



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 BY :  
AND THROUGH ITS TRUSTEE LAUREL A :  
HIRT and LAUREL A. HIRT, Individually :

v. :

EHB Docket No. 2025-005-W

COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION and ERIE COUNTY :  
CONSERVATION DISTRICT and :  
MILLCREEK TOWNSHIP SCHOOL :  
DISTRICT, Permittee :

ANGELA CRES TRUST OF JUNE 25, 1998 BY :  
AND THROUGH ITS TRUSTEE LAUREL A :  
HIRT and LAUREL A. HIRT, Individually :

v. :

EHB Docket No. 2025-022-W

COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION and ERIE COUNTY :  
CONSERVATION DISTRICT and :  
MILLCREEK TOWNSHIP SCHOOL :  
DISTRICT, Permittee :

Issued: September 19, 2025

**OPINION AND ORDER ON  
MOTIONS TO AMEND APPEAL**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Appellants' Motions for Leave to Amend Appeal are granted where the Board finds that the amendments will not unduly prejudice the opposing parties and where the opposing parties have not demonstrated that the new objections are beyond the scope of the Board's review.

## OPINION

### Introduction

This matter involves two Notices of Appeal filed with the Environmental Hearing Board (Board) by Angela Cres Trust of June 25, 1998 by and through its trustee Laurel A. Hirt and by Laurel A. Hirt, individually (collectively, the Trust). The appeals challenge a Chapter 105 Water Obstruction and Encroachment General Permit issued to Millcreek Township School District (School District) by the Erie County Conservation District (Conservation District) in connection with a project known as the Asbury Storm Sewer Project.

### Background

On January 14, 2025, the Conservation District, by letter, acknowledged receipt of and registered the School District's notification to use General Permit No. GP042500225-001 (permit), a water obstruction and encroachment general permit, for its Asbury Storm Sewer Project (project). The project involves the installation of a 24-inch stormwater pipe directing stormwater to a property adjacent to that owned by the Trust. The Conservation District authorized the permit pursuant to authority delegated to it by the Department of Environmental Protection (Department) under the Pennsylvania Dam Safety and Encroachments Act, Act of Nov. 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 (Dam Safety Act); 25 Pa. Code Chapter 105; and the Chapter 105 Permitting Program. On February 5, 2025, the Trust filed an appeal of the issuance of the permit with the Board, docketed at EHB Docket No. 2025-005-W. On April 10, 2025, the Conservation District acknowledged receipt of modifications to the permit, and on April 18, 2025, the Trust filed an appeal of the modified permit at EHB Docket No. 2025-022-W.<sup>1</sup>

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<sup>11</sup> A motion to consolidate the appeals is pending before the Board.

On August 26, 2025, the Trust filed nearly identical motions for leave to amend both appeals (motion).<sup>2</sup> On September 11, 2025, the Trust supplemented its motion with a verification and affidavit. The Department and Conservation District,<sup>3</sup> as well as the School District, have filed responses opposing the motion.

### **Standard of Review**

An appeal before the Board may be amended as of right within 20 days of the filing of the notice of appeal. 25 Pa. Code § 1021.53(a). After the 20-day period, the Board may grant leave for amendment “if no undue prejudice will result to the opposing parties.” *Id.* at § 1021.53(b); *Dengel v. DEP*, 2024 EHB 466, 468; *Sokol v. DEP*, 2016 EHB 427, 428. The decision of whether to allow a party to amend its appeal after the period for amendment-as-of-right has expired “rests firmly within the Board’s discretion.” *Dengel*, 2024 EHB at 469 (quoting *Tapler v. DEP*, 2006 EHB 463, 465).

### **Discussion**

Based upon our review of the Trust’s motion, which includes as an exhibit a document tracking the proposed amendments to the original appeal, it appears that the Trust seeks to amend its appeal to clarify certain existing objections and to add new objections. (Exhibit A to Motion for Leave to Amend.) The Trust asserts that the grounds for the new objections were learned in discovery and could not have been included in the original appeal. The Trust further asserts that none of the parties are prejudiced by the amendment to the appeal because it constitutes a substantively small addition to the original appeal and concerns facts already known to the other

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<sup>2</sup> Because the Motions for Leave to Amend Appeal are virtually identical, we refer to them in the singular as “motion.”

<sup>3</sup> The Department and Conservation District’s response was filed jointly and both parties are represented by the same counsel in this matter.

parties. The Department and Conservation District and the School District oppose the motion to amend, arguing that it is prejudicial and improperly expands the scope of the appeal.

As we recently explained in *Ullom v. DEP*, EHB Docket No. 2024-114-W (Opinion and Order on Motion for Leave to Amend Notice of Appeal issued June 11, 2025), the prior version of Board Rule 1021.53 contained a stricter standard for amendment of appeals. That version of the rule required an appellant to demonstrate that the requested amendment satisfied one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

35 Pa.B. 2107 (Annex A) (April 9, 2005).

The rule was amended in 2006 to its present form which allows amendment of an appeal after the period for amendment-as-of-right has expired so long as “no undue prejudice will result to the opposing parties.” 25 Pa. Code § 1021.53(b). The Preamble to the proposed 2006 rule change stated as follows:

This subsection has been amended to create a more liberal standard for allowing the amendment of appeals and complaints after the 20-day amendment as of right period. Rather than setting forth three particular circumstances under which appeals and complaints may be amended after the 20-day amendment as of right period, the rule allows amendment when no undue prejudice will result to the opposing parties.

35 Pa.B. 2107 (Preamble) (April 9, 2005).

Thus, the decision of whether to allow the Trust's amendment comes down to whether the Board believes it will cause undue prejudice to the Department, Conservation District and School District. Factors that the Board considers in making this determination include the following: the reason for the amendment, the time when the amendment is requested relative to other developments in the litigation such as the hearing schedule, the scope and size of the amendment and the extent to which it diverges from the original appeal, and whether the opposing party had notice of the issue. *Borough of St. Clair v. DEP*, 2013 EHB 171, 173 (citing, *inter alia*, *Rhodes v. DEP*, 2009 EHB 325, 328-29.)

Based on a consideration of the above factors, we find that the Department, Conservation District and School District will not be unduly prejudiced by the proposed amendment to the appeal. This appeal is early in the litigation process: Discovery is still ongoing, dispositive motions have not been filed and no hearing has been scheduled. Additionally, based on our review of the proposed amendments, they appear to be related to objections that are already in the appeal regarding flooding and stormwater management.<sup>4</sup> Moreover, even if the proposed amendments were to expand the litigation, as argued by the Department, Conservation District and School District, that, by itself, would not necessarily prevent us from granting the motion. As we pointed out in *Ullom*, in adopting the language of the 2006 rule, the Board rejected one commenter's suggestion that Rule 1021.53 provide that any expansion of the litigation is *per se* prejudicial:

Such a statement would swallow the rule since there may be times when an amendment *will* expand what is in the case. The question is not whether the case will be expanded but whether the expansion at that stage of the proceeding is prejudicial. This will be determined on a case-by-case-basis. An expansion 21 days after an appeal has been filed may not be prejudicial, whereas the same expansion closer to the trial may be problematic.

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<sup>4</sup> See paragraphs 8 and 9 of the appeal docketed at EHB Docket No. 2025-005-W and paragraphs 10 and 11 of the appeal docketed at EHB Docket No. 2025-022-W.

36 Pa.B. 709 (Preamble) (Feb. 11, 2006) (emphasis added) (cited in *Ullom*, slip op. at 8-9).

The Department and Conservation District further argue that they are prejudiced because they have already served the report of their expert, Karl Gross, P.E., on the Trust, and in his report, Mr. Gross did not opine on the new objections set forth in the amended appeal. We agree that Mr. Gross should have an opportunity to weigh in on any new objections raised by the Trust, and this can easily be corrected by the submission of a supplemental report by Mr. Gross.<sup>5</sup>

Finally, the Department and Conservation District and the School District argue that the Trust's objections regarding Millcreek Township's and the School District's management of stormwater is beyond the Board's jurisdiction. The Department and Conservation District particularly direct our attention to the following new objections which appear as paragraphs 13 and 15 in the amended appeal at Docket No. 2025-005-W and paragraphs 15 and 17 in the amended appeal at Docket No. 2025-022-W:

Accordingly, the GP-4 permit is inappropriate and should not be applied. The School District acknowledges that stormwater conditions will not be improved by the project.

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The registration is a violation of stormwater management laws and regulations. Also, it is not prudent and safe stormwater management.

(Exhibit A to Motion.)

The Department and Conservation District argue that these objections “seek to expand this appeal from a review of whether the registration requirements of the [Bureau of Waterways Engineer and Wetlands’ General Permit 04] have been met to a comprehensive evaluation of how

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<sup>5</sup> The Case Management Order issued in this matter on August 4, 2025 allows for the service of supplemental expert reports by the Department and Conservation District on or before November 5, 2025.

the School District and Millcreek Township manage stormwater.” (Department/Conservation District Memorandum of Law in Response, p. 2.) The Department and Conservation District assert that similar objections were rejected as being outside the Board’s jurisdiction in another matter involving the Trust: In *Angela Cres Trust of June 25, 1998 v. DEP*, 2009 EHB 342, the Trust appealed the extension of a water obstruction and encroachment permit that authorized Millcreek Township to widen and deepen a channel located in part on the Trust’s property. The Board found that a number of the Trust’s objections did not relate to the permit but, instead, challenged the adequacy of Millcreek Township’s stormwater management plan. As the Department correctly points out, the Board dismissed those objections stating:

[O]ur review is limited to an examination of [the] permit and the work authorized by it. While we understand that the Trust is unhappy with how the Township manages storm water in the area, the Township’s management of storm water is not an “action of the Department” that is reviewable by this Board . . . We cannot use this appeal as an opportunity to address the legality or effectiveness of the Township’s entire storm water management plan.

*Id.* at 363, 364.

The Department and Conservation District rely on this language in asking us to deny the Trust’s motion on the grounds that the aforesaid objections relating to stormwater management are outside the scope of this Board’s review. However, it is important to note that the Board in the 2009 *Angela Cres* decision went on to state, “Where Millcreek’s storm water management plan and storm sewer project are relevant to the channel project, which is before us on appeal, we may certainly consider evidence relating to those matters.” *Id.* at 363.

Likewise, here, where Millcreek Township’s management of stormwater is relevant to our review of the action on appeal, we may consider evidence related to it. Moreover, it does not appear to us that the aforesaid objections, on their face, are beyond the scope of the Board’s

jurisdiction as the Department and Conservation District suggest. If the Department and Conservation District wish to pursue that argument, it may be more appropriate to do so in a properly supported dispositive motion to which the Trust may file a response.

Accordingly, we enter the following order:



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**ORDER**

AND NOW, this 19<sup>th</sup> day of September, 2025, it is hereby ordered that the Motions for  
Leave to Amend Appeal filed at EHB Docket Nos. 2025-005-W and 2025-022-W are **granted**.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock  
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**MARYANNE WESDOCK**  
**Judge**

**DATED: September 19, 2025**

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

Attention: Maria Tolentino  
(via *electronic mail*)

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