



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| REP. TARAH PROBST | : | |
| | : | |
| v. | : | EHB Docket No. 2025-114-L |
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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL | : | |
| PROTECTION and FIRST PENNSYLVANIA | : | Issued: May 27, 2026 |
| RESOURCE, LLC, Permittee | : | |

**OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS**

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

Synopsis

The Board denies a petition for supersedeas because it asks the Board to supersede a permit that is not under appeal, and the petition fails to include affidavits or supporting legal authority as required by the Board’s Rules.

OPINION

Pennsylvania State Representative Tarah Probst (“Rep. Probst”), proceeding *pro se*, has appealed the issuance of Water Obstruction and Encroachment Permit No. MB990264-0001 by the Department of Environmental Protection (the “Department”) to First Pennsylvania Resource, LLC (“First Pennsylvania”) for the Sunny Brook Mitigation Bank. The mitigation bank will restore and establish an integrated stream and wetland complex on 68 acres in Damascus Township, Wayne County. The mitigation bank proposes to generate riverine and wetland credits to be used by other, unspecified projects for compensatory mitigation.

A common theme throughout the course of this appeal has been using the appeal of the mitigation bank permit to levy critiques at a proposed project to expand Interstate 80 in



Stroudsburg, Monroe County, approximately 60 miles from the site of the mitigation bank. For example, Rep. Probst avers in her Notice of Appeal that the mitigation bank permit approval “enables or facilitates environmental impacts from the I-80 expansion project in Monroe County by providing compensatory mitigation credits.” Earlier in the appeal, Jessica Delfino, Lisa Wayland, and Joseph Tortorelli filed a petition to intervene, which we denied due to the intervention petitioners’ material and repeated failure to comply with our Rules, and because their stated interests in this appeal all concerned the I-80 construction project near their homes. We found those interests to be too remote and speculative to establish the standing necessary for intervention in *this* appeal of the mitigation bank permit. *Probst v. DEP*, EHB Docket No. 2025-114-L (Opinion and Order on Petition for Leave to Intervene issued Apr. 7, 2026). The intervention petitioners then filed a petition for reconsideration of our Opinion and Order denying intervention. We denied the petition for reconsideration because it also failed to comply with our Rules and the petitioners did not present any compelling and persuasive reasons for granting reconsideration. *Probst v. DEP*, EHB Docket No. 2025-114-L (Opinion and Order on Petition for Reconsideration issued Apr. 29, 2026). Instead, they primarily repeated their complaints about the I-80 project.

We now have a petition for supersedeas filed by Rep. Probst and “joined by Petitioners for Reconsideration Jessica Delfino, Lisa Wayland, and Joseph Tortorelli” that continues the theme. The supersedeas petition argues that the permit for the Sunny Brook Mitigation Bank “is the exclusive regulatory prerequisite for the destruction of High Quality (HQ) wetlands 60 miles away in Stroudsburg.” The petition contends that, if construction of the mitigation bank proceeds, it will generate credits that will be used by the I-80 project and cause the irreversible destruction of wetlands, some of which are on the unsuccessful intervenors’ property. The petition for

supersedeas was filed before we issued our Opinion and Order denying the petition for reconsideration. Jessica Delfino, Lisa Wayland, and Joseph Tortorelli are not parties to this appeal. The Board does not have jurisdiction to adjudicate claims made by persons who are not parties to an appeal. *See Lester v. DEP*, 2015 EHB 25, 27. However, we will evaluate the petition for supersedeas in terms of the Appellant, Rep. Probst.

The petition for supersedeas was filed after business hours on April 22, 2026. On April 23, we issued an Order requiring any responses to the petition to be filed on or before May 4. First Pennsylvania filed a response in opposition on May 4, arguing that the petition does not contain adequate legal or factual support and fails to state grounds sufficient to support granting a supersedeas. The Department, instead of filing a response *per se*, filed a motion to deny the petition without a hearing pursuant to 25 Pa. Code § 1021.62(c), arguing that the petition is deficient under our Rules. We waited 15 days for any responses to the Department’s motion to be filed, 25 Pa. Code § 1021.95(c), but we did not receive a response.

The Environmental Hearing Board Act, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Departmental action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The Board’s Rules define a supersedeas as “[a] suspension of the effect of an action of the Department pending proceedings before the Board.” 25 Pa. Code § 1021.2. “The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal.” *Friends of High Point Lake v. DEP*, 2025 EHB 687, 693 (quoting *Center for Coalfield Justice v. DEP*, 2017 EHB 38, 55).

Among the factors to be considered in whether to grant a supersedeas are (1) irreparable harm to the supersedeas petitioner, (2) the likelihood of the supersedeas petitioner prevailing on

the merits, and (3) the likelihood of injury to the public or other parties, such as a permittee. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a). The petitioner bears the burden of proof to show that a supersedeas should be issued by making a credible showing on each of the three factors, with a strong showing of a likelihood of success on the merits. *RES Coal LLC v. DEP*, EHB Docket No. 2026-005-BP, slip op. at 5 (Opinion and Order on Petition for Supersedeas issued Apr. 24, 2026). Where a petition fails to satisfy any one of the three criteria, the Board is not obligated to consider the remaining criteria. *Id.*; *Liberty Twp. v. DEP*, 2023 EHB 170, 172.

Our Rules spell out the straightforward requirements that need to be contained in a petition for supersedeas, which include pleading facts with particularity, supported by affidavits or an explanation why affidavits have not been included, and citations to specific legal authority to support granting a supersedeas. 25 Pa. Code § 1021.62(a)-(b). These requirements are important because, as we have said many times before, “[a] supersedeas is an extraordinary remedy that places a heavy burden on the petitioners to make a clear showing of need.” *Liberty Twp. v. DEP*, 2023 EHB 158, 166 (quoting *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 764 (citing *Emerald Contura, LLC v. DEP*, 2017 EHB 670, 672-73)). *See also Pa. Fish and Boat Comm’n v. DEP*, 2004 EHB 473, 476 (“we must keep in mind that superseding a Department action is an extraordinary remedy that may be granted only where the evidence indicates it is clearly warranted.”). The extraordinary nature of a supersedeas demands that a petition for supersedeas essentially make out a *prima facie* case for granting a supersedeas. *Dougherty v. DEP*, 2014 EHB 9, 12-13.

The flipside of these requirements is that a petition that fails to include them can be denied without a hearing. Under our Rules, a petition for supersedeas may be denied upon motion or *sua sponte* without a hearing for one of the following reasons: (1) lack of particularity in the facts

pleaded; (2) lack of particularity in the legal authority cited as the basis for the grant of the supersedeas; (3) an inadequately explained failure to support factual allegations by affidavits; or (4) a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c). Where a petition along with its supporting documents does not provide a basis for granting a supersedeas, it will be denied. *Dougherty, supra*, 2014 EHB at 13 (citing *Mellinger v. DEP*, 2013 EHB 322).

Rep. Probst's petition for supersedeas must be denied because we are unable to grant any of the relief requested in the petition in this appeal. Rep. Probst has asked us to take the following actions:

GRANT this Petition for Supersedeas and STAY all activity authorized by Permit No. E4502125-001;

ORDER the Department to rescind the Finding of No Significant Impact (FONSI);

REQUIRE the completion of a full Environmental Impact Statement (EIS) that accounts for the documented Bald Eagle nesting, the Fort Hamilton archaeological site, the verified wetland acreage, and the de facto taking of Petitioners' properties; and GRANT such other relief as the Board deems just and proper.

(Petition at 6.) Permit No. E4502125-001 is the number assigned to the Chapter 105 permit application for the I-80 project. The permit under appeal is Permit No. MB990264-001 for the Sunny Brook Mitigation Bank. Whether this is a parapraxis or intentional, it is entirely consistent with the fact that Rep. Probst's true concerns relate directly to the I-80 project and only in the most indirect sense to the mitigation bank. As we have previously explained in this appeal, the Board's jurisdiction is circumscribed by the action under appeal. *See* Opinion and Order on Reconsideration, slip op. at 6 ("We cannot review the merits of one permit in the context of an appeal from an entirely separate permit."). *See also Sayreville Seaport Assocs. Acquisition Co. v. DEP*, 2011 EHB 815, 819-20; *Winegardner v. DEP*, 2002 EHB 790, 793. Simply put, Rep. Probst

cannot use her appeal of the mitigation bank permit to challenge a different, unappealed permit for the I-80 project.

We cannot afford any relief with respect to Rep. Probst’s next two requests either. This Board has no authority “to rescind the Finding of No Significant Impact (FONSI)” or “REQUIRE the completion of a full Environmental Impact Statement (EIS),” both of which relate to federal actions that are beyond our reach and again concern the I-80 project, not the mitigation bank. Our jurisdiction is statutorily limited to state actions taken by the Department of Environmental Protection. 35 P.S. § 7514(a). “We do not review actions of the federal government.” *Lower Salford Twp. v. DEP*, 2011 EHB 333, 335.

If we give Rep. Probst the benefit of the doubt and assume she meant to ask us to supersede the permit under appeal, the petition must nevertheless be denied. First, the petition is deficient because it does not comply with our Rules outlined above explaining the requirements that need to go into a petition for supersedeas. A petition for supersedeas *must* be supported by one of the following:

- (1) Affidavits, prepared as specified in Pa.R.C.P. 76 and 1035.4 (relating to definitions; and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.
- (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

25 Pa. Code § 1021.62(a). Pennsylvania Rule of Civil Procedure 76 defines “affidavit” as:

A statement in writing of a fact or facts signed by the person making it, that either (1) is sworn to or affirmed before an officer authorized by law to administer oaths, or before a particular officer or individual designated by law as one before whom it may be taken, and officially certified to in the case of an officer under seal of office, or (2) is unsworn and contains a statement that it is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Pa.R.Civ.P. 76. Pennsylvania Rule of Civil Procedure 1035.4 requires that affidavits must be made on personal knowledge, shall set forth facts as would be admissible in evidence, and show affirmatively that the signer is competent to testify to the matters stated therein.

Rep. Probst's petition is verified, but that does not at least in this case satisfy the requirement for affidavits.¹ Among other deficiencies, the verification does not expressly or by necessary implication show that any of the verifiers (Rep. Probst and the unsuccessful intervenors) would be competent to testify from personal knowledge that many of the allegations in the petition are true and correct. Many of the allegations are more inferential than factual. Almost all are based entirely on hearsay. Many appear on their face to go well beyond the verifiers' personal knowledge by, for example, predicting the future (e.g. if construction of the mitigation bank proceeds, the Department will allow the irreversible destruction of Stroudsburg Borough wetlands; once the bank is permitted, destruction "becomes a bureaucratic 'fait accompli'"). Many are legal conclusions rather than factual. Some allegations go beyond the verifiers' expertise (e.g. no local option for mitigation at the I-80 project site; wetland credits cost "about \$300-400,000 per 1 credit"). The included verification falls short of qualifying as an affidavit and compels denial of the petition for supersedeas. 25 Pa. Code § 1021.62(c)(3). *See also Eachus v. DEP*, EHB Docket No. 2025-132-L, slip op. at 12 (Opinion and Order on Petition for Supersedeas issued Jan. 26, 2026) (failure to include affidavits or explain their absence is enough on its own to deny a petition for supersedeas) (citing *VanDuzer v. DEP*, 2018 EHB 696, 703; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635, 636).

The petition for supersedeas is also deficient because it does not contain any relevant legal support. Our Rules require a petition for supersedeas to "state with particularity the citations of

¹ Rep. Probst does not explain why affidavits have not accompanied her petition.

legal authority the petitioner believes form the basis for the grant of supersedeas.” 25 Pa. Code § 1021.62(b). Rep. Probst’s petition does not cite any provision of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, or the Chapter 105 regulations that largely govern the water obstructions and encroachments that have been permitted for the mitigation bank. There is one mention of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, but no citation or reference to any specific provision. Rep. Probst does not cite any Environmental Hearing Board cases discussing a supersedeas or the standards for obtaining a supersedeas. There is no citation to any caselaw at all. The opening sentence of the petition says Rep. Probst requests a supersedeas pursuant to the Environmental Hearing Board Act at 35 P.S. § 7514(d) and our Rules at 25 Pa. Code § 1021.61, but she never discusses those provisions anywhere in the petition.

Rep. Probst makes some very general legal references in support of her petition, but nothing specific and nothing related to the mitigation bank. She invokes Article I, Section 27 of the Pennsylvania Constitution and says that Article I, Section 27 guarantees a “healthful environment,” but that phrase is not contained in the text of the constitutional amendment.² All of the references to Article I, Section 27 are in service of her criticism of the I-80 project. For instance, she asserts that there will be a “constant ‘Zone of Danger’” from noise and highway-affected air quality that will force people near the I-80 expansion area “to live in conditions that are already physically and psychologically traumatizing,” which she asserts constitutes a violation

² Article I, Section 27 provides:

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

PA. CONST. art I, § 27. *Accord* MONT. CONST. art. II, § 3 and art. IX, § 1 (provisions of the constitution of the state of Montana discussing “a clean and healthful environment”); ILL. CONST. art. XI, §§ 1 and 2 (similar provisions regarding a “healthful environment” in the Illinois state constitution).

of Article I, Section 27. (Petition at ¶ 5.) She argues the Department violated its trustee duties under Article I, Section 27 because a bald eagle nest was reportedly discovered in the I-80 project corridor and bald eagles do not appear as a species in the Pennsylvania Natural Diversity Inventory (PNDI) search for the I-80 project site. (Petition at ¶ 14.) Some of the claimed violations of Article I, Section 27 concern the federal approvals that were apparently given to the I-80 project. However, there is no analysis of Article I, Section 27 in any of these claims, or an explanation of how they justify a supersedeas, particularly as it relates to the mitigation bank permit that is under appeal. *See Citizens for Pa.'s Future v. DEP*, 2025 EHB 275, 347-48 (proper constitutional analysis needs to recognize and balance development with any potential environmental harms), *appeal pending*, 3d Cir. No. 25-2134. Merely sprinkling in references to Article I, Section 27 is not enough to satisfy the requirement for particular legal authority that forms the basis of granting a supersedeas.

The other legal references in the petition are no more compelling. Rep. Probst mentions the Pennsylvania History Code, arguing the Department failed to acknowledge the Fort Hamilton archeological site and that the I-80 project would permanently destroy the site “before a proper Phase II or Phase III archeological survey can be completed, in direct violation of the Pennsylvania History Code.” (Petition at ¶ 15.) However, even putting aside that this is yet another complaint regarding the I-80 project and not the mitigation bank, there is no citation to any provision of the History Code or discussion of the Department’s duties with respect to historic sites. She also alleges that the design of the I-80 project violates Stroudsburg Borough’s 75-foot buffer requirement, but again there is no explanation of how that relates to the mitigation bank. (Petition at ¶ 12.)

The petition contains no allegations of harm, let alone irreparable harm, from work that is a direct result of the mitigation bank permit. There is no allegation of harm to any resource in Damascus Township from the encroachments encompassed by the mitigation bank permit. The petition for supersedeas does not even try to establish any irreparable harm as a result of the mitigation bank's encroachments. *See Leisher v. DEP*, 2025 EHB 786, 794-95 (denying petition for supersedeas without a hearing where the appellant "does not make a credible showing of irreparable harm, nor does he even allege it"). The petition only discusses alleged harms as a result of the I-80 project and any encroachments that might be authorized by a permit issued for that project, but as we have noted earlier in this case, any harm from the I-80 project is simply too remote to the permit under appeal. *See* Opinion and Order on Intervention, slip op. at 8-9; Opinion and Order on Reconsideration, slip op. at 3-4. The mitigation bank permit does not authorize any encroachments at the I-80 project site, nor do the terms of the mitigation bank permit authorize any mitigation credits to be used for the I-80 project, or any project at all for that matter.

Rep. Probst, who is the only party to this appeal connected to the petition for supersedeas, has not identified any specific harm to herself, which is one of the factors for supersedeas consideration. 35 P.S. § 7514(d)(i)(i); 25 Pa. Code § 1021.63(a)(1). The alleged harms concern the "Petitioners" broadly, but seem to particularly rely upon alleged harm to the unsuccessful intervenors, who are not parties. *See Mellinger, supra*, 2013 at 327-28 (denying petition for supersedeas without a hearing in part because there was no allegation of harm to the appellant/petitioner). Even if we consider the alleged harm to the unsuccessful intervenors under the factor of likelihood of injury to the public, 35 P.S. § 7514(d)(1)(iii); 25 Pa. Code § 1021.63(a)(3), the harms are all still associated with the I-80 project.

In evaluating a supersedeas petition, we must consider the potential harm to the other parties in the appeal as a result of granting a supersedeas. 35 P.S. § 7514(d)(1)(iii); 25 Pa. Code § 1021.63(a)(3). First Pennsylvania tells us in its response that construction of the Sunny Brook Mitigation Bank is approximately 75% complete and it is expected to be fully constructed by mid-June 2026. It argues if a supersedeas is granted there could be harm to the streams and wetlands in Damascus Township affected by the mitigation bank. First Pennsylvania attaches to its response an affidavit from Paul Golubic, who is First Pennsylvania’s Regulatory Specialist for the Sunny Brook Mitigation Bank project. (First PA Resp., Ex. B.) Mr. Golubic avers that halting construction would leave the site unstabilized and could increase erosion and sediment pollution to streams and wetlands. Rep. Probst has not addressed any environmental harm in the area of the mitigation bank. It is noteworthy, and perhaps a little ironic, that the only potential harms concerning the actual area of the mitigation bank are environmental harms cutting against the issuance of a supersedeas.

Finally, Rep. Probst has demonstrated a very low likelihood of success on the merits. The petition states that Rep. Probst is likely to prevail on the merits because the permit was issued “in violation of several regulatory mandates.” (Petition at ¶ 10.) However, as discussed above, Rep. Probst does not identify a single regulation that relates to the permitting of a mitigation bank. Instead, there is only a series of allegations relating to the I-80 project involving Stroudsburg’s 75-foot buffer requirement, bald eagle nests and Native American artifacts within the I-80 project corridor, the Fort Hamilton archeological site near I-80, PennDOT’s easement for I-80, and the infrequent updating of a website related to the I-80 project, among others.

The only thing the petition alleges with respect to the permit under appeal is that the Department should have held a public hearing on the mitigation bank permit. (Petition at ¶ 11.)

Rep. Probst has not cited any regulation pertaining to public hearings for water obstruction and encroachment permits.³ As we noted in a prior Opinion, it appeared that the Department did not feel it necessary to hold a public hearing on the mitigation bank permit because the only comments it received (from Rep. Probst, for example) concerned the I-80 project. *See* Opinion and Order on Reconsideration, slip op. at 4. Claims of inadequate public notice are not often successful for obtaining a supersedeas of the underlying permit. *See PRIZM Asset Mgmt. Co. v. DEP*, 2005 EHB 819 (granting in part petition for supersedeas and requiring Department to re-notice the permit but leaving the permit in place). Rep. Probst has not shown that failing to hold a public hearing on the mitigation bank permit, particularly a public hearing that does not appear to be mandatory, is sufficient grounds for superseding this permit.

As suggested in her notice of appeal and now reinforced by the petition for supersedeas, Rep. Probst appears to have appealed the wrong permit. She has not identified a single provision of the mitigation bank permit that she contests in her petition for supersedeas. There is no real discussion of the mitigation bank permit at all. She has not identified any part of the permit that allocates mitigation credits to any project. All of her critiques in the petition relate to the I-80 project. Although Rep Probst repeatedly contends that the permitting of the mitigation bank effectively authorizes the irreparable destruction of wetlands and other harms 60 miles away, she has not provided credible support for the assertion. Even if we did supersede the mitigation bank permit, Rep. Probst has provided no legal or factual support for the notion that doing so would halt any present or future work with the I-80 project. All of Rep. Probst's claims, if the claims are

³ The Department tells us in its motion to deny the petition that the Department has discretion whether or not to hold public hearings, citing 25 Pa. Code § 287.153(a). (DEP Mot. at ¶ 34; DEP Memo at 7-8.) That regulation concerns permits for residual waste processing or disposal and does not appear to have any relevance here.



valid at all, would be more appropriately raised in an appeal of a permit that actually authorizes the I-80 project. This appeal is not of that permit.

Accordingly, we issue the Order that follows.



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ORDER

AND NOW, this 27th day of May, 2026, it is hereby ordered that the Appellant’s petition for supersedeas is **denied** without a hearing.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Board Member and Judge

DATED: May 27, 2026

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