

construction and initial operation of the Homer City Generation Project, a natural gas-fired electric generation station located in Center Township, Indiana County. The appeals are docketed at EHB Docket Nos. 2025-135-L and 2025-136-L.¹ The appeal at EHB Docket No. 2025-135-L was filed by three organizations—Clean Air Council, Citizens for Pennsylvania’s Future, and Sierra Club (the “CAC Appellants”). The appeal at EHB Docket No. 2025-136-L was filed by a group of appellants comprised of minor children proceeding through their legal guardians and young adults, with ages ranging from two-months to 21-years old (the “McIntosh Appellants”).

Homer City has moved to consolidate the two appeals, filing essentially the same motion in both appeals. Homer City argues that consolidation is in the best interest of efficiency and judicial economy, and it will allow for a hearing and adjudication on a common set of facts and legal claims. Homer City points out that the two appeals involve the same action and contends that there is an overlap in the claims raised in the appeals. It says the appeals will likely involve the same witnesses from Homer City and the Department, and consolidation would save Homer City from the cost of duplicative depositions, hearing testimony, and related travel in litigating the appeals separately. Homer City also raises the prospect that litigating the appeals separately could lead to inconsistent or conflicting outcomes. The Department concurs in the motion and has filed a response in the McIntosh Appeal echoing many of the same concerns over the costs on the Department in litigating the appeals separately.

The Appellants in both appeals oppose the motion. They both say the claims raised in the two appeals are distinct with little overlap. They also say that consolidation would impose additional burdens on them by introducing new parties into their respective appeals. The McIntosh

¹ On March 16, 2026, these appeals were reassigned from Chief Judge and Chairperson Beckman to Judge Labuskes.

Appellants also assert that they want a quicker resolution to their appeal than what the parties' joint case management schedule established in the CAC Appeal would allow.

Under our Rules, the Board, on its own or in response to a motion, may order proceedings to be consolidated when they involve a common question of law or fact. 25 Pa. Code § 1021.82(a). Cases may be consolidated for hearing of any or all of the matters at issue. *Id.* The Board has broad discretion in deciding whether or not consolidation is appropriate. *Montgomery Twp. Friends of Family Farms v. DEP*, 2018 EHB 778, 781; *White Twp. v. DEP*, 2005 EHB 722, 723. Beyond the basic consideration of whether the cases involve common questions of law or fact, we also consider judicial efficiency, reducing the inconvenience to witnesses who might need to be deposed or testify multiple times in separate proceedings, and whether there is a possibility that the separate litigation of the appeals could result in inconsistent outcomes. *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Twp.*, 2005 EHB at 723. Ultimately, consolidation should promote judicial economy and administrative efficiency, and act to reduce or limit unnecessary cost and delay to the parties and to the Board. *Bucks County Water & Sewer Auth. v. DEP*, 2013 EHB 203, 205; *Barshinger v. DEP*, 1996 EHB 1021, 1022; *Columbia Gas of Pa., Inc. v. DEP*, 1996 EHB 22. For the reasons explained below, we deny Homer City's motion to consolidate at this time.

In support of its motion, Homer City argues that consolidation is justified because there is a significant overlap in the Appellants' claims. Homer City essentially contends that the claims in the McIntosh Appeal are subsumed by the claims in the CAC Appeal. According to Homer City, both appeals advance a claim that, by issuing the plan approval, the Department violated its obligations pursuant to Article I, Section 27 of the Pennsylvania Constitution (also known as the

Environmental Rights Amendment),² and the CAC Appeal merely adds some claims that the Department also failed to comply with applicable statutory and regulatory requirements. However, Homer City oversimplifies the two appeals. Beyond the facial parallel of citing the same constitutional provision of Article I, Section 27, there is not an extensive similarity in the Appellants' respective claims.

The McIntosh Appellants lay out their claims across numerous pages in their notice of appeal. The main substantive thrust of their appeal is that the Homer City facility will release greenhouse gas emissions that will contribute to and worsen climate change and, as a result, cause harm to the Commonwealth's public natural resources, environment, and to the health and safety of Pennsylvania's children and young people, including the McIntosh Appellants. In support of this claim, the McIntosh Appellants allege that the additional greenhouse gas emissions from the Homer City facility will, among other things: increase temperatures that could lead to high concentrations of ground-level ozone and increase the risk of heat-related illness or death; increase precipitation and flooding; increase drought conditions; increase the risk of wildfires and wildfire smoke; increase water temperatures that could cause algal blooms; increase the populations of mosquitoes and ticks due to longer breeding seasons; threaten native plant and animal species; and cause economic damage to the Commonwealth from the various ill effects of climate change.

The McIntosh Appellants argue that the greenhouse gas emissions authorized by the plan approval violate their rights as beneficiaries under Article I, Section 27 and that the Department

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.

has violated its duties as a fiduciary under the Constitution to conserve and maintain public natural resources. They also advance claims under Article I, Section 1 of the Pennsylvania Constitution, arguing that the issuance of the plan approval violates their due process rights to life, liberty, property, and the pursuit of happiness.³ The heart of the McIntosh Appeal is an overarching contention that the permitting of a facility that will release greenhouse gases in the volume authorized in this plan approval violates their constitutional rights.

On the other hand, the CAC Appellants' constitutional claims are a less significant part of that appeal. They argue that the Department, in part under Article I, Section 27, failed to evaluate the Homer City project in totality by also considering an adjacent proposed data center campus. They also include a more general objection that the Department violated its duties and obligations under Article I, Section 27 by issuing a plan approval that will emit "unprecedented levels of pollution." (CAC Notice of Appeal, Objection ¶ J.)

We think the degree to which the Article I, Section 27 claims in the two appeals overlap is overstated. Nearly every appeal that has been filed with the Board since the 2013 decision of the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), has included some objection related to Article I, Section 27. Sometimes these objections are somewhat generic but other times they are rather extensive. The mere existence of a constitutional claim does not necessarily render two appeals appropriate for consolidation.

The CAC Appellants' non-constitutional claims further separate their appeal from the McIntosh Appeal. The CAC Appellants make several specific objections premised on complex

³ Article I, Section 1 provides:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

PA. CONST. art I, § 1.

aspects of the air quality regulatory program. For instance, the CAC Appellants argue that the Department should not have accepted Homer City’s methodology for determining Lowest Achievable Emission Rate (“LAER”), Best Available Control Technology (“BACT”), and Best Achievable Technology (“BAT”), which they allege resulted in incorrect emissions limits in the plan approval. They argue that the BACT analysis for carbon monoxide and the BAT analysis for ammonia slip for the facility’s combined cycle combustion turbines is wrong. They say the Department failed to conduct a proper analysis of alternative sites, sizes, production processes, and environmental control techniques under 25 Pa. Code § 127.205(5), or demonstrate that the benefits of the project significantly outweigh the environmental and social costs. The CAC Appellants challenge the Department’s determination regarding emission reduction credits for the project’s criteria pollutants under 25 Pa. Code § 127.206(c), 25 Pa. Code § 127.208(3), and 25 Pa. Code § 127.208(4). They also argue that Homer City did not provide a sufficient analysis of additional impacts under 40 C.F.R. § 52.21(o). These sorts of highly technical regulatory claims are not contained in the McIntosh Appeal. The McIntosh Appellants actually come right out and say in their response that they are not alleging in their appeal any violations of statutory or regulatory provisions mandating the use of specific methodologies or analyses for the plan approval application. (McIntosh Resp. at ¶ 3.)

Each of the CAC Appellants’ non-constitutional claims is technically complex and will likely require extensive expert witness support and testimony. Although the McIntosh Appellants say that both cases are likely to involve expert witnesses, they express doubt that there will be an overlap in the subjects on which the experts will testify. At this juncture, we tend to agree. Assuming both appeals eventually proceed to a merits hearing, we question the utility of making the McIntosh Appellants sit through what will likely be days of technical expert witness testimony

that is unrelated to the claims in their appeal. The same can be said for the CAC Appellants having to sit through extensive expert testimony related to greenhouse gas emissions and climate change that are not present in their appeal.

Homer City asserts that the written discovery in both appeals is “likely to be substantially identical.” Given the significant differences in the Appellants’ claims, we do not believe that is true. As the CAC Appellants point out, even if there is likely to be some overlap in the two appeals with respect to the production of documents in response to discovery requests, each party in a consolidated appeal has the right to serve its own written discovery requests, which will necessitate individual responses from Homer City and the Department. Consolidation is not guaranteed to alleviate any significant time that the Department and Homer City need to respond to written discovery from both sets of Appellants.

The McIntosh Appellants also say that they are seeking a resolution in their appeal on a timeline much shorter than the one agreed to by the parties in the CAC Appeal. In the CAC Appeal, the Board has approved a joint case management order proposed by the parties that has fact discovery being completed in August 2026, depositions occurring in November 2026, expert reports being exchanged during the first quarter of 2027, and dispositive motions being filed by the end of April 2027. However, in what could be a sign of these dates being pushed out further, the parties titled their proposal as a “first” joint case management order, and it states that the deadlines may be extended by the Board upon the consent of the parties embodied in a letter or for good cause upon written motion.

In the McIntosh Appeal, the McIntosh Appellants have moved for a case management order that sets the dispositive motion deadline in November 2026, more than five months earlier

than the CAC Appeal.⁴ The McIntosh Appellants assert that the longer case management schedule in the CAC Appeal is unnecessarily long and not needed to litigate their claims. They contend that consolidation, and adhering to that case management schedule, would increase the time, preparation, and resources expended by the McIntosh Appellants. We hesitate to bind the McIntosh Appellants to a schedule they had no role in negotiating, particularly if they are advocating for a significantly shorter schedule for the prosecution of their appeal.

Although we are denying the motion to consolidate, we are not unsympathetic to the potential burdens on Homer City and the Department and the possibility that witnesses for the Department and Homer City will be deposed more than once, or that there could be some additional preparation for the Department and Homer City as a result of not consolidating the appeals. The McIntosh and CAC Appellants both suggest working with the parties across the appeals to schedule similar depositions together when possible. All Appellants have committed in their responses to working in good faith with all the parties to maximize efficiency. We encourage the parties in both appeals to work toward coordinating discovery to the extent possible to alleviate burdens of duplicative work. While we decline to consolidate the two appeals at this time, we do so without precluding the possibility that consolidation may make sense further on in the proceedings, and we may revisit the issue if necessary.

Accordingly, we issue the Order that follows.

⁴ The existing deadline for filing dispositive motions, set by the Board's Pre-Hearing Order No. 1, is July 16, 2026. We have scheduled a conference call with the parties in the McIntosh Appeal on March 23, 2026 to discuss that appeal's case management schedule.

For the Commonwealth of PA, DEP:

Carl D. Ballard, Esquire
Sean L. Robbins, Esquire
Andrea Costello, Esquire
Maria Solomidou, Esquire
Dearald Shuffstall, Esquire
(via *electronic filing system*)

For Appellants, Clean Air Council, et al.:

Lawrence Hafetz, Esquire
Angela Kilbert, Esquire
Jessica R. O'Neill, Esquire
Annie Fox, Esquire
Sarah Gordon, Esquire
Eleanor M. Breslin, Esquire
Lauren E. Otero, Esquire
(via *electronic filing system*)

For Appellants, McIntosh, et al.:

M. Jason Asbell, Esquire
Andrew L. Welle, Esquire
Avi Lipman, Esquire
David Schwartz, Esquire
(via *electronic filing system*)

For Permittee:

David R. Raphael, Esquire
Samuel R. Boden, Esquire
Conor T. Daniels, Esquire
Marie A. LaRosa, Esquire
(via *electronic filing system*)