Board's decision in *Kiskadden, supra*, which, unlike *O'Reilly,* did involve a water supply investigation. In *Kiskadden*, a third-party appellant challenged the Department's finding that oil and gas operations had not contaminated his water supply. As in this case, one of Mr. Kiskadden's arguments was that the Department had failed to conduct an adequate investigation. In its adjudication of the matter, the Board found that the appellant had not met his burden of proof. In so holding, the Board stated:

> Thus, it is not enough for Mr. Kiskadden simply to demonstrate that the Department did not consider certain evidence in making its decision; rather, he must show that the evidence makes a difference in the final outcome. It is not enough for Mr. Kiskadden to provide hundreds of pages of laboratory data that were not reviewed by the Department. He must demonstrate to us, the Board, that the laboratory data proves that Range's operations at the Yeager site contaminated his water well.
>
> *****
>
> [I]t is normally not enough for the Appellant to argue that the Department has conducted an inadequate investigation. Instead, the Appellant must convince the Board that, based on the record developed at trial, we should overturn the Department's decision.

Id. at 409–10. CNX cites this language in support of its contention that, in order to make a prima facie case, the Ulloms must present evidence showing that CNX caused the loss of water in well W2.

However, as we noted earlier in this Opinion, the *Kiskadden* decision was an adjudication issued after a hearing on the merits. The standard for meeting one's burden of proof at a hearing is far different than the standard for making a prima facie case, which is all that is required here. While it may be challenging to meet one's burden of proof at a hearing by simply asserting that the Department's investigation was inadequate, nonetheless both Mr. Kiskadden and Mr. O'Reilly were allowed to proceed to a hearing on their claims.

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Moreover, in *Kiskadden* the Board went on to state:

> *[E]ven assuming that proof of an inadequate investigation can justify a remand in some cases*, there is no basis for such a remand *here*. The Department personnel who were assigned to Mr. Kiskadden's case conducted a comprehensive investigation based on the information that was available to them.

Kiskadden, 2015 EHB at 411 (emphasis added). Clearly, the Board has acknowledged that, depending on the circumstances of the case, there may be a basis for a remand should the Board find that the Department conducted an inadequate investigation.

Rebuttable Presumption

Finally, CNX seeks summary judgment on the Ulloms' claim that CNX should be subject to a rebuttable presumption that its oil and gas operations at the NV110 well pad caused the water loss at well W2. CNX points out that the rebuttable presumption set forth in Section 3218(c)(2) of the Oil and Gas Act applies only to claims of water contamination, not water loss. That section establishes a rebuttable presumption that an unconventional well operator is responsible for pollution of a water supply "if (i) the water supply is within 2,500 feet of the unconventional vertical well bore; and (ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well." 58 Pa. C.S. § 3218(c)(2).

Paragraphs 24 through 26 of the Ulloms' amended appeal state as follows:

> 24. In reaching its Negative Determination, the DEP did not apply the rebuttable presumption provided for by Section 3218(c)(2) of the Oil and Gas Act, which would have placed the burden on CNX to disprove the contention that the loss of Well 2 was caused by the operation of its unconventional gas wells. 58 Pa.C.S.A. § 3218(c)(2). Although the text of Section 3218(c) only describes the rebuttable presumption as applying to pollution, not diminution, Well 2 was polluted in addition to the diminution, as shown by the presence of elevated levels of coliform bacteria in the post-drill samples – a pollutant which was not found in pre-drill samples. 58 Pa.C.S.A. § 3218(c). Well 2 meets the requirements for the presumption under Section 3218(c)(2), as it is located well within

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> 2,500 of the NV110 unconventional gas wells, and the pollution occurred within 12 months of when the gas wells commenced drilling. Therefore, the 05/16/2025 DEP should have applied this rebuttable presumption in the process of its water supply investigation.
>
> 25. In the alternative, even if the DEP was correct in not applying the rebuttable presumption provided for by Section 3218(c) when reaching its Negative Determination, the DEP still erred in not finding a rebuttable presumption of liability based on other sources of law, including concepts of liability under tort and property law, the DEP's administrative discretion as a finder of fact, and the DEP's trustee obligations under Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. Pa. Const. art. I, § 27. The finding of a rebuttable presumption of liability for diminution occurring in the vicinity of unconventional gas wells beyond that explicitly authorized by the Oil and Gas Act is justified by the geologically disruptive nature of unconventional gas drilling, the difficulty of establishing firm causation for events taking place deep underground, and the substantial difference in the resources available to individual property owners and those available to large energy firms.
>
> 26. The DEP erred in not recognizing a rebuttable presumption of liability based on the oral promise made by a CNX representative to Mr. Ullom, to compensate him for any loss to his water supply which should occur during CNX's drilling operations. By making this promise to Mr. Ullom, CNX assumed a presumption of liability for any loss of water which occurred on the Ulloms' Property after drilling began.

(Amended Notice of Appeal, para. 24–26.)

In our Opinion granting leave to the Ulloms to amend their appeal, the Board rejected the Ulloms' request to amend their appeal to add a claim of water contamination:

> [T]o the extent the Ulloms are claiming that this appeal involves a complaint of water contamination, that claim is precluded. Based on the record before us, the Ulloms did not file a complaint of water contamination with the Department nor notify CNX of alleged water contamination. While the Department's investigation into the Ulloms' complaint involved testing the water for certain constituents, the investigation was in response to the Ulloms' claim of water diminution and not water contamination. We understand paragraph 24 of the Ulloms' amended appeal to simply be an

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> argument in support of why it believes the rebuttable presumption of Section 3218(c)(2) should have been applied in the Department's investigation of its complaint of water loss.

Ullom, 2025 EHB at 510 n. 4. Thus, to the extent that the Ulloms are arguing that the rebuttable presumption of Section 3218(c)(2) applies here because this is a case of water contamination, that claim is precluded as per the Board's earlier holding.

As to the Ulloms' assertions that a rebuttable presumption should be applied to their complaint for water loss pursuant to the Environmental Rights Amendment, theories of tort and property law, or based on an alleged oral promise made to Mr. Ullom by a representative of CNX, those claims involve questions of law and fact that have not been adequately addressed in the parties' briefs. We believe it would be more prudent to address any such arguments with the benefit of a fully developed record.

In conclusion we enter the following order:

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O R D E R

AND NOW, this 3rd day of February, 2026, it is hereby ordered that the Motion for Summary Judgment filed by CNX is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: February 3, 2026

c: **DEP, General Law Division:**
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