COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BCD PROPERTIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2025-066-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 29, 2025**

OPINION AND ORDER ON
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board ("Board") denies Appellee Commonwealth of Pennsylvania Department of Environmental Protection's ("Department") Motion to Dismiss. The Board finds that the Department's April 16, 2025 letter is an appealable action over which the Board has jurisdiction.

O P I N I O N

Background

The issue in the motion before us centers around whether a Department letter issued to Appellant constitutes a final appealable action, subject to the Board's jurisdiction, or whether the letter is merely an advisory opinion.

Factual Background

Appellant BCD Properties, Inc. ("Appellant" or "BCD") is the owner and operator of an oil and gas well – Danylko No. 4 well, Permit No. 049-25121 - located in McKean Township, Erie County ("Well"). The Well was originally drilled as a gas well and produced gas in commercial

quantities until approximately 2010. The Well currently produces insufficient gas to be sold commercially or for residential use. The Well, however, is capable of producing brine that can be sold in commercial quantities.

At an unknown date, BCD spoke with the Department about obtaining a "commercial product determination" for the brine as the Department had done for a competitor, Seneca Mineral Company in 2007.[1] According to Appellant, the Department responded that it would not approve BCD's request, but to have its lawyer speak with the Department's lawyers. Around 2018, BCD entered into an agreement with Seneca Mineral to sell BCD brine to Seneca Mineral for the 2018/2019 winter season. The brine was used for municipal road dust suppression and de-icing.

At some point in time around 2019, BCD's counsel repeated its request that the Department make a "commercial product determination" for the brine. Again, the Department advised it would not do so. According to Appellant, Department counsel suggested that in lieu of a "commercial product determination," BCD could have a consultant prepare a "coproduct determination report" that compared BCD's brine to Seneca Mineral's commercially sold brine. As a result of this recommendation, BCD retained Burt A. Waite, P.G. to prepare a coproduct determination report dated March 23, 2019 ("Danylko 4 Report"). The Danylko 4 Report compares the chemical and physical characteristics of BCD's brine with Seneca Mineral's commercial product. After the Danylko 4 Report was completed, BCD began selling brine produced from the Well for road dust suppression and de-icing between the years 2019-2024.

Appellant states that in spring 2023, Randy Brace, President of BCD, learned that the Department had disapproved a number of coproduct determinations made by oil and gas operators;

[1] According to Appellant, in 2018, the Department stopped granting permission to spread brine produced from oil and gas wells on roads; thus, a commercial product determination was necessary.

thus, he contacted the Department's Oil and Gas Program to discuss the Danylko 4 Report. According to Appellant, "The Department representative responded that the Danylko 4 Report had not been disapproved, that he viewed the Report as comparing 'apples to apples and oranges to oranges,' and that if anything changed from the Department's perspective the Department would let BCD know." (*See* Appellant's Brief in Resp. to Motion to Dismiss, pg. 3).

Contrastingly, the Department states that sometime around 2023-2024, the Department became aware of a contractual dispute between PennField Energy, LLC and Harmony Township where PennField was using Appellant's brine for road spreading. (*See* DEP's Brief in Supp. of Motion to Dismiss, pg. 1). According to the Department letter under appeal, the Department requested the Danylko 4 Report from Appellant. (*See* April 16, 2025 DEP coproduct letter, pg. 1).

In late March 2025, Mr. Brace was contacted by an Environmental Crimes Section ("ECS") Special Agent of the Pennsylvania Attorney General's Office, who requested information about BCD's brine sales. On or about April 7, 2025, the ECS Special Agent advised BCD's Counsel that both the Department and ECS were in possession of the Danylko 4 Report and as "long as the Department [did] not take any action that would alter the *status quo*, the ECS would not pursue criminal enforcement of BCD's brine sales." (*See* Appellant's Brief in Resp. to Motion to Dismiss, pg. 4, 8). Approximately nine days later, on April 16, 2025, the Department issued the subject coproduct letter.[2] The letter states:

> The Department of Environmental Protection (DEP) performed a review of the BCD Properties coproduct determination of Danylko 4 Well, API # 49-25121-00 in McKean Township, Erie County, Pennsylvania, for Brine Application for Dust Suppression and Deicing of Roads dated March 23, 2019. The document was submitted by you in response to a DEP request for documentation supporting a coproduct determination.

[2] The Department refers to the April 16, 2025 letter as "Department Letter" in its Motion to Dismiss. The Appellant refers to this letter as an "Invalidation Letter." For purposes of consistency and compromise, we will refer to the letter as the "coproduct letter."

> The provided documentation is insufficient to support a coproduct determination because it does not meet the conditions of the definition of "coproduct" in 25 Pa. Code § 287.1 (relating to definitions) and/or the requirements as specified in 25 Pa Code § 287.8 (relating to coproduct determinations) of the DEP Residual Waste Management Regulations. The regulations may be accessed using the following web address: www.pacode.com.
>
> [a summary of the code regulations is omitted]
>
> In order for a coproduct determination to be valid, you must generate and maintain documentation that meets the conditions of the definition of "coproduct" in 25 Pa Code § 287.1 (relating to definitions) and the requirements as specified in 25 Pa Code § 287.8 relating to coproduct determinations)[*sic*], and, in accordance with 25 Pa Code § 287.8(e), you are required to provide the documentation that supports the coproduct determination to persons selling, transferring, possessing or using the material. Managing the material as a coproduct prior to generating or supplying documentation that sufficiently supports the coproduct determination to persons selling, transferring, possessing, or using the material may result in enforcement action.
>
> This letter is neither an order nor any other final action of the DEP on your coproduct determination. It neither imposes nor waives an action available to the Department under any of its statutes.
>
> [contact information and signature omitted]

See April 16, 2025 DEP coproduct letter.

BCD alleges that due to the coproduct letter and comments made by the ECS Special Agent, BCD cancelled all contracts and planned sales of its brine for 2025.[3]

Procedural Background

On May 15, 2025, BCD filed the instant appeal challenging the Department's coproduct letter. On June 3, 2025, Appellant filed an Amended Notice of Appeal providing a factual and legal history of the case, supporting documents, and a number of objections. On September 8,

[3] Appellant alleges that for the 2025 calendar year, BCD had arranged to work with Dodson Trucking, LLC to sell brine produced from the Well as road dust suppression, and as of March 2025, Dodson had arrangements with six municipalities for summer contracts for the brine. BCD also alleges it was pursuing additional contracts for the sale of brine.

2025, the parties attended a 120-day conference call with Judge Bruder where they advised that they were in the process of exchanging written discovery. On September 25, 2025, the Department filed its Motion to Dismiss asserting that the Board lacked jurisdiction over the appeal because the coproduct letter was merely an advisory opinion and not a final appealable action. After receiving Board approval for additional time, Appellant timely filed its Response to said Motion on November 25, 2025. The Department filed its Reply Brief on December 11, 2025.

Standard of Review in Jurisdictional Matters

Our Board's jurisdiction is mandated by express statutory language in the Environmental Hearing Board Act that enumerates we have jurisdiction over final actions of the Department. 35 P.S. § 7514(a); *Tighes v. DEP*, 2024 EHB 451, 457. The term "action" is defined as an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification. 25 Pa. Code § 1021.2(a) (definition of "action").

There is no formulation of a strict rule on whether a Department communication is an appealable "action." Each communication is determined on a case-by-case basis. Indeed, as Chief Judge and Chairperson Steven C. Beckman stated:

> There is no rigid rule we apply that makes a Department letter either appealable or non-appealable. **Instead, the question of jurisdiction over a Department letter must be made on a case-by-case basis and certain factors such as: the wording of the Department communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and the relief, if any, the Board can provide, guide our determination.**

Tighe v. DEP, 2024 EHB 451, 458 (emphasis added).

As in this matter, a party may file a motion to dismiss when they wish to challenge Board jurisdiction over an appeal. *Consol Pa Coal Co., LLC v. DEP*, 2015 EHB 48, 54. When jurisdiction is challenged, the Board will evaluate whether the moving party is able to clearly demonstrate that

an appeal exceeds the Board's review under the Environmental Hearing Board Act or other statutes. *Karnick v. DEP*, 2016 EHB 1, 3 *citing Rocky Ridge Motel v. DEP*, 2012 EHB 303 (*citing* 35 PS. § 7514); *Dobbin v. DEP*, 2010 EHB 852; *Kennedy v. DEP*, 2007 EHB 511, 512; *P.E.A.C.E. v. DEP*, 2000 EHB 1, 2.

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party, which in practical terms means the Board must accept the nonmoving party's version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Indeed, the Board must only grant a motion to dismiss when the moving party is clearly entitled to judgment as a matter of law. *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. In instances where a moving party has failed to provide enough evidence to resolve all doubts that a Department document is advisory, a motion to dismiss must be denied. *M&M Realty Partners, L.P. v. DEP,* 2024 EHB 406 (denying a motion to dismiss an appeal of a Department letter where it was not clear and free from doubt that the letter was not an appealable action).

Discussion

The Parties' Arguments

In its Motion to Dismiss, the Department argues that the April 16, 2025 coproduct letter is not an appealable action because the letter merely advises Appellant of the Department's understanding of the coproduct regulations and what is required for a coproduct determination. (*See* DEP's Brief in Supp. of Motion to Dismiss, pg. 9). Further, a coproduct determination is self-executing; thus, review and approval by the Department is not required by the Residual Waste Management Regulations. (*Id.* at 2-3). Specifically, the Department argues that the "regulations do not state that the Department shall approve or deny a coproduct determination, nor do they

require BCD to submit a form or application to the Department for the Department to declare that is has a valid 'coproduct.' " (*Id.* at 9). Practically speaking, the Department argues, its letter has no effect as it does not require Appellant to take any action. (*Id*. at 9-10). Appellant could have revised or supplemented its Danylko 4 Report to meet the Department's comments or simply done nothing and relied on its own evaluation that the Danylko 4 Report met applicable regulatory requirements. (*Id.* at 10). Any and all decisions to stop selling the brine were "business decisions" made by Appellant alone. (*Id*.).

In contrast, Appellant argues the coproduct letter is not advisory because: (1) it reflects the Department's revised interpretation of 25 Pa. Code § 287.8 to mean that BCD's brine is residual waste; thus, requiring BCD to obtain a permit absent a coproduct determination deemed satisfactory from the Department; (2) it threatens an enforcement action if BCD continues to sell brine without first correcting perceived deficiencies; (3) it implies that BCD's sale of brine for the past several years was unlawful; and (4) it alters Appellant's business *status quo*, especially for purposes of the ECS criminal investigation, giving an air of finality. (*See* Appellant's Brief in Resp. to Motion to Dismiss, pg. 6-9). Further, Appellant argues the timing of the coproduct invalidation letter is indicative of its non-advisory nature. Specifically, the coproduct letter was sent merely nine days after BCD's Counsel spoke to ECS Special Agent about the Department keeping the *status quo* as to not indicate the sale of brine was illegal. (*Id*. at pg. 7-8).

Case Law Precedent

The Department argues the Board should grant its Motion to Dismiss as this matter is analogous to *Clean Air Council v. DEP*, 2023 EHB 203 and *Sayreville Seaport Assocs. Acquisition Co. v. DEP*, 60 A.3d 867 in that the coproduct letter only expresses the Department's understanding of the regulations and the regulations themselves give the Department no real power

over enforcement of coproduct determinations. (*See* DEP's Brief in Supp. of Motion to Dismiss, pg. 7-9 & DEP's Reply Brief, pg. 1, 3-5).

In *Clean Air Council*, the Board granted a motion to dismiss a third-party appeal of a Department letter that informed a company its proposed facility met the definition of an "advanced recycling facility" and did not require a permit under the Solid Waste Management Act. *Clean Air Council*, 2023 EHB 203. In that case, third-party Appellant Clean Air Council appealed a letter sent from the Department to Encina Development Group, LLC ("Encina") concerning its proposed facility. *Id*. The letter stated that Encina's proposed facility met the definition of "advanced recycling facility." The letter further stated that residual waste did not fall under the definition of a "post-use polymer." As a result, if Encina wanted to accept residual waste at its advanced recycling facility, it would need to apply for a permit. *Id*. at 204. Encina, with the Department's support, filed a motion to dismiss the appeal on the basis that the letter was not a final appealable action.

In deciding *Clean Air Council*, the Board looked closely at the Solid Waste Management Act definitions; specifically, the definitions of "advanced recycling facility" and "post-use polymers." *Id*. at 208-09. The Board concluded that the definitions themselves offered no defined evaluative process in the statute or regulations; there was no mandatory duty or defined regulatory framework requiring the Department to make a decision on whether an activity qualifies as an "advanced recycling facility;" there was no sampling or testing that needed to be conducted to demonstrate acceptable conditions; and there was no required information that a party needed to submit to the Department to be declared an "advanced recycling facility." *Id*. at 215-217. In effect, there was no process at all. *Id*. at 215.

Moreover, the definitions declared an "advanced recycling facility" to be outside of the solid waste permitting regime so Encina would not need any approval by the Department to operate an "advanced recycling facility" as long as Encina stayed within the confines of the definitions of the Act. *Id*. at 216-17. As such, there was no change in the *status quo* as Encina would not be required to act or seek a permit under the Solid Waste Management Act. *Id*. at 212; 216. The Board distinguished *Clear Air Council's* factual scenario from situations where the Department follows a defined statutory or regulatory procedure for investigating a complaint and then rendered a determination on that complaint one way or the other. *Id*. at 217.

Additionally, in *Sayreville Seaport Assocs. Acquisition Co. v. DEP*, the Commonwealth Court determined that a Department letter, which advised Sayreville of the Department's interpretation of the law as it applied to the material which the company proposed to either dispose of or use for reclamation purposes, was not a final appealable action. *Sayreville Seaport Assocs. Acquisition Co. v. DEP*, 60 A.3d 867, 872. In *Sayreville*, Sayreville Seaport Associates Acquisition Company, LLC ("Sayreville") was pursuing industrial property redevelopment, which involved excavation and handling of contaminated soil, including enhanced radioactive material. *Id.* at 868. Sayreville engaged in discussions with the Department about potentially disposing the soil at a landfill or as regulated fill at an abandoned mine site. *Id.* The Department issued two letters advising Sayreville that it could not dispose of the soil as regulated fill or otherwise under applicable statute/regulation, essentially limiting disposal options and requiring compliance with disposal rules. *Id.* at 869. Sayreville appealed the two letters to this Board, which consolidated the appeals and ruled the letters were appealable actions but were not ripe because both parties had by-passed the applicable regulatory framework of the general permit for a review on the merits. *Id.* at 870. Sayreville appealed to the Commonwealth Court on the issue of ripeness. *Id.* at 871.

The Commonwealth Court did not determine the issue of ripeness as it found the Department's letters did not constitute appealable actions within the Board's jurisdiction. *Id.* at 871. The Commonwealth Court concluded that the letters were merely advisory or interpretative as they explained regulatory positions on *future compliance* but did not impose obligations or alter Sayreville's current personal or property rights or duties. *Id*. at 872. Specifically, the Commonwealth Court stated:

> Here, the Department's July and December letters do not grant or deny a pending application or permit, and they do not direct Sayreville to take any action nor impose any obligations on the company. Rather, the letters are best characterized as advisory opinions, expressing the Department's understanding of Pennsylvania law. Indeed, as the December letter demonstrates, the Department was not even in possession of all relevant facts when its initial letter issued. (*See* letter of December 23, 2010, stating, "We have recently learned that Sayreville's contaminated soil is licensed in New Jersey . . . .").
>
> While the Department's position may not actually change from that expressed above, as of yet, neither Sayreville nor HCP have followed the formal regulatory process required to seek approval to beneficially use the soil and, therefore, the Department has not yet adversely affected Sayreville's personal or property rights, privileges, duties or obligations.

Id. at 872.

The Commonwealth Court vacated the Board's adjudication and remanded the case with instructions to quash the appeals as they did not constitute final actions. *Id.*

Upon review of the above cases, we do not believe *Clean Air Council* or *Sayreville* are analogous to the current factual scenario present before us. Indeed, as discussed in more detail below, the regulations in this case are inapposite to the ones present in *Clean Air Council*, in that the coproduct regulations require extensive measures to be taken to determine whether something is in fact a coproduct and provide the Department with authority to render a coproduct determination. 25 Pa Code § 287.1. Additionally, unlike *Sayreville*, where the circumstances

involved a letter advising a party as to the legality of its potential future action, the present matter involves a letter that alters Appellant's current and ongoing duties and obligations.

In our evaluation of precedential case law governing this issue, we find the instant matter to be analogous to the factual scenario present in *Borough of Kutztown v. DEP*, 2001 EHB 1115. In *Kutztown*, the Department sent the Borough of Kutztown a letter stating that its wastewater treatment facility was projected to be overloaded and requested that the Borough submit a corrective action plan to comply with the applicable regulations. *Kutztown*, 2001 EHB at 1115-1116. Kutztown filed an appeal of the letter, and the Department moved to dismiss the appeal on the basis that the letter did not constitute an "action" by the Department. *Id.* at 1116.

Similar to the current matter, the Department argued that the letter, unlike an order, was not independently enforceable and was akin to a notice of violation, which merely advised Kutztown of its legal obligations but did not itself compel Kutztown to satisfy those obligations. Kutztown may have faced consequences if it ignored the regulations, but it was free to disregard the letter. *Id*. In response, Kutztown stated that the letter by its own terms required Kutztown to take several very specific, costly actions. But for the letter, Kutztown would not be required to act. The letter imposed liability on Kutztown that did not previously exist, and in effect, created a significant change in Kutztown's *status quo*. *Id.* at 1117.

Our Board found that although the specific wording of the letter may have looked like it was an advisory opinion, the *substance* of the letter made it an appealable action. The Board stated that it is not bound by the actual words chosen by the letter writer, but it must look at whether the intent or consequences of the letter affected the personal or property rights of Kutztown and whether the Board could offer any meaningful relief. *Id.* at 1122. The Board concluded that Kutztown's rights were altered by the letter as "no reasonably prudent municipality would simply

file the letter away and wait for the other foot to fall." *Id.* Kutztown would have been taking a serious risk had it not appealed. The Board further concluded that it could offer meaningful relief in the appeal as it could find the Department's determination of a looming overload was not accurate, thereby relieving Kutztown of any expensive and time-consuming planning efforts. *Id.* at 1124. Thus, the letter was deemed an appealable action subject to the Board's review and jurisdiction.

Appealable Action Factors

In looking at the current matter, we must examine all the relevant factors to determine if the Department's coproduct letter is an appealable action. First, we look at the wording of the Department communication, *i.e.*, the language of the letter itself. Here, the coproduct letter explicitly states: "[t]his letter is neither an order nor any other final action of the DEP on your coproduct determination. It neither imposes nor waives an action available to the Department under any of its statutes."[4] (*See* coproduct letter, pg. 3). Based on the words themselves, the coproduct letter does not appear to be a final action. However, to truly examine whether this is an appealable action, the Board must look at substance over form. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1122; *M&M Realty Partners, L.P. v. DEP,* 2024 EHB 406, 407; *Tighes v. DEP*, 2024 EHB 451, 457 & n. 5.

We are not persuaded by a carefully cultivated wordsmith when the effect of the letter produces adverse consequences or changes the *status quo* for a party. We must closely examine the purpose and intent as well as the practical impact of the communication. *Kutztown,* 2001 EHB at 1123. Although the wording of the coproduct letter states this is not a final action, the

[4] The Board views the Department's self-serving language unfavorably. It is the Board's responsibility to determine jurisdiction over what is an appealable action.

circumstances surrounding the purpose and intent of the letter and the effect it has on Appellant suggest otherwise.

Here, the coproduct letter acknowledges that the Department requested the Danylko 4 Report from Appellant. Following review of the Danylko 4 Report, the Department issued the subject coproduct letter stating its determination that the Report did not meet the conditions necessary to establish a coproduct. This determination in effect invalidates that the brine is a coproduct and prohibits the distribution of the brine. (*See* coproduct letter at pg. 1; 25 Pa Code § 287.1). The fact that the Department requested the Danylko 4 Report and then issued a response disagreeing with the Appellant's determination suggests an air of finality. There is no indication that the coproduct letter is tentative, contingent, or interim. It does not ask or allow for further study nor does it open the matter up for discussion, debate or suggestions. *See Kutztown*, 2001 EHB at 1123-24. Indeed, the coproduct letter states:

> In order for a coproduct determination to be valid, **you must generate and maintain documentation that meets the conditions of the definition of** "coproduct" in 25 Pa Code § 287.1 (relating to definitions) and the requirements as specified in 25 Pa Code § 287.8 relating to coproduct determinations)[*sic*], and, in accordance with 25 Pa Code § 287.8(e), **you are required** to provide the documentation that supports the coproduct determination to persons selling, transferring, possessing or using the material. **Managing the material as a coproduct prior to generating or supplying documentation** that sufficiently supports the coproduct determination to persons selling, transferring, possessing, or using the material **may result in enforcement action.**

(*See* coproduct letter at pg. 1 (emphasis added)).

As such, the Board finds the coproduct letter to fundamentally alter the current and ongoing *status quo* of Appellant's business. The letter directs the company to cease use of the brine or act - by generating, maintaining, and producing documentation that sufficiently supports a valid coproduct determination - to avoid facing enforcement consequences.

Also, we find the regulatory language itself to be in direct conflict with the Department's assertions. Specifically, the Department argues "there is no defined evaluative process in the statute, regulations, or provision of law requiring the Department to render a decision." (DEP Brief in Support of Motion to Dismiss, pg. 9). The Department likewise argues that the "regulations do not state that the Department shall approve or deny a coproduct determination, nor do they require BCD to submit a form or application to the Department for the Department to declare that is has a valid 'coproduct.' " (*Id*.). However, upon a review of the regulations governing coproducts, the term "coproduct" not only has a fairly complicated definition[5] but also requires a complex and

[5] *Coproduct—*
(i) A material generated by a manufacturing or production process, or a spent material, of a physical character and chemical composition that is consistently equivalent to the physical character and chemical composition of an intentionally manufactured product or produced raw material, if the use of the material presents no greater threat of harm to human health and the environment than the use of the product or raw material. A material may not be compared, for physical character and chemical composition, to a material that is no longer determined to be waste in accordance with § 287.7 (relating to determination that a material is no longer a waste). **A coproduct determination, which shall be made in accordance with § 287.8 (relating to coproduct determinations),** only applies to materials that will be applied to the land or used to produce products that are applied to the land, including the placement of roadway aggregate, pipe bedding or construction materials, or that will be used for energy recovery as is with a minimum BTU value of 5,000/lb. as generated or as fired. If the proposed coproduct material is oil, a determination may only be made for oil refined from crude oil or synthetically produced oil, not contaminated by physical or chemical impurities, that will be used for energy recovery if the material has a minimum heat content (BTU value) comparable to the petroleum fuel it will replace.
(ii) The term only applies to one of the following: *[omitted]*
(iii) If no product or produced raw material exists for purposes of chemical and physical comparison, the Department will review, upon request, information provided and determine whether the material is a coproduct because it is an effective substitute for an intentionally manufactured product or produced raw material, based on the criteria in subparagraph (ii) and whether the material presents a threat of harm to human health and the environment in accordance with § 287.8.
(iv) A waste may become a coproduct after processing if it would otherwise qualify as a coproduct.
(v) Persons producing, selling, transferring, possessing or using a material who claim that the material is a coproduct and not a waste **shall demonstrate** that there is a known market or disposition for the material, and **that they meet the terms of this definition and § 287.8. In doing so, they shall provide appropriate documentation, such as contracts showing that a second person uses the material as an ingredient in a production process, to demonstrate that the material is not a waste.**

25 Pa. Code § 287.1 (emphasis added).

extensive evaluative process[6] to be made by either a party or the Department that the product is in fact a "coproduct." 25 Pa. Code §§ 287.1; 287.8.

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[6] (a) In addition to meeting the conditions of the definition of ''coproduct'' in § 287.1 (relating to definitions**), a person performing a coproduct determination shall evaluate chemical composition and threat of harm to the environment and public health in accordance with this section.** A proposed coproduct may not present a greater threat of harm to human health and the environment than use of an intentionally manufactured product or produced raw material. A greater threat of harm is presented if one of the following is met:

(1) For comparison of the proposed coproduct with a product or produced raw material, hazardous or toxic constituents are present at elevated levels unless an assessment of hazardous and toxic constituents demonstrates that the constituents are not biologically available.
(2) For a proposed coproduct where no product or produced raw material will be replaced, an assessment of hazardous and toxic constituents demonstrates that the constituents are not biologically available.

(b) If the proposed coproduct is being compared to an intentionally manufactured product or produced raw material, a person performing a coproduct determination shall demonstrate that the use of a proposed coproduct does not present a greater threat of harm to human health and the environment by performing the following:

(1) An evaluation to determine which, if any, hazardous or toxic constituents are present in the proposed coproduct at levels exceeding those found in the material it is replacing.
(2) An evaluation of the total levels of hazardous or toxic constituents, including the constituents in 40 CFR Part 261, Appendix VIII (relating to hazardous constituents) as incorporated by reference in § 261a.1 (relating to incorporation by reference, purpose and scope), to determine whether the total levels of constituents contained in the proposed coproduct exceed the total levels found in the intentionally manufactured product or produced raw material it is replacing. Based on generator knowledge, if a hazardous or toxic constituent is not present evaluation of total levels is not required.
(3) An evaluation of the levels of leaching of hazardous or toxic constituents, including the constituents in 40 CFR Part 261, Appendix VIII as incorporated by reference in § 261a.1, to determine whether the levels of leaching from the proposed coproduct exceed the levels of leaching from the manufactured product or produced raw material it is replacing. A leaching procedure shall be performed that is appropriate for the intended use of the proposed product. Based on generator knowledge, if a hazardous or toxic constituent is not present evaluation of leaching levels is not required.
(4) The routes of exposure to humans and ecological receptors shall be identified. These routes of exposure shall include ingestion, inhalation, dermal contact, leaching to the groundwater, plant uptake and surface runoff potential. Mitigating circumstances, such as protective gear worn by workers to reduce exposure during processing or application of the proposed coproduct, shall be identified.
(5) The use of a 95% upper confidence interval, using the ''Test Methods for Evaluating Solid Waste'' (EPA SW-846), may be applied to the comparisons of constituent levels between the proposed coproduct and the intentionally manufactured product or produced raw material it is replacing.

(c) If the proposed coproduct is not being compared to an intentionally manufactured product or produced raw material, a person performing a coproduct determination shall demonstrate that the proposed coproduct does not present a threat of harm to human health and the environment and the hazardous or toxic constituents are not biologically available by performing the following:

(1) An evaluation of the total levels of hazardous or toxic constituents, including the constituents in 40 CFR Part 261, Appendix VIII as incorporated by reference in § 261a.1. Based on generator knowledge, if a hazardous or toxic constituent is not present evaluation of total levels is not required.
(2) An evaluation of the levels of leaching of hazardous or toxic constituents, including the constituents in 40 CFR Part 261, Appendix VIII as incorporated in § 261a.1. Based on generator knowledge, if a hazardous or toxic constituent is not present evaluation of leaching levels is not required.
(3) The routes of exposure to humans and ecological receptors shall be identified. These routes of exposure include ingestion, inhalation, dermal contact, leaching to the groundwater, plant uptake and surface runoff

For example, the regulations clearly indicate that there is a defined regulatory procedure for determining whether something qualifies as a coproduct, and the Department may be required to render a determination on the matter by assessing a variety of factors. 25 Pa. Code §§ 287.1; 287.8. The regulation states: "[i]f no product or produced raw material exists for purposes of chemical and physical comparison, the Department will review, upon request, information provided and determine whether the material is a coproduct . . . . 25 Pa. Code. § 287.1(B)(iii). The Department is also permitted by regulation to make industry wide coproduct determinations. 25 Pa Code § 287.9. Additionally, the regulations state, "[a] person who completes a coproduct determination shall maintain documentation supporting the determination. This documentation shall be available to the Department upon request" as well as to any "persons selling, transferring, possessing or using the material." 25 Pa Code § 287.8(d)&(e).

We find it self-serving that the Department excluded all relevant portions of the regulatory language discussing its role in the coproduct determination in the actual coproduct letter. We also find the Department to be inconsistent in its own arguments. The Department argues in its Reply Brief "that the Department's Letter expresses the Department's interpretation of a regulation, and that the Department has no authority to approve or deny a coproduct determination" yet states in its Brief in Support of its Motion to Dismiss that "[t]he Department's Letter advised BCD of the Department's opinion that the Danylko 4 Report did not include all of the necessary chemical

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potential. Mitigating circumstances, such as protective gear worn by workers to reduce exposure during processing or application of the proposed coproduct, shall be identified.

(4) The use of a 95% upper confidence interval, using the ''Test Methods for Evaluating Solid Waste'' (EPA SW-846), may be applied to the analytical results of the constituents evaluated.

(d) A person who completes a coproduct determination shall maintain documentation supporting the determination. This documentation shall be available to the Department upon request.

(e) A person who completes a coproduct determination shall provide documentation supporting the determination to persons selling, transferring, possessing or using the material.

25 Pa. Code § 287.8 (emphasis added).

analysis to meet the regulatory requirements." (*See* DEP Brief in Supp. of Motion to Dismiss, pg. 2 & DEP Reply Brief, pg. 1).

Thus, unlike *Clean Air Council*, this matter involves: (1) the coproduct definition itself providing an evaluative process to be undertaken to determine something is in fact a coproduct,[7] (2) a regulatory provision of law requiring the Department to render a coproduct determination, and (3) regulations requiring a party to submit to the Department and others documentation proving it has a valid coproduct.

Furthermore, the Department argues the Board should not concern itself with the effects on private contracts in this matter.[8] We disagree. The Department's stated position undermines its own admission that it originally requested the Report only *after* it became aware of a contract dispute between private parties. (*See* DEP's Brief in Supp. of Motion to Dismiss, pg. 1). The Department cannot play both sides of the fence on this issue. The Department requested the Danylko 4 Report after learning of a dispute between Pennfield Energy, LLC and Harmony Township that involved the use of BCD's brine material. (*Id.* at pg. 1). Upon BCD's receipt of the Department's coproduct letter stating that the Danylko 4 Report did not meet the requirements of a valid coproduct, BCD cancelled its contracts to sell its brine. It is only reasonable that the Department and the Board consider the effects the coproduct letter has on BCD's contracts, as they are relevant and important to the matter at issue.

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[7] *See* fn. 6. at § 287.8(b)&(c).

[8] The Department argues that "BCD evaluated its options and unilaterally made the business decision to stop selling the brine from the Danylko 4 well as a coproduct [and,] [t]o allow BCD to generate an appealable action by unilaterally making business decisions based on the Department's Letter leads to the absurd result that any recipient of any Department letter can create jurisdiction by changing their position." (*Id*. at pg. 10).

Accordingly, we go back to one of the factors of whether a Department letter is a final action - the factor of "practical impact." The Department must have known, or reasonably should have known, the impact that the letter would have on BCD's business and contractual relationships. As in *Kutztown*, we do not believe a reasonably prudent company would sit idly by and take its chances on continuing to sell its brine after receiving correspondence such as the coproduct letter. BCD did what any prudent business would have done by cancelling the contracts, an action that it would not have taken but for the Department coproduct letter.

Lastly, unlike *Sayreville* where the Board found applicable procedures established in the general permit had not been followed for a review on the merits,[9] we find that, as in *Kutztown*, the Board can offer meaningful relief in this matter. The Board may find the Danylko 4 Report does in fact meet the legal definition of a coproduct and thereby relieve BCD from the expense of hiring an additional expert and obtaining additional data for its Report. It would also allow BCD to continue with the *status quo* of continuing to sell its brine as a coproduct.

Conclusion

In sum, the Department's coproduct letter is a determination that directly affects Appellants' personal property rights, ongoing obligations, and business *status quo*, creating a final action over which the Board has jurisdiction. Thus, we deny the Department's Motion to Dismiss.

Accordingly, we issue the following order.

[9] "Specifically, the Board noted that the procedures set forth in the general permit for new waste streams at the HCP site had not been followed, that HCP was required to seek approval if it wanted to use the material, and it was not even clear that HCP wanted the material." *Sayreville*, 60 A.3d at 870.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BCD PROPERTIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2025-066-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of December, 2025, it is hereby **ordered** that the Department of Environmental Protection's Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Paul J. Bruder, Jr.
PAUL J. BRUDER, JR.
Judge

DATED: December 29, 2025

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