COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.*, and EMMA WRIGHT, *et al.*, Intervenors	:	**EHB Docket No. 2024-016-B (Consolidated with 2024-017-B, 2024-018-B, 2024-019-B, 2024-020-B, 2024-021-B, 2024-026-B, 2024-027-B, 2024-028-B, 2024-029-B, 2024-030-B, 2024-031-B, 2024-032-B, 2024-033-B, 2024-034-B, 2024-035-B, 2024-036-B, 2024-037-B, 2024-038-B, 2024-041-B, 2024-042-B, 2024-043-B, 2024-044-B, 2024-045-B, 2024-046-B, 2024-047-B, 2024-048-B, 2024-049-B, 2024-050-B, 2024-051-B, 2024-052-B, 2024-053-B, 2024-054-B, 2024-055-B, 2024-056-B, 2024-057-B)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CATALYST ENERGY INC., PERMITTEE	:	**Issued: January 17, 2025**

OPINION SUPPORTING ORDER DENYING
APPELLANTS' AND INTERVENORS' PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies a petition for supersedeas where appellants and intervenors have not shown by a preponderance of the evidence that they are likely to prevail on the merits of their appeal of a permit changing the use of an existing well to an injection well.

O P I N I O N

Background

The Appellants' and Intervenors' (collectively, "Ms. Lananger") have filed a petition for supersedeas in connection with their appeal of the Department of Environmental Protection's ("Department's") issuance of a change in use permit at Permit Number 37-083-46237-00-01 ("Permit") to Catalyst Energy, Inc. ("Catalyst"). The Permit authorizes Catalyst to convert an existing conventional oil and gas well to an underground injection well in Keating Township, McKean County ("Injection Well"). The Injection Well is located at 4505 State Route 646, Cyclone, PA (the "Site"). The Injection Well will receive flowback and produced water generated from Catalyst's oil and gas related operations as well as oil and gas related wastewaters from other oil and gas operators. (Stipulation of Fact for Supersedeas Hearing ("Stip."), at ¶ 5). Prior to applying for the change-of-use Permit, Catalyst obtained an Underground Injection Control Permit for the Injection Well from the United States Environmental Protection Agency ("EPA") as is required by the Department.

The Department issued the Permit on January 11, 2024 and a corrected permit was issued on January 17, 2024, including two additional conditions. (Joint Ex. 4) (Stip. at ¶ 13). Between February 15, 2024 and February 26, 2024, the Board received, via U.S. mail, thirty-eight individual appeals of the Permit. The majority of the appeals were consolidated under EHB Docket No. 2024-016-B on March 28, 2024 and the remainder of the appeals were eventually consolidated on April 18, 2024. On May 6, 2024, sixteen individuals, collectively, filed a petition to intervene and the Department subsequently filed an answer in opposition to their petition. On May 30, 2024, the Board issued an Opinion and Order granting the Intervenors' petition. As the case progressed, two appellants withdrew their appeals and ten intervenors discontinued their interventions.

After granting several extensions of pre-hearing deadlines, discovery ultimately concluded in this matter on October 11, 2024. On October 28, 2024, Ms. Lananger filed an expedited motion

to reopen discovery and to extend pre-hearing deadlines. The Department and Catalyst filed responses in opposition to the expedited motion on November 7, 2024 and, that same day, Ms. Lananger filed an Application for Temporary Supersedeas ("Application") and a Petition for Supersedeas (the "Petition"). The Board held a conference call with the parties on November 8th to discuss the Application and Petition, as well as Ms. Lananger's expedited motion. Following the conference call, and after receiving a joint update and proposed orders on the Application and Petition from the parties, the Board, on November 11, 2024, granted in part and denied in part the temporary supersedeas, allowing Catalyst to conduct activities related to the preparation for injection but prohibited any actual injection of oil and gas related fluids and further prohibited any earth disturbance activities. On November 12, 2024, the Board issued an order that scheduled the supersedeas hearing and set deadlines for submitting responses to the Petition, witness and exhibits lists, and stipulations. In addition, the order stayed the deadline for filing dispositive motions until the Petition for Supersedeas was resolved. On November 20, 2024, Ms. Lananger filed a motion for site view and the Department and Catalyst subsequently filed responses in opposition. The Board ultimately denied both Ms. Lananger's outstanding expedited motion to reopen discovery and the motion for site view on November 21st and November 25th, respectively.

The Board held a pre-hearing conference call with the parties on November 26, 2024 to discuss the final logistics in advance of the hearing, including the possibility of relocating the hearing from the Board's Erie office to its Pittsburgh office because of adverse weather conditions. On December 2, 2024, due to the heavy accumulation of snow in Erie Pennsylvania, the Board relocated the hearing to Pittsburgh. The supersedeas hearing was held over the course of five non-consecutive days and concluded on December 10, 2024 after the parties made their closing arguments. The following day, the Board issued an order permitting the parties to file post-hearing

briefs by December 24, 2024 which they all opted to submit. On December 27, 2024, we issued an order denying the Petition for Supersedeas and lifting the Temporary Supersedeas (the "Order"). This Opinion is in support of the Order.

Standard of Review

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). A supersedeas, as defined by the Board's regulations, is a "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. The grant or denial of a supersedeas is committed to the Board's discretion as guided by relevant judicial precedent and the Board's own precedent and the balancing of relevant criteria applied to the specific facts of the case. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 484; *Center for Coalfield Justice v. DEP et al*., 2017 EHB 38, 43. Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Liberty Township et al., v. DEP et al.,* 2023 EHB 170, 172; *Abercrombie v. DEP*, 2020 EHB 293, 295; *Erie Coke Corp. v. DEP*, 2019 EHB at 485.

The Board may grant a supersedeas temporarily suspending the status of the Department's action "upon cause shown." 35 P.S. §7514(d). The petitioner bears the burden of demonstrating that a supersedeas should be granted. *Erie Coke Corp*, 2019 EHB at 484; *Delaware Riverkeeper Network*, 2016 EHB 41, 43 (citing *Tinicum Twp. v. DEP*, 2008 EHB 123, 126). In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three statutory criteria, with a strong showing of likelihood of success on the merits. *Delaware*

Riverkeeper Network et al., v, DEP, 2022 EHB 103,110; *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91 (citing *Pa. Mining Corp. v. DEP*, 1996 EHB 808, 810); *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. Where a petitioner fails to satisfy any one of the supersedeas criteria, the Board is not obligated to consider the remaining criteria. *Liberty Township,* 2023 EHB at 172**;** *Spencer v. DEP*, 2019 EHB 756, 760 (citing *Teska v. DEP*, 2016 EHB 541, 547). In considering whether the criteria have been met, we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals, Inc. v. DEP*, 2021 EHB 104, 106 (citing *Del. Riverkeeper Network v. DEP*, 2016 EHB 41, 43).

Analysis

Ms. Lananger's appeal challenges the Department's issuance of the Permit for the Injection Well. Ms. Lananger, along with the other Appellants and Intervenors, objected to the Injection Well because of concerns that it would leak and have a negative impact on the drinking water and the general environment, as well as the health and safety of people in the area. Apparently, Catalyst was gearing up to begin injecting fluids into the Injection Well in mid-November 2024. In early November 2024, prior to Catalyst commencing injection, Ms. Lananger filed her application for temporary supersedeas and Petition for Supersedeas. Unlike most supersedeas petitions before the Board which are filed far earlier in the proceedings, Ms. Lananger's filed her Petition after discovery had fully concluded. The Board granted the temporary supersedeas, prohibiting Catalyst from disposing of fluids in the Injection Well and held a hearing on the Petition for Supersedeas in early December 2024. Following the conclusion of the hearing and the review of the parties post-hearing briefs, on December 27, 2024, the Board issued an Order denying the Petition for Supersedeas and lifting its temporary supersedeas. We also stated in that Order that an Opinion supporting the Order would follow. This is that Opinion.

In order to prevail on her Petition, Ms. Lananger, must convince the Board that the factors that we consider in evaluating a supersedeas request, including but not limited to, the risk of irreparable harm to Ms. Lananger, the likelihood of her success on the merits, and the likelihood of injury to the public or other parties, such as the permittee in third-party appeals, support the grant of a supersedeas. Ms. Lananger failed to do so in this case. Specifically, the filings and the evidence presented at the hearing do not demonstrate that she is likely to succeed in winning her appeal at a full hearing. Because Ms. Lananger failed to prevail on the key factor in our consideration, her likelihood of success on the merits, we are not required to address any additional factors in denying her Petition for Supersedeas and, as such, do not discuss those in our decision.

Likelihood of Success on the Merits

In order to succeed in challenging a Department permit decision, Ms. Lananger must demonstrate by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In considering this case, it is important to keep in mind the type of permit that is at the heart of this matter. Ms. Lananger is challenging the Department's decision to grant a permit to Catalyst, authorizing it to change the use of an existing production well, the Catalyst Lot 580-1 well, into an injection well for the disposal of oil and gas waste fluids. Because Catalyst's activity involves the conversion of an existing well to an injection well, the Site contained the pre-existing production well, some limited production equipment and an access road prior to the permit decision. The regulation governing the permitting of an injection well is found at 25 Pa. Code § 78.18. It provides that a person may not alter an existing well to be

a disposal well unless the person: (1) obtains a well permit under § 78.11; (2) submits a copy of the well permit for the disposal well from EPA along with the EPA well permit application and related documentation; (3) submits a copy of a control and disposal plan for the disposal well and related facilities that meets the requirements of § 91.34; and (4) submits a copy of an erosion and sedimentation plan for the disposal well that meets the requirements of Chapter 102 and §78.53.

In her filings and at the hearing on the Petition for Supersedeas, Ms. Lananger raised a number of issues with the Department's permit decision that can be grouped into two major lines of argument. The first focused on the permitting of the surface infrastructure and the potential impact on the watershed and wetlands arising from Catalyst's additional development at the Site and the future operations of the Injection Well. In her post-hearing brief, Ms. Lananger argues that the Department failed to require Catalyst to satisfy the requirements of 25 Pa. Code § 78.18 (3) and (4) dealing with the control and disposal ("C&D") plan and an erosion and sedimentation ("E&S") plan. Further, she argues that the Department did not properly consider and apply the Clean Streams Law and regulations governing the waterways and wetlands at the Site. Ms. Lananger's second line of argument is centered on the downhole integrity of the Injection Well and the potential impact of the injection of oil and gas fluids on the drinking water in the area surrounding the Injection Well. Ms. Lananger stated that the groundwater in the vicinity of the Injection Well has existing contamination issues that have not been properly addressed by the Department or Catalyst and asserts that the Department's issuance of the Permit did not properly evaluate and/or account for the risks posed by the Injection Well. The Department and Catalyst of course oppose the positions set forth by Ms. Lananger and contend that the Department's permit decision complied with all relevant statutes and regulations, was reasonable and supported by the facts, and satisfied the Department's constitutional obligation.

We first address Ms. Lananger's claims surrounding the Department's actions regarding the surface development activities at the Site. In its initial permit application dated May 5, 2023 ("May 2023 Application) (Joint Ex. 29), as is required under 25 Pa. Code § 78.18, Catalyst included copies of a C&D plan dated April 20, 2023 ("April 2023 C&D Plan") and an E&S plan dated March 2023 ("March 2023 E&S Plan"). Both the April 2023 C&D Plan and the March 2023 E&S Plan were updated several times as the development at the Site moved forward. There is a revised C&D plan dated September 15, 2023 (Joint Ex. 16) and an updated C&D plan attached as Appendix D to the Preparedness, Preventions, and Contingency ("PPC") plan that was submitted on October 11, 2024. (Joint Ex. 17). Revised E&S plans are dated April 2024 (Joint Ex. 19) and August 2024 (Joint Ex. 20). Revisions to these plans incorporate changes to the Site's development as well as comments from the Department. The initial and revised E&S plans and C&D plans, along with conditions related to the E&S plans that were added to the Permit, are the main mechanisms by which the Department regulated Catalyst's surface development activities.

The Department reviewed the C&D and E&S plans, requested changes where appropriate, approved them as necessary, and conducted numerous inspections to ensure that the plans were followed and that the environment, including the waterways and wetlands around the Site, were protected. Brian Ayers ("Mr. Ayers"), a Water Quality Specialist Supervisor for the Department, conducted the initial review of the March 2023 E&S Plan and also an early version of the C&D Plan[1]. He drafted an internal Department memo dated October 16, 2023 stating that the March 2023 E&S Plan "is consistent with the requirements set forth in Chapter 102 & Chapter 78.53." (Joint Ex. 22). In the same memo, he reached a similar conclusion regarding the C&D plan finding

[1] We cannot determine from Mr. Ayers' testimony or his internal memo whether he initially reviewed the April 2023 C&D Plan or the C&D Plan dated September 15, 2023.

that it "meets the requirements set forth in" the Department's Guidelines for the Development and Implementation of Environmental Emergency Response Plans. (*Id*.). A week later, on October 23, 2023, Mr. Ayers wrote a second memo ("October 23 Memo") in which he again stated that the plans met the requirements but, in addition, suggested permit conditions addressing E&S control measures to protect the nearby wetlands and watercourses. (Joint Ex. 23). The three specific conditions discussed in the October 23 Memo were as follows: (1) Mark the boundaries of all wetlands with high visibility fencing during all phases of the activity, including construction; (2) The owner or operator may not cause or allow a discharge from the well pad under 25 Pa Code § 78.60; and (3) The owner or operator shall implement ABACT BMPs[2] throughout the well site to maintain and protect the existing water quality of surface water resources. Mr. Ayers testified that these suggestions were based on discussions with his staff after Evan Bruce, a Department inspector, conducted a field inspection on September 7, 2023. (Lananger Ex. XX). He explained that the conditions were intended to ensure that Catalyst undertook the necessary steps to protect the waterways and wetlands. The Department incorporated the three specific conditions set forth in the October 23 Memo as special conditions in the Permit, making them enforceable conditions governing Catalyst's site development activities.

The evidence at the hearing satisfied us that Catalyst complied with the Permit's special conditions and followed the other requirements in its March 2023 E&S Plan as subsequently revised. The high visibility fencing and the ABACT BMPs, which consists of a rock construction entrance and filter sock, were installed in February 2024 (See Joint Ex. 7) and appeared to still be in place and maintained close to the time of the hearing. (Joint Ex. 1; Notes of Testimony Page

[2] ABACT BMPs is an acronym for Antidegradation best available combination of technologies – best management practices. 25 Pa Code § 102.1.

No. ("T") 249-50). The hearing record reflects that these ABACT BMPs were effective in protecting the identified wetlands and principal waterway in the area, the unnamed tributary to Kinzua Creek. The Department's inspection reports associated with its frequent inspections of the Site (See Joint Exs. 8, 9, 10, 11 and 12; DEP Ex. 19) and the testimony provided at the hearing do not evidence any discharges from the Site or any other violations of the E&S special conditions in the Permit. Ms. Lananger presented no evidence of any impacts on the identified wetlands or waterways from the surface activities at the Site.

Ms. Lananger's principal argument is that the Department did not follow its own regulations and the Clean Water Act in permitting the surface activities at the Site. The site plan in the March 2023 E&S plan identified three wetlands and the unnamed tributary to Kinzua Creek. While it is a little unclear from the testimony, the unnamed tributary and two of the wetlands at the Site qualify as exceptional value waters pursuant to the Department's classification scheme. Ms. Lananger argues that because of the exceptional value classification, the Department was required to apply various regulations that govern development in areas containing exceptional value waterways. The problem with Ms. Lananger's argument is that the regulations that she cites in support of her position are triggered during water permitting. Catalyst did not apply for any water permits for this project nor did the Department issue any water permits for this project. The only question is whether the Department was correct in determining that no water permits were required for this site development.

There was no evidence at the hearing that Catalyst planned for or had a point source discharge at the Site during construction. The hearing record also did not contain any evidence of a point source discharge from the proposed operations of the Injection Well. The water collected in the containment area surrounding the equipment at the Site will be added to the incoming

disposal fluids and then injected into the underground formation rather than discharged as a point source. The lack of a point source discharge obviates the need for an NPDES permit which eliminates the specific antidegradation requirements cited by Ms. Lananger. Early in the development and permitting process, one water permit was discussed by the Department and Catalyst for the Site. The March 2023 E&S Plan identified the need for a GP-7 permit to cover the construction of a portion of the Site's driveway that would encroach into existing wetland #3. A GP-7 permit is a general permit intended to cover minor road crossings in wetlands that impact less than a 1/10th of an acre. The April 2024 E&S Plan continued to discuss the need for the GP-7 permit and at least as of May 1, 2024, the Department's position remained that a GP-7 permit was necessary before construction commenced. (Lananger Ex. DDD). However, Catalyst neither applied for nor received the GP-7 permit prior to commencing construction. (T. 581). Instead, Catalyst redesigned its Site layout to avoid encroaching on wetland #3. An updated site plan was sent to the Department on July 15, 2024 by Catalyst employee Jason Horvath. (Lananger Ex. BBB). In response to this e-mail, Department staff conducted a site inspection on July 17, 2024 to confirm that Catalyst had followed the new site plan and that it did not encroach on wetland #3. Following that on-site inspection, the Department determined that a GP-7 was no longer required and communicated that to Catalyst via email. (Catalyst Ex. 24). Ms. Lananger argues that the failure to have a GP-7 permit when Catalyst began construction is a violation and thereby supports her supersedeas claim. We do not see it that way and agree with the Department's position that this permit issue became moot as it was not ultimately necessary for the Site as developed. (T. 593). Catalyst should have communicated with the Department regarding its decision to alter the Site design to avoid encroaching on wetland #3 earlier than mid-July 2024 when construction was well underway. However, we don't find that the communication issue here gives rise to a violation

by Catalyst sufficient to grant a supersedeas. The Site redesign led to a better environmental outcome by avoiding any impact or encroachment to wetland #3 thereby obviating the need for a GP-7 permit. Catalyst's failure to obtain a permit that ultimately was not required simply does not support superseding the Department's permit decision in this case.

Ms. Lananger also argues in her post-hearing brief that the Department failed to properly account for the exceptional value wetlands and waterways in the permitting process. She states that the Department was not authorized to issue the Permit because it failed to evaluate and apply the criteria for special protection wetlands and watersheds and failed to require proper permits under Chapter 102 and 105. Ms. Lananger failed to establish that any permits were required at the Site under these regulations. Chapter 102 governs erosion and sedimentation requirements. It requires an NPDES Permit for earth disturbance activities that equal or exceed one acre. 25 Pa Code § 102.5(b). It specifically lists oil and gas activities as requiring an E&S permit if the activities involve 5 acres or more of earth disturbance over the life of the project. 25 Pa Code § 102.5(c). Neither of these permit requirements apply in this case based strictly on the size requirement alone. The Site developed by Catalyst was under one acre as originally proposed and as ultimately constructed. The constructed Site measures .8458 acres. (T. 978). The Department correctly determined that no Chapter 102 permit was required. In the absence of a GP-7 permit, Catalyst was still required to follow an E&S plan and did so in this case as demonstrated by the testimony at the hearing.

Chapter 105 requires a written permit if a person is going to construct, operate, maintain, enlarge or abandon a dam, water obstruction or encroachment. 25 Pa Code § 105.11(a). There was no evidence that Catalyst proposed a dam or a water obstruction. An encroachment is defined as "a structure or activity which changes, expands or diminishes the course, current or cross section

of a watercourse, floodway or body of water." 25 Pa Code § 105.1. Ms. Lananger produced no evidence that Catalyst encroached into any water course, floodway or body of water associated with the wetlands or unnamed tributary to Kinzua Creek located near the Site. As we understand it, Ms. Lananger's main argument here has to do with the permitting of activities in the exceptional value wetlands identified on the Site. The regulation that she cites in support of her argument is found at 25 Pa Code § 105.18a. It provides that the Department will not grant a permit for an encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise effecting an exceptional value wetland unless certain requirements are met. However, there is no evidence of any encroachment, so the need for a Chapter 105 permit and its related requirements raised by Ms. Lananger does not apply to the Site development undertaken by Catalyst. Ultimately, the facts of the case support the finding that the Department properly addressed the surface development activities at the Site and required Catalyst to take the proper steps to protect the wetlands and waterways. Further, Ms. Lananger produced no evidence that the development activities had any impact on the wetlands or the unnamed tributary to Kinzua Creek. The E&S controls required by the Department and implemented by Catalyst, specifically, the high visibility fencing and the filter sock, along with the stone placed on the Site, effectively protected the surface water resources during construction and will prevent and/or address any issues that might arise during future operations.

Ms. Lananger also raised an issue regarding the review of the C&D Plan submitted by Catalyst, questioning whether it met the requirements found in the applicable regulations. The permitting requirements for the Injection Well require that Catalyst submit a C&D Plan to the Department that satisfies the requirements set forth in 25 Pa Code § 91.34. Section 91.34 requires that persons engaged in activities utilizing pollutants provide a plan outlining the nature of the

activity and includes preventative measures that the person intends to undertake to prevent pollutants from reaching the waters of the Commonwealth. In addition to these general requirements, the Department has specific requirements for C&D plans involving oil and gas facilities found at 25 Pa Code § 78.55. Multiple Department witnesses testified that the Catalyst's C&D Plan met the regulatory requirements. In his initial review, Mr. Ayers stated that the C&D Plan met the regulations' requirements. Despite that, Catalyst continued to revise the C&D Plan as the Site plans developed. Eventually a final C&D Plan was incorporated into the PPC Plan identified as Joint Exhibit 17. The Department had Kevin Maskol ("Mr. Maskol") review the final C&D plan because he had experience in reviewing plans for facilities like Catalyst's Injection Well. (T. 936-7). Mr. Maskol testified that the PPC Plan, including the C&D Plan, generally satisfied the Department's requirements. (T. 942).

During the hearing, Ms. Lananger raised an issue concerning whether the PPC Plan, including the C&D Plan, required the signature of a registered professional engineer. Mr. Maskol testified that the Site did not meet the criteria requiring a stamp by a professional engineer and Ms. Lananger did not provide evidence to the contrary. In her post-hearing brief, Ms. Lananger also raised the specific issue that the C&D Plan presented at the time of the application did not include a pressure barrier policy which she claimed is required under 25 Pa Code § 78.55. We are not convinced that Ms. Lananger is correct in this assertion. A pressure barrier plan is not mentioned in the permitting requirements for injection wells as forth in 25 Pa Code § 91.34. It is only mentioned as a requirement in 25 Pa Code § 78.55 which requires a C&D plan "prior to generation of waste." Mr. Maskol testified that this phrase requires that the final and complete plan be in place prior to Catalyst beginning operations at the Injection Well. The last C&D Plan that Catalyst submitted in October 2024 as part of the PPC Plan does contain a pressure barrier plan and,

therefore, appears to satisfy the requirement at 25 Pa Code § 78.55. Overall, we again find that Ms. Lananger has not shown that she is likely to prevail on the merits of her claim that there are issues with the C&D Plan accepted by the Department for the Catalyst Site.

Ms. Lananger's second concern is the potential risk posed by injecting oil and gas fluids into the Injection Well. She argues that the groundwater in the area around the Injection Well is already contaminated and that the disposal of the oil and gas waste authorized by the Permit creates further risk to the people in the area who use that groundwater as the source of their drinking water. She specifically argues that Catalyst has not performed a successful mechanical integrity test and raises a question regarding the lack of a cement bond log for the Injection Well above 3,300 feet. (Ms. Lananger's Post-Hearing Brief at 13). She also raises concerns about numerous oil and gas wells in the vicinity of the Injection Well, many of which are reportedly abandoned, unplugged and/or improperly plugged. Ms. Lananger asserts that the Department lacks sufficient information about these wells and the risk that they potentially provide a pathway by which the injection fluids could reach the shallower groundwater. She argues that the Department should have denied the Permit on the basis of this risk. Upon review of the testimony and the evidence of record, we conclude that the Department and Catalyst adequately addressed these concerns and the Department properly determined that Catalyst met the requirements for the Permit. Therefore, we find that Ms. Lananger is not likely to prevail on the argument that the Department should have denied the Permit based on these concerns, and, as such, her claims do not support a supersedeas.

The Injection Well is classified as a Class II-D commercial injection disposal well and the primary responsibility for permitting these types of wells in Pennsylvania lies with the EPA. Under a cover letter dated December 4, 2020, Catalyst submitted a permit application for the Injection Well to the EPA. (Joint Ex. 2). The EPA issued a permit for the Injection Well on July

18, 2022 and issued a revised permit with minor modifications to correct typographical issues on or around August 19, 2024. ("EPA Permit") (Joint Ex. 3). The EPA Permit which authorizes Catalyst to operate a Class II-D commercial injection disposal well, was not appealed by any party. The EPA Permit generally controls the Injection Well operations that go to many of Ms. Lananger's concerns and sets forth detailed provisions governing the construction, operation, and monitoring requirements for the Injection Well. As noted previously, the Department regulations that govern the permitting of injection wells, required that Catalyst submit a copy of the EPA Permit, along with the associated application and related documentation, as part of its change-of-use permit application. 25 Pa. Code § 78.18(2). There is no dispute that Catalyst satisfied this requirement as part of its application filings with the Department. Beyond the regulatory requirement that Catalyst possess an EPA Permit, the Department also conditioned the change-of-use Permit on the existence of the EPA Permit and further required Catalyst to submit copies of any revisions or modifications of the EPA Permit to the Department. Even though some of the operating parameters for the Injection Well are contained in the EPA Permit and not the change-of-use Permit, based on the testimony at the hearing, it appears that the Department considered these operating requirements in it permit decision.

Both the EPA Permit and the change-in-use Permit address mechanical integrity testing of the Injection Well. Mechanical integrity looks at the well's ability to prevent the loss of fluids which is generally accomplished by casing and cementing the well bore. In the case of the Injection Well, there are several strings of well casings designed to prevent leakage from the well bore. Starting from the outside of the Injection Well and working in, there is a 11 ¾ inch casing starting from the surface and going down to 425.9 feet; an 8 ⅝ inch casing from the surface to 2,504.36 feet; and a 4 ½ inch production casing from the surface down to 5,396.35 feet. (Joint Ex.

25, CAT001336). Each of these three casing strings are cemented in place. In addition to the existing casing, Catalyst installed a new 2 ⅞ inch tubular and packer inside the 4 ½ inch production casing. The oil and gas fluids will be sent downhole to the injection level through the new tubular. Ms. Lananger pressed the Department and Catalyst on the issue of the Injection Well's mechanical integrity and, in her post-hearing brief, Ms. Lananger states that Catalyst "has not yet performed a successful mechanical integrity test." (Ms. Lananger's Post-Hearing Brief at 13). The Board heard testimony and reviewed evidence that extensively addressed the mechanical integrity of the Injection Well and the testing conducted to evaluate its integrity. Based on that testimony and evidence, we find that the Ms. Lananger's assertion that Catalyst has not performed a successful mechanical integrity test is not supported by the evidence and, further, she has not shown that the Department's permit decision was unreasonable due to issues involving the mechanical integrity of the Injection Well.

The mechanical integrity of the Injection Well is clearly important because if the casing and cement are unable to contain the fluid within the wellbore above the injection zone, the injected fluids could theoretically leak from the Injection Well and potentially reach the shallow groundwater that serves as the drinking water in the area. Andrea McGill, a Department geologist involved in reviewing the permit application, repeatedly testified that as long as the mechanical integrity was upheld, she did not see any chance of migration from the injection reservoir to the shallower geological zones. (T. 820, 821, 826). The EPA Permit prohibits Catalyst from commencing injection operations until it has demonstrated to the EPA's satisfaction that the Injection Well has mechanical integrity and it has received written correspondence from EPA confirming as much. (Joint Ex. 3). The Permit requires Catalyst to provide the Department with documentation from EPA demonstrating compliance with the EPA mechanical integrity

requirements. Catalyst demonstrated the mechanical integrity of the Injection Well by passing two mechanical integrity tests witnessed by EPA and Department staff. The first mechanical integrity test was conducted on July 16, 2024. The first test was described as a joint effort between Catalyst and EPA. The EPA inspection report (Joint Ex. 14) listed Jason Horvath ("Mr. Horvath") of Catalyst, as the person conducting the test and Dave Rectenwald ("Mr. Rectenwald") as the EPA witness. Doug Welsh ("Mr. Welsh") of the Department was listed as present for the test. Mr. Rectenwald marked the section of the EPA form for the test results as "Passed." Mr. Rectenwald did not testify but both Mr. Horvath and Mr. Welsh testified that the first test passed EPA requirements to demonstrate mechanical integrity. (T. 270, 510). A second mechanical integrity test was run on November 26, 2024. The EPA inspection report (Joint Ex. 31) again lists Mr. Horvath as conducting the test and Mr. Rectenwald as the EPA witness. Marshall Wurst ("Mr. Wurst") of the Department was listed as present for the second test. The second test was run at a higher starting pressure and for a longer time than the first test. The EPA inspection report again lists the test result as "Passed." (Joint Ex. 31, CAT001847).

Ms. Lananger did not put on any direct fact or expert witness testimony challenging the mechanical integrity test results. Through her counsel's cross-examination of various witnesses, Ms. Lananger attempted to create doubt surrounding the results of the two mechanical integrity tests. None of the testimony elicited on cross-examination overcame the clear testimony and evidence presented by Catalyst and the Department that showed the Injection Well satisfactorily passed both tests. When a party raises technical issues, such as those pertaining to the mechanical integrity tests, the Board would generally expect the party questioning the test's reliability and results to present expert testimony to support their position.

While Ms. Lananger failed to provide expert testimony challenging the mechanical integrity testing, Catalyst presented testimony from David Wozniak ("Mr. Wozniak") who was admitted as an expert petroleum and reservoir engineer. Mr. Wozniak testified that he reviewed the test information and that it was his expert opinion that both of the mechanical integrity tests were conducted per the EPA guidelines and, furthermore, based on those guidelines, he concurred with the EPA in finding that the Injection Well passed the tests and that it was mechanically sound. (T. 451).

Ms. Lananger raised issues regarding the cement surrounding the well casings. Her counsel seized on the term "open hole" in an effort to raise concerns about the Injection Well. It is our understanding that in this case, the term "open hole" was used to describe a portion of the wellbore where the 4 ½ inch production casing is not cemented in place. This occurs from the top of the cement at 3,512 feet back to the surface. Mr. Wozniak and others testified that this lack of cement was purposefully designed because the filling of that void with cement would create hydrostatic pressure that could potentially fracture the surrounding rock; a result that the company who originally drilled the well would obviously want to avoid. (T. 216-217, 439). The "open hole" does not, as Ms. Lananger's questioning tried to suggest, create an automatic pathway for injected fluids to enter the level containing the area's drinking water. Any injected fluids would first have to escape the tubular and the 4 ½ inch production casing which is unlikely to take place due in part to the pressure monitoring discussed below. If fluids did in fact get released from the 4 ½ inch production casing, they would then have to pass through either the surrounding thousands of feet of rock or, after moving up through the uncemented portion of the well bore, escape out of either the 8 ⅝ inch casing and cement or the 11 ¾ inch casing and cement or both. None of these

possibilities seem likely to occur and the repeated discussions of the "open hole" did not convince the Board otherwise.

Ms. Lananger also took issue with the completion report because it lacked a cement bond log for the Injection Well above 3,300 feet. (Ms. Lananger's Post-Hearing Brief at 13). As the Board understands it, the intent of the cement bond log run in the Injection Well was to determine the condition of the cement around the 4 ½ inch casing. (T. 491). The cement bond log identified that the top of the cement was at 3,512 feet and the lack of cement above that point was clearly identified in the log. (Joint Ex. 25). Ms. Lananger neither identified any statutes or regulations requiring a cement bond log be run above 3,300 feet, nor did she present an expert to testify why the lack of a cement bond log above that depth created an issue with the integrity of the Injection Well. Based on the testimony discussed above that explained the lack of cement was part of the intended design of the cement program for the 4 ½" production casing, we find that the lack of a cement bond log in a section where all parties acknowledge there is no cement, is not an issue. Without expert testimony to explain why the lack of the cement bond log poses a risk of a release from the Injection Well, there is no basis on which we can find that the Department's permit decision was improper or unreasonable.

Beyond requiring that the Catalyst demonstrate that Injection Well is mechanically sound prior to injection, both the EPA Permit and the Permit require Catalyst to monitor the pressures in the Injection Well to ensure that mechanical integrity is maintained during ongoing operations. The Permit requires that Catalyst continuously monitor injection pressures, annular pressures, and injection rates. If the monitoring indicates that any mechanical integrity problems have arisen, Catalyst is required to notify the Department within 24 hours of these conditions and must cease fluid injection. Ms. Lananger's counsel asked Catalyst's expert, Mr. Wozniak, what was the most

common cause for failures of Class II injection wells. He testified that, based on his experience, it was failure in the tubulars due to corrosion caused by improper maintenance. (T. 457).[3] He stated, however, that in the instances involving tubular failures that he was aware of that occurred at other sites, no environmental impacts occurred because these failures were detected as a result of the companies' monitoring of the pressures in the wells. Catalyst has installed two pressure monitoring gauges on the Injection Well that are designed to ensure the integrity of the tubular and of the 4 ½ inch production casing. Mr. Horvath, a district engineer for Catalyst, testified extensively about the two pressure monitoring gauges. Pressure gauge P1 continuously monitors the pressure in the tubular and P2 continuously monitors the pressure in the annular space between the tubular and the 4 ½ inch production casing. If a problem with the tubular occurred above the packer, there would be a drop in the pressure on the P1 gauge and an increase in the pressure in the P2 gauge. (T. 990). Mr. Horvath stated that Catalyst would be aware of the issue "the second it happened" as text messages would go out to multiple Catalyst staff and, in addition, the injection pump would automatically shut-off under these circumstances, thereby preventing any further injection of fluid into the Injection Well. (T. 990-91). Any leaks would be contained within the 4 ½ inch production casing. (T. 991-92). Similarly, if there was any issue with the integrity of the 4 ½ inch production casing independent of an issue with the tubular, the pressure measured by the P2 gauge would drop and Catalyst would immediately be notified of that issue. (T. 241, 244-45). In addition, the EPA Permit also requires Catalyst to run a full mechanical integrity test on the Injection Well every two years and also in the event of certain activities, such as removal of the tubing from the well. The EPA can also request that Catalyst run a mechanical integrity test at any

[3] Catalyst will be adding a corrosion inhibitor to the injected fluids to address potential corrosion issues. (T. 79-81).

time it deems it appropriate to do so. Overall, we find that Catalyst and the Department have properly addressed the mechanical integrity of the Injection Well and have put in place proper safety monitoring to ensure that any issues are quickly identified and that the risk of any fluid escaping the wellbore is minimal. Ms. Lananger has failed to show that the Department's permit decision should be superseded because of issues surrounding the mechanical integrity of the Injection Well.

The second argument Ms. Lananger presents is the possibility that the injected fluids may escape from the injection zone and contaminate the drinking water level. The Injection Well is permitted to inject fluids into the Onondaga Formation in an interval from 5,170 feet to 5,188 feet. The Injection Well was initially drilled by Belden and Blake in 1990 to produce gas from the Onondaga. Catalyst presented testimony from its expert witness Mr. Wozniak describing the specifics of the reservoir that will receive the disposal fluids. Besides his extensive experience in the oil and gas industry, Mr. Wozniak was very familiar with the Injection Well and the development of the Onondaga Formation around the Injection Well. He described the Onondaga Formation in the area of the Injection Well as a reef formation called the Cyclone Reef. While Mr. Wozniak did not work for Belden and Blake at the time that the Injection Well was drilled, he joined Belden and Blake in 1995 and worked there while the Injection Well was in production. During his time at Belden and Blake, his responsibilities included evaluating reserves, so he was familiar with the production characteristics of the Injection Well. He also testified that he was part of a study at Belden and Blake to evaluate the reservoir quality and the aerial extent of the Cyclone Reef, examining this formation from a reservoir engineering, geologic, and geophysical standpoint. This study was undertaken because Belden and Blake considered using the Onondaga Formation in the area of the Injection Well for gas storage. He stated that based on this analysis,

the Onondaga Formation at the Injection Well has "excellent containment" and "tremendous deliverability" which make it "a perfect container" for disposal. (T. 432). We found Mr. Wozniak's testimony on this topic well-supported and persuasive given his direct knowledge of the geologic setting and characteristics of the injection formation. Ms. Lananger offered no expert testimony that contradicted Mr. Wozniak's expert opinions regarding the suitability of the Onondaga Formation for receiving the disposal fluids from Injection Well.

Mr. Wozniak's testimony and opinions were also consistent with the factual and expert testimony offered by Susan Price ("Ms. Price") and Andrea McGill ("Ms. McGill"). Ms. Price is a Professional Geologist Manager at the Department and a licensed professional geologist in the Commonwealth of Pennsylvania. Ms. Price testified that there was several thousand feet of predominantly shale layers between the Onondaga Formation and the shallower Bradford Sandstone (also known as the Bradford Sands) located at a depth of around 2,000 feet. Ms. Price described the shale as a good confining zone to prevent the movement of fluids because it does not have good permeability. (T. 657). She also identified that there is another approximately 2,000 feet or so of shale between the Bradford Sandstone and the lowermost source of drinking water at 350 feet that is also a protective confining layer preventing injected fluids from reaching the shallow drinking water zone. Ms. McGill is a licensed professional geologist in the Department's oil and gas program and was the main reviewer for the Permit. (T. 804). She testified that several thousand feet of confining shales exists between the injection depth and the underground sources of drinking water. (T. 820). Ms. McGill stated that "with correct mechanical integrity and the confining layers, there should not be natural pathways" for injected fluids to reach the drinking water. (*Id.*). Ms. Lananger offered no expert testimony or other evidence challenging Mr. Wozniak's and the Department's professional geologists' testimony that supported the position

that the Onondaga Formation is a well contained formation with several thousand feet of confining layers of overlying shale and, therefore, offers a suitable formation for the injection of fluids.

The Department evaluated two possible issues with the confining layers as part of its analysis of the permit application. The first involved reviewing geologic information to determine the presence or absence of faults and the potential for seismic activity in the vicinity of the Injection Well. The presence of faults is a concern because they can create a potential pathway for injected fluid to move through the confining shale layers. Faults can also be activated by the pressures created by injection wells, resulting in earthquakes, a concept known as induced seismic activity. Department geologic staff, specifically Ms. Price and Ms. McGill, reviewed the information on this issue. Ms. McGill testified that there are no known faults within the area of review, a distance of 1,000 feet from the Injection Well. (T. 819, 822). The closest known earthquake to the Injection Well occurred 25 miles away and took place in 1995. (T. 822). Ms. Price stated that, based on maps of faults in Pennsylvania, there are no known faults in the formations above the Onondaga Formation. (T. 661-2).

Ms. Price also testified that the Department uses a spreadsheet to evaluate the risk of induced seismic activity at disposal wells. (T. 636). The spreadsheet involves seven questions and is scored from zero to seven, with seven being the highest score indicating the highest risk level for induced seismic activity. The Injection Well scored a one on the spreadsheet with the one-point deriving from a question concerning the monthly volume of injected fluids. The question asks whether the injected volume is at a rate below 100,000 barrels per month. The EPA Permit allows Catalyst to inject 100,000 barrels per month. As such, the Department treated the answer to this question on the spreadsheet as a "yes" and gave it one-point. Based on the spreadsheet score, the Department considers the Injection Well is at low risk for induced seismic

activity. Ms. Price offered her expert opinion that the use of the Injection Well is not likely to induce seismic activity. (T. 664). Ms. Lananger offered no testimony, expert or otherwise, disputing any of the factual testimony offered by the Department regarding the presence or absence of faults, the risk of seismic activity, or challenging the expert opinion offered by Ms. Price.

Despite the low risk of induced seismic activity and the lack of any known faults in the area, the Department still placed special conditions in the Permit requiring Catalyst to address the potential for seismic activity in the vicinity of the Injection Well. (Joint Ex. 4). The Permit gave Catalyst the option of either installing seismic monitoring equipment or obtaining data from the Pennsylvania earthquake monitoring system. Catalyst elected to install their own seismic monitoring equipment and submitted a seismic monitoring plan to the Department. (Catalyst Ex. 21). The Department approved the seismic monitoring plan (Catalyst Ex. 59; T. 621) and, in addition, inspected the seismic monitoring equipment that Catalyst installed and did not identify any problems during the inspection. (Joint Ex. 13). Overall, we find that the Department properly reviewed the issues posed by potential faults and induced seismic activity at the Injection Well and took appropriate steps to monitor these issues going forward. Ms. Lananger has failed to identify any problems or shortcomings on this issue that create a likelihood of her prevailing on her claims in this case.

The second issue raised by Ms. Lananger is the potential for existing wells to create a path for fluids to move from the Injection Well and the Onondaga Formation into the shallow groundwater. Both the Department and Catalyst evaluated this concern. The Department evaluated the area for existing wells based on a 1,000 foot radius around the Injection Well. Additionally, the EPA sets the area of review at a slightly greater distance of a ¼ mile. There is no dispute among the parties that there are numerous historic oil and gas wells in the vicinity of

the Injection Well. There is also no dispute that the status of some of the historic oil and gas wells in this area are unknown and others are unplugged and/or abandoned. The Board heard extensive testimony during the hearing about historic maps of the oil and gas wells in the area, including the Tidewater Oil map (1937), the South Penn map (date unknown) and the Pennzoil map (undated). In addition, the Department and Catalyst testified about historic information collected and published by the Pennsylvania Geologic Survey that tracks deep wells in Pennsylvania. The term "deep well" is historically used to describe conventional wells in Pennsylvania that reach the Onondaga Formation. The Department concluded that there are only four deep wells that penetrate to the depth of the Onondaga Formation within the area of the Injection Well and required Catalyst to address all four of these wells. The Department determined that the remaining wells falling in the area of review are much shallower and only penetrate into the Bradford Sands at a depth of between 2,000 and 2,200 feet and, therefore, do not pose a risk to the integrity of the injection zone and are unlikely to act as a pathway for fluids to move into the shallow groundwater. Ms. Lananger argued that the Department lacked sufficient information about the wells and failed to undertake a thorough enough investigation of the existing wells to support its conclusion that they do not create an unreasonable risk to the groundwater. We thoroughly reviewed and considered the testimony and evidence on this issue and find that the evidence supports the Department's conclusion that the existing wells do not create a level of risk that should have led to denying the Permit.

We start by looking at the deep wells. The Department and Catalyst identified four deep wells that penetrate the Onondaga Formation in the area of the Injection Well: 1) the Enervest Lot 581-1 Well; 2) the Amoco-Witco Lot 580-1 Well; 3) the Sweeley No. 1 Well; and 4) the Lot 580 – 1 Well. The Department required Catalyst to address all four of these identified deep wells. The Lot 580-1 Well is the well the Department permitted for conversion into the Injection Well.

Although the Permit only required the conversion of the Amoco-Witco Lot 580-1 Well to a monitoring well, Catalyst converted both the Amoco-Witco Well and the Sweeley Well into monitoring wells to monitor the level of the disposal fluid in the injection zone of the Onondaga Formation. (Stip. at ¶ 8). Conversion of the Sweeley Well to a monitoring well was not required by the EPA Permit or the Permit. Catalyst voluntarily added the Sweeley Well as an additional monitoring well. Lastly, Catalyst plugged the Enervest Lot 581-1 Well, bringing it into compliance with the Permit and the EPA Permit.

The Department determined that these were the only four deep wells in the vicinity of the Injection Well based on several lines of evidence. The Oil and Gas Conservation Law became effective in 1961. As a result of that law going into effect, drillers were required to report to the Commonwealth any wells that penetrated the Onondaga Formation. The Department's records only show the four deep wells identified by Catalyst and the Department. To investigate wells drilled prior to the Oil and Gas Conservation Law, the Department and Catalyst relied on a study and publications from the Pennsylvania Geologic Survey, commonly referred to as the Fettke report. The Survey collected information about all deep wells in Pennsylvania and compiled that information into reports. Those reports do not identify any deep wells in the vicinity of the Injection Well prior to the enactment of the Oil and Gas Conservation Law. Mr. Wurst, the Department's acting oil and gas inspector for the area around the Injection Well, was questioned by Ms. Lananger's counsel about deep wells in the area. Mr. Wurst testified that he had reviewed the Tidewater, South Penn and Pennzoil maps to see if they showed any deep wells. (T. 559). He stated that the historic maps use a specific symbol demarcating deep wells and that this symbol "stands out pretty well" and "is kind of unmistakable." (*Id.*). According to Mr. Wurst, none of the maps contained the distinctive symbol that would indicate the presence of a deep well. Mr.

Wurst was also involved in paper record reviews and field investigations of abandoned wells in the Cyclone area since March of 2023. Mr. Wurst testified that based on his investigation, he did not see evidence that the abandoned wells in the Cyclone area are deep wells. (T. 551-59). Ms. Lananger presented no evidence that directly contradicted the Department's and Catalyst's determination that there are only four deep wells in the vicinity of the Injection Well.

As we have stated, there are numerous historic wells in the Cyclone area. Based on its review of the available information, the Department concluded that these wells were shallow wells and were unlikely to have penetrated below the Upper Devonian Bradford Sands at a depth of around 2,200 feet. The Department further concluded that these shallow wells do not create a risk to the drinking water because they are separated from the Onondaga Formation by approximately 3,000 feet of confining shale layers. (Catalyst Ex. 46). Ms. Lananger's stated concern is that the Department lacks sufficient records and other information pertaining to these historic wells to adequately support its conclusion that the wells within the Injection Well's vicinity are shallow and, therefore, do not pose a risk to the drinking water wells in the area.

Various Department staff testified in support of its conclusion that the historic wells are shallow and do not go below the Bradford Sands. Mr. Wurst testified that he had reviewed the Tidewater, South Penn and Pennzoil maps and completed over 50 inspections of wells in the area. (T. 548-51). Based on that information and his investigation, as well his knowledge of historic practices, he stated that these were water-flood wells that he concluded were drilled in the Bradford Third Sand at an approximate depth of 2,000 to 2,200 feet. He testified that most of the wells were likely drilled in the 1930's and 1940's and because they had good oil recovery, the operators lacked an incentive to drill deeper than the Bradford Third Sand. He noted that most operators at the time also lacked the capacity to drill deeper wells. (T. 553). Ms. Lananger's counsel asked Mr. Wurst

about the possibility that other deep wells could be present in the area besides the four wells identified by Catalyst. He responded, stating "[n]ot according to any mapping we have. […] they tend to keep good records of those [deep] wells. So we feel confident that anything past the Bradford Third Sand doesn't exist in this area." (T. 558). In response to a question from Department counsel, asking him whether, based on his experience, his multiple inspections, available mapping, and the symbols on the maps, he was confident that the abandoned wells in the Cyclone area were shallow, Mr. Wurst simply answered "Yes." (T. 564).

The two Department licensed professional geologists, Ms. McGill and Ms. Price both testified briefly regarding the historic wells. Ms. McGill testified that based on her review of the geologic setting and the wells in the area, the area is "rich with basically shallow oil wells to the Bradford Sands, which are thousands of feet shallower" than the Injection Well. (T. 825). While discussing the deep wells, she further stated that all the other wells the Department found or were identified in the area are shallow wells. (T. 826). Ms. Price was asked to discuss the geology of the Cyclone area. She stated that the Department looked at the Bradford Sandstone which is at about 2,000 feet in depth. She noted that this is where all the shallow wells in the area are located. (T. 657).

Catalyst's expert witness Mr. Wozniak discussed early drilling history and noted that the Bradford Sands within the Cyclone area was extensively developed. He agreed with Mr. Wurst that this included water-flooding to enhance oil recovery. (T. 441). He noted that the Bradford Sands were separated from the Onondaga Formation by 3,000 feet of Middle and Upper Devonian Shales that provided an excellent confining interval. (T. 445). He offered his expert opinion that the existence of the wells drilled into the Bradford Sands, even if abandoned and unplugged, would

not create a pathway for fluids to migrate from the Onondaga Formation into the groundwater. (T. 448-49).

Ms. Lananger presented testimony from a local Cyclone resident, Dennis Johnson ("Mr. Johnson"). Mr. Johnson testified that he grew up in Cyclone and worked in the oil fields, including for a period of approximately 22 years when he worked for Pennzoil from 1973 to 1996. (T. 398-401, 415). He stated that there were wells all over the place, some of which were plugged while others he described as abandoned with open holes. (T. 402-04). He was asked whether the wells in the area drilled by Pennzoil during the time he worked for the company were drilled into the Bradford Sands. He testified that many of the wells were drilled prior to his time at Pennzoil but that the newer wells that he was involved with were drilled to the Bradford Third Sand at a depth of around 2,210 feet. (T. 415-16). Mr. Johnson did not offer any testimony that contradicted the Department's conclusion that the historic wells were shallow and drilled to the Bradford Sands.

Ms. Lananger also presented an expert witness, Marc Glass. ("Mr. Glass"). Mr. Glass was admitted as an expert in environmental monitoring and remediation but acknowledged during questioning that he is neither a licensed professional geologist nor a licensed professional engineer in Pennsylvania and had little to no expertise involving oil and gas wells. (T. 846-58). Mr. Glass reviewed the Tidewater and Pennzoil maps and attempted to review well records. He testified that he was unable to determine the well depths of more than 20 wells located in the ¼ mile area of review around the Injection Well. (T. 879). Mr. Glass testified that the lack of information confirming the depth of the wells in the area of review created a data gap that he concluded created a risk that the Department failed to address in its permit application review and decision. (T. 878-85). Mr. Glass did not directly contradict the Department's determination that the historic wells

were shallow wells that did not penetrate below the Bradford Sands, but only offered his opinion that the available information was insufficient to support that conclusion.

Overall, we find Ms. Lananger has not shown that there are wells unaccounted for that penetrate the confining shales above the Onondaga Formation and thereby pose a risk of transporting fluids into the groundwater. She did not produce any well records or map information that definitively demonstrate the existence of any wells deeper than the Bradford Sands, a depth of around 2,200 feet. Her one fact witness on this topic, Mr. Johnson, confirmed that the Pennzoil wells, about which he had personal knowledge, were drilled to around a 2,200 foot depth. Mr. Lananger's expert witness, Mr. Glass, stated that the lack of certain well information left open the possibility that there were deeper wells unaccounted for but had no evidence, either direct or indirect, that this was the case. As such, we find his testimony on this issue speculative at best. In contrast, we found the testimony from the Department staff, particularly Mr. Wurst, and Catalyst's expert, Mr. Wozniak, convincing regarding the limited number of deep wells near the Injection Well and that the historic wells identified in the area of review are likely shallow wells that do not extend deeper than the Bradford Sands. The Department did a reasonable review of the available information, which included its own field investigations, in reaching this decision.

There is one other issue Ms. Lananger raised that we want to address. Witnesses presented by Ms. Lananger raised concerns with the existing contamination of the groundwater in the Cyclone area. There appears to be no question that groundwater contamination exists in the area. Helen Dragonette testified that the well she uses for her drinking water contains methane and that this has been confirmed by testing the Department conducted. Catalyst tested the water from 15 water wells within 1,000 feet of the Injection Well to establish baseline conditions prior to injecting fluids. (T. 197, 203). Lab reports showing methane along with other potential contaminants in

the water from three of those locations were presented at the hearing. (Lananger Exs. T, PP and QQ). Ms. Lananger also entered evidence pertaining to a water supply investigation the Department conducted of a well belonging to Jamie Coleman. This water well also showed methane and other potential contaminants in the water. (Lananger Ex. RR). We also heard testimony about the Pithole Water Association and water issues with its water supply well. The Pithole Water Association well is located approximately 2,000 feet northeast of the Injection Well and is outside the area of review. (Joint Ex. 2; T. 640). The problem with this evidence is that Ms. Lananger made no showing that any of the contamination was caused by Catalyst's Injection Well and, moreover, she is unlikely to be able to do so based on the information we know about the situation. Catalyst had not begun commercial injection of oil and gas fluids into the Injection Well when the contamination in the above-mentioned water wells was identified. At most, Catalyst had placed/injected limited quantities of water into the Injection Well in order to control the Injection Well during the work it performed on the casing and when it ran the mechanical integrity tests. On one inspection report, the Department stated that brine may have been run down the Injection Well when it was being worked on but Catalyst disputed that fact and asserted that only water was used. Regardless, there was no evidence presented that showed the limited amounts of fluids that Catalyst placed in the Injection Well during the development stage had any relationship with the identified water well contamination. Short of some evidence of causation, the most that can be said about this line of evidence is that there is a concern that a bad water situation in Cyclone might be made more problematic if, and only if, there is an issue with the Injection Well. However, given the evidence we heard at the hearing, this argument presents an insufficient basis to hold that Ms. Lananger is likely to prevail on her claim that the Department improperly issued the Permit.

Conclusion

Ms. Lananger had the burden in this case to demonstrate that she was entitled to a supersedeas. In order to do so, she needed to make a strong showing that she was likely to succeed on the merits of her claim at a full hearing by demonstrating by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision was not supported by the facts, or that the decision was inconsistent with the Department's constitutional obligations. Ms. Lananger failed to convince the Board that she is likely to succeed on the merits of her case. This is especially true in light of the fact that, unlike most supersedeas petitions heard by the Board, the discovery process had been completed at the time of the hearing and, therefore, little new evidence is likely to be brought forth at the full hearing. The evidence presented at the supersedeas hearing demonstrates that the Department acted reasonably, followed the law and regulations in its review of Catalyst's permit application and did a fair and thorough evaluation of the risks posed by granting the Permit. The Department addressed those risks through the terms of its Permit to further minimize any potential for harm from the development and operation of the Injection Well. Ms. Lananger failed to present any expert witness evidence in this case that challenged the technical decisions made by the Department. The lack of expert witness testimony on technical issues such as well construction, mechanical integrity, geology and seismic activity that contested the Department's positions make it very difficult for the Board to find in her favor. Overall, Ms. Lananger has failed to meet her burden. We issue this Opinion in support of our December 27, 2024 Order denying her request for a supersedeas suspending the Department' Permit. A copy of our December 27, 2024 Order is attached.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.*, and EMMA WRIGHT, *et al.*, Intervenors	**:**	**EHB Docket No. 2024-016-B (Consolidated with 2024-017-B, 2024-018-B, 2024-019-B, 2024-020-B, 2024-021-B, 2024-026-B, 2024-027-B, 2024-028-B, 2024-029-B, 2024-030-B, 2024-031-B, 2024-032-B, 2024-033-B, 2024-034-B, 2024-035-B, 2024-036-B, 2024-037-B, 2024-038-B, 2024-041-B, 2024-042-B, 2024-043-B, 2024-044-B, 2024-045-B, 2024-046-B, 2024-047-B, 2024-048-B, 2024-049-B, 2024-050-B, 2024-051-B, 2024-052-B, 2024-053-B, 2024-054-B, 2024-055-B, 2024-056-B, 2024-057-B)**
v.	**:**	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CATALYST ENERGY INC., PERMITTEE	**:**	

O R D E R

AND NOW, this 27th day of December, 2024, following the hearing on the Petition for Supersedeas and review of the parties' post-hearing briefs, it is hereby ORDERED that:

1. The Appellants' and Intervenors' Petition for Supersedeas is **denied**.
2. The temporary supersedeas granted by the Board's November 12, 2024 Order is **lifted**.
3. An Opinion in support of this Order shall follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: December 27, 2024

c: **For the Commonwealth of PA, DEP:**
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(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIGHTS PLAZA MATERIALS, INC.	:	
	:	
v.	:	**EHB Docket No. 2024-170-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 28, 2025**
	:	

OPINION AND ORDER ON APPELLEE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS AND APPELLANT HEIGHTS PLAZA MATERIALS, INC.'S PETITION TO FILE AN APPEAL *NUNC PRO TUNC*

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board ("Board") grants Appellee Commonwealth of Pennsylvania, Department of Environmental Protection's ("Department") Motion to Dismiss and denies Appellant Heights Plaza Materials, Inc.'s ("Heights Plaza" and "Appellant") Petition to File an Appeal *Nunc Pro Tunc*. The Board does not have jurisdiction over an untimely appeal, even if it is filed one day late, and there is no evidence of fraud, a breakdown in the Board's administrative operations, or any other unique and compelling circumstances to warrant *nunc pro tunc* relief.

O P I N I O N

Background

This appeal centers around a Department Compliance Order dated October 7, 2024 ("Order") issued to Appellant Heights Plaza Materials, Inc. The Order was served on Heights Plaza via hand delivery on October 16, 2024 to John E. Marino, President and Owner of Heights Plaza by Ryan Fuller, Investigator for the Pennsylvania Department of Environmental Protection,

Bureau of Investigations, Office of Chief Counsel.

Heights Plaza appealed the subject Order by sending a notice of appeal to the Board via facsimile and mail. The appeal was mailed express through United States Postal Service on November 16, 2024, and was delivered to the Board on November 18, 2024. The Board received the appeal documents via facsimile on November 16, 2024.[1]

On December 9, 2024, the Department filed a Motion to Dismiss the appeal for being untimely. In response, on January 10, 2025, Appellant filed a Petition to File an Appeal *Nunc Pro Tunc*, requesting the Board hear the untimely appeal because the Department "negligently and fraudulently" advised Appellant of the wrong appeal deadline. On January 13, 2025, Appellant filed a Response to the Motion to Dismiss re-stating substantially the same arguments contained within its Petition to Appeal *Nunc Pro Tunc*, but relying on the principles of equitable estoppel. On January 17, 2025, the Department filed its Response to Appellant's Petition for *Nunc Pro Tunc* Relief.

On January 17, 2025, Appellant contacted the Board and stated that there were factual inaccuracies in its Petition to File an Appeal *Nunc Pro Tunc* and requested leave to file an amendment. On January 17, 2025, the Board issued an Order allowing Appellant until January 21, 2025 to file an Amendment and the Department until January 24, 2025 to Respond. On January 21, 2025, Appellant filed said Amendment. On January 22, 2025, the Department filed its Response to the Amendment.

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[1] Further proof of this timeline is exhibited in an email from John E. Marino to Peter Burch dated November 20, 2024, Mr. Marino writes: "Saturday morning I emailed you a copy of my appeal forms and overnighted, the appeal documents to both the appeal board and legal counsel in Harrisburg." (*See* Heights Plaza's Response to the Board's Order to Perfect e-filed on December 10, 2024). Mr. Marino acknowledges this to be true in his signed Declaration provided with his Petition to Appeal *Nunc Pro Tunc*. (*See* Declaration e-filed on January 10, 2025).

Both Appellant and the Department have submitted affidavits/declarations and exhibits with their pending motions and responses. The notice of appeal and amended notices of appeal also contain various documents as exhibits. The Board has noted that "as a matter of practice, the Board has authorized motions to dismiss as a 'dispositive motion' and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board's jurisdiction . . . is in issue." *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7 (*citing Florence Twp. v. DEP*, 1996 EHB 282, 302). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' filings. Because the Motion to Dismiss and Petition to Appeal *Nunc Pro Tunc* involve the same issues of fact and law, we will address them both in this Opinion and Order.

For the reasons that follow, we grant the Department's Motion to Dismiss and deny Appellant's Petition to File an Appeal *Nunc Pro Tunc*.

Standard of Review

A motion to dismiss is appropriate where there are no material facts in dispute and 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. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*, 2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Winner v. DEP*, 2014 EHB 135, 136-37. A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. *Consol*, 2015 EHB

at 54. As a matter of practice, where there are no facts at issue that touch jurisdiction, a motion to dismiss may be decided on the facts of record without a hearing. *Beaver v. DEP*, 2002 EHB 666, 671 n. 4. *See also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Discussion

Jurisdiction of the Board

According to the Board's regulations governing the timeliness of an appeal, "jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner . . . within 30 days after [the person to whom the action of the Department is directed] has received written notice of the action." 25 Pa. Code § 1021.52(a)(1). The only exception to this rule is if a different time period is provided for by statute. *Id.* at § 1021.52(a); *Olympic Foundry, Inc. v. DEP*, 1998 EHB 1046, 1048. The date that the Board receives a notice of appeal determines its timeliness, not the date of postmark or the date that delivery is anticipated. *Spencer v. DEP*, 2008 EHB 573, 575-76. If by facsimile, it is the date the Board receives the fax. 25 Pa. Code § 1021.32(d)(2) ("The date of facsimile filing is the date the document is received by the Board"). The Board lacks jurisdiction over untimely appeals and will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set. *Ametek v. DEP*, 2014 EHB 65; *Spencer v. DEP*, 2008 EHB 573.

Although the untimeliness of an appeal generally deprives the Board of jurisdiction, in very limited circumstances we may grant permission to appeal *nunc pro tunc* upon written request and for good cause shown. 25 Pa. Code § 1021.53a. "[T]he standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." *Id.* at § 1021.53a(a). To prevail on a *nunc pro tunc* petition,

> The party seeking *nunc pro tunc* filing must show 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-

> negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

Hudson v. DEP, 2022 EHB 375, 376 *citing Feudale v. DEP*, 2016 EHB 774, 776 (*quoting Bureau Veritas N. Am., Inc. v. DOT*, 127 A.3d 871, 879 (Pa. Cmwlth. 2015)). *See also Bass v. Cmwlth*., 401 A.2d 1133 (Pa. 1979); *Grimaud v. DER.*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Barchik v. DEP*, 2010 EHB 739, 742; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391. As the Pennsylvania Supreme Court has recognized, "an appeal *nunc pro tunc* is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996). Appellant has a heavy burden to show it is entitled to *nunc pro tunc* relief as the Board rarely grants *nunc pro tunc* petitions. *See, e.g., McCauley v. DEP,* 2020 EHB 305 (lack of understanding of the legal process or failure to check the Pennsylvania Bulletin is not a sufficient basis for granting a petition to appeal *nunc pro tunc*); *Ametek v. DEP*, 2014 EHB 65 (Department's alleged agreement to toll the appeal period and/or extend the litigation schedule did not provide a basis for allowing appeal to proceed *nunc pro tunc*); *Spencer v. DEP*, 2008 EHB 573 (Board's receipt of notice of appeal one day beyond the appeal period, even though Department received it within the appeal period, was not a sufficient basis for allowing the appeal to proceed *nunc pro tunc*); *Greenridge Reclamation, Inc. v. DEP*, 2005 EHB 390 (inadvertently mailing a notice of appeal to the Department instead of the Board did not constitute grounds for granting a petition to appeal *nunc pro tunc*); *Pedler v DEP*, 2004 EHB 852 (starting a new job and being out of state did not constitute good cause for allowing an appeal *nunc pro tunc*); *Ziccardi v. DEP*, 1997 EHB 1 (appellants' confusion regarding permits did not provide a basis for allowing an appeal *nunc pro tunc*); *cf. Freyer Excavating, LLC v. DEP*, 2020 EHB 270, 273-4 (finding that the global pandemic of COVID-19 mandating the

closing of all non-life sustaining businesses was an unforeseeable and unavoidable event to warrant "extraordinary circumstances" necessary to warrant *nunc pro tunc* relief). "In the absence of fraud or breakdown in the Board's operation, the circumstances justifying the grant of an appeal *nunc pro tunc* must be extraordinary and compelling." *Freyer*, 2020 EHB at 273-74.

The Parties' Arguments

The Department argues in its Motion to Dismiss that Appellant's appeal should be dismissed because it was filed after the 30-day deadline. 25 Pa. Code § 1021.52(a)(1). In support of its position, the Department directs the Board's attention to the case of *Spencer v. DEP*, 2008 EHB 573.

In *Spencer*, Appellant Spencer received a Department Order on July 10, 2008. *Spencer*, 2008 EHB at 574. On August 9, 2008, Spencer mailed copies of his appeal first-class mail to both the Department and the Board. *Id.* Although the Department received Spencer's appeal on August 11, 2008, the Board did not receive the appeal documents until August 12, 2008, one day after the appeal deadline. *Id.* The Department filed a motion to dismiss, arguing the appeal was untimely, and Spencer filed a request to be heard *nunc pro tunc*. *Id.* at 573-74. The Board held that the Board's rules and regulations as well as the Clean Streams Law and Dam Safety and Encroachments Act all require 30-day appeal deadlines; thus, it must receive appeal documents within that 30 day deadline to have proper jurisdiction. *Id.* 574-75. The Board also denied Spencer's petition for *nunc pro tunc* relief because there was no fraud, breakdown in the Board's operations, or other unique and compelling circumstances to warrant *nunc pro tunc* review. *Id.* In fact, the Board found that Spencer could have checked with the Board to ensure his appeal was received within the 30-day time period allotted or faxed the appeal to ensure its timeliness. *Id.* at 574-76.

In its Response to the Motion to Dismiss, Appellant argues it is entitled to equitable relief because Appellant relied upon the Department's "representations and erroneous guidance" that the compliance issues could be worked out, and that the appeal deadline was November 16, 2025. (*See* Appellant's Response to Motion to Dismiss at pgs. 3-4). Appellant asserts that this reliance created "active interference" with it timely filing an appeal with the Board. (*See* Appellant's Response to Motion to Dismiss at pgs. 4-7). Appellant further argues that it acted in good faith attempting to remediate the issues outlined in the Order and a one-day delay in filing a timely appeal is a *de minimis* violation; thus, its appeal should not be dismissed. (*Id.* at pgs. 7-9).

Appellant makes similar arguments in its Petition to Appeal *Nunc Pro Tunc*. Specifically, Appellant argues that the Department's Inspector Peter Burch engaged in "negligent actions" and "misrepresentations" to Appellant regarding the ability to resolve the issues in the Compliance Order and advised him of the wrong appeal deadline. (*See* Appellant's Petition to File Appeal *Nunc Pro Tunc*). These actions, argue Appellant, constitute "extraordinary circumstances beyond [Appellant's] control" and warrant *nunc pro tunc* relief. (*Id*. at pg. 1).

In sum, Appellant argues that it did not timely file an appeal because (1) it believed it could resolve, or had resolved, the issues outlined in the Compliance Order and (2) it relied upon Peter Burch's oral statements that November 16, 2024 was the appeal deadline.

In support of its position, Appellant relies on few Board cases, but does cite *Hudson v. DEP*, 2022 EHB 375 (*citing Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001), *Marshall v. DEP*, 2020 EHB 60, *B&R Resources, LLC v. DEP*, 2020 EHB 40, and *D.F. Bart Bartholomew, Jr. v. DEP*, 2020 EHB 22 to support its position that it is entitled to equitable or *nunc pro tunc* relief. (*See* Petition to File an Appeal *Nunc Pro Tunc* at pgs. 4, 5, 7, 8 & Response to Motion to Dismiss at pgs. 4 & 9). The Board has reviewed these cases and finds that although some of them involve

petitions for *nunc pro tunc* relief, none support Appellant's position.[2] In fact, many of the cases hold the exact opposite outcome Appellant is requesting.

The Department responded to Appellant's Petition by arguing that (1) prior Board case law holds that reliance on the Department's statements regarding settlement or the appeal deadline are not sufficient reasons for the allowance of a *nunc pro tunc* appeal; (2) The Compliance Order provided express written appeal rights to Appellant, and therefore, no administrative breakdown occurred; and (3) concepts of equitable fairness provide no grounds for a *nunc pro tunc* appeal. (*See* the Department's Response to Petition for *Nunc Pro Tunc* e-filed on January 17, 2025). The Department also cites numerous Board case law in support of its position. *See e.g., Simons and J.J.H. Maguire, Inc. v. DEP*, 1998 EHB 1131 (holding that statements made by the Department advising Appellant that there was no need to file an appeal was not sufficient to qualify for *nunc pro tunc* relief); *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695 (holding that attempts to negotiate settlement of a dispute with the Department are not grounds for the allowance of an appeal *nunc pro tunc*); *Ziccardi v. DEP*, 1997 EHB 1, 8 (equitable estoppel does not apply in determining whether an Appellant is entitled to *nunc pro tunc* relief for an untimely appeal as it involves a jurisdictional defect). Upon review of the cases, we agree this case law is applicable to the current matter at hand.

[2] In fact, both *Hudson* and *Criss* involved petitions for *nunc pro tunc* relief that were denied. In *Hudson*, this Board found failure to properly read the Pennsylvania Bulletin was not sufficient reasoning for *nunc pro tunc* relief. *Hudson*, 2022 EHB at 379. In *Criss*, the Pennsylvania Supreme Court reversed the Superior Court's grant of *nunc pro tunc* relief by finding that an appeal sent 6 days before the deadline and the court's receipt 2 days after the deadline did not consist of the extraordinary circumstances necessary to warrant *nunc pro tunc* relief. *Criss*, 781 A.2d at 1160. The Board is perplexed by the additional cases cited by Appellant, as they do not involve issues of *nunc pro tunc* relief nor do they support the arguments that Appellant sets forth. It is particularly difficult to determine where the cited arguments come from as Appellant does not provide pin cites.

The Board's Findings

There is no dispute that Heights Plaza received the Compliance Order on October 16, 2024, making the 30-day deadline to file an appeal end on Friday November 15, 2024.[3] In a Declaration filed by John Marino, Appellant states that on October 29, 2024, Mr. Marino discussed the Compliance Order with Peter Burch, Department Inspector. (*See* John Marino Declaration filed on January 13, 2025). At this time, according to Mr. Marino, Mr. Burch assured him that the compliance issues could be resolved collaboratively and without the need for an appeal.[4] (*See* Amended Response to Motion to Dismiss e-filed on January 21, 2025 at ¶ 2). As such, a site inspection was scheduled for November 7, 2024; however, on this date, it was rescheduled due to a Department Engineer having a conflict. (*See* John Marino Declaration filed on January 13, 2025).

On November 15, 2024 at 3:04 p.m., an email was sent from Mr. Marino to Mr. Burch stating:

> Hello Peter, as a follow up to our conversation on October 29 and my submission of my completion and evidence documents and videos forwarded to you showing the time frame discrepancies in the Compliance violations orders, we discussed

[3] "[J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute…" 25 Pa. Code § 1021.52(a) (emphasis added). Our rule provides a default provision for timely appeals, but that default can be supplanted if a statute provides otherwise. *McCarthy v. DEP*, 2019 EHB 406, 407. However, there is no language in the Clean Streams Law that extends or modifies the time period for appeal of an order issued pursuant thereto, as is the case in this appeal. 35 P.S. § 691.7; *Spencer v. DEP*, 2008 EHB 573, 574 (explaining that the Clean Streams Law defers to the Board's rules).

[4] Although Appellant does not elaborate on his phone conversation with Mr. Burch, Mr. Burch has provided a Declaration stating: "[d]uring the October 29, 2024 call, Mr. Marino inquired as to whether the deadline for the appeal of the Compliance Order could be extended. I explained to Mr. Marino on October 29, 2024 that it was not possible to extend the appeal deadline for the Compliance Order." Mr. Burch also stated: "Mr. Marino brought up the deadline for the appeal by stating his belief that it was thirty days from the Compliance Orders issue date of October 7, 2024. I explained to Mr. Marino on October 29, 2024, that the thirty-day appeal period for the Compliance Order began with his receipt of the Compliance Order, via hand delivery, on October 16, 2024." (*See* the Department's Response to Petition to Appeal Nunc Pro Tunc at Exhibit "B").

> the time frame extension requirements for me to appeal the charges, we were tentatively trying to set up a site inspection for November 7, which had to be canceled due to your engineer being tied up in Harrisburg for CE classes and that I originally had until November 17th which is this Sunday unless it could be extended until the proper site inspections were completed. Can you please advise me on my options for appeal? Thanks John Sent from my iPhone

(*See* the Department's Response to Petition to Appeal *Nunc Pro Tunc* at Exhibit "C").

At 3:17 p.m., Mr. Burch replied to Mr. Marino stating: "Please give me a call . . . . With regards to your appeal options, they are specified on the first page of the compliance order under the header 'appeal options'." (*See id*.). Mr. Marino further asserts that on November 15, 2024, during a telephone conversation with Mr. Burch, Mr. Burch advised Mr. Marino the deadline to file an appeal was November 16, 2024.[5] (*See* Amended Response to Motion to Dismiss e-filed on January 21, 2025 at ¶ 2). Appellant argues that this factual background documenting erroneous guidance by Mr. Burch is the reason for the late appeal.

Based on the documents and declarations submitted, the Board finds that at the very least, Appellant was aware it needed to file an appeal on October 29, 2024.[6] Appellant had ample time

[5] Mr. Burch has denied making this comment. Specifically, Mr. Burch has stated that Mr. Marino told him that he intended to file an appeal and was attempting to contact the Board. Mr. Burch has stated that he did not provide Mr. Marino a date for his appeal deadline, but did advise him to attempt to contact the Board and to file his appeal "as soon as possible." (*See* the Department's Response to Petition to Appeal *Nunc Pro Tunc* at Exhibit "B"). However, for purposes of determining a motion to dismiss, the Board evaluates the contents in the light most favorable to the non-moving party. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*, 2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Winner v. DEP*, 2014 EHB 135, 136-37. Thus, when resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155.

[6] Even assuming *arguendo* the Board did find that Appellant relied upon misinformation provided by Mr. Burch, Mr. Burch's email was sent mid-afternoon on November 15, 2024. Mr. Marino was made aware at this time to review the Order for his appeal options. If he would have checked the document, he would have had time to fax over a basic appeal form to preserve a timely appeal. Indeed, the initial appeal submitted by Mr. Marino was Ordered to be perfected twice before it was accepted by the Board.

to review the Order and speak with its attorney regarding its appeal rights.[7] Indeed, the Board finds there was ample express written notice to the Appellant of the 30-day appeal deadline. The Board's notice of appeal form, as well as the Department's Order, contain this information in clear, capitalized font. Specifically, the first page of the subject Compliance Order issued to Heights Plaza states:

APPEAL NOTICE

> Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800-654-5984, Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. . . .
>
> IF YOU WANT TO CHALLENGE THIS ACTION OF THE DEPARTMENT, YOUR APPEAL MUST BE FILED AND RECEIVED BY THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD; HOWEVER, BECAUSE IMPORTANT LEGAL RIGHTS ARE AT STAKE, YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. . . .

(*See* October 7, 2024 Compliance Order, pg. 1).

Additionally, the first page of the notice of appeal form completed by Appellant states:

NOTICE OF APPEAL

Pages 1 through 4 of the following form and any required attachments must

[7] Mr. Marino himself declared that he has over 50 years working with the Department. He also stated that he has ongoing litigation in the Allegheny County Court of Common Pleas, GD 24-3650, regarding excessive storm water on his property and he has been in communications with the Department regarding this matter. (*See* December 6, 2024 letter included in Response to Order to Perfect e-filed on December 10, 2024). Due to these statements, we believe Appellant had ample implied knowledge to learn of its own appeal rights or speak with an attorney regarding such rights.

be received by the Environmental Hearing Board within 30 days after your receipt of notice of the action of the Department that you are appealing. You may mail, fax, or hand-deliver your Notice of Appeal to:

ENVIRONMENTAL HEARING BOARD
Rachel Carson State Office Building – 2nd Floor
400 Market Street, P.O. Box 8457
Harrisburg, PA 17105-8457
Fax: (717) 783-4738

You may wish to send your appeal to the Environmental Hearing Board by certified mail, return receipt, so that you know your appeal was received within the required time.

(*See* notice of appeal form located at https://ehb.pa.gov/forms).

In addition to the above, the Board also has a citizen's guide on its website that includes detailed information on the process for timely filing an appeal. There are a multitude of sources that specify the appeal period is 30 days, but specifically, if Appellant reviewed the "Filing of the Notice of Appeal" guide, the following information was presented in bold ink:

QUICK LOOK: FILING A NOTICE OF APPEAL

If you are affected by an action of the Department of Environmental Protection, you can appeal that action. To begin the appeal process, you must file a Notice of Appeal, which formally asks the Environmental Hearing Board to review the action. Your Notice of Appeal must be filed within 30 days of when you first become aware of the action. To file you must complete a Notice of Appeal Form, file it with the Environmental Hearing Board, and send copies of it to the Department of Environmental Protection and any other directly affected person, business, or municipality. If the action requires you to pay a penalty, you are still responsible for payment while you appeal the action.

WHEN TO FILE YOUR NOTICE OF APPEAL

You only have 30 days to file a Notice of Appeal, starting from the date you became aware of the Department's action. If you do not file a Notice of Appeal within those 30 days, the action may no longer be appealable.

The 30-day period begins in one of three ways:

1. You receive written notice of the Department's action, which is directed at you or issued to you;

2. The Department publishes notice of its action in the Pennsylvania Bulletin; or
3. You receive actual notice of a Department action that was not published in the Pennsylvania Bulletin.

(*See* Citizens Guide, pgs. 8-9 located at https://ehb.pa.gov/_files/ugd/ad7b29_dd563d3a9ed1459baaee0bbb3a6afac4.pdf).

The Board finds that Appellant had ample written notice of when the 30-day deadline expired. We also agree with the Department that Appellant has not met its heavy burden to prove that it is entitled to *nunc pro tunc* relief. The Board finds the facts of this case to be directly analogous to *Ametek v. DEP*, 2014 EHB 65.

In *Ametek*, the Department issued a remediation Order to Ametek. *Id.* Certified mail receipts confirmed Ametek received the Order on October 16, 2013. *Id.* at 65-66. Following the issuance of the Order, the parties engaged in continued negotiations regarding the Order and allegedly the Department discussed tolling the time period for pursuing an appeal before the Board. *Id.* at 66. Ametek filed a timely Notice of Appeal with the Department but inadvertently failed to timely file a Notice of Appeal with the Board. *Id.* at 67. Ametek filed a petition for *nunc pro tunc* relief alleging that the Department had consented to Ametek delaying the filing of the appeal pending the outcome of negotiations over the transfer of the site to the Bucks County Redevelopment Authority. *Id.* at 67-68. The Board found Ametek's arguments did not meet the heavy burden of justifying *nunc pro tunc* relief. The Board stated:

> Ametek asserts that there is an equitable basis for allowing the appeal based on the Department's alleged representations to Ametek that it was agreeable to extending the time for filing an appeal of its order. Even if the Department led Ametek to believe that the period for filing an appeal with the Board could be tolled, the Department has no legal authority to extend the deadline for filing an appeal with the Board. The appeal period is statutorily prescribed and is jurisdictional. The Department has no more authority to lengthen the appeal period than does the Board itself. Moreover, the duty was on Ametek to ensure that it was in compliance with the law and to file a timely appeal. As we held in *Rhodes v. DEP*, 2009 EHB 599, 615 "Even in those cases where a Department employee gives a clear but wrong legal opinion, responsibility for compliance with the law ordinarily rests with the

regulated party."

Id. at 73.

As in *Ametek*, the Board finds that it was up to Heights Plaza alone to determine when that 30-day appeal deadline ended. "[N]either negligence nor a mistake on the part of an appellant is an excuse for late filing." *McCauley v. DEP*, 2020 EHB 305, 312. "As former Environmental Hearing Board Chairman Maxine Woelfling has recognized, "the Board and the appellate courts have had little sympathy" for litigants who fail to make themselves aware of the statutory requirements or rely on the Department to make them aware of the appeal procedures." *Freyer,* 2020 EHB 270, 274 (*quoting Fisher v. Dep't of Envtl. Res.*, 1993 EHB 425, 428). Moreover, this Board has held that an appellant's discussions with the Department regarding settlement or tolling of the appeal period do not meet the criteria of fraud or an administrative breakdown to warrant the granting of a *nunc pro tunc* appeal. *See Simons and J.J.H. Maguire, Inc. v. DEP*, 1998 EHB 1131 (holding that statements made by the Department advising Appellant that there was no need to file an appeal was not sufficient to qualify for *nunc pro tunc* relief); *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695 (holding that attempts to negotiate settlement of a dispute with the Department are not grounds for the allowance of an appeal *nunc pro tunc*).

Although the Board agrees with Appellant that the Department is not prejudiced by the untimeliness and the appeal was filed a short time after the deadline, only 1 day after, these factors are irrelevant as the Board does not find any extraordinary circumstances, fraud, or breakdown in the Board's administrative process to warrant *nunc pro tunc* relief. Additionally, as this is a jurisdictional issue, equitable principles of fairness do not apply in the analysis of whether Appellant may file of an appeal *nunc pro tunc*. *See Ziccardi v. DEP*, 1997 EHB 1, 8.

Conclusion

Therefore, for the above stated reasons, we grant the Department's Motion to Dismiss the appeal for being untimely and deny Appellant's Motion to file an Appeal *Nunc Pro Tunc*. Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIGHTS PLAZA MATERIALS, INC.	:	
	:	
v.	:	**EHB Docket No. 2024-170-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of January, 2025, it is hereby **ordered** that Appellee Commonwealth of Pennsylvania Department of Environmental Protection's Motion to Dismiss is **granted** and Appellant's Petition to File an Appeal *Nunc Pro Tunc* is **denied.** The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

∗ **Judge Sarah L. Clark is recused in this matter and did not participate in the decision.**

DATED: January 28, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Christopher L. Ryder, Esquire
Melanie Seigel, Esquire
(*via electronic e-filing*)

For Appellant:
Anthony E. Patterson, Esquire
(via electronic e-filing)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	**Issued: February 21, 2025**

OPINION AND ORDER ON THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE MONTGOMERY COUNTY CONSERVATION DISTRICT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board ("Board") denies the Department of Environmental Protection and the Montgomery County Conservation District's (collectively referred to as "the Agencies") Motion for Partial Summary Judgment as genuine issues of material fact and law exist regarding the Agencies' discretion in the consideration of Mr. Bernstein's Montgomery County Court of Common Pleas land use appeals.

O P I N I O N

Introduction

This third-party appeal centers around a National Pollutant Discharge Elimination System ("NPDES") general permit, PAC460811 ("the permit") issued to 222 Church Road, LLC. Appellant David C. Bernstein ("Mr. Bernstein") filed two appeals with the Board regarding the subject permit. The first Board appeal occurred in November 2023 and challenged the

Montgomery County Conservation District's ("MCCD") issuance of the permit. The second appeal was filed in January 2024 and challenged the Department of Environmental Protection's ("Department" or "DEP") determination, after an informal hearing, that the MCCD's issuance of the permit was valid. The Board consolidated the two appeals by Order dated January 22, 2024 at EHB Docket No. 2023-090-BP.

On December 16, 2024, Appellee Agencies filed a Motion for Partial Summary Judgment asking the Board to strike Mr. Bernstein's Notice of Appeal paragraphs 12a,[1] 13a,[2] 17D,[3] 19,[4] and 22,[5] as they relate to the Agencies' consideration of Mr. Bernstein's two pending Montgomery County Court of Common Pleas appeals. Appellant filed his Response to said Motion on January 15, 2025. Appellee Agencies did not file a Reply Brief. This matter is ready for review and disposition.

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[1] "MCCD failed to adequately account for Mr. Bernstein's appeals of the Township of Cheltenham Board of Commissioner' preliminary and final land development approvals for the project. The Department should rescind the MCCD Approval and withhold further review until resolution of those appeals[.]" (*See* NOA e-filed on January 10, 2024 at ¶ 12(a)).

[2] "MCCD failed to adequately account for Mr. Bernstein's appeals of the Township of Cheltenham Board of Commissioner' preliminary and final land development approvals for the project. The Department should rescind MCCD's approval and withhold further review until resolution of those appeals[.]" (*See* NOA on January 10, 2024 at ¶ 13(a)).

[3] "MCCD's review and approval failed to properly account for Mr. Bernstein's underlying appeals of two local subdivision and land development approvals to the Montgomery County Court of Common Pleas. Resolution of the underlying appeals may materially impact Permittee's ability to develop the Permittee Property and materially impact Permittee's ability to comply with PAG-02." (*See* NOA e-filed on November 8, 2023 at ¶ 17(d)).

[4] "MCCD's action violates Article 1, Section 27 of the Pennsylvania Constitution and Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, because MCCD did not account for the two pending appeals before the Montgomery County Court of Common Pleas." (*See* NOA e-filed on November 8, 2023 at ¶ 19).

[5] "The Department's Determination violates Article 1, Section 27 of the Pennsylvania Constitution and Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, because the Department did not account for the two pending appeals before the Montgomery County Court of Common Pleas[.]" (*See* NOA e-filed on January 10, 2024 at ¶ 22).

Background

In 2021, Appellant Mr. Bernstein sold 222 Church Road, Elkins Park, Cheltenham Township, Montgomery County, Pennsylvania 19027 ("Site") to Permittee, 222 Church Road, LLC ("Permittee"). (*See* Appellant's Resp. to DEP's First Set of Req. for Admissions at ¶¶ 5 & 7). Mr. Bernstein currently owns 216 Church Road, Elkins Park which is directly adjacent to the Site. (*See* NOA, November 8, 2023 at ¶¶ 1 & 3).

After the purchase,[6] Permittee filed a subdivision and land development application to Cheltenham Township seeking approval to construct eight new single-family homes and a cul-de-sac on the Site. (*See* NOA, November 8, 2023 at ¶ 5). In 2022, Cheltenham Township granted Permittee's preliminary subdivision and land development approvals, and in 2023, Cheltenham Township granted Permittee's final subdivision and land development approvals. Mr. Bernstein filed appeals of those two actions in the Montgomery County Court of Common Pleas ("land use appeals"). (*See* NOA, November 8, 2023 at ¶ 6 & Appellees' Summ. J. Brief at pg. 3 n.3).[7]

Separately, in November 2021, Permittee applied to the MCCD for a general permit for discharge of stormwater associated with construction activities for development associated at the Site. (*See* NOA, November 8, 2023 at ¶ 4). Between November 2021 and October 2023, MCCD rejected several applications for a general permit submitted by Permittee. (*See* NOA, November 8, 2023 at ¶ 7). The MCCD also received several sets of comments on the proposed project at the Site on May 26, 2023, June 7, 2023, and August 18, 2023. (Ex. DEP-6, Affidavit of Elise Eggert

[6] An exact date has not been provided.

[7] The Montgomery County Court of Common Pleas dockets are *Bernstein v. Cheltenham Twp. Bd. Of Comm'rs*, 2022-07062 (Appeal of Cheltenham Twp. Bd. of Supervisors Resolution 08-22 granting preliminary land development approval for 222 Church Rd.) (filed May 17, 2022) and *Bernstein v. Cheltenham Twp. Bd. Of Comm'rs*, 2023-06556 (Appeal of Cheltenham Twp. Bd. of Supervisors Resolution 08-23 granting final land development approval for 222 Church Rd.) (filed April 14, 2023).

Crowe, P.E. at ¶ 29). On August 16, 2023, MCCD asked Permittee to provide a response to the comments on the project received. (*Id*.) On September 13, 2023, Robert E. Blue Consulting Engineers, P.C. prepared a response on behalf of Permittee and forwarded it to MCCD for review. (Ex. DEP-8).

On October 9, 2023, MCCD issued the subject NPDES Permit No. PAC460811 to conduct earth disturbance activities and discharge stormwater associated with construction activities into the Tookany Creek. (*See* NOA, November 8, 2023 at ¶ 8 & Appellees' SUMF at ¶ 1). The permit includes several conditions requiring that Permittee comply with all federal, state and local requirements, including local ordinances, when it undertakes earth disturbance activities and discharges stormwater associated with construction activities at the Site. (Ex. DEP-1, Condition III.D. and Part B.II.E, pgs. 9 & 16).

On October 28, 2023, notice of MCCD's issuance of the permit was published in the *Pennsylvania Bulletin*. 53 Pa. Bull. 6716, 6755 (October 28, 2023). On November 8, 2023, Mr. Bernstein requested that the Department hold an informal hearing on the MCCD's issuance of the permit, pursuant to 25 Pa. Code § 102.32(c). (Appellees' SUMF at ¶ 4). On November 27, 2023, as part of the informal hearing process, Mr. Bernstein submitted 246 pages of comments and argument regarding the Project. (*See* Ex. DEP-9). On December 7, 2023, the Department held a virtual informal hearing where the Department accepted comments and documents from both Mr. Bernstein and Permittee's technical and legal representatives. (*See* December 11, 2023 Determination, Ex. DEP-2). After review, on December 11, 2023, the Department issued a determination affirming the MCCD's actions. (*Id.* & Appellees' SUMF at ¶ 5). The current appeal to the Board followed.

Standard of Review

Summary judgment is appropriate when the record - including pleadings, depositions, answers to interrogatories, and other related documents - shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (*citing Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is granted only in the clearest of cases, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Liberty Twp. v. DEP*, 2022 EHB 324, 326; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106.

Discussion

Act 67/68

Acts 67 and 68 amended the Municipalities Planning Code to provide Commonwealth agencies, such as the Department, express authority to consider and rely on local land requirements when making permitting decisions. This authority was in doubt prior to their enactment. *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324, 329 (*citing New Hanover Twp. v. DEP*, 2011 EHB 645, 680).

Act 67, also known as the "Land Use Planning and Management Act" states: "[s]tate agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." 53 P.S. §

11105(a)(2). Act 68 compliments Act 67 by enhancing the planning capabilities of municipalities and states: "[w]hen a county adopts a comprehensive plan . . . Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." 53 P.S. § 10619.2(a). Additionally, Section 10619.2(c) of Act 68 states: "[w]hen municipalities adopt a joint municipal zoning ordinance: (1) Commonwealth agencies shall consider and may rely upon the joint municipal zoning ordinance for the funding or permitting of infrastructure or facilities." In sum, Acts 67 and 68 provide agencies with an express statutory duty to consider certain local land use decisions and discretionary authority to rely upon these local decisions when reviewing applications for: (1) funding, (2) permitting of infrastructure, or (3) permitting of facilities. Act 67/68 does not prevent the issuance of permits before compliance with local ordinances is achieved but promotes acquiescence with and consideration of local regulations.

Although Acts 67 and 68 provide Commonwealth Agencies authority to rely upon comprehensive plans and zoning ordinances when reviewing applications for permitting projects; however, they do not define the term "rely upon." Therefore, the Department has discretion in applying this language. (Ex. DEP-3 at pg. 1). To aid in the Department's discretion, it developed the "Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure" – Document No. 012-0200-001 ("Land Use Policy"). (*Id*.) The purpose of this policy document is to provide guidance and direction to the Department's staff on how to avoid or minimize conflicts with local land use decisions. (*Id.*) Specifically, the Land Use Policy states:

> The term "rely upon" is not defined in Acts 67, 68 and 127 of 2000. DEP interprets the statutory language "may rely upon" to give DEP discretion as to how to rely upon planning and zoning in its authorizations. DEP has chosen to rely upon this information in several ways. DEP can deny an application, approve the application

> or put a special condition on a permit when conflicts have been identified. DEP may also decide to suspend further review of an application until the conflict has been resolved. DEP does not interpret the law to authorize DEP "to rely" solely upon a comprehensive plan, because comprehensive plans do not have the same force of law as zoning ordinances. The PA MPC requires county comprehensive plans, municipal comprehensive plans and municipal ordinances to be generally consistent.

Id.[8]

In their Motion for Partial Summary Judgment, the Agencies argue that no genuine issue of fact or law exists regarding satisfaction of their duties under the Act 67/68 Amendments. Specifically, they state that they acted in accordance with the Department's Land Use Policy by: (1) reviewing Cheltenham Township and Montgomery County Planning Commission determinations that the Project was consistent with local zoning and the Montgomery County Comprehensive Plan; (2) using permit conditions to ensure compliance with local zoning and county planning; and (3) reviewing and considering voluminous public comments prior to issuing the Permit.

In response, Appellant argues genuine issues of material fact exist as to *how* the Agencies complied with Act 67/68 in making their final decision to approve the permit. Such issues include, but are not limited to, questions regarding MCCD's follow up with Cheltenham Township and Montgomery County Planning Commission after learning of Mr. Bernstein's land use appeals, how the Agencies applied the Department's Land Use Policy to guide their review, and how the Agencies took into consideration the stormwater concerns made by Appellant.

The Board finds that this motion for summary judgment revolves around the issue of what

[8] This Board has held on previous occasions that Department guidance documents do not have the weight of properly promulgated regulations, and the Board is under no duty to follow them. *PQ Corp. v DEP*, 2016 EHB 826, 837; *Winner v. DEP*, 2014 EHB 1023, 1035. *United Refining Co. v. DEP*, 2006 EHB 846. We do however recognize such documents as a tool used by the Department for the purpose of trying to establish consistent application of existing regulations.

level of effort is necessary on the part of the Agencies to prove that they had considered all local land use regulations and conflicts in efforts to protect the Commonwealth's natural resources in accordance with Act 67/68 and the Department's Land Use Policy. We find the 2015 case of *Tri-County Landfill, Inc. v. DEP*, to be particularly helpful to this analysis. *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324. In *Tri-County*, this Board stated:

> Actually, we find that level of effort to be rather limited due, in large part, to the need on the part of the agency to defer to local authorities when it comes to local matters such as zoning. We have frequently held that neither the Department nor this Board has the duty or even the authority to act as a statewide zoning hearing board. To the contrary, local zoning issues must be decided at the local level. *Casey v. DEP*, 2014 EHB 439; *Lyons v. DEP*, 2011 EHB 169; *Cnty. of Berks v. DEP*, 2005 EHB 233. The Department has no role in actually enforcing local land use and zoning requirements. *New Hanover Twp*., 2011 EHB at 680. Indeed, the Department is not required to conduct an independent investigation whether a project complies with local zoning requirements before permitting the project. *Heasley v. DER*, 1991 EHB 1758. It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue. In this respect, the Department's role is analogous to its role when a legitimate dispute regarding a permittee's legal right to enter land is identified; the Department must account for the dispute, not decide it. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599-606, 613; *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229.
>
> Once a potential conflict between the project and local zoning is identified, the Department must decide what to do about it. . . . It may be appropriate in some cases to deny the permit, but it might be appropriate in other cases to suspend review of the permit, as was previously done with respect to this project. *See Tri-County Landfill v. DEP*, 2010 EHB 747. . . . It may be appropriate under other circumstances to issue the permit with conditions. *See New Hanover*, *supra*; *Lyons*, *supra*. Choosing among these options may depend on any number of factors, one of which might involve the degree of the perceived conflict between the project and local requirements.

Id. at 330-31.

Relying on the above quoted language, we look to the Agencies' arguments on what actions they took to consider whether any local land use conflicts existed and how they addressed said

conflict. The Agencies state that they: (1) obtained certification from the Municipality and County that the Project was consistent with the Township's zoning ordinance and its stormwater management ordinance,[9] the Montgomery County Comprehensive Plan,[10] and all other county land use plans that impact the area;[11] and (2) took into account public comments related to land use and zoning issues in affirming the validity of the permit. Further, the Agencies argue that the permit itself includes several conditions[12] requiring that Permittee comply with federal, state, and local requirements, including local ordinances, when it undertakes earth disturbance activities. The Agencies provided Affidavits from Elise Eggert-Crowe, District Engineer for the MCCD, and Domenic Rocco, Director of the Bureau of Waterways Engineering and Wetlands, as well as written documentation to support their position.

Although the Board finds that the Agencies facially showed that they complied with Act 67/68, there are still outstanding questions surrounding whether Mr. Bernstein's land use appeals constitute a zoning conflict, and if so, whether the Agencies properly evaluated how the appeals would affect the permit. The Department acknowledges that it received notice of Mr. Bernstein's

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[9] On March 8, 2023, the Cheltenham Township Director of Planning and Zoning, Mr. Henry Sekawangu, acknowledged receipt of the permit application, and responded to the form by indicating, *inter alia*, that the proposed project is consistent with the Township's zoning ordinance and its stormwater management ordinance. (*See* Municipal Notification Form, DEP-4 at pg. 4).

[10] On March 8, 2023, Jon A. Lesher, LEED, Environmental Planning Assistant Manager, MCPC, responded to the form and indicated that "your project is consistent with the Montgomery County Comprehensive Plan (adopted January 15, 2015) and all other county land use plans that impact this area…" (*See* County Notification Form, DEP-5 at pg. 4).

[11] *See* DEP-6 at ¶ 22-26 & DEP-7 at ¶ 20-21, 24.

[12] Condition III.D states: "No condition of this General Permit shall release any person from any responsibility or requirements under relevant federal or Pennsylvania environmental statutes or regulations, or under relevant local ordinances." Part B, Standard Conditions, II. Compliance Requirements, E. Property Right states: "This General Permit does not convey any property rights of any sort, nor does this General Permit convey any exclusive privileges, and this General Permit does not authorize any injury to private property invasion of personal rights, or infringement of federal, state, or local laws or regulations." (Ex. DEP-1, Condition III.D. and Part B.II.E, pgs. 9 & 16).

land use appeals on May 26, 2023, four months before the permit was issued. (*See* Appellees' Summ. J. Brief at pg. 12). Additionally, the pleadings themselves were included in Bernstein's November 27, 2023 comments (Ex. DEP-9). However, there is no evidence that the Department reviewed or considered the pleadings in the county actions, or that anyone from the Department reached out to anyone from the Township or the County to discuss the claims made, or the issues raised in the county actions. *Snyder v. DEP*, 2015 EHB 857, 876-80 (Under certain circumstances, where a potential zoning conflict is brought to the Department's attention during the permit review process, the Department must decide how to proceed in light of that information, which is then, of course, reviewable by this Board.). Indeed, when a local land use decision is being challenged in court, the Department will have to make a permitting decision based upon the existing circumstances and status of that appeal. [13]

"If the Department considered an issue in its evaluation of a permit then it is likewise appropriate for us to review the same issue." *Borough of Jessup v. DEP*, 2024 EHB 174, 176 (*quoting Marshall v. DEP*, 2020 EHB 60, 71). "Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision." *Friends of Lackawanna v.*

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[13] Former Board Judge Richard P. Mather, Sr., during his tenure with the Department as Director of the Bureau of Regulatory Counsel, wrote:

> While local land use issues can be resolved during the Department's review of a permit application in most situations, there may be situations where challenges to local land use decisions extend beyond the time periods, established by law or policy, for timely Department permit action. In these rare cases, the Department will be asked to consider and may rely upon a local land use decision which is being challenged in court, and it will have to make a permitting decision based upon the existing circumstances and the status of the local land use decision.

Richard P. Mather, Sr., *DEP Implementation of Acts 67 and 68*, 3 Lawyers J. 8 (2001).

DEP, 2017 EHB 1123, 1165. "The Board's review considers more than whether the Department followed the laws and regulations in taking an action, but also considers whether the action was a reasonable exercise of the Department's discretion and in accordance with the Department's obligations under the Pennsylvania Constitution." *Snyder*, 2015 EHB at 857. "[O]nce we enter the world of reviewing the Department's discretion, we tend to exit the world where summary judgment is appropriate." *Tri-County Landfill*, 2015 EHB at 333. Thus, if the Department considered Mr. Bernstein's land use appeal, the Department's Land Use Policy, and/or public comments and then used its discretion on these matters in making its permitting decision, the Board must decide whether it did so correctly. *See Jessup*, 2024 EHB at 176.

As such, considerations on how the Agencies used their discretion in considering local land use conflicts in their permitting decision, and whether Mr. Bernstein's appeals constitute a zoning conflict are inappropriate for resolution on summary judgment. A hearing with the opportunity for live testimony and cross-examination on the matter is essential when dealing with matters involving discretionary actions such as these.

Article 1, Section 27

The Agencies further argue they are entitled to summary judgment on the Article 1, Section 27[14] claim made by Appellant because (1) Mr. Bernstein provides no specificity to this claim; (2)

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[14] Article 1, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment ("ERA"), states:

> 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 the people.

PA. CONST. art. I, § 27.

the Agencies did consider and take into account Mr. Bernstein's Montgomery Court of Common Pleas appeals, and (3) Article 1, Section 27 does not require the Agencies to stay their permit review pending a final outcome of local litigation related to land use decisions. (Appellant's Law Summ. J. Brief at pg. 15-17). Mr. Bernstein responds to these arguments by re-stating that there are genuine issues of material fact on *how* the Agencies addressed Mr. Bernstein's appeals and *how* they took the appeals into consideration against the "further degradation of the environment that will result from the improperly designed and planned stormwater management facility." (Appellants' Resp. Brief at pg. 15). For the same reasons as stated above, the question of the Departments' discretion and evaluation of these matters involve disputed issues of fact and law. Clearly, such matters are inappropriate for disposition in the context of a motion for summary judgment.

Conclusion

Therefore, we must deny Appellees' Motion for Partial Summary Judgment. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	

O R D E R

AND NOW, this 21st day of February, 2025, it is hereby **ordered** that the Department of Environmental Protection and the Montgomery County Conservation District's Partial Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 21, 2025

DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

c: For the Commonwealth of PA, DEP & Montgomery County Conservation District:
William J. Gerlach, Jr., Esquire
Patrick J. Donovan, Esquire
(via electronic filing system)

For Appellant:
Aaron S. Mapes, Esquire
Robert J. Schena, Jr., Esquire
(via electronic filing system)

For Permittee
Steven Hannn, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONCERNED CITIZENS OF UPPER MOUNT BETHEL TOWNSHIP	:	
v.	:	**EHB Docket No. 2023-001-CS**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW DEMI ROAD, LLC, Permittee	:	**Issued: March 14, 2025**

A D J U D I C A T I O N

By Judge Sarah L. Clark, in which Judge MaryAnne Wesdock joins

Judge Bernard A. Labuskes, Jr. files a separate Opinion, in which Chief Judge and Chairperson Steven C. Beckman joins

Judge Paul J. Bruder, Jr. is recused

Synopsis

The status quo is maintained and this third-party appeal of a Major Amendment to an Individual NPDES permit is dismissed where one of the Board's judges is recused, and the remaining Board judges are evenly divided on the merits of this third-party appeal.

FINDINGS OF FACT

The Parties stipulated to the following facts:

1. Appellant Concerned Citizens of Upper Mount Bethel Township is a citizens group who oppose the issuance of the major amendment to the Permit at issue in this appeal. (Parties' Joint Stipulation of Facts No. ("Stip.") 1.)

2. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, as amended, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Stip. 2.)

3. The Department administers the Title 25 Chapter 102 regulations (relating to erosion and sediment control and post-construction stormwater management), which were promulgated under the authority of the Clean Streams Law ("Chapter 102 Regulations"). (Stip. 3.)

4. The Department has the authority to delegate certain regulatory functions to County Conservation Districts. 3 P.S. § 859(2); 25 Pa. Code § 102.41. The Northampton County Conservation District ("NCCD"), at the time of the review and issuance of the major amendment of the permit subject to the instant appeal, was the Department's designee for the administration of the Post Construction Stormwater Management ("PCSM") Program and for the administration and enforcement functions of the Erosion and Sediment ("E&S") Pollution Control Program for the discharge of stormwater associated with construction activities within the political boundaries of Northampton County, consistent with 3 P.S. § 859(2) and 25 Pa. Code § 102.41. (Stip. 4.)

5. Permittee is New Demi Road, LLC, a limited liability company registered to do business in Pennsylvania and abroad. Permittee is the owner of 60.84 acres of real property located at 303 New Demi Road, Mount Bethel PA 18343, which is approximately 2,750 feet southwest of River Road in Upper Mount Bethel Township, Northampton County, PA ("Property"). Permittee is the recipient of the Major Amendment to NPDES Permit No. PAD480132 ("Amended Permit"). (Stip. 5.)

6. Permittee is a successor in interest to property owned by Portland Properties, LLC ("Portland"). (Stip. 6.)

7. The Project Site covered by the Amended Permit is located in the I-2 General Industrial Zoning District. It is bounded by Demi Road and commercial properties to the north, residential properties to the west, and wooded land and open agricultural land to the south and east. (Stip. 7.)

8. In its pre-development state, the Project Site is undeveloped, with existing and historic use of the property being 16% agriculture and 84% forest/woodland. (Stip. 8.)

9. The surface cover of the Project Site generally consists of surficial forest litter with fallen branches/trees and sporadic cobbles/boulders. (Stip. 9.)

10. Topographically, the Project Site is located on a slope, strongly sloping in the southeast to northwest direction, and separated by a very steep slope/ridge near the southeastern property edge. (Stip. 10.)

11. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, along its eastern edge, the Project Site's elevation ranges from approximately 595 feet near the southeast corner to approximately 540 feet near the northeastern corner. Along its western edge, the Project Site's elevation ranges from approximately 405 feet in the southwest corner to approximately 390 feet in the northwest corner. (Stip. 11.)

12. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, an unnamed tributary of the Delaware River is located partially within and along the Project Site's western boundary. (Stip. 12.)

13. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, the unnamed tributary of the Delaware River located partially within

and along the Project Site's western boundary drains directly to the Delaware River approximately 4,500 feet to the east. (Stip. 13.)

14. Using the northern, western, southern and eastern edge or property boundary of the site as depicted on Joint Exhibit 1, the unnamed tributary of the Delaware River partially within and along the Project Site's western boundary is classified under 25 Pa. Code Chapter 93 as Cold-Water Fishes, Migratory Fish (CWF-MF). (Stip. 14.)

15. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, the unnamed tributary of the Delaware River partially within and along the Project Site's western boundary as well as the Delaware River is not impaired and is a non-TMDL watercourse. (Stip. 15.)

16. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, wetlands are present along the western boundary of the Project Site. (Stip. 16.)

17. The wetlands along the western boundary of the Project Site are Exceptional Value (EV) wetlands of the Commonwealth because of the presence of bog turtle habitat. (Stip. 17.)

18. The bog turtle is listed as an endangered species under Pennsylvania's Fish and Boat Code, 30 Pa.C.S. §§ 2102 and 2305. (Stip. 18.)

19. The bog turtle is listed as a threatened species under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq*. (Stip. 19.)

20. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 1, the EV wetlands on the western side of the Project Site range in elevation from approximately 405 feet at their southernmost point in the southwest corner of the

Project Site to approximately 390 feet at their northernmost point in the northwest corner of the Project Site. (Stip. 20.)

21. The proposed project is the development of the Project Site with a 420,000 ft2 building with associated employee parking lot consisting of 97 spaces, rear truck court for 42 loading dock spaces, 72 trailer spaces, and direct access to the Demi Road cul-de-sac ("Proposed Development"). (Stip. 21.)

22. The Proposed Development will involve earth disturbance activities that would disturb approximately 50.99 acres of the Project Site. (Stip. 22.)

23. The Proposed Development includes 15.64 ac. +/- of new impervious surfaces. (Stip. 23.)

24. The building plans indicate a proposed finished floor elevation of the building of 495.95 feet. (Stip. 24.)

25. Maximum cuts are anticipated to be on the order of approximately 12 feet at the southern building corner, 36 feet for the southern parking area, and 61 feet for the eastern parking area. (Stip. 25.)

26. Maximum fill at the Project Site will be approximately 33 feet in the north building corner. (Stip. 26.)

27. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 2, surface flows of stormwater falling east of the cut on the eastern side of the Project Site will be managed by a newly-constructed diversion swale. The swale will run along the eastern edge of the Project Site until the [Swale] reaches the northern boundary of the Project Site, where stormwater will enter a pipe running along the northern boundary and flowing

towards the west, ultimately discharging via an outlet across a riprap apron at the north[west] [1] corner of the site to the unnamed tributary of the Delaware running along the western edge of the Project Site. (Stip. 27.)

28. Stormwater falling on the building, parking lot and associated facilities proposed for the Project Site will be managed by three dry extended detention basins onsite: Basin 1A, 1B, and 1C. (Stip. 28.)

29. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 2, Basin 1A is an underground detention basin located directly south of the building. It is designed to collect stormwater falling on the southern half of the building roof as well as on constructed areas south of the building. (Stip. 29.)

30. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 2, Basin 1B is an above-ground detention basin located near the northwest corner of the building. It is designed to collect stormwater falling on the northern half of the building roof, and the constructed areas north of the building. (Stip. 30.)

31. Using the northern, western, southern and eastern edge or boundary of the site as depicted on Joint Exhibit 2, Basin 1C is an underground detention basin located on the eastern side of the building near the buildings southeast corner. It is designed to collect stormwater falling on the paved areas on the east side of the building. (Stip. 31.)

32. The three basins were not designed for infiltration due to unacceptable infiltration test results and perched and/or seasonal high-water tables in those areas. (Stip. 32.)

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[1] While the Parties' Joint Stipulation as to Facts states that the clean water diversion swale discharges to the *northeast* of the Project Site, the Board believes that the clean water diversion swale discharges into the voluntary riparian forest buffer in the *northwest* corner of the Project Site. A review of the PCSM Plan confirms this. (Joint. Exhibit 1.)

33. Basins 1A, 1B, and 1C are all designed to discharge their stormwater via three level spreaders located to the west of the northern half of the building, although Basin 1B includes an emergency overflow outlet to the pipe carrying flow from the diversion swale. (Stip. 33.)

34. The Proposed Development utilizes a bog turtle conservation zone that is designed to extend approximately 300 feet from the edge of the wetlands on the western side of the Project Site up the slope of the Project Site, but sections of the bog turtle conservation zone south and west of the proposed building were modified as approved by the U.S. Fish and Wildlife Service. (Stip. 34.)

35. In 2004, a Bog Turtle Phase II Visual Survey was performed by Amy S. Greene of Environmental Consultants, Inc. (ECI) during which two (2) bog turtles were found in a wetland located on, and adjacent to the west of, the project parcel. Because of this, a 300-foot habitat protection buffer was established from the wetlands where the bog turtles were found, except for a small portion of an entrance road being located within it. (Stip. 35.)

36. In August of 2019, Permittee, through Vertek, retained Herpetological Associates, Inc. (HAI) to provide consultation services for the bog turtle associated with the NPDES Permit Boundary (as defined in Stipulated Fact #57), which included (1) review all available project information related to the bog turtle and proposed development plans, including Phase I and II bog turtle reports, wetland delineation reports, wetland maps, project maps, permits, agency correspondence and Pennsylvania Natural Diversity Inventory (PNDI) results, (2) a field view to examine all wetlands and determine their suitability for bog turtles, and (3) assist Permittee and Vertek in the preparation of a document package for review by United State Fish and Wildlife Service (USFWS), including any modification of the typical 300-foot bog turtle buffer. (Stip. 36.)

37. On March 24, 2020, HAI conducted a site visit of the bog turtle habitat within the NPDES Permit Boundary (as defined in Stipulated Fact #57), and HAI's field visit of the habitat confirmed that suitable bog turtle habitat is still present, although the wetland is being negatively impacted by the growth of cattail and reed canary grass. (Stip. 37.)

38. In a letter to USFWS dated April 13, 2020, HAI noted that "the majority of the wetland is classified as emergent and hydrology is provided by multiple sources including seeps that emerge along the northwestern wetland edge, and by larger springs that emerge laterally near the base of the slope alone the southeastern, forested wetland edge." HAI also noted the following in the letter:

> An unnamed tributary enters the wetland from the western corner and two culverts drain water under a gravel road from the south. Two channels from along the northwestern and southeastern wetland edges, and the overall direction of water flow through the wetland is from southwest to northeast. Numerous smaller rivulets spread water flow through the wetland.

(Stip. 38.)

39. The 300 ft. +/- bog turtle buffer is primarily wooded (which HAI described as "mixed hardwood forest with mature trees and a moderately dense understory"). (Stip. 39.)

40. The soils within the 300 ft. +/- buffer are mapped primarily as the Conotton soil series. The Conotton series is designated as Hydrologic Soil Group A (HSG A), which are highly permeable soils. While these soils might be suitable for stormwater recharge, no testing was performed in this area as construction within the 300-ft bog turtle buffer is not permitted. (Stip. 40.)

41. A portion of the grading associated with the proposed driveway and stormwater management facility, including outfalls from onsite stormwater structures, for the Proposed Development encroaches within the margins of the 300-foot buffer up to a maximum of 75 feet

when accounting for construction of the proposed improvements. As a result, Permittee, through HAI, on April 13, 2020 requested the United States Fish and Wildlife Service ("USFW") to review a modification to the 300-foot wide/deep bog turtle buffer criteria in certain areas because of these encroachments as indicated in Vertek's April 9. 2020 letter. (Stip. 41.)

42. On August 6, 2020, in response to HAI's April 13, 2020 letter about the modification to the 300-foot bog turtle buffer, USFW sent a letter in which it stated:

> The proposed Demi Road Logistics Center project is a new 300,000 square-foot building and associated parking, loading, and unloading areas, driveway, stormwater management and conveyance facilities, and other associated improvements on what is currently a primarily forested 67.7-acre property. A portion of the grading associated with the proposed driveway and stormwater management facility, including outfalls from onsite stormwater structures, encroaches within 300 feet of the wetland along the project's western boundary up to a maximum of 75 feet when accounting for construction of the proposed improvements . . .
>
> As proposed, the Logistics Center encroaches within the surrounding [bog turtle] conservation zone by 75 feet for a portion of the driveway and stormwater management facilities. This conservation zone was previously diminished by development on adjacent properties. The project proponents assert that, as designed, the proposed action will preserve the hydrology in the wetland and avoid adverse effects to bog turtles. Based on our review of the information provided, including the project description, project plans, and anticipated consequences of construction and operation of the Logistics Center, we concur that the proposed project may affect but is not likely to adversely affect the bog turtles or their habitat.

(Stip. 42.)

43. On January 5, 2021 and January 12, 2021, Vertek and HAI, respectively, sent a follow-up request to USFW for minor modification to the 300-foot bog turtle buffer based on the increase in building size from 300,000 sf to 420,000 sf. (Stip. 43.)

44. Through a response dated May 14, 2021, USFW sent a form stating:

> The federally listed bog turtle occurs or may occur in or near the project area. However, based on our review of the information provided, including the project description and location (Modifications to previously reviewed construction proposal are minor and not likely to impact bog turtle habitat) no adverse effects to

> this species is likely to occur. If there is any change in the location, scale, scope, layout or design of the project, further consultation or coordination with the Service will be necessary.

(Stip. 44.)

45. On or about October 20, 2021, Value Engineering sent a follow-up request to USFW requesting an updated clearance letter after an additional PNDI search was conducted. (Stip. 45.)

46. On December 3, 2021, USFW sent a response to the October 20, 2021 request on a form which stated:

> The federally listed bog turtle occurs or may occur in or near the project area. However, based on our review of the information provided, including the project description and location (Updated PNDI polygon only. No changes to scope, work proposed, or project impacts. Comments issued in our letter of August 6, 2020, remain valid) no adverse effects to this species is likely to occur. If there is any change in the location, scale, scope, layout or design of the project, further consultation or coordination with the Service will be necessary.

(Stip. 46.)

47. On September 26, 2016, the Department issued NPDES Permit No. PAI024816005 to Portland Properties, LLC for development of the Site that centered around the potential construction of a forty thousand (40,000) square foot industrial building along with associated site improvements (parking, access drives, stormwater management, etc.) on a 23.4 acre lot. (Stip. 47.)

48. On June 18, 2020, NPDES Permit No. PAI024816005 was transferred to New Demi Road and reassigned as NPDES Permit No. PAD480132 ("transferred permit"). (Stip. 48.)

49. Permittee retained Vertek to prepare the stormwater management design that included preparation of Erosion and Sedimentation (E&S) Plans, E&S Narrative Report, Post Construction Stormwater Management (PCSM) plans, and PCSM Report and assist Permittee in

the preparation and submission of application for a major amendment to the transferred NPDES Permit. (Stip. 49.)

50. On March 11, 2020, June 17, 2020, July 22, 2020; and January 27, 2021, the NCCD held pre-application meetings with representatives of New Demi Road and their design consultants to discuss, among other things, general design, environmental, technical, and regulatory considerations associated with development of the Property. (Stip. 50.)

51. During the preapplication meetings, the Applicant's consultant, Geo-Technical Associates, Inc. ("GTA"), submitted a "Stormwater Infiltration Report" after performing a predevelopment site characterization of the on-site soils ("Soil Characterization"). (Stip. 51.)

52. As to the potential for infiltration BMPs within the area proposed for development and earth disturbance, GTA's Report included its finding that "infiltration of stormwater on the site is considered marginally feasible and very limited." (Stip. 52.)

53. On or about February 9, 2021, Permittee, through Vertek, submitted an application for a major amendment to the transferred NPDES Permit ("Major Amendment Application") signed by Permittee on January 22, 2021, describing the Proposed Development as follows:

> Construction of a 420,000 sf general industrial/logistics center with associated employee parking lot consisting of 97 spaces and rear truck court for 72 trailer spaces and direct access to Demi Road. Two dry extended detention basins discharging via level spreaders over a 250'-300' wide riparian buffer are provided to manage stormwater rate and volume. The site is being served with public water and on lot sewage.

(Stip. 53.)

54. On or about May 14, 2021, Permittee submitted to DEP/NCCD a General Information Form (GIF), dated May 6, 2021, concerning the development of the Project Site with a 420,000 ft2 building with associated employee parking lot consisting of 97 spaces, rear truck court for 42 loading dock spaces, 72 trailer spaces, and direct access to Demi Road. (Stip. 54.)

55. On June 10, 2021, NCCD found the Major Amendment Application administratively complete, and published the Major Amendment Application on June 26, 2021. (Stip. 55.)

56. On November 1, 2021, in response to the Department Technical Deficiency Letter dated September 30, 2021, Permittee, through Vertek, resubmitted a Major Amendment Application signed by Permittee on 10-27-2021. (Stip. 56.)

57. The Major Amendment Application is for a total permit boundary area of 86.04 ac ("NPDES Permit Boundary"), consisting of the following parcels:

- The Property, which is a 60.84 acre parcel and the proposed devilment area ("Project Site");
- Additional tax parcel to the west of the Project Site (5.5 ac. +/-); and
- An offsite area to the east of the Project Site (19.7 ac. +/-), which is the Ultra-Poly site to be utilized as a haul road/temporary construction access and possible future public sanitary sewer connection ("Ultra-Poly Site"). The Ultra-Poly Site is associated with an open/active NPDES permit # PAC480057 and POI #1.

(Stip. 57.)

58. In connection with its application, Permittee submitted a Post-Construction Stormwater Management (PCSM) Plan. (Stip. 58.)

59. As a result of the Department's and NCCD's review of the Application and associated documents, and to ensure compliance with applicable Department regulations, two technical deficiency letters were sent to New Demi Road. The NCCD issued the first technical deficiency letter on September 30, 2021. (Stip. 59.)

60. In response to the September 30, 2021 deficiency letter, a resubmission from New Demi Road was received by the NCCD on or about November 1, 2021. (Stip. 60.)

61. The NCCD issued its second deficiency letter to New Demi Road on February 24, 2022; DEP Exhibit 33, Second Technical Deficiency Letter, dated February 24, 2022. (Stip. 61.)

62. In response to the February 24, 2022 deficiency letter, New Demi Road submitted a second resubmission on or about April 14, 2022. (Stip. 62.)

63. The Department and NCCD determined that each of the deficiencies included in both the September 30, 2021 and February 24, 2022 deficiency letters were fully and adequately addressed. Therefore, on August 5, 2022, the Department issued its draft Major Amendment to NPDES Permit No. PAD480132 and published notice of its issuance in the Pennsylvania Bulletin for review and comment on August 9, 2022. (Stip. 63.)

64. On September 19, 2022, the Department issued to Permittee a Major Amendment to Individual NPDES Permit No. PAD480132 for 303 Demi Road Planned Industrial Park, Upper Mt. Bethel Township and Portland Borough, Northampton County. The Amended Permit authorizes the discharge of stormwater from an earth disturbance activity to UNT to Delaware River (CWF, MF) and UNT to Delaware River via EV Wetlands (EV) in accordance with effluent limitations, monitoring requirements, and other conditions set forth in the Amended Permit. (Stip. 64.)

65. Until the Permittee has received written approval of the Notice of Intent to Terminate (NOT) the Amended Permit, the Permittee, and co-permittees, are "responsible for compliance with the permit terms and conditions, including long-term operation and maintenance of all PCSM BMPs on the project site and is responsible for violations occurring on the project site." (Stip. 65.)

66. The Amended Permit requires the Permittee "at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances), including

BMPs, which are installed or used by the permittee to achieve compliance with the terms and conditions of [the Amended Permit].” (Stip. 66.)

67. On November 3, 2022, Permittee recorded the Stormwater Management Plan and Declaration of Restrictions and Covenants. (Stip. 67.)

68. Public Notice of the issuance of the Amended Permit was placed in the Pennsylvania Bulletin on December 3, 2022. (Stip. 68.)

69. On January 2, 2023, Appellant filed its Notice of Appeal of the Amended Permit. (Stip. 69.)

Additional Findings of Fact

70. The EV Wetlands are primarily groundwater fed. (A. Ex. 71.)

71. Stormwater infiltrates into the soil prior to reaching the EV Wetlands (T. Vol. 2 pp. 107-108.) [2]

72. A level spreader takes the erosive properties out of stormwater runoff by dispersing the water in a sheet flow manner. (T. Vol. 2 pp. 37-38.)

73. The three level spreaders are designed to “replicate predevelopment flow” and drain it through the proposed voluntary riparian forest buffer. (T. Vol. 2 p. 39.)

74. The soils in the voluntary riparian forest buffer downslope from the level spreaders are, Conotton soils and Hydrologic Soil Group A soils, which are more sandy in nature, and are the “most porous and infiltrate the most water.” (T. Vol. 2 pp. 50-51.)

[2] Because the transcript of the hearing on the merits was provided to the Board and Parties in three nonconsecutively paginated volumes, we indicate the volume number in the citations to the transcript throughout this Adjudication.

75. Looking at the area on the Site, 36% of the preconstruction stormwater flow to the southern half of the wetlands will be diverted to the northern half of the wetlands post construction. (T. Vol. 2 p. 56.)

76. The 14.3 acres of the 39-acre Project Site that drain to the southern portion of the EV Wetlands during preconstruction will be diverted to the northern portion of the EV Wetlands post construction and 24.7 acres, or 64%, of the preconstruction stormwater runoff will continue to flow to the southern half of the EV Wetlands post construction. (T. Vol. 2 p. 56.)

77. The reduction in stormwater flow to the southern wetlands post construction, when considering the entire watershed, is only 5% of total volume. (T. Vol. 2 p. 57.)

78. The entire watershed consists of 293 acres that drain to the EV Wetlands (T. Vol. 2 p. 57.)

79. The volume of stormwater runoff being redirected to the northern portion of the EV Wetlands will be negligible and will not have a negative impact on the hydrology of the southern half of the EV Wetlands. (T. Vol. 2 pp. 60-61.)

80. The TR-55 is a primary modeling software used for calculating stormwater runoff and relying on the USDA Web Soil Survey is industry standard practice. (T. Vol. 2 p. 18.)

81. There are three wetland swale “fingers” or channels that project into the voluntary riparian forest buffer and concentrate flow. (T. Vol. 2 p. 40).

82. The draft five level spreader plan is infeasible due to the presence of the wetland swale channels because they will negate sheet flow through the buffer. (T. Vol. 3 171-172.)

83. The Permittee does not control the Kinney Property from the first 50 feet from the top of the bank of the UNT to the western edge of the Project Site, so a conservation easement could not be obtained to ensure that the voluntary riparian forest buffer would remain there in

perpetuity as required by 25 Pa. Code §102.14(g), making the area to the south of the Kinney Property not viable for locating level spreaders. (T. Vol 2 p. 39; T. Vol. 3 pp. 171-172.)

84. The bottom corner of Basin 1C may dip into the seasonal high water table, but its entire 341.5-foot length will not sit below the seasonal high water table. (T. Vol. 3 pp 58-59.)

85. The facilities that appear to be below the groundwater contour elevations are very localized and will not adversely impact the groundwater flow to the EV Wetlands. (T. Vol. 3 pp. 60-61, 105-106.)

86. The PCSM design preserves hydrologic support to the northwest and southwest wetlands in a similar manner as occurs presently, with stormwater collected and gradually released at the topographically lower portion of the Site, and the gradually released stormwater will infiltrate and move through the relatively permeable surface soils that flank the northwest and southwest wetlands, maintaining Site recharge." (T. Vol. 2 p. 111; A. Ex. 71.)

87. The Bog Turtle Grading Plan incorporates voluntary conservation recommendations. (T. Vol. 3 pp. 130-132.)

88. Bog turtles require a specific, predominantly groundwater-fed wetland habitat, but they are adaptable to variations in the overall saturation of their habitat throughout the year. (T. Vol. 2 pp. 131, 133-134.)

89. Bog turtles are able to swim and are comfortable on land as well. (T. Vol. 2 p. 135.)

90. A nondischarge alternative eliminates the net change in stormwater rate, volume and water quality, while ABACT manages the net change and can allow for a change. (T. Vol. 3 p. 239.)

91. A nondischarge alternative is always the Department's preferred option. (T. Vol. 3 p. 239.)

92. A pipe and endwall that discharge stormwater from the Swale is located within the riparian forest buffer. (T. Vol. 3 p. 228.)

93. The pipe and endwall cannot discharge in a sheet flow because it is a pipe outfall. (T. Vol. 3 p. 229.)

94. The Swale diverts offsite stormwater in a non-erosive manner. (T. Vol. 3 pp. 194-195.)

95. The 2-year/24-hour storm is the design basis that the PCSM BMPs are designed to address. (T. Vol. 3 p. 158.)

96. The net change in volume does not exceed preconstruction rates. (T. Vol. 3 p. 188.)

97. The required pollutant reductions are exceeded by the reduction credits, which indicates that the net change in water quality is adequately managed. (T. Vol. 3 p. 191.)

98. The stormwater analysis shows that the net change in peak rate for the 2, 10, 50, and 100 year storms will be adequately managed. (T. Vol. 3 p. 164, 167; DEP Ex. 26 (at 1761).)

DISCUSSION

Concerned Citizens of Upper Mount Bethel Township ("Appellant"), a citizens group, has appealed the Department of Environmental Protection's ("Department") issuance of the Major Amendment to Individual NPDES Permit No. PAD480132 ("Amended Permit") to New Demi Road, LLC ("Permittee"), a limited liability company registered to do business in Pennsylvania and abroad. The Amended Permit authorizes the discharge of stormwater from earth disturbance activity related to a proposed development project ("Project"), to an unnamed tributary to the Delaware River ("UNT") and an unnamed tributary to the Delaware River via Exceptional Value Wetlands ("EV Wetlands") in accordance with effluent limitations, monitoring requirements, and other conditions set forth in the Amended Permit. (Joint Stipulation of the Parties ("Stip.") 64.)

The EV Wetlands are designated as such because of the presence of critical habitat for the bog turtle, a species threatened at the federal level and listed as endangered by the Commonwealth. (Stip. 17-19.) There has been a 300-foot habitat protection buffer ("bog turtle conservation zone")[3] since the discovery of two bog turtles at the proposed Project Site ("Project Site" or "Site") in 2004, and the proposed development encroaches within the bog turtle conservation zone up to a maximum of 75 feet. (Stip. 35, 41).

Project and Best Management Practices

The Project Site is undeveloped land located in Upper Mount Bethel Township, Northampton County, with a wooded hillside that strongly slopes in the southeast to northwest direction and is separated by a steep ridge near the southeastern property edge. (Stip. 8,9,10.) At about the central point of the western boundary of the Site, there is what has been referred to as a "notch" of land ("Kinney Property") that intrudes into the Project Site that is owned by Frank Kinney, Jr, and is thus beyond the control of the Permittee. A UNT of the Delaware River is located partially within and along the Project Site's western boundary and drains directly to the Delaware River approximately 4,500 feet to the east. (Stip. 12, 13.) The UNT is classified as Cold-Water Fishes, Migratory Fish ("CWF-MF") under Chapter 93. (Stip. 14.) The UNT is not impaired and therefore does not have an assigned Total Maximum Daily Load. (Stip. 15.) Along its western boundary, the Project Site contains wetlands, which are primarily groundwater fed, a fact upon which all parties agree, and are considered Exceptional Value due to the presence of critical habitat of the bog turtle, a species considered threatened at the federal level and endangered by the Commonwealth of Pennsylvania. (A. Ex. 71 at 14; Stip. 16, 17.)

[3] The record identifies this area as the "bog turtle habitat protection buffer", the "bog turtle buffer", and the "bog turtle conservation zone." Because there is also a voluntary riparian forest buffer at issue in this appeal, we have chosen to use "bog turtle conservation zone" to avoid any confusion.

The Project is the development of the Project Site with a 420,000 ft^2 building and associated parking lot and truck court, and is estimated to generate 50.99 acres in earth disturbance. (Stip. 21,22.) When more than one acre of earth disturbance is proposed for a project, the requirement to treat runoff from construction activity as a point source and obtain an NPDES permit under Chapter 102 Erosion and Sediment Control regulations is triggered. 25 Pa Code §102.5(a); *O'Reilly v. DEP*, 2001 EHB 19, 33. An individual NPDES permit is required when the proposed earth disturbance is within a special protection watershed, as here.

The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 600. Chapter 102 regulates discharges associated with stormwater by requiring the application of best management practices ("BMPs") instead of discreet numerical effluent limits. *Blue Mountain*, 2006 EHB at 600. BMPs are defined as "[a]ctivities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing and designated use of waters within this Commonwealth." 25 Pa. Code § 102.1. Any person proposing a new earth disturbance activity that requires permit coverage under Chapter 102 is responsible to develop, implement, operate and maintain a post construction stormwater management plan ("PCSM Plan") in accordance with the requirements in Section 102.8. 25 Pa. Code § 102.8(a). A PCSM Plan is "A site-specific plan consisting of both drawings and a narrative that identifies BMPs to manage changes in stormwater runoff volume, rate and water quality after earth disturbance activities have ended and the project site is permanently stabilized." 25 Pa. Code §102.1.

The main PCSM BMPs contained in the PCSM Plan prepared and submitted by the Permittee include dry extended detention basins, level spreaders, and a voluntary riparian forest

buffer ("buffer"). Stormwater falling on the building, parking lot, and associated facilities will be managed by three dry extended detention basins. (Stip. 28.) Basin 1A is an underground detention basin located directly south of the building and is designed to collect stormwater falling on the southern half of the proposed building roof as well as on constructed areas south of the proposed building. (Stip. 29.) Basin 1B is an above-ground detention basin located near the northwest corner of the proposed building and is designed to collect stormwater falling on the northern half of the proposed building's roof and constructed areas north of the building. (Stip. 30.) Basin 1C is an underground detention basin located on the eastern side of the proposed building near the building's southeast corner and is designed to collect stormwater falling on the paved areas on the east side of the building. (Stip. 31.) The three basins are designed to discharge their stormwater into a 150-foot wide, 760-foot long voluntary riparian forest buffer located within a 300-foot bog turtle conservation zone, via three level spreaders located to the west of the proposed building, north of the Kinney Property. (Stip. 33.)

Offsite stormwater falling east (upslope) of the cut on the eastern side of the Project Site will be managed by a newly-constructed clean water diversion swale ("Swale"), which will run along the eastern edge of the Project Site until it reaches the northern boundary, where stormwater will enter a pipe running along the northern boundary and flowing towards the west, ultimately discharging via an outlet across a riprap apron at the northwest corner of the Site to the UNT. (Stip. 27.) While this Swale is included in the overall E&S controls at the Site, it is not a component of the proposed PCSM Plan and is therefore not implicated by the regulations controlling the PCSM Plan.

Standard

The Board reviews Department actions *de novo*, meaning the Board "decide[s] the case anew on the record developed before" it. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318 (citing *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975)). In a third-party appeal such as this one, the Appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). The Appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd* 131 A.3d 578 Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. "To prove one's case by a 'preponderance of the evidence' means that the 'evidence in favor of the proposition must be greater than that opposed to it...It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Untied Refining Co. v. DEP*, 2016 EHB 442, 449 (quoting *Noll v. DEP*, 2005 EHB 505, 515 (quoting *Bethenergy Mines, Inc. V. DER*, 1994 EHB 925, 975 (quoting *Midway Sewage Auth. V. DER*, 1991 EHB 1445, 1476). Therefore, a third-party appellant of the issuance of a permit such as Concerned Citizens of Upper Mount Bethel Township must present evidence showing that the Department's issuance of the Permit here "was not appropriate or did not conform with the applicable law or was unreasonable, and its evidence must be greater than the evidence showing that the issuance of the permit was appropriate or in accordance with the applicable law." *United Refining*, 2016 EHB at 449. It is insufficient to "raise an issue and then speculate that all types of unforeseen calamities may occur." *Id.* Rather, the third-party appellant must prove – by a preponderance of the evidence – that the issues it raises are likely to occur. *Id.* Finally, technical issues raised must be supported with technical evidence, including but not limited to expert

testimony, that is more credible than the technical evidence brought by the Department and Permittee. *Id.*

Failure to mimic preconstruction stormwater conditions

The Appellant's main argument in this appeal is that the Amended Permit was improperly issued because the proposed PCSM BMPs fail to mimic preconstruction stormwater runoff conditions at the Site as required by 25 Pa. Code §102.11(a)(2). Section 102.11 states:

> 102.11 General requirements.
>
> (a) *BMP and design standards*. A person conducting or proposing to conduct an earth disturbance activity shall:
> ….
>
> (2) If required to develop a PCSM Plan, design, implement and maintain PCSM BMPs to mimic preconstruction stormwater runoff conditions to protect, maintain, reclaim and restore water quality and existing and designated uses. Various PCSM BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* (Stormwater BMP Manual), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

The Appellant focuses specifically on the word "mimic," and argues that the proposed discharge of stormwater runoff from the developed areas of the Project Site via the level spreaders through the voluntary riparian forest buffer to the northern portion of the EV Wetlands, as proposed in the Permittee's PCSM Plan, fails to mimic preconstruction stormwater runoff conditions. The Appellant cites testimony given by Daniel Ahn ("Mr. Ahn"), District Engineer, Lehigh County Conservation District,[4] an expert stipulated to and accepted by the presiding judge in post construction stormwater management, in which he stated that the word "mimic" as used in Section

[4] While Mr. Ahn is currently the District Engineer for the Lehigh County Conservation District, he served in the same position at the Northampton County Conservation District from August 2017 to February 2023, where he performed the technical review of the application for the Amended Permit at issue here. (T. Vol. 3 p. 111, 119.)

102.11(a)(2) means to "imitate, match to the extent practical." (T. Vol. 3 p. 142.) The Appellant contends that stormwater falling on the southern half of the Project Site will have "much different" runoff conditions post construction than in its preconstruction state, and therefore does not "imitate" or "match to the extent practical" preconstruction stormwater runoff conditions. (A. Post-Hearing Brief at 48.) The Appellant refers to testimony provided by Charles R. Dutill ("Mr. Dutill"), an expert in stormwater management systems and site hydrology who was stipulated to by the parties and accepted by the presiding judge. Mr. Dutill testified that wetlands are often fed by surface water, and there is indication that the wetlands on the Project Site are fed to "some significant degree" by surface water. In his opinion, preconstruction stormwater flows down the slope from east to west, where a "smaller portion" is taken up by the trees, a "significant portion" infiltrates into the soil and flows into the groundwater, flowing to the wetland area through the groundwater, and the remainder flows over the surface to the wetland area. (T. Vol. 1 pp. 16-17, 23.) Mr. Dutill further testified that the stormwater falling on the southern half of the Project Site in its preconstruction state would flow from east to west and end up in the southern half of the wetlands, and that the stormwater falling on the northern half of the Project Site in its preconstruction state would flow from east to west and end up in the northern half of the wetlands. (T. Vol. 1 pp. 23-24.)

In regards to the flow of stormwater post construction, Mr. Dutill testified that the stormwater that falls uphill (offsite) on the southern portion of the property will flow into the Swale and discharge at the northern part of the site post construction, so none of the stormwater from that area will reach the southern half of the wetlands. (T. Vol. 1 pp. 27-28.) Mr. Dutill further testified that stormwater falling on the developed portion of the site post construction will flow to the level spreaders, which are proposed to be located on the northwestern portion of the site, then down to

the wetlands area, resulting in all of the stormwater for those sections flowing to the northern half of the wetlands instead of the southern half of the wetlands. (T. Vol. 1 p. 28.) Mr. Dutill then opined that, given these changes, the stormwater flow to the southern portion of the EV Wetlands will be reduced by approximately 60-70% post construction. (T. Vol. 1 pp. 28-29.)

In response, the Permittee contends that the PCSM BMPs proposed in the PCSM Plan indeed mimic preconstruction conditions because they are designed to maintain the designated preconstruction use of the EV Wetlands as required by Section 102.11(a)(2) by directing stormwater to continue to flow towards the UNT along the western boundary of the property and infiltrate prior to reaching the wetland. (P. Post-Hearing Brief at 39.) Stephen Dadio ("Mr. Dadio"), an expert in ecology and hydrology, including ecologic, hydrologic and wetland impact evaluations, who was stipulated to by the Parties and accepted by the presiding judge, and who prepared a Wetlands Impact Report for the Proposed Project, provided testimony that preconstruction stormwater flows in a westerly direction toward the UNT and infiltrates into the soil prior to reaching the EV wetland, feeding the wetland as groundwater. (T. Vol 2 pp. 101-102; T. Vol 2 p. 108; *See also* T. Vol 3 pp. 37, 40.) Mr. Dadio testified that he did not see any evidence of surface run-off or rills or gullies forming in the area during any of his site visits. (T. Vol. 2 p. 105.) Mr. Dadio also reported that he saw no evidence of runoff that would indicate that the soils would not drain, or "any surface impacts to the wetland through evidence of erosion" and concluded that the stormwater infiltrated into the soil prior to reaching the EV wetlands. (T. Vol. 2 pp. 107-108.)

Michael Sodl ("Mr. Sodl"), an expert in stormwater hydrology, stormwater modeling and stormwater management design, who was stipulated to and accepted by the presiding judge, and who prepared the PCSM Report and PCSM Plan for the Proposed Project, testified that the PCSM

BMPs are designed so that the stormwater will continue to flow toward the UNT along the western boundary of the property and infiltrate into groundwater prior to reaching the EV Wetlands. (T. Vol. 2 pp. 14, 50-51, 60-61, 66-70; *see also* T. Vol. 3 pp 65-66.) As described above, the stormwater falling on the developed area of the Project Site is conveyed through the dry detention basins to three level spreaders, which discharge into the proposed voluntary riparian forest buffer in the northwest portion of the Project Site. According to Mr. Sodl, a level spreader takes the erosive properties out of stormwater runoff by dispersing the water in a sheet flow manner. (T. Vol. 2 pp. 37-38.) Mr. Sodl testified that the three level spreaders are designed to "replicate predevelopment flow" and drain it through the proposed voluntary riparian forest buffer. (T. Vol. 2 p. 39.) He further testified that the soils in the voluntary riparian forest buffer downslope from the level spreaders are, according to the USDA Web Soil Survey, Conotton soils and Hydrologic Soil Group A soils, which are more sandy in nature, and are the "most porous and infiltrate the most water." (T. Vol. 2 pp. 50-51.)

The Permittee counters Mr. Dutill's opinion regarding the 60-70% reduction in post construction stormwater flow to the southern half of the EV Wetlands with additional testimony from Mr. Sodl. Mr. Sodl testified that, looking at the area on the site, 36% of the preconstruction stormwater flow to the southern half of the EV Wetlands will be diverted to the northern half of the EV Wetlands post construction. (T. Vol. 2 p. 56.) He explained that the 14.3 acres of the 39-acre Project Site that drain to the southern portion of the EV Wetlands during preconstruction will be diverted to the northern portion of the EV Wetlands post construction, and 24.7 acres, or 64%, of the preconstruction stormwater runoff will continue to flow to the southern half of the EV Wetlands post construction. (T. Vol. 2 p. 56.) Mr. Sodl opined that the reduction in stormwater flow to the southern wetlands post construction, when considering the entire watershed, is only

5% of total volume. (T. Vol. 2 p. 57.) He explained that the entire watershed consists of 293 acres that drain to the EV Wetlands,[5] and 14.3 acres of volume is being diverted to the northwest wetlands via the PCSM BMPs. (T. Vol. 2 p. 57.) Mr. Sodl concluded that, based on these calculations, the volume of stormwater runoff being redirected to the northern portion of the EV Wetlands will be negligible and will not have a negative impact on the hydrology of the southern half of the EV Wetlands. (T. Vol. 2 pp. 60-61.)

Weighing competing expert testimony is one of the Board's core functions. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082- L, slip op. at 19 (Adjudication, Nov. 15, 2024). See also *DEP v. EQT*, 2017 EHB 439, 497, aff'd, 193 A.3d 1137 (Pa. Cmwlth. 2018). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. "We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

Mr. Dutill was not asked to, and did not, provide testimony or cite evidence to support his opinion that the EV Wetlands were significantly fed by surface water, and the parties agree that

[5] The Appellant argues that there is nothing on the record to independently support that the 293-acre watershed is feeding the southern portion of the EV Wetlands. (A. Post-Hearing Brief at 60.) However, the Appellant, who bears the burden in this appeal, does not offer any proof that this is not an accurate representation of the overall acreage in the watershed, while Mr. Sodl offered testimony to support his calculations, and we therefore credit the testimony and calculations of Mr. Sodl and accept this figure as representative of the entire acreage.

the EV Wetlands are predominantly groundwater fed. (A. Post-Hearing Brief at 40-41; P. Post-Hearting Brief at 55; DEP Post-Hearing Brief at 51.) On the other hand, Mr. Dadio's opinions were based on personal observations he made during "the half a dozen times" he was on the site to conduct the wetland evaluation and jurisdictional determination and prepare the Wetlands Impact Report. (T. Vol. 2 p. 105.) Although the parties stipulated to Mr. Dutill's expertise in the areas of stormwater management systems and site hydrology, and the Board finds Mr. Dutill to be qualified in those areas, his testimony failed to explain how he calculated his 60%-70% reduction estimation. Further, when questioned on cross about how he calculated his estimation, Mr. Dutill responded that he did not have the numbers that he used for the calculation memorized and appeared to confirm that he did not provide a calculation in his expert report. (T. Vol. 1 pp. 48-49.) Conversely, Mr. Sodl testified that he calculated his estimated 5% reduction using both the Department's Worksheet 4, which is included in the BMP Manual[6] and used to calculate the change in runoff volume for the 2-year storm, and the Soil Conservation Service TR-55 urban hydrology model ("TR-55"), receiving similar results with each. (T. Vol. 2 p. 60.) The TR-55 is a program that calculates runoff volume and rate for small watersheds under about 200 acres and generates hydrographs for stormwater management calculations. (T. Vol. 2 p. 17.) Mr. Sodl explained that his organization relied upon the USDA Web Soil Survey, which provides the underlying soils and hydrologic soil groups for the property. (T. Vol. 2 p. 18.) Mr. Dadio's personal observations of the soils on the Project Site from using a hand auger and walking the property were in "general agreement' with the data in the USDA Web Soil Survey. (T. Vol. 2 p.

[6] This Board has held on previous occasions that Department guidance documents do not have the weight of properly promulgated regulations, and the Board is under no duty to follow them. *PQ Corp. v DEP*, 2016 EHB 826, 837; *Winner v. DEP*, 2014 EHB 1023, 1035. *United Refining Co. v. DEP*, 2006 EHB 846. We do however recognize such documents as a tool used by the Department for the purpose of trying to establish consistent application of existing regulations.

104.) Mr. Sodl further testified that the TR-55 is one of the primary modeling software used for calculating stormwater runoff and relying on the USDA Web Soil Survey is industry standard practice. (T. Vol. 2 p. 18.)

In a battle of the experts such as this, the failure to provide relevant calculations used to arrive at the conclusions drawn is simply insurmountable in the face of opposing expert opinion based solidly in calculations made using tools and methodologies recognized and accepted by the professional communities to which these experts belong. While the Permittee's experts, Mr. Dadio and Mr. Sodl, provided the methodologies and calculations used to arrive at the conclusion of a 5% reduction in flow, the Appellant's expert, Mr. Dutill, could neither articulate nor point to the calculations in his expert report by which he came to his prediction of a 60-70% reduction in flow. For these reasons, the Board credits the opinions of Mr. Dadio and Mr. Sodl on the question of the extent of the reduction in surface water flow to the southern EV Wetlands and finds that the post construction reduction in flow to the southern EV Wetlands will be approximately 5%.

Five Level Spreader Plan

The Appellant next refers to a draft Bog Turtle Grading Plan (A. Ex. 74) that the Permittee included in its first request to the U.S. Fish & Wildlife Service ("USFWS") on April 8, 2020 for an opinion on a 75-foot encroachment into the 300-foot bog turtle conservation zone. (A. Post-Hearing Brief at 51.) The Bog Turtle Grading Plan proposed to utilize five level spreaders instead of three, with three of the spreaders proposed to be located south of the Kinney Property. The Appellant cites the existence of this plan as evidence that the discharge of stormwater to the southern half of the wetlands is "doable" and thereby, under Mr. Ahn's term, "practical," seemingly concluding that the absence of level spreaders in the southwest portion of the Project

Site indicates that PCSM BMPs do not mimic preconstruction stormwater runoff. (A. Post-Hearing Brief at 51.)

The Permittee responds that the five level spreader plan was abandoned during the design of the PCSM Plan because it was determined to be infeasible. (P. Post-Hearing Brief at 45.) Mr. Sodl testified that there are three existing wetland swale "fingers," or channels, that project into the riparian forest buffer and concentrate flow, which will "defeat the purpose of what the riparian buffers are designed to do," which is to promote sheet flow. (T. Vol. 2 p. 40.) Mr. Ahn agreed with this assessment in his testimony, explaining that the channels are within the buffer and would negate the sheet flow through the buffer. (T. Vol. 3 pp. 171-172.) Mr. Sodl and Mr. Ahn also testified that, since the Permittee does not control the Kinney Property from the first 50 feet from the top of the bank of the UNT to the western edge of the Project Site, a conservation easement could not be obtained to ensure that the voluntary riparian forest buffer would remain there in perpetuity as required by 25 Pa. Code §102.14(g), thus the area to the south of the Kinney Property was not viable for locating level spreaders. (T. Vol 2 p. 39; T. Vol. 3 pp. 171-172.)

The Appellant did not present any testimony or evidence beyond the existence of the Bog Turtle Grading Plan to show that using level spreaders south of the Kinney Property is feasible. Further, the Appellant did not provide testimony or evidence of any kind to rebut Mr. Sodl and Mr. Ahn's opinion that utilizing level spreaders in the southern half of the Project Site was not feasible. The Board is not convinced that the mere fact that a conceptual plan proposed to utilize level spreaders in the southwestern half of the Project Site demonstrates that it is feasible or practical, or that the Department erred in approving a PCSM Plan that did not utilize level spreaders in the southwestern portion of the Project Site. Therefore, we find that the Appellant has not met its burden of proving by a preponderance of the evidence that it was unreasonable of

the Department to approve the three level spreader plan where the only proffered proof of that said unreasonableness is that a plan involving five level spreaders had once been ideated.

Basin 1C

The Appellant next asserts that specific aspects of the proposed PCSM BMPs, such as Basin 1C, show that the Project fails to "mimic" preconstruction stormwater runoff conditions. (A. Post-Hearing Brief at 52.) The Appellant points to the Hydrologic Evaluation Report prepared by GTA ("GTA Report") (A. Ex. 71), which states that the bottom of Basin 1C and portions of the related stormwater conveyances have profiles that "may extend below the seasonal high groundwater table, with depths below groundwater potentially ranging from slightly more than zero to less than 10 feet." (A. Post-Hearing Brief at 52; A. Ex. 71 (at 15).) The Appellant then cites testimony provided by Paul Scott ("Mr. Scott"), an expert in hydrology and hydrogeology, including hydrologic and hydrogeologic impact evaluations, who was stipulated to by the Parties and accepted by the presiding judge, and who prepared the GTA Report. When questioned about the seasonal high groundwater contour elevation and whether the proposed retaining walls would impede groundwater flow to the EV Wetlands, Mr. Scott stated "…when you see a wall and it's parallel to the contours and perpendicular to the flow, you can infer that it would be a barrier." (T. Vol. 3 p. 62.) The Appellant uses this statement to argue that the entire 341.5-foot length of Basin 1C would act as a barrier to the flow of groundwater from east (upslope) of Basin 1C.

The Permittee clarifies that neither Mr. Scott nor the GTA Report indicated that the entirety of the 341.5-foot length of Basin 1C would sit below the seasonal high water table. Mr. Scott testified that the bottom corner of Basin 1C *may* dip into the seasonal high water table. (T. Vol. 3 pp. 58-59.) Mr. Scott elaborated that the facilities that appear to be below the groundwater contour elevations are "very localized," explaining that "…water will move around them, but also the

aquifer is very thick so water will continue to move down towards the wetlands and will not be impeding," and concluded that they "would not adversely impact the groundwater flow to the wetlands." (T. Vol. 3 pp. 60-61, 105-106.) Additionally, Mr. Scott testified that the seasonal high water level can move ten feet or more in a year, will drop throughout the course of the year, and may drop completely below all of the features that appear to be below it. (T. Vol. 3 p. 58.)

The Appellant did not provide any expert testimony or evidence, other than the mere existence of Basin 1C and the fact that a portion of it may sit below the seasonal high water table at various times throughout the year, to show that groundwater could be impeded, and that the PCSM BMPs would not mimic preconstruction stormwater conditions. This claim is speculative, and without supporting evidence stronger than that brought by the opposition, there simply is no showing that it is likely that the groundwater would be impeded by the depth and placement of Basin 1C. We find that the Appellant did not meet its burden on this issue. *See United Refining Co.*, 2016 EHB at 449.

As the Board has explained previously, the purpose of the Chapter 102 regulations is to prevent pollution of waters of the Commonwealth due to accelerated erosion and sedimentation caused by stormwater runoff from impervious surfaces as a result of development. The regulations are not intended to completely preclude the development of property, but to ensure that development is done in a manner which is protective of water quality. If the Board were to adopt the Appellant's interpretation of the word "mimic" to mean that preconstruction and post construction stormwater runoff conditions must be nearly identical, it would effectively prohibit the development of any property, as installing impervious surfaces will always change stormwater runoff conditions. The record shows that the Permittee considered all PCSM BMPs and chose those that were feasible for the Project Site. (T. Vol. 2 pp. 43-45.) The Board finds that the

Permittee has designed the PCSM BMPs in a way that will mimic preconstruction stormwater runoff to the extent that they will ensure the continued designated use of the EV Wetlands as critical bog turtle habitat as required by 102.11(a)(2).

Impacts to Exceptional Value Wetlands and Critical Bog Turtle Habitat

The Appellant's arguments regarding the Project's impact on the EV Wetlands and the critical bog turtle habitat contained therein are twofold. First, the Appellant contends that the alleged failure to mimic preconstruction conditions will result in a failure to "protect, maintain, reclaim and restore water quality and designated uses" of the EV Wetlands under § 102.11(a)(2). Second, the Appellant broadly states that the record establishes that the post construction stormwater system will alter the southern portion of the EV Wetlands and adversely impact the critical bog turtle habitat therein, and that in approving such a plan, the Department failed in its regulatory duty to ensure protection of the critical bog turtle habitat under 25 Pa. Code § 93.4c(a)(2).

As detailed above, the proposed PCSM Plan for the Project includes the use of three level spreaders that discharge post construction stormwater falling on the developed areas of the Project Site through the voluntary riparian forest buffer in the northwestern portion of the Project Site. The Appellant argues that this configuration will reduce groundwater flow to the southern half of the EV Wetlands, in turn adversely impacting the EV Wetlands and their provided critical bog turtle habitat. In support of this contention, the Appellant points to the opinion of its accepted expert on wetlands and wetland ecology, James A. Schmid (Dr. Schmid"), who testified that reducing the amount of water going into a wetland may cause the extent of the wetland to be decreased and may result in there being less water in the wetland. (T. Vol. 2 p. 74.) According to Dr. Schmid, a 60%-70% reduction in stormwater flow as estimated by Mr. Dutill, would have a

"dramatically adverse effect" on the bog turtle habitat. (T. Vol. 1 p. 77.) However, the Board has already credited the opinion of Mr. Sodl that the decrease in stormwater flow to the EV Wetlands between preconstruction and post construction is 5%.

As the Board has already discussed, the Permittee asserts that the proposed PCSM BMPs are designed to maintain the protected use of the EV Wetlands as bog turtle habitat as required by Section 102.11(a)(2), and the Permittee's experts provided extensive testimony on the design and function of the proposed PCSM BMPs. Again, the parties agree that the EV Wetlands are primarily groundwater fed. Mr. Dadio, who prepared the Wetlands Impact Report, testified that he believed the post construction stormwater discharged by the level spreaders will infiltrate into the groundwater and equilibrate, so the EV Wetlands "should not be adversely impacted." (T. Vol. 2 p. 111.) Mr. Dadio concluded: "I don't believe that the groundwater level will be impacted by this project, so I think that they are groundwater fed and I think it remains consistent." Mr. Scott's findings in the GTA Report support Mr. Dadio's opinion. In the GTA Report, Mr. Scott concluded that the PCSM design "preserves hydrologic support to the NW and SW wetlands in a similar manner as occurs presently, with stormwater collected and gradually released at the topographically lower portion of the site." The GTA Report further states: "This gradually released stormwater is expected to infiltrate and move through the relatively permeable surface soils that flank NW and SW wetlands, such that site recharge is maintained." (A. Ex. 71.)

Dr. Schmid testified on cross-examination that he expects that there would be an adverse impact to a wetland if the amount of water going into the wetland is decreased, and he did not believe there would be a threshold below which there would be no impact. (T. Vol. 1 p. 91.) However, Dr. Schmid stated that the impacts to the EV wetlands depend on the "precise volumetric change." (T. Vol. 1 p. 74.) Further, Dr. Schmid acknowledged that he had not seen "specific

numbers on the volumes of liters per square foot of water reaching a particular square foot of wetland," so it would be difficult to predict the exact impact, but he expected that the greater the reduction, the greater the impact. (T. Vol. 1 p. 78.) Dr. Schmid did not provide an opinion on the potential impact of Mr. Sodl's 5% estimated reduction in stormwater flow. When asked whether he visited the area of the EV Wetlands, Dr. Schmid responded that he visited some neighboring properties to the west of the UNT. (T. Vol. 1 p. 79.) Dr. Schmid further conceded on cross-examination that he did not conduct any groundwater testing, and did not review Mr. Scott's Hydrologic Evaluation Report. (T. Vol. 1 pp. 82, 89.)

It thus appears from the record that Dr. Schmid's opinions regarding the potential impacts to the EV Wetlands at issue are largely speculative. And to the extent that his opinions are based on any figures or calculations, they seem to be based exclusively on Mr. Dutill's unsupported prediction of a 60-70% reduction in flow, which the Board has already declined to adopt. As we have said before, speculative claims unsupported by technical evidence are simply insufficient to meet the burden carried by appellants in third-party appeals. Where, as here, the opinions of opposing experts are well-supported, they must carry the day. Thus, we find that the Appellant has not met its burden on the question of whether the alleged failure to mimic preconstruction conditions will result in a failure to "protect, maintain, reclaim and restore water quality and designated uses" of the EV Wetlands under § 102.11(a)(2).

The Appellant further argues that by permitting this PCSM Plan and its alleged alteration of flow to the southern EV Wetlands, the Department is in derogation of its regulatory duty to ensure protection of the critical bog turtle habitat within the EV Wetlands:

> (2) *Endangered or threatened species.* If the Department has confirmed the presence, critical habitat, or critical dependence of endangered or threatened Federal or Pennsylvania species in or on a surface water, the Department will ensure protection of the species and critical habitat.

25 Pa. Code § 93.4c(a)(2). The Appellant argues that nothing in the record establishes or even suggests that the Department took specific steps to ensure the protection of the critical bog turtle habitat, and, without pointing to anything specific in the record to support its claim, broadly asserts that the record establishes that any alteration of flow to the southern half of the EV Wetlands will adversely impact the critical bog turtle habitat. We disagree.

First, the Permittee was issued technical deficiency letters regarding the EV Wetlands. (T. Vol. 2 p. 101; Stip. 59; P. Ex. 30.) In response, the Permittee furnished the Northampton County Conservation District ("NCCD") and the Department with the Wetlands Impact Report, resubmitted the Major Amendment Application twice, and shortly thereafter the Department and NCCD determined that each deficiency included in the letters had been fully and adequately addressed. (Stip. 63.) This generally indicates that the Department was not simply rubber stamping this Major Modification Application without regard for potential impact to the critical bog turtle habitat, but rather that the Department initially found the Application insufficient for the protection of that habitat and required adjustments to the plan to ensure its protection. In other words, issuing the technical deficiency letters was one specific step the Department took to ensure protection of the critical bog turtle habitat.

In support of its contention that the Department did not take specific steps to ensure protection of the critical bog turtle habitat, the Appellant takes issue with the Department's seeming reliance on letters issued by the USFWS determining no impact to the critical bog turtle habitat, apparently on the basis of the Appellant's belief that USFWS granted approval based only on the outdated, and never formalized, five level spreader plan discussed above. USFWS' reference to what the Appellant refers to as an "obsolete plan" should have caused the Department – pursuant to its duty to ensure protection of the critical bog turtle habitat – to raise questions

regarding USFWS' analysis of the potential impact to the critical bog turtle habitat. This tenuous argument seems to be based on the idea that, because USFWS pointed back to a letter issued in August of 2020, and stated the letter's continued validity in its determination of no impact in December 2021, USFWS must necessarily have based that determination on the never officially submitted five level spreader plan. This basis is mere conjecture and indeed belies the record, which includes further communication between the Permittee and USFWS, such as requests to USFWS in January of 2021 for comment specifically on the modification to the bog turtle conservation zone, which included the updated Bog Turtle Grading Plan showing the increased building size and three – not five – level spreaders. (Stip. 43; P. Ex. 13, 14, 15.) USFWS issued a response to that comment request in May of 2021:

> The federally listed bog turtle occurs or may occur in or near the project area. However, based on our review of the information provided, including the project description and location **(Modifications to previously reviewed construction proposal are minor and not likely to impact bog turtle habitat)** no adverse effects to this species is [sic] likely to occur. If there is any change in the location, scale, scope, layout or design of the project, further consultation or coordination with the Service will be necessary.

(Stip. 44.) (emphasis added). It is clear from the language above that USFWS was indeed responding to the current Plan, and to the extent that the Department relied on this determination of no impact by USFWS, we find that such reliance was reasonable. While we decline to speculate on USFWS' state of mind when referencing back to the earlier letter in its final communication, the August 2020 letter did contain several voluntary conservation recommendations – many incorporated by the Permittee into the Bog Turtle Grading Plan – that go above and beyond what is required by the Chapter 102 regulations or permit conditions. (T. Vol. 3 pp. 130-132.) We fail to see how the Department's approval of this Amended Permit wherein the Plan contains not only

what is required to ensure protection of the critical bog turtle habitat, but also includes voluntary measures to protect that habitat, is not a specific step undertaken to ensure that protection.

Finally, the Appellant argues that the Department failed to fulfill its duty to ensure the continued protection of the critical bog turtle habitat "by approving and issuing a Major Amendment to the Permit that authorizes the use of stormwater BMPs that will result in…adverse impacts" to the critical bog turtle habitat. (A. Post-Hearing Brief at 102.) For this contention, the Appellant does not cite any specific testimony or other record evidence, but rather broadly states that the record establishes that the PCSM BMPs will alter the southern half of the EV Wetlands and adversely impact the critical bog turtle habitat. As made clear above, this assertion is simply not in line with the totality of the evidence taken, and instead, we presume, based exclusively on the testimony of Appellant's experts, Mr. Dutill and Dr. Schmid. As we explained above, Mr. Dutill's opinion that the PCSM BMPs would rather dramatically alter the flow to the southern EV Wetlands was unsupported by calculations and thus not creditable, particularly in the face of the Permittee's experts, Mr. Dadio and Mr. Sodl, who did provide relevant calculations and methodologies to support their far less dramatic conclusions regarding the flow of stormwater runoff to the southern EV Wetlands. Because we have already credited the opinions of Mr. Dadio and Mr. Sodl on this issue, we need not further expound here.

The Appellant's expert, Dr. Schmid, testified that any reduction in the amount of water flowing to a wetland could cause the wetland to decrease and become drier over time. (T. Vol. 1 p. 74.) He explained that this alteration could result in changes to the plant composition of the wetland over time, causing the soils to become firm and not easily penetrated by the bog turtle, as well as a change in the kinds of insects and invertebrates that are present in the wetland that may provide the food supply for bog turtles. (T. Vol. 1 pp. 74-75.) While Dr. Schmid was stipulated to

and accepted by this Board as an expert on wetlands and wetland ecology, the Appellant also offered him as an expert in bog turtle habitat.[7] In contrast, the Permittee's well-qualified bog turtle expert, Michael Torocco ("Mr. Torocco"), a herpetologist who has been studying bog turtles since 1994, is a USFWS qualified bog turtle surveyor. Mr. Torocco, who was stipulated to and accepted by the presiding judge to offer expert testimony on the impact of the Project to the ecology and herpetology of the EV Wetlands, concluded that the Project would not have adverse effects or a long-term impact on the bog turtles and their critical habitat within the EV Wetlands. (T. Vol. 2 pp. 125-128, 130.) Mr. Torocco supported this opinion with a detailed description of bog turtles' perhaps surprising adaptability.

According to Mr. Torocco, while bog turtles do require a specific, predominantly groundwater-fed wetland habitat, they are adaptable to variations in the overall dampness of their habitat throughout the year. (T. Vol. 2 pp. 131, 133-134.) Mr. Torocco explained that, depending on the relative wetness of a given year, the overall saturation of the wetland bog turtle habitat can vary. (T. Vol. 2 p. 134.) During a dry year, the springheads can dry up, thus reducing the overall saturation of the bog turtle habitat, and during a wet year, there can be excess water in the wetlands. (T. Vol. 2 p. 134.) Mr. Torocco further testified that there can also be great topographic variety in where these wetland bog turtle habitats are found, which creates variability in how the groundwater affects these habitats. (T. Vol. 2 p. 134.) In sloping wetlands, water can run off quite quickly, whereas valley wetlands can be inundated by sudden and heavy storms. (T. Vol. 2 p. 134.) In stream-fed wetlands, this water is generally discharged through a system of rivulets into nearby

[7] Over the objections of the Permittee and Department, the presiding judge allowed the Appellant to question Dr. Schmid on impacts to the bog turtle habitat. The presiding judge noted that the Board would of course give any testimony provided by Dr. Schmid on the question of impacts to the bog turtle habitat the appropriate weight – if any.

tributaries, typically discharging any influx of water within a matter of hours or days. (T. Vol. 2 p. 134.) In addition, other natural processes can affect the relative saturation of the wetland, such as beavers causing flooding to portions of the wetland and creating deeper areas. (T. Vol. 2 pp. 134-135.) Mr. Torroco opined that, while deeper water is not preferred, it does not impact the bog turtle habitat to the extent that bog turtles cannot adapt. (T. Vol. 2 p. 135.) According to Mr. Torocco, while bog turtles are not the strongest swimmers, they can swim and are "quite able" to adapt to these periodic inundations. (T. Vol. 2 p. 135.) Mr. Torocco further testified that bog turtles are very comfortable on land and able to adapt in dryer conditions, such as late summer when springs can reduce to a mere trickle. (T. Vol. 2 p. 135.)

In addition to being a well-established expert in bog turtles and their critical habitat, Mr. Torocco was brought into the Project at the application stage to determine whether the modifications to the Bog Turtle Grading Plan would adversely impact the critical bog turtle habitat. (T. Vol. 2 p. 128.) In addition to reviewing the plans, Mr. Torocco conducted a site visit in which he walked the EV Wetlands and evaluated the sources of hydrology to the Wetlands from a surface view. (T. Vol. 2 p. 129.) While Dr. Schmid is an accepted expert in wetlands and wetland ecology, one of the Board's core functions is weighing expert testimony, and on the question of whether the project will adversely affect the bog turtles and their critical habitat, we credit the opinion of Mr. Torocco and find that the PCSM BMPs proposed here will not adversely impact the bog turtles or their critical habitat. Further, we find that the Department did not derogate its duty under Section 93.4c(a)(2).

Failure to Follow Antidegradation Regulations

The Appellant's final claim is that the Amended Permit was issued in violation of regulatory antidegradation requirements, specifically, the provisions found in 25 Pa. Code §93.4c(b)(1):

> (b) *Protection of High Quality and Exceptional Value Waters.*
>
> (1) *Point source discharges.* The following applies to point source discharges to High Quality or Exceptional Value Waters.
>
> (i) *Nondischarge alternatives/use of best technologies.*
>
> (A) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.
>
> (B) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters, except as provided in subparagraph (iii).

As the Department indicates, the Chapter 102 regulations were amended in 2010 to, *inter alia*, incorporate the antidegradation provisions of Chapter 93.4c(b).[8] As a result, to satisfy the

[8] According to the Department, the 2010 amendments to the Chapter 102 regulations were adopted in part in response to the Board's decision in *Blue Mountain*, in which the Board held that compliance with the best management practice provisions of the Chapter 102 regulations for special protection waters in effect at the time did not constitute compliance with antidegradation regulations with respect to special protection waters. According to the regulatory preamble from the final rulemaking:

> A number of the regulated community specifically requested that the Board clarify the antidegradation implementation provisions in the final-form rulemaking to more definitively link the antidegradation implementation requirements included in this final-form rulemaking with Chapter 93 and to provide a framework that can be relied upon to demonstrate compliance with antidegradation requirements therein.

The Preamble explained the need to clarify antidegradation requirements specific to erosion and sedimentation:

antidegradation implementation requirements in Section 93.4c(b), an applicant must evaluate and include nondischarge alternatives in its E&S Plan in accordance with Section 102.4(b)(6) and its PCSM Plan in accordance with Section 102.8(h).[9]

Section 102.8(h) lists specific requirements for PCSM Plan implementation in special protection waters, such as the EV Wetlands at issue here:

> (h) *PCSM implementation for special protection waters.* To satisfy the antidegradation implementation requirements in § 93.4c(b) (relating to implementation of antidegradation requirements), an earth disturbance activity that requires a permit under this chapter and for which any receiving water that is classified as High Quality or Exceptional Value under Chapter 93, the person proposing the activity shall, in the permit application, do the following:
>
> (1) Evaluate and include nondischarge alternatives in the PCSM Plan unless a person demonstrates that nondischarge alternatives do not exist for the project.
>
> (2) If the person makes the demonstration in paragraph (1) that nondischarge alternatives do not exist for the project, the PCSM Plan must include ABACT, except as provided in § 93.4c(b)(1)(iii).
>
> (3) For purposes of this chapter, nondischarge alternatives and ABACT and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

Section 102.8(h) requires an applicant proposing an earth disturbance activity that requires a permit under Chapter 102 for which the receiving water is classified as Exceptional Value to evaluate and include nondischarge alternatives in the PCSM Plan *unless* the applicant demonstrates that one does not exist for the project. A nondischarge alternative is defined as:

> Section 93.4c(b) utilizes language and approaches based upon NPDES programs that regulate continuous flow such as traditional industrial discharges flowing out of pipes, whereas the discharges regulated under Chapter 102 involve wet weather driven, primarily overland diffuse runoff that is controlled with BMPs rather than numeric effluent limitations. Further, the § 93.4c(b) stated preference for "nondischarge" alternatives is confusing and when applied literally in the stormwater context is problematic.

[9] The Appellant does not contest whether the provisions of the E&S Plan meet the requirements in Section 102.4(b)(6).

> Environmentally sound and cost-effective BMPs that individually or collectively eliminate the net change in stormwater volume, rate and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities to maintain and protect the existing quality of the receiving surface waters of this Commonwealth.

25 Pa. Code §102.1. If a demonstration is made that a nondischarge alternative does not exist, the PCSM Plan must include antidegradation best available combination of technologies ("ABACT"), which is defined as:

> Environmentally sound and cost effective treatment, land disposal, pollution prevention and stormwater reuse BMPs that individually or collectively manage the difference in the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities to maintain and protect the existing quality of the receiving surface waters of this Commonwealth.

25 Pa. code §102.1. Robert Joseph Jevin, III ("Mr. Jevin"), Environmental Group Member/Permit Section Chief, Waterways and Wetlands Program, Northeast Regional Office, Pennsylvania Department of Environmental Protection and fact witness for the Department testified that the difference between "nondischarge alternative" and "ABACT" is that the nondischarge alternative *eliminates* the net change in stormwater rate, volume and water quality, while ABACT *manages* the net change and can allow for a change. (T. Vol. 3 p. 239.) According to Mr. Jevin, a nondischarge alternative is always the Department's preferred option. (T. Vol. 3 p. 239.) As such, Section 102.8(h) indicates a preference for nondischarge alternatives whenever practicable.

The Appellant claims that the Permittee and the Department failed to undertake the analysis required in Section 93.4c(b)(1) "because they thought they could avoid them via a shortcut involving a nondischarge alternative," and requests that the Amended Permit be remanded to the Department for "a proper Chapter 93 analysis." (A. Post-Hearing Brief at 80.) The nondischarge

alternative that the Appellant is referring to is the proposed voluntary riparian forest buffer, and the "shortcut" is the legal presumption afforded to riparian buffers in Section 102.14(e)(1).

A riparian buffer is "a BMP that is an area of permanent vegetation along surface waters." 25 Pa. Code § 102.1. A riparian forest buffer is a type of riparian buffer with vegetation that is "predominantly native trees, shrubs and forbs" that is "maintained in a natural state or sustainably managed to protect and enhance water quality, stabilize stream channels and banks, and separate land use activities from surface waters." 25 Pa. Code § 102.1. Chapter 102 provides for both mandatory and voluntary riparian buffers. Mr. Ahn testified that he made the determination that the Permittee's proposed riparian buffer is not a mandatory riparian buffer under Section 102.14(a)(1) because the proposed earth disturbance activity is not located within 150 feet of a special protection water course. (T. Vol. 3 p. 146.) Mr. Ahn further testified that the voluntary riparian buffer proposed by the Permittee meets the requirements to be a forest buffer. (T. Vol. 3 pp. 146-149.)

The Appellant does not challenge these determinations. Chapter 102 includes an "antidegradation presumption," which provides a legal presumption that a riparian buffer meeting the requirements of Section 102.14 is a "nondischarge alternative" and satisfies §102.4(b)(6) and §102.8(h) unless data or information is provided to the Department during the review process to show that the proposed earth disturbance activity will degrade water quality. 25 Pa. Code § 102.14(e)(1) states:

> (e) *Utilization of riparian forest buffers.*
>
> (1) *Antidegradation presumption.* Except for riparian buffers protected under subsection (a)(1) or (d), a riparian forest buffer meeting the requirements of this section will prevent thermal impacts and is a nondischarge alternative. When included in an E&S Plan or PCSM Plan meeting the requirements of this chapter, the proposed earth disturbance activity will satisfy § § 102.4(b)(6) and 102.8(h), unless data or information provided or available to the Department during the

> permit application or authorization review process shows that the proposed earth disturbance activity will degrade water quality.

Section 102.14(e)(3) provides that "persons that protect, convert or establish a new riparian forest buffer meeting the requirements of this section, may qualify for benefits" under Section 102.14(e)(1). The Appellant argues that the proposed voluntary riparian forest buffer does not qualify for the antidegradation presumption due to the fact that the Permittee proposed to locate a pipe and endwall,[10] which discharge stormwater from the Swale, within the voluntary riparian forest buffer in the northwest corner of the property. Specifically, the Appellant contends that the proposed voluntary riparian forest buffer does not comply with Section 102.14(c)(1), which lists the following requirements for all riparian buffers, including the voluntary riparian forest buffer proposed in the Permittee's PCSM Plan:

> (c) *Mandatory requirements for all riparian buffers.*
>
> (1) *Management of stormwater into the riparian buffer.* Stormwater and accelerated erosion and sedimentation shall be managed in accordance with § § 102.4(b)—(e) and 102.8 (relating to erosion and sediment control requirements; and PCSM requirements) to ensure that stormwater enters the area upgrade and along the riparian buffer as sheet flow or shallow concentrated flow during storm events up to and including the 2 year/24 hour storm.

In support of its argument, the Appellant refers to Mr. Ahn's responses to questioning regarding the pipe and endwall on cross-examination. When asked whether the endwall was upslope of the voluntary riparian forest buffer, Mr. Ahn answered that it was located within the voluntary riparian

[10] During the hearing on the merits, objections were made regarding the pipe and endwall, specifically whether the doctrine of administrative finality prevents the Appellant from challenging the Amended Permit based on these facilities since they were approved in the original NPDES permit, and whether the Appellant's arguments regarding these facilities were waived due to the Appellant's failure to raise them in the Notice of Appeal or Pre-Hearing Memorandum. The presiding judge heard the evidence but requested briefings on the objections. In their Post-Hearing Briefs, the Permittee and Department argued that the Appellant's argument regarding the clean water diversion swale was waived due to the Appellant's failure to raise the issue in its Notice of Appeal or Pre-Hearing Memorandum. However, the Board is not convinced that waiver does apply here, and is convinced that the doctrine of administrative finality – which was not briefed – does not apply here. We decide this issue on the merits.

forest buffer. (T. Vol. 3 p. 228.) Mr. Ahn was then asked whether the discharge from the endwall pipe would be in a sheet flow, and Mr. Ahn responded that "by its nature" it is not a sheet flow because it is a pipe outfall. (T. Vol. 3 p. 229.) Based on Mr. Ahn's testimony, the Appellant argues that the voluntary riparian forest buffer does not meet the regulatory requirements of Section 102.14(c)(1) because the stormwater from the pipe and endwall do not enter upgrade of the voluntary riparian forest buffer as sheet flow or shallow concentrated flow and, therefore, the voluntary riparian forest buffer is not entitled to the presumption in Section 102.14(e)(1). The Appellant then concludes that the proposed voluntary riparian forest buffer fails to meet the regulatory requirements to be a nondischarge alternative, so the Permittee and the Department were required to implement ABACT and demonstrate that the existing quality of the EV Wetlands will be maintained, and they failed to do so. (A. Post-Hearing Brief at 83.)

In response, the Permittee and the Department assert that the record shows that the proposed voluntary riparian forest buffer meets the requirements of Section 102.14, including Section 102.14(c)(1), and is entitled to the antidegradation presumption in Section 102.14(e)(1). The Permittee and the Department refer to lengthy testimony provided by Mr. Ahn in which he detailed his review of the proposed voluntary riparian forest buffer and the applicable regulations. Mr. Ahn testified that the NCCD reviews discharges into a buffer to verify that they meet the criteria in Section 102.14(c)(1). (T. Vol. 3 p. 151.) When asked to identify the proposed discharges into the voluntary riparian forest buffer, Mr. Ahn responded that the proposed level spreaders discharge the stormwater from the developed areas of the Project Site into the voluntary riparian forest buffer. (T. Vol. 3 p. 151.) The level spreaders are proposed to be constructed upslope of the voluntary riparian forest buffer to ensure that the stormwater is discharged in shallow or sheet flow. (T. Vol. 3 p. 151.) Mr. Ahn proceeded through the rest of the regulatory provisions and

concluded that the proposed voluntary riparian forest buffer meets the regulatory requirements in Section 102.14. (*See* T. Vol. 3 pp. 173-176.) Aside from Section 102.14(c)(1), the Appellant does not specifically challenge whether the proposed voluntary riparian forest buffer meets the remaining requirements outlined in Section 102.14.

In order to rebut the Appellant's contention that the voluntary riparian forest buffer does not meet the requirements of Section 102.14(c)(1) due to the proposed siting of a pipe and endwall within the voluntary riparian forest buffer, the Department cites Section 102.14(f), which provides a list of practices and activities that are allowable in a riparian buffer when authorized by the Department. The list of activities includes the "Construction or placement of roads, bridges, trails, storm drainage, utilities, or other structures." 25 Pa. Code § 102.14(f)(2)(i). The Department again refers to testimony provided by Mr. Ahn. When asked whether the Swale would be considered "storm drainage" under Section 102.14(f), Mr. Ahn replied in the affirmative and agreed that it would therefore be an allowable activity in the proposed voluntary riparian forest buffer. (T. Vol. 3 p. 231.)

While "storm drainage" is not a defined term within the regulations, a review of the regulatory record shows that the Department intended for the term to include not just storm drainage structures, but actual storm drainage. In the comment response document included in the 2010 rulemaking package, a commenter asked specifically why storm drainage activities are acceptable in a buffer when permitted by the Department, but an applicant is not allowed to use concentrated flow. The Department responded: "Storm drainage structures that are allowed will be permitted by the Department and will minimize or eliminate concentrated flow so as not to impact the integrity of the riparian buffer." In light of this, Section 102.14(c)(1) and Section 102.14(f)(2) are clearly irreconcilable. Section 102.14(c)(1) contains mandatory requirements for

all riparian buffers and requires all stormwater to enter upgrade and along the riparian buffer as sheet flow or shallow concentrated flow, yet Section 102.14(f)(2) allows the placement of "storm drainage" within a riparian buffer if authorized by the Department. Section 1934 of the Pennsylvania Rules of Statutory Construction provides that "…whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail." Here, Section 102.14(f)(2) is the clause last in order and thus prevails. The question then becomes whether the Department's determination that the pipe and endwall are allowable storm drainage within the voluntary riparian forest buffer is reasonable under these circumstances.

Again, no definition of "storm drainage" is supplied in the regulations, and Section 102.14(f) places no constraints upon the additions of such structures within a buffer beyond that they must be authorized by the Department. Mr. Ahn was not asked – and thus did not provide – testimony describing what is required for the Department to find that a structure is an allowable activity within a buffer beyond guidance indicating that storm drainage into a buffer must be non-erosive. Nor was Mr. Ahn asked how he determined that the discharge from the pipe and endwall in the buffer at issue here would be non-erosive. Likewise, the Permittee's experts were neither asked why the pipe and endwall were placed within the buffer, nor whether there were any viable alternative locations for this discharge. Finally, the Appellant did not provide evidence that the discharge would in fact be erosive. Indeed, the parties overall failed to provide testimony – expert or otherwise – that is helpful in determining whether the placement of the pipe and endwall within the buffer is indeed a reasonable, non-erosive allowable activity that should stand, or whether the Department erred in allowing the discharge from the Swale within the buffer. Thus, in order to determine whether the Department's permitting of this discharge into the proposed buffer as an

allowable activity was reasonable, we review *de novo* the totality of the evidence relevant to this issue.

First, it is important to note that the discharge from the pipe and endwall must travel across/through a riprap apron, rather than simply landing straight from the pipe and endwall directly into the buffer soil. A riprap apron is a type of outlet protection, typically made of crushed stone, that is designed to prevent the erosive action of flowing water from the outfall of a pipe or channel. (DEP Ex. 4.) Very little testimony or other evidence was given on the specifics of the riprap apron here, but to the extent that it is designed and created to meet the controlling requirements and does indeed control and disperse the discharge so that it does reach the buffer in a non-erosive way, we are satisfied that the discharge from the pipe and endwall is unlikely to cause erosion within the buffer.

While we are satisfied that the riprap apron is likely to reduce the potential for erosion from this discharge, our inquiry does not end there. Next, we must consider whether the buffer soils are sufficiently permeable so that the flow from this pipe and endwall does not cause erosion and inundate the EV Wetlands, but rather enters the groundwater via the buffer. The Appellant suggests that the answer to this question is a resounding no. (A. Post-Hearing Brief at 88-89.) As previously discussed, Mr. Dadio, soil scientist and expert for the Permittee whose opinion we have already credited, used a variety of tools to establish that the soils within the buffer are Conotton soils, which are classified as Hydrologic Soil Group A, meaning that they are among the fastest draining soils. (T. Vol. 2 p. 104.) The Appellant's concern vis a vis the permeability of the soils within the buffer stems from the fact that soil testing was conducted on the Site in soils with the same classification as those within the buffer and were found to have low recharge potential. (A. Post-Hearing Brief at 88-90.) Were this the only evidence on the record regarding the soils at the

Site and within the buffer, we may very well agree with the Appellant. However, while Mr. Dadio did rely upon desktop resources including the Web Soil Survey to understand the underlying soil conditions within the buffer and EV Wetlands because more usual excavation was not an option due to the bog turtle conservation zone, he also made field visits to the Site to confirm the information generated by the Web Soil Survey. (T. Vol. 2 pp. 102-103.)

In addition to visual observations made while walking the Site, Mr. Dadio testified that he used a hand auger to help confirm the permeability of the soil. (T. Vol. 2 p. 104.) While he could not auger down particularly deeply due to the presence of rounded rocks – a sign in and of itself of the soils' speedy drainage – he stated that "there was a thick layer of organic material and nice granular structure in the surface," creating "more pathways for water to drain through." (T. Vol. 2 p. 105.) As well as testing the permeability as best he could with his hand auger, Mr. Dadio also looked to the vegetation within the buffer, which also influences infiltration rates. (T. Vol. 2 p. 104.) He testified that forested soils generally infiltrate better than agricultural soils for a variety of reasons, including the lack of tractors driving upon and compacting the soils, and the presence of roots primarily belonging to perennial plants, which have strong roots that help enhance soil structure and thus enhance infiltration into the soil. (T. Vol. 2 p. 104.) He added that "a good layer" of leaf litter and organic material also improves soil structure and infiltration into the soil. (T. Vol. 2 pp. 104-105.) At the Site, Mr. Dadio noted the presence of mature forest with big trees, which is exactly the kind of forest that creates the above-described conditions. (T. Vol. 2 p. 104-105.) Further, Mr. Dadio testified that he evaluated the buffer area for signs of erosion and stated that "in the half dozen times I was on the [S]ite between the wetland evaluation jurisdictional determination [and] these EV [W]etland studies, I didn't see any evidence of surface run-off or rills forming or gullies forming in this area." (T. Vol. 2 pp. 105-106.) Mr. Dadio was particularly

attentive to signs of erosion because of the heavy rain occurring prior to and around the times of his visits to the Site. (T. Vol. 2 p. 105.) Finally, Mr. Dadio testified that his field observations caused him to generally agree with the conclusions of the Web Soil Survey. (T. Vol. 2 p. 104.) As we have previously done, we credit the opinion of Mr. Dadio on the soil structure and likelihood of the discharge to infiltrate the buffer soils.

While the Appellant does suggest that the location of the pipe and endwall within the buffer near the EV Wetlands "raises questions" regarding the ability of the discharge from the pipe and endwall to infiltrate the buffer soils and the possibility of the discharge to cause erosion or degrade water quality, merely raising questions unsupported by testimony or other evidence on the record is insufficient to meet the burden of proof carried by third party appellants in appeals of this nature. Moreover, in his testimony, Mr. Ahn revealed that, as part of his technical review of the Application, he reviewed and evaluated the design of the Swale and its component parts, and concluded that the Swale diverts offsite stormwater in a non-erosive manner. (T. Vol. 3 pp.194-195.) This, combined with Mr. Dadio's testimony above regarding permeability of the buffer soils, as well as the presence of the riprap apron to prevent erosive action from this discharge, and in light of the plain language of the irreconcilable regulations at issue here and the edicts of the Pennsylvania Rules of Statutory Construction, lead us to conclude that in this Appeal it was not unreasonable for the Department to determine that the discharge is an allowable activity within the buffer. This is not to say that any activity the Department deems allowable within a buffer under Section 102.14(f) is *per se* reasonable; rather, we simply hold that with the evidence presented in this Appeal and with the burden of proof being carried by the Appellant, we cannot find that the Department acted unreasonably when it permitted the discharge within the buffer.

While we share the dissent's concerns that interpreting Section 102.14(f) too broadly could theoretically allow the Department to permit stormwater for the entire site to be discharged into a buffer via a pipe and endwall, that is just not the case in this Appeal. The entirety of the onsite stormwater falling on the developed portions of the Site is being discharged through the upgrade level spreaders as sheet flow into the voluntary riparian forest buffer. There is simply no evidence on the record to indicate that the placement of the pipe and endwall within the voluntary riparian forest buffer would cause the buffer to not function as intended and the Appellant has not met its burden to show that the Department's determination that the pipe and endwall are allowable storm drainage under Section 102.14(f) was unreasonable. Therefore, the Board concludes that the Department's determination that the pipe and endwall were allowable "storm drainage," thus qualifying the voluntary riparian forest for the antidegradation presumption in 102.14(e)(1) was reasonable under these circumstances.

Additionally, the Department contends that the Department and the NCCD reviewed the proposed PCSM BMPs to evaluate whether they adequately managed changes in volume, water quality, and peak rate resulting from construction activities and determined that the Permittee has shown that post construction stormwater conditions would satisfy Section 102.8(h) related to implementation for special waters. (DEP Post-Hearing Brief at 32.) The requirements for stormwater analysis in the PCSM Plan are established in Section 102.8(g). Mr. Ahn provided extensive testimony regarding the typical process he takes when reviewing a permit application to determine if the proposed PCSM Plan meets the regulatory requirements. Section 102.8(g)(2) requires a PCSM Plan to include an analysis demonstrating that the PCSM BMPs will "manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality," and lists the criteria for the analysis. 25 Pa.

Code §102.8(g)(2). According to Mr. Ahn, the 2-year/24-hour storm is the design basis, or the amount of rainfall that the PCSM BMPs are designed to address. (T. Vol. 3 p. 158.) It is defined in the Department's E&S Manual as a storm event that occurs once every two years, meaning there is a 50% chance of that storm occurring in any given year, and is calculated over a 24-hour period. (DEP Ex. 4.) It is important to note that the Swale does not factor into this analysis because it is not a PCSM BMP and, even if it was, it has the same volume, water quality, and peak rate preconstruction as post construction (*See* T. Vol. 3. P. 192.)

Volume

Mr. Ahn testified that the Permittee used Worksheet 4, which was included in the Permit Application, to calculate the net change in volume between preconstruction and post construction. (T. Vol. 3 p. 184; Ex. 26 (at 1804).) Mr. Ahn explained that the Permittee included the total acreage of area that will be managed for stormwater (70.70 acres) and input the existing conditions, including cover type and soil groups and associated acreage, to calculate the runoff volume for existing conditions (186,768 cubic feet). Using the worksheet, the Permittee next calculated the increased volume from developed conditions (305,835 cubic feet), and then found the difference between the two values to arrive at the increase in volume (119,067 cubic feet) that would be required to be managed by the PCSM BMPs. (T. Vol. 3 pp. 184-187.)

Mr. Ahn then detailed his review of the Permittee's submitted Worksheet 5, which itemizes the volume credits for structural BMPs. According to Mr. Ahn, the Permittee entered the volume required to be controlled from Worksheet 4 (119,067 cubic feet), subtracted the volume credits for nonstructural BMPs (4,262 cubic feet), such as re-vegetate and reforest, and then subtracted volume credits for structural BMPs, such as landscape restoration (16,453 cubic feet) and the voluntary riparian forest buffer (207,936 cubic feet), to calculate the difference in volume between

preconstruction and post construction (-109,584 cubic feet). (T. Vol 3. pp. 187-188; DEP Ex. 26 (at 1805).) Mr. Ahn testified that this result indicated that the net change in volume does not exceed preconstruction rates and that stormwater volume from the proposed development has been adequately managed. (T. Vol. 3 p. 188.) The Department and Permittee also cite the previously discussed testimony provided by Mr. Sodl, regarding the volume calculations he performed in preparing a Stormwater Management Report and PCSM Report for the project. (*See* T. Vol. 2 p. 9.)

Water Quality

Mr. Ahn testified that the evaluation of PCSM BMPs in relation to water quality is handled in a similar way to volume. According to Mr. Ahn, Worksheet 12 is used to calculate the pollutants that need to be mitigated by PCSM BMPs that address water quality. (T. Vol. 3 p. 189.) Mr. Ahn explained that the Permittee entered the cover types and associated acreages, as well as the runoff volumes and pollutant loads associated, into Worksheet 12 to calculate the total load of each pollutant that would need to be managed. (T. Vol. 3 p. 189.) Mr. Ahn testified that, using the methodology in Worksheet 12, the required reduction for the Project Site is 85% of total suspended solids (314.92 pounds), 85% of total phosphate (1.34 pounds), and 50% of total nitrate (1.7 pounds). (T. Vol. 3 pp. 189-190; DEP Ex. 26 (at 1808).)

Mr. Ahn then described the use of Worksheet 13 for each of these pollutants to determine whether the proposed PCSM BMPs will adequately address the required reductions from Worksheet 12. Mr. Ahn explained that the Permittee input the required reductions from Worksheet 12 and the credits provided by the proposed PCSM BMPs for each pollutant (582.21 pounds for total suspended solids, 1.74 pounds for total phosphate, 3.28 pounds for total nitrate). Since the

reduction credits exceeded the required reductions, Mr. Ahn determined that the net change showed that water quality was adequately addressed. (T. Vol. 3 p. 191.)

Peak Rate

Mr. Ahn testified that the PCSM BMPs have to be designed to manage the net change in peak rate for the 2, 10, 50, and 100 year storms. (T. Vol. 3 p. 159); *See also* 25 Pa. Code §102.8(g)(3). Using the 2-year storm as an example, Mr. Ahn explained how he reviewed the peak rate analysis and hydrographs included in the PCSM Plan to determine whether the net change in peak rate will be adequately managed as required by the regulations. (T. Vol. 3 pp. 159-167.) The hydrographs and peak rate analysis for the 2-year storm showed that the pre-development peak rate equals 5.76 CFS and the combined post-development rate equals 1.69 CFS. (T. Vol. 3 p. 164; DEP Ex. 26 (at 1761).) Mr. Ahn concluded from these calculations that the PCSM BMPs adequately managed the net change in peak rate for the 2-year storm. Mr. Ahn further testified that the stormwater analysis that the Permittee provided in its application showed that the net change in peak rates for the 10, 50, and 100 year storms would also be adequately managed. (T. Vol. 3 p. 167.) A review of the calculations in the application confirm Mr. Ahn's testimony. The Appellant does not appear to challenge the Department's compliance with Section 102.8(g).

The Board credits the testimony of Mr. Ahn and finds that the Permittee and the Department have shown through expert testimony and evidence on the record that the proposed PCSM BMPs will adequately manage the net change in volume, water quality, and rate, and therefore satisfy Section 102.8(h).

Conclusion

For the foregoing reasons, we find that the Appellant did not meet its burden and enter the following order dismissing this appeal.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.7; 35 P.S. § 7514.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Envtl Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

3. In third-party appeals, the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

4. The Appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

5. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

6. "Expert testimony is required where the issues require scientific or specialized knowledge or experience to understand." *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016) (citing *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 828-29 (Pa. Cmwlth. 2010)).

7. The Appellant did not show that the proposed PCSM BMPs fail to mimic preconstruction stormwater runoff conditions to protect, maintain, reclaim and restore water quality and existing uses as required by 25 Pa. Code § 102.11(a)(2).

8. The Appellant did not show that the Department failed to ensure protection of the bog turtles or their critical habitat as required by 25 Pa. Code § 93.4c(a)(2), or that the proposed PCSM BMPs would adversely impact the bog turtles or their critical habitat.

9. The Department reasonably found that the proposed voluntary riparian forest buffer qualified for the antidegradation presumption in 25 Pa. Code § 102.14(e)(1).

10. The Department properly found that that the proposed PCSM BMPs will adequately manage the net change in volume, water quality, and peak rate and satisfied the requirements of 25 Pa. Code § 102.8(h).

11. The Appellant has not met its burden of proof on its claims in this appeal. 25 Pa. Code § 1021.122(c)(2).

ENVIRONMENTAL HEARING BOARD

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: March 14, 2025

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONCERNED CITIZENS OF UPPER MOUNT BETHEL TOWNSHIP	:	
v.	:	**EHB Docket No. 2023-001-CS**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW DEMI ROAD, LLC, Permittee	:	

OPINION IN SUPPORT OF
REMANDING THE PERMIT TO THE DEPARTMENT

By Judge Bernard A. Labuskes, Jr., in which Chief Judge and Chairperson Steven C. Beckman joins

In our view, the voluntary riparian forest buffer being used as a component of the Permittee's PCSM Plan does not qualify as a nondischarge alternative for purposes of antidegradation. A riparian buffer can only qualify as a nondischarge alternative for purposes of antidegradation if the buffer meets the requirements of 25 Pa. Code § 102.14. A buffer only qualifies for purposes of the antidegradation analysis if stormwater "enters the area upgrade and along the riparian buffer as sheet flow or shallow concentrated flow…." 25 Pa. Code § 102.14(c)(1). This requirement is "mandatory." *Id.* The Department has no authority to waive the requirement. Here, one of the Permittee's stormwater discharges enters via a pipe and endwall about 60 feet from the wetland inside the buffer. It is neither upgrade, sheet flow, nor shallow concentrated flow. This is not disputed. Therefore, this clearly prevents the buffer from qualifying as a nondischarge alternative. It should be as simple as that.

Furthermore, the riparian forest buffer regulation contains detailed requirements regarding the composition and width of acceptable buffers. 25 Pa. Code § 102.14(b)(1) and (2). A buffer that does not meet those criteria does not qualify. There is nothing in the regulation that gives the Department the authority to change or waive those criteria. To the contrary, the regulation says the criteria *must* be met. 25 Pa. Code § 102.14(b). Where, as here, concentrated stormwater is discharged into the buffer itself, the Permittee has effectively defeated the requirements regarding width and zoned vegetation. For example, the average minimum width of a buffer should be 150 feet. 25 Pa. Code § 102.14(b)(2)(ii). Here, there is only 60 feet downgradient of the discharge inside the buffer. It would also seem that the discharge necessarily defeats the zoned vegetation requirements of Section 102.14(b)(1)(iii).

Presumably, the Environmental Quality Board has determined based upon scientific study and input from the public and regulated community that a buffer must have the minimum size and cover requirements that are spelled out in the regulation in order for the buffer to do its job, but the regulatory language makes clear that is only **if** stormwater directed into it originates upgradient and as sheet flow. It follows that anything less can be presumed to *not* be adequate. Here, the Department has approved a buffer that not only violates the letter of the regulation, but one which must be presumed to be inadequate to serve its intended function.

The Department has no authority to waive the requirement for an upgrade, sheet flow discharge into a buffer for a buffer to qualify as an antidegradation nondischarge alternative, but even if it did, we would have hoped that such a waiver would have been based on a determination that something different was in the best interests of the environment. The Department made no such showing here. Because the riparian buffer is being treated by virtue of

regulatory grace as the functional equivalent of a nondischarge alternative, strict compliance with the regulation should be required.

The Department offers several excuses for why it approved the Permittee's buffer as a nondischarge alternative notwithstanding the lack of compliance with Subsection 102.14(c)(1). First, it argues that the pipe does not count because it discharges water from a "clean water diversion swale." It says the swale is not a BMP in the plan because it only captures and redirects off-site stormwater. This makes no sense to us. The swale is only there because of the construction. The Permittee must have an NPDES permit to operate it. The swale has permanently altered natural stormwater flow in the drainage area by redirecting and concentrating flow in a manmade conveyance. If it is true that the volume of stormwater has not changed as claimed by the Department, the rate and character of the discharge certainly have. The swale's only purpose is to alter natural stormwater flow in a way that allows the Permittee to operate on the site. Proper post construction stormwater flow planning here should have factored in one of the Permittee's key stormwater discharges. Even if we accept the Department's curious view that the Permittee's swale and discharge are not "part of the PCSM Plan," there is nothing in Section 102.14 that says a buffer can qualify as a nondischarge alternative even if stormwater discharges via a point source into the middle of the buffer so long as the point source is not "part of the PCSM plan."[1]

The Department next says the Permittee's discharge does not prevent the buffer from qualifying as a nondischarge alternative because the discharge in question is "nonerosive." The Department does not cite to an exception in Section 102.14 for "nonerosive" discharges. Nor do we see one. As previously noted, the scientific basis for using buffers as a nondischarge

[1] We fully concur in our esteemed colleagues' conclusion that the Department was not entitled to ignore the in-buffer discharge based on meritless claims of waiver and administrative finality.

alternative must depend on flow being dispersed **before** entering a buffer that meets certain nonwaivable criteria. If there is an upgradient sheet flow discharge into a buffer meeting defined criteria, it can safely be assumed that receiving waters on the other side of the buffer will not be degraded. The goal of this program must have been to eliminate the need for site-specific investigations. Yet, that is precisely what the Department attempted here when it excused compliance with Subsection 102.14(c)(1) in the form of evaluating the in-buffer discharge's "erosivity." Query whether the Department will now, going forward, allow the use of otherwise nonqualifying buffers at other sites so long as any discharge into them is "nonerosive," regardless of the dictates of Section 102.14.

The Department's next excuse is that it can disregard Subsection 102.14(c)(1) (upgrade/sheet flow discharge) because Subsection 102.14(f) contains a list of practices and activities in a buffer that are "allowable" when authorized by the Department, which includes the following:

> (i) Construction or placement of roads, bridges, trails, storm drainage, utilities or other structures.

25 Pa. Code § 102.14(f)(2)(i).

To be clear, we are not suggesting that the Permittee's discharge is not "allowable." It appears to be a perfectly allowable, fully permitted discharge. A permittee is free to locate a discharge in the middle of a buffer. However, by placing the discharge inside the buffer, the Permittee has precluded the use of the buffer as a nondischarge alternative for purposes of the antidegradation analysis pursuant to Subsection 102.14(e)(1) (riparian buffer must meet requirements of this section to qualify as a nondischarge alternative). We see no inconsistency between 102.14(e)(1), which specifically addresses antidegradation, and the description of allowable activities in 102.14(f). The activities are allowable; it is just that the buffer does not

then qualify as a nondischarge alternative if the other regulatory criteria—such as an upgradient sheet flow discharge—are not met. Subsection 102.14(f) is not intended to excuse compliance with the other regulatory criteria. For example, building a road through a buffer that acts as a BMP is fine and the buffer can act as a nondischarge alternative *so long as the regulatory criteria are met*. Here, they are not.

To say that the words "storm drainage" in Subsection (f) trump everything else in the regulation strikes us as the height of irony. Under the Department's view, a permittee could channel every ounce of stormwater flow from the entire site into the middle of the buffer by virtue of Subsection (f) and this huge *discharge* would not prevent the buffer from being treated as a *nondischarge* alternative. We believe the Department is reading the language of Subsection (f) far too broadly. Subsection (f) also speaks about the "construction or placement" of "structures." In this case, it is not the pipe or endwall that is our concern; it is the discharge from that pipe.

Accordingly, we would have remanded the permit for further consideration that does not treat the buffer as currently located vis-à-vis the swale discharge as a nondischarge alternative.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: March 14, 2025

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONCERNED CITIZENS OF UPPER MOUNT BETHEL TOWNSHIP	:	
v.	:	**EHB Docket No. 2023-001-CS**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW DEMI ROAD, LLC, Permittee	:	

AND NOW, this 14th day of March, 2025, it is **ordered** that the Appellant's appeal is **dismissed** because the Appellant has failed to convince a majority of the Judges that the appeal should be granted.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

*** Judge Paul J. Bruder, Jr. is recused in this matter and did not participate in the decision.**

DATED: March 14, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Ann Conserette, Esquire
Michael T. Ferrence, Esquire
(*via electronic filing system*)

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
William D. Auxer, Esquire
Gregg I. Adelman, Esquire
Benjamin R. Picker, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.*, and EMMA WRIGHT, *et al.*, Intervenors	**: EHB Docket No. 2024-016-B**
	: Consolidated with: 2024-017-B, 2024-
	: 018-B, 2024-019-B, 2024-020-B, 2024-
v.	**: 021-B, 2024-026-B, 2024-027-B, 2024-**
	: 028-B, 2024-029-B, 2024-030-B, 2024-
	:031-B, 2024-032-B, 2024-033-B, 2024-
	: 034-B, 2024-035-B, 2024-036-B, 2024-
	: 037-B, 2024-038-B, 2024-041-B, 2024-
	: 042-B, 2024-043-B, 2024-044-B, 2024-
	: 045-B, 2024-046-B, 2024-047-B, 2024-
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CATALYST ENERGY LLC, PERMITTEE	**: 048-B, 2024-049-B, 2024-050-B, 2024-**
	: 051-B, 2024-052-B, 2024-053-B, 2024-
	: 054-B, 2024-055-B, 2024-056-B, 2024-
	: 057-B
	:
	: Issued: March 17, 2025

OPINION AND ORDER ON
APPELLANTS' AND INTERVENORS' MOTION TO REOPEN DISCOVERY AND EXTEND PRE-HEARING DEADLINES

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

We deny the appellants' and intervenors' motion to reopen discovery where they failed to show good cause to do so. The issues they seek to explore have been adequately explained and answered by the Department and Permittee in their responses. A multi-day supersedeas hearing was held in this matter wherein appellants and intervenors had ample opportunity to question multiple witnesses about the topics they assert justify re-opening discovery. It is unlikely that the reopening of discovery will lead to additional relevant information.

O P I N I O N

On February 12, 2025, Appellants and Intervenors (collectively "Ms. Lananger") filed a motion entitled "Appellants' and Intervenors' Motion to Reopen Discovery and Extend Pre-

Hearing Deadlines" ("Motion"). The case is an appeal of the Department of Environmental Protection's (Department's) issuance of a change of use permit at Permit Number 37-083-46237-00-01 ("Permit") to Catalyst Energy, Inc. ("Catalyst")[1]. After Catalyst obtained an EPA Class II-D brine disposal injection well permit ("EPA Permit"), a condition required by the Department's Permit, the Department authorized Catalyst to convert its Lot 580-1 well, a conventional oil and gas well, into an injection well ("Injection Well" or "Well"). The Notice of Appeal was filed in mid-February 2024. The Board issued its standard Pre-Hearing Order No. 1, setting August 13, 2024 as the deadline to complete discovery. In response to joint requests from the parties, discovery was extended multiple times. General discovery closed on October 11, 2024 and all discovery closed on October 18, 2024. On October 28, 2024, Ms. Lananger filed an expedited motion to reopen discovery and extend pre-hearing deadlines. On the same day that the Department and Catalyst filed their responses to the expedited motion, Ms. Lananger filed an application for a temporary supersedeas and petition for supersedeas.

On November 12, 2024, the Board granted a temporary supersedeas, preventing Catalyst from disposing fluids produced in association with oil and gas production into the Injection Well and scheduled a hearing on the petition for supersedeas. On November 21, 2024, as part of the process leading up to the supersedeas hearing, the Board denied Ms. Lananger's expedited motion to reopen discovery. The supersedeas hearing was held over five days in December 2024 and included testimony from seventeen witnesses. On December 27, 2024, the Board issued an order denying Ms. Lananger's petition for supersedeas and lifted the temporary supersedeas. On January 17, 2025, the Board issued its Opinion Supporting Order Denying Appellants' and Intervenors'

[1] For a more detailed background and discussion on the case, see the Board's Opinion Supporting Order Denying Appellants' and Intervenors' Petition for Supersedeas filed on January 17, 2025.

Petition for Supersedeas ("Supersedeas Opinion"). After issuing the Supersedeas Opinion, the Board held a conference call with the parties' counsel on January 31, 2025 to discuss how to proceed in the case. Following the conference call, the Board issued an order setting April 4, 2025 as the deadline for the parties to file dispositive motions.

Ms. Lananger's Motion was filed on February 12th and Catalyst and the Department filed their responses on February 21, 2025. Ms. Lananger filed a Motion for Surreply ("Surreply Motion") on February 26, 2025 and the Department and Catalyst timely filed their respective responses. On February March 4, 2025, the Board granted the Surreply Motion. This Opinion and Order address the Motion and the Surreply Motion.

Ms. Lananger argues that recent inspections and activity concerning the Injection Well's operations warrant a limited period for the reopening of discovery and extending the deadline to file dispositive motions. Based on those assertions, Ms. Lananger seeks to:

> […] explore what the Department and [Catalyst] knew about the failure of the Well, what led to the testing of water levels in the monitoring well, the failure of mechanical integrity testing, whether the Department and [Catalyst] are aware of or suspect contamination of private and public water supplies, whether the Department and [Catalyst] are aware of or suspect pollution of the surrounding waters of the Commonwealth, and other related topics.

(Ms. Lananger's Motion at 6, ¶ 36). In addition to the above information, Ms. Lananger also seeks discovery pertaining to her previous request to reopen discovery that the Board denied in late October 2024. That request sought to explore communication and documents related to the EPA and the Pithole Water Association and to depose designees of the Department and Catalyst. Ms. Lananger contends that she will be prejudiced if she is not able to obtain this information, "particularly given the seriousness and gravity of the failure of the Well's mechanical integrity during injection. *Id.*

The Department and Catalyst oppose the reopening of discovery. Both argue that discovery, while initially extended, has been closed for months, that no failure in mechanical integrity occurred, the information Ms. Lananger seeks is not relevant to the questions of this case, and that a comprehensive post-discovery supersedeas hearing has already occurred. They also contend that the basis of the Motion is predicated on falsehoods regarding the Injection Well's mechanical integrity and on unsupported assertions of potential water supply contamination. Catalyst argues that the discovery Ms. Lananger wishes to obtain concerns Catalyst's current day-to-day operations and that such discovery is far removed from the Department's decision to issue the Permit that merely authorized the conversion of the oil and gas well into the Injection Well. After reviewing the parties' arguments, we hold that Ms. Lananger has not convinced the Board that we should grant her Motion and reopen discovery.

When assessing a motion to reopen discovery we typically look at the justification provided by the moving party and whether there is a demonstration of good cause for further discovery. *M.C. Resource Development Company v. DEP*, 2017 EHB 330, 333; *Kiskadden v. DEP*, 2013 EHB 154*; Energy Res. Inc. v. DEP*, 2006 EHB 431; *Shenango Inc. v. DEP*, 2005 EHB 941. The Board is responsible for effectively monitoring and managing the discovery process. *Protect PT v. DEP*, 2020 EHB 326, 332, citing *Kiskadden v. DEP*, 2013 EHB 21, 23. Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Protect PT v. DEP*, 2020 at 333; *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 683. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Discovery regarding a matter should be permitted when it appears to be reasonably calculated to lead to information that

is relevant to the subject matter involved in the appeal. *Protect PT v. DEP*, 2020 at 333; *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 683.

Ms. Lananger has failed to show good cause for reopening discovery on any of the topics she raised. We have extended discovery several times in this matter and discovery has now been closed since October 2024. Ms. Lananger's counsel had the benefit of questioning numerous Department and Catalyst witnesses under oath on a variety of issues, including the design and integrity of the well, testing, casings, gas migration and potential environmental issues, all of which she cites in her Motion to justify reopening discovery. Issues that have arisen since operations began, in of themselves, do not warrant reopening discovery, especially when there is apparently ample information readily available through public records regarding ongoing operations, including the specifics as to what took place between January 22nd and February 6, 2025. Furthermore, we find that the details the Department and Catalyst provide in their responses to the Motion surrounding recent events is exactly the type of information that Ms. Lananger would receive through discovery. It is unlikely that reopening discovery at this point will yield any additional relevant information beyond the public records and information that she is currently receiving from the government agencies overseeing the Injection Well. If this case proceeds to a full hearing, Ms. Lananger's counsel will be able to question Department and Catalyst personnel about the operations at the Injection Well so long as she can demonstrate the relevance of the information to the Department's permitting decision that is the basis of the appeal. Therefore, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.,* and EMMA WRIGHT, *et al.,* Intervenors	**: EHB Docket No. 2024-016-B : Consolidated with: 2024-017-B, 2024-**
v.	**: 018-B, 2024-019-B, 2024-020-B, 2024- : 021-B, 2024-026-B, 2024-027-B, 2024- : 028-B, 2024-029-B, 2024-030-B, 2024- :031-B, 2024-032-B, 2024-033-B, 2024- : 034-B, 2024-035-B, 2024-036-B, 2024- : 037-B, 2024-038-B, 2024-041-B, 2024- : 042-B, 2024-043-B, 2024-044-B, 2024- : 045-B, 2024-046-B, 2024-047-B, 2024-**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CATALYST ENERGY LLC, PERMITTEE	**: 048-B, 2024-049-B, 2024-050-B, 2024- : 051-B, 2024-052-B, 2024-053-B, 2024- : 054-B, 2024-055-B, 2024-056-B, 2024- : 057-B**

O R D E R

AND NOW, this 17th day of March, following review of Ms. Lananger's Motion to Reopen Discovery and Extend Pre-Hearing deadlines and her Motion for Leave to File Surreply and, the Department's and Catalyst's responses thereto, it is hereby ORDERED that the Motion is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: March 17, 2025

c: **DEP, General Law Division:**
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(via electronic mail)

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Paul J. Strobel, Esquire
Nicholas A. Maskery, Esquire
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For Permittee:
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Sean Keegan, Esquire
Joshua Snyder, Esquire
Kathy Condo, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	**Issued: March 18, 2025**

OPINION AND ORDER
GRANTING MOTION TO WITHDRAW AS COUNSEL

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board ("Board") grants a motion requesting leave to withdraw as counsel. Permittee 222 Church Road, LLC has failed to substantially fulfill an obligation to counsel and withdrawal will not prejudice the litigants, delay the case, or impede the efficient administration of justice. Permittee 222 Church Road, LLC shall obtain new counsel if it wishes to participate in any hearing or submit any filings in this case.

O P I N I O N

Background

This third-party appeal centers around a National Pollutant Discharge Elimination System ("NPDES") permit, PAC460811, issued to Permittee 222 Church Road, LLC. Appellant David C. Bernstein ("Mr. Bernstein") filed two appeals with the Board regarding the subject NPDES permit. The first Board appeal occurred in November 2023 and challenged the Montgomery County Conservation District's ("MCCD") issuance of the NPDES permit. (*See* NOA, November 8, 2023

at docket 2023-090-BP*)*. The second appeal was filed in January 2024 and challenged the Department of Environmental Protection's ("Department" or "DEP") determination, after an informal hearing, that the MCCD's issuance of the permit was valid. (*See* NOA, January 10, 2024 at docket 2024-006-BP). The Board consolidated the two appeals by Order dated January 22, 2024 at EHB Docket No. 2023-090-BP. Throughout the appellate process, Permittee was represented by Steven A. Hann, Esquire of Hamburg, Rubin, Mullin, Maxwell & Lupin, PC.

Procedurally, fact and expert discovery have ended, and dispositive motions have been filed and decided. However, pre-trial deadlines have not yet been established nor has a hearing date been scheduled.

On February 28, 2025, Attorney Hann filed a Motion for Leave to Withdraw as Counsel. On March 3, 2025, the Board issued an Order that any Response to said Motion was due on or before March 14, 2025. It was further ordered that Permittee be made aware, in writing, that it must obtain counsel if it wishes to participate in any hearing and/or submit any filings in accordance with 25 Pa. Code § 1021.21(a).[1] On March 13, 2025, the Department and MCCD filed their Response agreeing to the withdrawal so long as Permittee is advised that failure to participate in any hearing or filing does not protect it from potential costs and attorneys' fees under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), and applicable case law. Appellant did not file a Response. This matter is ready for review and disposition.

Standard of Review

Pennsylvania Rule of Professional Conduct 1.16(b), governing declining or terminating representation, states that a lawyer may withdraw from representing a client if "withdrawal can be

[1] A copy of the March 3, 2025 Order was served on Permittee's personal contact, Zvi Bloom, as well as counsel.

accomplished without material adverse effect on the interests of the client." Pa.R.P.C. 1.16(b)(1). Additionally, a lawyer may withdraw from representation if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Pa.R.P.C. 1.16(b)(5).

In ruling on a request for leave to withdraw in a circumstance that will leave a party unrepresented, the Board considers "the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice." 25 Pa. Code § 1021.23(b); *DEP v. Allegheny Enterprises, Inc.*, 2013 EHB 40, 41.

Discussion

In the instant matter, Attorney Hann requests leave to withdraw as counsel as Permittee failed in its obligation to pay the money due to him and his firm for legal services in this current appeal. The Board has found it appropriate for an attorney to withdraw from representation for the failure of a client to pay money owed, as it constitutes failure to substantially fulfill an obligation. *DEP v. Allegheny Enterprises, Inc.*, 2015 EHB 40, 42 (*citing Mann Realty Assocs., Inc. v. DEP,* 2014 EHB 1040, 1043). Any continuation of representation of Permittee will result in an unreasonable financial burden on Mr. Hann and his firm. In addition, as required by Pa.R.P.C. 1.16(b)(5), Mr. Hann has fully advised Permittee that he is seeking withdrawal of counsel unless his payment obligation is fulfilled. Specifically, Mr. Hann's firm has contacted Permittee on numerous occasions via email, texts, telephone, and certified mail regarding the outstanding bills for legal services rendered and has received only a limited payment.

The Board expresses concern with the withdrawal in that Permittee will be unable to represent itself in any proceedings before the Board *pro se*, as it is a limited liability company. 25

Pa. Code § 1021.21(a). However, this Board has Ordered Mr. Hann to inform Permittee of that information, in writing, and served a copy of that Order on the direct contact person for Permittee. At this stage in the proceedings, all discovery and dispositive motions have been completed. The parties are waiting for the Board to set pre-trial deadlines and a hearing date, and it is unlikely that a hearing will take place for several months. This will allow Permittee ample time to decide if it would like to obtain new counsel to participate in the pre-trial filings and hearing.

As the Board has previously stated in *DEP v. Allegheny Enterprises, Inc.*, while we are permitting Mr. Hann and his firm to withdraw, we advise him of his responsibility to 222 Church Road, LLC and advise:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Pa.R.P.C. 1.16(d).

Notably, Mr. Hann did "provide the Board with a single contact person for future service in all proceedings," as required by 25 Pa. Code § 1021.23(c). As such, future service will be provided directly to the Zvi Bloom c/o 222 Church Road, LLC, 509 Cedar Hill Road, Far Rockaway, NY 11691 until such time as new counsel enters an appearance before the Board on behalf of Permittee. *See Manning v. DEP*, 2013 EHB 845, 847.

Conclusion

Therefore, for the reasons stated above, we grant the Motion for Leave to Withdraw as Counsel for Permittee 222 Church Road, LLC. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	

O R D E R

AND NOW, this 18th day of March, 2025, in consideration of an unopposed Motion to Withdraw as Counsel for Permittee 222 Church Road, LLC filed by Steven A. Hann, Esquire of Hamburg, Rubin, Mullin, Maxwell & Lupin, PC., it is hereby **ordered** that said Motion is **granted**.

It is further **ordered** that under 25 Pa. Code § 1021.21(b), which requires corporations to be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania, 222 Church Road, LLC shall retain new counsel and shall have counsel enter an appearance in this matter **by no later than April 30, 2025** if it wishes to participate in any hearing and/or submit any filings. If no attorney has entered an appearance on behalf of 222 Church Road, LLC by April 30, 2025, but Permittee does intend to seek new counsel, 222 Church Road, LLC **shall file a statement on the docket** addressing its progress toward obtaining counsel **by April 30, 2025**.

222 Church Road, LLC is further advised that failure to participate in any hearing, briefing, or filing at any stage of the current appeal does not protect it from potential costs and attorneys' fees under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).

ENVIRONMENTAL HEARING BOARD

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

DATED: March 18, 2025

DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

c: **For the Commonwealth of PA, DEP & Montgomery County Conservation District:**
William J. Gerlach, Jr., Esquire
Patrick J. Donovan, Esquire
(via electronic filing system)

For Appellant:
Aaron S. Mapes, Esquire
Robert J. Schena, Jr., Esquire
(via electronic filing system)

For Permittee
Steven Hannn, Esquire
(via electronic filing system)

Zvi Bloom
222 Church Road, LLC
509 Cedar Hill Road
Far Rockaway, NY 11691
(via first class U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2024-092-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: March 18, 2025**

OPINION AND ORDER ON OLYMPUS ENERGY LLC'S MOTION TO DISMISS APPEAL AS MOOT

By MaryAnne Wesdock, Judge

Synopsis

Where the record contains insufficient information to find that an appeal is moot or fails to fall within an exception to the mootness doctrine, the permittee's motion to dismiss is denied. The Board must exercise restraint in dismissing appeals as moot if the circumstances are not entirely free from doubt.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Protect PT challenging the approval of alternative waste management practices issued to Olympus Energy, LLC (Olympus) by the Department of Environmental Protection (Department) in connection with Olympus' Aphrodite Well Site in Penn Township, Westmoreland County.

When an unconventional oil and gas well operator seeks to manage waste on a well site in a manner other than that provided for in the oil and gas regulations, the operator is required to submit a request to the Department outlining the alternative waste management practices it intends

to employ, along with a description of how those practices are equivalent to or superior to the protections outlined in the regulations. 25 Pa. Code § 78a.63a. According to documents submitted with the notice of appeal, Olympus sought approval pursuant to 25 Pa. Code § 78a.63a to utilize alternative waste management practices at its Aphrodite Well Site "for the physical and chemical processing of drill cuttings and for the beneficial use of drilling fluids." (Notice of Appeal, Ex. A.) On March 18, 2024, the Department granted approval pursuant to Authorization ID No. 1477181 (Original Approval).[1] The Original Approval was to "terminate upon the cessation of operations associated with the completion of the final permitted well drilled on the Aphrodite Well Site that is associated with this approval." *Id.* On or about March 24, 2024, Protect PT became aware of the Original Approval on the Department's website and this appeal was filed on April 17, 2024. (Amended Notice of Appeal, EHB Docket No. 2024-092-W, at para. 2(d).)

On November 20, 2024, approximately eight months after the Original Approval had been issued, Olympus requested that the Department terminate the approval and authorize a different set of alternative waste management practices at the Aphrodite Well Site. The Department granted that approval one day later, on November 21, 2024, pursuant to Authorization ID No. 1507399 (New Approval).[2] On December 3, 2024, the Department terminated the Original Approval. Protect PT appealed the New Approval on December 23, 2024 at Docket No. 2024-185-W.

Presently before the Board is a motion to dismiss filed by Olympus asserting that the appeal of the Original Approval is moot. Olympus contends that because the Original Approval has been terminated there is no relief the Board can grant. The Department concurs in the relief requested

[1] The waste management practices authorized by the Original Approval were previously approved for usage at Olympus' Calliope Well Site. (Olympus Motion, at para. 2.)

[2] The waste management practices authorized by the New Approval were previously approved for usage at Olympus' Metis Well Site. (Olympus Motion, at para. 4–5.)

in Olympus' motion. Protect PT filed a response opposing the motion, and Olympus filed a reply. This matter is now ripe for disposition.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Heights Plaza Materials, Inc. v. DEP*, EHB Docket No. 2024-170-BP, *slip op*. at 3 (Opinion issued January 28, 2025); *Protect PT v. DEP*, 2023 EHB 191, 193; *Hopkins v. DEP*, 2022 EHB 143, 144. Because "mootness is a prudential limitation related to justiciability," it is properly resolved by a motion to dismiss. *Lancaster Against Pipelines v. DEP,* 2019 EHB 134, 135; *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Ongaco v. DEP*, 2023 EHB 239, 241; *Popovich v. DEP*, 2023 EHB 35, 36. For the purposes of resolving motions to dismiss, the Board accepts the non-moving party's version of factual events as true. *Clean Air Council v. DEP*, 2023 EHB 203, 206; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155; *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741. Motions to dismiss will be granted only when a matter is free from doubt. *Greyhound Aramingo Petroleum Co. v. DEP,* 2022 EHB 96, 98; *Bartholomew v. DEP,* 2020 EHB 19, 21.

Mootness

A matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Citizens for Pennsylvania's Future v. DEP*, 2024 EHB 624, 626 (quoting *Protect PT v. DEP*, 2024 EHB 154, 157); *Scott v. DEP*, 2023 EHB 138, 140 (quoting *Horsehead Resource Development Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001)). There

are exceptions to mootness, including where the action complained of is capable of repetition but likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision by the Board. *Citizens for Pennsylvania's Future*, 2024 EHB at 626 (quoting *Protect PT*, 2024 EHB at 157); *Lawson v. DEP*, 2018 EHB 513, 515; *Consol Pennsylvania Coal Co. LLC v. DEP*, 2015 EHB 48, 56. The existence of any of these circumstances may justify the Board retaining jurisdiction of the matter. *Consol Pennsylvania Coal Co. LLC v. DEP*, 2019 EHB 146, 148.

In its motion, Olympus asserts that Protect PT's appeal of the Original Approval is moot because the approval is no longer in effect. According to the affidavit of Olympus' Environmental Compliance Manager, Laura Karosic, included with the motion, the Department terminated the Original Approval on December 3, 2024. (Olympus Motion, Ex. 1 at para. 11.) Because the approval is terminated, Olympus argues there is no meaningful relief that the Board can grant. Olympus also argues that no exceptions to mootness apply. It disputes that this matter falls within the "capable of repetition yet evading review" exception because Protect PT has had the opportunity to appeal the New Approval. Likewise, it disputes that this appeal falls within the second exception to the mootness doctrine, i.e., involving matters of great public importance, because it believes that any such matters can be addressed in the appeal of the New Approval. Finally, Olympus argues that Protect PT will suffer no detriment if the appeal is dismissed, again because it has a full opportunity to challenge the New Approval.

Protect PT acknowledges that, at first glance, Olympus' arguments "seem compelling and suggest that the proper course of action would be to grant the Motion and dismiss this case." (Appellant Memorandum in Support of Response, p. 11.) However, it urges us to take a deeper

examination of the record which it contends supports its argument that this case should be allowed to proceed under exceptions to the mootness doctrine.

It is important to note that "[m]ootness does not deprive the Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed." *Sludge Free UMBT v. DEP*, 2015 EHB 888, 891 (citing *Ehmann v. DEP*, 2008 EHB 386, 390). Moreover, the Board must "exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt." *Citizens for Pennsylvania's Future*, 2024 EHB at 627 (quoting *Protect PT*, 2024 EHB at 162). [3] In this instance, we choose to exercise such restraint and deny the motion to dismiss because it is not clear from the record that the issues raised in the appeal of the Original Approval are moot or fail to fall within exceptions to the mootness doctrine.

The record contains almost no information about the waste management practices approved under the Original Approval (or, for that matter, the New Approval) and no information on what activities, if any, Olympus undertook pursuant to the Original Approval during the eight months it was in effect. For example, in its memorandum of law, Olympus states that it "determined it would not act pursuant to Authorization ID No. 1477181 [the Original Approval] and, moving forward, will not seek the Department's approval to use at any other location those alternative waste management practices approved for use at the Calliope Well Site."[4] (Memorandum of Law in

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[3] *See also Consol*, 2015 EHB at 74 (Labuskes, J., dissenting) (recommending that the Board exercise prudence before dismissing a case based on mootness):

> Our legislatively mandated charge is to review actions of the Department in challenges brought by persons aggrieved by those actions and we should not unnecessarily turn away from that charge. In close cases such as the one before us now, prudence dictates that we not toss out a party, at least in the context of a motion to dismiss. This may be [the appellant's] one and only chance to be heard on an important issue. . .

[4] Because the waste management practices approved under the Original Approval were first approved for use at Olympus' Calliope Well Site, the parties' filings often reference the Calliope Well Site rather than the Aphrodite Well Site when referring to those waste management practices.

Support of Olympus Motion, p. 1.) Similarly, Environmental Compliance Manager, Laura Karosic, states in her affidavit: "Following a change in its operational plans, on November 20, 2024, Olympus notified the Department in writing that it would not conduct activities pursuant to [the Original Approval] and requested that the Department terminate [the Original Approval]." (Olympus Motion, Ex. 1, at para. 8.) While it is clear from these statements that Olympus does not intend to utilize the alternative waste management practices approved under the Original Approval going forward, it is not clear whether they engaged in those practices during the eight months the approval was in existence. This uncertainty "cloud[s] the mootness issue." *Citizens for Pennsylvania's Future*, 2024 EHB at 627. Simply because the Old Approval was terminated and a New Approval is in place, that does not automatically moot the appeal of the Old Approval. Further information is needed in order to make that determination. *See, e.g., Cooley v. DEP*, 2004 EHB 554 (finding that issuance of a new air quality plan approval did not necessarily moot the appeal of an earlier plan approval; the determination of that question required further development of the factual record). If Olympus engaged in activity pursuant to the Original Approval, it is possible that some or all of the issues raised by Protect PT in its appeal of the Original Approval remain viable.

Olympus argues that there is no relief the Board can grant since the Original Approval has been terminated. In other words, the Board cannot strike down an approval that is no longer in effect. Although Olympus argues that there is no relief the Board can grant at this stage, that is not clear from the record. For one thing, it is not clear whether any alternative waste management practices that may have been implemented under the Original Approval remain in effect, such as on-site storage of waste materials. The Board has held that the rescission of a Department action

will not automatically moot an appeal where concrete continuing obligations exist. *Consol*, 2015 EHB at 55-56.

Citizens for Pennsylvania's Future involved an appeal of permits issued in connection with the construction of a pipeline. While the appeal was pending, construction of the pipeline was completed and it was put into service. The permittee argued that the appeal was moot because there was no relief the Board could provide with respect to activities that had already been completed. The Board disagreed and stated:

> While construction prior to the Board's decision may as a practical matter limit what relief the Board can reasonably mandate, it does not *necessarily* circumscribe the Board's options if it finds that an error has been committed. So, for example, a particular [best management practice] that is determined to have been faulty by design may need to be redone.

2024 EHB at 627 (emphasis in original).

Similarly, here, while termination of the Original Approval may limit what relief the Board can grant, it "does not necessarily circumscribe the Board's options" if we find that an error has been committed. *Id.* For example, a particular alternative waste management practice that is determined to have been faulty may need to be redone. At this point, there is insufficient evidence in the record to make the determination of what remedies, if any, may be available.

Moreover, even if we were to find that the appeal of the Original Approval is moot, this matter may fall within at least one exception to the mootness doctrine, specifically, involving conduct that is capable of repetition yet evading review. Olympus owns and operates a number of gas wells in Westmoreland County, and at least three of those well sites (the Metis, Calliope, and Aphrodite) have requested approval of alternative waste management practices. In its motion, supported by Ms. Karosic's affidavit, Olympus states that it does not intend to apply for the alternative waste management practices set forth in the Original Approval at any point in the future.

(Olympus Motion, at para. 11, and Ex. 1, at para. 12.) While we have no reason to doubt that this is Olympus' intention at the present time, there is nothing to prevent it from seeking such authorization in the future. Further, as Protect PT notes in its response, there is nothing preventing Olympus from withdrawing and the Department from terminating the New Approval and seeking yet a different approval. Under these circumstances, it is possible that future alternative waste management approvals could evade review. *See, e.g., Harriman Coal Corp. v. DEP*, 2000 EHB 1170 (declining to dismiss appeals of surface coal mining license renewals that had expired where the issues raised by the appellant were capable of repetition yet likely to evade review).

Olympus asserts that the issues raised in the appeal of the Original Approval will not evade review since the same issues have been raised in the appeal of the New Approval. While the appeal of the Original Approval may contain the same or similar objections as the appeal of the New Approval, it is nonetheless challenging a different action. There is nothing in the record clearly demonstrating that Protect PT's issues with the Original Approval will be resolved by its appeal of the New Approval and Protect PT does not indicate this is the case. As we stated earlier, the record contains scant information on what the Original Approval and New Approval actually entail.[5] Where there is doubt, we must view the record in the light most favorable to the non-moving party. Moreover, based on a comparison of the two appeals, it appears that at least one issue in the appeal of the Original Approval does not appear in the appeal of the New Approval. That issue concerns Olympus' Calliope Well Site which utilizes the same alternative waste management practices as those authorized by the Original Approval. While Olympus argues that

[5] In an affidavit attached to a motion to stay filed by Olympus on November 20, 2024, Environmental Compliance Manager Laura Karosic states that the waste management practices of the New Approval are "substantially similar" to those of the Original Approval; she notes that the former allows for an additional solidification agent. Putting aside the fact that this document is not part the materials filed in support of the motion to dismiss, it does not convince us that Protect PT's appeal of the New Approval will resolve all the issues raised in its appeal of the Original Approval.

any matters pertaining to the Calliope site are no longer relevant, that argument is premised on its assertion that the appeal of the Original Approval is moot, which, as we have explained, is not clear.

Without clear information regarding the implementation, or lack thereof, of the alternative waste management practices outlined in the Original Approval, we can only speculate as to whether any portion of this dispute is moot. We simply do not have enough information at this point to make that determination. Likewise, there is insufficient information to determine whether this matter falls within an exception to the mootness doctrine. [6] As we have stated, the Board will only grant a motion to dismiss when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517. Where the matter is not clear, the motion must be denied. *See Thomas v. DEP*, 1998 EHB 93, 98.

[6] Although the parties' filings also discuss the remaining exceptions to mootness, i.e., matters of great public importance and matters where a detriment will be suffered without a ruling by the Board, we decline to address those issues at this time without a more complete record.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2024-092-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	

O R D E R

AND NOW, this 18th day of March, 2025, it is hereby ordered that the Motion to Dismiss Appeal as Moot is denied.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: March 18, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Sharon Rice Stritmatter, Esquire
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For Appellant:
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For Permittee:
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Travis Brannon, Esquire
Maureen O'Dea Brill, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

354 BROADWAY, LLC AND DARIAN FLATLEY	:	
v.	:	**EHB Docket No. 2024-139-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 18, 2025**

OPINION AND ORDER
ON THE DEPARTMENT'S MOTION FOR SANCTIONS IN THE FORM OF A DISMISSAL AGAINST APPELLANTS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants in part and denies in part the Department's motion for sanctions in the form of dismissal. The Board dismisses the appeal of appellant limited liability company for its failure to obtain counsel and to abide by Board rules and orders. The Board denies the dismissal of individual appellant's appeal where the individual appellant has filed a list of objections, demonstrated an intent to participate in proceedings, and the Department has not suffered prejudice.

O P I N I O N

Background

This matter involves an appeal filed by 354 Broadway, LLC ("Broadway") and Darian Flatley ("Mr. Flatley") (collectively, "Appellants") of an Administrative Order issued on September 23, 2024 by the Department of Environmental Protection ("Department"). The Appellants own and operate a mobile home park located at 126 Kerr Road, Shenango Township, Lawrence County (the "Site"). The Site sits near Big Run, a stream, that borders a portion of the

Site. The Administrative Order requires the Appellants to take corrective actions in order for the Site to achieve compliance with The Clean Streams Law and the Dam Safety and Encroachments Act. The Appellants filed their Notice of Appeal on October 22, 2024 ("Appeal") with the Environmental Hearing Board (the "Board"). The Appeal did not include a list of Appellants' objections, prompting the Board to issue an Order to Perfect, directing Appellants to file a list of objections by November 12, 2024. Additionally, because no attorney entered an appearance on behalf of Broadway, the Board issued an order requiring Broadway to retain counsel to represent it in this matter by December 2, 2024.

The Appellants failed to file a list of objections by the ordered deadline, and on November 19, 2024, the Board issued a Rule to Show Cause ("Rule") requiring the Appellants to submit their objections by December 6, 2024. The Rule further provided that the Appellants' failure to file objections could result in the dismissal of their Appeal. In addition to Appellants missing the deadline to perfect, Broadway also failed to retain counsel by December 2, 2024. On December 5, 2024, the Appellants filed a letter with the Board requesting a thirty-day extension to file objections and for Broadway to retain counsel. The Board granted the request, setting January 9, 2025 as the deadline for Broadway to acquire counsel and for Appellants to file objections. On the day of the deadline, the Board received a second request from Appellants, this time asking for an additional sixty-day extension. The Board ordered the Department to respond to the Appellants' request and on January 16, 2025, the Department filed its Response to Request for 60-day Extension and Motion for Sanctions in the Form of a Dismissal Against 354 Broadway, LLC and Darian Flatley ("Motion"). On February 13, 2025, the Appellants filed their response to the Department's Motion and, in addition, submitted a list of objections and also filed a discovery request on the docket directed at the Department. The next day, the Appellants docketed their

responses to the Department's discovery request which included, amongst other things, email correspondence between Mr. Flatley and the Department. On February 28, 2025, the Department filed its reply. We are now ready to rule on the Motion.

The Department asks the Board to dismiss the Appellants' Appeal as a sanction pursuant to Rule 161 of the Board's Rules of Practice and Procedure. The Department puts forth two positions that it argues are grounds for dismissal. First it asserts that we should sanction Broadway by way of dismissal for its failure to obtain counsel. In its second argument, the Department asserts that dismissal is appropriate for both Broadway and Mr. Flatley due to their ongoing failure to perfect their Appeal. The Board's rule on sanctions provides that:

> [t]he Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and only grants the motion where the moving party is entitled to judgment as a matter of law. *Protect PT v. DEP*, 2024 EHB 154, 155; *Scott v. DEP*, 2023 EHB 138, 139 (citing *Muth v. DEP*, 2022 EHB 262, 264); *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, 2023 EHB 203, 206 (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155.

In the Department's first argument, it asserts that by failing to secure legal representation, Broadway has committed multiple violations of the Board's orders and of its Rules of Practice and Procedure and, as such, we should dismiss its Appeal as a sanction. Section 1021.21(a) of our

Rules provide "[p]arties, except individuals appearing on their own behalf, shall be represented by an attorney." 25 Pa. Code § 1021.21(a). Further, our rules require that corporations "shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania." 25 Pa. Code § 1021.21(b). In considering the mandatory language of our rule, we have consistently held that corporations may not proceed with an appeal without legal representation. *L.A.G. Wrecking, INC. v. DEP*, 2015 EHB 338, 241; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 261; *Potts Contracting Co. v. DEP*, 1999 EHB 958, 960; *Bucket Coal Co. v. DEP*, 1999 EHB 288, 289-90. Broadway is a registered limited liability company in the state of Pennsylvania, hence, subject to Section 1021.21(b).[1] Almost five months have passed since the Appeal was initially filed. To date, Broadway has not been represented by legal counsel over the course of this matter's proceedings.

On October 23, 2024, after Broadway filed its appeal, the Board ordered Broadway to obtain counsel by December 2, 2024. No attorney entered an appearance on behalf of Broadway by that deadline. The Appellants submitted their first request for extension on December 5, 2024, stating that, "[w]e are currently in the process of trying to obtain counsel." (Appellants' Letter Requesting Extension at Dkt. No. 7). The Board granted this request and ordered Broadway to acquire legal representation by January 9, 2025. Rather than an attorney entering an appearance before or on that date, the Appellants submitted another extension request on January 9th that provides in relevant part as follows:

> Our current attorney recommended an environmental atto[r]ney after speaking with David Hall from the D.E.P for this case and

[1] The decision to form and operate as an LLC creates both rights and responsibilities for the entity. It provides liability protection to its members but also requires that corporate formalities be observed including the requirement to be represented in legal proceedings in front of the Board by an attorney.

> after speaking to the recommended attorney we are asking for a sixty day extension to secure the necessary funds to obtain that council.

(Appellants' Letter Requesting Second Extension at Dkt. No. 10).

In its Memorandum in Support of the Motion ("Memorandum"), the Department argues that Broadway concedes in its second extension request that it does not have the financial ability to retain counsel and, as such, there is no guarantee it will have the financial means to acquire counsel moving forward. Additionally, the Department takes issue with the content of Broadway's second request, or rather, lack thereof, asserting, in essence, that Broadway did not convincingly demonstrate in its request it is indeed earnestly seeking legal representation. The Department states that the Appellants "have not stated what efforts they have made to obtain counsel, what efforts they have made to raise the necessary funds, and when they plan to secure the necessary funds, among other things." (Department's Memo at 5).

Broadway addresses the Department's Section 1021(b) challenge in Paragraph two of its Response, entitled "Legal Representation" which provides in its entirety as follows:

> Darian Flatley, as the sole member of 354 Broadway, LLC, is actively seeking legal counsel. Financial limitations have delayed securing representation, but efforts are ongoing, and an attorney will be retained before the hearing. Under 25 Pa. Code § 1021.21(b), LLCs must be represented by counsel, and Appellants are making every effort to comply.

(Response at ¶ No. 2).

In its Reply, the Department argues that the Board does not recognize an appellant's financial constraints as a defense to the requirement set forth in Section 1021.21(b). Further, the Department is concerned that if Broadway is allowed to remain in the case and retains representation at some unknown point in the proceedings, it could lead to further delays and continuances if an attorney enters his or her appearance at the eleventh hour in this matter.

We agree with the Department that dismissal of Broadway's appeal is warranted at this juncture. As the Department points out, the Board has given Broadway several opportunities to obtain counsel since filing its Appeal. In our Order dated October 23, 2024, we first gave Broadway forty-days to acquire counsel. After missing that deadline, the Appellants filed their first request for extension several days later. The Board freely granted this request, allotting Broadway thirty more days to secure representation. On the day of the deadline for counsel to enter an appearance on Broadway's behalf, Broadway submitted its second request, this time seeking an additional sixty-day extension. Section 1021.21(b) is clear in its requirement that Broadway be represented by counsel and, furthermore, Broadway has failed to comply with two Board orders directing it to obtain legal representation to conform with this Rule. Moreover, Broadway filed its sixty-day extension request on January 9, 2025. We ordered the Department to file a response to this request which it did in the form of the Motion. Hence, we have yet to formally act on the 60-day request. Due in part to the designated timeframe under our Rules for Broadway to file its Response to the Motion and for the Department to submit its Reply, more than 60 days has in fact passed since Broadway made its second request and still no attorney has entered an appearance on Broadway's behalf.

We agree with the dissent that this is not a case where communication with the Board has ceased resulting in the abandonment of the Appeal. But despite the case not being abandoned, the communications from Mr. Flatley do not present a compelling argument on behalf of Broadway. First, while Mr. Flatley may be the sole member of Broadway, legally, it is a separate entity and he cannot act as the attorney for Broadway in front of the Board and file documents on its behalf.[2]

[2] We have no knowledge of whether Mr. Flatley is a licensed attorney in the Commonwealth of Pennsylvania but, if he is not, continuing to file legal documents on behalf of Broadway, arguably constitutes the unauthorized practice of law.

A *pro se* corporation does not and cannot exist as a legal party in front of the Board. The Board may exercise its discretion to allow that situation to be corrected, as we have done here, and in many other cases, but that discretion does not alter the fact that our rules require that corporations be represented by attorneys and that such representation is required from the beginning of the case.

The dissent highlights Mr. Flatley's statement that he will retain an attorney for Broadway before the hearing in front of the Board. That, of course, ignores the ongoing case activities that must take place before a matter in front of the Board even reaches a hearing. Our pre-hearing order No. 1 requires that parties consult about settlement within 45 days and file a statement certifying those discussions took place within 60 days (December 23, 2024 in this case). The Department filed a letter with the Board on December 13, 2024 stating that it had been unable to hold settlement discussions with Broadway because it did not have counsel. Discovery is to be completed in 6 months by April 21, 2025 in this case and written discovery is to be served no later than March 21, 2025. Without counsel, Broadway will not be able to meet any of the discovery deadlines and the Department will be hindered in the discovery process. Once discovery is completed, our prehearing order calls for the filing of dispositive motions. Absent counsel, this cannot take place. Finally, before a hearing can take place, pre-hearing memos are exchanged and other hearing preparation steps must be completed, all of which cannot be done by Mr. Flatley on Broadway's behalf. As should be evident, a statement that Broadway will obtain counsel before the hearing is problematic and is not a position that the Board should endorse. The failure to have counsel to represent Broadway has a real impact on the parties by preventing the proceedings in front of the Board from moving forward in an orderly fashion. All parties to a Board proceeding, including the Department, have a right to expect the Board's rules to be followed and for matters to proceed in a proper manner. Considering Broadway's failure both to obtain counsel in

accordance with our Rules and to comply with our orders after it has had ample time to retain counsel, and the clear impact that failure has had on these proceedings, we find it appropriate to dismiss Broadway's Appeal as a sanction.

We now turn to the question of whether Mr. Flatley in his individual capacity can pursue his appeal. Mr. Flatley filed the Appeal using the Board's Notice of Appeal form. Paragraph four of the form directs filers to describe their specific objections, both factual and/or legal, to the challenged Department action. The requirement for an appellant to set forth their objections is codified in Section 1021.51 of the Board's Rules. See 25 Pa Code § 1021.51(e). Mr. Flatley did not file a list of his objections at the outset of his Appeal and, in addition, continued in his failure to submit his legal challenges even when ordered to do so by the Board in its Order to Perfect, the Rule to Show Cause, and the Order extending the deadline to submit his objections by January 9, 2025. Only recently has Mr. Flatley finally filed his objections in this matter.

The Department asserts that Mr. Flatley's repeated disregard for Board orders and the failure to comply with Board Rules should result in the dismissal of his appeal. At the time the Department filed its Motion, Mr. Flatley had not yet perfected his appeal which, it argues, demonstrates his lack of intention to prosecute the Appeal. The Department also claims that Mr. Flatley refused to participate in the settlement meeting required by the Board's Pre-Hearing Order No. 1 and that he has not complied with the Department's discovery requests, further evidencing that he has no interest in pursuing his Appeal. Additionally, the Department argues that Mr. Flatley's failure to provide his objections "has prejudiced the Department in its preparation for a trial in this matter, as the Department does not even know what is allegedly objectionable about its order […]" and that the Department is handicapped "in its ability to attempt to settle or

otherwise resolve this matter, as it does not know which terms of the Department's Order are acceptable to Appellants and which are not." (Department's Memo at 6).

We do not disagree with the Department in that Mr. Flatley has on multiple occasions failed to comply with our Rules and Orders. However, we do not agree that Mr. Flatley is disinterested in pursuing this matter or that the Department is particularly prejudiced by his failure to file his objections. In several cases in front of the Board, appellants have become entirely dormant and unresponsive to the proceedings of their appeals and to Board outreach, making it clear that they have abandoned their legal pursuits. That is not the case here. While there is no doubt that Mr. Flatley has been dilatory in filing his objections, an approach we do not condone, he has not ceased his engagement in this matter. He has submitted two requests to extend the deadline for submitting his objections and timely filed his Response to the Department's Motion. Although long overdue, Mr. Flatley also filed his list of his objections the same day he filed his Response. Additionally, while not the standardized practice and procedure of this Board, Mr. Flatley also filed his requests for discovery and his responses to discovery on the docket. To us, such activity does not suggest a lack of interest on Mr. Flatley's part in prosecuting his appeal.

Moreover, we do not believe the Department is unduly prejudiced by the late arrival of Mr. Flatley's objections. The Departments asserts that it can neither prepare for a hearing nor potentially settle this matter because it has no sense as to what Mr. Flatley objects to or what he finds unacceptable about its Administrative Order. However, in the discovery responses that Mr. Flatley filed on the docket, he provides email correspondence between him and the Department, including communication involving negotiations of a consent order and agreement that took place prior to this Appeal. Within that exchange, Mr. Flatley lists the terms of the proposed consent order and agreement that he takes issue with. The list of objections Mr. Flatley ultimately filed in

this matter are, for the most part, like the issues he wished to address with the Department during their prior negotiations. Based on this information, it appears that the Department has likely had at least general idea as to what Mr. Flatley found objectionable in the Administrative Order. Further, we are still within the initial discovery period set by the Board and a hearing in this matter is not imminent. Given the timing and the responses that have been filed, we conclude that under these facts, the Department has not suffered significant prejudice in its ability to proceed in this matter. Overall, we do not think the Department has demonstrated a sufficient basis for the Board to apply the serious sanction of dismissing Mr. Flatley's appeal. At the same time, we caution Mr. Flatley that if he continues to fail to comply in a timely manner with the Board's Orders and Rules, sanctions, including dismissal, may be warranted in the future.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

354 BROADWAY, LLC AND DARIAN FLATLEY	:	
	:	
v.	:	**EHB Docket No. 2024-139-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of March, 2025, the Department's Motion to Dismiss is **granted in part** and **denied in part**, and it hereby ORDERED as follows:

1. The Department's motion to dismiss as it pertains to 354 Broadway, LLC is **granted**.

2. The Department's motion to dismiss as it pertains to Mr. Flatley is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

*** Judge Sarah L. Clark files an Opinion Concurring in Part and Dissenting in Part, which is attached.**

DATED: March 18, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
David Hull, Esquire
Dearald Shuffstall, Esquire
(via electronic filing system)

For Appellants, *Pro se*:
354 Broadway, LLC
Darian Flatley
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

354 BROADWAY, LLC AND DARIAN FLATLEY	:	
	:	
v.	:	**EHB Docket No. 2024-139-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION OF JUDGE SARAH CLARK
DISSENTING IN PART AND CONCURRING IN PART

By Sarah L. Clark, Judge

Although appellants who file appeals *pro se* are subject to the same Rules of Practice and Procedure as those represented by counsel, it is often the case that some leniency is granted to Commonwealth citizens appealing actions of the Department unassisted. *Perrin v. DEP*, 2008 EHB 82 ("Although we often have said that *pro se* parties will be given no special consideration, as we in fact did earlier in this very Opinion, in many (if not most or all cases) this simply is not true.") The actions of the Department can have very real financial and practical consequences for these citizen appellants, who face an uphill battle to often even understand what is being asked of them and why, as well as what processes they must adhere to in order to avoid procedural dismissal, let alone make it to, or prevail at, a hearing. Indeed, even attorneys who are not seasoned practitioners before this Board are sometimes flummoxed by the particularities of our procedural Rules, but they at least have the training to work out what is expected of them. The reality is that many *pro se* appellants do not understand that the initiation of an appeal to the Board is akin to filing a lawsuit; rather, many seem to believe that the Board is the Department's complaint box and simply do not understand that their continued participation in the appeal and compliance with our Rules is necessary to protect their rights. And even for those more sophisticated *pro se*

appellants who do understand that they have initiated a legal process, understanding and complying with the intricacies of our Rules can be a procedural minefield, often resulting in dismissal of their appeals before the merits can be reached. While this is often justified as *pro se* appellants frequently file an appeal and then completely disappear, where they are actively engaged and it is within the Board's discretion to dismiss the appeal or not, I believe it is prudent and in the interest of due process to exercise that discretion with benevolence. As the Board stated in *Hrivnak Motor Company v. DEP*, "…there is an absolutely fundamental, deep-seated right grounded in our federal and state constitutions that parties should have access to the courts and be afforded due process of law." 1999 EHB 437, 440.

While I concur with my esteemed colleagues in denying the dismissal of Mr. Flatley's appeal, I respectfully dissent in granting the dismissal of Broadway's appeal. First, it appears that Mr. Flatley is the sole owner and member of Broadway. Therefore, if we dismiss Broadway's appeal, even if Mr. Flatley should prevail in his individual appeal, the Department could simply enforce the Administrative Order against Broadway, which is Mr. Flatley for all intents and purposes.

It is true that the Board has consistently dismissed appeals as a sanction for failure to obtain counsel when an appellant has been unresponsive to Board Orders or motions to dismiss for failure to obtain counsel. In *Waroquier Coal Co. v. DEP*, we dismissed the Appellant company that filed its appeal *pro se* only after issuing an Order to Obtain Counsel and two subsequent Rules to Show Cause that all went unanswered, followed by nearly a month of email communication between Board staff and the Appellant company in which the Appellant company initially indicated that counsel had been obtained but stopped responding in any way when Board staff instructed that the alleged counsel must enter an appearance, and no attorney did enter an appearance. 2024 EHB

396, 397-398. In *Earth First Recycling, LLC v. DEP*, we only dismissed the Appellant LLC that filed its appeal *pro se* for failure to obtain counsel following the issuance of a letter advising the LLC to obtain counsel that went unanswered, a Rule to Show Cause to explain why it had not obtained counsel that was likewise not responded to, a conference call with the Parties explaining the Board appeal process and requirement that businesses be represented by counsel, a thirty day stay of proceedings while the LLC attempted to obtain counsel and subsequently missed the deadline to do so following the lifting of the stay, and, finally, the LLC's failure to respond to the Department's Motion to Dismiss for failure to obtain counsel. 2018 EHB 819, 820-821. In *L.A.G. Wrecking, Inc. v. DEP*, the incorporated Appellant's appeal was filed by counsel, but counsel withdrew due to a potential conflict of interest. Following the Board's grant of counsel's Motion for Leave to Withdraw Appearance as Counsel, the Board held a conference call with the Parties, stayed the matter for thirty days and ordered the incorporated Appellant to obtain new counsel. 2015 EHB 338, 339. Then Board staff contacted the Appellant's president to confirm her receipt of the Opinion and understanding of the requirement to obtain new representation. *Id.* When no counsel entered an appearance, we issued a Rule to Show Cause, made further attempts to reach the Appellant by telephone, and sent a letter reiterating the requirement to obtain counsel, none of which the Appellant responded to. *Id.* The appeal was dismissed only after the Department filed a Motion to Dismiss that likewise went unanswered. *Id.* at 340. Indeed, a review of our Opinions on this issue indicates that this Board tends to dismiss appeals for failure to obtain counsel where the non-individual Appellant that files its appeal *pro se* has either never responded to or has ceased responding to letters, Orders, Rules to Show Cause, and other communications from this Board on the issue of required representation, or where the Appellant's failure to respond generally demonstrates a disinterest in pursuing its appeal. *See Citizens Advocating a Clean Healthy*

Environment v. DEP, 2017 EHB 1077, 1078; *KH Real Estate, LLC v. DEP*, 2012 EHB 155, 156-157; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 261; *Potts Contracting Co. v. DEP*, 1999 EHB 958, 960, 962; *Bucket Coal Co. v. DEP*, 1999 EHB 288, 289.

This appeal is different in that the Appellants have remained active in the appeal – albeit on a delayed schedule – and indicated to the Board their intention to obtain counsel, citing financial limitations as the reason for the delay in compliance with our rules. While we recently dismissed an LLC Appellant that filed its appeal *pro se* for failure to obtain counsel where that Appellant was actively engaged in the appeal process in *Lizabella Mining, LLC v. DEP*, that dismissal came only after the Appellant indicated in its Response to the Department's Motion to Dismiss that it did not have the funds to obtain counsel and that it would therefore not obtain counsel. 2024 EHB 783, 784, 786. Here, the Appellants have filed a Response to the Department's Motion for Sanctions in the Form of a Dismissal which mentions several times the Appellants' ongoing attempts to comply with the Boards Rules and Orders and obtain counsel, referencing only financial limitations as the cause of the delay. (A. Response at ¶¶ 1, 2.) In fact, the Department's Motion was filed at least in part in response to the Appellants' January 9, 2025 request for a sixty day extension specifically to raise the necessary funds to engage counsel in the form of a letter to Presiding Judge Beckman, which is being addressed by the Board for the first time in the majority's dismissal of the LLC's appeal. That letter states in its entirety:

> Our current attorney recommended an environmental attoney [sic] after speaking with David Hall from the D.E.P. for this case and after speaking to the recommended attorney we are asking for a sixty day extension to secure the necessary funds to obtain that counsil [sic].

(A. Extension Request at 1.) To me this indicates that these Appellants are actively seeking representation and, importantly, taking specific steps to secure that representation, clearly

distinguishing this matter from the vast majority of our Opinions addressing failure to obtain counsel.

Unfortunately, financial constraints do not relieve an appellant from complying with our Rule requiring that non-individuals be represented by counsel. However, Broadway is not seeking to be relieved from complying with that Rule. In fact, the Appellant's most recent communication to the Board stated:

> Darian Flatley, as the sole member of 354 Broadway, LLC, is **actively seeking legal counsel**. Financial limitations have delayed securing representation, but efforts are ongoing, and **an attorney will be retained before the hearing**. Under 25 Pa. Code § 1021.21(b), LLCs must be represented by counsel, and Appellants are **making every effort to comply**.

(A. Response at ¶ 2 (emphasis added).) According to this statement, Broadway is actively seeking counsel and intends to do so prior to the hearing on the merits, but has been delayed due to financial limitations. Additionally, I do not find the Department's argument that allowing Broadway to retain representation at some unknown point in the proceedings could lead to further delays and continuances at the eleventh hour persuasive because Mr. Flatley is proceeding *pro se*, and is the sole member of Broadway, so Mr. Flatley could choose to obtain counsel in his individual appeal at any point during the proceedings.

For these reasons, while it is entirely within the Board's discretion to dismiss Broadway's appeal at this juncture, and I respect the majority's decision to do so, I believe that granting a further extension to comply with the Board's Order to Obtain Counsel, or, in the alternative, first providing the Appellants with an opportunity to justify the extension through a request for documentation of the Appellants' attempts to obtain counsel, would be harmonious with our prior Opinions on this issue and a generally judicious approach to ensure that Mr. Flatley receives true

due process. Therefore, I would have denied the Department's Motion to Dismiss Broadway's appeal for failure to obtain counsel at this time.

ENVIRONMENTAL HEARING BOARD

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: March 18, 2025

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN LATKANICH	:	
	:	
v.	:	**EHB Docket No. 2023-043-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT CHAP, LLC, Permittee	:	**Issued: March 27, 2025**

OPINION AND ORDER ON MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO MEDICAL CONDITIONS AND TOXICOLOGY REPORTS

By MaryAnne Wesdock, Judge

Synopsis

A Permittee's motion in limine to exclude evidence related to medical conditions and toxicology reports in connection with a landowner's appeal of the Department's determination that his water supply was not impacted by oil and gas operations is denied where it is unclear that the documents are not relevant.

O P I N I O N

Background

This matter involves an appeal filed by Bryan Latkanich (the Appellant), challenging an April 20, 2023 letter (the determination letter) from the Department of Environmental Protection (Department). The determination letter stated that, following an investigation into the Appellant's water supply, the Department could not conclude that the water supply had been adversely affected by oil and gas operations, including oil and gas activities conducted by Chevron Appalachia, LLC

(Chevron). The Appellant appealed the determination letter on May 8, 2023 and filed an amended notice of appeal on May 31, 2023.[1]

According to the notice of appeal, the Appellant owns property and resides in Frederickstown, Washington County, Pa. (the property) with his minor son who was age 13 at the time of the filing of the appeal. The property is served by a private groundwater well (the water supply). In 2009 the Appellant entered into oil and gas lease agreements with Phillips Exploration, Inc., effective March 2010, that were subsequently held by Chevron. (Notice of Appeal, para. 12; Exhibit B to Notice of Appeal.)[2] Chevron constructed a well site and drilled two unconventional gas wells approximately 500 feet from the water supply on what is known as the "Latkanich well site." (Notice of Appeal, para. 19a and 19b; Exhibit A to Notice of Appeal.) Drilling, well development and operations commenced at the Latkanich well site in 2011. (*Id*.) The wells were plugged in 2020. (Exhibit A to Notice of Appeal, p. 2.)

On April 22, 2022, the Appellant filed a complaint with the Department requesting an investigation of his water supply pursuant to 58 Pa. C.S. § 3218(b) of the Oil and Gas Act, Act of February 14, 2012, P.L. 87, *as amended*, 58 Pa. C.S. §§ 2301-3504, at § 3218.2 According to the notice of appeal, the Appellant "requested that the Department investigate environmental complaints involving his property's water, air, and soil." (Notice of Appeal, para. 1.) Approximately one year later, on April 20, 2023, the Department issued its determination letter

[1] Because the amended notice of appeal is virtually identical to the original notice of appeal, with the exception of a few paragraphs and the addition of an exhibit, we refer to the documents collectively as "notice of appeal."

[2] References to paragraphs in the "notice of appeal" are to the amended notice of appeal. References to exhibits to the "notice of appeal" are to the original notice of appeal.

stating that it could not conclude that oil and gas operations had impacted the Appellant's water supply. This appeal ensued.

In his appeal, the Appellant alleges that he and his minor son have had ongoing medical issues and health complications which he attributes to oil and gas operations. The notice of appeal includes the following assertions:

- On May 1, 2018, during a visit to University of Pittsburgh Medical Center (UPMC), the Appellant's son was treated for "hydraulic fracking/volatile hydrocarbon exposure" with differential diagnoses of "#1 respiratory irritation from hydrocarbon exposure, #2 neurotoxicity, # 3 radiation exposure." (Notice of Appeal, para. 85-86, Ex. II to Notice of Appeal.)
- The Appellant's son was chemically burned in April 2013 when taking a bath using water from the private water well. Additionally, his son has developed rashes. (Notice of Appeal, para. 87.)
- The Appellant suffered a heart attack on March 11, 2023 and has been diagnosed with stage IV kidney failure and neuropathy. (Notice of Appeal, para. 80.)
- Urine tests conducted on the Appellant and his son showed the presence of harmful chemicals. (Notice of Appeal, para. 81-84; Ex. GG to Notice of Appeal.)

In support of the above, the Appellant provides toxicology reports and a copy of his son's May 1, 2018 medical report.

In addition to his appeal before the Environmental Hearing Board (Board), the Appellant is also pursuing a civil action against EQT[3] and other defendants in the Court of Common Pleas of Washington County. Discovery in the common pleas action was stayed, and during that time

[3] EQT CHAP, LLC (EQT) is the successor in interest to Chevron. (Ex. P & Q to Notice of Appeal.)

the appeal before the Board was also stayed while allowing for limited discovery. Following the lifting of the stay of discovery before the common pleas court, the stay before the Board was also lifted. While some discovery has been undertaken in the appeal before the Board, the parties have advised the Board that more discovery needs to be done.

Pending before the Board is a motion in limine filed by EQT seeking to exclude evidence related to medical conditions and toxicology. The Department filed a response and memorandum of law in support of the motion. The Appellant filed a response opposing the motion.

Discussion

By its motion, EQT seeks to "preclude the admission of any evidence of medical conditions, physical reactions, and/or toxicology results." It cites to various statements in the notice of appeal, discovery responses and emails among counsel which it contends show a reliance by the Appellant on evidence of medical conditions and toxicology testing in support of his claim that oil and gas operations have impacted his water supply. EQT argues that such evidence is not probative of contamination of the Appellant's water supply. It asserts that even if an expert were to opine that a particular medical condition or toxicity result were caused by toxic exposure, it does not prove that the Appellant's water supply was contaminated by oil and gas development. Acknowledging that discovery is still ongoing, EQT states that it "seeks an early determination on the admissibility of medical conditions and/or physical reactions because such a determination would increase the efficiency of discovery, reduce the cost of discovery and limit discovery related disputes between the parties." (EQT Motion, para. 20.) The Department supports EQT's motion and agrees with EQT that evidence of medical conditions and toxicology results for the Appellant and his son are irrelevant to the issue before the Board. It further argues that permitting the

introduction of such evidence would unreasonably and unnecessarily escalate the time and cost to litigate this matter.

In his response, the Appellant states that he intends to introduce only two pieces of medical evidence: 1) the May 1, 2018 medical report in which his minor son was diagnosed with hydrocarbon exposure and radiation exposure and 2) toxicology results for him and his son contained in Exhibit GG of his notice of appeal. He strongly disagrees with EQT's and the Department's assertions that this information has no relevance. He states that he intends to introduce this information in support of his claim that the Department failed to fulfill its duties under the Oil and Gas Act and the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, to conduct a reasonable and lawful investigation. The Appellant argues that the reports lend support to a finding that his water supply has been contaminated by oil and gas operations, and had the Department properly considered this information it would have been on notice to test for certain constituents in his water and other media.

EQT argues that the Appellant cannot simply point to alleged errors in the Department's investigation – i.e., things the Department failed to do or information that the Department should have considered – to meet his burden of proof in this case. Rather, asserts EQT, he must show that the evidence makes a difference in the final outcome. In support of its position, EQT cites *Kiskadden v. DEP*, 2015 EHB 377, in which the Board held:

> Thus, it is not enough for Mr. Kiskadden simply to demonstrate that the Department did not consider certain evidence in making its decision; rather, he must show that the evidence makes a difference in the final outcome. It is not enough for Mr. Kiskadden to provide hundreds of pages of laboratory data that were not reviewed by the Department. He must demonstrate to us, the Board, that the laboratory data proves that Range's operations at the Yeager site contaminated his water well.

Id. at 409-10.

It is important to note that the Board's ruling in *Kiskadden* was made in an adjudication after a hearing on the merits in which the parties presented evidence in support of their case, rather than in the context of a motion in limine seeking to preclude evidence prior to the hearing. While we recognize EQT's desire to streamline discovery in this matter, we cannot conclude at this time that the Appellant's and his son's medical records and toxicology results are not relevant to this proceeding. At this stage, it difficult for us to know what evidence may or may not be relevant. Some discovery has been conducted, but much of it was put on hold during the stay. There is no indication that expert reports have been prepared or exchanged. We understand that the purpose of EQT's motion is precisely for the very purpose of limiting discovery; however, at this stage of the proceeding, we are hesitant to exclude evidence that may well turn out to be probative. These reports, "when presented in context and with a proper foundation at the hearing might well prove to be admissible" notwithstanding EQT's and the Department's arguments to the contrary. *Liberty Township v. DEP*, 2023 EHB 87, 89.

Furthermore, we must keep in mind that the purpose of a motion in limine is to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison v. DEP*, 2020 EHB 404, 405. A motion in limine may not be used for the purpose of disposing of issues in a case. *The Florence Mining Co. v. DER*, 1991 EHB 1301. Although EQT's motion is carefully worded to ask for the exclusion of evidence rather than a ruling on any of the issues in the case, it nonetheless requires us to consider the viability of some of the Appellant's claims. A motion in limine is not the proper vehicle to resolve such disputes. *Benner Township v. DEP*, 2017 EHB 1228, 1233-34. In *Florence Mining*, the Board explained the difference between a motion in limine and a dispositive motion:

> Our review of DER's motion leads us to conclude that what DER is seeking here is a de facto partial summary judgment rather than the barring of certain

> evidence at the hearing on the merits….Our granting of a party's motion in limine requires the decision of only one Board Member, whereas for us to grant a motion which finally disposes of an issue, such as a motion for summary judgment or for judgment on the pleadings, at least a majority of the Board's Members must agree to grant judgment. In the present motion, DER is not seeking to preclude a piece or type of evidence's admission while allowing other evidence on that issue to come in, but, rather, is requesting that we find in its favor on most of the issues raised by Florence's notice of appeal with such a finding precluding further consideration of those issues. In such a circumstance, it would be inappropriate for us to disregard the dispositive effect which our granting of DER's motion would have merely because it is called a motion to limit issues as opposed to a motion for summary judgment.

Id. at 1306-07.

As further explained in *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235:

> Motions in limine…should not be used as motions for summary judgment in everything but name. A typical (and perfectly acceptable) motion in limine is presented on the eve of a hearing and otherwise does not usually comply with all of the procedural requirements that relate to a motion for summary judgment….There is obviously good reason for those requirements, and we must be wary of permitting parties to disregard them by using the vehicle of a motion in limine to obtain a ruling on the merits. Thus, a motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. Of course, this principle can be easier to state than to apply. One clue to determining whether a motion is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.

Id. at 237.

Here, EQT has asked for the exclusion of all "evidence of medical conditions, physical reactions, and/or toxicology results." To the extent EQT is seeking to dismiss any claims in the notice of appeal alleging that the Department failed to fulfill its duties under the Oil and Gas Act or Article I, Section 27 by failing to consider toxicology results and the Appellant's son's May 2018 diagnosis when conducting its investigation, this determination cannot be made in the context of a motion in limine.

Finally, the Department argues that even if the Board finds the toxicology and medical evidence to be relevant, it should nonetheless be excluded because its probative value is insufficient to warrant the extensive discovery that will be needed to litigate these claims. The Department cites Pennsylvania Rule of Evidence 403 which states in relevant part as follows:

> The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues…undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa. R.E. 403. It is the Department's contention that the medical evidence and toxicology information should be excluded under Rule 403 because the evidence lacks reasonable probative value and would greatly expand the litigation.

The Appellant disagrees and asserts that extensive discovery is not needed. He states that he intends to introduce his son's medical report and the toxicology results solely to lend support to his claim that his water supply was impacted by oil and gas operations. As we noted earlier, at this stage of the proceeding we cannot say that the probative value of the evidence is outweighed by concerns over extensive discovery. Moreover, during a Board conference call with the parties on March 25, 2025, the parties agreed to discuss the discovery remaining in this matter and, if possible, reach an agreement on how to proceed. If the parties are unable to reach an agreement, the Board can address any issues in the context of a discovery motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN LATKANICH	:	
	:	
v.	:	**EHB Docket No. 2023-043-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT CHAP, LLC, Permittee	:	

O R D E R

AND NOW, this 27th day of March, 2025, it is hereby ordered that the Motion in Limine to Exclude Evidence Related to Medical Conditions and Toxicology Reports is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: March 27, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
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For Permittee:
Kathy Condo, Esquire
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Joshua Snyder, Esquire
Edward Phillips, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: April 1, 2025**

ADJUDICATION

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

Synopsis

The Board remands to the Department a major modification to a municipal waste landfill's solid waste management permit. The landfill has experienced challenges controlling offsite odors and excess leachate generation at its facility for several years. The Department erred in issuing a permit that does not sufficiently control or mitigate these issues. The Department must assess on remand whether additional measures to control odors and leachate, some of which have been required by a recent Consent Order and Agreement, warrant inclusion in the landfill's permit or changes to the landfill's operating plans. The Appellant and Intervenor have not shown that the landfill should not remain in operation during the remand.

FINDINGS OF FACT

Background

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the agency with the duty and responsibility to administer and enforce the

Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003; the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), Act of July 28, 1988, P.L. 556, No. 101, *as amended*, 53 P.S. §§ 4000.101 – 4000.1904; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. §§ 691.1 – 691.1001; the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001 – 4015; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510- 17; and the rules and regulations promulgated thereunder, including the Municipal Waste Regulations at Title 25, Chapters 271 – 285 of the Pennsylvania Code.

2. Friends of Lackawanna (the "Appellant" or "FOL") is a Pennsylvania 501(c)(3) nonprofit established in 2014 to support the health, welfare, and education of individuals in need in Northeast Pennsylvania. (Hearing Transcript Page No. ("T.") 42-43; Friends of Lackawanna Exhibit No. ("FOL Ex.") 1.)

3. Sierra Club has intervened in this matter. *Friends of Lackawanna v. DEP*, 2022 EHB 11.

4. Keystone Sanitary Landfill, Inc. (the "Permittee" or "Keystone") is a Pennsylvania business corporation with an address of 249 Dunham Drive, Dunmore, Pennsylvania 18512. (Sierra Club Exhibit No. ("SC Ex.") 1.)

5. Keystone owns and operates a municipal solid waste landfill (the "Keystone Landfill"), located in Dunmore and Throop Boroughs, Lackawanna County, pursuant to Solid Waste Management Permit No. 101247. (SC Ex. 1; Keystone Sanitary Landfill Exhibit No. ("KSL Ex.") 16, 109.)

6. The current permit boundary of the Keystone Landfill covers 714 acres with 435 acres approved for waste disposal. The site is comprised of various sections, including the closed

disposal areas of Keystone/Dunmore (an unlined disposal area) and Phase I (also known as Logan and Tabor), and a currently active Phase II disposal area. (T. 149-52, 755-56; SC Ex. 1; Department of Environmental Protection Exhibit No. ("DEP Ex.") 1; KSL Ex. 16, 109.)

7. Keystone's solid waste permit allows it to accept up to a maximum of 7,500 tons of waste per day. (KSL Ex. 16.)

8. In March 2014, Keystone submitted an application to the Department for a major modification to its solid waste permit for what Keystone calls the Phase III expansion. (T. 153, 701; FOL Ex. 25; DEP Ex. 1; KSL Ex. 109.)

9. On June 3, 2021, the Department approved and issued the Phase III modification to Keystone's solid waste disposal permit to expand the landfill, which is the action of the Department currently under appeal. (T. 153; SC Ex. 1.)

10. Phase III has a permitted disposal area of 435 acres, located within Keystone's existing 714-acre permit boundary, and it involves disposing additional waste on top of and in between existing fill areas. Phase III will have fourteen cell openings. (T. 151-53, 838, 1502; FOL Ex. 25; DEP Ex. 1; SC Ex. 1; KSL Ex. 16, 109.)

11. The Phase III expansion is a vertical expansion of the Keystone Landfill, with the majority of Phase III waste disposal occurring in the valley between two existing disposal areas. (T. 152, 782-83; SC Ex. 1; DEP Ex. 1; KSL Ex. 109.)

12. The Phase III expansion will extend the peak elevation of the landfill that was reached during Phase II over a larger area within the existing permit boundary and approximately 3,000 feet closer to residential homes. (T. 782-84, 837-38; FOL Ex. 25.)

13. Phase III increases the landfill's disposal capacity by 94 million tons and is expected to extend the life of the landfill for 42 years based on the currently approved waste acceptance rate at the landfill. (T. 152-53; DEP Ex. 1.)

14. The Phase III expansion does not include an increase to the daily maximum or quarterly average waste acceptance rates for the landfill. (FOL Ex. 25.)

15. The Phase III expansion does not change the 10-year term of Keystone's existing solid waste permit, which runs until April 6, 2025, and which Keystone has applied to renew. (T. 544-45, 876; DEP Ex. 1.)

16. The Department added several conditions to Keystone's permit in connection with the Phase III expansion, including a requirement for Keystone to implement additional odor mitigation measures. (SC Ex. 1.)

17. Keystone began placing waste in Phase III in January 2024, but as of the merits hearing Phase III filling operations had been temporarily halted. (T. 164, 525, 633.)

18. Keystone is focused on completing Phase II, which is still accepting waste, and complying with a capping schedule imposed through a Consent Order and Agreement. Phase II is not expected to close until sometime in late 2025. (T. 163-64, 525.)

19. At the end of 2022, the Keystone Landfill had an overall estimated remaining life of 49.79 years. (T. 705-06; KSL Ex. 36.)

Standing

20. Friends of Lackawanna has about 5,000 members, which it defines as anyone who supports its cause by taking such actions as making a donation, showing up at its events, or engaging with its newsletter or Facebook account. (T. 45, 92.)

21. The overwhelming number of FOL's members live in and around Dunmore, Throop, and the City of Scranton, with some members living within one-half mile of the Keystone Landfill. (T. 46.)

22. Part of FOL's mission is to educate the local community regarding the Keystone Landfill through community involvement and awareness, including hosting conferences and community gatherings and interacting with public officials and the Department. (T. 42-45.)

23. Patrick Clark is a member, board member, and treasurer of Friends of Lackawanna. (T. 41-42.)

24. Mr. Clark has lived in Dunmore Borough nearly his entire life and currently resides about two miles from the Keystone Landfill with his wife and six children. Mr. Clark works in an office located four blocks from his house. His children participate in sports and recreational activities at several parks in the town of Dunmore and at basketball courts throughout the region. (T. 32-34, 68.)

25. Mr. Clark has regularly experienced odors he attributes to the landfill in his neighborhood and at his house. In January 2024, Mr. Clark smelled odors at both the Dunmore High School and the Mid Valley High School while attending high school basketball games, prompting him to make complaints to the Department. (T. 34-36, 108.)

26. Mr. Clark also has visual concerns with the expansion of the landfill and its size and scope, since the landfill is the first thing a person will see upon exiting Route 81 into Dunmore. (T. 38-39, 51, 60-61.)

27. Sierra Club is an organization with a mission to engage and educate people in the community and to conserve, protect, and restore the environment. (T. 111, 128.)

28. Sarah Helcoski has been a member of Sierra Club since 2020. (T. 128.)

29. Ms. Helcoski lives in Jessup Borough, around three miles from the Keystone Landfill, with her three sons. She often goes hiking with her children in areas near the landfill, including near the Lackawanna River, where she likes seeing different plants, trees, and animals, which she believes are important for her children to experience. (T. 129-30, 137-38, 140-41.)

30. Ms. Helcoski is concerned about Keystone's Phase III expansion because she believes the landfill is an unattractive feature and the permit modification allows the landfill to expand and extends its life for about 40 years. She is concerned about the leachate coming from the landfill and the possibility that it could get into the environment and groundwater and impact the wildlife and water where her children play and recreate. (T. 131-34, 141.)

31. Ms. Helcoski travels near the landfill on the Casey Highway between Dunmore and Jessup almost every day to take one of her children to preschool. She sees trash surrounding the landfill and going over the landfill's fence and onto the roadway. She also experiences odors she attributes to the landfill on a daily basis. (T. 129-31, 139.)

32. John S. Mellow is a member of both FOL and Sierra Club. (T. 110, 118-19, 126.)

33. Mr. Mellow lives in Archbald and frequently visits the area near the landfill, including the Dunmore No. 1 Reservoir, where he takes walks and enjoys the nearby streams, and the Lackawanna River. He enjoys the good condition of the environment in those places and because they are aesthetically pleasing. (T. 111-13, 126-27.)

34. Mr. Mellow is concerned about the landfill because of its aesthetic and visual impacts with how large it has become, and because of potential contaminants he believes could come from the landfill. Mr. Mellow is particularly concerned about the possibility of per- and polyfluoroalkyl substances (PFAS) coming from the landfill. (T. 113-15.)

Leachate Management

35. “Leachate” is defined in the regulations as “a liquid that has permeated through or drained from solid waste.” 25 Pa. Code § 271.1. Landfill leachate includes any liquid that is generated from the decomposition of organic matter, any precipitation that comes in contact with the waste mass, and any liquid that is hauled into the landfill for disposal. (T. 1356.)

36. A landfill operator is required to have plans addressing the collection and storage system to manage leachate generated by the landfill as well as for the treatment of that leachate. 25 Pa. Code §§ 273.161, 273.162, and 273.275.

37. The Keystone Landfill has two leachate lagoons with a current combined storge capacity of roughly 9.7 million gallons. The lagoons previously had a combined capacity of 11 million gallons before the lagoons were relined in January 2018 to fix a leak, which reduced their capacity. (T. 169, 170-71, 270; FOL Ex. 72; SC Ex. 3, 6; KSL Ex. 98.)

38. Leachate is conveyed from the disposal area to the lagoons through a leachate collection and conveyance system. All stormwater that comes into contact with a disposal area that has waste in it is directed into the lagoons. The leachate conveyance system for the Phase III expansion will tie into the existing conveyance system. (T. 270-71, 412, 1356-57; KSL Ex. 98.)

39. Leachate from the lagoons is conveyed to Keystone’s leachate treatment plant where Keystone pretreats its leachate prior to being conveyed via sewer line to the Scranton Wastewater Plant for final treatment pursuant to Keystone’s industrial user permit with the wastewater plant, which authorizes Keystone to discharge up to 360,000 gallons of pretreated effluent per day. (T. 270-71, 336, 520-21; FOL Ex. 25; KSL Ex. 53.)

40. By April 2025, Keystone intends to obtain permits to install two 2.5-million-gallon enclosed leachate storage tanks to be used in lieu of the lagoons, which will be retained for backup storage capacity for excess leachate. The storage tanks will be equipped with emission destruction

devices to reduce leachate odors. (T. 1357-60, 1442-43, 1460-61, 1474, 1488-91, 1525, 1535, 1540, 1546-47; FOL Ex. 115.)

41. When the Phase III expansion was approved, Keystone's leachate treatment consisted of a relatively new mixed bed biological reactor treatment system (the "biologic system") with a rated treatment capacity of 150,000 gallons per day (gpd) and one reverse osmosis (RO) system with a design average treatment capacity of 90,000 gpd, for a total treatment capacity of 240,000 gpd. (T. 183-84, 194-95, 242-43, 291, 570; FOL Ex. 25; SC Ex. 6; KSL Ex. 98.)

42. However, in 2021 the landfill began having problems with the biologic system and it was taken out of service. The problems arose because some of the constituents of the leachate were not compatible with the bacteria in the biologic system, and because at times there was not enough oxygen in the system to sustain the biologic mass. (T. 184, 186-87, 243, 348-50, 571-72, 710-12, 719, 1383-88.)

43. Since the Phase III expansion was approved, Keystone has shifted from biological treatment to an entirely RO-based treatment system. (T. 183-87, 242-44, 291, 348-50, 569-70, 710-12, 1360-61, 1383-89; SC Ex. 6; KSL Ex. 34.)

44. Reverse osmosis treatment works by sending leachate through semi-impermeable membranes at high pressure to filter out select constituents. It yields a high quality effluent on discharge. (T. 1362-63.)

45. Each RO unit is rated at a processing capacity of roughly 100,000 gpd, with a rated efficiency of 90%, meaning that when an RO unit processes 100,000 gallons of leachate, 90,000 gallons are treated to treatment specifications while 10,000 gallons do not meet treatment specifications. (T. 189, 195-96, 238, 243, 293, 573, 1518-19; KSL Ex. 98.)

46. The amount of leachate each RO unit is able to effectively treat per day depends upon the efficiency at which the unit is operating. (T. 1444-45.)

47. The fluid from the RO units that does not meet treatment specifications is referred to as RO concentrate, which has a higher concentration of contaminants than regular leachate. (T. 573-74.)

48. The RO concentrate is disposed of at the working face of the landfill where it eventually filters back down into the leachate collection system. (T. 238-39, 540-41, 573-74.)

49. The less efficient an RO unit, the more RO concentrate the unit creates. Rather than 90% efficiency, Keystone's RO units have historically operated at as low as approximately 70% efficiency, meaning they were only able to fully treat approximately 70,000 gallons of leachate per RO unit per day with 30,000 gallons of RO concentrate generated per RO unit. (T. 187, 190-91, 238-39, 293, 569-70, 574, 713, 1515; FOL Ex. 109, 110.)

50. The Department has ordered Keystone to evaluate the impact of RO concentrate disposal on slope stability due to the amount of RO concentrate that Keystone has been disposing in the waste mass, which was more than 2.2 million gallons in September 2023. Too much moisture in the waste mass can affect the stability of a landfill's outside slope. (T. 240-41, 245-46, 397-401; FOL Ex. 109, 110, 115.)

51. Keystone believes the issue with poor RO efficiency relates to a change in membranes that are being sold to Keystone by the RO unit manufacturer that get clogged more easily with Keystone's leachate. (T. 383-84, 575-76, 1393-1400, 1506, 1536-37.)

52. Keystone has recently been able to operate the RO system at 80–90% efficiency by using different RO membranes and membrane cleaning methods. (T. 575, 1393-1400, 1447-50, 1514-15.)

53. Because of the issues with the biologic system and the efficiency of the RO units, Keystone has had to add additional RO units so that Keystone can keep up with the leachate generated by the landfill. (T. 187-90, 243, 570-71, 1443-44.)

54. Keystone has installed two additional RO units since the Phase III permit modification was issued. A second RO unit began operating in February 2022 and a third RO unit began operating in March 2023. (T. 243-44; SC Ex. 6; KSL Ex. 24, 34.)

55. Keystone has purchased a fourth RO unit that it plans to install to address the efficiency issues that are requiring more downtime than expected. (T. 188-90, 244, 292-93, 1360-61, 1443-44, 1538; FOL Ex. 115.) At the time of the merits hearing, the Department had not received an application for the fourth RO unit. (T. 244.)

56. Keystone intends to operate three RO units and have a fourth unit as a backup to be put into service during cleaning or maintenance on one of the other units. (T. 1443-44, 1538-39.)

57. Pursuant to the regulations, a landfill operator is required to provide in its application a predicted amount of leachate the landfill expects to generate to assure the Department that the landfill has adequately designed and sized leachate storage, conveyance, and treatment systems. 25 Pa. Code § 273.162(a)(1). (T. 155-56, 688-89.)

58. Keystone utilized the Hydrologic Evaluation of Landfill Performance model (the "HELP model") to project a maximum 30-day leachate generation rate using factors such as the stages of landfill construction, depth of waste, location of the landfill, and meteorological data. (T. 155-56, 293-94, 682-83, 743-44, 750, 993-97, 1240-41; SC Ex. 3; KSL Ex. 98.)

59. The HELP model is designed to account for heavy rain years in a landfill's design, and the landfill's leachate management system should be designed to handle the maximum predicted flow. (T. 302, 638-39.)

60. The municipal waste landfill regulations provide that a landfill's leachate storage tanks or impoundments shall have sufficient storage capacity at least equal to the maximum expected production of leachate for any 30-day period for the life of the facility. 25 Pa. Code § 273.275(b). (T. 1263.)

61. Using the HELP model, Keystone predicted that the "maximum daily leachate flow" for its Phase III operations would be approximately 127,644 gallons per day. (T. 301-02, 687-88, 1255, 1260; SC Ex. 3; KSL Ex. 98.)

62. Accordingly, under the regulations, Keystone's lagoons only need to have a total capacity of about 4 million gallons (127,644 gpd x 30 days = 3,829,320 gallons), rather than the 9.7 million gallons of leachate capacity that Keystone currently has. (T. 1278-79, 1312-13; KSL Ex. 98.)

63. The Department relied on Keystone's HELP modeling results, in combination with actual leachate generation rates at Keystone, to evaluate the proposed leachate management and treatment system, and to determine whether Keystone's treatment management plan was sufficient. (T. 294-96, 302, 309, 414-16, 682-84, 747-48.)

64. Historically, the Department has found that actual leachate generation rates at Keystone are higher than what Keystone has predicted with the HELP model. (T. 157, 253, 302-05, 684-86.)

65. Since Phase III operations began in January 2024, Keystone's actual daily leachate generation has been greater than the 127,644 gpd predicted as "maximum daily leachate flow" for Phase III. (T. 304-05, 307-08, 690-91, 991-93; SC Ex. 6, 27.)

66. In February 2024, a month after Phase III operations began, Keystone reported generating leachate at an average of 282,676 gpd, more than double Keystone's prediction, and nearly 8.2 million gallons of leachate for the month. (SC Ex. 27.)

67. Under the waste management regulations, no more than 25% of a landfill's total leachate storage capacity may be used for flow equalization on a regular basis. 25 Pa. Code § 273.275(b). (T. 169-70.)

68. Flow equalization is to assure a steady flow of leachate to the treatment plant so the treatment process runs smoothly and without interruption. (T. 271-72, 678-679.)

69. The Department interprets this regulatory requirement to mean that, while a landfill needs to maintain some amount of leachate in its lagoons for the functioning of a lagoon aeration system, a landfill cannot regularly store more leachate in its lagoons than what would equal 25% of the lagoons' total capacity. (T. 271-72.)

70. The purpose of the 25% regulation is to ensure that a landfill maintains appropriate leachate storage capacity to handle rain events. (T. 678, 681.)

71. Twenty-five percent of Keystone's 9.7 million gallons of leachate storage capacity in its lagoons is approximately 2.43 million gallons. (T. 171, 285, 679; SC Ex. 6.)

72. Keystone has stored leachate in excess of 25% of its lagoons' capacity on a regular basis during the years 2016 to 2019, 2021 to 2022, and late 2023 through the time of the merits hearing. (T. 198-206, 283-85, 566-67; FOL Ex. 71, 72, 74, 78, 85, 90, 91, 119, 120; SC Ex. 6, 12, 27; KSL Ex. 24, 112.)

73. The Keystone Landfill was out of compliance with the 25% leachate storage requirement for 19 of the 21 months prior to and including August 2018, with some months

reaching more than 80% of the leachate lagoons' capacity. According to data from the Department's monthly engineering reports, the lagoons' capacity during this time was as follows:

12/21/2016	27.72%
1/18/2017	42.1%
2/15/2017	42.09%
3/15/2017	64.47%
4/19/2017	80.23%
5/17/2017	70.21%
6/21/2017	46.1%
7/19/2017	42.98%
8/16/2017	44.48%
9/20/2017	43.19%
10/17/2017	38.34%
11/12/2017	38.27%
12/30/2017	12.16%
1/22/2018	17.21%
2/20/2018	40.14%
3/21/2018	56.86%
4/17/2018	54.78%
5/15/2018	46.36%
6/19/2018	46%
7/17/2018	40.57%
8/14/2018	85.77%

(T. 171-72; FOL Ex. 72.)

74. To address the excess leachate generation at the landfill, the Department has approved "temporary emergency storage" of leachate by the landfill in tanks, and Keystone has hauled leachate offsite for disposal at other facilities. (T. 174-75.)

75. Keystone has regularly hauled untreated leachate off-site for treatment and disposal at other facilities using 5,500-gallon tanker trucks to manage its leachate and to ensure it is maintaining enough capacity in its lagoons for emergency purposes. (T. 178-79, 286, 303, 309-10, 333-34, 335-36, 689-90, 1439-40, 1574-75; FOL Ex. 73, 83, 93.)

76. In September 2018, approximately 808,000 gallons of leachate had been transferred from the lagoons into a 1.7-million-gallon temporary tank to increase available capacity in the lagoons. (T. 174-76; FOL Ex. 73.)

77. During the month of September 2018, Keystone hauled 1.434 million gallons of leachate offsite. As of September 30, 2018, Keystone stored 6.7 million gallons of leachate in its lagoons and more than 2 million gallons in temporary tanks. (T. 181-82; FOL Ex. 92.)

78. On September 20, 2018, the Department issued a notice of violation (NOV) to Keystone for regularly exceeding 25% of its available leachate storage capacity since October 2016, in violation of 25 Pa. Code § 273.275(b). The Department requested that Keystone submit a plan within 15 days to correct the violation and to prevent it from reoccurring. (T. 1184-86; FOL Ex. 72, 74.)

79. The Department does not have a clear-cut rule for determining when a landfill is in violation of the regulation regarding 25% leachate storage levels. The Department assesses the levels in the lagoons over a period of time and considers factors such as major weather incidents

or unforeseen plant upsets. If leachate levels continue to trend upward without a significant rain event, the Department will begin to consider a violation. (T. 272-73, 1187-88.)

80. On October 31, 2018, Keystone's temporary leachate tank was holding more than 1.4 million gallons of leachate, while the leachate lagoons were holding more than 5.2 million gallons. (T. 177; FOL Ex. 71, 75.)

81. As of December 10, 2018, the lagoons were still holding 4.9 million gallons of leachate, more than 50% of their capacity. (T. 198; FOL Ex. 71.)

82. On December 10, 2020, the Department and Keystone entered into a Consent Order and Agreement (CO&A) to resolve Keystone storing leachate in excess of 25% of its storage capacity on a regular basis from October 2016 until February 2019 and resolving the September 2018 NOV. The CO&A did not require Keystone to pay a penalty. Instead, the Department and Keystone agreed that Keystone would complete a Community Environmental Project in which the landfill accepted $112,905 of waste from a non-compliant waste pile. (T. 589-92, 1189, 1191, 1214, 1219; DEP Ex. 125.)

83. Various operational efforts have been made by Keystone over the years to address excess leachate at the landfill, including diverting rainwater in landfill cells into sumps that could be pumped to stormwater management facilities, applying rain tarping to Phase II of the landfill, and attempting to accelerate capping. Some of the efforts to control excess leachate began in 2015 and are still going on today. (T. 165-68, 319-323.)

84. Following the 2016-2019 excess leachate period, Keystone, at the Department's direction, took additional measures to reduce stormwater infiltration into the leachate collection system, including placing tarps on intermediate cover areas, compartmentalizing the landfill cells, using more intercellular berms, and placing berms across slopes. (T. 175-76, 319-23, 1380-81.)

85. At the time of the hearing, the Department believed that Phase II was the main contributor to excessive stormwater infiltration into the leachate collection system, but the Department has been waiting since 2019 for an explanation from Keystone definitively determining what the contributing factors might be. (T. 162-63, 168-69, 318-19; FOL Ex. 19.)

86. When the Department issued the Phase III permit modification in June 2021, it knew there was an issue with excess leachate generation at the Keystone Landfill. (T. 255-56, 683, 776-82; FOL Ex. 25.)

87. Leachate storage at the landfill again exceeded 25% of the total leachate storage capacity in each month between May 2021 and July 2022. (T. 202-04; FOL Ex. 71, 78, 85, 91.)

88. In August 2021, the lagoons were holding more than 6 million gallons of leachate, which is more than 60% of the lagoons' capacity. (T. 199; FOL Ex. 71, 78.)

89. In August 2021, Keystone requested authorization from the Department to begin using its bank of twenty-four 21,000-gallon frack tanks and a 750,000-gallon former Dunmore Oil above ground storage tank to store excess leachate and to continue aggressively trucking untreated leachate offsite. (T. 178, 332; FOL Ex. 79.)

90. The Department granted Keystone's request to use the tanks for the temporary emergency storage of excess leachate for 60 days, which the Department then extended for another 60 days at Keystone's request. (T. 178-79, 182-83; FOL Ex. 79, 83.)

91. In September 2021, Keystone hauled 3.608 million gallons of leachate offsite, while storing more than 5 million gallons of leachate in its lagoons by the beginning of October 2021. (T. 180-81; FOL Ex. 93.)

92. On April 12, 2022, the Department issued an NOV to Keystone for storing leachate in excess of 25% of available capacity from May 2021 until April 2022, in violation of 25 Pa.

Code § 273.275(b). The NOV was ultimately resolved with a February 8, 2023 Consent Assessment of Civil Penalty in the amount of $11,025.00. (T. 351-52, 1193-94; FOL Ex. 85, 90, 91; SC Ex. 12.)

93. From May 2021 through June 2022, Keystone hauled untreated leachate off-site every month. (T. 180-181; FOL Ex. 93; SC Ex. 6.)

94. From October 2022 through March 2023, Keystone was again hauling untreated leachate off-site. (T. 259-60; SC Ex. 6.)

95. At the time of the hearing, Keystone was engaged in another emergency leachate storage situation that had begun in the fall of 2023. (T. 260-61, 327-28).

96. In October, November, and December of 2023, the lagoons exceeded the 2.4-million-gallon threshold. (T. 284-85; SC Ex. 6.).

97. As of February 2024, the amount of leachate stored in the leachate lagoons was about 6.4 million gallons. In March 2024, the amount of leachate storage in the lagoons was nearly 7.5 million gallons, or three times the 25% limit. (T. 205-06, 284-285; FOL Ex. 119, 120; SC Ex. 27.)

98. From January 2024 through at least the time of the merits hearing, Keystone was again hauling untreated leachate off-site. (T. 260, 634; SC Ex. 27; KSL Ex. 112.)

99. To address the recent excess leachate generation, by letter dated April 2, 2024, the Department again approved the use of additional temporary leachate storage capacity in the 750,000-gallon former Dunmore Oil tank and a 1,680,000-gallon Rain-for-Rent tank, and additional leachate trucking, until June 30, 2024. (T. 191-92, 568; FOL Ex. 121, 122, 123; KSL Ex. 112.)

100. A Department inspection report on April 18, 2024 indicated that leachate in the lagoons was at over 70% of the lagoons' storage capacity. (T. 566-67; KSL Ex. 112.).

101. From May 2021 through April 2024, Keystone reported storing leachate in amounts that exceeded 25% of its leachate storage capacity in at least 20 of the 36 months. (FOL Ex. 71, 78; SC Ex. 6, 27; KSL Ex. 24.)

102. Between May 2021 and April 2024, Keystone hauled untreated leachate off-site in 30 of those 36 months. (FOL Ex. 71, 78; SC Ex. 6, 27; KSL Ex. 24, 112.)

103. The Department allows a landfill to apply to the Department to truck its leachate off-site as part of its leachate management plan and its regular leachate management operations, but Keystone has not gone through this process for its emergency offsite trucking of leachate, and Keystone did not apply to actively haul leachate off-site as part of the Phase III permit application. (T. 258-59, 586-88, 677, 796-97.)

104. Although Keystone did not anticipate offsite hauling to be required for its Phase III operations, Keystone has already engaged in extensive offsite hauling since Phase III operations commenced, with nearly 3.5 million gallons of leachate hauled off-site during January and February 2024. (T. 1280-81, 1452-53; SC Ex. 27.)

105. Even with Keystone's leachate hauling, truck traffic has not increased beyond that projected by the traffic studies submitted to the Department with Keystone's permit application. (T. 532-34, 623, 1563-69; KSL Ex. 7A, 74.)

106. Keystone has attributed the excess leachate periods in 2016-2019, 2021-2022, and 2023-2024 to opening or constructing new cells at the landfill and an influx of stormwater into the leachate collection system during rain events. (T. 260-61, 327-28, 527-29, 1379-80, 1381-83, 1390-92.)

107. In 2018, Keystone opened a new cell and received 18 inches of rain. (T. 1379-80.)

108. Keystone attributes the 2021-2022 excess leachate period to a landfill liner installation company opening a new cell but being unable to complete its work before a heavy rain event and the company then pulling out, leaving the cell open to rain events all winter, along with issues with the efficacy of Keystone's biologic treatment system. (T. 1381-88.)

109. Keystone attributes the excess leachate in 2023-2024 to a failure by Keystone to fully install rain tarp prior to opening the Phase III leachate collection system in early January 2024 and receiving two significant precipitation events, resulting in excess stormwater entering the leachate collection system. (T. 308-09, 325-26, 1390-93.)

110. Keystone has verbally committed to the Department that, prior to certifying that a new cell is ready for waste placement, Keystone will have rain tarp in place to divert stormwater from the leachate collection system, but that commitment is not memorialized as a requirement of Keystone's waste permit or otherwise required by any order or formal communication of the Department. (T. 324, 483-84, 1400-01, 1442.)

111. During the excess leachate generation in 2023-2024, Keystone was again experiencing performance issues with its RO treatment system. (T. 1393-1400.)

112. Because of Keystone's excess leachate storage capacity, its use of temporary storage tanks, and its offsite hauling of leachate, the lagoons have never overflowed and have never been at imminent risk of overflowing. (T. 347-48, 1157, 1440.)

113. There is no evidence of environmental harm from Keystone hauling leachate from the landfill for offsite treatment. (T. 1440.)

114. During the 2016-2019 and 2021-2022 stretches of excess leachate storage, there were no discharges of untreated leachate and there were no overflows of the lagoons, storage tanks, or hauling trucks. (T. 347-48.)

Odors

115. Under the solid waste regulations, a landfill operator must have a nuisance minimization and control plan (NMCP) to minimize and control things like vectors, noise, dust, and odors that arise from the operation of the landfill and could affect offsite areas. 25 Pa. Code §§ 273.136 and 273.218.

116. Keystone has a Department-approved NMCP to address known and potential nuisances, which contains provisions on, *inter alia*, weather monitoring, traffic, noise control, vector and bird control, dust control, enhanced odor mitigation, litter control, and transportation compliance and vehicle safety. (T. 443-45, 1173, 1469; KSL Ex. 25.)

117. Specific to odors, Keystone's NMCP contains measures including: odor patrols, gas detection equipment, odor neutralizers, portable flares, horizontal gas collectors, temporary gas wells, stone columns to promote leachate drainage, temporary liner, vacuum equipment installation, limiting the size of the working face, immediate disposal of odorous waste, daily monitoring of the gas collection system, and the use of aeration systems within the leachate lagoons. (T. 1173; FOL Ex. 25; SC Ex. 1; KSL Ex. 25.)

118. Landfill gas emissions at Keystone are controlled by a gas collection and control system, which collects landfill gas by vacuum and directs it to an onsite gas plant to be processed into pipeline quality gas or to onsite flare systems for combustion. (T. 486-90, 1330-36; KSL Ex. 42, 43, 44, 46, 48.)

119. Landfill gas is generated from the breakdown of waste by bacteria after all oxygen is consumed. (T. 1329-30.)

120. Condition 20 of the Phase III permit requires Keystone to implement additional odor mitigation practices to prevent excessive landfill gas emissions that may lead to offsite odors, including enhanced monitoring of intermediate slopes and areas of intermediate cover and the use of temporary geosynthetic cap. This condition not only applies to Keystone's Phase III expansion but also its ongoing Phase II operations. (T. 367-68, 441; FOL Ex. 39; SC Ex. 1.)

121. Pursuant to Condition 21 of the Phase III permit, Keystone must conduct a multi-year ambient air monitoring program that consists of the collection of air monitoring data from six air monitoring stations located around the perimeter of the landfill site. (T. 434-37, 440; SC Ex. 1; KSL Ex. 39.)

122. Pursuant to Condition 22 of the Phase III permit, Keystone must monitor the subsurface for landfill gas constituents. The condition requires Keystone to install four gas probe monitoring locations along the southern perimeter of the landfill site. (T. 437-41; SC Ex. 1; KSL Ex. 68, 69, 70.)

123. By their nature, waste disposal operations have the potential to create odors, and periodic odors will likely occur at any landfill. (T. 442-43, 595, 772-73, 1148, 1454-57.)

124. Odors from the Keystone Landfill can come from various sources, including the leachate lagoons, the working face during the disposal of waste, areas where intermediate cover has been deployed, and from landfill gas emanating from the waste mass. (T. 353, 442-43, 1146, 1454-57; FOL Ex. 37, 41.)

125. According to the Department's records on the Keystone Landfill before the Phase III permit modification approval was issued in June 2021, the Department received 38 odor

complaints in 2016, 12 odor complaints in 2017, 116 odor complaints in 2018, 74 odor complaints in 2019, 67 odor complaints in 2020, and 46 odor complaints as of May 2021. (T. 213-14, 216, 358; FOL Ex. 26 (Comment Response at 11).)

126. Every odor complaint received by the Department is investigated and evaluated by Department staff. (T. 359.)

127. The Department does receive some odor complaints where no odor is detected upon inspection or where the odor that the complainant attributes to Keystone was coming from another source. However, some odor complaints are not responded to until the following day or until multiple days later when the odor is unlikely to still be present. (T. 453-54, 475, 1150-52, 1167-68; KSL Ex. 52.)

128. In order for the Department to cite a landfill for an odor violation, the Department takes the position that it must be able to trace the source of an odor back to the landfill and attribute the odor to a specific failure of the landfill to follow its NMCP. (T. 360, 613-14, 617-18.)

129. The Department will also cite a landfill for an odor violation when the Department determines it is a malodor. A malodor is "[a]n odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1. To be a malodor, the odor needs to rise to the level of a public nuisance, which means someone from the Department must actually smell the odor and determine it to be a public nuisance. (T. 362, 614, 618-19.)

130. The Department's primary waste inspector for the Keystone Landfill testified that he will only indicate a violation on his inspection reports if there is an "egregious violation" and that offsite odors are not necessarily a violation because "landfills smell," but he will find a violation if the odor is a nuisance. (T. 1123, 1143, 1167.)

131. Keystone's staff has detected intermittent odors during complaint investigations and voluntary odor patrols in the vicinity of Marshwood Road and Route 6, which are in close proximity to the leachate lagoons and working face operations. (T. 1457-58.)

132. By letter dated February 15, 2019, the Department advised Keystone that the Department had received numerous complaints relating to offsite landfill odors from residents located in the Boroughs of Throop, Dunmore, and Olyphant, in the Townships of Jefferson and Roaring Brook, and from the City of Scranton. Department staff had responded to the complaints and confirmed that landfill odors had been detected at various locations around the landfill. (T. 215-16; FOL Ex. 29.)

133. The letter notes that on February 4, 2019 six odor complaints were received after hours by the Department, a member of the Department's emergency response team responded, and during his investigation he detected a strong landfill odor along Marshwood Road in Throop that the Department believes originated from the landfill. The letter further notes that on February 14, 2019 the Department visited the landfill and identified an area of intermediate slope above a newly installed temporary cap that may have been contributing to offsite odors. (T. 215-16; FOL Ex. 29.)

134. During the months of September and October 2022, a total of 68 complaints were filed from residents located in Throop, Dunmore, Jessup, Olyphant, and the City of Scranton. The Department responded to all of the complaints and landfill-associated garbage odors were detected at various locations surrounding the landfill. (T. 217-18; FOL Ex. 33.)

135. More than 15 complaints were filed with the Department from October 28, 2022 to October 30, 2022, with many complainants stating the odor was strong, nauseating, and akin to rotten garbage. (FOL Ex. 33.)

136. During the Department's monthly inspection of the landfill on October 31, 2022, very strong odors were detected in the area being filled under the settlement accommodation plan ("SAP")—a minor permit modification approved on February 17, 2021 that allowed Keystone to remove the final cap and place additional waste in areas that had previously reached final grade but where the waste had settled below final grade. (T. 223-25, 1149; FOL Ex. 33.)

137. Between September 1, 2022 and January 20, 2023, the Department received and responded to 233 odor complaints from residents in Dunmore and Throop and surrounding areas, many of the whom described the odor as having a strong hydrogen sulfide component that the Department believed was caused by uncaptured landfill gas and, to a lesser extent, the leachate storage lagoon odors. (T. 218-19; FOL Ex. 37.)

138. Following the issuance of the Phase III approval in June 2021, the Department issued NOVs to Keystone related to offsite odors on January 25, 2023, December 13, 2023, and January 8, 2024. (FOL Ex. 37, 44, 46.)

139. In the January 25, 2023 NOV, the Department detailed its findings as a result of investigating odor complaints and conducting inspections between September 2022 and January 2023. Those findings included:

- On November 9, 2022, the Department responded to multiple odor complaints from residents in multiple municipalities. The complaints were investigated by a representative of the Department's Waste Management Program. During the investigation, a landfill gas odor was detected at multiple locations and a landfill gas malodor was detected at multiple residences in Dunmore Borough.

- On November 15, 2022, the Department responded to multiple odor complaints from residents in multiple municipalities. The complaints were investigated by a representative of the Department's Air Quality Program. During the investigation, a landfill gas odor was detected at multiple locations and residences in the Scranton and Dunmore areas.

- On November 16, 2022, the Department responded to multiple odor complaints from residents in multiple municipalities. The complaints were investigated by a representative of the Department's Waste Management Program. During the

investigation, a landfill gas odor was detected along Marshwood Road in Throop Borough.

- On November 21, 2022, a representative of the Department's Waste Management Program conducted an odor patrol in response to the multiple odor complaints being filed. During the investigation, landfill odors were detected along Marshwood Road in Throop Borough and State Route 6 in Dunmore and Throop Boroughs.

- On December 16, 2022, the Department responded to an odor complaint from a resident located in Jefferson Township. The complaint was investigated by a representative of the Department's Emergency Response Team. During the investigation, a landfill operations-associated odor was detected at the complainant's residence and on State Route 6 in Dunmore and Throop Boroughs.

- On December 21, 2022, the Department responded to multiple odor complaints from residents in multiple municipalities. The complaints were investigated by representatives of the Department's Waste Management Program and Emergency Response Team. During the Waste Management Program's investigation, hydrogen sulfide/landfill gas odors were detected at multiple locations and hydrogen sulfide/landfill gas malodors were detected at multiple residences, in Dunmore and Throop Boroughs.

- On December 23, 2022, a representative of the Department's Waste Management Program conducted an odor patrol in response to the multiple odor complaints being filed the previous day. During the investigation, landfill odors were detected along Marshwood Road in Throop Borough and on State Route 6 in Dunmore and Throop Boroughs.

- On December 28, 2022, a representative of the Department's Waste Management Program conducted an odor patrol in response to the multiple odor complaints being filed. During the investigation, landfill gas and hydrogen sulfide odors were detected in multiple locations, in Dunmore, Throop and Jessup Boroughs.

- On December 30, 2022, the Department responded to multiple odor complaints from residents in multiple municipalities. The complaints were investigated by a representative of the Department's Waste Management Program. During the investigation, landfill odors were detected at multiple locations and residences in Dunmore and Throop Boroughs.

(T. 218-20; FOL Ex. 37.)

140. During the inspections conducted on November 21, 2022 and January 5, 2023, Department staff recorded high readings of methane gas at numerous locations where intermediate cap had been placed and at the base of some gas collection wells. (FOL Ex. 37.)

141. The Department determined that the odors over this period were largely attributable to Keystone's noncompliance with provisions of its NMCP because of Keystone's intermediate cover failing to contain odors and Keystone failing to conduct adequate surface monitoring by not doing monthly monitoring of areas of intermediate cover. (T. 218-20, 364-68; FOL Ex. 37.)

142. The Department cited Keystone for failing to perform regular site inspections for detecting odors, failing to correct problems during inspections, failing to implement its NMCP, failing to maintain intermediate cover, failing to implement its gas control and monitoring plan, allowing the emission of a malodorous air contaminant, failing to prevent and control air pollution, and failing to conduct enhanced surface monitoring on intermediate slopes. (FOL Ex. 37.)

143. The Department requested that Keystone submit a written response within 15 days identifying the reason the violations occurred and how such violations would be prevented in the future. (FOL Ex. 37.)

144. Odor complaints increased again in September and October 2023, when the Department received over 100 odor complaints related to the landfill and the Department regularly detected offsite landfill odors, particularly along Marshwood Road, the Casey Highway, and Interstate 81. (T. 220-21 FOL Ex. 39.)

145. The Department's review of Keystone's enhanced surface monitoring results conducted in July through October 2023 indicated that surface methane emissions in the scan areas had gotten progressively worse. (FOL Ex. 36, 39.)

146. The Department attributed these odors to a failure of intermediate cover and its ability to contain the gas-causing odors, as well as to Keystone's failure to properly conduct enhanced surface monitoring on those areas. (T. 220-23, 353-55, 1149-50.)

147. The Department believes Keystone's intermediate cover may not have had the appropriate volume of fines to make a proper seal to prevent odors. (T. 233-34.)

148. In a letter dated October 30, 2023, the Department requested that Keystone provide the Department with information so that the Department could determine if Keystone had complied with its NMCP. The Department advised that Keystone should immediately consider additional mitigation measures to minimize offsite odors, as it was apparent to the Department that Keystone's mitigation measures had not been effective. (T. 221-22, 378-79; FOL Ex. 39, 40.)

149. On November 13, 2023, in response to the increased volume of odor complaints being received by the Department since September 2023, the Department began conducting twice daily odor patrols of the areas surrounding the landfill. (T. 396; FOL Ex. 41, 115.)

150. The Department determined that the odors during this period were primarily caused by Keystone's implementation of the SAP. (T. 225-27, 353-55, 1149- 50; FOL Ex. 41, 44.)

151. On November 16, 2023, the Department inspected the landfill and found strong, pungent landfill gas odors in the SAP area. High readings on a surface methane gas monitoring meter were recorded throughout the SAP area. (FOL Ex. 41.)

152. The Department suspended Keystone's SAP authorization on November 21, 2023 because the Department determined that the SAP area was a hotspot for landfill gas leakage that could be directly linked to offsite odors being detected, and Keystone was unable to maintain overall operational compliance in controlling odors from the area. (T. 380; FOL Ex. 41.)

153. Keystone has completely closed and recapped the SAP area. (T. 355, 1150.)

154. On December 13, 2023, the Department issued an NOV to Keystone for failure to maintain a uniform intermediate cover that prevents odors due to offsite landfill gas odors being detected on numerous occasions during the Department's odor patrols, extensive areas of

intermediate cover with excessive methane emissions results in the months of September and October 2023, and the Department detecting strong landfill gas and elevated methane readings during its November 16, 2023 inspection. The Department requested that Keystone submit within 30 days a proposed plan and schedule to address the correction and prevention of the violation. (T. 227, 381-83; FOL Ex. 44.)

155. On January 8, 2024, the Department issued an NOV to Keystone for offsite leachate odors detected along Cypress Street, Dunmore Street, George Street, Marshwood Road, and South Street in the Dunmore and Throop areas, including malodors at multiple complainants' residences detected by the Department during a December 2, 2023 odor complaint investigation. The Department requested that Keystone submit within 15 days a proposed plan and schedule to address the correction and prevention of the odors. (T. 227-28, 383-84; FOL Ex. 46.)

156. By letter dated February 1, 2024, the Department advised Keystone that "additional, more immediate, odor mitigation measures need to be implemented" because the Department had continued to detect offsite landfill gas odors and continued to receive a high volume of odor complaints. The Department requested more specific information from Keystone regarding mitigation measures. (T. 228-29; FOL Ex. 47.)

March 29, 2024 Consent Order and Agreement

157. On March 29, 2024, approximately three weeks before the start of the merits hearing in this matter, the Department and Keystone entered into a CO&A to resolve violations found by the Department largely pertaining to odors from November 2022 through February 2024. The CO&A documents more than 30 odor incidents during that time period. (T. 229-30; FOL Ex. 115.)

158. The March 2024 CO&A requires Keystone to undertake a number of corrective actions designed to further mitigate or eliminate potential offsite odors from the Keystone Landfill, as well as to prevent stormwater infiltration into the leachate collection system that go beyond what is required in Keystone's solid waste permit or its operating plans. (T. 231-32, 242, 389-95, 476, 478-79, 1458-66; FOL Ex. 115.)

159. The corrective actions are required to be completed between March 2024 and April 2025 and are related to leachate lagoon odor mitigation measures, leachate generation and reverse osmosis reject water evaluations, and intermediate cover and landfill gas emission mitigation measures. Specifically, the CO&A requires Keystone to do the following:

- Immediately apply foam to the leachate lagoons, use an additive to mitigate potential offsite lagoon odors, and inspect the surface coverage of the foam daily.
- Complete installation of the Hexprotect floating cover system on the surface of the leachate lagoons by July 30, 2024.
- Submit to the Department a minor permit modification for the installation of two 2,500,000-gallon leachate storage tanks systems and respond to any technical deficiency letters concerning the permit modification within 30 days.
- Complete installation of the 2,500,000-gallon leachate storage tanks by April 1, 2025.
- Evaluate by May 1, 2024 appropriate RO system modifications needed to reduce the volume of RO reject water being generated.
- Determine by May 1, 2024 areas of the landfill that contribute the most significant volumes of leachate as a result of storm events and include measures to be implemented to minimize the impact of storm events on leachate generation.
- Submit a minor permit modification by June 1, 2024 to install a fourth RO unit and any other proposed changes to the current RO leachate treatment system, and evaluate the maximum safe volume of RO reject water that can be disposed of at the active working face.
- Complete installation of the fourth RO unit by August 1, 2024.
- Immediately implement more frequent surface emissions monitoring utilizing aerial drone technology, at least once per month.

- Immediately ensure that its cover material meets minimum intermediate cover standards.

- Comply with a detailed schedule for the application of Posi-Shell, temporary cap, rain tarp, temporary liner, and final cap on certain areas of Phase II of the landfill.

- Submit to the Department an updated NMCP within 60 days of execution of the CO&A to include the measures noted in the CO&A, as well as an evaluation to determine a maximum acreage of intermediate cover that can be in place at any given time while ensuring landfill gas emissions are controlled to a level where offsite odors are adequately mitigated, and any additional measures recently taken to address odors.

- Obtain written approval from the Department for any modifications to the corrective actions pertaining to leachate odor management and alternative intermediate cover products.

- Submit monthly progress reports to the Department on the corrective measures, with copies sent to Throop and Dunmore.

(T. 231-32, 242, 444; FOL Ex. 115.)

160. In response to the CO&A, Keystone has taken measures to control potential leachate lagoon-associated odors, including foaming the lagoons, deploying a floating cover material, and using a hydrogen sulfide reducing chemical. (T. 1459-60, 1544-45.)

161. In accordance with the CO&A, Keystone recently began using drones as part of its surface emissions monitoring program, in addition to monthly on the ground monitoring with flame ionization detector (FID) scans and mapping. (T. 392, 490-96, 1346-49, 1352-56; FOL Ex. 115; KSL Ex 87, 88, 89, 90.)

162. The CO&A also assessed a civil penalty against Keystone in the amount of $180,000, required Keystone to reimburse the Department costs in the amount of $35,000, and allowed Keystone to establish funds totaling $360,000 for use by Dunmore and Throop for Community Environmental Projects. (T. 237, 605-06; FOL Ex. 115.)

163. The CO&A's corrective actions are designed to return Keystone to compliance, and Keystone is obligated to complete the corrective actions or face automatic penalties. (T. 476, 479, 620; FOL Ex. 115.)

164. The CO&A does not amend Keystone's permit, and the measures contained in the CO&A will eventually expire. (T. 607.)

165. The Department can at any time modify, suspend, or revoke Keystone's permit if necessary and warranted by the circumstances. 35 P.S. § 6018.503. (T. 418, 545, 607.)

Environmental Assessment / Harms-Benefits Analysis

166. The municipal waste regulations require the Department to perform an environmental assessment of Keystone's Phase III permit application pursuant to a harms-benefits analysis that weighs the benefits of the project against the known and potential harms that remain after mitigation. 25 Pa. Code §§ 271.126 and 271.127.

167. Under the harms-benefits analysis, an applicant must: (1) include a detailed analysis of the potential impact of the proposed facility on the environment, public health, and public safety; (2) describe the known and potential harms of the proposed project; (3) include a written mitigation plan that explains how each known and potential harm will be mitigated and the extent to which any known or potential harms remain after mitigation; and (4) demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms that will remain after the proposed mitigation. 25 Pa. Code § 271.127.

168. The Department evaluates the information submitted by a permit applicant, and for each benefit and harm, the Department assesses the duration, frequency, intensity, reach, and receptor sensitivity. (T. 785-86; FOL Ex. 25.)

169. If a harm is fully mitigated, that harm does not need to be balanced against the benefits of the project. If there is harm remaining after mitigation, that remaining harm is included in the balancing. The balancing looks at the individual and collective impacts of all the harms and benefits to ensure that the total effect of the project is such that the benefits clearly outweigh the harms. (T. 772-73, 785-86; FOL Ex. 25.)

170. The Department prepared an environmental assessment / harms-benefits analysis in July 2019 and a revised analysis in April 2021. (T. 767-68, 801-05; FOL Ex. 21, 25.)

171. For the benefits of the Phase III expansion, the Department evaluated: recycling and cleanup programs, the purchase of goods and services, continued employment, state disposal fees, tax revenue, the Pennsylvania Department of Transportation adopt a highway program, and borough host agreement fees. (T. 769-71; FOL Ex. 25.)

172. The potential environmental harms evaluated by the Department included: landfill odors, litter, offsite noise, the attraction of vectors and birds, tracking dirt and mud offsite, stormwater runoff during ongoing construction operations, the migration of air pollutants, groundwater impacts, risk of fires and subsurface reactions, and the discharge of treated leachate to the Lackawanna River during combined sewer overflows. (T. 771-772; FOL Ex. 25.)

173. For social and economic harms, the Department assessed traffic and the visual impacts of the landfill. (T. 771, 837-39; FOL Ex. 25.)

174. Keystone's proposed mitigation for the harm of offsite odors is its NMCP. (T. 774; FOL Ex. 25; KSL Ex. 25.)

175. The Department determined that, while Keystone has generally operated in compliance and has proposed adequate mitigation measures to control offsite odors, it was unlikely

to provide complete elimination of odors at all times, and therefore, potential harm related to odors would remain for purpose of the harms-benefits balancing. (T. 774, 840; FOL Ex. 25.)

176. With regard to excess leachate generation, the Department acknowledged that Keystone "has an issue with either excess leachate generation or stormwater infiltration into the leachate conveyance system" and that these excess flows increase the potential for the facility to have overflows and other incidents, which could then potentially lead to groundwater or surface water impacts. (T. 252-53, 776-78, 780-81, 792-94; FOL Ex. 25 (at 13).)

177. The harms-benefits analysis noted Keystone's need to add temporary leachate storage and to haul leachate off-site as a result of excess leachate, and that current leachate flows at the site regularly exceed the HELP model calculated maximum flow for both the existing site and what was calculated for the Phase III expansion. (T. 776-78, 792-93; FOL Ex. 25.)

178. For visual impacts, the Department determined that harm remained because the Phase III expansion will extend the elevation of the disposal area across a larger distance and extend the peak of the landfill 3,000 feet closer to residential areas. The intensity of the visual harms related to the expansion will be greatest during the 40 years of construction activities and active working face operations. (T. 782-85; FOL Ex. 25.)

179. The Department concluded in the harms-benefits analysis that Keystone had demonstrated that the benefits of the landfill to the public clearly outweigh the known and potential harms. (T. 786, 791; FOL Ex. 25.)

180. Erika Bloxham, a facility specialist in the Department's waste management program in the Northeast region, who was the primary author of the harms-benefits analysis, concluded that the benefits of the Phase III Expansion *did not* outweigh the harms, primarily because in her opinion Keystone had not mitigated the excess leachate production to the fullest

extent possible. However, Ms. Bloxham's supervisor, Roger Bellas, the waste program manager for the Northeast region, disagreed and authored the conclusion of the analysis for the Department. (T. 146, 265-66, 765, 786, 789-91, 919-20.)

181. Keystone's compliance history does not at this time demonstrate an inability or unwillingness to operate the landfill in accordance with the permit or with the law. (T. 1195-1207, 1223-24; DEP Ex. 1, 74, 75 76, 77; KSL Ex. 22, 23, 71.)

182. FOL and Sierra Club failed to present any credible evidence that the Keystone Landfill has contaminated or will contaminate groundwater or any other waters with per- or polyfluoroalkyl substances (PFAS), or that any modification of the permit is warranted at this time to account for PFAS. (*See* T. 406-08, 646, 648, 1079, 1090, 1096-1101, 1105; SC Ex. 16.)

DISCUSSION

Friends of Lackawanna ("FOL") has appealed the Department of Environmental Protection's (the "Department's") June 3, 2021 issuance of a major modification to Keystone Sanitary Landfill, Inc.'s ("Keystone's") solid waste disposal permit (Permit No. 101247) for its municipal waste landfill located in the boroughs of Dunmore and Throop in Lackawanna County. Sierra Club has intervened in support of FOL's appeal. The major permit modification authorizes Keystone's Phase III expansion of the landfill. The conditions in the Phase III permit modification modify, replace, and/or add permit conditions regarding Keystone's existing operating permit. (SC Ex. 1.) The Phase III expansion generally allows Keystone to add additional waste on top of existing waste disposal areas and to dispose of waste in other areas within the existing permit boundary, primarily in a valley between the peaks of two existing disposal areas. The Phase III modification would increase Keystone's disposal capacity by 94 million cubic tons and extend the overall life of the Keystone Landfill by 42 years. Phase III operations began in January 2024, but

as of the hearing on the merits, operations had been temporarily halted so that Keystone could focus on completing its Phase II operations and complying with a capping schedule and other measures established in a Consent Order and Agreement (CO&A) issued by the Department in March 2024 to address ongoing odor and leachate management issues at the landfill. (T. 525, 633.) The Board conducted a site view of the Keystone Landfill with the parties on May 9, 2024, shortly after the merits hearing in this matter concluded.[1]

[1] A significant period of time has elapsed from when the merits hearing was held and the final brief was filed due to repeated requests from the parties to extend the established and agreed-upon deadlines for filing post-hearing briefs. The hearing on the merits began on April 22, 2024 and concluded on April 30, 2024. At the conclusion of the hearing, the parties agreed on a framework for post-hearing briefing where, following the receipt of all transcripts, FOL and Sierra Club would file their post-hearing briefs within 60 days; the Department and Keystone would file their post-hearing briefs 60 days later; and FOL and Sierra Club could file any post-hearing reply briefs 30 days after that. (T. 1670-71.) The final transcripts from the merits hearing were received by the Board on May 23, 2024. On the same day, the Board issued an Order setting a post-hearing briefing schedule where FOL and Sierra Club were to file their post-hearing briefs on or before July 22, 2024; the Department and Keystone were to file their post-hearing briefs on or before September 20, 2024; and any reply briefs from FOL or Sierra Club were to be filed on or before October 21, 2024. On July 11, 2024, FOL filed a letter requesting a 60-day extension of all post-hearing briefing deadlines. The request was consented to by all parties. On July 11, 2024, we issued an Order granting the request and amending the post-hearing briefing schedule in accordance with FOL's request so that FOL and Sierra Club were to file their post-hearing briefs on or before by September 20, 2024; the Department and Keystone were to file their post-hearing briefs on or before November 19, 2024; and any reply briefs from FOL and Sierra Club were to be filed on or before December 19, 2024. FOL and Sierra Club filed their post-hearing briefs on September 20, 2024.

On October 31, 2024, the Department requested a further 30-day extension of the post-hearing briefing deadlines, which was not objected to by any party. On November 1, 2024, we issued an Order granting the Department's request and amending the post-hearing briefing schedule yet again so that the Department and Keystone were to file their post-hearing briefs on or before December 19, 2024, and any reply briefs from FOL or Sierra Club were to be filed on or before January 21, 2025. Our November 1 Order across eight paragraphs detailed the history of post-hearing briefing extensions requested by the parties. The Department and Keystone filed their post-hearing briefs on December 19, 2024. On January 7, 2025, FOL then requested another 30-day extension of the deadline for FOL and Sierra Club to file their post-hearing reply briefs, which was also not opposed by any party, and which we granted with an Order on January 9, again outlining the history of extensions requested by the parties. FOL and Sierra Club filed their reply briefs on February 20, 2025 in accordance with our Order, four months after they were to be filed under the schedule originally agreed upon by the parties and established in our first Order on post-hearing briefing.

Keystone, to its credit, never initiated a request for an extension. FOL did not seek a supersedeas at any point during this proceeding so Keystone's permit has remained in effect and its operations have not been affected by the protracted briefing schedule. While we try to be accommodating on mutually agreed upon requests by the parties for extensions, we must balance these requests with our aim to secure the just,

Back in 2015, FOL also appealed the renewal of Keystone's solid waste management permit, which authorized the Keystone Landfill to operate for another ten years.[2] *See Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L. During 18 days of hearing in that appeal, FOL raised a number of issues, including the management of leachate at the landfill and the control of offsite odors being experienced by its members and the local community. In our 2017 Adjudication, we noted that "[t]he Department appear[ed] to have been rather tolerant of chronic odor and leachate management issues." *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1183. Nevertheless, we for the most part rejected FOL's challenges, but we revised Keystone's permit to contain a condition requiring Keystone to prepare a groundwater assessment of groundwater degradation that was being detected in a monitoring well (MW-15).

Much like in the appeal of the renewal permit, in the current appeal of the Phase III expansion, FOL and now Sierra Club have raised issues with persistent offsite odors emanating from the landfill, and with the management of leachate generated by the landfill, which at times far exceeds what Keystone has been able to store and treat on a monthly basis. The hearing on the merits has shown that Keystone continues to struggle managing the generation of offsite odors and leachate from its operations. Since the Phase III permit modification was issued, Keystone, at the Department's request or by Department order, has modified its operations to further address the mitigation of odors and leachate, but none of these new requirements are contained in any permit condition in the Phase III permit. For the reasons explained below, we conclude that the Department erred in issuing the Phase III permit modification without appropriate conditions or

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speedy, and inexpensive determination of every appeal. 25 Pa. Code § 1021.4. While we acquiesced in the parties' requests in this appeal, we might not always be so accommodating.

[2] We are told that Keystone has already submitted another renewal application before the expiration of its current permit on April 6, 2025. (T. 544.)

without ensuring that requirements in Keystone's operating plans effectively control and manage leachate and odors. We remand the Phase III permit modification to the Department to consider whether or not it is appropriate to impose any additional conditions in the permit to further address the control and management of leachate and odors, or to require Keystone to revise any of the plans it has developed and operates under.

"In matters challenging action of the Department, the Board conducts a *de novo* hearing to determine the propriety of the Department's action…." *PennEnvironment v. Dep't of Env't Prot.*, ___ A.3d ___, No. 566 C.D. 2024, slip op. at 7 (Pa. Cmwlth. Mar. 11, 2025). "The Board's *de novo* review allows it to admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal." *United Ref. Co. v. Dep't of Env't Prot.*, 163 A.3d 1125, 1136 (Pa. Cmwlth. 2017). *See also Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot.*, 316 A.3d 668, 677 (Pa. Cmwlth. 2024) (the Board "can properly consider evidence produced after DEP's action in question and in anticipation of litigation"). The Board "decide[s] the case anew on the record developed before" it. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318 (citing *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Env't Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975)). In a third-party appeal such as this one, FOL and Sierra Club bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). They must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna*, 2017 EHB at 1156.

Standing

Before getting into the merits, we once again must address a challenge raised to FOL's standing, as well as a challenge to Sierra Club's standing. Keystone, but not the Department, contests the standing of both FOL and the Sierra Club in this matter. Keystone in its post-hearing brief does not challenge the interests of the members of these organizations who testified at the hearing. Rather, Keystone primarily argues that FOL and Sierra Club are nonprofit corporations, and corporations, according to Keystone, are separate legal entities that cannot represent the interests of their members for purposes of obtaining standing. In other words, according to Keystone, a non-corporate organization or association can have standing on behalf of its members, but a corporation cannot.[3]

Keystone never cites any case holding that a nonprofit corporation has no standing as a representative of its members. It only cites cases for the rather unremarkable proposition that a corporation is a legal entity. Keystone argues that, because a corporation is a distinct legal entity, it cannot derive standing on behalf of its members. It would seem that most courts, including the United States Supreme Court, disagree with Keystone. *See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 198-201 (2023) (finding that a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its

[3] Keystone previously contested Sierra Club's standing in the context of Keystone's opposition to Sierra Club's petition to intervene in this matter, which we granted over Keystone's objection. *Friends of Lackawanna v. DEP*, 2022 EHB 11. Keystone then moved to amend our Order granting Sierra Club's intervention so that Keystone could seek immediate appellate review of the interlocutory Order, which we denied, *Friends of Lackawanna v. DEP*, 2022 EHB 39, and Keystone did not appeal that decision. Keystone later sought partial summary judgment on, among other things, its claim that a corporation cannot have standing to assert claims under Article I, Section 27 of the Pennsylvania Constitution, which we also denied. *Friends of Lackawanna v. DEP*, 2024 EHB 149. In its post-hearing brief, Keystone incorporates by reference "to the extent necessary," its opposition to Sierra Club's petition to intervene and its motion to amend the interlocutory order. Keystone also contested the standing of FOL in the appeal of Keystone's renewal permit, but we found Keystone's arguments to have no merit. *Friends of Lackawanna, supra*, 2017 EHB at 1147-55.

mission had standing and that, "Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates."); *Americans for Fair Treatment, Inc. v. Phila. Fedn. of Teachers, Local 3*, 150 A.3d 528, 533 (Pa. Cmwlth. 2016) (finding that an association has standing if at least one of its members suffers an immediate or threatened injury and that "[t]his rule applies equally to nonprofit membership corporations."). *See also NAACP, Inc. v. Button*, 371 U.S. 415 (1963) (finding the NAACP could bring suit "on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. We also think petitioner has standing to assert the corresponding rights of its members." (citations omitted)); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (finding that environmental organizations Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and Sierra Club had standing on behalf of their members to file a citizens suit against the operator of a hazardous waste incinerator); *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring) ("The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.")).

Keystone does not add anything particularly new to the arguments that it made first in opposition to Sierra Club's petition to intervene and then in its motion for partial summary judgment. Keystone does not address or try to rebut any of the reasons we found their arguments to fail in our Opinion granting intervention. *Friends of Lackawanna v. DEP*, 2022 EHB 11. We find no reason to change our prior ruling on standing.

Keystone also argues that a corporation cannot assert a challenge based on Article I, Section 27 of the Pennsylvania Constitution. We rejected that argument in our Adjudication on Keystone's renewal permit and we do so again here:

> Keystone also makes the argument that FOL lacks standing to assert challenges under Article I, Section 27 of the Pennsylvania Constitution because it is a corporate entity. We are not aware of any separate standing inquiry for constitutional claims. In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), a majority of the Pennsylvania Supreme Court Justices joined in the standing analysis and found standing for an organization to assert challenges to the Oil and Gas Act of 2012, which included challenges premised on Article I, Section 27. 83 A.3d 901, 921-23. The Pennsylvania Supreme Court never parsed out the constitutional claims or carved out different standards for an organization making constitutional challenges. The individual members of FOL, on whose behalf FOL is litigating, are precisely the sort of people that Article I, Section 27 is designed to protect, and FOL unquestionably has standing to advance Article I, Section 27 challenges on their behalf.

Friends of Lackawanna, 2017 EHB at 1154-55.

In the interest of a complete record, we will briefly address the standing of FOL and Sierra Club. "An organization has standing if at least one individual associated with the group has standing." *Friends of Lackawanna*, 2022 EHB at 14 (quoting *Friends of Lackawanna*, 2017 EHB at 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)). *See also Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) ("an association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate."). As we said recently in *Dengel v. DEP*, 2024 EHB 605:

> In order to have standing to appeal an administrative decision, persons must have a direct interest in the subject matter of the case. *Mountain Watershed Assn. v. DEP*, [2024 EHB 476, 479], citing *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies,*

> *Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). See also, *Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Id.* (citing *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024)). In order for a person to have a direct interest, their material interests must be discrete to them or a limited class of persons from more diffuse interests common among the citizenry. *Muth*, 315 A.3d at 196 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007))….
>
> In third-party permit appeals, as is the case here, the Board has held that a party can meet the requisite interest for standing based on where they reside and/or where they recreate. *Food and Water Watch v. DEP*, 2020 EHB at 247. An appellant has standing when [] they come forward with specific facts to credibly aver that they use the affected area and that there is a realistic potential that their use and enjoyment of the area will be adversely affected by the permitted activity. *Muth v. DEP, et al.*, 2022 EHB 411, 415 (citing *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643).

Id. at 615-16.

The members of FOL and Sierra Club who testified at the merits hearing clearly have interests sufficient to support standing on behalf of FOL and Sierra Club. FOL is a Pennsylvania 501(c)(3) nonprofit organization formed in 2014 in opposition to the Keystone Landfill with a mission to support the health, welfare, and education of individuals in need in Northeast Pennsylvania, and to protect and educate the community on the impacts of the landfill. (T. 42-43, FOL Ex. 1.) FOL has approximately 5,000 members, mostly concentrated in the Dunmore, Throop, and Scranton area. (T. 45-46, 92.)

Patrick Clark is a member, board member, and officer of FOL. (T. 41-42.) He lives in Dunmore about two miles from the Keystone Landfill with his wife and children, and has lived in Dunmore nearly his entire life. (T. 32-33, 68.) His children play sports and use parks near the landfill, and Mr. Clark has experienced odors he attributes to the landfill while he and his family do these activities. (T. 34-36.) Mr. Clark testified that odors from the landfill were not noticeable

years ago but he now experiences odors on a regular basis in his neighborhood and at his house. (T. 34-35.) Mr. Clark has experienced odors since Keystone's Phase III operations began in January 2024. (T. 108.) Mr. Clark is also concerned with the visual impacts of the landfill, as it is the first thing one sees coming into Dunmore from the highway. (T. 38-39.) He believes that both odors and visual impacts will get worse as Keystone's Phase III progresses. (T. 41.)

Sierra Club presented the testimony of Sarah Helcoski and John Mellow. Ms. Helcoski is a member of Sierra Club who lives in Jessup around three miles from the landfill with her husband and children. (T. 128-29, 140-41.) She is in Dunmore nearly every day because her youngest child attends preschool at a YMCA near the landfill. (T. 129-30.) She says she sees trash blowing on the highway as she travels to Dunmore, which she attributes to the Keystone Landfill. (T. 130-31, 139.) She enjoys hiking with her children around Jessup, Scranton, and Dunmore. (T. 129.) She is concerned about the Phase III expansion of the landfill, which she says is already an unattractive feature with the visible trash, and believes the landfill will only get larger with the expansion. (T. 131-32.) She is also concerned about Keystone's leachate management and Keystone potentially generating more leachate than it can handle. (T. 132-33.)

John Mellow is a member of both Sierra Club and FOL who lives in Archbald. (T. 110, 111, 118-19.) Mr. Mellow likes to walk around the Dunmore No. 1 Reservoir near the landfill. (T. 111-12.) Mr. Mellow has aesthetic concerns with the landfill, saying recently it has become quite large and visible and he is concerned with how large the expansion is, and the possibility of potential contaminants from the landfill entering the environment. (T. 113.) Mr. Mellow is also concerned about per- and polyfluoroalkyl substances (PFAS) from the landfill because he believes landfills in general are likely to contain PFAS. (T. 114-15.) PFAS have been associated with possible negative health consequences (T. 1078) and were addressed in the Department's comment

response document (SC Ex. 1, Comment Response at 26). Roger Bellas, the Department's waste program manager for the Northeast region, testified that it is highly likely PFAS is in the leachate from any landfill. (T. 269.) The Department considered whether to require Keystone to evaluate PFAS as part of the Phase III permit modification, but the Department did not require it because no standard currently exists. (T. 268-69.) For purposes of standing, Mr. Mellow's concern over PFAS is justified and supports his interest in this matter.

In short, the members of FOL and Sierra Club who testified have clearly expressed the sort of interests and concerns in the Phase III permit modification and expansion of the Keystone Landfill that give rise to standing in environmental cases. We have no difficulty concluding, once again, that their interests are sufficient to provide standing to FOL and Sierra Club as their representatives.

Leachate Management

Leachate generated at the Keystone Landfill is collected in a leachate collection and conveyance system that carries leachate to Keystone's leachate storage lagoons. From the lagoons, Keystone treats the leachate in an onsite leachate treatment plant before it is sent via sewer line to the Scranton Wastewater Plant for final treatment. Keystone had utilized a biologic system to treat its leachate, but the system began to fail in 2021 and Keystone has switched to a reverse osmosis (RO) treatment system. At the time of the hearing, Keystone had three RO units with a design specification treatment capacity of 90,000 gallons per day (gpd) per unit, putting Keystone's total treatment capacity at 270,000 gpd. However, in practice, Keystone historically has not been able to fully treat 90,000 gpd per unit. Although each RO unit processes 100,000 gpd, issues that Keystone attributes to the membranes within the RO units have reduced the treatment efficiency to only 70,000 gpd. The remaining 10,000-30,000 gpd that are processed but not successfully

treated to specifications becomes a concentrated waste liquid that is disposed of back into the waste mass instead of being transferred to the Scranton Wastewater Plant. Because of the operational difficulties Keystone has had with the RO units, Keystone has planned to purchase a fourth RO unit so it can have two to three RO units in operation while performing cleaning and maintenance on the non-running RO unit(s).

Under the municipal waste regulations for the storage and management of leachate, a landfill must have a plan in place addressing its collection, storage, and treatment of leachate. 25 Pa. Code § 273.162. A landfill must "have sufficient storage capacity at least equal to the maximum expected production of leachate for any 30-day period for the life of the facility estimated under § 273.162 (relating to leachate treatment plan), or 250,000 gallons, whichever is greater." 25 Pa. Code § 273.275(b). Importantly to this case, "[n]o more than 25% of the total leachate storage capacity may be used for flow equalization on a regular basis." *Id.* The parties interpret this latter requirement to mean that, while a landfill needs to maintain some amount of leachate in its lagoons for the functioning of a lagoon aeration system, a landfill cannot regularly store more leachate in its lagoons than what would equal 25% of the lagoons' total capacity. (T. 271-72.) The rationale behind this requirement is to ensure that a landfill has sufficient leachate storage capacity to handle significant rain events without overtopping, since rain that falls on uncapped areas of the landfill eventually makes its way through the waste mass and into the leachate collection system. (T. 678, 681.)

Keystone's two leachate storage lagoons have a combined storage volume of around 9.7 million gallons.[4] Keystone's lagoons are sized in excess of what Keystone has projected as its

[4] Keystone's lagoons previously had a total capacity of 11 million gallons, but the total capacity was reduced beginning in January 2018 due to Keystone relining the lagoons to fix a leak that was allowing leachate to escape into groundwater. (T. 170; FOL Ex. 72.)

expected maximum leachate production for a 30-day period. However, as detailed in the Findings of Fact, Keystone has frequently stored more leachate in its lagoons than 25% of their capacity, or approximately 2.43 million gallons. From December 2016 until February 2019, all while the Department was reviewing Keystone's Phase III permit application, Keystone stored leachate in excess of 25% of its capacity in 24 of the 26 months. (FOL Ex. 71, 72.) Keystone was storing leachate at more than 80% of its lagoons' capacity in April 2017 and August 2018 (more than 8.8 million gallons), and more than 70% in May 2017 and September 2018 (more than 6.8 million gallons). From May 2021 until July 2022, Keystone stored more than 2.43 million gallons of leachate in its lagoons during each month, with some months exceeding 60% capacity. (FOL Ex. 71, 78; SC Ex. 6.)

Even as the hearing was going on in April and May 2024, Keystone was once again exceeding 25% of its storage capacity, having been above the threshold since the end of October 2023. (SC Ex. 6; FOL Ex. 119, 120; FOL Ex. 112.) Keystone's lagoons held 6.4 million gallons of leachate in February 2024, and nearly 7.5 million gallons of leachate in March 2024, more than 5 million gallons above what Keystone is supposed to regularly store in its lagoons. (T. 205-06; FOL Ex. 119, 120.) During an inspection conducted by the Department in April 2024, within days of the merits hearing, Keystone's lagoons were still at 70% capacity, or 6.8 million gallons. (KSL Ex. 112.)

There was considerable discussion at the hearing over what constitutes storing leachate above 25% of capacity "on a regular basis" under 25 Pa. Code § 273.275(b) for purposes of determining when a landfill is in violation of that regulation. The Department does not interpret the regulation to embody any clear-cut moment when a landfill is storing excess leachate on a regular basis. Instead, the Department says it is a subjective determination that the Department

makes when looking at how much leachate is being stored on a monthly basis and whether that amount goes up and down in relation to weather events, i.e. the Department would generally expect leachate levels to decrease during periods with little or no precipitation. (T. 272-73, 1187-88, 1213.) If the levels are not going down and there has not been wet weather or the correction of any problems at the landfill, the Department will begin to view it as a violation. (T. 1188.)

At the time of our Adjudication on Keystone's renewal permit, even though Keystone's leachate storage lagoons had repeatedly stored more leachate than 25% of their capacity since 2015, the Department had never issued a Notice of Violation (NOV) to Keystone for violation of 25 Pa. Code § 273.275(b). *Friends of Lackawanna*, 2017 EHB at 1184. However, over the last few years, the Department has issued two NOVs to Keystone for periods of time that Keystone was regularly storing leachate in excess of 25% of its lagoons' capacity.

In September 2018, the Department issued an NOV to Keystone for storing leachate in excess of 25% of its total leachate storage capacity on a regular basis since October 2016. (FOL Ex. 74.) The NOV noted that leachate storage amounts ranged from 27.72% to 85.77% of total capacity over that period. 85.77% of Keystone's total leachate capacity is 8,332,328 gallons of 9,714,881 gallons. (FOL Ex. 72.) The Department considered Keystone exceeding the 25% limit in 19 of the previous 21 months to qualify as "on a regular basis" in terms of 25 Pa. Code § 273.275(b). However, even after the NOV was issued, Keystone was not able to bring down its leachate levels to under 25% until mid-February 2019. (FOL Ex. 71.)

In December 2020, the Department issued a CO&A to Keystone to resolve the September 2018 NOV, as well as a November 2016 NOV relating to groundwater pollution due to a leak in the liner of the lagoons. (DEP Ex. 125.) In lieu of assessing a monetary penalty, the Department and Keystone agreed that Keystone would complete a Community Environmental Project and

clean up an illegal dumpsite (not in any way associated with Keystone) at an estimated cost of $112,905. (T. 590-92, 1191.)

Keystone managed to keep its leachate levels under 25% from February 2019 until May 2021, when the lagoons reached 29% and then remained elevated for more than a year. (FOL Ex. 71, 78; SC Ex. 6.) During this time, the Department issued a second NOV to Keystone, in April 2022, for exceeding the 25% limit since May 2021. (T. 1193; FOL Ex. 85.) The levels continued to be above the 25% limit until July 2022. At the hearing, Mr. Bellas testified that the Department was considering whether Keystone was again in violation of the 25% regulation due to the leachate levels from 2023 into 2024, stating that, if he were not busy testifying, he would be looking right then at whether Keystone's recent leachate exceedances were "on a regular basis."

Keystone largely portrays the leachate exceedances as simply bad luck, bad timing, or as the result of completely unforeseeable events. For instance, Keystone says it often opened up a new landfill cell before a significant rain event and failed to isolate the stormwater from reaching a cell where some waste had been disposed of. Keystone's operations manager, Michael Bair, testified that all three excess leachate events (what he says are 2018, 2021, and 2024) happened when Keystone was opening up or constructing new cells at the landfill. (T. 1379.) Keystone says the excess leachate during these periods is really just stormwater that is making its way into the leachate collection system. It says it merely opened new cells at bad times when large rain events happened, and even though no waste was in the new cells, it is legally obligated to treat that water as leachate. It also tells us that, once a lot of stormwater enters the leachate collection system, it takes time to bring the levels back down again. Apparently, it can sometimes take years.[5]

[5] No party has explained why, if Keystone's leachate was primarily stormwater uncontaminated by waste, its RO units have had such difficulty treating what is essentially uncontaminated stormwater, or why the RO units' membranes could only treat heavily diluted leachate at 70% efficiency.

Mr. Bair testified that the excess leachate period in the summer and fall of 2018 was because Keystone opened up a new cell in 2018 and received 18 inches of rain. (T. 1379-80.) However, the Department's monthly engineering reports and the September 2018 NOV show that Keystone had already been exceeding its leachate levels on a regular basis for two years before then, with Keystone storing more than 80% of its lagoons' capacity in April 2017. (FOL Ex. 72.) Mr. Bair described the 2018 excess leachate event as a "learning process" to figure out how to best divert stormwater away from the leachate collection system. (T. 1380.) In response to a question from FOL's counsel asking if Keystone, after 30 to 40 years of operating the landfill, still has challenges opening cells in a way to not allow excess water into the leachate collection system, Mr. Bair responded that Keystone is always trying to learn and be better. (T. 1502.)

For the excess leachate in 2021 until 2022, Mr. Bair faults a liner crew for opening up a low spot in a cell before a rain event impeded completion of their work and then pulling out for the winter. Keystone could not repair the low spot until the spring of 2022. (T. 1381-83.) However, Keystone's leachate levels had been elevated since May 2021, long before the onset of winter, possible due in part to the difficulties Keystone experienced with its biologic leachate treatment system in 2021. (T. 579, 1383-88.)

Mr. Bair acknowledges some degree of fault of Keystone for the excess leachate that began toward the end of 2023 and continued through the time of the merits hearing. He said Keystone made a "bad decision" to start placing waste in Phase III before having the rain tarp completed. (T. 1390-91, 1504.) But Phase III operations began in January 2024 and the Department's monthly engineering reports show that leachate levels had been elevated above 25% since the end of October 2023. While the opening of new cells coupled with rain events is undoubtedly a large part of the story, it does not fully explain the ongoing issues Keystone has had managing its

leachate. It appears that the leachate exceedances involve major rain events but also coincide with operational errors or oversights by Keystone. Roger Bellas testified that the extended periods when Keystone has stored leachate in excess of 25% of its total capacity were due to foreseeable events or circumstances. (T. 579.)

During the periods of storing excessive leachate, Keystone has employed somewhat dramatic measures to maintain space in its leachate lagoons and to avoid any overtopping, utilizing more than a million gallons in temporary leachate storage tank capacity and engaging in extensive offsite hauling of leachate to other facilities. FOL and Sierra Club point out that, even when Keystone was deploying emergency leachate reduction measures like hauling and using temporary storage tanks in August 2018 to February 2019, it was still storing leachate in its lagoons above 50% of capacity. (T. 197-98; FOL Ex. 71.) They also highlight periods of time when Keystone has trucked hundreds of thousands of gallons of leachate offsite in a given month, with Keystone hauling as much as 3.6 million gallons of untreated leachate offsite in September 2021. (SC Ex. 6.) FOL and Sierra Club say that there is a risk of spills from trucking leachate, and that it puts more trucks on the roads in addition to the solid waste hauling trucks that already come in and out of the landfill. While there is no evidence of any spill of leachate from any truck, whether that spill would occur while filling or emptying the truck or from any incident on the road, it is a legitimate concern, especially at the volumes that Keystone has had to haul.[6]

Keystone deserves credit for being responsive to conditions, at least remedially, and taking measures to avoid any environmental harm. Keystone has adjusted its operations in response to the influx of stormwater into its leachate collection system. It has previously deployed stormwater

[6] There is no evidence that the leachate hauling trucks have exceeded the overall number of trucks and truck trips that Keystone predicted as part of its Phase III permit application for the waste being hauled into the landfill, or that the trucks are otherwise causing any environmental harm.

diversion berms. Keystone did not implement rain tarping as a best practice following the periods of excess leachate in 2016-2019 and 2021-2022, but it says that, going forward, it has no intention of placing waste in a cell before rain tarping is completed (T. 1400), which seems like a good idea given the difficulty Keystone has had in keeping its leachate levels below the 25% regulatory level. Keystone has also added more treatment capacity and worked to resolve issues with the treatment efficiency of its RO units. It is in the process of adding more storage capacity with two 2.5-million-gallon enclosed tanks. Multiple witnesses of the Department testified that Keystone is generally always responsive when the Department raises any issues. (T. 599, 731-32, 1148.)

The excess leachate generated by Keystone was an issue known to the Department at the time it was reviewing the Phase III permit modification application. Indeed, Erika Bloxham, a facility specialist in the Department's waste program in the Northeast region, and the person tasked with completing the environmental assessment / harms-benefits analysis for the Phase III expansion application, noted the issues with excess leachate generation in her review. (T. 776.) She wrote in her assessment that Keystone's need to haul leachate and add temporary leachate storage over the past few years "has made it apparent that KSL [Keystone] has an issue with either excess leachate generation or stormwater infiltration into the leachate conveyance system." (FOL Ex. 25 (at 13); T. 776.) She reasoned that "[t]hese excess flows increase the potential for the facility to have overflows and other incidents related to the leachate conveyance system which could then potentially lead to groundwater impacts." (*Id.*) Keystone's operations up to the point of the hearing have shown that the leachate has not been appropriately managed, and the measures taken by Keystone in accordance with the permit conditions contained in the Phase III expansion permit have not brought Keystone's leachate management into compliance with the law.

As recognized in the Department's harms-benefits analysis, the excessive leachate generation at the landfill poses a risk to groundwater, and the potential for the lagoons to overtop or any spills to occur also poses a risk to surface water. (*See* T. 794.) Although Keystone has thus far avoided overtopping its leachate lagoons through extraordinary efforts of deploying temporary containment tanks and trucking millions of gallons of leachate offsite, the excessive leachate generation is undoubtedly a problem from a water quality perspective. At times it appeared that Keystone could have been only one large rain event away from being in a situation where it had more leachate than it could handle, even with the temporary tanks and hauling. A municipal waste landfill is required to be operated in a way that prevents the discharge of pollutants to surface or groundwater within or outside of the facility site. 25 Pa. Code § 273.241. Keystone's permit and the conditions contained therein must fully guard against that potential threat.

FOL and particularly Sierra Club also challenge the modeling Keystone undertook to project the maximum monthly leachate generation at the landfill. Under 25 Pa. Code § 273.162(a)(1), a permit applicant must submit with its leachate treatment plan an estimate of its 30-day leachate volume and average flow rate for each month of the year. Keystone utilized the Hydrologic Evaluation of Landfill Performance model (the "HELP model") to perform this estimate. Generally, the HELP model analyzes the stages in landfill development in conjunction with available weather and precipitation data for a region. Keystone estimated that the landfill's maximum daily leachate flow for Phase III would be approximately 127,644 gpd. That estimate puts the 30-day generation rate at about 3.8 million gallons.

In February 2024, a month after Phase III operations began, Keystone reported generating leachate at an average of 282,676 gpd, more than double Keystone's prediction, and nearly 8.2

million gallons of leachate for the month. (SC Ex. 27.) There is a large disparity in the predicted leachate generation and the actual observed leachate generation.

The Department says that the HELP model is more useful for predicting leachate generation at a brand new facility than estimating leachate flows at an existing facility. The Department cites testimony of Department environmental engineer Sam Warmate, who ran his own HELP model to check Keystone's, and stated that the HELP model did not tell the Department anything that it did not already know because of Keystone's existing leachate management system and historical data. (T. 682-84, 743-44.) However, it seems that neither the HELP model nor the Department's analysis of historical data proved an accurate predictor of the leachate that Keystone would generate. If the HELP model is not a tool that is well-suited to projecting flows from an existing facility, the Department's reasoned analysis of historical data did not fare any better.

We do not need to dwell on model calculations for leachate generation when it is clear that Keystone is exceeding both its projection and its capacity for monthly storage and treatment. The monthly leachate generation volumes since the onset of Phase III operations support Sierra Club's expert, Matthew Hodge, P.E.'s opinion that Keystone underpredicted its maximum monthly leachate generation rate, as well as his opinion that offsite hauling of leachate remains likely.[7] One of Mr. Hodge's bottom lines was that, by underestimating leachate generation, Keystone cannot know how much leachate it needs to handle and cannot make good decisions about leachate treatment capacity and leachate storage capacity. (T. 1023.) We do not necessarily think that Keystone has undersized leachate storage or treatment capacity. Its 9.7 million gallons of storage far exceed regulatory requirements, and the fourth RO unit should increase total treatment

[7] Mr. Hodge did not offer an opinion on what a more appropriate daily maximum leachate generation number should be for Keystone's Phase III operations, (T. 1047-48), but we do not think that necessarily matters for purposes of determining that Keystone has exceeded what it is capable of handling.

capacity, if needed, to 360,000 gpd. Instead, all the evidence points to Keystone having operational problems controlling the flows that enter the leachate collection and conveyance system.

Indeed, Keystone's expert witness who prepared the HELP model, Daniel Fellon, P.E., stood by his predicted leachate generation numbers, even in the face of evidence showing that Keystone's leachate generation has far exceeded anything Mr. Fellon predicted. He maintained his conclusion that offsite leachate hauling is not anticipated during Phase III, even though it already had been happening for months, adding the caveat that hauling should not happen so long as Keystone's operations were conducted according to its plans and sequencing. (T. 1280-81.) Mr. Fellon seemingly conceded that Keystone must not have been following its plans when Phase III was opened.

Odors

Pursuant to the regulations, a landfill operator must minimize and control public nuisances from odors through the use of a nuisance minimization and control plan (NMCP). 25 Pa. Code §§ 273.136 and 273.218. A landfill operator is required to "perform regular, frequent and comprehensive site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation." 25 Pa. Code § 273.218(b)(2). The Department retains the discretion to modify the landfill's NMCP or to require the landfill to modify the plan and get approval from the Department. 25 Pa. Code § 273.218(b)(1). Among other measures in Keystone's NMCP regarding odors, it performs odor patrols around the landfill, utilizes a landfill gas collection system, conducts surface monitoring, limits the size of the working face, and aerates the leachate lagoons. (KSL Ex. 25.)

Despite these measures, Keystone has experienced difficulty managing offsite odors. The Department was clearly cognizant of Keystone's issues with managing odors when it issued the Phase III permit modification because it imposed conditions in the permit addressing odor control and/or potential air contaminants. Condition 20 of the Phase III permit requires Keystone to implement additional odor control measures contained in Keystone's approved NMCP, such as monthly monitoring on intermediate slopes and deploying temporary geosynthetic cap on intermediate slopes in place for 12 months. (SC Ex. 1.) These measures apply not only to the Phase III expansion but the ongoing Phase II operations as well. (T. 367-68.) Condition 21 requires Keystone to complete a one-year ambient air monitoring study, installing six air monitoring stations around the perimeter of the site, and submitting to the Department a health risk assessment based on the data from the monitoring stations. (SC Ex. 1.) The study is to be repeated every five years. Condition 22 requires Keystone to implement an approved Subsurface Gas Probe Monitoring Plan, which involves quarterly monitoring of four gas probes to be installed along the southern perimeter of the site. (*Id.*) The plan was required to be in place six months before the start of Phase III operations.

As detailed in the Findings of Fact, there have been stretches of time when Keystone has created numerous offsite odors. One reflection of that is in the odor complaints that the Department has received from the public. The Department has received significant numbers of odor complaints from the surrounding community both leading up to the issuance of the Phase III permit modification and following its issuance. The Department received 38 odor complaints in 2016, and only 12 odor complaints in 2017, but 116 odor complaints in 2018, 74 odor complaints in 2019, 67 odor complaints in 2020, and 46 odor complaints as of May 2021, according to the Department's response to public comments regarding odors during its review of the Phase III

permit application. (T. 213-14, 216, 358; FOL Ex. 26 (at 11).) Between September 2022 and January 2023, the Department received and responded to 233 odor complaints over that five-month span. (FOL Ex. 37.)

Keystone says that not every odor complaint necessarily means that there was an offsite odor from Keystone. It points out that there are several other industrial operations in the vicinity of the landfill. Keystone even speculates that FOL is encouraging its members to lodge baseless, fabricated odor complaints with the Department to undermine Keystone's operation, but there is no evidence of that in the record. (*See* T. 105-06.) Mr. Bellas testified that the Department treats every complaint as valid and he resisted the suggestion that any or a significant portion of the complaints received by the Department were not valid. He stated that Keystone has significant odor problems and the people who have complained to the Department were complaining about real odors they thought were coming from the landfill. (T. 449-50.) Although Keystone highlights odor complaint investigations from the Department where no odor was detected by Department staff, it is not uncommon for complaint investigations to occur the next day or multiple days after receiving a complaint, when an odor that is transient in nature and subject to the direction the wind is blowing is unlikely to still be there. (T. 1150-52, 1167-68; FOL Ex. 52.)

The Department takes the position that, in order to cite a landfill for an odor violation, the odor must be able to be traced back to the landfill and be the result of the landfill not following some provision in its NMCP. (T. 360.) Or, the Department will cite a violation if it determines that there is a malodor, which is essentially an odor noxious enough to cause a public nuisance that is actually smelled by an employee of the Department. (T. 362.) At the time of our 2017 Adjudication on Keystone's renewal permit, the Department had never cited Keystone for an offsite odor violation, despite Department inspection reports noting strong odors and there being

more than 300 citizen odor complaints between January 2011 and October 2016. *Friends of Lackawanna*, 2017 EHB at 1181. At the time the Department issued the Phase III permit modification in June 2021, the Department's position was that it had not confirmed offsite odors in such a number that would be expected if the Keystone Landfill had caused offsite odors on a regular basis, and that Keystone's odor mitigation efforts had been successful. (T. 211; FOL Ex. 26 (Comment Response at 11).) Since that time, the Department seems to have taken a more active enforcement effort and has documented deficiencies in Keystone's management of its site with respect to odors.

The Department has issued three NOVs to Keystone for offsite odors: on January 23, 2023, December 13, 2023, and January 8, 2024. The January 2023 NOV details the results of the Department's inspections from September 2022 through January 2023, primarily in response to odor complaints from the community. (FOL Ex. 37.) On November 9, 2022, in response to multiple odor complaints, the Department determined that there was a landfill gas malodor at multiple homes in Dunmore Borough. On November 15, 2022, in response to multiple complaints, the Department detected landfill gas odors at multiple locations in Scranton and Dunmore. The Department responded to more complaints the next day, November 16, and detected a landfill gas odor along Marshwood Road in Throop Borough. On November 21, the Department conducted an odor patrol in response to multiple odor complaints and detected odors along Marshwood Road and State Route 6. On December 16, the Department responded to an odor complaint and detected a landfill operations-associated odor at the complainant's home and on State Route 6. On December 21, the Department responded to odor complaints from residents in multiple municipalities and found hydrogen sulfide and landfill gas odors and malodors at multiple locations in Dunmore and Throop. On December 23, the Department responded to multiple odor

complaints from the day prior and detected odors along Marshwood Road and State Route 6. On December 28, the Department conducted an odor patrol after receiving multiple odor complaints and detected hydrogen sulfide and landfill gas odors at multiple locations in Dunmore, Throop, and Jessup. On December 30, the Department responded to odor complaints from people in multiple municipalities and detected landfill odors at multiple locations and homes in Dunmore and Throop. During inspections conducted at the landfill on November 21, 2022 and January 5, 2023, the Department found high readings of methane gas at numerous spots at the landfill where intermediate cover had been placed and at the base of some gas collection wells.

In the January 2023 NOV, the Department cited Keystone for several operational failures: failing to implement its NMCP; failing to perform regular inspections for detecting odors; failing to correct problems discovered during inspections; failing to implement its gas management and monitoring plan; allowing the emission of a malodorous air contaminant; failing to prevent and control air pollution; and failing to conduct enhanced surface monitoring on intermediate slopes. (FOL Ex. 37.)

Later in 2023, the Department began to receive another uptick in odor complaints. In an October 30, 2023 letter the Department sent to Keystone, the Department noted that it had received well over 100 odor complaints over the last month and a half. (FOL Ex. 39.) The Department stated that, while it did not detect a malodor in response to the complaints, the Department had regularly found offsite landfill odors, with particularly strong landfill odors along Marshwood Road, the Casey Highway, and Interstate 81. The Department reviewed Keystone's surface monitoring results from July through October 2023 and found that Keystone's surface methane readings had gotten progressively worse. The Department noted in the letter that Condition 20 of Keystone's Phase III permit modification required enhanced surface monitoring on intermediate

slopes in place for more than six months to determine if additional gas mitigation measures need to be implemented in accordance with Keystone's NMCP, and that Keystone's NMCP states that Keystone will deploy emission reduction efforts if surface scan levels of methane exceed 500 parts per million (ppm) or concentrations increase during the monthly scan interval. The Department concluded that both of those triggers had occurred and required Keystone to submit, within five days, information on its surface scans, its evaluation of the surface scan data, whether emission reduction efforts had been triggered, and the identification of areas where intermediate cover had been in place for 12 months or more. After Keystone submitted information to the Department, the Department determined that the information was not fully responsive, was too generalized, and the Department requested Keystone to provide additional information. (FOL Ex. 40.)

In a letter to Keystone dated November 21, 2023, the Department again noted that it had received hundreds of odor complaints and it determined that the majority of the complaints were the result of Keystone's operations, based upon the Department routinely detecting landfill-related offsite odors. (FOL Ex. 41.) The Department's inspection of Keystone from a few days prior found that Keystone's Settlement Accommodation Plan (SAP) areas had "pungent" landfill gas odors similar to the smell of leachate and had numerous methane readings well above 500 ppm. The Department stated that Keystone had failed to maintain operational compliance, particularly with respect to controlling odors from the SAP area, and the Department suspended Keystone's implementation of the SAP and required Keystone to submit a plan within ten days to mitigate and control the ongoing landfill gas odors from the SAP area.

On December 13, 2023, the Department issued an NOV to Keystone, referencing the Department's inspections in November 2023 and twice daily odor patrols since November 16, 2023, and determined that the odors over this period of time, and excessive methane emissions,

were a result of a failure of Keystone's intermediate cover to prevent odors and a failure to properly conduct enhanced surface monitoring. (FOL Ex. 44; T. 220-23, 353-55, 382-83, 1149-50.) The Department requested that Keystone submit a proposed plan and schedule to correct the violation.

On January 8, 2024, the Department issued another NOV to Keystone. (FOL Ex. 46.) The Department stated that it had conducted an odor complaint investigation on December 2, 2023 and detected moderate to strong leachate odors on Cypress Street, Dunmore Street, George Street, Marshwood Road, and South Street, including malodors at the residences of three complainants. The Department noted violations of Keystone allowing the emission of malodorous air contaminants, failing to prevent and control air pollution, and failing to implement the NMCP to minimize and control odors and public nuisances from odors.

On February 1, 2024, the Department issued a letter to Keystone acknowledging the information Keystone had provided in response to the December 13, 2023 and January 8, 2024 NOVs, but stating that the Department had determined that "additional, more immediate, odor mitigation measures need to be implemented." (FOL Ex. 47.) The Department asked Keystone to provide more detail about Keystone's proposed use of temporary geomembrane capping materials, such as the type of geomembrane, the areas where the geomembrane would be utilized, and the conditions that would trigger the use of geomembrane. The Department also wanted more information about immediate measures Keystone could take to control odors since temporary and final capping can be impacted by winter weather. The Department asked for more information about spray-on latex and Posi-Shell materials, any onsite testing of the products that Keystone had conducted, and where and when the materials could be utilized. Finally, the Department asked for an update on deploying foam on the leachate lagoons to control lagoon odors.

Keystone is not wrong in saying that localized odors are a reality at any landfill. But the frequency and duration of odor and malodor events that Keystone has experienced has exceeded an acceptable baseline for normal landfill operations. We do not doubt the complexity of operating a landfill. But the same problems have been occurring for years without being fully controlled by Keystone, despite its efforts, and despite the conditions of the Phase III permit or Keystone's Department-approved NMCP. At the hearing, Mr. Bellas acknowledged that the additional odor mitigation measures imposed in the Phase III permit did not succeed in preventing odors, all but conceding that the Phase III permitting conditions are inadequate. (T. 595-96.) Accordingly, the Department erred in issuing the Phase III permit modification without including measures to do a better job controlling offsite odors.

Consent Order and Agreement and Remand

The odor issues, and to some extent the issues with leachate management, culminated in the Department and Keystone entering into a CO&A on March 29, 2024, a few weeks before the merits hearing, to resolve the violations found by the Department. (FOL Ex. 115.) The CO&A contains extensive provisions for Keystone to manage odors. In addition to a detailed capping and tarping schedule to control odors, the CO&A requires Keystone to apply foam to its lagoons and add a sulfur control additive to control odors from the lagoons. It imposes a requirement for Keystone to install above-ground leachate storage tanks by April 1, 2025. It requires Keystone to use aerial drones at least once per month to conduct surface monitoring, which Keystone has already implemented. (T. 392, 1355-56; FOL Ex. 115.) It requires Keystone to ensure its intermediate cover material meets standards to control odors. It also requires Keystone to revise its NMCP to include the measures contained in the CO&A, and to provide the Department with monthly status reports on Keystone's progress in implementing the corrective measures.

Whether the measures in the CO&A will be successful in controlling offsite odors is unclear. At the time of the hearing, Roger Bellas expressed mixed feelings on the odor control measures. At one point he expressed confidence that the corrective measures would effectively address the odor issues. (T. 355-56.) But when his testimony continued the following day, he said he was not confident that the CO&A measures would work to address odors. (T. 596.) He testified that he was only confident that the odor issue was solved at the moment. (T. 597.) But he expressed optimism that, once Keystone performed some additional studies on the maximum acreage of intermediate cover that can be managed under enhanced surface monitoring, the odors would be controlled. (T. 596-97.)

The CO&A also contains a few provisions addressing the management of leachate at the landfill. (FOL Ex. 115.) For instance, it requires Keystone to make adjustments to its RO treatment system to reduce the amount of concentrate being generated, to install a fourth RO unit (which Keystone had already intended to do), and to evaluate the effect of disposing RO concentrate on the slope stability of the waste mass. It also requires Keystone to evaluate the areas that contribute most to its leachate generation rate and to provide measures to minimize the impact of storm events on the amount of leachate generated. The detailed schedule for installing rain tarp and completing capping of areas in Phase II of the landfill for purposes of odor control should also have the attendant effect of reducing the amount of rain that enters the waste mass. (T. 234-36.)

In light of the ongoing issues with odors and leachate management at the Keystone Landfill, we conclude that the Department erred in issuing the permit modification without appropriate conditions or requirements to effectively manage leachate and control offsite odors. We find it appropriate to remand the permit for further consideration. The Department at the hearing signaled an interest in amending the Phase III permit based in part on what it learns from

Keystone's compliance with the requirements of the CO&A. The Department is already considering modifying the permit to include provisions that are either directly taken from the CO&A, or are a result of Keystone taking steps in complying with the CO&A. (*See* T. 607-08.) Indeed, Mr. Bellas testified, at times in response to questioning from Keystone's counsel, that, if the Department sees issues at a site, the Department has the authority to reevaluate at any time the conditions of a permit and administratively amend that permit, if necessary, to add additional conditions or modify the permit. (T. 418, 423, 644.)

Mr. Bellas testified that, although Keystone must comply with the corrective measures in the CO&A, they are not amendments to Keystone's permit, and they will eventually expire at some point. (T. 607.) We think on remand the Department must take a hard look and assess whether the measures in the CO&A warrant inclusion in the Phase III permit modification. For instance, part of the CO&A requires Keystone to perform studies and keep open lines of communication with the Department to try to determine a maximum acreage of intermediate cover that can be managed so as to ensure that odors are properly controlled. (T. 596-97.) Whatever the appropriate maximum acreage is determined to be could be a worthwhile permit condition.

There are also some items that were addressed at the hearing that are not contained in the CO&A but may nevertheless be measures that should be required as a permit condition or as part of Keystone's operating plans. For instance, it is currently not a requirement of the Phase III permit for Keystone to have rain tarp in place prior to the Department certifying a landfill cell for construction or placement of waste, but Mr. Bellas testified that the Department is going to require that now. (T. 324.) Mr. Bellas testified that merely a verbal communication between Keystone and the Department indicates that Keystone will use rain tarping during all stages of Phase III to keep uncontaminated stormwater out of the leachate collection system. (T. 483-84.) In response

to questioning from Keystone's counsel, Mr. Bellas agreed that this could be made a condition of Keystone's future permit renewal, assuming it is granted. We do not see why what the Department and Keystone believe to be such an important requirement for keeping Keystone's leachate under control should be left to an informal, verbal agreement until that time.

We do not necessarily see why there is any reason to wait for a future permitting action from the Department, for instance on Keystone's renewal application, for appropriate conditions to be imposed or plan amendments to be enacted. Our remand ensures that the Department assesses any appropriate changes in a timely manner. It has been a year since the CO&A was issued and 11 months since Mr. Bellas testified that the Department intended to consider permit amendments based on information provided by Keystone pursuant to the CO&A. (T. 607-08.) It is possible that, at this point, the Department has sufficient information already to make amendments to the permit. Mr. Bellas agreed with a question posed by counsel for FOL that the Department did not have any obligation at that time to consider permit amendments. (T. 608.) Now it does.

Mr. Bellas testified that he felt somewhat responsible for the issues Keystone has experienced since the permit modification was issued, while at the same time also feeling that he could not have foreseen all the things that have happened. (T. 422.) Now on remand the Department can exercise its authority to consider whether the issues identified at the hearing warrant any changes to Keystone's plans or the Phase III permit. It is not for us to decide here in the first instance whether the provisions required by the CO&A, or any other measures, are appropriate requirements to impose as permit conditions. But the Department will have the opportunity to consider whether more lasting measures by way of permit conditions or changes to the plans that are incorporated into the permit are needed.

Harms-Benefits Analysis

Recently, in *Liberty Township v. DEP*, 2024 EHB 36, we explained the harms-benefits analysis as follows:

> Under 25 Pa. Code §§ 271.126 and 271.127, an applicant for a municipal waste landfill must demonstrate that the benefits of a proposed project to the public clearly outweigh the known and potential harms. A permit applicant must prepare an environmental assessment with a detailed analysis of the potential impact of the proposed facility on the public health and safety, as well as a description of the known and potential environmental harms of the facility. 25 Pa. Code § 271.127(a) and (b). The assessment must then include a written mitigation plan that explains how the applicant plans to mitigate each known and potential environmental harm. 25 Pa. Code § 271.127(b). The Department must review the mitigation plans to see if the known and potential environmental harms have been fully mitigated. That is to say, it must ensure that the mitigation measures, individually and collectively, will "adequately protect the environment and the public health, safety and welfare." *Id.* The Department's review is known as the harms-benefits analysis. The harms-benefits analysis also takes into account any social and economic benefits that remain after accounting for the known and potential social and economic harms. 25 Pa. Code § 271.127(c). If a harm has been fully mitigated, it does not factor into the harms-benefits balancing.
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> ….
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> We have held that, when a party challenges the Department's conclusion regarding the harms-benefits balancing test, it is not sufficient to simply have a different opinion about how the balancing could have been done; rather, the party must show that the Department acted unreasonably or violated the law in deciding the result of the harms-benefits balance. *Borough of St. Clair*, 2014 EHB at 96 (citing *Exeter Citizens Action Comm., Inc. v. DEP*, 2005 EHB 306, 328). We have also noted that 25 Pa. Code § 271.127(c) does not require that a landfill cause no harm. *Id.*

Id. at 83, 84-85.

In its analysis of the Phase III permit modification, the Department determined that the following potential environmental harms from the Keystone Landfill remain after Keystone's proposed mitigation: landfill odors, litter, offsite noise, the attraction of vectors and birds, tracking dirt and mud offsite, stormwater runoff during ongoing construction operations, the migration of air pollutants, groundwater impacts, risk of fires and subsurface reactions, and the discharge of treated leachate to the Lackawanna River during combined sewer overflows. (FOL Ex. 25.) The

Department also considered the known social and economic harms of traffic and the visual impact of the landfill from increasing the vertical height of some areas and extending the landfill's existing vertical peak 3,000 feet closer to residential homes. The Department balanced these harms against what it identified as the following known social and economic benefits: recycling and cleanup programs, the purchase of goods and services, continued employment, disposal fees, tax revenue, the PennDOT adopt a highway program, and host agreements with the boroughs of Dunmore and Throop. (*Id.*) Although Erika Bloxham, the Department staff member who wrote the majority of the harms-benefits analysis, determined that the benefits did not clearly outweigh the harms, primarily due to Keystone's leachate management issues, her supervisor, Mr. Bellas, disagreed and he wrote the conclusion of the analysis supporting the issuance of the permit modification. (T. 786, 789-91, 919-20.)

As part of its analysis of groundwater impacts, the Department considered Keystone's excess leachate generation, noting,

> Over the past few years, events involving a leachate conveyance system manhole overflow, the need to add temporary leachate storage and the need to haul leachate offsite to be treated has made it apparent that KSL [Keystone Sanitary Landfill] has an issue with either excess leachate generation or stormwater infiltration into the leachate conveyance system. These excess flows increase the potential for the facility to have overflows and other incidents related to the leachate conveyance system which could then potentially lead to groundwater impacts.

(FOL Ex. 25 (at 13).) The Department stated that, at that time, Keystone continued to have leachate flows that exceeded both what was predicted for the existing landfill and what was predicted for the Phase III expansion. (*Id.* at 14.) The Department detailed measures that Keystone had implemented to try to control stormwater infiltration into the leachate conveyance system, but noted that, "[a]lthough KSL has made progress, based on a review of recent flow amounts, it is apparent KSL continues to have an issue with either excessive leachate generation and/or

infiltration into the leachate conveyance system." (*Id.*) Nevertheless, the Department concluded that Keystone's current and proposed efforts to isolate and mitigate excessive leachate generation were expected to limit the number, duration, and intensity of future excessive leachate flows.

For odors, the Department determined that, based on its past inspections and oversight of the landfill, Keystone was generally operating in compliance with the regulations requiring the control of odors through its NMCP, and that Keystone's odor control measures had been effective. The Department noted in its analysis that many landfills in the northeast region had odor issues in 2018 and 2019 due to wet weather and temperature fluctuations and that Department inspections conducted in April 2019 had found that Keystone's odor mitigation efforts had been successful. Nevertheless, the Department reasoned that Keystone's mitigation efforts, while adequate, would be unlikely to completely eliminate all odors at all times. (FOL Ex. 25 (at 8).)

FOL and Sierra Club assert that the Department erred in concluding that the benefits of the Phase III expansion outweigh the known and potential harms. However, because we have found that the Department erred in concluding that Keystone had adequate operations and nuisance minimization and control plans under 25 Pa. Code §§ 123.32(b), 273.136, 273.218, and 273.275(b), and that additional measures and possibly permit conditions will be necessary to make those plans and the permit acceptable, the existing harms-benefits analysis is obsolete. It will need to be revised to include a consideration of any new plan amendments and permit conditions that the Department may decide are appropriate on remand. Thus, it would be premature for us to weigh in on the harms-benefits analysis at this point and we express no opinion on the Department's overall analysis or its ultimate conclusion.

Article I, Section 27

FOL and Sierra Club argue that the Department violated Article I, Section 27 of the Pennsylvania Constitution in issuing the Phase III permit modification. 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.

In resolving challenges premised on Article I, Section 27, our constitutional analysis begins with first determining whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next, we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Liberty Twp. v. DEP*, 2024 EHB 790, 828 (citing *Stocker v. DEP*, 2022 EHB 425, 445).

For the same reasons that the harms-benefits analysis is obsolete, so too is the Department's analysis under Article I, Section 27 of the Pennsylvania Constitution. The Department's analysis must be revised to include a consideration of any new plan amendments and permit conditions that the Department may decide are appropriate on remand in conjunction with any environmental effects of the Keystone Landfill. Accordingly, our assessment of the Phase III permit modification in light of the Department's duties and obligations under the Pennsylvania Constitution must wait until the Department performs a new analysis on remand.

Compliance History

FOL and Sierra Club argue that Keystone's permit modification should be rescinded because of Keystone's compliance history, or what they argue is Keystone's past and continuing violation of the law, primarily the Solid Waste Management Act, because of Keystone's excess leachate generation, its storage of leachate above 25% of its storage capacity, and its inability to control offsite odors.

We recently addressed the compliance history provisions governing municipal solid waste landfills in *Liberty Township, supra*, 2024 EHB at 128-29, and summarized them as follows:

> Section 503(c) of the Solid Waste Management Act, 35 P.S. § 6018.503(c), provides the Department with the authority to deny a permit to any applicant if the Department finds that the applicant has failed or continues to fail to comply with the Solid Waste Management Act or any other environmental statutes or regulations, or the applicant has shown a lack of ability or intention to comply with the environmental statutes, regulations, or orders of the Department, as evidenced by past or continuing violations. Section 503(d) requires the Department to deny any permit or license required under the Act where the person or related entities have engaged in unlawful conduct "unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected." 35 P.S. § 6018.503(d). The regulation at 25 Pa. Code § 271.125 lists the compliance information to be contained in the permit application.
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> A third-party appellant who would have us overturn a permit based on the compliance history and status of the permittee has a heavy burden. This is an area where the Department has a considerable amount of discretion. *Concerned Citizens of Yough, Inc. v. Dep't of Envtl. Prot.*, 639 A.2d 1265, 1271 (Pa. Cmwlth. 1994). A generalized claim of noncompliance without a showing of specific, concrete problems typically will not suffice. *Friends of Lackawanna*, 2017 EHB at 1178. We consider the totality of the permittee's compliance history to assess whether the party's conduct shows that it cannot be trusted with the permit. *O'Reilly v. DEP*, 2001 EHB 19, 44-45. We consider such factors as the number, duration, and severity of the violations, harm to the environment caused by the violations, and the applicant's efforts to correct the violations. *Id.*, 2001 EHB at 44-46; *Belitskus v. DEP*, 1998 EHB 846, 868-70. The purpose of the compliance review is to ensure the applicant is likely to be responsible enough to be informed of what the law and regulations require and motivated to make an effort to comply with those regulations; an applicant's past is certainly an indicator of future behavior. *See Perano v. DEP*, 2011 EHB 453, 494-97; *Colbert v. DEP*, 2006 EHB 90, 109-10. Section 503 vests the Department with the vital power to screen out bad actors. *Concerned Citizens of Earl Twp. v. DER*, 1994 EHB 1525, 1619.

> Where we have remanded a permit for further consideration of compliance history, it has generally been because the Department did not conduct a thorough review. *See, e.g. Colbert, supra*.

In light of the remand necessitated by the Department's mistaken approval of Keystone's inadequate leachate and odor management plans, the substantial passage of time since the issuance of the permit, and the entry into a comprehensive CO&A, we believe it would be appropriate for the Department to reassess Keystone's compliance history on remand. This will ensure that Keystone can "be trusted with the permit" based on information that is up to date if and when the Department issues a permit modification with revised plans and/or new permit conditions. At this point, particularly in light of the CO&A, we feel comfortable in saying that Keystone's compliance history is not such that it provides an independent justification for overturning, as opposed to remanding, the permit for further consideration. FOL and Sierra Club have not shown that anything in Keystone's compliance history at this juncture requires immediate action from the Board pending remand.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514; 35 P.S. § 6018.108.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Env't Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

3. "The Board's *de novo* review allows it to admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal." *United Ref. Co. v. Dep't of Env't Prot.*, 163 A.3d 1125, 1136 (Pa. Cmwlth.

2017). *See also Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot.*, 316 A.3d 668, 677 (Pa. Cmwlth. 2024).

4. In third-party appeals, an appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

5. An appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

6. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *EQT Prod. Co. v. Dep't of Env't Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Env't Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

7. FOL and Sierra Club have standing as organizations representing the interests of their members who have a direct interest in Keystone's Phase III permit modification. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016); *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *Dengel v. DEP*, 2024 EHB 605, 615-16; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152.

8. An operator of a municipal waste landfill must comply with the plans and specifications in the permit, the terms and conditions of the permit, and the applicable environmental protection acts and regulations. 25 Pa. Code § 273.201.

9. A municipal waste landfill is required to be operated in a way that prevents the discharge of pollutants to surface or groundwater within or outside of the facility site. 25 Pa. Code § 273.241.

10. A landfill must have a plan in place addressing its collection, storage, and treatment of leachate. 25 Pa. Code § 273.162.

11. No more than 25% of a landfill's total leachate storage capacity may be used for flow equalization on a regular basis. 25 Pa. Code § 273.275(b).

12. A landfill operator must minimize and control public nuisances from odors through the use of a nuisance minimization and control plan. 25 Pa. Code §§ 273.136 and 273.218.

13. A landfill operator is required to "perform regular, frequent and comprehensive site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation." 25 Pa. Code § 273.218(b)(2).

14. The Department retains the discretion to modify a landfill's nuisance minimization and control plan or to require the landfill to modify the plan and get approval from the Department. 25 Pa. Code § 273.218(b)(1).

15. The Department has the authority to modify, suspend, or revoke a solid waste management permit. 35 P.S. § 6018.503.

16. FOL and Sierra Club have shown that the Department erred in approving Keystone's Phase III permit modification application and associated plans and issuing the Phase III permit modification because the permit and plans have failed to control offsite odors or the generation of excess leachate at the landfill.

17. The Phase III permit modification necessitates a remand for the Department to consider whether additional conditions or modifications to Keystone's Phase III permit modification or its operating plans are necessary to further control, manage, and/or mitigate offsite odors and leachate generation resulting in Keystone storing leachate in excess of 25% of its total capacity on a regular basis.

18. FOL and Sierra Club have not shown that Keystone's Phase III permit modification should be suspended, revoked, overturned, or vacated instead of being allowed to remain in effect pending remand.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 1st day of April, 2025, it is hereby ordered that the June 3, 2021 major modification to Keystone's Solid Waste Permit No. 101247 for the Phase III expansion of its landfill is **remanded** to the Department for further consideration in accordance with this Adjudication.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Board Member and Judge

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

DATED: April 1, 2025

c: **DEP, General Law Division:**
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(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LLC and JESSE JONES, JONES MANURE HAULING, LLP, and JONES FAMILY FARMS	:	
v.	:	**EHB Docket No. 2023-034-B (Consolidated with 2023-035-B, 2024-119-B, and 2024-121-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THOMAS CLOPPER, ET AL., Intervenors	:	**Issued: April 4, 2025**

OPINION AND ORDER ON
APPELLANTS JESSE JONES', JONES MANURE HAULING, LLP'S, AND JONES FAMILY FARM'S MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

Appellants' motion for summary judgment is denied where the evidence of record sufficiently demonstrates that the Department can make a *prima facie* case that the release of residual waste impacted three private drinking wells.

Background

This matter involves the consolidated appeals of Jesse Jones, Jones Manure Hauling, LLP, and Jones Family Farm (collectively, "Jones") and Barr Farms, LLC ("Barr Farms") of the Department of Environmental Protection's ("Department's") issuance of a Water Supply Notification and Administrative Order. Jones' operations involve the transport of Food Processing Residuals ("FPRs") to Pennsylvania farms where they are stored and eventually applied as fertilizer. On June 30, 2021, Jones transported FPRs via a tanker truck to Barr Farms where a release of the FPRs occurred due to a torn hose. In August 2021 and September 2021, the Department received complaints about contaminated well water from residents located near Barr

Farms. The Department investigated the complaints and concluded the June 2021 FPR release at Barr Farms caused the contamination of the surrounding wells.

On March 22, 2023, the Department issued a Water Supply Replacement Notification ("2023 Notification") to Jones and Barr Farms requiring them to provide a temporary water supply to the impacted residences and to restore or replace the impacted water supplies within 90 days. On August 12, 2024, the Department issued an Administrative Order ("2024 Order") to Jones and Barr Farms for their failure to comply with the 2023 Notification directives. The 2024 Order directed Jones and Barr Farms to pay the costs incurred by the residents for their temporary and permanent water supplies and to replace the water supplies. Both Jones and Barr Farms timely appealed the 2023 Notification and the 2024 Order.

The Board consolidated Jones' and Barr Farms' appeals of both the 2023 Notification and 2024 Order and also granted intervention to Thomas Clopper, Lori Clopper, Anthony Grove, Stacie Grove, Brad Kershner and Kayla Kershner (collectively, the "Residents"), the impacted residents, allowing them to participate in the consolidated appeals. After granting several extensions of prehearing deadlines, discovery was completed on November 19, 2024 with the exchange of expert reports. Jones filed its Motion for Summary Judgment (the "Motion") on December 18, 2024, and Barr Farms filed a Memorandum in Support of the Motion on January 2, 2025. The Board granted a joint request to extend the deadlines to submit responses and replies to the Motion. The Department and Residents filed their respective responses on February 3, 2025, and Jones submitted its reply brief on March 5, 2025. The briefing in this matter is now complete and the matter is ripe for decision.

Standard of Review

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of

material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Protect PT v. DEP*, 2024 EHB 683, 684 (*citing Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 351–52). Summary judgment may also be available:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pileggi v. DEP, 2023 EHB 288, 290 (citing Pa. R.C.P. No. 1035.2(2)).

In other words, the party bearing the burden of proof must make out a prima facie case. *Dengel v. DEP*, 2024 EHB 605, 608. In a motion for summary judgment challenging whether there is sufficient evidence to make out a *prima facie* case, the Board will not gauge the quality of the evidence but will simply determine whether there is enough evidence to form a *prima facie* case. *Sunoco Pipeline, L.P. v DEP*, 2021 EHB 43, 51 citing *Diehl v. DEP and Angelina Gathering Company, LLC*, 2018 EHB 18, 24. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, 2024 EHB 318, 319. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Id*. at 99 (citing *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587).

Analysis[1]

The consolidated appeals of Jones and Barr Farms challenge the Department's issuance of the 2023 Notification and the 2024 Order. The Department issued the 2023 Notification and the

[1] Barr Farms filed a short Memorandum of Law in which it concurred in Jones' assertions and with the conclusion that the Board should grant Jones' Motion. Because Barr Farms did not add any new arguments to those set forth by Jones, we will not separately discuss Barr Farms' position in this Opinion. Our discussion on Jones' positions should be read as inclusive of Barr Farms' positions in this matter.

2024 Order based on its determination that a release that took place while Jones was transferring FPRs from a truck to a tank on Barr Farms' property that ultimately caused contamination of the Residents' water wells. In its brief accompanying its Motion, Jones sets forth the issue as "[w]hether Jones is entitled to summary judgment on its appeal where the DEP water replacement directives are the product of legally insufficient expert factual and scientific causal speculation and conjectures", asserting that this question should be answered in the affirmative. (Jones' Brief at 12). Specifically, Jones argues that the Department failed to properly investigate the release and, therefore, the Department relied on impermissible speculation and conjecture to arrive at its conclusion that Jones caused the contamination of the Residents' wells. (Jones' Brief at 15). The gist of Jones' argument is that the Department relied on a report from its expert, Tim Long ("Mr. Long"), to establish causation and, because the report is full of speculation resulting from the alleged shortcomings in the investigation, the Department has not established its *prima facie* case, therefore making summary judgment appropriate under Pa. R.C.P. §1035.2. Jones alleges that the investigations shortcomings include 1) the failure to test the released material; 2) failure to investigate the hole found near the release to determine whether the FPRs actually reached bedrock or groundwater and; 3) the failure to perform a dye test to demonstrate the actual flow of either water or the released material from Barr Farms. Jones also argues that the Department disregarded a different potential contamination source and points to a field located closer to the Residents' wells than that of the site of the release. That field received an application of biosolids only days before the Residents' reported the contamination. (Jones' Brief at 19).

The Department argues that Jones' Motion should be denied, stating that there are genuine issues of material fact in dispute and that Jones has not established that it is entitled to judgment as a matter of law. (Department's Brief at 16). The material facts that the Department asserts are

in dispute include the size of the FPR release, the potential impact of the application of biosolids to the nearby farm field, and related testing in the Residents' water wells. The Department also notes that there is a mixed factual and legal dispute about whether the release of the FPRs should have been reported to the Department pursuant to the residual waste regulations. However, the focus of the argument is centered on the Department's investigation and the expert testimony of Mr. Long. The Department states that Jones disregards the full record of material facts, including the documents the Department relied on in finding that the FPR release caused the contamination of the water wells. According to the Department, Mr. Long considered a number of factors in reaching his professional opinion regarding the cause of the contamination. The Department states that while Jones raises a facial challenge to Mr. Long's expert report, Jones does not challenge the validity of the data underlying his report.

In their brief, the Residents assert that Jones' Motion should be denied because the Department has made out a *prima facie* case. They argue that the Department's evidence shows that an unreported release of FPRs took place and that it adversely impacted the Residents' private water supplies. They cite various lines of evidence that they contend support the Department's determination including their own expert report that concludes that the probable source of contamination of their residential potable wells was the accidental release of FPRs. (Residents' Response, Ex. 2 at 21). The Residents specifically state that the available evidence contradicts Jones' position and instead supports the Department's decision to exclude the spreading of the biosolids, FPR land application, and/or a sewer source as the cause of the well contamination. The Residents also argue that the Board should reject Jones' argument that claims the Department's investigation was insufficient because it failed to test the released FPRs, pointing out that the Department was unable to test those FPRs specifically because neither Jones nor Barr Farms timely

reported the release. They characterize Jones' arguments as flawed and state that the challenges Jones raises pertaining to the expert report create issues that require further development of the evidentiary record.

A prima facie case in this instance requires evidence demonstrating that 1) Jones and Barr Farms released a waste material into the environment; 2) the Residents' wells are contaminated and; 3) the release of the waste material caused the contamination of the Residents' wells. Although Jones repeatedly uses the term "alleged" in its Motion when discussing the FPR release and the well contamination, it does not directly challenge the evidence that supports a finding that a release occurred or that the Residents wells are contaminated. (See Jones' Statement of Undisputed Facts, ¶¶ 6, 9). In their responses, both the Department and the Residents cite evidence of the release and the contamination. When we view the evidence in the light most favorable to the non-moving parties, as we are required to do in evaluating a summary judgment motion, we find that there is sufficient evidence for the Department to establish a prima facie case for the occurrence of a release and for the Residents' contaminated wells.

Here, the central issue of the Motion is causation, the third requirement the Department needs to establish a prima facie case in this matter. Causation in a water contamination case is frequently the most complex issue faced by the parties. In this case, all parties agree that expert testimony is necessary for the Board to rule on the issue of causation. Jones' Motion rests on its argument that the Department failed to demonstrate that the June 30, 2021 release caused the contamination of the wells because, according to Jones, the Department's determination relies on speculation and conjecture from its expert Mr. Long. Jones argues that the Board, as the fact finder in this case, is not permitted to rely upon speculation and conjecture to find Jones responsible for the water well contamination and cites several Pennsylvania Superior court cases to support this

assertion, including *Krishack v. Milton Hershey Sch.* 145 A.3d 762, 766 (Pa. Super. 2016). They further argue that an expert report that uses phrases like "possibly", "more likely than not", "could have", etc., to describe the actions of a party who is found to be responsible for an injury, is legally insufficient to satisfy the burden of proof as to causation. (Jones' Brief at 14). Jones states that a "mere common sense reading of Mr. Long's analysis reveals DEP's contrived endeavor to hold Jones and Barr financially responsible for something they did not do." (Jones' Reply Brief at 5).

In light of Jones' arguments, we turn our attention to Mr. Long's expert report, attached as Exhibit 13 to the Motion. Mr. Long signed his report, listed his title as a Licensed Professional Geologist, and placed his Commonwealth of Pennsylvania Registered Professional Geologist stamp on the report. The Motion does not challenge Mr. Long's professional qualifications. Mr. Long's expert report consists of a lengthy narrative along with multiple figures, attachments, including inspection reports and sample results, and two tables summarizing sample results. In his report, Mr. Long discusses the geologic setting at Barr Farms, the FPRs' nature, FPR sample results collected at Barr Farms, the June 2021 release, the weather conditions of the relevant area, the Residents' wells, including video from the wells, water supply impacts, and well sample results from the water wells. Mr. Long's report concludes with a summary that includes 34 bulleted statements and his expert opinion. Mr. Long does not explain the bulleted items but these statements appear to set forth facts the Department determined during its investigation and that Mr. Long subsequently relied on in forming the basis for his conclusion. (Jones Ex. 13 at 21-22). At the end of the narrative, Mr. Long sets forth his expert opinion as follows:

> Given the nature of the bedrock, the nature of the waste, the residual waste sludge spill, the subsidence features at the Barr Farm Front Tank, the amount of precipitation experienced while the residual waste was on the ground and entering the subsurface, the facts that water supply complaints only began after the spill occurred, the similar chemical signatures of the spill material and the Grove and

> Kershner well water sample results, the similarity of materials in each well as shown on the downhole videos, the similar descriptions of well water quality by the homeowners, and the timing of the residential well impacts, it is my professional opinion, to a reasonable degree of scientific certainty, that the material spilled onto the ground at the Barr Farm Tank on 6/30/2021 entered a sinkhole and adversely affected the Grove, Kershner and Clopper wells.
>
> (Jones Ex. 13 at 23-24).

Following the narrative portion of his expert report, Mr. Long includes references, his qualifications, maps, aerial views of the area of investigation, photographs, Department inspection reports, correspondence, analytical reports, weather data, and well reports. This information is referenced within the narrative portion of Mr. Long's report.

In its Motion and Reply Brief, Jones repeatedly calls Mr. Long's expert report speculative but cites only a limited number of specific statements in the report in support of that position. Jones directly challenges Mr. Long's discussion of the alleged hole near the tanks at Barr Farms that the Department concluded was a conduit for the FPR release. Mr. Long notes in his report that the Department observed spillage of FPRs during its initial inspection and goes on to state that "[d]uring follow-up Department inspections on 9/9/2021 and 9/10/2021, Department inspectors found a hole in the ground along the outside edge of the Front Tank […]. The hole was obscured by vegetation and had not been previously noted by the Department." (Jones Ex. 13 at 5). Shortly after this statement, Mr. Long goes on to state "[c]onsidering the location of the truck unloading area in relation to the sinkhole, it is possible that sludge was pumped directly into the sinkhole from the 'ruptured hose.'" (Jones Ex. 13 at 5). Jones argues that these statements rely on the speculative assumption that the hole existed prior to when the Department observed it on September 9th and 10th, 2021 and, furthermore, Mr. Long's conclusion that the FPRs were pumped directly into the sinkhole is sheer conjecture and speculation. (Jones' Brief at 17). Jones also

asserts that Mr. Long elevated the hole to a sinkhole despite their being testimony from other Department staff that conflicts with Mr. Long's determination. Other various Department personnel described it as a hole (Mr. Sweeney) and a groundhog hole (Ms. Fleming). (*Id*.).

Jones' position ignores other statements in Mr. Long's report that tend to support his conclusion about the existence and nature of the hole and the role it played in allowing the FPR release to reach the Residents' wells. In the same section of the report previously quoted in this Opinion, Mr. Long states "[p]hotos taken on 9/9/2021 and 9/10/2021 (Figures 12-15) show that the release material had flowed and/or washed into the hole and the hole was approximately 3-4 feet long, 2 feet wide, and 2 feet deep. The Department inspector also noted these approximate hole dimensions in the general inspection report and that there was release material observed in the bottom of the hole. (Attachment 8)." (Jones' Ex. 13 at 5). The cited dimensions certainly do not suggest a groundhog hole. In other portions of his report, Mr. Long cites to the geologic setting and notes that the formation underlying Barr Farm and the Residents' homes is very prone to sinkholes and subsidence features. (Jones' Ex. 13 at 2). He then discusses the fact that Barr Farms is seated in a major karst region and further states that, based on his personal observation of the topography at Barr Farm, the area is a well-developed karst terrain. (*Id*. at 3). Our reading of the report leads us to conclude that there is sufficient factual evidence supporting Mr. Long's position and, moreover, the Department's prima facie case on this issue. As to the ultimate outcome, it would be best for the Board to hear testimony from the parties' experts before making any decisions on this issue.

Jones also presents an alternate theory of the source for the contamination found in the Residents' wells. Jones asserts that Waynesboro Municipal Waste Authority spread a total of 486,000 gallons of biosolids at Barr Farms on Field R4 in June 2021 and early August of 2021.

(Jones' Statement of Undisputed Facts, ¶ 8.). In their responses, both the Department and the Residents denied this assertion as stated. (Department's and Residents' Responses to Jones' Statement of Undisputed Facts, ¶ 8). They assert that Jones' statement does not accurately describe the location where the biosolids were spread. The Department notes that the biosolids were spread on Frank Barr Farm 2 Field R4 rather than Barr Farm 1 which is the farm at issue in this case. The Department also states that the Frank Barr Farm 2 is located further east of Barr Farm 1. The Residents note that Field R4 is located south and east of their properties whereas the location of the FPR release took place to the north of their properties. In its Brief, the Department points to testimony from Department employee, Carrie Fleming. Her testimony provides that the Department tested the Residents' wells for a common contaminant from a sewer source and found nothing, leading the Department to rule out septage as a source. (Department's Brief at 10). Overall, the parties' positions demonstrate that there are issues of material fact on what role, if any, the spreading of the biosolids may have played in the contamination of the Residents' wells. That dispute does not support the granting of the Motion.

As we stated previously, the other issues raised in the Motion focus less on what is in Mr. Long's report and more on what is not in the report and, further, what was not part of the Department's investigation. Jones discusses both the Department's failure to test the FPRs released on June 30, 2021 and the lack of any dye testing which Jones claims would have demonstrated the actual flow of the FPR release and/or water from Barr Farms. (Jones' Brief at 15). The Department does not dispute that it neither sampled the FPR release nor conducted a dye test.

The Department does not offer a reason why it chose not to directly test the FPR release. There is no dispute that any testing would have taken place several weeks after the release given

that the Department's initial inspections of the release site took place in late August 2021 and early September 2021. Perhaps, as the Residents suggest, the amount of rain between the time of the release and the dates of the inspection may have made any test results unreliable. We simply do not know the Department's reasons and look forward to further testimony on this issue. However, we ultimately view this issue as going to the outcome in this case and whether the Department will be able to prevail in meeting its burden rather than sufficient to show the lack of a prima facie case. In *Sunoco*, we noted that the Department's case would certainly have been stronger if the Department had completed an on-site investigation but, nevertheless, we found that viewing the record in the light most favorable to the Department, as we are required to do when ruling on a summary judgment motion, there was sufficient evidence for the Department to establish a prima facie case. (*Sunoco*, 2021 EHB at 51). We think that the same can be said about this case. Jones will have the opportunity at a hearing to present its arguments about the lack of certain actions by the Department and, the Board, after weighing the evidence, including any expert testimony that the parties choose to present, will decide whether the Department has met its burden of proof in this case.

When we review Mr. Long's report in its entirety, along with the undisputed facts and other information submitted by the parties, we conclude that the Department has adequately established a prima facie case to prevail over Jones' Motion. Specifically, the Department has put forth evidence on the issue of causation that is sufficient for us to rule in the Department's favor. That is not to say that the Department will prevail in this case after a hearing. This matter is the type of complex case where the Board will benefit from the development of a full evidentiary record, including the evaluation of the credibility of the witnesses. Post-hearing briefing will give the Board the opportunity to hear and consider the legal arguments of the parties on a complete record.

There also appears to be several material facts that the parties dispute, making it inappropriate for the Board to grant summary judgment in this case.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LLC and JESSE JONES, JONES MANURE HAULING, LLP, and JONES FAMILY FARMS	:	
v.	:	**EHB Docket No. 2023-034-B (Consolidated with 2023-035-B, 2024-119-B, and 2024-121-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THOMAS CLOPPER, ET AL., Intervenors	:	

O R D E R

AND NOW, this 4th day of April, 2025, the Jones' Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: April 4, 2025

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHERYL L. PARKS	:	
	:	
v.	:	**EHB Docket No. 2025-012-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 2025**

OPINION AND ORDER
DISMISSING APPEAL

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

Synopsis

The Board dismisses an appeal where the appellant has not perfected her appeal and has not responded to a Board Order or Rule to Show Cause.

O P I N I O N

On March 4, 2025, we received by mail a notice of appeal from Cheryl L. Parks of Stroudsburg, PA, proceeding *pro se*. The notice of appeal form said she was appealing Chapter 102 and 105 permits issued by the Department of Environmental Protection (the "Department") for a warehouse in Pocono Township, Monroe County. Ms. Parks stated that she did not receive any notice of the Department action under appeal. She said that the warehouse is near her property and she expressed concern about a loss of forest associated with the project and potential impacts on wildlife, aquatic life, wetlands, and water quality. However, in her notice of appeal she did not identify the name or address of the facility, the name of the owner, operator, or permittee of the facility, or any specific information about the permits she was appealing. She also did not indicate that she served her notice of appeal on the permittee of the facility or on the Department.

On March 7, 2025, we issued an Order requiring Ms. Parks to perfect her appeal. In the Order we requested that she supply a description of the action under appeal and provide the name of the permittee and the facility. We also requested that she serve her appeal on the Department and on the permittee. In our Order we informed Ms. Parks that failure to supply this information could result in the dismissal of her appeal. We requested that she provide the Board with the information by March 28, 2025.

When March 28 passed without receiving anything from Ms. Parks, we issued a Rule to Show Cause on April 7, 2025 asking again that she provide the necessary information for the perfection of her appeal, including a description of the action under appeal with the name of the permittee and the permitted facility, and proof of service of the appeal on the Department and the permittee. We again advised her that her appeal could be dismissed for failing to comply. We set a deadline of April 22, 2025 to provide the information. As of this date, Ms. Parks has not responded to our Order or our Rule to Show Cause.

"An appellant's perfection of its appeal is an important step in proceeding in front of the Board." *White Tavern v. DEP*, 2022 EHB 180, 182. Obviously providing enough information for us to figure out what exactly is being appealed is an important component of a notice of appeal. The Environmental Hearing Board is an agency independent of the Department of Environmental Protection. We are not aware of all the numerous actions, permitting or otherwise, taken by the Department across the Commonwealth. We do not know what warehouse in Pocono Township is being challenged or what permits are being appealed without being supplied that information by Ms. Parks.

As we stated recently in *Wilkinson v. DEP*, 2024 EHB 401, another case where an appellant did not perfect its appeal despite being ordered to do so:

> This Board may impose sanctions – including dismissal of the appeal – for failure to comply with our orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Dismissal is warranted where the Appellant clearly demonstrates a lack of intent to pursue the appeal by failing to comply with Board orders. *Blackwood v. DEP*, 2020 EHB 442; *Scottie Walker v.* DEP, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628; (citing *Bishop v. DEP*, 2009 EHB 260; *Miles v. DEP*, 2009 EHB 179; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 396; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54).

Id. at 402. Having failed to provide us with the information necessary for the perfection of her appeal for nearly two months and having failed to comply with our Order and Rule to Show Cause, Ms. Parks has indicated that she has is not interested in pursuing this appeal. Accordingly, we dismiss this appeal and issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHERYL L. PARKS	:	
	:	
v.	:	**EHB Docket No. 2025-012-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of May, 2025, it is hereby ordered that the Appellant's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Board Member and Judge

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

DATED: May 5, 2025

c: **DEP, General Law Division:**
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(*via electronic mail*)

DEP, Office of Chief Counsel:
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(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE, MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK	:	
v.	:	**EHB Docket No. 2023-026-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: May 16, 2025**

ADJUDICATION

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

Synopsis

The Board dismisses an appeal of two water obstruction and encroachment permits and one erosion and sediment control permit for a natural gas pipeline project where the appellants have not produced evidence showing that the permits and associated plans fail to adequately protect and restore any impacted resources, or that there is any specific harm to any of the streams or wetlands affected by the project. The appellants have not shown that it was unreasonable for the Department to not require the permittee to obtain baseline water quality data for every affected water resource before construction work began.

FINDINGS OF FACT

1. Appellant Citizens for Pennsylvania's Future ("PennFuture") is a Pennsylvania nonprofit environmental advocacy organization with offices in Harrisburg, Philadelphia, Pittsburgh, Erie, and East Stroudsburg, Pennsylvania. (T. 31-32.)[1]

[1] Citations to the record cited as: Parties' Stipulation No. ("Stip. __."); Transcript of Testimony Page No. ("T. __."); Carolyn Lange Deposition Transcript Page No. ("L.T. __."); Dr. Alexander Jackson Deposition

2. Appellant Delaware Riverkeeper Network (the "Riverkeeper Network") is a nonprofit organization established in 1988 to protect, preserve, and enhance the Delaware River, its tributaries, and habitats. (T. 48-50.)

3. Appellant Maya van Rossum, the Delaware Riverkeeper, is the Executive Director of the Riverkeeper Network. (T. 48-50.)

4. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the executive branch agency responsible for administering the environmental protection laws of the Commonwealth, including the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001; and their implementing regulations.

5. The permittee is Transcontinental Gas Pipe Line Co. ("Transco"), a subsidiary of The Williams Companies, Inc. (T. 664.)

6. Transco's Regional Energy Access Expansion Project (the "Project") is an expansion and increase in capacity of an existing interstate natural gas transmission system that consists of mainline construction, ancillary components, temporary access roads, permanent access roads, and contractor yards in Pennsylvania, New Jersey, and Maryland. (Stip. 1; T. 667, 684-85.)

7. In Pennsylvania, construction of the Project included constructing two new pipeline segments, among other facilities. In Luzerne County, the Project included construction of 22.3 miles of a 30-inch diameter pipeline, which is referred to as the "Regional Energy Lateral." In

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Transcript Page No. ("J.T. __.") Parties' Joint Exhibit No. ("Jt. Ex. __."); Appellants' Exhibit No. ("App. Ex. __."); Department Exhibit No. ("DEP Ex. __."); and Transco Exhibit No. ("Tr. Ex. __.").

Monroe County, the Project included construction of 13.8 miles of 42-inch diameter pipeline, which is referred to as the "Effort Loop." (Stip. 2; T. 337, 685; DEP Ex. 1.)

8. Approximately 78-percent of the Project is collocated with existing pipelines constructed in the 1950s, 1960s, and 1980s, and overlapping with existing utility rights-of-way. In Luzerne County, the Regional Energy Lateral is 59-percent collocated with Transco's existing Leidy A Line. In Monroe County, the Effort Loop is 100-percent collocated with Transco's Leidy Line. (Stip. 3, 4; T. 514, 636, 866-68, 926-27, 1188; Jt. Ex. 7, 8, 11.)

Standing

9. PennFuture has a local mission in the Northeast region to protect the headwaters of the Delaware River with a particular focus on protecting and conserving Exceptional Value ("EV") and High Quality ("HQ") streams, which are concentrated in the Poconos region. (T. 32.)

10. PennFuture employs a civic engagement organizer based in Luzerne County who also does work in Monroe and Pike Counties. (T. 33.)

11. PennFuture started the "Our Pocono Waters" campaign in 2018, bringing together businesses, organizations, and local officials to educate the region on the importance of EV streams. It estimates engaging more than 3,500 people as part of this campaign. (T. 34.)

12. PennFuture has done stream mapping, held many events, and monitored projects adjacent to or on EV streams in the region to ensure that those streams are being protected. (T. 34.)

13. PennFuture has submitted public comments on Transco's Project at least four different times since 2020, including comments to the Department on the applications for Transco's Chapter 102 and Chapter 105 permits. (T. 38, 45-46; Jt. Ex. 2, 3.)

14. PennFuture has also engaged its membership about the Project to update its members on the development of the Project and to inform them about opportunities to comment. (T. 38.)

15. As of September 2024, PennFuture had around 830 members, including members in Monroe County and Luzerne County. (T. 35-36, 42.)

16. Carolyn Lange has been a continuous member of PennFuture since 2018 and is a monthly donor. She is also a monthly donating member of the Riverkeeper Network. (T. 37; L.T. 50-52, 54, 59.)

17. Ms. Lange lives in Saylorsburg, Ross Township, Monroe County, and has lived there since 1987. She lives a couple miles from Transco's construction. (L.T. 21-22, 30.)

18. Ms. Lange uses McMichael Creek for recreational purposes, like hiking, birding, and sometimes fishing, and she uses Pohopoco Creek for kayaking as well as hiking and birding in the area. (L.T. 35-38.)

19. Transco's Project crosses unnamed tributaries to both Pohopoco Creek and McMichael Creek. (Jt. Ex. 37; DEP Ex. 27w.)

20. Pohopoco Creek is an area of concern for Ms. Lange because the pipeline crosses it and she believes there will be inherent disturbances to the resource from the crossing. (L.T. 31-32.) She is concerned about tree cutting, stream crossings, silt pollution, macroinvertebrate disturbances, trout fishery habitat disturbance, thermal degradation, habitat fragmentation, and preserving water quality. (L.T. 20-21, 44-46, 76-77, 79.)

21. Ms. Lange likes to recreate in Chestnuthill Park and the West End Regional Park, which she and her husband use for hiking, birding, exercising, and enjoying nature, and have enjoyed for many years. (L.T. 39-41.)

22. Transco's Project crosses through the Chestnuthill Park and passes within a tenth of a mile of the West End Regional Park. (Jt. Ex. 26, 37.)

23. Ms. Lange has avoided going to the West End Regional Park because she did not want to observe Transco's construction. She and her husband have generally avoided areas where Transco's construction was happening because it was emotionally trying for them. (L.T. 42-43, 103-04.)

24. The Riverkeeper Network does educational work teaching people about the Delaware River watershed and its tributaries, the values of the environment, and any existing threats to the watershed. It has also done education work and programs about special protection waters, including the importance of HQ and EV streams and wetlands in the northern part of the Delaware River. (T. 50-51, 61-62, 64-65.)

25. The Riverkeeper Network has a scientific monitoring program with staff scientists and volunteers performing data collection, collecting water samples, documenting aquatic life, and taking pictures and videos. (T. 51-52.)

26. The Riverkeeper Network has been active in the Our Pocono Waters campaign with PennFuture. (T. 63-64.)

27. The Riverkeeper Network has also been involved in matters concerning threats of harm to the waterways in Northeastern Pennsylvania in Monroe County and in the Delaware River watershed portions of Luzerne County and Northampton County addressing warehouse and pipeline projects. (T. 64.)

28. The Riverkeeper Network has drafted testimony with organizational partners concerning Transco's Project, created educational programming for its members and the

community to help them understand the Project, and distributed alerts to encourage its members and the community to participate in the permitting process. (T. 66-67.)

29. The Riverkeeper Network also testified at public hearings and submitted comments to the Department on the applications for the permits under appeal. (T. 83; Jt. Ex. 2, 3.)

30. Transco and the Riverkeeper Network had a meeting together before the permit applications were filed where Transco sought the Riverkeeper Network's input on the Project. (T. 71-72, 89, 668.)

31. The Riverkeeper Network was also involved in the proceedings before the Federal Energy Regulatory Commission (FERC) regarding the Project. (T. 67-68.)

32. Dr. Alexander Jackson has been a donating member of the Riverkeeper Network since around 2023, but previously volunteered with the organization to help with monitoring events in the area from around 2021. (T. 59; J.T. 52-53, 104.)

33. Dr. Jackson has lived in Blakeslee, PA in Tunkhannock Township, Monroe County since 2015, about 1,300 feet from the right-of-way or edge of disturbance for Transco's pipeline work. (J.T. 15, 17.)

34. Dr. Jackson could not access the trails near his house where he hikes and walks his dog during most of 2023 because he would have had to cross the pipeline right-of-way to access the trails and it was not possible with Transco's construction work. (J.T. 23-26.)

35. Dr. Jackson fishes in the area of the confluence of Poplar Run and Pohopoco Creek in Monroe County. (J.T. 86.)

36. He testified about a sediment pollution event in Poplar Run upstream of where he fishes, which he believed was from Transco's construction, and which caused him concern. (J.T. 43-47.)

37. Wetlands in the McMichael Creek watershed and in the Tunkhannock watershed that Dr. Jackson visits and uses for recreation were impacted by the Project. (J.T. 87.) The wetland in the Tunkhannock watershed had black gum trees that Dr. Jackson enjoyed; the wetland was impacted by the Project and is not there anymore. (J.T. 87-88.)

38. Dr. Jackson also keeps bees. Transco's Project affected what he estimated to be a 30-acre swath of goldenrod when Transco cleared the right-of-way that the bees would use for nectar and pollen, and he has had to supplement their food with cane sugar to keep the bees alive. (J.T. 32-37.)

39. Dr. Jackson also uses Bear Creek and Shades Creek in Luzerne County for recreational purposes. (J.T. 107-08.)

40. Portions of Transco's Project are located within the Shades Creek and Bear Creek watersheds and the Project affects Bear Creek and its unnamed tributary and Shades Creek and eight of its unnamed tributaries. (Jt. Ex. 35 (at 12-13); DEP Ex. 26w.)

Transco's Project

41. On March 26, 2021, Transco filed an application with FERC pursuant to Sections 7(b) and 7(c) of the Natural Gas Act, 15 U.S.C. § 717f, and Part 157 of FERC's regulations, 18 C.F.R. Part 157, requesting authorization to construct and operate the Project. (Stip. 5.)

42. On April 9, 2021, FERC determined that an Environmental Impact Statement ("EIS") should be prepared for the Project. (Stip. 7; T. 685.)

43. FERC issued a Certificate Order on January 11, 2023, *Transcon. Gas Pipeline Co., LLC*, 182 FERC 61,006 (2023), which authorized Transco to construct and operate the Project as described and conditioned in the Certificate Order. (Stip. 12, 13; Tr. Ex. 1.)

44. The recommended environmental conditions in the Final EIS were included as conditions in Appendix B of the Certificate Order. (Stip. 14.)

45. As a condition of the Certificate Order, Transco was required to obtain certain federal authorizations for the Project. (Stip. 15.)

46. One of the required federal authorizations for the Project in Pennsylvania was a Water Quality Certification under Section 401 of the Clean Water Act ("Section 401 Water Quality Certification"), 33 U.S.C. § 1341, which is issued by the Department. (Stip. 16; T. 683.)

47. Transco submitted an application to the Department for a Section 401 Water Quality Certification on March 31, 2021 and subsequently responded to a January 7, 2022 technical deficiency letter from the Department by submitting a revised application on March 2, 2022. (Stip. 17.)

48. The Department issued the Section 401 Water Quality Certification to Transco on March 30, 2022. 52 Pa.B. 2287 (Apr. 16, 2022). (Stip. 18.)

49. The Section 401 Water Quality Certification requires Transco to obtain an Erosion and Sediment Control Permit under 25 Pa. Code Chapter 102, and Water Obstruction and Encroachment Permits under 25 Pa. Code Chapter 105. (Stip. 19; T. 683, 689.)

50. Transco submitted applications for an Erosion and Sediment Control Permit and Water Obstruction and Encroachment Permits in connection with the Project to the Department on April 9, 2021. (Stip. 20.)

51. On February 3, 2023, the Department issued Erosion and Sediment Control Permit No. ESG830021002-00 (the "Chapter 102 permit") and Water Obstruction and Encroachment Permit Nos. E4083221-006 and E4583221-002 (the "Chapter 105 permits") to Transco for the Project. Separate Chapter 105 permits were issued for Luzerne County and Monroe County. The

Chapter 102 permit and Chapter 105 permits are collectively referred to as the "permits." (Stip. 23; Jt. Ex. 31, 32a, 32b.)

52. Utility line stream crossings are typically regulated by a general permit, but Transco's Project required individual permits because it proposed to cross EV wetlands and streams, which the Department reviews with additional scrutiny. (T. 1114-15, 1133-35.)

53. On March 23, 2023, FERC issued a Notice to Proceed authorizing Transco to commence construction of all components of the Project in Pennsylvania, New Jersey, and Maryland. *See* FERC Notice to Proceed (Mar. 23, 2023), FERC Document Accession Number 20230323-3094. (Stip. 27; Tr. Ex. 5.)

54. Transco completed pipeline construction in October 2023. (Stip. 28, 29.)

55. Following the completion of work on certain compressor stations and metering and regulating stations, Transco received approval from FERC on July 26, 2024 to place the Project into full service. Transco commenced full Project service on August 1, 2024, meaning gas is flowing through the pipelines. (Stip. 30, 31; T. 676-77, 679-82, 690; Tr. Ex. 7.)

56. In Pennsylvania, Transco's Project disturbed 262.2 acres of land in Monroe County and 405 acres in Luzerne County. (Jt. Ex. 8, 10.)

57. A total of 108 wetland complexes are traversed by the Project in Luzerne County, with 42 of them being EV wetland complexes, and 18 wetland complexes are traversed by the Project in Monroe County, with 16 of them being EV. (Jt. Ex. 35, 37.)

58. The Project crosses 19 named and classified streams along with many of their unnamed tributaries in Luzerne County for a total of 76 stream and floodway crossings. The Project crosses six named and classified streams along with several of their unnamed tributaries in

Monroe County for a total of ten stream and floodway crossings. (Jt. Ex. 32a, 32b, 35, 37; DEP Ex. 26w, 27w.)

59. Thirty-eight of the streams and unnamed tributaries crossed by the Project in Luzerne County and ten of the streams and unnamed tributaries crossed in Monroe County are special protection waters. (Jt. Ex. 32a, 32b, 35, 37.)

60. Special protection waters, such as HQ and EV streams and wetlands, are afforded greater protection from degradation under Pennsylvania Law. (T. 434-36.) *See generally* 25 Pa. Code Chapter 93.

61. Among the special protection waters crossed by the Project in Monroe County is Poplar Run, an EV stream. (T. 342, 580; Jt. Ex. 32b.)

62. Transco developed the erosion and sediment control ("E&S") and post construction stormwater management ("PCSM") plans for the Project by utilizing the Department's Erosion and Sediment Pollution Control Program Manual and its PA Stormwater Best Management Practices Manual, as well as the antidegradation best available combination of technologies ("ABACT") best management practices ("BMPs") listed in the Department's guidance documents identified in the regulations at 25 Pa. Code §§ 102.4(b)(6)(iii) and 102.8(h)(3). (T. 819-23; Jt. Ex. 4, 8, 10, 11, 12; Tr. Ex. 17.)

63. The Department approved Transco's use of ABACT BMPs, having determined that they either individually or collectively managed the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year / 24-hour storm during earth disturbance activities. (T. 340-49, 1054-56, 1088-90; Jt. Ex. 33.)

64. The entire Project was treated as if it were in a special protection watershed even where it was not, so Transco used ABACT BMPs across the entire length of pipeline construction. (T. 341-44, 823-24.)

65. In addition to utilizing ABACT BMPs, in accordance with the Chapter 102 permit, Transco used decompaction of the soil during restoration of the right-of-way to "meadow in good condition" in order to promote infiltration within the temporary and permanent rights-of-way. (T. 345-46; Jt. Ex. 31 (Part C, V.G and V.I).)

66. "Meadow in good condition" is a type of vegetative restoration that has a goal of resulting in little to no increase in the rate and volume of stormwater runoff coming from a site. (T. 346, 407-08.)

67. 99.44% of Project impacts will be restored to meadow in good condition through soil decompaction and the use of a meadow seed mix. (T. 345-54, 409-10, 416-18; Jt. Ex. 33.)

68. Contractors laying the pipeline remove and segregate the topsoil during construction and then put it back on top of the subsoil. The area is scarified during restoration to ensure proper seed germination and vegetative growth. The affected area is covered with meadow seed mix to allow for regrowth of plants aboveground with specific root structures to provide stormwater management and function. (T. 407-09, 416-19.)

69. The BMPs required for the Project, such as the use of timber mats underneath heavy construction equipment, protect soils for restoration purposes by preventing compaction or liquefaction of soils. (T. 809-10, 1236-37.)

70. The remaining 0.56% of the Project area consists of impervious surfaces, such as pipeline infrastructure (pipeline machinery, mainline valves, regulator stations), and will be mitigated through the use of PCSM BMPs (infiltration berms, level spreaders, subsurface

infiltration beds) to help infiltrate and slow down the rate and volume of stormwater coming off of those areas. (T. 347-49; Jt. Ex. 33.)

71. Transco's permit applications included detailed descriptions and technical plan drawings of each site-specific BMP, including calculations and narratives prepared by licensed professionals that articulate how those BMPs will work to keep the stormwater on the site to mimic the pre-construction natural management of stormwater. (T. 286-90, 300, 389-90.)

72. There is no credible evidence that Transco's E&S and PCSM controls were not adequately designed and, therefore, should not have been permitted. (*See* T. 342-45, 513, 615-19, 629-30, 823-24; Jt. Ex. 33; Tr. Ex. 28a.)

73. Transco's Chapter 102 permit application and companion plans addressed potential thermal impacts to water bodies affected by the Project from the removal of mature trees and canopy at stream and wetland crossings. (T. 831-36, 838-39; Jt. Ex. 8, 33.)

74. The measures to minimize thermal impacts include the preservation of tree canopy cover to the maximum extent practicable, and, consistent with the riparian buffer requirements, the replanting of riparian buffers five feet from the pipeline centerline. (T. 794-97, 1160; Jt. Ex. 7, 27, 47.)

75. Transco's permit application included riparian reforestation plans describing how Transco would replant trees along the riparian buffers. (T. 607, 794-97, 1160; Jt. Ex. 27.)

76. The Project involves about 19 acres of total riparian buffer replanting in Luzerne and Monroe Counties. (T. 1160.)

77. The Department evaluated the potential impacts to water temperature from the Project and determined that the proposed changes in vegetation and loss of canopy cover associated with the Project would not have a major change in the water temperature. (T. 1158-60.)

78. Thermal impacts to streams are not anticipated for this Project due to the reduction in size of the resource crossing, the riparian replanting, and because most streams in Pennsylvania are groundwater-fed. (T. 831-36, 838-40, 1158-61, 1247-48.)

79. Transco made "neck-downs" to reduce the size of the construction right-of-way to 50 feet at stream and wetland crossings to minimize the area of disturbance and avoid and reduce impacts. (T. 447-48, 607, 989-91, 1175-76; Jt. Ex. 7, 23; DEP Ex. 26w, 27w.)

80. These reductions to the workspace are considered the maximum reductions for the safe operation and passage of equipment and personnel while minimizing the length of time required to cross the streams and wetlands. (T. 962-64, 991.)

81. The Aquatic Resource Impact Tables ("ARIT") prepared by Transco and submitted to the Department identify each surface water (i.e., wetlands and streams) impacted by the Project, the latitude and longitude of the resource, the Chapter 93 designation for the resource, the work proposed within the resource, whether the work relates to a temporary or permanent impact, and the exact square footage of the impact dimensions. (T. 1136-40, 1175-76; DEP Ex. 26w, 27w.)

82. Transco submitted watercourse data forms that identified the characteristics of each watercourse affected by the Project, including the flow type, stream depth, substrate type, water clarity, slope, the types of riparian vegetation and aquatic organisms present (including the presence of macroinvertebrates), and the geometry of the stream, among other characteristics. (T. 620-22; Jt. Ex. 14-18, 25.)

83. The Environmental Assessment also contained a module that identified and described the potential project impacts and how those impacts would be minimized, including the minimization of effects on fish and other aquatic biota. (Jt. Ex. 19, 26.)

84. As part of its data collection, Transco did not do any pre- or post-construction sampling or analysis to determine water quality or temperature in any of the streams affected by the Project. Transco did not collect pre- or post-construction information regarding aquatic life or populations of benthic macroinvertebrates in affected waters. Transco did not conduct pebble counts or grain-size measurements or detailed analyses of streambed characteristics. (T. 227-28, 289, 548, 1065-66, 1068-69, 1286.)

85. The Department determined that additional testing, including pre- or post-construction sampling, macroinvertebrate studies, fish studies, and water quality studies, is not needed for the Project because of the type of impacts, the proposed construction activities, the proposed minimization practices, and the provisions of the Chapter 102 permit. (T. 1155-58, 1174-77.)

86. In making this determination, the Department considered the relatively small and quick nature of the stream crossings and the common methods of utility crossings of streams and wetlands being employed by Transco. (T. 1154-55, 1176-80, 1219-20, 1273-74.)

87. The primary construction methods utilized for the Project are considered standard industry practices and are common in all types of utility line projects, including not only natural gas transmission lines, but also sanitary sewer lines, stormwater control lines, drinking water lines, and electric and fiber optic lines. (T. 1154-55, 1178-80.)

88. The way in which the Department regulates crossings for Transco's pipeline Project is the same as the way in which the Department regulates crossings for activities associated with these other types of linear projects. (T. 1179-80, 1281-82.)

89. The Department considers utility line crossings to be low risk based upon decades of experience regulating them. (T. 1219-21, 1231, 1258-59, 1273-74.)

90. In-stream sampling was also not required because all stream crossings for the Project were done "in the dry." "In the dry" crossings utilize a pump or flume to divert the water around the workspace so there is no water flowing through the workspace while the excavator operates. While the water is diverted, the pipeline is installed and the soils are removed and put back in more or less the same contours of the stream. After the completion of construction activities, the workspace is stabilized and the pump or flume is removed to allow water to flow again. (T. 1154-57.)

91. According to the Department, working "in the dry" means that there will be no major change to the shape of the stream after pipeline installation and there will be no extra sediment. (T. 1155.)

92. An "in the dry" crossing for pipeline construction generally takes 24 to 48 hours depending on the size of the stream. Construction across streams and wetlands should be done as quickly as possible to reduce the risk of a storm event and to restore the water resource as soon as possible. (T. 236, 996, 1011, 1157, 1174.)

93. None of the crossings for the Project were constructed "in the wet," which may include having an excavator dig in the stream while water is flowing around. For a project proposing "in the wet" construction, an applicant may be required to conduct macroinvertebrate and sediment testing. (T. 1155-57, 1193.)

94. The Department has determined that the requirement to include macroinvertebrate assessments in the environmental assessments for all stream enclosures and stream realignments is not appropriate, particularly for stream systems with low to minimal macroinvertebrate populations, and the Department in its discretion determines whether those assessments are needed on a case-by-case basis. (T. 1227-30, 1264-68.)

95. In contrast to utility line crossings, the Department does require in-stream sampling, monitoring, and additional analysis for other permitted activities, such as dredging, bridge culvert projects, stream channel realignments, dam removals, brownfield sites, mining, and others. (T. 1221-27.)

96. The permits and Transco's approved plans require Transco to stabilize and restore pipeline crossings upon the completion of work by stockpiling native streambed material and using a minimum of six inches of native streambed material prior to restoring stream flow. Restored streambed elevation cannot exceed the pre-existing streambed elevation. (T. 288-89, 418, 468, 622-23, 990, 1235-36; Jt. Ex. 9, 31, 32a (Special Condition V), 32b (Special Condition U).)

97. Transco's stream construction plans require the stream banks and streambed to be restored to pre-construction contours. (T. 287-88, 392, 1155; Jt. Ex. 19, 26.)

98. The permits contain pre- and post-construction monitoring conditions to ensure that BMPs are properly installed and functioning, and that restoration of affected resources is achieved. (T. 226-27, 292-93, 372-73; Jt. Ex. 31, 32a, 32b.)

99. The Chapter 102 permit requires a licensed professional to be present onsite during all critical stages of the implementation of Transco's PCSM plan, including the installation of structurally engineered BMPs. (Jt. Ex. 31 (Part A, III.D; Part C, V.C).)

100. Once post-construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process in Chapter 102, 25 Pa. Code § 102.7, to ensure that the BMPs have been constructed in accordance with the plans and are functioning as intended. (T. 351, 1036-37.)

101. Until a notice of termination is accepted by the Department, the Chapter 102 permit requires Transco to visually inspect the Project site weekly, at minimum, to ensure that BMPs are

properly constructed and maintained to effectively minimize pollution to waters of the Commonwealth. Each inspection must include an evaluation of the BMPs to determine whether they are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed. (Jt. Ex. 31 (Part A, III.C).)

102. Transco must also prepare a long-term operation and maintenance schedule addressing the repair, replacement, or other routine maintenance of the BMPs to ensure proper function and operation. (Jt. Ex. 31 (Part A, III.C).)

103. Transco is required to "prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions," and to submit that documentation to the Department within 90 days of completing the work under each Chapter 105 permit. (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).)

104. There are site specific plans, including designs, photos, and other documentation that the Department can review to ensure that a stream channel or wetland is restored and remains stable post-construction. (T. 226-27, 287-90.)

105. After construction, Transco is required to supply post-construction and monitoring reports for restored resources for five years, which include post-construction monitoring of stream hydrology and of tree and shrub plantings in wetlands. (T. 224-28, 412-14; Jt. Ex. 32a (Special Conditions X, Y, Z), 32b (Special Conditions W, X, Y).)

106. The Chapter 105 permits require Transco to monitor for secondary impacts to hydrology, which includes the submission of reports that "contain information describing the presence or absence of hydrology at the time of inspection, a narrative comparison to hydrology

present in the watercourse during pre-permitting field investigation(s), and photographs of the watercourse." (Jt. Ex. 32a (Special Condition Z.1), 32b (Special Condition Y.1).)

107. Under the Chapter 105 permits, Transco is required to provide post-construction monitoring reports for restored resources for a minimum of five years, with two reports filed in each of the first two years and annual reports filed in the following three years. The Department can request additional monitoring if parameters are not met. (T. 371-73; Jt. Ex. 32a (Special Conditions Y, Z, CC, DD), 32b (Special Conditions X, Y, BB, CC).)

108. The purpose of these reports, among other things, is to ensure that affected resources are being properly restored, to demonstrate that the existing wetlands onsite are maintaining pre-construction wetland conditions and delineated acreages, to ensure that vegetative replanting is successful, to make sure hydric soils are present, and to ensure any excess fill has been removed from the resources. (T. 372-73, 844-49; DEP Ex. 15d.)

109. The monitoring reports do not require metrics on the affected wetland such as water quality parameters, functions, hydrology, or the ecosystem. (T. 227-28, 292-93.)

110. Transco's adaptive management plans specify that, if its work fails to meet restoration or other requirements, e.g. if there are issues with replanting survival, Transco must propose a plan to the Department to ensure compliance with those requirements, such as planting additional vegetation or enhancing soil conditions. (T. 403-04, 625, 802-05.)

111. The Department's in-the-field observations on this Project, including an inspection of EV stream Poplar Run, reflect that streams have recovered or are recovering in accordance with the terms of the permits. (T. 1166-68.)

112. The Department determined that there would be no adverse impacts to EV wetlands and no significant adverse impacts to other wetlands if the Project is implemented as designed in

the Chapter 105 permits and plans and Transco follows all permit conditions. In making this determination, the Department considered the effect on each wetland complex as opposed to individual wetland within the complex. (T. 1151-53; Jt. Ex. 35, 37.)

113. There is no complete or permanent loss or fill of any wetlands associated with the Project. While the habitat function of some portions of wetlands will change, there is no loss of hydrology or biogeochemical processes. All wetland areas will be restored to wetland areas. (T. 184, 192-93, 237-38, 782-83, 1163-65.)

114. Some sections of the Project converted Palustrine Forested (PFO) and Palustrine Scrub Shrub (PSS) wetlands into Palustrine Emergent (PEM) or PSS wetlands in areas immediately above the pipeline within the right-of-way. (T. 1147-48.)

115. This is a permanent functional conversion of wetlands from a change in the type of vegetation growing in the wetland, i.e. a change from a forested function to a meadow function. (T. 245, 784-75, 1148-50, 1180-82.)

116. The permanent functional conversion of the wetlands is due to vegetative maintenance in the right-of-way that is designed to ensure that tree roots do not damage or corrode the pipeline. (T. 1009, 1180-82.)

117. The permits allow for the cutting of woody material within the 30-foot-wide corridor of the right-of-way on a routine basis, but only a ten-foot-wide swath within that corridor (five feet on each side of the pipeline) will be subject to mowing. (T. 237-38, 246, 364, 787, 814-15, 935; Jt. Ex. 35, 37.)

118. Certain sections of the right-of-way will be mowed as infrequently as once every three years. Wetlands within those sections will reach different functional status intermediately

because of the change in vegetation. A mowed area that reaches PSS status intermediately means shrub species and vegetated cover will appear. (T. 244-46, 814-15; Jt. Ex. 35.)

119. The Department considered the conversion of PFO and PSS wetlands to PEM and PSS wetlands to be a permanent indirect impact. (T. 213-16, 1147-51, 1177.)

120. Permanent indirect impacts include the placing of the pipeline under a stream because it is permanent but it does not change the stream grade or substrate, or the maintaining of vegetation in the right-of-way because it only changes one function of the wetland (vegetation). A permanent direct impact would be a loss or fill of wetlands, e.g. paving over wetlands. (T. 783, 806-07, 1177.)

121. In the Department's view, the conversion of one function of a portion of a wetland does not amount to wetland fill or loss. The Department considers loss to be when the wetland no longer exists. (T. 195-96.)

122. For Luzerne County, 0.24 acres of PSS wetlands are permanently converted to PEM wetlands, 0.54 acres of PFO wetlands are permanently converted to PEM wetlands, and 0.78 acres of PFO wetlands are converted to PSS wetlands as a result of the required mowing to maintain the pipeline right-of-way. (T. 1148; Jt. Ex. 35.)

123. For Monroe County, 0.04 acres of PSS wetlands are permanently converted to PEM wetlands, 0.15 acres of PFO wetlands are permanently converted to PEM wetlands, and 0.10 acres of PFO wetlands are converted to PSS wetlands due to of the required mowing to maintain the pipeline right-of-way. (T. 1149; Jt. Ex. 37.)

124. A total of 1.56 acres of EV wetlands across both counties are converted from PFO or PSS wetlands to PEM or PSS wetlands. (Jt. Ex. 35, 37.)

125. The Department determined that no adverse impacts to any wetland's functions and values were anticipated from the Project. (T. 1152; Jt. Ex. 35, 37.)

126. The Department determined that the function and value of the existing wetlands are not unique to the area, nor will the Project impair the wetland systems from providing their functions and values once restoration is complete. (T. 1287; Jt. Ex. 35, 37.)

127. The Department requires mitigation not just for complete and direct losses of wetlands, but also for the conversion of wetland functions. Transco's mitigation plans require compensatory mitigation for the permanent and temporal functional conversion of wetland cover types due to mowing. (T. 782-90, 1265-67; Jt. Ex. 20, 27, 35, 37.)

128. Mitigation for any permanent conversion of wetlands is being done in excess of the minimum one-to-one ratio required by the regulations, with the mitigation ratio for EV wetlands at 2.5 to 1. (T. 1149-50; Jt. Ex. 35, 37.)

129. Offsite mitigation for the functional conversion of wetlands involves identifying existing offsite wetlands in an emergent state and selecting them for planting with trees and shrubs. (T. 785-86.)

130. The replacement ratios used for the Project factor in the time it takes for trees or shrubs to grow, which is why the ratio is higher than one-to-one. (T. 1287-88.)

131. The Department accounted for the nature of the resource and its special protection status when setting wetland replacement ratios and increased the ratios so that they were higher than is normally required. (T. 1288, 1294.)

132. Apart from the right-of-way directly over the pipeline, the permits require Transco to restore many areas to preconstruction conditions. (Jt. Ex. 31, 32a, 32b, 35, 37.)

133. Under the Chapter 105 Permits, after the completion of earthmoving activities, Transco "shall restore all disturbed wetland areas to original contours and replant with indigenous wetland vegetation in accordance with the restoration plans as presented in the permit application." (Jt. Ex. 32a (Special Condition S), 32b (Special Condition R).)

134. The Chapter 105 Permits require that "[a]ll Palustrine Scrub-Shrub (PSS) and Palustrine Forested (PFO) wetlands within the temporary right-of-way (ROW) shall be replanted with woody species that are similar to those species present in the wetland prior to the permittee conducting construction activities." (Jt. Ex. 32a (Special Condition W), 32b (Special Condition V).)

135. The Chapter 105 Permits require Transco to "ensure at least an eighty-five percent (85%) survival rate of wetland plantings during the five (5) year monitoring period. Additional wetland plantings and/or reports in subsequent years beyond the initial five (5) years may be required if an eighty five percent (85%) survivability of planted species is not achieved." (Jt. Ex. 32a (Special Condition X), 32b (Special Condition W).)

136. The Department and Transco considered the cumulative impacts of the Project to stream and wetland resources in relation to other projects, including the previously installed collocated pipelines. (T. 863-69, 1162-66, 1193-94.)

DISCUSSION

Citizens for Pennsylvania's Future ("PennFuture"), the Delaware Riverkeeper Network (the "Riverkeeper Network"), and Maya van Rossum, the Delaware Riverkeeper (collectively the "Appellants") have filed an appeal of the Department of Environmental Protection's (the "Department's") issuance of Erosion and Sediment Control Permit No. ESG830021002-00 and Water Obstruction and Encroachment Permit Nos. E4083221-006 and E4583221-002 to

Transcontinental Gas Pipe Line Company, LLC ("Transco") for work associated with Transco's Regional Energy Access Expansion Project in Luzerne and Monroe Counties (the "Project"). The Erosion and Sediment Control Permit is known as a Chapter 102 permit under Title 25 of Pennsylvania's regulations, 25 Pa. Code Chapter 102, and the Water Obstruction and Encroachment Permits are known as Chapter 105 permits, 25 Pa. Code Chapter 105. Separate Chapter 105 permits were issued for Luzerne and Monroe Counties.

Transco's Project is an expansion and increase in capacity of an existing interstate natural gas transmission system that spans Pennsylvania, New Jersey, and Maryland. In Pennsylvania, construction of the Project included constructing two new pipeline segments, one in Luzerne County and one in Monroe County. In Luzerne County, the Project included construction of 22.3 miles of a 30-inch diameter pipeline for what Transco calls the "Regional Energy Lateral." In Monroe County, the Project included construction of 13.8 miles of 42-inch diameter pipeline for what Transco calls the "Effort Loop." Approximately 78-percent of the Project is collocated with existing pipelines and it overlaps with existing utility rights-of-way. In Monroe County, the Effort Loop is 100-percent collocated with Transco's Leidy Line. In Luzerne County, the Regional Energy Lateral is 59-percent collocated with Transco's existing Leidy A Line.

Transco's Project disturbed 262.2 acres of land in Monroe County and 405 acres in Luzerne County. The Project crossed numerous streams and wetland complexes in those counties, with some of the streams and wetlands being classified as High Quality or Exceptional Value waters of the Commonwealth, and thus subject to the Commonwealth's antidegradation program.

On March 23, 2023, the Federal Energy Regulatory Commission (FERC) issued a Notice to Proceed authorizing Transco to commence construction of all components of the Project in Pennsylvania, New Jersey, and Maryland. Transco completed pipeline construction in October

2023. Transco received approval from FERC on July 26, 2024 to place the Project into full service and subsequently commenced full Project service on August 1, 2024, meaning gas has been flowing through the pipelines since that time.

Standard of Review

The Board reviews Department actions *de novo*, meaning the Board "decide[s] the case anew on the record developed before" it. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318 (citing *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975)). In a third-party appeal such as this one, the Appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The Appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. *See also Lyons v. DEP*, 2011 EHB 169, 178 (appellant of Chapter 105 permit must show "no reasonable basis" for Department's action) (citing 25 Pa. Code § 105.21(e)).

By their own admission, the Appellants have not shown that there has been any actual environmental harm or degradation as a result of Transco's Project. They do not even allege that any particular harm was likely to occur at any particular location given the permits. Instead, they mostly argue in general terms that the Department's improper, inadequate, incomplete review failed to ensure that no harm could come from the Project. As we have said many times before, it is possible for a third-party appellant who bears the burden of proof to prevail in an appeal with such a case, but it can be difficult. *Stocker v. DEP,* 2022 EHB 425, 453 ("an appellant who rests

on the fact of an inadequate investigation or analysis alone often does so at its peril.") (quoting *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484); *Kiskadden v. DEP*, 2015 EHB 377, 410 ("Our function in this proceeding is not to critique the Department's procedures generally or as employed in this case. While an inadequate investigatory process may be evidence of a potentially dispositive finding, it is not dispositive in and of itself.") (quoting *O'Reilly, supra*, 2001 EHB at 45).

A case built upon speculation, possibilities, and little actual investigation on the part of the appellants themselves has limited chances of success. We made this clear in *Shuey v. DEP*, 2005 EHB 657:

> Where the appellants argue that the granting of a permit will destroy or pollute a valuable natural resource it is not enough to meet their burden to simply focus on the value of the natural resource. The natural resource's value is usually acknowledged by all parties involved, including the Department whose primary function it is to protect the environment. They must come forward with evidence, usually in the form of expert testimony, to prove their claims….An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur.

Id. at 711-12. *See also Stedge v. DEP*, 2015 EHB 577, 612. Here, for the reasons discussed below, the Appellants have failed to meet their burden of proof.

Standing

Before getting to the merits of this appeal, we will address the preliminary issue of standing. Transco, but not the Department, argues that both PennFuture and the Riverkeeper Network lack standing in some way. Transco contends that PennFuture does not have standing to challenge any of the permits under appeal, and that the Riverkeeper Network does not have standing to challenge the Luzerne County Chapter 105 permit. The issue of standing first came up during the filing of the parties' pre-hearing memoranda in the lead up to the merits hearing. The Appellants' pre-hearing memorandum, which was filed first, contained no mention of their

standing. However, Transco's pre-hearing memorandum contained a section asserting that PennFuture and the Riverkeeper Network did not have standing in this appeal, raising the issue for the first time. The Appellants then filed a motion to amend their pre-hearing memorandum to address their standing in this litigation. They said that they omitted any mention of standing in their pre-hearing memorandum because Transco and the Department had not brought up the issue of standing at any time prior. The Appellants sought to amend their pre-hearing memorandum to include a new section on standing as well as five additional witnesses who would testify for purposes of standing. The Department and Transco filed responses in opposition to the motion, arguing that they would be prejudiced by the amendment because they would be deprived of the opportunity to depose the new witnesses ahead of their testimony to explore their interests.

We issued an Order granting the motion to amend and allowing the Appellants to call Matthew Stepp and Maya van Rossum, who had already been named in Transco's pre-hearing memorandum, as witnesses as part of their cases-in-chief during the merits hearing. In the Order we stated that, following the conclusion of the merits hearing, the record would be left open and discovery would be reopened for 30 days to allow the Department and Transco to take discovery regarding the issue of standing from the organizational members the Appellants identified in their motion to amend. We also permitted the Appellants to reopen their cases-in-chief to provide hearing testimony on the issue of standing from those organizational members, subject to cross-examination from the Department and Transco, and we scheduled an additional day of hearing in November 2024.[2]

At the conclusion of the merits hearing, the parties indicated that they would inform the Board about the depositions and if the depositions could be used in lieu of another day of hearing

[2] In our Order we also denied the Appellants' request that we bifurcate this matter and decide the issue of standing separately from the merits before receiving testimony from any other witnesses.

testimony. The parties thereafter filed a letter stating that the depositions of the standing witnesses had been completed and that the parties agreed to use the deposition transcripts instead of reconvening in November for additional hearing testimony. The deposition transcripts for Carolyn Lange and Dr. Alexander Jackson were filed on November 4, 2024 for inclusion in the record. We issued an Order on the same day accepting the transcripts, closing the record, and setting the post-hearing briefing schedule.

In its post-hearing brief, Transco continues to object to our Order allowing the Appellants to amend their pre-hearing memorandum and reopening discovery, saying it provides an incentive to parties to "abuse the discovery process" and "withhold evidence until the eve of trial without penalty." (Transco Brief at 58.) We fully stand by our decision allowing the Appellants to amend their pre-hearing memorandum to address their standing in this appeal, and to reopen discovery for the purpose of Transco taking the depositions of the newly identified witnesses. Reopening discovery curtailed the prejudice to the Department and Transco and is consistent with the Board's preference to resolve cases on the merits and not through procedural maneuvering. *See Goheen v. DEP*, 2003 EHB 92, 97 ("We must remain ever mindful that the Board's primary responsibility is to decide cases on the merits."). *Cf. PQ Corp. v. DEP*, 2017 EHB 870, 876 n.4 ("the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected") (quoting *Neville Chem. Co. v. DEP*, 2003 EHB 530, 532).

Transco also preserves its earlier argument that the Appellants are "bound by" the testimony Matthew Stepp and Maya van Rossum, as organizational designees, gave during depositions regarding the effect of Transco's project on specific members of the two organizations. Fundamentally, this is a discovery dispute, and at this point we have little interest in devoting time

to resolving a discovery dispute a year and a half after discovery has been completed. Transco could have raised this issue in discovery via e.g. a motion to compel, but for whatever reason, it chose not to. Its main gripe appears to be that Mr. Stepp and Ms. Van Rossum were not better prepared for their depositions, and yet Transco did nothing about it until filing its pre-hearing memorandum three weeks before the start of the merits hearing. At this stage in the proceedings we are much more interested in deciding the issue of standing on its own merits and not based on some drawn-out discovery grievance.

Even so, Transco's argument is without merit. Transco does not explain what it means by saying the Appellant organizations are "bound by" the deposition testimony. It offers no support for a contention, if that is what it is, that the organizations could not name additional witnesses at the hearing solely because they were not identified by the organizations' designees at their depositions. Even if the designees had testified at the depositions, "We have no members adversely affected," that would not have precluded them from testifying at the hearing that they did have such members, let alone precluded other members from testifying themselves. They obviously could have been impeached by their prior deposition testimony, Pa.R.Civ.P. 4020(a)(2), but it does not follow that they could not testify at all. Instead, any witness testifying at a hearing can be impeached by prior allegedly inconsistent deposition testimony, Pa.R.Civ.P. 4020(a)(1), but that does not preclude the witness from testifying at the hearing.

In *Pennsylvania Trout v. DEP*, 2003 EHB 622, we considered a permittee's motion for summary judgment arguing that the organizational appellants did not have standing to challenge a Chapter 105 permit. The permittee asserted that, during depositions of the organizations' representatives, the representatives did not identify any member with a sufficient interest to establish standing. In response to the motion, the appellants submitted affidavits from three

members attesting to their interest in the area affected by the development. We rejected the permittee's argument and denied the motion. We held that the affidavits were sufficient to overcome the motion for summary judgment and the issue of standing would be determined conclusively following the hearing on the merits. We thereafter allowed the standing witnesses to testify at the hearing, and found that the appellants demonstrated standing. *Pa. Trout v. DEP*, 2004 EHB 310, 354-59, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004).

In any event, being unable or unprepared to identify specific members and describe how they stand to be affected is not the same as saying there are no members adversely affected and then later claiming the opposite. The fact that Transco was unsatisfied with the deposition answers of Matthew Stepp and Maya van Rossum is as much a comment on the lawyers' questioning as it is on the deponents' answers. There is no real conflict in the deposition testimony of Mr. Stepp and Ms. van Rossum and the clarification they and the Appellants later provided.

Transco's argument with respect to the Riverkeeper Network is even weaker. During her deposition, Maya van Rossum identified "Mr. Jackson" as a Riverkeeper Network member affected by the Project. Through questioning of Ms. van Rossum on cross-examination at the merits hearing, Transco confirmed that during Ms. van Rossum's deposition she could not describe with particularity exactly how Dr. Alexander Jackson was impacted by the Project, and whether he was impacted by the Project generally or impacted by the permits themselves. (T. 77-80.) That Transco points to this as "binding testimony" to somehow argue that the Riverkeeper Network cannot utilize Dr. Jackson as a standing witness borders on complete nonsense. There is no evidence that Transco ever followed up with any questions seeking any more information about Dr. Jackson after Ms. van Rossum's deposition. Transco could have sought to depose Dr. Jackson

ahead of the hearing, but it apparently never did. It could have served interrogatories, but it never did. Transco's feigned surprise at the Riverkeeper Network's standing witness is not credible.

To that end, Transco relies on Rule 4007.4 of the Pennsylvania Rules of Civil Procedure to argue that the Appellants were under a duty to seasonably supplement their deposition testimony to identify persons having knowledge of discoverable matters. Pa.R.Civ.P. 4007.4(1). However, the Explanatory Note to the Rule provides some guidance on the procedure for one party securing the supplementation of deposition testimony from another party, and it places much of the onus on the party seeking the information:

> First, it is quite common, when an oral deposition is complete, for the inquirer to request, and obtain, an agreement from the opponent or from an expert witness to supplement the response within the scope of the Rule. This also can be accomplished by appropriate closing questions in interrogatories.
>
> Second, the inquirer, if such an agreement is refused, may move the court to enter an appropriate order.
>
> Third, the inquirer may, at any time, force a review of prior responses by filing supplementary interrogatories or noticing a supplementary oral examination to discover whether the respondent has become aware of any information which requires an amendment of any prior response.

Pa.R.Civ.P. 4007.4 (Explanatory Comment). It does not appear that Transco did any of these things or ever followed up on the depositions in any way to get more information about any members affected by the Project. There is no indication that Rule 4007.4 does not apply to the deposition of a designee taken under Rule 4007.1(e).

Transco says it "had a right to rely on the Appellants' *discovery responses* and deposition testimony" (emphasis added), but it is unclear whether Transco ever served any discovery requests on the Appellants that would have generated a discovery response. Transco has never pointed to any interrogatory it served, let alone one requesting the identity of the Appellants' witnesses or anything about standing. Transco in its opposition to the Appellants' motion to amend cited discovery requests served by the Department and responses served on the Department, but never

any of its own. It appears that Transco's entire discovery in this case, at least with respect to standing, consisted of a couple organizational designee depositions. It strains credulity for Transco to so vociferously complain about the Appellants' conduct in discovery when Transco hardly conducted any discovery itself.

Turning our focus away from stale discovery disputes and toward the actual standing issue, remarkably, no party addresses whether Maya van Rossum, the Delaware Riverkeeper, who is also a named party to this appeal, has standing. Any challenge to her standing to appeal all three permits at issue in this matter has been waived. 25 Pa. Code § 1021.131(c) (issues not argued in a post-hearing brief may be waived); *Morrison v. DEP*, 2021 EHB 211, 221 (finding waiver where objections not addressed in post-hearing brief); *Stedge, supra*, 2015 EHB at 594 ("if an appellant's standing is never challenged, it does not need to be proven"). Accordingly, it would seem that we can end this discussion here. Any further discussion of standing is almost superfluous since there is no barrier to reaching the merits of this appeal, regardless of whether PennFuture or the Riverkeeper Network have standing. Nevertheless, in the interest of a complete record, we will address their standing.

Transco argues in its post-hearing brief that neither PennFuture nor the Riverkeeper Network possess standing in their own right as organizations, that PennFuture does not have standing as a representative of any of its members, and that, while the Riverkeeper Network has standing on behalf of its members to challenge the Monroe County Chapter 105 permit and the Chapter 102 permit, it does not have representational standing to challenge the Luzerne County Chapter 105 permit. If a standing challenge has been properly raised in a pre-hearing memorandum, pursued at the hearing, and preserved in a post-hearing brief, an appellant must show that it demonstrated by a preponderance of the evidence at the hearing on the merits that it

has standing. *Montgomery Twp. Friends of Family Farms v. DEP*, 2024 EHB 716, 726-31; *Williams v. DEP*, 2021 EHB 232, 244; *Stedge*, 2015 EHB at 594; *Giordano v. DEP*, 2000 EHB 1184, 1187.

We recently summarized the general standard for standing in Board matters in *Dengel v. DEP*, 2024 EHB 605:

> In order to have standing to appeal an administrative decision, persons must have a direct interest in the subject matter of the case. *Mountain Watershed Assn. v. DEP*, [2024 EHB 476, 479], citing *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). See also, *Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Id.* (citing *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024)). In order for a person to have a direct interest, their material interests must be discrete to them or a limited class of persons from more diffuse interests common among the citizenry. *Muth*, 315 A.3d at 196 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007))….
>
> In third-party permit appeals, as is the case here, the Board has held that a party can meet the requisite interest for standing based on where they reside and/or where they recreate. *Food and Water Watch v. DEP*, 2020 EHB at 247. An appellant has standing when [] they come forward with specific facts to credibly aver that they use the affected area and that there is a realistic potential that their use and enjoyment of the area will be adversely affected by the permitted activity. *Muth v. DEP, et al.*, 2022 EHB 411, 415 (citing *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643).

Id. at 615-16.

An organizational party before the Board can generally have standing as a third-party appellant in two ways—as the organization itself, or as a representative of one or more of its members. *Lawson v. DEP*, 2018 EHB 265, 267; *Citizens for Pa.'s Future v. DEP*, 2015 EHB 750, 751; *Pa. Trout, supra*, 2004 EHB at 355. For an organization to have standing in its own right, we have found standing where the organization's work, interests, and/or mission are sufficiently

close to the subject matter of the appeal, such as if the organization's mission and/or work includes the protection or improvement of the environment in the area affected by the Department's action. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648. For representational standing, "[a]n organization has standing if at least one individual associated with the group has standing." *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)). *See also Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) ("an association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate.").

Beginning with the standing of PennFuture and the Riverkeeper Network in their own right as organizations, Transco argues PennFuture lacks standing as an organization because its interest in the Project is no different than the abstract interest that all citizens have in ensuring compliance with the law. Transco also challenges the standing of the Riverkeeper Network as an organization, but only with respect to the Luzerne County Chapter 105 permit. Transco argues that the Riverkeeper Network has not shown any evidence of it being adversely affected by the Luzerne County permit apart from its general organizational purpose of protecting waters in Pennsylvania.

Transco says that, just because the protection of the environment may be part of an organization's mission, it does not necessarily mean that the organization has standing. Instead, Transco says, an organization must actually be aggrieved in some way. In support of its argument, Transco relies on certain cases from the Commonwealth Court. Transco quotes the Commonwealth Court in *Americans for Fair Treatment, Inc. v. Philadelphia Federation of*

Teachers, Local 3, 150 A.3d 528 (Pa. Cmwlth. 2016) as saying that "the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing." *Id.* at 534. Transco also points to *Armstead v. Zoning Board of Adjustment of City of Philadelphia*, 115 A.3d 390 (Pa. Cmwlth. 2015), which Transco says found that an organization lacked standing because the organization had not been involved in any negotiations, made significant investments, or pointed to any other evidence to show that its interest extended beyond its organizational purpose.

However, the caselaw from the Commonwealth Court is not as unequivocal as Transco makes it out to be. For instance, *Americans for Fair Treatment* contains no discussion of organizational standing in its own right apart from the quoted sentence. The Oklahoma nonprofit corporation at issue did not appear to argue that it had standing as an organization itself to challenge a provision of a collective bargaining agreement between the Philadelphia Teachers Union and the Philadelphia School District. Instead, the Commonwealth Court determined that the organization did not have standing because it did not identify any members adversely affected by the challenged action. *Id.*, 150 A.3d at 535-38.

In *Dowds v. Zoning Bd. of Adjustment*, 242 A.3d 683 (Pa. Cmwlth. 2020), a case not cited by Transco, the Commonwealth Court, reviewing cases, found that an association or organization can have standing in its own right in part if that organization has participated in hearings or expressed concerns before e.g. a zoning board or at public meetings before a historical commission. *Id.* at 692-95 (discussing *Society Hill Civic Ass'n v. Phila. Bd. of License & Inspection Review*, 905 A.2d 579 (Pa. Cmwlth. 2006), and *Goodchild*, 2020 Pa. Commw. Unpub. LEXIS 232, No. 562 C.D. 2019 (Pa. Cmwlth. May 4, 2020)). The Court in *In re Friends of Marconi Plaza & Rich Cedrone*, 287 A.3d 965, 975 (Pa. Cmwlth. 2022) subsequently construed

Dowds as establishing the following factors for determining organizational standing in a land use appeal: "(1) being a recognized community organization, (2) expressing concerns at meetings before the Historical Commission, and (3) participating in negotiations with the permit applicant." Although these cases dealt with standing in different administrative proceedings, we find the factors to be instructive.

PennFuture is a recognized statewide environmental advocacy organization that has one of its five Pennsylvania offices in East Stroudsburg, Monroe County, in the Poconos region, and it previously had an office in Wilkes-Barre, Luzerne County. (T. 31-33.) PennFuture employs a civic engagement organizer based in Luzerne County who also does work in Monroe and Pike Counties. PennFuture has an overall mission "to fight for an equitable just state economy through clean air, clean water, and climate change solutions utilizing legal advocacy, policy engagement, and empowering Pennsylvanians." (T. 31.) The organization also has a local mission in the Northeast region to protect the headwaters of the Delaware River with a particular focus on protecting and conserving Exceptional Value and High Quality streams, which are highly concentrated in the Poconos region. (T. 32.) In 2018, PennFuture started the "Our Pocono Waters" campaign, where PennFuture brought together businesses, organizations, and local officials to educate the region on the importance of Exceptional Value streams to the local economy. PennFuture estimates that it has engaged over 3,500 people as part of this campaign. (T. 34.) PennFuture has also performed an economic development study that it says showed Exceptional Value streams have supported three billion dollars in economic growth for the region. PennFuture has done stream mapping, held many events, and monitored projects adjacent to or on Exceptional Value streams in the region to ensure that those streams are being protected.

Specific to the Transco Project, PennFuture has submitted public comments at least four different times since 2020, including 15 pages of comments to the Department in October 2021 on the applications for the permits under appeal here, along with the Riverkeeper Network and another organization. (T. 38, 45-46; Jt. Ex. 2, 3.) PennFuture has also engaged its membership about the Transco Project to update its members on the development of the Project and to inform them about opportunities to comment if they wished. (T. 38.)

The Riverkeeper Network has a mission "to champion the rights of our communities to a Delaware River and tributary streams that are free flowing, clean, healthy, and abundant with the diversity of life." (T. 49-50.) The Riverkeeper Network has been active in the Our Pocono Waters campaign along with PennFuture. The Riverkeeper Network has done educational programming about the importance of High Quality and Exceptional Value streams and wetlands in the northern part of the Delaware River watershed because of the relation of the streams to the health of the main stem of the Delaware River. (T. 64-65.) It has also been involved in matters concerning threats of harm to the waterways in Northeastern Pennsylvania in Monroe County and in the Delaware River watershed portions of Luzerne County and Northampton County addressing warehouse and pipeline projects. (T. 64.) It has conducted stream monitoring in special protection water areas. (T. 62-63.)

Regarding the Transco Project, the Riverkeeper Network initially researched what was proposed for the Project and how the Project could impact the tributary streams and watershed for the Riverkeeper Network's community. It then crafted written testimony with organizational partners, created educational programming for its members and the community to help them understand the implications of the Project, and distributed action alerts to encourage its members and the community to participate and get engaged in the permitting process. (T. 66-67.) The

Riverkeeper Network also testified at public hearings. It submitted comments to the Department on the applications for the permits under appeal. (T. 83; Jt. Ex. 2, 3.) The Riverkeeper Network was also involved in the proceedings before FERC regarding the Project, filing a motion to intervene, commenting on the draft Environmental Impact Statement, and contesting FERC's issuance of the certificate for the Project. (T. 67-68.) Perhaps most notably, Transco and the Riverkeeper Network were engaged before the permit applications were filed and had a meeting together where Transco sought the Riverkeeper Network's input on the Project. (T. 71-72, 89, 668.)

In *Friends of Lackawanna, supra*, 2017 EHB 1123, we found that a third-party appellant organization had standing in its own right because its work and mission included protecting the environment near the landfill facility subject to the appeal. We noted that the organization was involved in public hearings on the landfill, including borough council meetings and zoning proceedings. The organization also submitted comments to the Department on the permitting action that was under appeal, expressing concerns about the possible impact to the environment and local community. *Id.* at 1151. In *Petrus Holdings, supra*, 2022 EHB 284, we granted a petition to intervene and determined that the petitioner organization had standing in its own right in an appeal of a denial of an application to revise a township's Act 537 plan. The organization focused its work in the county where the proposed project was located and spent time sampling and monitoring an Exceptional Value stream that would have received a discharge from the project. The organization also submitted comments on the application for the Act 537 plan revision. We found that there was a "clear nexus" between the organization's mission and work in the area and the action under appeal. *Id.* at 288.

The work that PennFuture and the Riverkeeper Network have engaged in here is very similar to the work that the organizations in *Friends of Lackawanna* and *Petrus Holdings* pursued. They do work in the areas near the project, engage the community, hold events, develop educational materials, perform mapping and monitoring, and have commented on and been involved in the permits at issue in the appeal. Although one might draw a contrast between the more locally focused organizations in *Friends of Lackawanna* and *Petrus Holdings* and the statewide or watershed-focused organizations here, this alone does not automatically disqualify PennFuture and the Riverkeeper Network from possessing standing in their own right. Transco's Project itself is not confined to a specific site or a particular discharge point. The Project involves two pipelines that run through two different counties over 36 combined miles. By its nature it affects a far greater geographic area than many other types of projects. It is possible that an organization could have a specific interest in a specific stream crossing of a pipeline project that would provide standing to that organization, but that does not mean that an organization with a more diffuse interest in an area where a pipeline project crosses numerous streams and wetlands lacks the particularity of interest that is required for organizational standing. It is enough that the Appellant organizations here do significant work in Monroe and Luzerne counties and in the High Quality and Exceptional Value waters and local watersheds that stand to be affected by Transco's project. *See Friends of Marconi Plaza, supra*, 287 A.3d at 977 (the Commonwealth Court rejected a requirement for a granular level of interest in an action: "We reject the City's argument that the association's interest must be pinpointed to a single feature of the park, *i.e.*, the statue itself; Friends of Marconi Plaza's involvement in the preservation and beautification of the park includes the statues located therein.").

We also note that, like in the Commonwealth Court cases of *Dowds* and *Friends of Marconi Plaza*, PennFuture and the Riverkeeper Network were also involved in public hearings and the public comment process for the permits. While submitting comments to the Department on a project may not always be sufficient to establishing standing for an organization or an individual, the submission of comments coupled with PennFuture and the Riverkeeper Network's other involvement in the Project area are sufficient to establish standing as an organization. *Compare PennEnvironment v. DEP*, 2020 EHB 350, 354-56 (finding that Section 10.2 of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4010.2, provides standing in an EHB appeal to any person who participates in the public comment process for a plan approval or permit).

Accordingly, given the work and localized missions and campaigns that the Appellant organizations have engaged in over the past several years, both generally as it concerns special protection waters in the headwaters of the Delaware River, and specifically with respect to Transco's Project, we have no hesitation concluding that PennFuture and the Riverkeeper Network each have standing as an organization in their own right. They have invested time and energy in preserving the water quality of special protection waters that serve as the headwaters for the Delaware River, and they have an objectively reasonable belief that the permits under appeal authorize activities that could impact the water quality of the resources affected and crossed by Transco's pipeline Project. Even by Transco's own standard, PennFuture and the Riverkeeper Network have clearly made investments in the Delaware River headwaters region, have been involved in negotiations about the Project, and have shown an interest in this matter that extends beyond merely their organizational purposes. (*See* Transco Brief at 63.) They have shown an organizational interest in the Project and in the permits under appeal sufficient to support standing.

Even though we find that PennFuture and the Riverkeeper Network have standing in their own right, we will briefly address Transco's arguments against the standing of the Appellants as representatives of their members. Initially, we point out that Transco bases this attack on the *depositions* it took of the Appellants' members after the conclusion of the initial dates of the merits hearing. The Appellants had no obligation to develop the direct testimony of the witnesses at those depositions. Instead, we scheduled an additional day for the merits hearing. Transco and the other parties had the opportunity to question the standing witnesses during that additional day of merits testimony, but they elected to use the deposition transcripts instead.

Transco argues that PennFuture does not have standing because its identified member, Carolyn Lange, could not describe how the resources she uses were impacted by Transco's construction work after the fact. Transco says Ms. Lange "admitted that the Project has not affected her use and enjoyment of any of the resources at issue." (Transco Brief at 55.) Transco does not seem to dispute that Ms. Lange uses resources that were affected by the Project; it seems to only argue that Ms. Lange must, for purposes of standing, have been actually harmed by the Project after it was completed while the appeal was pending.

The problem with Transco's argument is that it contorts the standing inquiry into a merits inquiry. Indeed, Transco has it backwards. The question for standing is not whether the Project in hindsight *has* harmed Ms. Lange; it is whether she had a reasonable concern at the time of permit issuance that it *would* harm her. Whether Transco's Project has impacted a resource and whether a person has objectively reasonable concerns about a project for purposes of standing are two different things. Transco does not offer any caselaw that says a backward-looking standing inquiry is appropriate. Instead, as we said in *Valley Creek Coalition v. DEP*, 1999 EHB 935:

> The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to file an appeal from an action of the Department; it does not

> evaluate whether or not a particular claim has merit…. We may ultimately find that the Department had no obligation to consider post-construction discharges, and deny the Appellant's request for relief, but that does not negatively impact its ability to seek relief in the first instance. Even if an appellant's position substantively lacks merit, it may nevertheless procedurally seek resolution of its appeal.

Id. at 944 (internal citations omitted). *See also Pa. Waste Indus. Ass'n v. DEP*, 2016 EHB 590, 603 ("Appellants are not required to prove their case on the merits in order to have a right to appeal, but they must show that they have more than subjective apprehensions.").

We have no difficulty concluding that Ms. Lange has an interest that is sufficient to support the standing of PennFuture in this matter. Ms. Lange testified that she uses McMichael Creek for recreational purposes like hiking, birding, and sometimes fishing. (L.T. 37-38.) She also uses Pohopoco Creek for kayaking as well as hiking and birding in the area. (L.T. 35-36.) The Department's Record of Decision and Transco's Aquatic Resource Impact Table show that Transco's Project crosses unnamed tributaries to both Pohopoco Creek and McMichael Creek. (Jt. Ex. 37; DEP Ex. 27w.) Ms. Lange testified that Pohopoco Creek is an area of concern for her because the pipeline crosses it and she believes there will be inherent disturbances to the resource from the crossing. (L.T. 31-32.) She is concerned about tree cutting, stream crossings, silt pollution even with the use of BMPs, macroinvertebrate disturbances, trout fishery habitat disturbance, thermal degradation, habitat fragmentation, and preserving water quality. (L.T. 20-21, 44-46, 76-77, 79.)

Ms. Lange also testified about the parks she likes to recreate in, including Chestnuthill Park and West End Regional Park, which she and her husband use for hiking, birding, exercise, and enjoying nature. (L.T. 39-41.) She stated that she and her husband have enjoyed those places immensely over the years. (T. 40.) Transco's permit application and the Department's Record of Decision show that the Project crosses through Chestnuthill Park and passes within a tenth of a

mile of the West End Regional Park. (Jt. Ex. 26, 37.) Notably, and contrary to all of Transco's assertions, Ms. Lange testified that she avoided going to the West End Regional Park because she did not want to observe the construction going on, and that she and her husband have generally avoided areas where Transco's construction was happening because it was emotionally trying for them. (L.T. 42-43, 103-04.) In short, Ms. Lange clearly uses the resources affected by Transco's Project, she had an objectively reasonable concern that the resources would be adversely affected by Transco's construction, and she even avoided visiting certain resources during construction.[3] *Dengel, supra*, 2024 EHB at 615-16.

Transco concedes that the Riverkeeper Network has representational standing to challenge the Monroe County Chapter 105 permit and the Chapter 102 permit. (Transco Brief at 67.) However, Transco maintains that the Riverkeeper Network does not have representational standing to challenge the Luzerne County Chapter 105 permit. Transco has not explained why we should parse out a project into its individual components for purposes of a standing analysis. First, the Chapter 102 permit covers both Monroe and Luzerne Counties. Much of Transco's construction work is covered by both the Chapter 102 and the Chapter 105 permits. The Project could not go forward without Transco first possessing both types of permits. The Department evaluated the permits as part of a single project. The Appellants have appealed and litigated the permits together. Many of the parties' arguments in this appeal are not county-specific. If a person has an interest in a specific stream crossed by a project that gives rise to standing, that person is not prevented

[3] Even if Ms. Lange had not avoided visiting some of the resources during Transco's construction, we would still conclude that she has standing. Just because Ms. Lange, by chance, did not recreate in or around e.g. Pohopoco Creek or McMichael Creek when Transco was constructing its pipeline through those streams does not mean she does not harbor an objectively reasonable belief that her use of those resources could have been impacted for purposes of standing.

from challenging the entire project or the entire permit authorizing the project. Standing is not so compartmentalized.

In any event, Transco's argument still fails. Transco says the Riverkeeper Network's only identified member who testified as being adversely affected by the Project, Dr. Alexander Jackson, testified exclusively to impacts on resources in Monroe County and none in Luzerne County.[4] Concerningly, Transco's assertion is simply untrue. While Dr. Jackson testified in detail about his use of resources in Monroe County, such as fishing in Poplar Run and Pohopoco Creek, enjoying wetlands in the Tunkhannock Creek and McMichael Creek watersheds, and hiking on trails where his access was blocked due to Transco's construction, he also identified Bear Creek and Shades Creek as resources he has used for recreational purposes, which are in Luzerne County. (J.T. 107-08.) The Environmental Record of Decision for Luzerne County states that the Luzerne County portion of the Project is located within the Shades Creek and Bear Creek watersheds, among others. (Jt. Ex. 35 (at 12).) Among the streams the Record of Decision identifies as being impacted by the Project, it lists Bear Creek and its unnamed tributary, and Shades Creek and its eight unnamed tributaries. (*Id.* at 13.) The Record of Decision also says a portion of Bear Creek and an unnamed tributary to Shades Creek will have floodway impacts. (*Id.*) Bear Creek, Shades Creek, and unnamed tributaries to each of them are listed in Transco's Aquatic Resource Impact Table for Luzerne County. (DEP Ex. 26w.) Like with Ms. Lange, Dr. Jackson has identified areas he uses that had a realistic potential to be adversely affected by Transco's activities such that he has standing on behalf of the Riverkeeper Network.

[4] During the deposition of Carolyn Lange, in response to a question from Transco's counsel asking if Ms. Lange is also a member of the Riverkeeper Network, she testified that she is and makes monthly donations to the organization. (L.T. 59.)

Finally, assuming for purposes of argument only that either PennFuture or the Riverkeeper Network did not have standing, it is not clear what Transco would have us do if, for instance, one party had standing to challenge the Luzerne County Chapter 105 permit but the other did not. Transco does not offer any insight into what relief it would want. It does not say we should do something as nonsensical as striking from the record all questioning from one Appellant's counsel at the merits hearing that related to a certain permit. *See Montgomery Twp. Friends of Family Farms v. DEP, supra*, 2024 EHB at 733 ("The Appellant does not support its request with any authority for why we would strike all of the exhibits Herbruck's introduced at the merits hearing, disregard the testimony of its witnesses, or strike any questioning from Herbruck's counsel from the transcript. This appeal would obviously not go away if Herbruck's were dismissed as a party."). And to bring this discussion full circle, no one has challenged the standing of Maya van Rossum.

Motion for Nonsuit

Transco and the Department ask us to grant the oral motion to dismiss they made at the hearing at the conclusion of the Appellants' cases-in-chief. The presiding judge informed the parties at that time that the hearing would need to be recessed in order to address the motion. He said the Board would take the motion under advisement subject to briefing if the parties wished to pursue it. Counsel for Transco then stated "[w]e understand that it is on the record, and we are happy to move forward on our case." (T. 662.) Both Transco and the Department then put on their cases-in-chief. The Appellants respond that the motion has now been waived because Transco and the Department decided to put on their cases-in-chief and enter evidence into the record.

The motion is effectively a motion for a nonsuit, and the parties argue it as such in their briefs. We do not need to decide whether or not a motion for nonsuit can still be pursued after the moving party has put on its entire case-in-chief, because even assuming the motion is still

actionable, it is groundless and must be denied on its merits. A motion for nonsuit can only be successful before the Board if a party with the burden of proof fails to present almost *any* evidence in support of its case. *DEP v. Schultz*, 2015 EHB 1, 4; *Fox v. DEP*, 2011 EHB 320, 324-25; *Clabbatz v. DEP*, 2006 EHB 263, 265; *Decker v. DEP*, 2002 EHB 610, 614. A motion for a nonsuit is not to be used for arguing the relative merits of the parties' arguments. Transco claims the Appellants did not produce any evidence of likely degradation and inadequate restoration, which are their main concerns in this case, but that is simply not true. Among other things, they presented the expert opinions of Paul Cooper and James Schmid, Ph.D. exactly to that effect. (*See, e.g.*, T. 431-33, 545-48.) Both Transco and the Department attack the qualifications and credibility of the Appellants' experts and their opinions, but a motion for nonsuit is not suited for that purpose absent extraordinary deficiencies not present here.

Transco says that it is entitled to a nonsuit because there is no regulation requiring in-stream sampling. However, the fact that there is no regulation that expressly requires in-stream sampling does not foreclose, for example, the Appellants' claim that the Department, despite having the authority to do so, acted unreasonably in not requiring it. Transco says the Appellants put on no evidence that the Department failed to comply with regulatory standards. (DEP Brief at 81.) Again, this is not true. The Appellants presented admissible evidence including expert testimony that the Department failed to ensure that the regulatory requirement that water quality be maintained as required by 25 Pa. Code § 93.4a was satisfied. The Department says that it is entitled to a nonsuit because "[t]he relief Appellants seek was not entirely clear at the close of their case." (DEP Brief at 81.) Again, this is simply not true, but in any event, the criticism seems out of place in the context of a motion for nonsuit.

In-Stream Water Quality Sampling

The Appellants' main argument is that the Department did not ensure that Transco would comply with the antidegradation requirement that the water quality of special protection waters must be maintained and protected. The issue comes down to whether the Best Management Practices (BMPs) and restoration requirements in Transco's permits were adequately designed to ensure that the water quality of special protection waters of the Commonwealth affected by the Project would not be degraded. The Appellants' primary complaint, repeated and rephrased many times throughout their briefs, is that, in addition to ensuring that the BMPs were properly engineered, the permits should have included a requirement for pre- and post-construction in-stream water quality sampling to ensure that the BMPs were properly designed and the water resources would not be degraded: the Department should not simply have assumed the controls would work. In their words, "Trust but verify." (App. Brief at 1.) Similarly, they argue in the same vein that there should have been better pre- and post-construction data gathering mandated in the permits with respect to site restoration. They argue that one cannot determine whether water quality and other site conditions have been returned to baseline if one does not know what baseline was. As a remedy, they ask us to remand the permits for further study because "it is not too late to learn the status of the water resources now." (App. Brief at 69.)

It is true that the Department did not in fact include a permit condition requiring pre- and post-construction in-stream water quality sampling for the Project. Like everything else the Department does, we review that aspect of the permits to assess whether it was lawful, reasonable, and supported by the facts. *Gerhart v. DEP*, 2019 EHB 534, 546-47. We will also consider whether the remedy proposed by the Appellants is justified.

The decision not to include the in-stream sampling was not unlawful. There is no express requirement to conduct such sampling in the regulations that apply to the Project.[5] Nor do we believe any such requirement is implicitly mandated for every construction project that drains to special protection waters.

No person is permitted to degrade the waters of the Commonwealth. 35 P.S. §§ 691.401 and 691.611; *DEP v. EQT Production Co*., 2017 EHB 439, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018); *Oley Twp. v. DEP*, 1996 EHB 1098, 1117. Exactly what constitutes degradation of the waters of the Commonwealth is set forth in 25 Pa. Code § 93.4a, which reads as follows:

> **§ 93.4a. Antidegradation.**
>
> (a) *Scope.* This section applies to surface waters of this Commonwealth.
>
> (b) *Existing use protection for surface waters.* Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (c) *Protection for High Quality Waters*—The water quality of High Quality Waters shall be maintained and protected, except as provided in § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements).
>
> (d) *Protection for Exceptional Value Waters*—The water quality of Exceptional Value Waters shall be maintained and protected.

25 Pa. Code § 93.4a. For *all* waters of the Commonwealth, permits must ensure that the level of water quality necessary to protect the existing and designated uses of the waters is maintained and protected. *Id.*; *Liberty Twp. v. DEP*, 2024 EHB 790, 807. For High Quality waters, in addition to protecting existing and designated *uses*, permits must ensure that the existing water quality of the

[5] The regulation at 25 Pa. Code § 102.11(c) incorporates the federal effluent limitations for the "Construction and Development Point Source Category" found at 40 C.F.R. Part 450, which is a turbidity requirement that applies to NDPES Permits for Stormwater Discharges Associated with Construction Activities if the permittee utilizes construction dewatering activities and such dewatering activities discharge the water from those activities to sensitive waters (sediment impaired or designated high quality waters). This monitoring requirement is in the nature of a "numeric" effluent limit and requires effluent sampling. It does not require sampling of the receiving water. Dewatering BMPs were utilized during construction for the Project but were not authorized to discharge directly to surface waters.

waters is also maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. 25 Pa. Code §§ 93.4a(c) and 93.4c(b)(1)(iii). For Exceptional Value waters, the water quality of the waters must be maintained and protected, period. 25 Pa. Code § 93.4a(d).

The regulations set up an algorithm for implementing the antidegradation requirements. For High Quality and Exceptional Value waters (a.k.a. special protection waters), the regulations for point sources provide:

> (b) *Protection of High Quality and Exceptional Value Waters.*
>
> (1) *Point source discharges.* The following applies to point source discharges to High Quality or Exceptional Value Waters.
>
> (i) *Nondischarge alternatives/use of best technologies.*
>
> (A) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.
>
> (B) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters, except as provided in subparagraph (iii).

25 Pa. Code § 93.4c(b)(1)(i). Thus, for discharges to special protection waters, a permit applicant must use an environmentally sound and cost-effective nondischarge alternative if one is available. If one is not available, a person proposing a discharge must do two things: (1) it must use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater technologies, which is also known as ABACT; *and* (2) the person must demonstrate that the discharge will maintain and protect the existing quality of the receiving waters. *Id.* Using

ABACT does not necessarily guarantee that the existing quality of the receiving waters will be protected. Otherwise, there would be no need for Section 93.4c(b)(1)(i)(B). ABACT is a technology-based standard. The technology-based standard of ABACT in Section 93.4c(b)(1)(i)(A) does not supplant the water quality-based standard in Section 93.4c(b)(1)(i)(B). *See generally Liberty Twp.*, 2024 EHB at 807 (NPDES permits must comply with both technology-based effluent limits and water quality-based effluent limits) (citing 25 Pa. Code §§ 93.4a, 96.4(b); 40 C.F.R. 125.1-125.3 (incorporated by 25 Pa. Code § 92a.3)). Therefore, regardless of ABACT being employed, the water quality of High Quality waters must be maintained unless a detailed Social and Economic Justification (SEJ) is allowed, and the water quality of Exceptional Value waters must be maintained. The step-by-step analysis set forth in 25 Pa. Code § 93.4c applies to earth disturbance activities covered by a Chapter 102 permit. 25 Pa. Code §§ 102.4(b)(6) and 102.8(h).

In the context of erosion and sedimentation and post-construction stormwater control for earth disturbance projects covered by a Chapter 102 permit, the regulations define nondischarge alternative and ABACT as follows:

> *Nondischarge alternative*—Environmentally sound and cost-effective BMPs that individually or collectively eliminate the net change in stormwater volume, rate and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities **to maintain and protect the existing quality of the receiving surface waters of this Commonwealth**.
>
> *ABACT—Antidegradation best available combination of technologies*—Environmentally sound and cost effective treatment, land disposal, pollution prevention and stormwater reuse BMPs that individually or collectively manage the difference in the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities **to maintain and protect the existing quality of the receiving surface waters of this Commonwealth**.

25 Pa. Code § 102.1 (emphasis added). These regulations conflate the technology-based and water quality-based concepts in a somewhat circular fashion, such that control measures cannot constitute a nondischarge alternative or ABACT unless they "maintain and protect the existing water quality of the receiving surface waters of this Commonwealth." *Id.* However, importantly, regardless of the technology employed, it is clear that the existing water quality of the special protection receiving waters must be maintained and protected (excluding the SEJ for High Quality waters). 25 Pa. Code § 93.4a.

There is no dispute, and we agree, that the Department has the authority to require in-stream water quality sampling in appropriate cases, and it has done so in other situations. (Findings of Fact No. 93, 94, 95.) However, the Appellants are wrong to insist that any of the regulations discussed above legally mandate such sampling for every project impacting special protection waters. Rather, whether to require it in any given case is a matter within the Department's reasoned discretion using its best professional judgment. The Department's decision to not require Transco to take pre- and post-construction in-stream water quality samples must be fact-based and reasonable. It must turn on the facts related to each permit under appeal. In order to prevail, the Appellants needed to show that the Department's decision was not reasonable or fact-based. They failed to do so.

The Appellants say the Department in approving BMPs relied too heavily on its Stormwater Best Management Practices Manual and Erosion and Sediment Pollution Control Manual. They say the Department simply assumes the measures described in those manuals will work. As this Board has repeatedly held throughout various regulatory revisions, and as we reaffirm today, simply following narrative *technology* requirements set forth in a manual is not *necessarily* a complete substitute for ensuring that *water quality* requirements are met. *Borough of*

Stockertown v. DEP, 2016 EHB 456, 468-69; *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 563-65; *Blue Mountain Preservation Ass'n v. DEP*, 2006 EHB 589, 609-13. However, by the same token, there is nothing inherently wrong with relying on the manuals, among other things, when deciding whether in-stream sampling is necessary in a particular case.

Still, the Board is more concerned with the result than the process that the Department used to get to that result. *Friends of Lackawanna*, 2017 EHB at 1156; *O'Reilly*, 2001 EHB at 51. The Appellants repeatedly criticize the Department for its use of forms and checklists, but this Board checks to see if the Department got to the right result using appropriate analyses, not how the Department used forms and checklists to manage and standardize the process. We must determine whether the Department correctly concluded that the applicant's proposed control measures are adequately designed to ensure that water quality in the special protection waters would be protected. The fact that the Department relied upon its manuals in making that decision is, in and of itself, neither definitive, irrebuttable proof that a control measure is adequately designed nor definitive, irrebuttable proof that a control measure is inadequately designed. Consistency or inconsistency with approved designs in a manual is certainly relevant, but it is not necessarily conclusive. The regulations do not say otherwise.[6]

Reliance on approved BMPs coupled with adequate site investigation will undoubtedly be sufficient in the vast majority of cases. Yet, the Appellants were nevertheless free to show that the Department approved an inadequate design in this case, or that water quality sampling should have been required based on site-specific considerations. They failed to do so. We have no evidence that any of Transco's BMPs were inadequately designed or that there was any particular reason why water quality sampling should have been required. The Appellants did not even try to

[6] There is a regulatory presumption that a forested riparian buffer meeting certain criteria will maintain water quality, 25 Pa. Code § 102.14(e)(1), but even that presumption can be overcome with specific proof.

make such a showing. The closest they came to making a particular showing was directing our attention to a significant sedimentation event that occurred at the crossing of Poplar Run, an Exceptional Value stream. However, the fact that this event occurred does not prove that the Department erred by approving the control measures at that location. No engineer testified that the event occurred *because* the control measures were inadequately designed. There is no direct evidence that measures were in fact inadequately designed. For example, Transco might have improperly installed or maintained the measures (there is no proof of that), but that does not mean the measures were inadequately designed and the permit was therefore issued in error.

The design of control measures is largely an engineering function, yet the Appellants did not present any expert engineering testimony. Instead, they presented the testimony of two ecologists, neither of whom was qualified to opine on the design of BMPs. Paul Cooper is a limnologist or freshwater ecologist. (App. Ex. 48.) He is neither an engineer nor an expert in stormwater management. (T. 527-28.) He was not offered as an expert on BMPs. He did very little review of the relevant files. He seemed less than adequately familiar with the Transco E&S and PCSM plans that he was purporting to criticize. (T. 617-19, 629-30, 637-38.) He never prepared such a plan himself. He performed no engineering calculations. (T. 615-17.) He was unfamiliar with various parts of the regulatory programs. Surprisingly, he never reviewed the Records of Decision for the permits. (T. 647-48.) He did not visit the site. He testified largely in generalities and vague possibilities.

His testimony boiled down to its essence was that there can be "a host of potential problems" with a pipeline project. (T. 568.)[7] This is the sort of testimony that we have repeatedly held adds very little value. *See, e.g.*, *Stocker, supra*, 2022 EHB at 444 ("It is on [the appellant] to

[7] For example, Mr. Cooper warned of thermal impacts from pipeline projects, but the Appellants fail to explain how any of Transco's BMPs could have been better designed to avoid any such impacts.

show based on evidence adduced at the hearing that the plan cannot be implemented, not to claim that there is no assurance that the plan can be implemented."); *Stedge*, 2015 EHB at 612 (discussing "the laundry list of potential but unsubstantiated problems that also will not support a correction on our part"). The fact that there *might* be "problems" is why environmental permits are required. Importantly, Mr. Cooper conceded that he was not in the position to say one way or the other whether Transco's BMPs were adequately designed. (T. 615.) Nothing in Mr. Cooper's testimony persuades us that the Department decision not to require in-stream water quality sampling for the Project was unreasonable.

The Appellants' other expert, James Schmid, Ph.D., is an expert in wetland ecology and environmental assessment. (App. Ex. 47.) He is not an engineer, and not an expert in stormwater controls. (T. 426-27, 429.) Unfortunately, although we have the highest regard for Dr. Schmid, his testimony in this case was not particularly helpful. Dr. Schmid never visited any sites on the Project or did any field work, a cardinal flaw for the type of opinions he was offering. (T. 488-93.) He conducted very limited file reviews. He presented no data to support his opinions. He often spoke in terms of theory, policy, generalities, and speculative possibilities, rarely providing any specifics. He conceded that he had a "fairly limited opportunity for review." (T. 500.) He tended to point out isolated errors he uncovered in the massive permit application record and complain about a lack of professionalism, yet the errors if they exist at all were not shown to be of any real consequence. (E.g. T. 441-42.) Dr. Schmid also did not testify directly in support of the Appellants' theory that in-stream water quality sampling should have been required.

In contrast to Mr. Cooper's testimony in support of a requirement for in-stream sampling, the Department's experts, David Goerman and Katie Seymore, credibly explained why pre- and post-construction in-stream sampling was not reasonable for this Project. The utility line crossings

at issue here, because they are of short duration, have limited extent relative to the overall size of the resources being impacted, and must be conducted "in the dry," are considered low risk projects. (T. 1154-57, 1174-80, 1219-21, 1231, 1258-59, 1273-74, 1283-84; Jt. Ex. 35, 37.)

Other witnesses explained that construction of the pipeline calls for the digging of a trench within the pre-existing pipeline right-of-way, laying and construction of the pipe itself, replacing fill and dirt once the pipe is laid, and reseeding and soil management to promote regrowth and revegetation of that area afterwards. (T. 285-89, 395, 418-19.) Construction here used the same construction methods used in all types of utility line projects, including natural gas transmission lines, gathering lines, distribution lines, sanitary sewer lines, drinking water lines, and electric and fiber optic lines. (T. 1178-80.) The majority of the crossings were designed and constructed using "in the dry" construction. (T. 1154-57.) This construction method utilizes a pump around or a flume to divert the water around the workspace so there is no water flowing through the workspace while the excavator operates. While the water is diverted around the workspace, the pipeline is installed and the soils are put back to the same contours of the stream. After the completion of construction activities, the workspace is stabilized and the pump around or flume is removed to allow water to flow again. Working "in the dry" means that there will be no major change to the shape of the stream after pipeline installation and that there will be no extra sediment. (T. 1154-55.)

Transco constructed resource crossings using minimization practices. Construction activities for each resource crossing generally took 24 to 48 hours depending on the size of the stream. (T. 1157, 1174.) The resource crossings are supposed to be as quick as possible to reduce the risk of a storm event and to restore the resource as soon as possible. Transco "neck-downed" and narrowed the right-of way when constructing the resource crossings to minimize impacts.

Furthermore, Transco's permits do in fact require a great deal of information regarding pre- and post-construction site conditions, 25 Pa. Code §§ 102.4(b)(1)-(9), 102.6(a)(2), 102.8(f)(1)-(15), 102.8(g)(1)-(6), 102.8(h), and 102.14, which provides further support for our conclusion that the Department acted reasonably in not requiring in-stream water quality sampling. Transco's applications needed to include detailed descriptions and technical plan drawings of each site-specific BMP, including calculations and narratives prepared by licensed professionals that articulate how those selected BMPs will work to keep the stormwater on the site to mimic the pre-construction natural management of stormwater. (T. 286-90, 300, 389-90.)

Transco submitted site-specific data regarding watercourses that identified the characteristics of each watercourse affected by the Project, including the flow type, stream depth, substrate type, water clarity, slope, the types of riparian vegetation and aquatic organisms present (including the presence of macroinvertebrates), and the geometry of the stream, among other characteristics. (T. 286-90, 389-90, 620-22; Jt. Ex. 14-18, 25, 33, 35, 37.) The Environmental Assessment also contains a module that identifies and describes the potential Project impacts and how those impacts will be minimized, including the minimization of effects on fish and other aquatic biota. (Jt. Ex. 19, 26.) Further, the Chapter 105 permits require Transco to "prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions." (Jt. Ex. 32a, 32b.) The Chapter 105 permits also require Transco to monitor for secondary impacts to hydrology, which includes the submission of monitoring reports that "contain information describing the presence or absence of hydrology at the time of inspection, a narrative comparison to hydrology present in the watercourse during pre-permitting field investigation(s), and photographs of the watercourse." (*Id.*)

With respect to post-construction sampling, there are already regulatory requirements and permit conditions mandating pre-construction meetings, inspections (weekly and after every stormwater event) throughout the duration of construction to confirm the proper installation and functioning of the BMPs, licensed professional oversight of critical stages of construction, and documentation of the required monitoring. (Jt. Ex. 31.) 25 Pa. Code §§ 102.4(b)(5)(x), 102.4(b)(8), 102.8(j)-(m) and 102.14(g)-(h). Once post construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process. 25 Pa. Code § 102.7. Further, there are requirements related to certifications from licensed professionals that the post-construction/restoration BMPs were installed in accordance with the approved plans, as well as operation and maintenance requirements that continue in perpetuity. 25 Pa. Code §§ 102.8(f), (j), (k), (l), (m), and 102.14(g).

The Appellants have not shown that there would be any significant additional benefit or value added from in-stream sampling. They say the costs would not be unduly burdensome, but the Department accurately counters that the Project involved numerous crossings. Requiring the sort of sampling advocated by the Appellants would add substantial time and cost to the application process.

The Appellants do not tell us what sort of in-stream sampling they believe would have sufficed. It is said that one never steps into the same stream twice. They are dynamic systems that are constantly changing. Do the Appellants believe there should be at least four quarters of pre- and post-construction samples to give a meaningful picture of seasonal changes in flow and benthic communities? What would they sample for? The primary pollutant of concern during construction is sediment, whereas post-construction controls are as much concerned with rate and volume of flow. Where and how would the sampling be performed? For example, how one would sample

for "thermal impacts" as advocated by the Appellants has not been explained. In-stream water quality sampling of sedimentation would seem to raise a number of questions that the Appellants do not answer.

The Appellants very much in passing argue that the numeric criteria of Chapter 93 apply to stormwater management. (App. Brief at 44-46.) They then go on to say that, because the numeric criteria apply, *in-stream* sampling should be required. This is a *non sequitur*. The connection between the two points is neither obvious nor explained.

The Appellants argue that the need to maintain and protect the existing water quality of the waters under the antidegradation regulations must include protecting the "ecology" of the waters. (App. Brief at 41-42, 51, 56.) There is no support in the law for such a broad, vague reading of the antidegradation regulations. The Appellants refer us to various regulations that set water quality criteria based in part on protection of the aquatic community, *e.g.* 25 Pa. Code §§ 93.4b, 93.7, but that hardly supports a claim that permittees must not only protect the water quality of the receiving stream, they must also protect the "ecology" of the stream in order to comply with Chapter 93. There are provisions in Chapter 105 regarding ecology, which we discuss below, but those are separate and apart from the obligation to refrain from degrading water quality set forth in Chapter 93.

The Appellants on occasion contend more generally that the Department failed to include or implement "Chapter 93 water quality or antidegradation requirements." (*See e.g.*, App. Reply Brief at 11.) Other than in-stream sampling, they do not tell us the "requirements" that they are referring to that they believe should have been included in the permits. They seem to accept that no sampling of the discharges themselves were required. As previously noted, they have not shown that any BMPs were inadequately designed to ensure the protection of water quality. The

Appellants were free to, but failed to, show us that there were any other aspects of the permits that fell short of protecting water quality.

The Appellants repeat their objection that in-stream pre- and post-construction water quality sampling should have been required for Transco's 105 permits as well as the 102 permit. We reject that objection for the same reasons we just discussed. Although authorized and appropriate in some cases, the Appellants failed to show that such in-stream water quality sampling was necessary or appropriate in this case as a condition of Transco's Chapter 105 permits.

For all of these reasons we conclude that the Department's decision not to require pre- and post-construction in-stream sampling for the Project was lawful and reasonable. There is no credible evidence that in-stream water quality sampling was necessary or appropriate in this case to ensure that the water quality of the affected waters of the Commonwealth would be maintained and protected. Even if we assume *arguendo* that the Department erred in this regard, we would not be inclined to grant the relief requested by the Appellants, namely, a remand for "further study." Pipeline construction was completed in October 2023. The pipeline has been in full service since August 2024. We are told that there is no outstanding federal litigation that imperils full operation going forward. The "Appellants are not asking the Board to order the pipeline removed or relocated." (App. Brief at 68.)[8] The Appellants acknowledge that it is now too late to take any pre-construction samples or to further evaluate pre-construction site conditions. Any measures related to E&S controls during construction are obviously moot. The Appellants do not explain how remanding the permit to require an assessment of "the status of these water resources now," (App. Brief at 69), could possibly translate into any specific measures to be taken regarding any BMP because the BMP was improperly designed and should not have been permitted. They

[8] The Appellants' concession that they are not asking for a pipeline relocation renders moot their argument that Transco's alternatives analysis regarding pipeline location was inadequate.

do not explain how the results could show that degradation has occurred, and if so, how it relates to an improper BMP design. This is not an enforcement case; it is an appeal to determine whether permits were issued in error.

The Appellants could have but did not seek a supersedeas. Some of that may be explained by the protracted jurisdictional wrangling that took place.[9] But be that as it may, the fact of the matter is that the scope of practical relief that we could have offered has been narrowed down considerably, which when coupled with the Appellants' limited proposed remedy, may explain why many of the Appellants' arguments come across as attacks on the Department's programs in general as opposed to attacks on Transco's permits for this Project.

Restoration

The Appellants also challenge Transco's Chapter 105 permits. 25 Pa. Code Chapter 105 primarily relates to work done *in* the water resources as opposed to in the upland areas, with the latter being primarily regulated under Chapter 102. The Chapter 105 regulatory framework allows impacts, including permanent impacts to water resources, subject to the review process and permitting standards, which require avoidance, minimization, and mitigation. 25 Pa. Code §§ 105.11 – 105.20a. There are myriad requirements relating to the review process and permitting standards, but the guiding principle is the Department must ensure that all permits contain

[9] *See* EHB Docket No. 2023-026-L, Docket Entries #7-9 (Transco's Motion to Stay Proceedings (seeking a stay based on Transco's initiation of federal litigation arguing that the United States Court of Appeals for the Third Circuit and not this Board had jurisdiction over this appeal), Appellants' Response in Opposition Thereto, and Order Denying Motion to Stay); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 97642 (M.D. Pa. June 5, 2023) (denying Transco's motion for preliminary injunction to enjoin the Board from proceeding with the Appellants' appeal on the basis of jurisdiction), *aff'd*, 108 F.4th 144 (3d Cir. 2024), *pet. for reh'g en banc denied*, 110 F.4th 612 (3d Cir. Aug. 8, 2024); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 233735 (M.D. Pa. Dec. 22, 2023) (granting Appellants' motion to dismiss Transco's complaint), *aff'd*, 2024 U.S. App. LEXIS 27958 (3d Cir. Nov. 4, 2024).

conditions and requirements that are protective of the public health and safety as well as the environment. 25 Pa. Code §§ 105.14, 105.15, 105.16, 105.18a, 105.21.

For Exceptional Value wetlands, a permit may not be issued unless it is shown that the encroachment will not have an "adverse impact" on the wetland. 25 Pa. Code § 105.18a(a)(1). The regulations also provide that the cumulative effect of the project and other projects may not result in "impairment" of the resource. 25 Pa. Code § 105.18a(a)(6). Meanwhile, another subsection speaks in terms of not causing or contributing to pollution or a "diminution of resources sufficient to interfere with their uses." 25 Pa. Code § 105.18a(a)(5). The regulation at 25 Pa. Code § 96.3(g) provides: "Functions and values of wetlands shall be protected pursuant to Chapters 93 and 105 (relating to water quality standards; and dam safety and waterway management)." 25 Pa. Code § 105.14(b)(11) requires the Department to review a Chapter 105 permit for "consistency" with state antidegradation requirements. In *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772, we reconciled these standards somewhat by saying "[f]or EV wetlands, the Department reviews a project to ensure that there will be no adverse impact to the functions and values of the wetlands." The permitting standards for "other wetlands," i.e. non-Exceptional Value wetlands, track these various terms, but prohibit a "*major* impairment" or a "*significant* adverse impact." 25 Pa. Code § 105.18a(b)(1) and (6) (emphasis added). All of these imprecise terms obviously leave a great deal of room for the exercise of reasonable discretion.

Avoidance, minimization, and mitigation are the operative principles. Impacts should be avoided if possible. Avoidance includes an alternatives analysis. The Appellants cling, just barely, to their criticism of Transco's alternatives analysis, suggesting that some wetlands might have been avoided with a different pipeline route. (App. Brief at 49 n.5.) They also concede, however,

that they are not asking us to relocate the pipeline now. Therefore, any opinion we would offer at this point would be purely academic and we will not address that issue further.

Minimization can relate to short-term and long-term impacts. With respect to short-term minimization, the Appellants complain that the disruption caused by Transco's construction activities during construction failed to minimize the impact of the Project. They complain that the permitted activities include bringing in earth-moving equipment, clearing forested wetlands, digging a ten-foot deep trench, laying a 30 or 42-inch wide pipe, and backfilling soils, stopping and diverting streams for a period of time, and the "total removal of everything in the right of way." (App. Reply Brief at 6.)

There is no relief we can offer at this point regarding the Appellants' complaint of inadequate attention to detail during construction. Construction is completed. Nevertheless, we reject the Appellants' accusation that the Department failed to properly minimize the impact of construction activities during construction. We touched on the numerous permit requirements relating to the minimization of impacts above. All impacts, temporary or otherwise, were identified and accounted for. The Aquatic Resource Impact Tables, often referred to as the acronym "ARIT," (T. 1136), describe all impacts from the Project. (*See* DEP Ex. 26w, 27w.) The Aquatic Resource Impact Tables identify each and every surface water (e.g., wetlands and streams) impacted by the Project, the latitude and longitude of the resource, the Chapter 93 designation for the resource, the work proposed within the resource, whether the work relates to a temporary or permanent impact, and the exact square footage of the impact dimensions. (T. 1136-38; DEP Ex. 26w, 27w.) The Department's Records of Decision also speak in significant detail regarding the impacts that are temporary or permanent, and how those impacts will be mitigated. (Jt. Ex. 35, 37.)

This directly refutes the Appellants' claim that Transco's permit application "vastly undercounts" the construction zone. (App. Brief at 55.)

To repeat, the actual construction of the "in the dry" stream crossings for this Project are quick and created the minimum disruption possible associated with trenching. (T. 1154-57, 1174; Jt. Ex. 32a (Special Conditions L.1, T, U, NN, OO, PP), 32b (Special Conditions K.1, S, T, MM, NN, OO).) The Appellants were free to show that the Department acted unreasonably by approving the permits without adequate protections during construction, but they have not explained what more could or should have been done.

Turning to mitigation, mitigation is defined as follows:

> (i) An action undertaken to accomplish one or more of the following:
>
> (A) Avoid and minimize impacts by limiting the degree or magnitude of the action and its implementation.
>
> (B) Rectify the impact by repairing, rehabilitating or **restoring** the impacted environment.
>
> (C) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.
>
> (ii) If the impact cannot be eliminated by following clauses (A)—(C), compensate for the impact by replacing the environment impacted by the project or by providing substitute resources or environments.

25 Pa. Code § 105.1 (emphasis added). Mitigation includes restoration. Complete and timely restoration equates to complete mitigation, which does not excuse appropriate minimization of impacts during construction, but it does mean that there will be, by definition, no adverse impact precluding the issuance of a permit within the meaning of the regulatory prohibition against adverse impacts. If a resource has been restored within a reasonable period of time, there has been no adverse impact within the meaning of the regulations. Otherwise stated, truly temporary impacts will generally not constitute adverse impacts within the meaning of the regulations. On

the other hand, absent restoration, the impact is permanent. If the Department in the exercise of its reasoned discretion is willing to tolerate a permanent impact, there must be compensation.

In *Center for Coalfield Justice v. DEP*, 2017 EHB 799, *appeal discontinued*, No. 1290 C.D. 2017, we held in the mining context that limited and temporary disruption of a stream's uses clearly can be anticipated as part of the Department's overall permitting scheme. We acknowledged that "limited" and "temporary" are imprecise terms, which means there must be an examination of the unique facts of each case to see whether the impacts result in impermissible impairment. Consideration of the mitigation measures proposed is an integral part of this examination. *Id.*, 2017 EHB at 845-54.

Restoration is not defined in the Chapter 105 regulations, but with respect to streams, we recently held that, when an encroachment is changed or removed, the goal is to return the impacted watercourse to natural conditions, i.e. the natural regimen and ecology that existed prior to the encroachment, to the extent possible. *Del. Riverkeeper v. DEP*, 2024 EHB 549, 574 (citing 25 Pa. Code §§ 105.2(4), 105.14(b), 105.16(d), 105.161(a)(3)). The idea is to return the resource back to its natural functioning ecosystem. 25 Pa. Code § 105.14. (*See* T. 1231-38.) If that is not possible, social and economic balancing will be required. 25 Pa. Code § 105.16. Restoration does not require the resource to be returned to an exact mirror image of its pre-construction appearance. The pebbles in the stream may not be in exactly the same place, and every plant in the post-construction wetland may not copy every individual plant pre-construction. Soil horizons cannot be restored with perfect exactitude over every inch of the project. The standard of success for wetlands is enough of a return to the natural regime that existed pre-construction that the wetland's functions and values are reestablished and revived. 25 Pa. Code § 105.14(b)(13); *Pine Creek Valley Watershed Ass'n*, 2011 EHB at 772. Mitigation is not just required for complete losses of

wetlands; it is also required for altered wetland functions and values. If pre-construction functions and values cannot be restored within a reasonable time or ever, compensation is required, even if the wetland itself remains. (T. 160-61, 372-73, 1217-18, 1267, 1286-88.) 25 Pa. Code §§ 105.1 (definition of mitigation), 105.18a(a)(7), 105.18a(b)(7), 105.20a.

With respect to restoration, the Appellants first posit the same argument regarding restoration that they made regarding water quality, namely, that there was not enough pre-construction data to properly assess whether the resources have been restored to their original condition. For example, Transco did not do pebble counts or grain-size measurements in the streams, inventory every single plant in the wetlands, or perform more detailed macroinvertebrate studies. Mr. Cooper, utilizing an example from the permit application, testified that

> there is a description of some of the major taxon present but it doesn't utilize more advanced metrics that would be used to describe those [benthic] communities, which is often the basis for determining existing uses at a site. Same with stream substrate characteristics. It does list the major types. It doesn't provide proportions, which would be valuable for showing stability and the crossing…once that material was replaced into the system. There is no description of [stream] hydraulics in that area. So much of the basic information is there. I think additional information would be important for characterizing the site, assisting in design for restoration, and for monitoring the restoration.

(T. 551-52.) Unfortunately for the Appellants, there is nothing we can do about the cited lack of baseline data now. Even if we could, we detect no error here.

There is no end to the study that is possible, but at some point reasonable heads must prevail. The Department actually mandated a wealth of pre-construction information to measure against post-construction conditions. At the risk of repetition, the permit application included four modules with several parts, including a part for resource identification and characterization and for identifying and describing potential impacts. (T. 1144-45; Jt. Ex. 13-30; DEP Ex. 26y, 27y.) Transco was required to prepare and maintain a detailed record of pre-construction and post-

construction conditions of each stream and wetland crossing, including but not limited to, photographs. (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).) The in-stream information included substrate data. (T. 620-23; Jt. Ex. 25.) Transco's application included a detailed analysis of the functions and values provided by each wetland along the project route. (T. 785-93, 842-43; Jt. Ex. 14-19, 25, 26, 27.) The approved mitigation plan ensures that those functions and values are maintained. (Jt. Ex. 19, 20, 26, 27.)

We do not credit Mr. Cooper's testimony that more baseline data was required for this Project. His testimony was repeatedly based on possibilities and consequences that might have occurred but might not be accurately measured. (*See, e.g.*, T. 570, 575-78.) He of course had no data of his own. He also seemed to be opining under the mistaken understanding that post-construction conditions must be an exact replica or carbon copy of pre-construction conditions. Such a standard is impractical, unnecessary, and unreasonable. Rather, the permit must ensure a return of the streams to their natural regime, and return wetlands so that they serve their pre-construction functions and values. With this standard in mind, the data requirements advocated by Mr. Cooper seem excessive, a search for knowledge for knowledge's sake alone, without adding any practical value.

Regardless of pre-construction conditions, Transco's permits contain extensive restoration requirements designed to ensure that regulatory standards would be met and long-term impacts are eliminated or minimized. The Project did not propose any permanent loss of wetlands. (T. 782-83, 1164.) All wetlands are restored to wetlands. For all the Appellants' objections, the reality is that the permanent impacts to wetlands on this Project relate to nothing more than a change in vegetation. "[T]he wetland is still there, it is just that the vegetation has changed a little bit." (T. 352. *See also* T. 784, 1163, 1181-82.) Transco's permit applications properly accounted for this

change in vegetation by ensuring that any functions and values associated with the change in vegetation were addressed. (T. 782-85.) 25 Pa. Code § 105.20a.

Transco's and the Department's witnesses explained why this functional conversion would not result in any adverse impact. (T. 815-16, 859-60, 898, 1152-53, 1193-94.) Appellants offered no contrary evidence. Dr. Schmid, the Appellants' expert witness pertaining to wetlands, acknowledged that he was not expressing an opinion as to whether the Project might have an adverse impact on wetlands. (T. 500-01, 513.)

Transco's stream construction plans require the stream banks and streambed to be restored to pre-construction contours. (T. 287-88, 1155; Jt. Ex. 19 (Section S3.G), 26 (Section S3.G).) The pipeline crossings must be restored and properly stabilized upon completion of the work, and restored streams must use a minimum of six inches of native stream bed material, which has been stockpiled. (T. 288-89, 418, 468, 622-23, 990, 1235-36.) Further, the restored streambed elevation cannot exceed the pre-existing streambed elevation. (Jt. Ex. 32a (Special Condition V), 32b (Special Condition U).) There was a reforestation plan identifying where to replant trees. (T. 625-26.) Wetlands are to be restored using native wetland seed mix. (T. 793-95; Jt. Ex. 27.)

Transco's Environmental Assessment addresses how pre-construction hydrology and drainage patterns of wetlands would be restored. (Jt. Ex. 19, 26 (Sections S3.D.2(i) and S3.G.1).) Transco's applications included adaptive management plans. These plans specified that if work fails to meet restoration or other requirements, Transco was required to propose a plan to the Department to ensure compliance with those requirements. (T. 403-04, 625, 802-05.)

Some of the other permit conditions regarding restoration that are present in both the Luzerne County Chapter 105 Permit and the Monroe County Chapter 105 Permit are:

- "Upon completion of final earthmoving activities, the permittee shall restore all disturbed wetland areas to original contours and replant with indigenous wetland

vegetation in accordance with the restoration plans as presented in the permit application." (Jt. Ex. 32a (Special Condition S), 32b (Special Condition R).)

- "All Palustrine Scrub-Shrub (PSS) and Palustrine Forested (PFO) wetlands within the temporary right-of-way (ROW) shall be replanted with woody species that are similar to those species present in the wetland prior to the permittee conducting construction activities." (Jt. Ex. 32a (Special Condition W), 32b (Special Condition V).)

- "The Permittee shall ensure at least an eighty-five percent (85%) survival rate of wetland plantings during the five (5) year monitoring period. Additional wetland plantings and/or reports in subsequent years beyond the initial five (5) years may be required if an eighty five percent (85%) survivability of planted species is not achieved." (Jt. Ex. 32a (Special Condition X), 32b (Special Condition W).)

- Transco is required to "prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions." (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).)

The Appellants have not provided any convincing evidence that these conditions are inadequate to ensure the effective restoration of the affected resources.

The Appellants ask us to remand the permits so that they can be revised to require more monitoring. To a large extent this request overlaps with their request for post-construction sampling of water quality and streambed materials. They add that the permits only require reports and photographs twice a year for the first two calendar years and once a year for three years after that, which they say is not enough. (App. Brief at 22; App. Reply Brief at 5.) They say there should be more to evaluate whether restoration has been successful and whether an impact is "truly temporary," but they do not tell us how long or at what frequency the monitoring reports should continue.

We do not see a need to remand the permits for more monitoring. The Department acted reasonably in requiring the amount that it has. Once post-construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process in Chapter 102. (T. 351, 1036-37.) 25 Pa. Code § 102.7. Further, there are requirements related to certifications from

licensed professionals that the post-construction/restoration BMPs were installed in accordance with the approved plans, as well as operation and maintenance requirements that continue in perpetuity. (T. 1038-39; Jt. Ex. 31.) 25 Pa. Code §§ 102.8(f), (j), (l), (m), and 102.14(g). Transco is required to observe wetlands, take photos, and monitor for a set of parameters, including percent survival of aquatic species and plant species. (T. 226-27, 1035-36; Jt. Ex. 32a, 32b.) It must monitor for secondary impacts to hydrology. (Jt. Ex. 32a, 32b.) Off-site and on-site mitigation activities are also monitored and reported on for five years. (*Id.*) The Department can request additional monitoring if parameters are not met. (*Id.*)

The Appellants next argue that the Department should better define "temporary" in terms of impacts to resources; it should include a specific deadline in the permits for when restoration must be complete. They complain that what the Department considers a "temporary impact" is based on a permittee's expectation of achieving restoration, and that can last until the expiration of the permits, which can be continuously renewed. (T. 293-94.) There is no enforceable time constraint, they say; as a result, impacts could *de facto* become permanent without any of the accompanying regulatory obligations for mitigation that should come into play for permanent impacts.

The Appellants say the Department may not disregard the "durational extent" of the impacts. We certainly agree. However, there is no evidence that the Department did that. To the contrary, the record is replete with evidence that Transco must obtain full restoration within a reasonable period of time, and extensive monitoring is required to ensure that happens. We decline to draw a red line between what may be a temporary impact and a permanent one. Tellingly, the Appellants do not suggest one. What constitutes timely restoration of a resource will vary in each case, and it will turn on the facts. *Cf. Ctr. for Coalfield Justice, supra*.

The Appellants next say that some of the impacts that the Department has labeled as temporary are in fact permanent. Because impacted resources will never be restored, there was inadequate compensation required for the Project, they claim. The problem that pervades throughout the Appellants' case and appears once again in this context is they do not give us specific examples. They do not point to any specific location where the Department treated what should have been a permanent impact as temporary. This case is to be contrasted with *Gerhart, supra*, 2019 EHB 534. In that case, two landowners appealed the Chapter 102 and 105 permits authorizing the construction and installation of a natural gas liquids pipeline that traversed the landowners' property. The landowners focused on specific streams and wetlands on their property that would be crossed by the pipeline and produced evidence showing that one of the wetlands classified as having emergent vegetation and to be restored as such, was actually a forested wetland and needed to be restored accordingly pursuant to the pipeline company's restoration and replanting plans. Here, we have nothing approaching that level of specificity.

We reject Dr. Schmid's opinion that deforestation of a forested wetland is never temporary, which is more a personal opinion of semantics than science. (T. 454-55.) Dr. Schmid's personal opinion does not support a remand of Transco's permits for any additional compensatory measures. Similarly, the fact that wetland recovery in general takes longer than Dr. Schmid would personally like does not compel us to change anything in the permits. Dr. Schmid has not explained how Transco could have accelerated the process to his satisfaction, even if that were the pertinent inquiry.

In any event, the Department does consider the time it takes to reestablish the same type of vegetation when deciding how much compensation is required. Section 105.18a requires replacement of affected wetlands, and Section 105.20a provides the wetlands replacement criteria.

The Chapter 105 replacement ratios take into account how long it takes for trees or shrubs to grow, so that is often why permits require a higher than one-to-one ratio of mitigation wetlands. The Department takes the type of the resource into account. (T. 1287-88.) In this case, for the crossings of Palustrine Forested (PFO) and Palustrine Scrub Shrub (PSS) wetlands where vegetative conditions will be converted to Palustrine Emergent (PEM) vegetative conditions, the Department determined that the functional conversion impacts will be mitigated for, as described in Transco's Mitigation Plan. For the PFO and PSS wetlands not in the right-of-way, these areas will be replanted and allowed to revert back to PFO conditions following construction, and off-site mitigation will also compensate for the temporal loss of their functions and values.

The sections of the Project that were proposed to convert PFO/PSS wetlands to PEM wetlands are limited to the section immediately above the pipeline right-of-way because mowing (as infrequently as every three years) is required to ensure pipeline integrity and safety from the threat of tree roots. (T. 1147-48.) The permanent functional conversion here of PFO/PSS wetlands to PEM constitutes permanent indirect impacts because one function, the vegetation, will change. (T. 1147-51.) These permanent functional conversions are in a narrow path on either side of the pipeline and are a small portion of the larger resources (T. 1150-51.) As documented in the Records of Decision, the total amount of permanent functional conversion for the Project is less than two acres. (Jt. Ex. 35, 37.) The mitigation ratio for EV wetlands in this permit was 2.5 to 1, much more than the regulatory minimum. (T. 1150; Jt. Ex. 35, 37.) The permanent functional conversion of 1.56 acres of EV wetlands (of 1.86 acres of total wetlands converted) over both counties from PFO/PSS wetlands to PEM or PSS wetlands will be mitigated for offsite. (Jt. Ex. 35, 37.)

Lastly, the Appellants complain that Transco and the Department did not adequately consider the *cumulative* impact of the Project, as required by, *e.g.*, 25 Pa. Code §§ 105.14(b)(14), 105.18a. The Appellants are referring to the otherwise favorable fact that most of the Project collocated the new pipelines with preexisting pipelines. However, the record clearly belies the allegation. (T. 863-69, 1162-66, 1193-94.) The Appellants have not shown how any alleged shortfall might have changed the result or would justify any remand.

Environmental Rights Amendment

The Appellants argue that the Department failed to fulfill its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution, sometimes referred to as the Environmental Rights Amendment (ERA). The ERA 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. The first step in our constitutional analysis is to determine whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next, we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Stocker*, 2022 EHB at 445.

The Department's "duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations…." *Del. Riverkeeper Network v. DEP*, 2022 EHB 103, 139-40 (citing *Friends of Lackawanna*, 2017 EHB at 1161). *See also Ctr. for Coalfield Justice*, 2017 EHB at 860. However, as a practical matter, an appellant

challenging a Department action that is otherwise compliant with the applicable statutes and regulations needs to explain what more the Department should have done to fulfill its responsibilities under the ERA. It will generally not be enough to merely restate the other arguments in the case relating to regulatory violations and reframe them as constitutional violations. *Liberty Twp. v. DEP*, 2024 EHB 36, 140; *Del. Riverkeeper Network, supra*.

The ERA requires the Department to fully consider the environmental effects of its action, but that duty will often be described in the regulations. The ERA precludes actions that result in an unreasonable degradation, diminution, depletion, or deterioration of the environment, but what is reasonable or unreasonable will often be established and delineated by regulation. There may be some daylight between full compliance with the applicable regulatory programs and acting with prudence, loyalty, and impartiality, but a successful appellant will need to explain.

The Appellants argue that the Constitution required the collection of more information about the baseline water quality in affected streams even though the regulations did not expressly require it. They similarly argue that the Department was required by the Constitution to collect more data about pre-construction site conditions than that which is required under the regulations. They say the Department had the authority to require such information from Transco but fell short of its constitutional duties by failing to exercise that authority in this case.

We are not convinced that the ERA is an appropriate vehicle for challenging the Department's actions at such a granular level. Even if it is, the Appellants have not convinced us that the Department's failure to require more pre-construction investigation created an unacceptable risk that anybody's constitutional right to clean air, pure water, or the preservation of the natural, scenic, historic, or esthetic values of the environment would be jeopardized. Failure to collect more data did not prevent the Department from being able to predict with a reasonable

amount of information and study that issuance of the permits would not result in unreasonable degradation. Nor in our judgment was requiring more data necessary for the Department to fulfill its trustee duties given the reams of data already required regarding the appropriately minimized, short-term construction in the water resources. The same is true with respect to the Appellants' claim that more post-construction monitoring than that required by the Department was constitutionally mandated. The amount of post-construction reporting in this case is sufficient to show that water quality has been maintained and pre-construction conditions have been restored.

This case stands in stark contrast to the situation in *New Hanover Township v. DEP*, 2020 EHB 124, *aff'd*, 316 A.3d 668 (Pa. Cmwlth. 2024). In that case, we found that the Department had violated its constitutional duties by failing to meaningfully account for the serious and demonstrated threat that groundwater pumping at a proposed quarry would spread contaminated groundwater from a nearby hazardous site and even pull it into the quarry itself. The Department gave no thought to what would happen when that occurred. This was a major failing in the Department's duty to consider the potentially grave consequences of its action. We did not in that case get into the particulars of whether there was enough sampling.

Finally, the Appellants argue that planting new saplings for restoration of a mature forested wetland can never be justified by the fact that only "future generations" will benefit from fully grown trees. The sacrifice of the "current generation" is too great; "the Commonwealth cannot allow for the present-day degradation of the public natural resources based on a promise that the degradation will be remedied in time for future generations' enjoyment." (App. Brief at 68.)

The Appellants' argument is essentially the same as saying there should never be any development in forested wetlands that requires tree cutting. The ERA was not intended to derail all development. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 954 (Pa. 2013). A complete

constitutional analysis needs to recognize and balance that the development at issue, in this case new pipelines, has social utility and leads to an increase in the general welfare, convenience, and prosperity of the people. *Id.*; *Ctr. for Coalfield Justice*, 2017 EHB at 860.

Furthermore, we reject the value judgment that perhaps underlies the Appellants' argument that any one kind of wetland is inherently more valuable than another. It is true that different types of wetlands provide different functions and values, and functions and values must be matched and restored, but that restoration is exactly what is required in Transco's permits. In fact, the wetland replacement ratios used for the Project factor in the time it takes for trees to grow, which is why certain ratios are higher than one to one. (T. 1288; Jt. Ex. 35 (at 6 (using ratios of 1.5, 2, and 2.5 for permanent impacts to forested wetlands)), 37 (at 5 (same)).)

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.24(a); 35 P.S. § 691.7; 35 P.S. § 7514; *Cole v. Pa. Dep't of Env't Prot.*, 329 A.3d 1228 (Pa. 2025); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 97642 (M.D. Pa. June 5, 2023), *aff'd*, 108 F.4th 144 (3d Cir. 2024), *pet. for reh'g en banc denied*, 110 F.4th 612 (3d Cir. Aug. 8, 2024).

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Envtl Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. In third-party appeals, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

4. The Appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

5. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *EQT Prod. Co. v. Dep't of Env't Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Env't Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

6. The Board reviews the Department's final action, not the Department's review process leading up to a final action. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156; *Snyder v. DEP*, 2016 EHB 705, 706.

7. Issues not argued in a party's post-hearing brief may be waived. 25 Pa. Code § 1021.131(c); *Morrison v. DEP*, 2021 EHB 211, 221.

8. Transco and the Department waived the ability to challenge the standing of Maya van Rossum, the Delaware Riverkeeper, in this appeal. 25 Pa. Code § 1021.131(c); *Morrison v. DEP*, 2021 EHB 211, 221; *Stedge v. DEP*, 2015 EHB 577, 594.

9. If a standing challenge has been properly raised in a pre-hearing memorandum, pursued at the hearing, and preserved in a post-hearing brief, an appellant must show that it demonstrated by a preponderance of the evidence at the hearing on the merits that it has standing. *Montgomery Twp. Friends of Family Farms v. DEP*, 2024 EHB 716, 726-31; *Williams v. DEP*, 2021 EHB 232, 244; *Stedge v. DEP*, 2015 EHB 577, 594; *Giordano v. DEP*, 2000 EHB 1184, 1187.

10. The purpose of standing is to determine whether an appellant is the appropriate party to file an appeal from an action of the Department; it does not evaluate whether or not a particular claim has merit. *Pa. Waste Indus. Ass'n v. DEP*, 2016 EHB 590, 603; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944.

11. An organization has standing in its own right when the organization's work, interests, and/or mission are sufficiently close to the subject matter of the appeal. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648.

12. An organization has representational standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)); *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012).

13. PennFuture and the Delaware Riverkeeper Network have standing as organizations in their own right in this appeal. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648; *In re Friends of Marconi Plaza & Rich Cedrone*, 287 A.3d 965, 975 (Pa. Cmwlth. 2022); *Dowds v. Zoning Bd. of Adjustment*, 242 A.3d 683 (Pa. Cmwlth. 2020).

14. PennFuture and the Delaware Riverkeeper Network have standing as representatives of their members. *Dengel v. DEP*, 2024 EHB 605, 615-16; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152.

15. Transco and the Department's motion for a nonsuit is denied. *Fox v. DEP*, 2011 EHB 320, 324-25; *Clabbatz v. DEP*, 2006 EHB 263, 265.

16. Permits must ensure that the level of water quality necessary to protect the existing and designated uses of the waters of the Commonwealth is maintained and protected. 25 Pa. Code

§ 93.4a.; *Liberty Twp. v. DEP*, 2024 EHB 790, 807; *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772.

17. For High Quality waters, permits must ensure that the existing water quality of the waters is also maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. 25 Pa. Code §§ 93.4a(c) and 93.4c(b)(1)(iii).

18. For Exceptional Value waters, the water quality of the waters must be maintained and protected. 25 Pa. Code § 93.4a(d).

19. The Appellants have not shown that Transco's permits, along with its plans and BMPS, do not adequately protect the existing and designated uses and water quality of the waters of the Commonwealth.

20. The Appellants have not shown that it was necessary for Transco to conduct pre- and post-construction in-stream water quality sampling for each stream and wetland affected by the Project.

21. The Appellants have not shown that the Department acted contrary to its trustee duties and obligations under Article I, Section 27 of the Pennsylvania Constitution in issuing the permit. PA. CONST. art. 1, § 27; *Stocker v. DEP*, 2022 EHB 425, 445.

22. The Appellants have not met their burden of proof on their claims in this appeal. 25 Pa. Code § 1021.122(c)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE, MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK	:	
v.	:	**EHB Docket No. 2023-026-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 16th day of May, 2025, it is hereby ordered that the Appellants' appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Board Member and Judge

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

DATED: May 16, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
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Margaret O. Murphy, Esquire
Robert A. Reiley, Esquire
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For Appellant, Citizens for Pennsylvania's Future:
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Emma H. Bast, Esquire
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For Appellants, Maya K. van Rossum, the Delaware Riverkeeper, and Delaware Riverkeeper Network:
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Devon E. Guyer, Esquire
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Sean T. O'Neill, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RIVER HILL COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2024-173-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 16, 2025**
	:	

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Sarah L. Clark, Judge

Synopsis

The Board grants a Motion to Dismiss where the Appellant limited liability company failed to obtain representation in accordance with 25 Pa Code §1021.21, failed to comply with Board Orders, and failed to file a response to the Motion to Dismiss.

O P I N I O N

Background

This appeal arises from a Compliance Order issued by the Department of Environmental Protection ("Department") to River Hill Coal Company, Inc. ("Appellant" or "River Hill") on November 15, 2024, alleging violations of regulatory provisions under the Surface Mining Conservation and Reclamation Act and the Clean Streams Law, specifically 25 Pa. Code § 87.107(a), for failure to properly design, construct or maintain treatment facilities, and detailing corrective actions.

The Appellant filed a Notice of Appeal with the Board on November 22, 2024. The Notice of Appeal did not include all required information, and the Board issued an Order to Perfect on

November 27, 2024, requesting a complete address, telephone number, the date that the Appellant received notice of the Department's action, objections to the Department's action, and proof of service. This Order notified the Appellant that it had 20 days, or until December 12, 2024, to amend the appeal as of right under 25 Pa Code §1021.53(a). On December 12, 2024, the Board received the requested information, and the appeal was deemed perfected.

As River Hill is an incorporated entity, the Board issued an Order to Obtain Counsel on December 13, 2024, requiring the appellant to have an attorney enter an appearance on River Hill's behalf by January 13, 2025, or, to the extent that the search for appropriate counsel remained ongoing, file a statement addressing its progress toward securing representation. After receiving no response from the Appellant by the given date, the Board issued an Order to Comply with the Order to Obtain Counsel on January 21, 2025, requiring River Hill to have an attorney enter an appearance on its behalf by February 21, 2025.

The Appellant once again failed to respond to the Board's Order, and the Department subsequently filed a Motion to Dismiss ("Motion") on March 17, 2025. On March 18, 2025, the Board issued an Order for Response to the Motion to Dismiss with a deadline of April 16, 2025. No response was filed, and this matter is now ripe for disposition by the Board.

Standard

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and only grants the motion where the matter is free from doubt and the moving party is entitled to judgment as a matter of law. *Protect PT v. DEP*, 2024 EHB 154, 155-156; *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, 2023 EHB 203, 206 (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*,

2022 EHB 153, 155. Where the non-moving party does not file a response to a motion to dismiss, the Board "will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.91(f); *Ongaco v. DEP*, 2023 EHB 239, 241; *Burnside Twp. v. DEP*, 2002 EHB700, 701.

Discussion

By its Motion, the Department argues that this appeal should be dismissed because the Appellant, an incorporated entity, has failed to obtain counsel as required by our Rules, and in so doing, has also ignored Orders of this Board. According to our Rules, "[p]arties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint[,]" and "[c]orporations shall be represented by an attorney of record." 25 Pa. Code § 1021.21(a)-(b). Indeed, we have regularly dismissed appeals filed by non-individuals for failure to obtain counsel once such entities have been given a reasonable opportunity to secure representation and have not done so. *Lizabella Mining, LLC v. DEP*, 2024 EHB 783, 786-787; *Waroquier Coal Co. v. DEP*, 2024 EHB 396, 397-398; *Earth First Recycling, LLC v. DEP*, 2018 EHB 819, 820-821; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210. As the Appellant is not an individual appearing on its own behalf, but rather a corporation, we issued two Orders directing River Hill to obtain counsel, or, at a minimum, to inform the Board of its progress toward obtaining counsel. The Appellant did not respond in any way to either of those Orders, and to date no attorney of record has entered an appearance in this appeal.

When appellants fail to respond to orders requiring affirmative action on their part, such as our Orders to Obtain Counsel here, such failure shows a lack of interest to pursue the appeal, justifying dismissal. *Citizens Advocating a Clean Healthy Environment v. DEP*, 2017 EHB 1077,

1078; *KH Real Estate, LLC v. DEP*, 2012 EHB 155, 156-157; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 261. It is worth noting that this is not a situation where an appellant files an appeal and then disappears completely, as sometimes occurs. As detailed above, prior to ordering River Hill to obtain counsel, we ordered River Hill to perfect its appeal because the initial filing did not include all necessary information. On the final day of the 20-day period in which an appellant may amend its notice of appeal by right under 25 Pa. Code § 1021.53(a), River Hill responded to our Order to Perfect by filing the required information, and we deemed the appeal perfected. Thus, it appears that while River Hill was originally engaged with this appeal, that engagement ceased sometime after perfecting the appeal. Further demonstrating the Appellant's apparent abandonment of this appeal is the fact that it failed to file a Response to the Department's Motion. Although the Board is not required to issue orders for responses to party motions, and our Pre-Hearing Order No. 1 explicitly states that we will not issue such orders, where an appellant has filed an appeal *pro se*, we often do issue orders to inform the non-moving *pro se* appellant that our Rules provide for a response, as well as the date upon which that response is due. We issued such an Order here, but the Appellant did not file a response, and so we deem all properly pleaded facts contained within the Department's Motion admitted. 25 Pa. Code § 1021.91(f); *Mathews v.* DEP, 2024 EHB 223, 226-227; *Ongaco v. DEP*, 2023 EHB at 241; *Burnside Twp. v. DEP*, 2002 EHB at 701. As the Appellant has failed to comply with our Orders and Rules, failed to file a response to the Department's Motion, and has therefore apparently lost interest in pursuing its appeal, we must grant the Department's Motion to Dismiss.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RIVER HILL COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2024-173-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of May, 2025, it is **ordered** that River Hill Coal Company, Inc.'s appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: May 16, 2025

c: **DEP, General Law Division:**
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(via electronic mail)

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(via electronic filing system)

River Hill Coal Company, Inc.
48 Memorial Road
PO Box 141
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(via first class U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY AND MARYANN PRUDEN	:	
	:	
v.	:	**EHB Docket No. 2024-023-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAUPHIN COUNTY CONSERVATION DISTRICT, and MERRILL MILLER, Permittee and J.D. ECKMAN, INC., Co-Permittee	:	**Issued: May 19, 2025**

OPINION AND ORDER ON APPELLANTS' MOTION FOR SUMMARY JUDGMENT

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board ("Board") denies Appellants Gary and MaryAnn Pruden's (collectively referred to as "Appellants") Motion for Summary Judgment. Appellants' motion is based on objections which, based on the information before us, cannot reasonably be said to be within the genre of the issues raised in the notice of appeal documents. A motion to amend with supporting documentation will need to be filed if Appellants wish to pursue these arguments at a hearing.

O P I N I O N

Introduction

This third-party appeal centers around a National Pollutant Discharge Elimination System Permit, No PAC220415 ("Permit"), issued to Merrill Miller and J.D. Eckman, Inc. On March 16, 2025, Appellants filed a Motion for Summary Judgment arguing: (1) the Permit was issued in violation of 25 Pa. Code § 102.8 because the project did not qualify as a "site restoration project,"

and (2) the Permit was issued in violation of Article 1, Section 27 of the Pennsylvania Constitution. (*See* Appellants' Summ. J. Brief at 7-15). The Department/Conservation District filed their Joint Response on April 15, 2025. Permittee Merrill Miller ("Permittee") and Co-Permittee/Intervenor J.D. Eckman, Inc. ("Intervenor") filed their individual Responses on April 16, 2025. Appellants' Reply Brief was due May 1, 2025, but no reply was filed. This matter is ready for review and disposition.

Background

On November 1, 2023, Permittee Merrill Miller and Intervenor J.D. Eckman, Inc. submitted a "PAG-02 National Pollutant Discharge Elimination System ("NPDES") General Permit for Discharge of Stormwater Associated with Construction Activities Notice of Intent" proposing new coverage for discharge of stormwater associated with earth disturbance activities at a clean fill site, located at 23 Kellocks Run Road, South Hanover, Dauphin County ("Site"). (*See* DEP Ex. 2). On November 27, 2024, the Department, through the Conservation District, approved the request for coverage under the PAG-02 NPDES Permit for the proposed project.[1]

On February 9, 2024, Appellants filed a Notice of Appeal ("NOA") with the Board. On February 12, 2024, Appellants filed an Addendum to their Notice of Appeal ("Addendum"). On March 1, 2024, Appellants filed an Amendment to their Notice of Appeal ("Amendment"). Collectively, we will refer to these documents as the "Appeal Documents."

On March 16, 2025, following the close of discovery, Appellants filed a Motion for Summary Judgment ("Motion") arguing that there are no genuine issues of material fact that the

[1] Although the subject Permit expired December 7, 2024, a renewal Notice of Intent for a major modification to the NPDES Permit has since been filed with the Conservation District. This remains pending with the Conservation District as they conduct their technical review prior to making a determination. (*See* J.D. Eckman's Brief in Resp. to Summ J. at n. 1-2 & the Department's Brief in Resp. to Summ. J. at n. 1).

Permit was improperly approved, and the Board should revoke the permit. Permittee and Intervenor objected to the Motion in part on the ground that the arguments advanced were not stated in the original appeal.

Standard of Review

Summary judgment is appropriate when the record - including pleadings, depositions, answers to interrogatories, and other related documents - shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is granted only in the clearest of cases, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Liberty Twp. v. DEP*, 2022 EHB 324, 326; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106.

Discussion

Appellants allege they are entitled to summary judgment because: (1) the Permit was issued in violation of 25 Pa. Code § 102.8, in that the project did not qualify as a "site restoration project," as was identified on the permit documents, and (2) the Permit was issued in violation of Article 1, Section 27 of the Pennsylvania Constitution. (*See* Appellants' Summ. J. Brief at 7-15). In response, Permittee and Intervenor assert that Appellants are not entitled to summary judgment because: (1) Appellants' Amendment to the Notice of Appeal was filed outside the 20 day "amendment as of

right" period and the objections contained within should not be considered; (2) Appellants' claims are raised for the first time in their Motion, and in effect waived, as they were never included in any of the Appeal Documents; and (3) Appellants' arguments involve disputed questions of fact and law.

Timeliness of the March 1, 2024 Appeal Amendment

Pursuant to Pennsylvania code and Board regulations, a person aggrieved by an action of the Department must file its appeal with the Board within 30 days after receiving notice of the action. 25 Pa. Code § 1021.52(a)(2). The thirty-day period begins to run after publication in the Pennsylvania Bulletin, or if no publication occurs, then after actual notice is provided to the aggrieved party. *Id*. at § 1021.52(a)(2)(i-ii). An appeal may then be amended "as-of-right" within 20 days after the initial filing. 25 Pa. Code § 1021.53(a). After the 20-day grace period ends, the Board, upon motion, may grant leave to further amend the appeal if no undue prejudice will result to the opposing parties. *Id.* at § 1021.53(b).

The decision of whether to allow a party to amend its appeal after the 20-day grace period has expired rests firmly within the Board's discretion and involves an analysis into whether the opposing parties will suffer undue prejudice. *Dengal v. DEP*, 2024 EHB 466, 469 (citing *Tapler v. DEP*, 2006 EHB 463, 465). The right to amend one's appeal is viewed liberally by the Board in efforts "to secure determination of cases on their merits." *Williams v. DEP*, 2020 EHB 277, 281 (citing *Chester Water Authority v. DEP*, 2016 EHB 358, 362).

The instant case is unique in that Appellants from the outset have discussed the issues they incurred with receiving proper notice of the Permit and why their appeal documents may be late. Appellants' original NOA was timely hand delivered to the Board on February 9, 2024. In their initial filing, Appellants state that they received no notice from the Department, but they received

letters regarding the Site and Permit activity on December 19, 2023 from JD Eckman[2] and a Certified Letter dated January 25, 2024 from the Township of South Hanover.[3] Appellants' NOA outlines specific objections on how the Permit's issuance violated proper public notice requirements and how the only notice they were able to find after conducting research into the issue was a "FINAL ACTIONS TAKEN FOR NPDES PERMITS AND WQM PERMITS" in the Pennsylvania Bulletin on January 13, 2024.

On February 12, 2024, three days after the filing of the original NOA, Appellants' Addendum was timely received by the Board via facsimile. Again, Appellants provided an explanation as to why their appeal may be viewed as tardy, and state objections regarding lack of proper public notice.[4]

On March 1, 2024, Appellants' Appeal Amendment was filed with the Board.[5] The Amendment was filed one day after the 20-day "appeal by right" period concluded. Appellants

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[2] The letter stated "[w]e hereby notify you of the approved Dauphin County NPDES permit for land disturbance and placement of fill material at the following location: Merrill 'Bud" Miller's Residence 23 Kellocks Run Road Hummelstown PA 17036." (*See* December 19, 2023 South Hanover Township letter attached to Appellants' February 9, 2024 NOA).

[3] The Township letter stated that a request was submitted to the Township's Board of Supervisors by JD Eckman, Inc. regarding a construction project wherein construction vehicles, including dump trucks bringing hundreds of loads of fill, would travel on Kellock's Run Road for a 4.5 year period from the date of approval. Specifically, the letter stated: "Because this request may affect property owners/residents of Kellock Run Road, the Board of Supervisors wants to be assured that proper notification with specific detail is given to all those in the affected area. The Board of Supervisors would appreciate hearing from you before it considers the project. . . .We would welcome all feedback by February 5, 2024." (*See* January 25, 2024 South Hanover Township letter attached to Appellants' February 9, 2024 NOA).

[4] Appellants state: "[w]e appreciate your acceptance of this addendum via mail, as it pertains to the lack of proper public notices related to the issuance of this permit which has seriously impacted our ability to respond within the 30 day timeframe of the Final Notice of permit." (*See* Appellants' February 12, 2024 Addendum).

[5] In their Amendment, Appellants assert three specific objections: "(1) The Permittee and site are not eligible for coverage under the General permit; (2) Permittee has been dumping unregulated fill at the site since at least 2010. Earlier estimates indicated the dumping began in 2021 [*sic*]; and (3) PAG-02 Application signed by Permittee, Merrill D. Miller Jr. contains material misrepresentations." (*See* Appellants' March 1, 2024 Addendum).

state that the reasoning for the late filing of their Amendment was due to their Right-to-Know Request documents not being timely received by the state. They requested that the objections contained within still be considered by the Board.

The Board does its best to grant leniency to *pro se* appellants, trying to navigate a complex procedural minefield, while understanding that they are nonetheless subject to the same rules of practice and procedure as those that do have legal counsel. *354 Broadway, LLC v. DEP*, EHB Docket No. 2024-139-B, slip. op. at 13-14 (Opinion and Order March 18, 2025) (Clark, J., concurring) (quoting *Perrin v. DEP*, 2008 EHB 78, 82 ("Although we often have said that *pro se* parties will be given no special consideration, as we in fact did earlier in this very Opinion, in many (if not most or all cases) this simply is not true.")). This premise aligns with the Board's precedence in ensuring that *pro se* appellants are not unduly disadvantaged from having a hearing on the merits by failing to comply with complex environmental regulations and/or procedural requirements.

In exercising the Board's discretion, we take into consideration the procedural history of this case coupled with the fact that the Prudens are *pro se*. We do not believe there is any undue prejudice at this time in considering Appellants' March 1, 2024 Amendment. Appellants established Board jurisdiction in this case by timely filing their initial NOA and Addendum. The period of time prescribed for the filing of a document (other than the jurisdictional deadline for filing an appeal) may be extended by the Board for good cause upon motion. 25 Pa. Code § 1021.12(a).

Although we understand that Appellants failed to file a formal motion for leave with affidavits, we acknowledge that Appellants' Amendment did specifically request the information be considered, despite its tardiness. Specifically, the Amendment language states: "[w]e are

requesting that information contained in, and findings related to, the above be allowed under the Appeal." (*See* March 1, 2024 Amendment). At no point in time after the filing of the Amendment did any opposing counsel file a motion to dismiss or a motion to strike Appellants' Amendment, despite Appellants acknowledging in all three of their Appeal Documents that timeliness might be in question.

Additionally, Appellants' Amendment was filed toward the beginning of this appeal,[6] a mere two weeks after the parties' attorneys entered their appearances, before the mandated 60-day settlement conference, and as far as we can tell, before any discovery was undertaken. The Department, Permittee, and Intervenor had ample time to conduct written discovery or depositions on any information contained within the Appeal Amendment or any of the Appeal Documents. It is also noteworthy to mention that on February 16, 2024, Chief Judge and Board Chairperson Steven C. Beckman provided written notice to the Pennsylvania Bulletin, pursuant to 25 Pa. Code § 92a.88, that it must publish notice of the appeal and petitions to intervene may be filed with the Board. Indeed, at the time Appellants filed their Amendment, there was still an opportunity for other parties to intervene in the lawsuit.

For these reasons, the Board finds there is no undue prejudice to opposing parties, and the March 1, 2024 Amendment, and the arguments contained within, are part of the Appeal.

Waiver of claims set forth in the Motion for Summary Judgment

The Board will now consider the issue of waiver. Intervenor and Permittee allege that

[6] According to the timeline provided by the Appellants, they had thirty days from written notice of the Permit in the Pennsylvania Bulletin to file an Appeal, which would have made that deadline February 12, 2024 at the earliest. 25 Pa. Code§ 1021.52(b). Appellants then would have had another 20 days to amend their appeal, making the amendment "as-of right" period end March 4, 2024. If taken from the date the Appellants received actual notice of the permit, on January 25, 2024, the Appellants would have had until February 26, 2024 to file their initial notice of appeal and then until March 18, 2024 to amend as of right.

Appellants' arguments: (1) that the project did not qualify as a "site restoration project" (2) and the Permit violates Article 1, Section 27 of the Pennsylvania Constitution, exceeded the scope of issues preserved in the Appeal Documents.

Under 25 Pa. Code § 1021.51, a notice of appeal to the Board must set forth separate specific objections – either factual or legal - to the action of the Department for which review is being sought. 25 Pa. Code § 1021.51(e). While it is true that allegations not raised in a notice of appeal are generally waived, the Board has consistently held that notices of appeal are to be read broadly, and we will be reluctant to find waiver so long as an objection falls within the "genre of the issue" contained in the notice of appeal. *See Bennner Twp. Water Authority v. DEP*, 2019 EHB 594, 637; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 206-08; *New Hanover Twp. v. DEP*, 2011 EHB 645, 671; *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 65-66, aff'd, 806 A.2d 482 (Pa. Cmwlth. 2002); *Jefferson Cnty. Bd. of Comm'rs v. DEP*, 1996 EHB 997, 1004-05. *See also Croner, Inc. v. DER*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

As Judge Labuskes stated in *Rhodes v. DEP*:

> It is a longstanding rule that allegations not raised in the notice of appeal are waived. [citations omitted] However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. [citations omitted].

New Hanover Twp. v. DEP, 2011 EHB 645, 671 (quoting *Rhodes, et al. v. DEP*, 2009 EHB 325, 327)).

Appellants argue in their Motion that the Permit was improperly issued for a "site restoration project" due to various activities occurring at the Site and the impervious surface present; thus, they argue, the Department failed to require the mandated PCSM information

pursuant to 25 Pa. Code. § 102.8(g) & (n) necessary to issue the Permit for a "site restoration project." (*See* Appellants' Summ. J. Brief at 8-11). Appellants further assert that the Department violated Article 1, Section 27 of the Pennsylvania Constitution because it did not obtain all the necessary information mandated by 25 Pa. Code § 102.8(g) and (n) before issuing the Permit. (*See* Appellants' Summ. J. Brief at 12-13).

Permittee and Intervenor contend in response that Appellants' arguments introduce novel legal theories and factual assertions not contained within the Appeal Documents. (*See* J.D. Eckman Brief in Resp. to Summ. J. at 4 & Merrill Miller Brief in Resp. to Summ. J. at 5).

In reviewing the three Appeal Documents filed, Appellants list a variety of objections, including:

1) The submission of and issuance of NPDES permit violated Act 14 public notice requirements. Notice was not provided as required under the PAG 02 NOI;

2) No public notice of permit applications and draft permits was provided violating § 92a.82;

3) The submission and issuance of the NPDES permit violated public notice requirements under Federal and State guidelines, including Pa Code § 102.5;

4) General Permit (PAG 02) does not cover earth disturbance activities that have the potential for hazardous or toxic discharges, including: C&D and residential waste burning at the site; dumping unclean fill at the site;[7]

5) Permittee has been dumping unregulated fill at the site since at least 2010. Earlier estimates indicated the dumping began in 2021;

6) The Permittee and site are not eligible for coverage under the General permit;

7) Not all permittees signed the Application or Notice of Intent; and

8) PAG-02 Application signed by Permittee, Merrill D. Miller Jr., contains material

[7] Appellants' NOA further details that they believe the earth disturbance activities at the Site have the potential for hazardous or toxic discharges, including the dumping, burning, and disposal of waste (including construction and demolition) and unclean/unregulated fill, hazardous and toxic waste ashes, and the contamination of water sources.

misrepresentations.

(*See* Notice of Appeal, Addendum to Notice of Appeal, and Amendment to Notice of Appeal).

Upon review of the Appeal Documents and Appellants' Motion, we agree with Permittee and Intervenor in that it *facially* appears Appellants' "site restoration project" and Article 1, Section 27 claims are not specifically raised in the Appeal Documents. However, given that discovery has been completed and no party has made any reference whatsoever to whether the issues of "site restoration project" or Article 1, Section 27 were identified or explored during the discovery process, at this time we cannot fairly say that those issues are not within the genre of issues included in the Appeal Documents or otherwise not properly before the Board.

We find this case to be similar to *Chester Water Authority*, 2016 EHB 280 and *Joshi v. DEP*, 2018 EHB 771. In *Chester Water Authority*, Chester Water Authority filed a motion for summary judgment arguing that Permittee Old Dominion's permit should have been initially denied, and presumably revoked, because Old Dominion was not able to comply with the permit requirements. *Chester Water Authority*, 2016 EHB 280, 284. In response, Permittee Old Dominion and the Department stated that this argument was not properly before the Board because Chester Water Authority did not include the issue in its notice of appeal. *Id.* They specifically argued that: "Chester Water did not identify the issue *in discovery* or otherwise and that, in fact, the argument appears for the very first time in Chester Water's motion for summary judgment. They add that Chester Water has not moved to amend its appeal to add to this issue." *Id.* (emphasis ours). The Board found that facially this argument was not included in the notice of appeal, and if Chester Water wanted to pursue the argument, it needed to file a motion to amend its appeal. *Id*. 285-87.

After the motion for summary judgment was denied for including arguments beyond the scope of its notice of appeal, Chester Water Authority filed a motion to amend. *Chester Water*

Authority v. DEP, 2016 EHB 358, 359. Old Dominion and the Department fought the amendment arguing they would be prejudiced by this late amendment. *Id.* at 360. The Board held that the Department and Old Dominion were not unduly prejudiced by appellant's motion because the issues in question were an iteration of legal issues that had been in dispute since the inception of the appeal, the topics had already been the subject of discovery, and there was no surprise to the opposing parties. *Id.* at 361, 364.

Similarly, in *Joshi v. DEP*, Appellant Joshi filed an untimely motion for summary judgment arguing issues of public notice. *Joshi v. DEP*, 2018 EHB 771. The Board found that Joshi had asserted arguments in his motion for summary judgment that were not encompassed within the genre of the objections listed in his original notice of appeal documents. *Id.* at 774. Therefore, he needed to file a motion to amend to include his new public notice argument. *Id*. at 775.

Joshi filed a motion to amend his appeal to include the new notice issues presented in his motion for summary judgment. *Joshi v. DEP*, 2018 EHB 787. Upon review of what was produced and discussed in discovery, the Board concluded that the new arguments asserted by appellant were never revealed in discovery and relied upon an entirely new set of facts not addressed in the lawsuit. *Id.* at 792-94. Thus, the opposing parties would be prejudiced by allowing the amendment, and the motion to amend was denied. *Id.* at 795.

As in *Chester Water Authority* and *Joshi*, in order for the Board to determine if Appellants' "site restoration project" and/or Article 1, Section 27 claims are within the genre of issues raised in the appeal documents, we would need information as to whether these claims were developed in discovery under Appellants' catch-all objection ("The Permittee and site are not eligible for coverage under the General permit.") or any other objections listed. Appellants would need to file

a motion to amend and provide support for the idea that DEP, Permittee, and Intervenor were well aware of these claims as a result of questioning during discovery, and therefore, no undue prejudice or surprise is present. *See Chester Water Authority*, 2016 EHB 280, 285 (arguments regarding what has been uncovered in discovery "relate to whether an amendment to the notice of appeal should be allowed, not whether a party may simply raise an issue for the first time in a motion for summary judgment."); *Dengal v. DEP*, 2024 EHB 466; *Joshi v. DEP*, 2018 EHB 771, 774 (finding a motion for "summary judgment may not be used as a substitute for a motion for leave to amend a notice of appeal.")

Appellants are free to file a motion to amend their notice of appeal, which if filed, must include specific objections to what claims they are setting forth. The motion would need to include citations to regulations being challenged, such as 25 Pa. Code § 102.8(g) and (n), and Article 1, Section 27. Although Appellants' original NOA outlines in paragraph form their environmental concerns with illegal dumping, burning of hazardous waste, air quality concerns, and contamination of water quality, their motion to amend would need to include factual or legal objections as to how the Department's actions or inactions violated Article 1, Section 27, led to or may lead to environmental degradation, or failed to uphold its trustee duties.

In addition, any motion to amend and any responses thereto would need to include written discovery that has taken place or any deposition transcripts that would support the idea that these issues were identified during discovery. At this point in time, the Board has no information on what was asked of any party during discovery. We would expect that thorough questioning of the Appellants during discovery would have led to the identification of these specific issues. As such, an analysis of the discovery or lack of discovery in this matter will be necessary to determine whether allowing these claims will prejudice opposing parties. *See Center for Coalfield Justice v.*

DEP, 2019 EHB 523, 627-528 (discussing motion to strike undisclosed Article 1, Section 27 claim); *Chester Water Authority*, 2016 EHB 280, 285-86; *Dengal v. DEP*, 2024 EHB 466; *Joshi v. DEP*, 2018 EHB 771, 774.

For the reasons stated above, the Board will not address the merits of Appellants' claims as we cannot say they are properly before the Board.[8] Appellants may file a motion to amend their appeal if they wish to pursue these arguments.

Accordingly, we issue the following order.

[8] Although we do not analyze the merits of the issues fully here, based on the information before us in this Motion for Summary Judgment, summary judgment would not be proper as there are genuine issues of material fact that must be resolved at a merits hearing. Summary judgment is only appropriate for issues free from doubt. *Williams v. DEP*, 2019 EHB 764, 774.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY AND MARYANN PRUDEN	:	
	:	
v.	:	**EHB Docket No. 2024-023-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAUPHIN COUNTY CONSERVATION DISTRICT, and MERRILL MILLER, Permittee and J.D. ECKMAN, INC., Co-Permittee	:	

O R D E R

AND NOW, this 19th day of May, 2025, it is hereby **ordered** that Appellants' Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 19, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP & Dauphin County Conservation District:
Elizabeth Davis, Esquire
Dawn Herb, Esquire
Robert Pawlinski, Esquire
(*via electronic filing system*)

For Appellants, *pro se*:
Gary Pruden
MaryAnn Pruden
(via electronic filing system)

For Permittee Merrill Miller:
Nicholas J. Wachinski, Esquire
(via electronic filing system)

For Co-Permittee J.D. Eckman, Inc.:
Errin T. McCaulley, Jr., Esquire
Scott A. Gould, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES and BARBARA ULLOM	:	
	:	
v.	:	**EHB Docket No. 2024-114-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CNX GAS COMPANY, LLC, Intervenor	:	**Issued: May 22, 2025**

OPINION AND ORDER ON
MOTION OF NON-PARTY CENTER FOR COALFIELD JUSTICE FOR A PROTECTIVE ORDER UNDER RULE 4012

By MaryAnne Wesdock, Judge

Synopsis

A non-party's motion for protective order, seeking to quash or limit a subpoena for the deposition of the non-party's employee, is granted in part. In deciding discovery motions, the Board is guided by the principles of relevance and the proportionality standard. The Board allows the deposition of the non-party's employee, but limits the scope, length and nature of the deposition.

O P I N I O N

Introduction

This appeal involves a water loss complaint filed by James and Barbara Ullom. The Ulloms contend that they experienced water loss on their property in connection with oil and gas operations conducted by CNX Gas Company, LLC (CNX) at its NV110 well pad in East Finley Township, Washington County. The Department of Environmental Protection (Department) investigated the complaint and, on June 28, 2024, issued a determination concluding that CNX's operation did not

cause diminution of the Ulloms' water supply. The Ulloms appealed that determination to the Environmental Hearing Board (Board) on July 26, 2024.

The matter before the Board is a motion for protective order filed by Center for Coalfield Justice (CCJ), a non-party, in response to a subpoena served by CNX on Jodi Borello, who is employed by CCJ as a community organizer.[1] CNX seeks to conduct a videotaped deposition of Ms. Borello. In response to written discovery, as well as in their depositions, the Ulloms had identified Ms. Borello as a non-expert witness who was expected to testify at the hearing in this matter. CNX served Ms. Borello with the subpoena on April 29, 2025. On May 7, 2025 CCJ filed its motion for protective order seeking either to quash the subpoena of Ms. Borello or to place limits on her deposition.[2] Later that day, the Ulloms supplemented their responses to written discovery to state that Ms. Borello was *not* expected to testify as a witness at the hearing. On May 14, 2025, the Department, which was also intending to depose Ms. Borello, filed a letter with the Board stating that it no longer intended to depose Ms. Borello since she was removed from the Ulloms' witness list. Two days ago, on the afternoon of May 20, 2025, CNX filed a response opposing the motion for protective order and stating that it still sought to depose Ms. Borello. Because Ms. Borello's deposition has been scheduled for May 29, 2025, one week from today, CNX has asked for an expedited ruling on the motion.[3]

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[1] Throughout the course of the events leading up to the filing of the motion for protective order by CCJ, there appears to have been a question or dispute among CNX, CCJ and the Ulloms as to whether Ms. Borello was being subpoenaed in her individual capacity or as an employee of CCJ. However, it appears that the parties have worked through that matter, and, for the sake of brevity and expediency, we need not address it in this opinion.

[2] The motion was filed on the evening of May 6, 2025 via the Board's electronic filing system and was docketed on the morning of May 7, 2025.

[3] Ms. Borello's deposition was originally scheduled for May 19, 2025 but was rescheduled to May 29, 2025 in order to provide CNX with an opportunity to file a response to CCJ's motion and to provide the Board with an opportunity to rule on the motion. (Motion, n. 2.)

Discussion

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1(a). However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa. R.C.P. No. 4011. The Board's Rules of Practice and Procedure authorize parties to serve subpoenas in accordance with the applicable Rules of Civil Procedure. 25 Pa. Code § 1021.103. With regard to the service of a subpoena on a person who is not a party to the action before the Board, we have explained:

> Under the [Pennsylvania Rules of Civil Procedure], a party may obtain through subpoena on a nonparty any documents that are normally within the scope of discovery under Rules 4003.1 - 4003.6. Pa.R.C.P. No 4009.7(a). Parties may also request the deposition of nonparties via subpoena. Pa.R.C.P. No. 4007.1. Any party or interested person may seek a protective order from the subpoena under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2).

Tri-Realty Co. v. DEP, 2015 EHB 552, 556.

A non-party served with a subpoena may move for a protective order under Rule 4012 of the Rules of Civil Procedure. Pa. R.C.P. 4012; *Cabot Oil & Gas v. DEP*, 2016 EHB 20, 25. Under that rule, the Board may, "for good cause shown," enter an order that protects a deponent "from unreasonable annoyance, embarrassment, oppression, burden, or expense." Pa. R.C.P. 4012(a). An order issued under Rule 4012 may provide "that certain matters shall not be inquired into," that "the scope of discovery or deposition shall be limited" and that the deposition "shall only be on specified terms and conditions." *Id*. at Pa. R.C.P. 4012(a)(2), (4), (5). Whether to grant or deny

a motion for a protective order is within the sound discretion of the trial court, or, in this case, the Board. *Tri-Realty Co. v. DEP*, 2015 EHB 517, 524-25 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.")).

In its motion for protective order, CCJ contends that, as a community organizer for its organization, Ms. Borello's advocacy work often touches on CNX's operations. Additionally, Ms. Borello has experience with CNX's operations on a personal basis. According to the motion, Ms. Borello lives adjacent to CNX's Oak Springs facility and provided testimony before the 43rd Statewide Investigating Grand Jury. (Motion, para. 2.) Of particular note, Ms. Borello and her family are plaintiffs in ongoing litigation with CNX before the Allegheny County Court of Common Pleas over alleged nuisances caused by CNX's Oak Springs operations. (Motion, para. 4) (citing *Borello v. CNX Gas Co*., Allegheny County Court of Common Pleas Case No. GD-13-018480, Docket Sheet (May 6, 2025) (Exhibit B)).[4]

CCJ argues, first, that Ms. Borello's deposition would be duplicative at best since her knowledge of the situation comes only from her conversations with the Ulloms. As such, CCJ argues her testimony is unlikely to meaningfully contribute to the evidentiary record in this case. Second, CCJ argues there is a strong potential for abuse and raises a concern that CNX will use Ms. Borello's deposition here as an opportunity to glean information pertinent to her litigation in the Court of Common Pleas.[5] CCJ asks the Board to quash the subpoena and preclude the

[4] The Borellos allege the following in their suit against CNX: emission of toxic, radioactive, and other air pollutants; noise, vibration, bright lights, dust and particulate matter, odors, and truck traffic.

[5] Because CCJ's motion was filed before the Ulloms supplemented their discovery responses to remove Ms. Borello as a potential witness in this matter, the motion does not raise that argument as a basis for granting the protective order.

deposition or, in the alternative, to limit the time and scope of the deposition and to order that it be recorded by a stenographer and not by video.

In its response, CNX first disputes CCJ's contention that Ms. Borello's deposition should be precluded because it may be duplicative of testimony already provided by the Ulloms. In support of its argument, CNX cites the Board's decision in *Tighe v. DEP*, 2024 EHB 214. In that case, the appellants sought to depose a Department inspector as well as a Department trainee. The Department sought to preclude the deposition of the trainee on the grounds that he was merely shadowing the inspector and his testimony would be duplicative of that of the inspector. The Board rejected this argument, holding that even if the trainee's knowledge was limited, as claimed by the Department, the appellants "should be permitted to hear his version of those key events in which he was an active participant, and which are clearly relevant to this appeal." *Id*. at 219. Here, it is CNX's contention that Ms. Borello "injected herself into this matter," contrary to the Ulloms' assertion that they contacted her. (Response, para. 25; Memorandum of Law in Support of Response, p. 4.) Therefore, CNX asserts that it should be allowed to inquire into Ms. Borello's knowledge with regard to the Ulloms' water loss claim and have the opportunity to test her veracity.

We agree with CNX that the potential for duplication of testimony is not a basis for prohibiting Ms. Borello's testimony in this matter. While duplicative testimony may certainly provide grounds for granting a protective order, nonetheless, as in *Tighe*, we do not believe that it is warranted under the circumstances of this case. According to the deposition testimony of Barbara Ullom, Ms. Borello helped her prepare a written timeline of the events relating to the claimed water loss and explained matters that Ms. Ullom did not understand. (Ex. 1 to Response, p. 17, 26.) She further testified that Ms. Borello "helped [her] with paperwork and things." (Ex.

1 to Response, p. 8.) At this stage of the proceeding, we cannot say that Ms. Borello's testimony is not relevant or that it is likely to be duplicative of that of the Ulloms. We agree with CNX that it should be permitted to inquire as to her knowledge of the events surrounding this appeal and to test her veracity.

Moreover, as the Board has previously held, it can be difficult to tell early on in a case what is relevant in a particular matter; therefore, "we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant." *Clean Air Council v. DEP*, 2016 EHB 567, 570. Here, the Ulloms listed Ms. Borello as a witness they expected to call at hearing and, therefore, they clearly believed she had something relevant to say. Although Ms. Borello is no longer listed as a witness as of a few days ago, we believe that has more to do with the controversy surrounding her testimony than the belief that her testimony is not relevant. We believe that CNX has adequately set forth grounds for allowing Ms. Borello's deposition.

That being said, we do find merit to CCJ's claim that there is a potential for misuse of Ms. Borello's deposition, given her ongoing litigation with CNX in the Court of Common Pleas. CCJ articulates its concern as follows:

> [T]he danger here is not only that CNX will use Ms. Borello's incidental interactions with the Ulloms as an opportunity to probe into her organizing activities and punish her for her advocacy. An unbounded deposition provides CNX with an opportunity to conduct discovery regarding the pending civil suit in an environment beyond the supervision of the presiding court and without Ms. Borello's counsel present.

(Motion, para. 24.) We agree that the danger is particularly acute here based on CNX's request for a video deposition. Given Ms. Borello's status as a non-party, the only purpose we can see for

conducting a video deposition of Ms. Borello is so that CNX can presumably use that same videotape at trial in Ms. Borello's unrelated civil suit.

Discovery before the Board is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." *Clean Air Council v. DEP*, 2023 EHB 23, 26 (quoting *Clean Air Council*, 2016 EHB at 571). The Board considers the following factors when evaluating whether a discovery request is proportional: (1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (2) The relevance of the information sought and its importance to the Board's adjudication in the given case; (3) The cost, burden, and delay that may be imposed on the parties to deal with the information; (4) The ease of producing the information and whether substantially similar information is available with less burden; and (5) Any other factors relevant under the circumstances. *Id*. at 26 (citing *Tri-Realty*, 2015 EHB at 556-57).

When considering these factors, we believe that it is appropriate to allow the deposition of Ms. Borello but with some limitations imposed on the scope, length and nature of the deposition. Pa. R.C.P. 4012(a)(2)-(5); *see Northampton Township v. DEP*, 2009 EHB 202, 205 ("The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required.") The issue in this case is the Department's determination that CNX did not cause a diminution of the Ulloms' water supply, and the scope of Ms. Borello's deposition must be limited to that issue. Both parties discuss the Board's decision in *Cabot Oil and Gas Corp. v. DEP*, 2016 EHB 20. In that case, the Department issued an order to Cabot to restore or replace a water supply. Cabot served a subpoena on a non-party (Ms.

Scroggins) who was affiliated with the owner of the water supply. Ms. Scroggins filed a motion for protective order and sought to quash the subpoena. In her motion she accused Cabot of vindictive and vexatious behavior, and in response Cabot accused her of bias and nefarious motives. The Board pointed out that none of the accusations were material to the central issue of whether the Department's determination of water contamination by Cabot was correct. As the Board aptly noted, "Evidence regarding Scroggins's and Cabot's feud has no meaningful part to play." *Id*. at 28.

Here, the issue is the Department's determination that CNX's operations did not cause diminution to the *Ulloms'* water supply. Matters pertaining to Ms. Borello's and CNX's ongoing litigation at the Court of Common Pleas are beyond the scope of discovery in this case. Pa. R.C.P. 4012(a)(4)-(5).

In light of the restrictions we are placing on the scope of the inquiries CNX may pose to Ms. Borello, we believe it is appropriate to limit the length of her deposition. *See Tighe*, 2024 EHB at 220 (limiting depositions of Department inspector and trainee to one hour). CCJ points out that the deposition of Barbara Ullom, which contained the most extensive discussion of Ms. Borello's connection to the case, lasted just under one hour. It therefore asserts that Ms. Borello's deposition should be similarly limited in time. However, we note that the deposition of James Ullom lasted approximately five hours. Based on these timeframes and Ms. Borello's role in this matter, we believe that it is appropriate to limit Ms. Borello's deposition to 90 minutes. In addition to ensuring that her deposition, as a non-party, is not unduly burdensome or disproportionate to her role in the case, limiting the length of the deposition will help to ensure that the questions do not veer into areas that are beyond the scope of this appeal.

Finally, we believe that CCJ has stated sufficient grounds for limiting Ms. Borello's deposition to one that is recorded by a stenographer rather than a video deposition. Although CNX is correct that video depositions are permitted under Pa. R.C.P. 4017.1(a), the method of deposition may be limited by the Board when it deems it appropriate, as we do here. Pa. R.C.P. 4012(a)(3).

In conclusion we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 22nd day of May, 2025, it is hereby ordered as follows:

1) The Motion for Protective Order filed by Center for Coalfield Justice (CCJ) is granted in part.

2) CCJ's motion to quash the subpoena is denied.

3) The deposition of Jodi Borello is limited to 90 minutes.

4) The scope of the deposition of Ms. Borello is limited to inquiries into matters within the scope of this appeal, as set forth in this Opinion.

5) The deposition of Ms. Borello shall be recorded by stenographic means only.

6) Ms. Borello may have an attorney present at the deposition.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: May 22, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Anna Zalewski, Esquire
Kathleen A. Ryan, Esquire
(via electronic filing system)

For Appellants, James and Barbara Ullom:
Joshua Ash, Esquire
(via electronic filing system)

For Intervenor, CNX Gas Company, LLC:
Rodger L. Puz, Esquire
J.R. Hall, Esquire
(via electronic filing system)

For Center for Coalfield Justice:
Evan Dimond Johns, Esquire
Thomas Kloehn, Esquire
(via electronic mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-074-W**
	:	**(Consolidated with 2022-072-W)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WCAA UPSTREAM, LLC, Permittee	:	**Issued: June 3, 2025**

ADJUDICATION

By MaryAnne Wesdock, Judge

Synopsis

The Board upholds the issuance and renewal of permits for the drilling and operation of two unconventional gas wells. Based on the testimony and record at the hearing, the Board finds that the preponderance of the evidence does not demonstrate that the Department failed to fulfill its statutory or constitutional duties in issuing and renewing the permits. However, the Board exercises its discretion to amend the permits to incorporate the terms of a consent judgment addressing noise and light mitigation, truck traffic and air monitoring.

Introduction

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) (Apex or Permittee) for the drilling of the Drakulic 1H and 7H unconventional gas wells in Penn Township, Westmoreland County. Apex elected not to drill the Drakulic wells while the appeal was pending, and instead sought a two-year renewal of the permits,

which was granted on August 15, 2023.[1] The permits and renewals were appealed to the Environmental Hearing Board (Board) by Protect PT, a grassroots nonprofit organization formed "to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development." (Notice of Appeal, Docket No. 2022-072-W, para. 7; Notice of Appeal, Docket No. 2023-074-W, para. 1.)

On May 13, 2025, the parties filed a Joint Stipulation to Amend Caption advising the Board of Apex's name change to WCAA Upstream, LLC (WCAA) and asking that the caption be amended to reflect the name change. The Board issued an order amending the caption on May 14, 2025. Although WCAA is now the permittee, the actions in this matter were taken by Apex, and the transcript and exhibits refer to "Apex." In order to avoid any confusion, we simply refer to WCAA/Apex as the Permittee.

Previously in this matter, the Board issued opinions in February and October 2024 dismissing certain issues from the case. *See Protect PT v. DEP and Apex Energy (PA), LLC*, 2024 EHB 191 (Opinion and Order on Motion for Partial Dismissal) and *Protect PT v. DEP and Apex Energy (PA), LLC*, 2024 EHB 683 (Opinion and Order on Department's and Apex's Motions for Partial Summary Judgment). In January 2025, an eight-day hearing was held before the Honorable MaryAnne Wesdock in Pittsburgh, PA. Protect PT's post-hearing brief was filed on March 24, 2025 and the Department's and Permittee's briefs were filed on April 22, 2025. Protect PT's reply brief was filed on May 12, 2025. Additionally, the Board conducted a site view on April 17, 2025.

[1] A well permit expires one year after issuance if drilling has not commenced. 58 Pa. C.S. § 3211(i); 25 Pa. Code § 78a.17(a). An operator may submit a request for a two-year renewal accompanied by a fee, a surcharge and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b).

FINDINGS OF FACT

1. The Appellant is Protect PT, which is a registered fictitious name for Promote PT, Inc., a Pennsylvania nonprofit with a registered address in Trafford, Pennsylvania. (Joint Stipulation, para. 2)

2. The Department of Environmental Protection (the Department) is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa. C.S. §§ 3201-3274, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Joint Stipulation, para. 3)

3. Permittee, WCAA Upstream, LLC (WCAA) (formerly Apex Energy (PA), LLC (Apex)) is a Delaware limited liability company that is engaged in the exploration and production of natural gas. (Joint Stipulation, para. 1)

4. Permittee is an upstream natural gas development company. "Upstream" is the segment of the gas industry that drills wells and produces natural gas. (Tr. 19)

The Permits

5. On July 13, 2021, Permittee applied for permits for two unconventional gas wells known as the Drakulic 1H and 7H wells (the Drakulic wells). (Joint Stipulation, para. 5; Stipulated Ex. 2)

6. The Drakulic wells are to be constructed on a site known as the Drakulic well pad (the Drakulic site), located at 1059 First Street, Trafford, PA 15085, in Westmoreland County. (Joint Stipulation, para. 4)

7. The Department issued permits for the Drakulic wells (the permits) on August 17, 2022. (Joint Stipulation, para. 6; Stipulated Ex. 3 and 4)

8. In issuing the permits, the Department prepared a Record of Decision that includes the Department's findings and conclusions regarding its decision to issue the permits. (Joint Stipulation, para. 7; Stipulated Ex. 5)

9. During the permit review process, the Department coordinated with the Department of Public Health to respond to public comments regarding public health. (Tr. 1260; Stipulated Ex. 5)

10. During the permit review process, the Department's lead permit reviewer requested that the Department's emergency response director review the Permittee's emergency response plans in response to public comments regarding the emergency response plans. (Tr. 1261; Stipulated Ex. 5)

11. Permittee revised its emergency response plans in accordance with recommendations made by the Department's emergency response director. (Tr. 1261)

12. During the permit review process, the Department's lead permit reviewer coordinated with the Department's air section to respond to public comments regarding air issues. (Tr. 1261-62; Stipulated Ex. 5)

13. During the permit review process, in response to public comments regarding potential spills, the Department requested that Permittee modify its Preparedness, Prevention and Contingency Plan, which it did. (Tr. 1262)

14. Protect PT appealed the permits on September 16, 2022 (the Issuance Appeal). (Joint Stipulation, para. 8; Notice of Appeal at Environmental Hearing Board Docket No. 2022-072-W.)

15. The term of a well permit is one year from issuance unless drilling is commenced or the Department renews the permit for a period of two years. 58 Pa. C.S. § 3211(i); 25 Pa. Code § 78a.17. (Joint Stipulation, para. 9.)

16. On July 20, 2023, Permittee applied for a two-year renewal of the permits. (Joint Stipulation, para. 10; Stipulated Ex. 6 and 7)

17. The Department renewed the permits on August 15, 2023 (the permit renewals). (Joint Stipulation, para. 11; Stipulated Ex. 8 and 9)

18. In renewing the permits, the Department prepared a Record of Decision on renewal that includes the Department's findings and conclusions regarding its decision to renew the permits. (Joint Stipulation, para. 12; Stipulated Ex. 10)

19. On September 14, 2023, Protect PT appealed the permit renewals (the Renewal Appeal). (Joint Stipulation, para. 13; Notice of Appeal at Environmental Hearing Board Docket No. 2023-074-W)

20. The Issuance Appeal and the Renewal Appeal were consolidated by the Board at Docket No. 2023-074-W. (Environmental Hearing Board Docket No. 2023-074-W, docket entries 6 and 7; Joint Stipulation, para. 14)

The Drakulic Well Site and Operations

21. The proposed Drakulic well site is located just off State Route 130. (Tr. 738)

22. At the time of the hearing in January 2025, the site was primarily wooded. (Tr. 738; Joint Stipulation, para. 4)

23. The well site is upland with moderate to steep slopes to the west and flat land to the east and northeast. (Tr. 455, 471)

24. There are residential properties to the north and to the east of the proposed site; it is rural to the south. (Tr. 738)

25. The Drakulic wells are unconventional gas wells that will be drilled into the Marcellus Shale formation. (Tr. 36)

26. The first step of putting a gas well into operation is to acquire property rights, i.e., leases for natural gas in a particular area, followed by a site selection process and permitting of the well. (Tr. 735)

27. Construction of the well pad will consist of building the physical pad itself, as well as roads leading to and from the site. (Tr. 103-04)

28. Construction of the well pad involves the movement of dirt. Bulldozers and front loaders will be used for the construction. (Tr. 742)

29. Once the well pad is complete, the gas wells are drilled using a drilling rig to construct the vertical and horizontal sections of the well. (Tr. 104, 735)

30. Once the gas wells are drilled, "well completion" takes place, which consists of hydraulic fracturing in the lateral portion of the wells in the Marcellus Shale. (Tr. 104, 124, 735)

31. The well casing of the horizontal section of the well is perforated to allow the fracturing fluids to be pushed into the formation. (Tr. 752, 757)

32. Water, sand and chemicals are then pumped at pressure down the wellbore through the perforated holes in the casing into the Marcellus Shale formation, causing fracturing of the Marcellus Shale. (Tr. 757)

33. Because the pressure of the earth is great, the fractures tend to re-close, so they are held open with sand that is part of the hydraulic fracturing process. (Tr. 758)

34. The gas molecule is smaller than the sand particle which allows the gas to flow through the fractures and into the borehole. (Tr. 759)

35. Once hydraulic fracturing has taken place, the fluids used in the hydraulic fracturing process flow back through the well. (Tr. 104)

36. The wells are then put into production, which means they are connected to a pipeline and begin to flow gas. (Tr. 104, 124)

37. Water produced during the production of gas will be collected on-site and emptied periodically. (Tr. 124)

38. When the wells are in production, the site consists of the production unit at the wellhead and a storage tank for collected water. There is no drilling equipment. (Tr. 124)

39. The well pad will be lined with an impermeable membrane. (Tr. 742-43)

40. There will also be a containment berm, with a liner that goes over the top and is tucked under a layer of gravel. (Tr. 746, 747)

41. There will be a liner placed between the gravel and rig mats. (Tr. 746)

42. During well production, the original well pad liner remains in place. Individual units on the site, such as water tanks, have their own containment. (Tr. 763)

43. Permittee performs leak detection and repair testing. (Tr. 767)

44. At the time of the hearing, Permittee had put 41 unconventional wells into production, and an additional eight wells were in the process of being completed. (Tr. 736)

45. The proposed wellbore path for the Drakulic wells will pass under residential properties. (Tr. 26)

46. The “kickoff” point is where the vertical portion of the unconventional wellbore begins to turn to the horizontal portion. (T. 61)

47. The kickoff point for the 1H well will occur at a true vertical depth of 5,830 feet. (Stipulated Ex. 1, p. 4 of Well Location Plat)

48. The kickoff point for the 7H well will occur at a true vertical depth of 5,529 feet. (Tr. 61; Stipulated Ex. 2)

49. Most properties near the Drakulic site are serviced by the municipal water supply. (Tr. 738)

50. There are approximately 96 private water supplies within 3,000 feet of the wellbores. (Stipulated Ex. 1 and 2, p. 2A–2E; Tr. 155)

51. Permittee intends to conduct predrill testing on private water supplies. (Tr. 769)

52. Although corporate designee, Christopher Hess, testified that Permittee did not search for public resources in the area of the proposed wells, as defined in the Oil and Gas Act, (Tr. 63–65, 68), the identification of "public resources" was part of the permit applications for the 1H and 7H wells. (Tr. 123)

53. The Department did not consider the proximity of the proposed well pad to schools and playgrounds when issuing the permits for the 1H and 7H wells because they did not consider schools and playgrounds to be a public resource. The Department did consider schools and playgrounds when granting the renewal of the permits. (Tr. 191–92)

54. The Department did not consider requiring Permittee to increase the setback requirement of its well pad for schools and playgrounds. (Tr. 192)

55. Penn Township imposes an additional 100-foot setback from structures beyond what is required by the Department. (Tr. 740)

56. Permittee does not own the surface or mineral rights to the property where the Drakulic wells will be drilled. The Permittee has a lease with the mineral owner, the Drakulic family. (Tr. 30-31) The surface owner is PT Property Management, LLC. (Tr. 47)

57. As of the date of the hearing in this matter, January 15 through January 27, 2025, the wells at the Drakulic site had not been drilled. (Joint Stipulation, para. 15.)

58. Construction of the well pad can take approximately 2-3 months. Drilling and completion (i.e., hydraulic fracturing) of the well can take up to 6 weeks. (Tr. 104)

59. Once the wells are put into production, the surface owner, PT Property Management, LLC intends to construct a residential housing plan in the area of the site. (Tr. 740-41)

The Consent Judgment

60. Permittee initiated a lawsuit in the Federal District Court of the Western District of Pennsylvania against Penn Township and the Penn Township Zoning Hearing Board (Zoning Hearing Board) to challenge the Zoning Hearing Board's denial of permits for multiple well pads within Penn Township. (Protect PT Ex. JJ; Apex Ex. 11)[2]

61. The federal litigation was resolved through a settlement agreement resulting in a Consent Judgment dated December 16, 2016 involving Permittee, Penn Township, the Penn Township Zoning Hearing Board and the Penn Township Board of Commissioners. (Protect PT Ex. JJ; Apex Ex. 11)

62. Protect PT and the Department are not parties to the federal Consent Judgment. (Tr. 812; Protect PT Ex. JJ; Apex Ex. 11)

[2] For the sake of clarity, we refer to Permittee's exhibits as "Apex Exhibit" since that is how the exhibits are identified in the record.

63. Among other things, the Consent Judgment requires the following: a) an air modeling and hydrogeological study (Protect PT Ex. JJ/Apex Ex. 11, Section 9(b); Tr. 815); b) the construction and maintenance of sound walls on the well pad during drilling and construction operations (Protect PT Ex. JJ/Apex Ex. 11, Section 9(c); Tr. 816); c) mechanisms to mitigate light, including downward facing light sources and translucent bags around light sources to reduce glare (Protect PT Ex. JJ/Apex Ex. 11, Section 9(c); Tr. 817); d) third-party noise monitoring during drilling and completions (Protect PT Ex. JJ/Apex Ex. 11, Section 9(d); Tr. 817); e) establishment of a 24-hour emergency hotline (Protect PT Ex. JJ/Apex Ex. 11, Section 9(g); Tr. 817); f) air emission monitoring during drilling and completion activities and notification to the township regarding any air monitoring that exceeds OSHA standards (Protect PT Ex. JJ/Apex Ex. 11, Section 9(h); Tr. 817-18); and g) management of truck traffic to avoid queuing on township roads, minimization of truck traffic during school bus hours, and elimination of truck traffic congestion around school bus stops (Protect PT Ex. JJ/Apex Ex. 11, Section 9(j); Tr. 818)

64. The Consent Judgment provides for continued federal jurisdiction over compliance with and enforcement of the agreement. (Tr. 819; Protect PT Ex. JJ/Apex Ex. 11, para. 6, Bates stamp 0000046)

65. The Record of Decision prepared by the Department prior to issuing the permits states that the Department "discussed the [Consent Judgment][3] with Penn Twp. and Apex" and learned from Penn Township that the Permittee was in compliance with it. (Exhibit 5 to Joint Stipulation, p. 2)

[3] The Record of Decision refers to the document as "Consent Order." (Stipulated Ex. 5.)

66. The "Air Quality" section of the Record of Decision prepared by the Department prior to issuance of the permits states that the Department "considered the air monitoring required by the Penn Twp. [Consent Judgment]." (Exhibit 5 to Joint Stipulation, p. 3-4)

67. The Department determined that the Consent Judgment addressed many of the objections to the permit that were received during the permit application process pertaining to dust, noise, light, aesthetics and air quality. (Tr. 1288)

68. The Department elected not to include permit conditions that it felt were addressed by the Consent Judgment. (Tr. 1288-89)

Protect PT and the Surrounding Community

69. Protect PT is a non-partisan organization founded to ensure the safety, security and quality of life for people in the Penn-Trafford area. (Tr. 262) It has further branched out to areas beyond Penn-Trafford in Allegheny and Westmoreland Counties. (Tr. 263)

70. Protect PT's activities include education, legal advocacy, environmental monitoring and sustainability programs. (Tr. 264-65)

71. Ms. Gillian Graber is the Executive Director of Protect PT. (Tr. 257)

72. Ms. Graber holds a Bachelor of Science degree in computer technology and professional communications and an associate degree in multimedia communications and graphic design. (Tr. 260)

73. Protect PT was formed in 2014 when Ms. Graber and her husband learned about the proposed well pad at the Drakulic site. (Tr. 258)

74. Protect PT has eight employees, including an environmental scientist who conducts monitoring for area residents. (Tr. 261-62)

75. Ms. Graber has testified at approximately 14-15 hearings involving well pads. (Tr. 263)

76. Ms. Graber lives approximately 2,400-2,500 feet from the proposed Drakulic site, or less than ½ mile. (Tr. 272)

77. Ms. Graber's home is downhill and downwind of the Drakulic site. (Tr. 338)

78. The source of Ms. Graber's water is the Wilkinsburg-Penn Joint Water Authority. (Tr. 274-75)

79. 932 people live within ½ mile of the Drakulic well site. (Tr. 289)

80. Approximately 3,000 people live within one mile of the Drakulic site and approximately 5,000 people live within 2 miles of the Drakulic site. (Tr. 289)

81. Approximately 37,000 people live within 3 miles of the Drakulic site. (Tr.702)

82. Within a 3-mile radius of the Drakulic site are the following facilities: Forbes Regional Hospital, 7 schools, 5 parks, 12 churches, 4 housing facilities and 3 assisted living facilities. (Tr. 701–02)

83. The Level Green Elementary School is located approximately one mile from the Drakulic site. (Tr. 190, 291, 1298)

84. The Level Green Presbyterian preschool is located approximately ¼ mile from the Drakulic site. (Tr. 291)

85. There is a playground located 1,974 feet from the Drakulic site. (Tr. 190)

86. The Level Green ballfield is located 2,410 feet from the Drakulic site. (Tr. 190)

87. Penn Township has a setback requirement of 600 feet. (Tr. 954)

88. As a resident living in proximity to the Drakulic site, Ms. Graber has been given no instructions on how to evacuate the site in the event of an emergency. (Tr. 334)

89. Ms. Graber's concerns regarding the Drakulic site are as follows: the location of the site and proximity to homes, schools, playgrounds, and places of worship; air emissions; diesel from truck traffic; water runoff; truck traffic on twisting narrow roads and overturned trucks; noise, light, and dust; 24/7 operation impacting her children's ability to sleep and go to school the next day; and a lack of information in the emergency response plan. (Tr. 282-83; 378–79)

90. The roads leading to the Drakulic site are "twisting and turning" and steep. (T. 282)

91. Ms. Graber was run off the road by a school bus on a blind curve in the area of the Drakulic site. (T. 282-83, 384)

92. Ms. Graber is a member of the Westmoreland Hazard Mitigation Team. (Tr. 397)

93. Protect PT requested that the Department hold a public hearing on the permit applications but the request was denied. (Tr. 285; Stipulated Ex. 5)

94. Protect PT participated in a Section 3251 hearing in 2016 regarding the proposed Drakulic pad but declined a subsequent Section 3251 hearing that would have been held prior to the issuance of the permits in question in this appeal. (Tr. 280, 347-48, 359)

95. Protect PT has received complaints from its members regarding Permittee's Quest site related to dust and noise. (Tr. 388)

96. Ms. Graber observed sand billowing at the Quest well site while the well was being fracked. (Tr. 386-87)

97. Dr. Larry Irr is a member of Protect PT. (Tr. 222)

98. Dr. Irr holds a Ph.D. in analytical chemistry from the University of Pittsburgh and spent nearly 41 years working at the Westinghouse Bettis Atomic Power Laboratory in West Mifflin, PA until his retirement in 2022. (Tr. 220)

99. Dr. Irr lives 0.45 miles from the proposed site of the Drakulic well pad. (Tr. 219)

100. Dr. Irr's water service is provided by the Wilkinsburg-Penn Joint Water Authority public water system. (Tr. 228, 245)

101. Dr. Irr's neighborhood consists of 44 people, which includes 22 adults and 22 children. (Tr. 218)

102. Dr. Irr has the following concerns regarding the Drakulic site: He is concerned about the gas wells leaking and substances getting into groundwater, exposure to toxic chemicals, and the lack of an emergency response plan for the neighborhood. (Tr. 211)

Groundwater

103. Stratigraphy is the layers of rock in a particular area. The layers are called strata. (Tr. 1266)

104. Lithology is the description of the strata in an area. (Tr. 1267)

105. Protect PT presented expert testimony by geologist John Barone. Mr. Barone holds both a Bachelor of Science and Master of Science degree in geology. (Tr. 422; Protect PT Ex. LL)

106. Mr. Barone has nearly 50 years' experience in the field of groundwater geology. (Tr. 423-45; Protect PT Ex. LL) He does not have experience with upstream oil and gas well sites. (Tr. 449)

107. Mr. Barone was admitted as an expert in geology, geohydrology, physical geology, physical geohydrology, engineering geology and engineering geohydrology. (Tr. 447, 451) All these areas relate to hydrogeology. (Tr. 449)

108. Permittee presented expert testimony by Michael Krehel, vice president and senior technical advisor of Netherland Sewell, a consulting firm primarily focused on the upstream oil and gas industry. (Tr. 996-97)

109. Mr. Krehel holds a Bachelor of Science degree in petroleum and natural gas engineering and has over 40 years' experience in the oil and gas field. (Tr. 1000)

110. Mr. Krehel was admitted by the Board as an expert in petroleum engineering. (Tr. 1006)

111. The Department presented expert testimony by lead permit reviewer, Andrea Mullen. Ms. Mullen is a licensed professional geologist and holds a Bachelor of Science with a certificate in environmental studies and a Master of Science degree in geosciences. (Tr. 1244–45)

112. Ms. Mullen has taken part in water supply complaint investigations, which involved looking at groundwater flows to determine if it was feasible that an oil and gas drilling operation could have impacted a water supply. (Tr. 1248-49)

113. Ms. Mullen was admitted as an expert in geology and hydrogeology. (Tr. 1255)

114. The permeability of the soils at the Drakulic site ranges from low to high with a tendency toward moderate to high. (Tr. 456)

115. Due to the soil's permeability, precipitation or other surface water will drain quickly. (Tr. 456)

116. The deepest fresh groundwater in the area of the Drakulic site is likely at a depth of 200 feet. (Tr. 464, 1273-74)

117. Private water wells in this area are generally drilled to a maximum depth of 500 feet. (Tr. 1273-74)

118. The shallow groundwater supplies the private water supplies in the area of the well site. (Tr. 464)

119. Based on regional data, there are likely to be natural fracture networks in the area of the Drakulic well site. (Tr. 463, 1277-78)

120. There are other wells located in the vicinity of the Drakulic site, including other unconventional wells, conventional wells, and historic or abandoned wells. (Tr. 472; Apex Ex. 12 and 13)

121. There is depth information available for all but two of the historic wells referenced in Mr. Barone's report. For the wells for which there is data, they were drilled no deeper than 3,500 feet. (Tr. 1271-72)

122. The design of Permittee's McIlvaine 5HN well is representative of how the wells at the Drakulic site will be constructed. (Tr. 778, 1011)

123. The McIlvaine well contains five concentric strings of steel casing in the well that are cemented to the surface and go down to a depth of 2,500 feet. (Tr. 1011-12; Apex Ex. 4)

124. The cement and casing provide isolation from the interior of the wellbore to the formations that the wellbore penetrates and also provide structural integrity. (Tr. 781, 1012)

125. During the production phase, the casing provides protection to prevent what is inside the wellbore from escaping out into the formations. (Tr. 1013)

126. The design of the wells at the Drakulic site calls for the surface casing string to be installed to a depth of 830 feet, which is below fresh groundwater. (Tr. 1014)

127. The Marcellus Shale formation is at a depth of approximately 7,500 feet true vertical depth, or 1 ¼ miles below the surface, in the area of the Drakulic site. (Tr. 772, 1015, 1272, 1275)

128. True vertical depth is the actual depth from a point below the surface to the surface, whereas total measured depth includes the twists and turns one takes to get to that same point. (Tr. 772)

129. The Drakulic 1H well will be drilled to a true vertical depth of 7,571 feet. (Stipulated Ex. 1, p. 4 of Well Location Plat)

130. The Drakulic 7H well will be drilled to a true vertical depth of 7,506 feet. (Stipulated Ex. 2, p. 4 of Well Location Plat)

131. The rock layers between the depth of where the wells will be drilled and the depth at which fresh groundwater is found include sandstones, siltstones, carbonates and shales. (Tr. 1016)

132. The Tully Limestone is shallower than the Marcellus Shale. (Tr. 1017-18)

133. The direction of flow in the wellbore depends on what part of operation is ongoing: During completion in hydraulic fracturing, the flow is downhole through the lateral and through the perforations and into the formation. Immediately after the completion is finished, the direction of flow comes into the wellbore and up to surface. (Tr. 1012-13)

134. The Drakulic wells will be extraction wells, designed for producing hydrocarbons from the formation. (Tr. 1022-24)

135. After completion (hydraulic fracturing) is executed, there is a pressure sink. The flow wants to go from high pressure to low pressure. After completion, the higher pressure would be in the formation. The lower pressure would be in the wellbore. As the well is turned on to flow back and produce, the fluids and hydrocarbons in the formation preferentially flow toward the wellbore into the lateral and out the top of the well. (Tr. 1035-36)

136. Department regulations require operators to conduct an area of review for the purpose of identifying active wells, inactive wells, orphan wells, abandoned wells, and plugged and abandoned wells within 1,000 feet measured horizontally from the vertical well bore and 1,000

feet measured from the surface above the entire length of a horizontal well bore. 25 Pa. Code § 78a.52a(a) and (b).

137. The operator must submit a report summarizing the area of review, including a plat showing the location and GPS coordinates of the identified wells, a monitoring plan for wells that are required to be monitored, and other information. 25 Pa. Code § 78a.52a(c).

138. The purpose of the area of review study is to avoid collisions with other wells when drilling and to avoid communication between wells. (Tr. 784-85)

139. "Communication" signifies communication of gas or liquids between one well and another. (Tr. 792)

140. For a communication event to occur between two wells, at least one of the wells must have an integrity issue or have been abandoned and unplugged. (Tr. 513, 793, 1030-31)

141. Existing wells that are in the same formation as where the operator intends to drill, in this case, the Marcellus Shale formation, pose a greater risk. (Tr. 924-25)

142. To its knowledge, Permittee has never had a communication event occur with one of its wells. (Tr. 793)

143. Permittee had completed its area of review studies for the Drakulic 1H and 7H wells at the time of the hearing and the plats were introduced into evidence as Apex Exhibits 12 and 13.

144. The Department's Guidelines for Implementing Area of Review (AOR) Regulatory Requirement for Unconventional Wells lists the risk level as "high" for wells plugged prior to 1956, orphaned and abandoned wells, and abandoned wells whose plugging status is unknown. (Tr. 508-09; Protect PT Ex. XX)

145. Apex Exhibit 14 lists wells that Permittee identified in its area of review study for the Drakulic 1H and 7H wells. (Tr. 785)

146. Apex Exhibit 14 identifies 24 wells in the area of review as being at "higher" risk of a communication event. (Apex Ex. 14)

147. Apex Exhibit 14 also identifies 17 wells as having an undetermined status but a "negligible" risk. (Apex Ex. 14)

Air Quality

148. Protect PT presented the expert testimony of Marc Glass who holds a Bachelor of Science degree in environmental science and completed course work for a Master of Science in soil science. (Tr. 563)

149. Mr. Glass's work has included groundwater sampling, air sampling and surface water sampling, as well as work on petroleum-related projects (Tr. 564-66; Protect PT Ex. TT)

150. In 2012 Mr. Glass became a member and owner of Downstream Strategies, an environmental consulting firm, where he developed the environmental monitoring and remediation division. (Tr. 566)

151. Mr. Glass is a licensed remediation specialist in the state of West Virginia and this is the majority of the work that he does. (Tr. 567, 599)

152. Mr. Glass has done sampling at and around unconventional oil and gas well pads. (Tr. 569-70)

153. Mr. Glass was admitted by the Board as an expert in environmental science, fate and transport, air quality monitoring, and environmental remediation. (Tr. 577, 608)

154. Fate and transport involves the tracking of a contaminant once it is released into the environment. (Tr. 576)

155. Permittee offered expert testimony by Tom Muscenti, Mr. Muscenti holds a Bachelor of Science in chemistry and a Master of Science in chemical engineering. (Tr. 1060) He

is an air quality consultant and approximately 2/3 of his work involves upstream oil and gas operations, primarily in Pennsylvania in the Marcellus Shale formation. (Tr. 1058, 1061–63)

156. Mr. Muscenti is employed as regional director and air quality consultant with Trinity Consultants. (Tr. 1057-58) Approximately 75% of his work is in the oil and gas industry. (Tr. 1058)

157. Mr. Muscenti serves as Permittee's air quality consultant and he has been to six or seven of Permittee's well pads. (Tr. 1063–64)

158. Mr. Muscenti was accepted as an expert in air quality. (Tr. 1065).

159. Unconventional natural gas drilling involves air emissions which differ during the various phases of the operation, from preproduction to drilling to hydraulic fracturing and flowback and finally to production. (Tr. 612-13)

160. Particulate matter is associated with unconventional natural gas operations. (Tr. 631, 639-40)

161. Particulate matter is likely to be emitted from operations at the Drakulic well site, but the experts disagree as to the amount. (Tr. 635, 1087-88, 1172)

162. The Consent Judgment between Permittee and Penn Township requires Permittee to monitor air pollutants, including particulate matter, during drilling and completion activities at the Drakulic site. (Protect PT Ex. JJ; Apex Ex. 11; Tr. 667, 817-18)

163. Ambient air monitoring in Westmoreland County shows attainment of the National Ambient Air Quality Standards for ozone and particulate matter 2.5 (PM2.5). (Tr. 671, 1079)

164. The 2024 PM2.5 standard is 9 micrograms per cubic meter. The most recent three-year average for Westmoreland County was below that limit, at 7.8 micrograms per cubic meter. (Tr. 1096-97)

165. None of the ambient air monitoring is done within five miles of the Drakulic site. (Tr. 1100)

166. Other counties where oil and gas operations take place, including Bradford, Wyoming, Tioga, Greene and Washington Counties, are in attainment with National Ambient Air Quality Standards. (Tr. 1080)

167. Gas well operators are required to report annual air emissions for certain constituents, including volatile organic compounds (VOCs), benzene, formaldehyde, and particulate matter. (Tr. 666)

168. The gas that will be produced at the Drakulic site, and generally in Westmoreland County, is dry gas. (Tr. 765, 1066-67; Apex Ex. 5)

169. Dry gas produces very low levels of VOCs. (Tr. 766, 1067-68)

170. The wells at the Drakulic site will be operated under Pennsylvania Air Quality Permit Exemption 38(c) (exemption 38(c)). (Tr. 1073)

171. Exemption 38(c) exempts unconventional gas well operations from needing an air permit if emissions are below a certain level. (Tr. 1072-74)

172. If annual emissions reporting were to show that the Drakulic site is exceeding the limits of exemption 38(c), Permittee would be required to obtain an air permit for the site. (Tr. 1094-95)

Radon

173. The Department presented the expert testimony of Bryan Werner, a program manager within the Department's Bureau of Radiation Protection. (Tr. 1348) Mr. Werner holds a Bachelor of Science degree in physics and a Master of Science degree in radiation protection physics. (Tr. 1349, 1351; DEP Ex. 6)

174. Mr. Werner spent approximately 40-60 hours of classwork on the topic of radon. (Tr. 1352)

175. Mr. Werner was involved in the Department's TENORM study as a reviewer. (Tr. 1357)

176. Mr. Werner was admitted as an expert in health physics and radiation protection, including the evaluation of radon air emissions. (Tr. 1358)

177. TENORM is technologically enhanced naturally occurring radioactive material. (Tr. 809-10)

178. An example of TENORM is the radioactive material that is naturally occurring in the Earth's geology and is brought to the surface through gas drilling. (Tr. 810)

179. Permittee has a Radiation Protection Action Plan (Radiation Plan). (Tr. 809; Apex Ex. 10)

180. Permittee's Radiation Plan provides for monitoring of radioactivity while bringing up drill cuttings. (Tr. 810)

181. Permittee has not encountered radiation monitoring levels in excess of a regulatory threshold. (Tr. 810-11)

182. Radon is released during the decay of uranium-238; it occurs after the decay of radium-226. (Tr. 620)

183. Uranium is a primordial (existing since the beginning of the earth) naturally occurring radioactive material. (Tr. 1363)

184. Radium-226 exists naturally in the environment, particularly in soils and rocks. (Tr. 1360; DEP Ex. 9)

185. Radium-226[4] is associated with fluids and drill cuttings generated from the Marcellus Shale. (Tr. 620, 622, 1384)

186. Radon is released by the rocks associated with the Marcellus Shale that are brought to the surface during flowback, as well as the gas that originates in the Marcellus Shale. (Tr. 620-21, 1384-85)

187. Pennsylvania has some of the highest radon levels in the world due to the Commonwealth's geology and near-surface soils, sediment, and rocks that have a slightly higher percentage of uranium, thorium and radium that is naturally occurring. (Tr. 1361, 1366-1367)

188. In Pennsylvania, the average public indoor dose of radioactive radon gas is just under 600 millirem, which is approximately twice that of the rest of the country. (Tr. 1361)

189. Exposure to radon includes exposure to radon progeny. (Tr. 1362)

190. Wherever radium-226 is present, it constantly undergoes radioactive decay to produce radon gas (radon-222). (Tr. 623)

191. A half-life is the amount of time required for half of a material to decay into a progeny of the original material. (Tr. 623, 1363)

192. Radon has a half-life of 3.8 days. (Tr. 623) In other words, it takes 3.8 days for half of the radon originally present to decay into another radioactive progeny. (Tr. 623-24)

193. There is no safe level of radon exposure. (Tr. 625, 632, 1170-71)

194. EPA has established an action level for indoor air radon levels that exceed 4 picocuries per liter. (Tr. 1382)

[4] Page 620 of the transcript refers to "Radium-262" but we believe this is an error and is supposed to read "Radium-226."

195. The EPA level of 4 picocuries per liter for radon exposure is not a health-based standard; it is simply a practical, manageable exposure level for homeowners to meet. (Tr. 625, 1382)

196. The average indoor exposure to radon in Westmoreland County is 7.6 picocuries per liter. (Tr. 1368; DEP Ex. 10)

197. Radon in the outdoor air dissipates quickly and presents only a low risk. (Tr. 1374-76, 1391-92)

198. To reach higher levels, radon requires a confined space to concentrate. (Tr. 1376)

199. How far radon travels from a particular well site is a function of how the gas moves in the atmosphere. (Tr. 630)

200. The Department did a study of outdoor radon monitoring at state parks in 2017-2018 and it showed averages of 0.1 to 0.3 picocuries per liter in counties where the most oil and gas exploration was done. The numbers were the same as those in areas where there is no oil and gas exploration. (DEP Ex. 11; Tr. 1371)

201. The Department's TENORM study looked at the TENORM impacts associated with oil and gas operations within Pennsylvania. (Tr. 1385; Protect PT Ex. GG)

202. The study showed ranges on the unconventional well pad sites to be between 0.2 and 1.7 picocuries per liter. (Tr. 1389; Protect PT Ex. GG)

203. The TENORM study showed no discernable difference between values for radon normally in the atmosphere versus the air at the edge of an unconventional well site. (Tr. 1390)

204. The TENORM Study showed that at a broad spectrum of the unconventional well sites featured in the study, there was not an increase in ambient radon levels. (Tr. 1391)

Emergency Response Planning

205. Protect PT presented the expert testimony of Silverio Caggiano regarding emergency response planning. (Tr. 531)

206. Mr. Caggiano served as a fire fighter with the Youngstown Fire Department for 39 years, and he retired as the battalion chief. (Tr. 515)

207. Mr. Caggiano has been involved with HAZMAT response for 30 years and has experience with drafting Preparedness, Prevention and Contingency (PPC) Plans and Emergency Response Plans, including site-specific Emergency Response Plans. (Tr. 517, 522–24)

208. Mr. Caggiano was recognized by the Board as an expert in emergency response and in planning and preparedness control. (Tr. 525, 529–30)

209. A PPC Plan contains information dealing with preparedness and prevention of spills or releases of chemicals. (Tr. 92–93; Stipulated Ex. 13)

210. An Emergency Response Plan is utilized for emergencies such as a loss of well control or larger spills that cannot be immediately cleaned up. (Tr. 92; Stipulated Ex. 11)

211. There are two types of Emergency Response Plan: system-wide and site-specific. (Tr. 793-94)

212. The system-wide Emergency Response Plan is a blanket plan that applies to all Permittee's sites operating in the state of Pennsylvania. (Tr. 793–94; Stipulated Ex. 11)

213. The site-specific Emergency Response Plan operates as an appendix to the system-wide plan and provides specific information for the location at issue. (Tr. 794; Stipulated Ex. 12)

214. Permittee's site-specific plan consists of an addendum to its system-wide plan with specific information for the Drakulic location. (Tr. 794; Stipulated Ex. 12)

215. Each well pad has a "mailbox" with a binder in it. The binder contains the Emergency Response Plan, the PPC Plan, and the safety data sheets for chemicals that are on site. (Tr. 805)

216. Safety data sheets contain chemical abstract service numbers (CAS numbers)[5] that are used to identify each chemical. (Tr. 536-37)

217. The CAS number can be used by first responders to research a chemical and determine characteristics about the chemical that are necessary for public safety. (Tr. 536-37)

218. The CAS number can also be used to identify chemicals that are listed by their trade name or as proprietary. (Tr. 536-37)

219. Safety data sheets are kept on-site when the corresponding material is brought onto the site. (Tr. 805-06)

220. Section 4.3 of Permittee's system-wide Emergency Response Plan states as follows: "[Safety data sheets] including those for Company-supplied materials, are supplied at well locations during the phases of site operation including but not limited to, drilling and completions. Contractors that bring their own hazardous materials on site provide their own [safety data sheets] and keep them on site while they are working." (Stipulated Ex. 11, p. 6)

221. Apex Exhibit 9 contains safety data sheets for a number of products used at Permittee's other sites. (Apex Ex. 9)

222. Permittee has a contract with a specialty first responder to handle emergencies that may occur at the wellhead. (Tr. 797, 799)

223. In the experience of Permittee's corporate designee, Mr. Hess, loss of well control events – such as an uncontrolled release of natural gas or fluids – are rare. (Tr. 798)

[5] The transcript incorrectly identifies this as a "CAST" number.

224. Permittee has never experienced an uncontrolled release, commonly known as a blowout. (Tr. 799)

225. The procedures to be followed should an uncontrolled release occur are set forth in Permittee's system-wide Emergency Response Plan. (Tr. 799; Stipulated Ex. 11, p. 11-15)

226. Permittee's system-wide Emergency Response Plan states as follows: "In the event of a worst probable release, residences, public buildings, bodies of water, and roads within a half mile of the well site (identified in the site-specific well pad [emergency response plan]) will be assessed for potential impact in consultation with the county 911 . . . Other hazards and emergency scenarios previously described in this [emergency response plan] may impact the public. Consultation with the County 911 Center will determine the appropriate response actions specific for the incident, site, and prevailing weather conditions." (Stipulated Ex. 11, p. 15)

227. If the public needs to be evacuated due to an incident at one of Permittee's wells, it will be handled by local first responders. (Tr. 802)

Public Health

228. Protect PT presented the expert testimony of Makenzie White. Ms. White holds a Master of Public Health degree with a concentration in community and behavioral health sciences and is on the staff of Protect PT as an environmental consultant. (Tr. 681, 688; Protect PT Ex. NN)

229. Ms. White has worked with communities impacted by oil and gas operations and has worked on health impact assessments (Tr. 683, 685–86)

230. In 2024 Ms. White co-authored a chapter on Pennsylvania shale gas development for a World Public Health textbook. (Tr. 689)

231. Ms. White was admitted by the Board as an expert in public health, including the health impacts of unconventional oil and gas drilling. (Tr. 699)

232. Apex presented the expert testimony of Julie Panko who holds a Bachelor of Science degree in industrial hygiene and is a certified industrial hygienist. (Tr. 1125–26) In this role, she has evaluated gas well sites and the potential for air pollution. (Tr. 1127, 1129–30)

233. Ms. Panko was accepted by the Board as an expert in industrial hygiene, as well as occupational and environmental health risk assessment. (Tr. 1135–36)

234. Due to its small size, PM2.5 is easy to breathe into one's lungs. It can cause respiratory and cardiovascular issues. (Tr. 708)

235. Health studies conducted by the University of Pittsburgh showed a correlation between proximity to oil and gas operations and health effects including asthma exacerbations, low birth weight and childhood cancer. (Tr. 707)

236. The University of Pittsburgh health studies used proximity to the oil and gas sites as a proxy for actual exposure. (Tr. 711 and 1160)

Compliance History

237. The Department's Andrea Mullen previously held the position of environmental compliance specialist in the Department's Northcentral Regional Office. (Tr. 1246) In this role, she evaluated cases referred for enforcement actions. (Tr. 1247)

238. Ms. Mullen's compliance work was in the field of oil and gas. (Tr. 1247)

239. Permittee received a notice of violation for failing to supply information to identify chemicals designated as "trade secret" in reports filed with the Department. (Tr. 105)

240. To identify trade secret chemicals in reports provided to the Department, the operator provides a code. (Tr. 106, 110)

241. A December 11, 2020 Department inspection report noted a well integrity violation at Permittee's Klylien 1 site under 25 Pa. Code § 78.88(d). (Tr. 884-85)

242. The December 11, 2020 report also noted a violation for well construction and operation under 25 Pa. Code § 78.73(a). (Tr. 885)

243. Other observations noted at the Klylien 1 site were corrosion of feed line and extreme corrosion of production casing. (Tr. 886)

244. At its Herminie site, Permittee received a violation for a spill of drilling mud outside its containment area. (Tr. 835)

245. At its Quest site, Permittee received a violation for failure to notify the Department of a spill of mercaptan. (Tr. 833)

246. At its Fatur site, Permittee received a violation for erosion and sedimentation control issues. (Tr. 829-30)

247. Protect PT obtains information regarding an operator's compliance history by using interactive reports on the Department's website. (Tr. 306)

248. Protect PT Executive Director Gillian Graber used an interactive tool on the Department's public-facing website to review Permittee's history of violations. The results of her search were admitted into the record as Protect PT Exhibit WW. (Tr. 311, 1437–38)

249. Protect PT Exhibit WW has a cover page stating that "an inspection report may cite multiple violations that are related to a single event or incident that occurred at a site, facility or sub-facility." It also states that the inspection type code may vary "as issues are being addressed and resolved to restore the site, facility, or sub-facility back to compliance." (Protect PT Ex. WW, Cover page)

250. In its review of the applications for the issuance of the Drakulic 1H and 7H permits, the Department found no violations at the Drakulic site. (Stipulated Ex. 5)

251. In its review of the applications for the issuance of the Drakulic 1H and 7H permits, the Department reviewed compliance at other sites operated by Permittee and found that there were no outstanding orders, one outstanding consent order and agreement with which Permittee was in compliance, and no pattern of non-compliance over the previous five years. (Stipulated Ex. 5)

252. At the time of the Department's review of the applications for issuance of the Drakulic 1H and 7H permits, Permittee had 22 notices of violation, 126 resolved notices of violation, 12 open enforcements and 17 closed enforcements. (Stipulated Ex. 5)

253. In its review of the applications for the renewal of the Drakulic 1H and 7H permits, the Department found no violations at the Drakulic site. (Stipulated Ex. 10)

254. In its review of the applications for the renewal of the Drakulic 1H and 7H permits, the Department reviewed compliance at other sites operated by Permittee and found that there were no outstanding orders and no pattern of non-compliance in the previous five years. (Stipulated Ex. 10)

255. At the time of the Department's review of the applications for renewal of the Drakulic 1H and 7H permits, Permittee had 41 notices of violations, 127 resolved notices of violation, 11 open enforcement actions and 20 closed enforcement actions. (Stipulated Ex. 10)

256. The Department consults an internal database to review compliance, as well as coordinates with its compliance program. (Tr. 156, 1282)

257. The manner in which the Department considers compliance history with respect to a permit application is to reach out to the applicant with regard to any ongoing compliance issues and provide the applicant with an opportunity to fix the problem. (Tr. 157–58)

258. Thomas Donohue is the Department's Environmental Program Manager, and in this role he is the manager for subsurface permitting across the Commonwealth of Pennsylvania. (Tr. 150)

259. Mr. Donohue was unable to confirm whether the open enforcements listed in the Department's Record of Decision for the permit issuances were the same open enforcements listed in the Record of Decision for the permit renewals. (Tr. 160)

260. Mr. Donohue was unable to state the number of notices of violation that had been resolved between the time of the Department's initial review of the permit applications and the review of the renewal applications. (Tr. 160-61)

261. Mr. Hess lives approximately ½ mile from the Moritz well site operated by Range Resources. (Tr. 845-46) He experienced noise from the site for approximately eight to nine months while the well pad was being drilled and completed. (Tr. 846-47) Following drilling and completion activities, his experience is that the well site is quiet and unlit. (Tr. 847)

DISCUSSION

Standard of Review

This matter involves a third-party appeal by Protect PT of unconventional gas well permits issued to Permittee by the Department. As such, Protect PT has the burden of proof. 25 Pa. Code § 1021.122(c)(2). To be successful in a third-party appeal, the party challenging the Department's permit decision "must show, by a preponderance of the evidence, that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the permit." *The Delaware Riverkeeper Network v. DEP*, 2018 EHB 447, 472-73 (citing *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017)). In other words, Protect PT's evidence must be greater than the evidence supporting the Department's

determination that the issuance and renewal of the permits for the Drakulic wells "was reasonable, appropriate, and in accordance with applicable law." *Liberty Township v. DEP*, 2024 EHB 36, 76.

A party who challenges the issuance of a permit by the Department may not simply speculate that issues may occur; rather, it must show by a preponderance of the evidence that the problems it alleges are likely to occur. *Id.* at 76-77; *Benner Township Water Authority v. DEP*, 2019 EHB 594, 633. "When a party raises technical issues, it must come forward with technical evidence to support its challenge, which many times will require competent and appropriate expert witness testimony." *Liberty Township*, 2024 EHB at 77 (citing *Liddick v. DEP*, 2018 EHB 207, 216; *Prizm Asset Management Co. v. DEP*, 2005 EHB 819, 844).

In *Shuey v. DEP*, 2005 EHB 657, we explained that an appellant challenging a permit cannot simply come forward with a list of problems and then rest its case. Rather:

> [i]t must prove by a preponderance of the evidence that these problems have occurred or are likely to occur. We are a trial court, expert in environmental issues including technical matters and, as such, our decisions must be based on the record developed before us.

Id. at 712.

Protect PT asserts that, in meeting its burden of proof, it is not required to prove that the harm it has alleged is more likely than not to occur. In support of its argument, it cites to the Commonwealth Court's holding in *United Refining Co. v. Department of Environmental Protection*, 163 A.3d 1125 (Pa. Cmwlth. 2017) wherein the Court discussed the burden of proof that an appellant must meet when challenging a permit issued by the Department. There the Court stated that the appellant was not required "to prove every factual detail by a preponderance of evidence" nor "to prove that it was more likely than not that harm would occur." *Id*. at 1133. The Court stated:

> We agree with Petitioner that, to the extent that the Board's discussion of the burden of proof could be interpreted to require Petitioner to prove every factual detail by a preponderance of evidence or require Petitioner to prove that it was more likely than not that harm would occur, such an interpretation would impose a higher burden than required. The Board was required to determine whether, based upon its factual findings, Petitioner proved by a preponderance of the evidence that the Department acted arbitrarily or abused its discretion. We can envision a scenario where the likelihood of the harm occurring is significant but *less* than fifty percent likely. The severity of the possible harm, however, could be so immense that issuing a permit could be determined to be abuse of discretion. To require a petitioner to prove a fifty percent or greater likelihood that the harm will occur would unduly restrict the Board's ability to consider the reasonableness of the issuance of a permit under this or any other similar scenario.

Id. However, the Court made it clear that the burden is on the appellant to prove, *by a preponderance of evidence*, that the issuance of the permit was arbitrary or an abuse of discretion. *Id.* This means that Protect PT must show that the evidence in favor of its proposition is greater than that opposed to it. *Liberty Township,* 2024 EHB at 76-77. This is the standard we apply in determining whether Protect PT has met its burden of proof in this matter.

It is also important to remember that the Board's review is *de novo* and, therefore, we can consider evidence that was not before the Department when it made its decision, including evidence developed by all parties since the filing of the appeal. *Delaware Riverkeeper*, 2018 EHB at 473. "*De novo* review involves full consideration of the case anew." *O'Reilly v. DEP*, 2001 EHB 19, 32 (quoting *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991)). As former Chief Judge Krancer explained in the seminal case, *Smedley v. DEP*, 2001 EHB 131:

> This is not merely a mechanical recitation of the allocation of power to the Board. The important point is that this description of the Board's function outlines the nexus between the rights of the appellant challenging a DEP action and defenders thereof. The Board operates at that center-point. The Board does not review a

> matter before it on the basis of an already developed record. The Pennsylvania Legislature and the Commonwealth Court have unambiguously delineated that the Board is a judicial tribunal of *first* impression. The Board protects the procedural due process rights of persons who allege and can prove that they are adversely affected by an action of DEP, a governmental agency. Under the Environmental Hearing Board Act the Board is established as a quasi-judicial body to review appeals from DEP actions and no action of the Department adversely affecting a person shall be final until the Board has heard the appeal. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). The Board proceeding is the *first* instance that a party challenging a DEP action has the right to judicial-type discovery and, in turn, to present evidence so developed to an independent quasi-judicial tribunal. 35 P.S. §§ 7513(a), 7514(c), 25 Pa. Code § 1021.111. The Board is the *first* opportunity any party challenging a DEP action has to a full adjudicatory hearing where one can present a full case in open court with the rights to subpoena witnesses, examine and cross-examine witnesses and present oral and documentary evidence. 35 P.S. §§ 7514(a), (f); 25 Pa. Code §§ 1021.85-1021.98, 1021.107-1021.108.

Id. at 156-57 (emphasis in original).

Exercising our *de novo* review, we consider the evidence presented by the parties in order to determine whether Protect PT has met its burden of proof.

History of this Matter

In June 2014 representatives of Permittee met with staff of Penn Township and presented a plan that consisted of seven proposed well pad sites for the drilling of unconventional gas wells.[6] This plan included the Drakulic site. Permittee submitted notices pursuant to Act 14, which requires that applicants for certain Department permits must provide written notification to the municipality where the project is located. At the time of the June 2014 meeting and the Act 14 notices, Penn Township's zoning ordinance permitted oil and gas drilling in all areas within the

[6] The information set forth in this section is taken from the Consent Judgment entered into between Apex and Penn Township, which will be discussed herein, as well as the decision of the Commonwealth Court in *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Cmwlth. 2019), which involved a challenge by Protect PT to Penn Township's zoning ordinance.

Township as a special exception subject to certain criteria. In January 2015 the Penn Township Commissioners amended the Township's zoning ordinance to add the following provision:

> The applicant shall demonstrate that the drill site operations will not violate the citizens of Penn Township's right to clean air and pure water as set forth in Art. I Sec. 27 of the Pennsylvania Constitution (The Environmental Rights Amendment). The applicant shall have the burden to demonstrate that its operations will not affect the health, safety, or welfare of the citizens of Penn Township or any other potentially affected land owner. The application submitted shall include reports from qualified Environmental individuals attesting that the proposed location will not negatively impact the Township residents' Environmental Rights, and, will include air modeling and hydrogeological studies as potential pathways that a spill or release of fluid may follow.

(Protect PT Ex. JJ/Apex Ex. 11.)

In the Fall of 2015, Permittee submitted applications to Penn Township's Zoning Hearing Board for special exception for the seven well sites, including Drakulic. Along with its applications, Permittee submitted risk assessment reports on air modeling and hydrogeological studies. Hearings were held on three of the sites, not including Drakulic. The Zoning Hearing Board denied Permittee's applications for the three sites on the basis that Permittee had not demonstrated that it would not violate the aforesaid provision of the zoning ordinance. With regard to the Drakulic well pad, as well as two other sites, Permittee asserted that its applications were deemed approved which the Township and Zoning Hearing Board contested.

Permittee filed suit against Penn Township and the Zoning Hearing Board in the United States District Court of Western Pennsylvania. The parties ultimately entered into a Stipulation which was entered as a Consent Judgment by the Court (Consent Judgment). *Apex Energy (PA), LLC v. Penn Township*, Civil Action No. 16-759 (December 16, 2016) (Protect PT Ex. JJ; Apex Ex. 11.) Under the Consent Judgment, the Township agreed to issue the special exception permits for the three sites for which hearings had been held in exchange for Permittee agreeing to conduct

certain activities aimed at alleviating concerns raised by the Township with regard to operations to be conducted at the sites.

Pursuant to the Consent Judgment, Permittee agreed to take a number of actions at its well sites, including the Drakulic site, which included the following:

- Provide a study including air modeling and hydrogeological studies regarding potential pathways that a spill or release of fluid may flow.
- During pre-production, construct and maintain sound walls on all sides of the pad to absorb and mitigate sound, light and airborne materials.
- Provide for third-party noise monitoring during construction, drilling and completions stages of development.
- Provide a site plan or testimony of a Pennsylvania Registered Professional Engineer certifying that the well pad will meet all setback requirements unless landowner consent is obtained for a waiver from Penn Township's 600-foot setback requirement.
- Plant and vegetate the well pad.
- Establish and maintain a 24-hour emergency hotline telephone number to be used by the Township representatives, employees, contractors and volunteer fire companies to contact Permittee in the event of emergency.
- Provide for monitoring by a third-party expert of air quality emissions and particulate content during drilling and completion activities.
- Mitigate the direction or deflection of light sources off the pad.
- Ensure that no trucks or construction vehicles will be staged or queued on any public roads within the Township, including consulting with the local school district to coordinate and

minimize truck traffic during regularly scheduled school bus stops, and minimizing the idling of trucks on the well pad.

(Protect PT Ex. JJ/Apex Ex. 11, paragraph 9 of Stipulation adopted by the Consent Judgment.) The Department is not a party to the Consent Judgment; nor is Protect PT. The Consent Judgment will be discussed in more detail later in this adjudication.

In or around 2015 or 2016, Protect PT requested and received a conference pursuant to Section 3251 of the Oil and Gas Act, Act of February 14, 2012, 58 Pa. C.S. §§ 3201 et seq. That section provides that "any person having a direct interest in a matter subject to [Chapter 32 - the Oil and Gas Act] may, at any time, request that a conference be held to discuss and attempt to resolve by mutual agreement a matter arising under this chapter." *Id*. at § 3251(a). The Section 3251 conference was attended by Protect PT's Executive Director, Ms. Gillian Graber, several Department officials and Permittee's General Counsel and Executive Vice President, Christopher Hess. Additionally, in 2016 or 2017, Ms. Graber had a meeting with various representatives of the Department, including then-Secretary Patrick McDonnell. She expressed her concerns about the proposed location of the Drakulic wells' proximity to homes, schools and playgrounds and pointed out where she believed those structures were not included in Permittee's materials. She also expressed concern over what she believed to be a lack of emergency planning. (Tr. 276-78.)

The Department issued permits for the Drakulic 1H and 7H wells in July 2018 (the 2018 permits), and the permits were appealed by Protect PT. EHB Docket No. 2018-080-R. The 2018 permits were renewed in 2019, and the renewals were also appealed by Protect PT. EHB Docket No. 2019-101-R. The appeals were consolidated at the earlier docket number. On July 23, 2021, the Department moved to dismiss the appeals on the grounds that the 2018 permits had expired.

On August 6, 2021 Protect PT filed a Praecipe to Withdraw the Appeal, and the consolidated appeals were dismissed.

Permittee subsequently reapplied for permits for the Drakulic 1H and 7H wells, which were issued by the Department on August 17, 2022 (the permits). Protect PT appealed the permits on September 16, 2022. The permits were renewed on August 15, 2023, and the renewals were appealed by Protect PT on September 14, 2023. These permits are the subject of the current appeal which is consolidated at EHB Docket No. 2023-074-W.

Protect PT and the Neighborhoods Surrounding the Drakulic Site

Before diving into the merits of the specific claims, we take a moment to briefly outline the involvement of Protect PT and the concerns of its individual members in this appeal. Gillian Graber is the Executive Director of Protect PT and a resident of Penn Township, Ms. Graber formed Protect PT in December 2014 in response to news that Permittee was seeking to construct an unconventional well pad on the Drakulic site, less than ½ mile from her home. The first meeting of Protect PT was held in her living room. Since then, the organization has grown to a full-time staff of eight, including an environmental scientist and a staff attorney.

Ms. Graber testified that when she attended the Section 3251 conference for the 2018 permits she took a list of requests with her that she believed were "pretty reasonable" and asked Permittee to consider them. Her list of requests included concerns about truck traffic, air emissions, and the safety of children in the area, in particular with respect to school buses. She stated that all her requests were denied. (Tr. 281.) As a result of her experience with the first Section 3251 conference, which failed to answer her questions or alleviate her concerns, she did not request a similar conference prior to the issuance of the permits which are the subject of this

appeal. (Tr. 347-48.) However, Protect PT did request a public hearing on the permit applications, which the Department denied. (Tr. 284-85.)

Ms. Graber provided meaningful and substantive testimony. At the time she learned about the proposed well pad at the Drakulic site her children were ages four and six, and she stated she was very concerned about how the well operations would impact their health and the health of her community. She poignantly described her neighborhood as follows:

> [W]hen we moved to the neighborhood, there were things that I knew I wanted to do and the reasons why we moved there. One of them was, because we have such a small road, my kids could learn how to ride bikes. They were four and six at the time…[O]ne of the reasons why we picked this neighborhood, too, is because trick-or-treating is the biggest thing for our community. We actually have a food truck on one of the . . . tees to the cul-de-sacs . . . [T]he fire department actually will block off [Route] 130 so the trick-or-treaters can get across here because there is . . . a playground here and all of the trick-or-treaters from . . . Larry's [Dr Irr's] neighborhood and up here, these are all new houses and these are all families, all these kids go down and down here and circle Belleauwood and come back up.

(Tr. 287)

In the past 10 years, Ms. Graber has attended a number of well pad hearings in her role with Protect PT and has testified at 14-15 of them, and has been actively involved in advocating for the community. (Tr. 263.) She described her experience in leading Protect PT as follows:

> [W]e engaged at the local level in order to have the voices heard of the community because that was, you know, very important to the community members that we engaged with . . . [S]o that was, like, really the beginning . . . going to the local hearing. You know, we were selling candy bars to pay for our attorney and, you know, engaging -- trying to find experts that would testify for free because we didn't have money. And we would also start looking at compliance history. We started doing some citizens' science monitoring. First, it was noise monitoring, water monitoring, and air monitoring. We still do those things to this day, only it has evolved a lot.

(Tr. 261.)

Ms. Graber's concerns include the following: the location of the site and proximity to homes, schools, playgrounds, and places of worship; air emissions; diesel and safety issues from truck traffic; water runoff; noise, light, and dust; 24/7 operation impacting her children's ability to sleep and go to school the next day; and a lack of information in the emergency response plan. In particular, she is concerned about the safety of drivers and children using the same roads as trucks accessing the Drakulic site, as they are twisting and turning. Level Green Elementary School is approximately one mile from the Drakulic site. Level Green Presbyterian Church, which runs a preschool, is approximately one-quarter mile from the site. There are also playgrounds in the area.

Dr. Larry Irr, a member of Protect PT and a resident of Penn Township, also provided testimony in opposition to the suitability of this site for unconventional gas well activities. His home is approximately 0.45 miles from the proposed Drakulic site. Dr. Irr expressed concern over what he perceives as a lack of emergency response preparedness, the potential for the leakage of chemicals into groundwater, and exposure to toxic chemicals. Dr. Irr testified that he is pro-fracking but is concerned about its impact when done in residential neighborhoods. Dr. Irr holds a Ph.D. in analytical chemistry and spent nearly 41 years working at the Westinghouse Bettis Atomic Power Laboratory. Based on his experience, he is familiar with emergency response planning and the handling of chemicals. He expressed his concern with the Drakulic site as follows:

> When I worked at Bettis…we were well regulated. We had to be so careful with the chemicals that we handled…When I come home, all these chemicals are being put into the ground and there is no, you know, evacuation plan for our neighborhood.

(Tr. 255.)

In addition to concerns over emergency response planning, site suitability, truck traffic, groundwater protection, air emissions, and nuisance issues, the members of Protect PT have raised concerns about protection of public resources and public health. Protect PT also contends that the permits should have been denied based on what it perceives to be Permittee's poor compliance history. We review the propriety of the Department's action in issuing and renewing the Drakulic permits under the Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa. C.S. §§ 3201 et seq., and the underlying regulations at 25 Pa. Code Chapter 78a, as well as under Article I, Section 27 of the Pennsylvania Constitution. Because Protect PT relies heavily on Article I, Section 27 in its challenges to the permits, we discuss herein what the Board considers in reviewing challenges brought under that provision.

The Department's Obligations Under Article I, Section 27

Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, provides as follows:

> 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.

Protect PT argues that the Department's obligations under Article I, Section 27 are distinct from its obligations under the Oil and Gas Act. It points out that a declared purpose of the Oil and Gas Act is to "[p]ermit optimal development of oil and gas resources of this Commonwealth." 58 Pa. C.S. § 3202(1).[7] Protect PT argues that the Oil and Gas Act is not environmental legislation

[7] The complete language of this provision reads:

but, rather, legislation that allows for and regulates the extraction and development of oil and gas. In contrast, the focus of Article I, Section 27 is on the preservation of natural resources.

In *Center for Coalfield Justice*, 2017 EHB 799, Chief Judge Beckman articulated the Department's duties and responsibilities under Article I, Section 27 following the decision of the Pennsylvania Supreme Court in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*):

> The Supreme Court, citing [*Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013], held that Section 27 grants two separate rights to the people of Pennsylvania. 2017 Pa. LEXIS at *38. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state's power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. *Id.* The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id.* The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries. *Id*. at *39. The Supreme Court in *PEDF* next turns its attention to defining the Commonwealth's responsibilities as trustee. After discussing private trust law principles, it finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the

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(1) Permit optimal development of oil and gas resources of this Commonwealth *consistent with protection of the health, safety, environment and property of Pennsylvania citizens*.

58 Pa. C.S. § 3202(1) (emphasis added).

The other declared purposes of the Oil and Gas Act are:

(2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.

(3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

Id. at § 3202(2)-(4).

> actions of private parties and 2) act affirmatively via legislative action to protect the environment. 2017 Pa. LEXIS at *41-42.

Center for Coalfield Justice, 2017 EHB at 855.

The Board has recognized that the subjects of the *Robinson Township* case (legislative action) and the *PEDF* case (money) "do not translate quite as directly to the more typical permitting cases that come before the Board." *Id*. at 856. However, based on our review of the *PEDF* opinion and the plurality decision in *Robinson Township* that was generally endorsed by the *PEDF* opinion, the Board has developed the following standard in assessing whether there has been compliance with Article I, Section 27:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

Delaware Riverkeeper, 2018 EHB at 493 (citing *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1163; *Center for Coalfield Justice,* 2017 EHB at 862). Importantly, "in order to satisfy its obligation to act in a prudent manner, a trustee with responsibility for environmental permitting, such as the Department, should consider the environmental effects of its permitting action before proceeding to grant a permit." *Id.* at 493.

In performing this assessment, we recognize that "compliance with statutes and regulations is not necessarily coextensive with the fulfillment of the duties laid out in Article I, Section 27." *Liberty Township*, 2024 EHB at 141 (citing *Friends of Lackawanna*, 2017 EHB at 1161). *See also Center for Coalfield Justice*, 2017 EHB at 860 (By rejecting the *Payne v. Kassab* test,[8] the

[8] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), set forth a three-part test for determining compliance with Article I, Section 27 including the first prong of the test which stated, "Was there

Pennsylvania Supreme Court in *PEDF* rejected the notion that the Article I, Section 27 standard is coextensive with compliance with the statutes and regulations that govern clean water and clean air). Thus, a demonstration of compliance with the Oil and Gas Act and the regulations of Chapter 78a may not be enough to demonstrate that the Department has fulfilled its duties under Article I, Section 27. However, as the Board recently explained in *Citizens for Pennsylvania's Future v. DEP*:

> [A]s a practical matter, an appellant challenging a Department action that is otherwise compliant with the applicable statutes and regulations needs to explain what more the Department should have done to fulfill its responsibilities under the ERA. It will generally not be enough to merely restate the other arguments in the case relating to regulatory violations and reframe them as constitutional violations. *Liberty Twp. v. DEP*, 2024 EHB 36, 140; *Del. Riverkeeper Network [v. DEP,* 2022 EHB 103].
>
> The [Environmental Rights Amendment] requires the Department to fully consider the environmental effects of its action, but that duty will often be described in the regulations. The ERA precludes actions that result in an unreasonable degradation, diminution, depletion, or deterioration of the environment, but what is reasonable or unreasonable will often be established and delineated by regulation. There may be some daylight between full compliance with the applicable regulatory programs and acting with prudence, loyalty, and impartiality, but a successful appellant will need to explain.

EHB Docket No. 2023-026-L, *slip op.* at 71-72 (Adjudication issued May 16, 2025).

In considering each of Protect PT's arguments set forth below, we assess whether the Department has considered the environmental effects of its decision to issue and renew the permits for the Drakulic well site and correctly determined that it will not lead to unreasonable degradation, diminution, depletion or deterioration of the environment. We also consider whether the

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compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" The test was rejected by the Pennsylvania Supreme Court in *PEDF*, 161 A.3d at 930.

Department has acted with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by its decision. As the party challenging the issuance of the permits, Protect PT bears the burden of demonstrating that the Department violated its constitutional duties under Article I, Section 27. *Logan v. DEP*, 2018 EHB 71, 115 (citing *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 250.)

As to the first part of the test, we find that the Department has considered the environmental effects of its decision. Upon both issuing and renewing the permits, the Department issued a Record of Decision memorializing the process by which it reviewed the permits and the conclusions of its review. In the Record of Decision for the issuance of the permits, the Department noted that it considered public resources, streams, wetlands, navigable waters, threatened and endangered species, and environmental justice areas. The Department also considered comments it received in connection with the permit applications, including comments related to public health, emergency response planning, air quality, spill responses, site design and engineering, as well as the Department's duties under Article I, Section 27. With respect to its duties under Article I, Section 27, the Department's Record of Decision provides:

> Based on DEP's review of the applications and the aforementioned information, including but not limited to the surface site's protections required under erosion and sedimentation regulations, site containment and waste management requirements, the production zone's distance and geologic separation from the deepest fresh groundwater, air quality regulations and site plans, DEP concluded that, pursuant to the site-specific requirements and the DEP's regulations generally, the public will be protected and the environment and public natural resources will be conserved and maintained, should these permits be issued.

(Stipulated Ex. 5.)

Ms. Andrea Mullen, the permit reviewer for the Drakulic applications, testified that a permit review for an unconventional well typically involves ensuring that the application is

complete and all documents submitted, followed by a technical review. Mr. Christopher Hess, Permittee's General Counsel and Executive Vice President, testified that the Department's review of the Drakulic permit applications lasted approximately 13 months, whereas, in his experience, the typical review and approval process for a well permit is 30 to 60 days. In addition to the extended review process, the Department states that it also requested information from Permittee not normally required as part of an oil and gas permit application, including information related to objecting parties' concerns as to site suitability, air quality, and waste disposal.

During her review, Ms. Mullen coordinated with the Department of Health regarding public health concerns, with the Department's emergency response director regarding emergency response concerns, and with the air quality section regarding air quality concerns. When concerns were raised by staff in another agency or program within the Department, Ms. Mullen conveyed the concerns to Permittee for correction. Throughout the extended review process, the Department considered and addressed a wide variety of objectors' concerns relating to environmental protection and coordinated with other agencies and divisions on matters that required more subject-matter expertise. We believe that these actions satisfy the Department's obligation to consider the environmental effects of its action.

We next consider whether the Department correctly determined that its actions will not lead to the unreasonable degradation, diminution, depletion or deterioration of the environment.

Site Suitability

One of the challenges raised by Protect PT is that the Department abused its discretion and violated Article I, Section 27 by issuing permits that introduce "heavy-duty industrial uses – natural gas development and processing – into a densely populated residential suburban area." (Protect PT Post-hearing Brief, p. 56.) It argues that the Department failed to consider whether

the site was suitable for industrial use and whether the established setbacks are sufficient to protect the environment and the health, safety and welfare of residents in the area. Specifically, Protect PT states:

> The Department's authorization of these operations was done regardless of whether the site [is] suitable for industrial use, whether the industrial use is compatible with existing uses and expectations, and whether dictated accompanying setbacks are sufficient to protect the environmental health, safety, and welfare of residents in the area. [citation omitted] The Permits provide no protection for the environment, public resources or for public health as there is no full identification of chemicals that will be used and emitted, there is no air or groundwater monitoring required, and the Department has willfully ignored the proven health impacts that include an increase in childhood cancers.

(Protect PT Post-hearing Brief, p. 57.)

The Department does not dispute that the operation of the well site is an industrial activity and concedes that it will be temporarily disruptive during the drilling and hydraulic fracturing of the wells. (DEP Post-hearing Brief, p. 55.) However, the Department argues that it conducted a thorough permit review that "involved significant internal and external coordination [ ] and made every effort to ensure protection of the environment for current and future generations." (*Id*.)

The Oil and Gas Act establishes a 500-foot setback from unconventional gas wells to existing buildings or private water wells. 58 Pa. C.S. § 3215(a).[9] The setback distance is measured from the vertical wellbore. To put this distance into perspective, 500 feet is the length of slightly over 1½ football fields. There was no evidence introduced at the hearing regarding the closest residence or building to the Drakulic wells. However, Ms. Graber testified that her home is approximately 2,400 - 2,500 feet or ½ mile; Dr. Irr's home is also approximately ½ mile.

[9] Penn Township, in which many of the members of Protect PT reside, has a setback requirement of 600 feet.

Additionally, as noted earlier, the Level Green Presbyterian Church operates a preschool approximately 0.25 miles from the site. Given its proximity to this residential neighborhood, we do not doubt that the Drakulic well site will have some impact on the surrounding community. The question becomes what level of impact and whether, in issuing the permits, the Department acted unreasonably or contrary to law or violated its duties under Article I, Section 27 of the Pennsylvania Constitution.

Pennsylvania's laws allow oil and gas operations, including unconventional drilling which incorporates the use of hydraulic fracturing. These activities are permitted and regulated by Pennsylvania's Oil and Gas Act, 58 Pa. C.S. § 3201 *et seq*. and the underlying regulations at 25 Pa. Code Chapter 78a. It is understood that there will be impact from oil and gas operations. *See Delaware Riverkeeper,* 2018 EHB at 506 (The permitting process involves some environmental impact); *Brockway Borough Municipal Authority*, 2015 EHB at 250 (Article I, Section 27 allows for "controlled" development, rather than no development). The goal is to allow development while ensuring protection of the environment and the public health, safety and welfare. As the Board explained in *Brockway Borough*:

> The majority of environmental permitting regimes contemplate some amount of environmental impact, whether it be a discharge to waters of the Commonwealth, or the surface and subsurface disturbances associated with oil and gas development. *See, e.g*., 35 P.S. §§ 691.202, 307, & 402; 58 Pa.C.S. § 3211. The permitting regimes require that the proposed environmental impact be carefully vetted through an application process and a review of that application by the Department. The question then becomes whether the Department's decision to permit the discharge of pollutants or temporary diminution in flow was unreasonable.

2015 EHB at 243.

Permittee notes in its post-hearing brief that the suitability of the Drakulic site for oil and gas development has been litigated in a series of other lawsuits and appeals. First, Protect PT

appealed the Penn Township Zoning Hearing Board's approval of Permittee's special exception application for the Drakulic wells. The trial court affirmed the decision of the Zoning Hearing Board and found that the Zoning Hearing Board did not err in determining Permittee's operations would not adversely impact the community. That decision was then appealed to the Commonwealth Court, which ultimately found that there was no apparent error in the Zoning Hearing Board's decisions. Second, Protect PT also filed a validity challenge to Penn Township's ordinance establishing a mineral extraction overlay district covering the area where the proposed Drakulic site will be located. That challenge was appealed to both the trial court and Commonwealth Court, and neither court was persuaded by Protect PT's argument that the Drakulic site was unsuitable for oil and gas development.

However, while those cases examined the suitability of the Drakulic site from a zoning perspective, we are charged with considering the environmental impacts of the Department's decision and to determine whether that decision was reasonable. Protect PT argues that there will be unreasonable impact to groundwater, air quality, public health and public resources, thus making this site unsuitable for oil and gas development. We consider each of Protect PT's arguments below.

Groundwater Protection

Protect PT objects to the issuance and renewal of the permits for the Drakulic site because it believes the wells present a risk to groundwater and local water supplies. It contends that chemicals used at the well site can enter the groundwater through spills and leaks. It also asserts that chemicals injected into the wells can migrate through subsurface fractures and abandoned wells to shallow groundwater and private water supplies.

Spills

There is no dispute that a number of chemicals and hazardous materials will be stored and used on the Drakulic site. Protect PT asserts that these materials pose a threat to groundwater in the event of a spill or leakage. Christopher Hess, General Counsel and Executive Vice President, testified regarding the containment practices that Permittee intends to employ to ensure that, should a spill occur, it will not impact waters of the Commonwealth.[10] The site-specific containment plan for the Drakulic site is set forth within Permittee's Preparedness, Prevention, and Contingency Plan (PPC Plan) which details the primary, secondary, and supplemental containment measures for materials to be used on the site. According to Mr. Hess, Permittee intends to provide several layers of successive containment. First, there is an initial pad liner that is buried underneath the site and covered with gravel. On top of the gravel covering the initial pad liner, another liner is placed before wooden rig mats are laid down. Next, there is a collapsible containment berm that is about 8 to 10 inches tall that goes around the edge of the rig mats. The berm is filled with foam and has a liner that goes over the top. In addition to this initial containment, there is individual containment associated with specific items.

We recognize that spills or leaks may occur, and that is the reason for including provisions in the permits requiring Permittee to take steps to contain any such spills or leaks. As Judge Labuskes astutely noted in the Board's recent adjudication in *Citizens for Pennsylvania's Future, slip op.* at 53, "The fact that there *might* be 'problems' is why environmental permits are required."

[10] Mr. Hess testified that Permittee has never had a release to the environment that impacted waters of the Commonwealth. However, in its post-hearing brief, Protect PT highlighted a July 2017 violation issued to Apex for failure to control and dispose of various fluids and materials in a manner that prevents pollution to waters of the Commonwealth, as well as an August 2019 inspection by the Department that revealed that industrial waste was being discharged into waters of the Commonwealth. While these incidents are listed in Protect PT Exhibit WW, which is a search of Permittee's compliance history by Protect PT Executive Director, Gillian Graber, no testimony was provided as to either of those alleged violations.

We find that Permittee's spill containment practices will be protective of groundwater at the Drakulic site.

Well Integrity

Protect PT asserts that Permittee offered no specifications on how the Drakulic wells will be designed and constructed but simply relied on the design of wells at another well site. It argues that without this critical information, there was no basis for the Department to conclude that the wells' design will be protective of groundwater. Wells with inadequate casing or wells that are poorly constructed can allow gas and other fluids to leak into surrounding aquifers.

At the hearing, Permittee's expert Mr. Michael Krehel testified that the design and construction of the Drakulic wells will be the same as that at Permittee's McIlvaine well site. He based his understanding of the McIlvaine wells on information provided to him by Mr. Hess. Based on his understanding of the wells, Mr. Krehel explained the design and construction of the McIlvaine wells as follows: There are five concentric strings of steel casing in the well, going down approximately 2,500 feet. He explained that the casing isolates the interior of the well bore from the surrounding formations and provides structural integrity. The cement serves as an additional feature providing isolation between the external surface of the casing to the borehole and within annular spaces between the casing strings, isolating both flow and pressure. He stated that, essentially, the casing and cement serve to ensure that anything that is inside the well bore stays inside and does not escape out into the surrounding formations. He further explained that one of the strings of casing, a surface casing string, is designed specifically to be protective of fresh groundwater. In Mr. Krehel's opinion, the well design proposed for the Drakulic wells is consistent with standard industry practice and will be protective of groundwater.

The Department's permit reviewer, Andrea Mullen, testified that, "as someone who's reviewed hundreds of well permits," she believed the design described by Mr. Krehel meets the Department's regulations. (Tr. 1265.) She also explained that the casing and cementing of the well, as described by Mr. Krehel, ensures the segregation of the production zone from shallower groundwater.

While we recognize that Mr. Krehel's testimony pertained to the McIlvaine wells, we have no reason to doubt that the same design and construction will be utilized for the Drakulic wells. Based on the testimony provided by Mr. Krehel, which was not rebutted, we are convinced that the design of the Drakulic wells is protective of groundwater. While Protect PT cited various violations at the McIlvaine site, none appear to involve well design or integrity. We find that the evidence supports the conclusion that the well design proposed for the Drakulic site provides protection for groundwater.

Migration through Fractures

The wells proposed for the Drakulic site are unconventional wells targeting the Marcellus Shale formation. The Permittee's Mr. Hess provided an overview of how the wells will be constructed: The wells are first drilled vertically and then turned laterally into the shale formation. Once the wells are drilled, hydraulic fracturing takes place in the lateral portion of the well. This involves perforating the casing of the horizontal section of the well in order to allow fracturing fluids, consisting primarily of water as well as sand and chemicals, to be pushed into the surrounding formation. The fluids are pumped at pressure down the wellbore through the perforated holes in the casing into the Marcellus Shale formation, causing fracturing of the shale. The sand is used to keep the fractures open for extraction of the gas. Because the gas molecule is

smaller than the sand particle this will allow the gas to flow through the fractures and back into the borehole.

Protect PT argues that chemicals injected into the shale during hydraulic fracturing can move through existing fractures as well as fractures created by the drilling and fracturing of the wells, and eventually end up in shallow groundwater and water supplies. In support of its argument, Protect PT offered the expert testimony of Mr. John Barone, a certified professional geologist with nearly 50 years of experience in geology and hydrogeology. In Mr. Barone's opinion, chemicals introduced into the injection zones at the active well can migrate via fractures to historic conventional wells in the area that have not been properly plugged or that otherwise lack well integrity. In order for such a communication event to occur between the Drakulic wells and historic conventional wells in the area, there must exist a "fracture network," consisting of naturally occurring fractures or fracturing created by the drilling and hydrofracturing of wells. Mr. Barone believes that such a subsurface fracture network could exist in the area of the Drakulic site. Based on regional characterizations, it is his opinion that there are natural joints and fractures across all lithologies found at the site. He relied on regional data because, in his opinion, there is almost no change in the characteristics across the extent of the particular rock formation. Mr. Barone opined that, by virtue of the fracture networks, injected fluid could travel from the Drakulic wells to a conventional well that is not properly plugged and cemented. From there, it can enter the shallow water table as it comes up through the borehole or through neglected and deteriorating casing of abandoned wells in the area, and then from the shallow groundwater table to domestic water wells.

Protect PT argues that this concern for a communication event is heightened based on information contained within Permittee's Area of Review, which consists of a survey of wells

within a 1,000-foot radius of the proposed Drakulic wells.[11] According to Apex Exhibit 14, there are 61 gas wells within the Area of Review of the proposed Drakulic wells. These include what are referred to as historic wells that were drilled decades ago. The Area of Review provides information regarding each well, including the well operator and status, well coordinates, and depth, where known. Also included is a category labeled "AOR TGD Risk Classification," which relates to the Department's technical guidance document entitled "Guidelines for Implementing Area of Review (AOR) Regulatory Requirement for Unconventional Wells" (guidance document). (Apex Ex. 14; Protect PT Ex. XX.) The guidance document provides information regarding the risk of a communication event occurring, with risk levels falling at negligible, lower, moderate, or higher. Pursuant to the guidance document, 24 of the 61 wells in the Drakulic Area of Review were classified as being at a "higher" risk of communication. (Apex Ex. 14, pages 924-25.) In addition to the 24 wells identified as higher risk, there are a number of wells having a status of "undetermined" or "abandoned" that Protect PT asserts should be classified as "higher" risk, rather than the "negligible" classification given to them.

Based on the existence of the higher risk wells, as well as Mr. Barone's belief that there is extensive fracturing in the stratigraphy of the area, it is his belief that fluids injected into the strata during the hydraulic fracturing process have the potential to enter abandoned wells in the area of the Drakulic site and eventually enter groundwater, thus posing a risk to water supplies. He recommends that a detailed structural analysis be conducted at the site via both literature reviews

[11] The Area of Review survey must be undertaken prior to drilling pursuant to 25 Pa. Code § 78a.52a. This regulation requires a well operator to identify active wells, inactive wells, orphan wells, abandoned wells, and plugged and abandoned wells "within 1,000 feet measured horizontally from the vertical well bore and 1,000 feet measured from the surface above the entire length of a horizontal well bore."

and coring of the borehole. He further recommends monitoring the flow regime in the area before, during, and after installation of the wells, and assessing the chemical quality of the groundwater.

Permittee sought to discredit Mr. Barone by pointing out what it perceived to be flaws in his understanding of the Drakulic wells. For example, Permittee states that Mr. Barone misidentified the depth of the Marcellus Shale, where the Drakulic wells will be drilled, by 1,000 feet. We gather that this assertion stems from Mr. Barone's testimony that the Marcellus Shale is at a depth of 6,500 feet whereas the permit application materials and the Department's and Permittee's experts put the Marcellus Shale at a depth of 7,500 feet. However, we are not convinced this was an error on the part of Mr. Barone. The permit application materials and Permittee's and the Department's experts state that the "true vertical depth" of the Marcellus Shale is 7,500 feet. The Permittee's Mr. Hess helpfully described "true vertical depth" as "the actual depth from a point below the surface to the surface."[12] (Tr. 772.) However, Mr. Barone was asked by counsel for the Department, "And approximately *where below sea level* is the Marcellus Shale formation?" (Tr. 499) (emphasis added.) In response, he identified the depth of the Marcellus shale as being at a depth of 6,500 feet below sea level. (*Id*.) He was not asked about true vertical depth. There is no definition in the record for "depth below sea level" nor any indication that this measurement is the same as "true vertical depth." As such, we cannot find Mr. Barone's measurement to be indicative of a lack of understanding as to where the Marcellus Shale is located.

Permittee also points out what it perceives to be an error in a conceptual model prepared by Mr. Barone. The conceptual model is a drawing prepared by Mr. Barone to demonstrate how a communication event could occur between the Drakulic wells and historic conventional wells

[12] In his testimony, Mr. Hess described this as the "total" vertical depth, however, based on the totality of his testimony, we understand him to be talking about "true" vertical depth.

located in the area of the Drakulic site. On the drawing, Mr. Barone labeled the lateral portion of the Drakulic well as "injection." Permittee sees this as evidence that Mr. Barone mistakenly believed the Drakulic wells to be injection wells, i.e., wells that are designed to put fluids into the ground rather than take them out. However, we read this label as simply indicating that several perforations will be made in the lateral portion of the well which will then "inject" fluid into the surrounding shale to create fractures, i.e., the injection that takes place as part of the hydraulic fracturing process.

In order for a communication event to occur as suggested by Mr. Barone, the following conditions need to be true: (1) the historic conventional wells in the area of the Drakulic site must pose a risk of allowing a communication event to occur and (2) the fracture networks associated with the proposed Drakulic wells and the fracture networks associated with the historic conventional wells must intersect. For the first of these conditions to be true, the historic conventional wells must have been improperly abandoned.[13] In other words, the wells were not plugged or properly cased and cemented to prevent interaction with groundwater. Since the Area of Review for the Drakulic site lists 24 wells as being "higher risk" and a number of additional wells with an "undetermined" status, we understand this to mean that the wells' integrity is

[13] Mr. Hess testified that when a reference is made to abandoned wells in the oil and gas industry, it generally refers to wells that have been plugged and abandoned. (Tr. 789.) He noted that an abandoned well, in the sense that people commonly think of them, is actually referred to as an orphaned well in the industry. (*Id*.) Under the Oil and Gas Act, an "abandoned well" is a well "(i) that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months; (ii) for which equipment necessary for production, extraction or injection has been removed; or (iii) considered dry and not equipped for production within 60 days after drilling, redrilling or deepening." 58 Pa. C.S. § 3203. However, we understand the testimony of most of the witnesses, when referring to "abandoned" wells, as referring to the common usage of that term, i.e., a well that is no longer in operation and that may or may not be plugged or properly cemented.

compromised or there is simply not enough information to know whether the well presents a risk. Therefore, we find that the first condition is met.

For the second of the above conditions to be true, the historic conventional wells would need to have been drilled to a depth that would allow for the intersection of fracture networks. In Mr. Barone's opinion, the interception intervals between the Drakulic wells and the historic conventional wells do not have to coincide for a communication event to occur, but they do need to be close enough for contaminants to flow between them. Mr. Barone acknowledged that he did not have direct information regarding the depth of historic conventional wells in the area surrounding the Drakulic site. However, it is his belief that the wells extend down to the Marcellus Shale, i.e, to the same formation where the Drakulic wells will be drilled. He based this opinion on records he examined from the Department of Environmental Protection and Department of Conservation and Natural Resources (DCNR), but those records were not produced. Based on sources that he reviewed, he believes that the gas-producing layers above the Marcellus Shale would have been uneconomical to drill and the drilling technology at the time allowed operators to drill to depths greater than 5,000 feet. Thus, it is his opinion that the historic conventional wells in the area of the Drakulic site were likely drilled to the Marcellus formation and, therefore, present a risk of communication with the Drakulic wells.

In his expert report, Mr. Barone identified 52 abandoned wells in the area of the proposed Drakulic wells that he believes pose a risk of communication with the Drakulic wells. In his opinion, the lateral portion of the Drakulic wells will pass near the abandoned wells in the same formation, and fractures and flow paths connecting the injection zone with the abandoned wells will allow contaminants to flow to and through the abandoned wells to shallower domestic water wells.

Permittee offered Mr. Michael Krehel to rebut Mr. Barone's testimony regarding the likelihood of a communication event occurring between the Drakulic wells and historic conventional wells at the site. Mr. Krehel is a licensed professional engineer with over 40 years of experience involving oil and gas operations, and particularly the upstream oil and gas industry. In Mr. Krehel's opinion, there is no reasonable basis to conclude that the operations associated with the proposed Drakulic wells are likely to result in a communication event with area historic wells or contamination of fresh groundwater formations. Mr. Krehel disagreed with Mr. Barone's testimony that historic wells in the vicinity of the Drakulic site were drilled to the Marcellus formation. In his experience, historic conventional wells targeted shallower formations, and unconventional production was not even thought of at the time. To his knowledge, the approximate depth of conventional wells is between 2,500 and 3,500 feet. He testified that shales such as the Marcellus Shale were not considered to be formations for gas production at the time the wells were likely drilled. He further testified that the ability to conduct horizontal drilling and multi-stage hydraulic fracturing would have been required to make the Marcellus Shale formation commercial, and those technologic advancements were not available at that time.

In addition to Mr. Krehel's testimony, the Department offered Ms. Andrea Mullen, a licensed professional geologist and the lead permit reviewer for the Drakulic wells. Ms. Mullen conducted research into the depths of the historic wells in the area and the type of drilling that would have taken place during the time the wells were drilled. Ms. Mullen referenced and relied upon a 1929 DCNR publication of the geology of the Pittsburgh Quadrangle containing representations of well logs for conventional oil and gas wells.[14] Ms. Mullen testified that during

[14] There is not a clear explanation of why Ms. Mullen believed the wells in the vicinity of the Drakulic site were drilled around 1929. However, none of the parties challenged this timeframe and, therefore, nor do we.

that time period, the depth of wells was determined by economics and available technology. It is her belief that the available technology at the time the historic wells were drilled was cable rig and rotary drill, which would not have allowed drilling to the depth of the Marcellus Shale. Notably, Ms. Mullen researched the 52 abandoned wells that were referenced in Mr. Barone's expert report by using the DCNR Exploration and Development Well Information Network (EDWIN) database. She was able to determine the depth of all the wells referenced in Mr. Barone's report, but two. None of the wells were drilled deeper than 3,500 feet. Based on Ms. Mullen's research into the EDWIN database, we find her testimony credible that the historic conventional wells in the vicinity of the Drakulic site are drilled to a depth no deeper than 3,500 feet and not to a depth of 7,500 feet as believed by Mr. Barone.

While Ms. Mullen agreed with Mr. Barone that there are fracture networks in Westmoreland County, and that it would be possible for the proposed Drakulic wells to connect with such fracture networks, in her opinion it was unlikely that the Drakulic wells would connect with any fractures associated with the conventional wells. As noted, the conventional wells are drilled no deeper than 3,500 feet compared to the targeted depth of approximately 7,500 feet (true vertical depth) for the Drakulic wells. Therefore, there are approximately 3,000 feet of intervening rock layers between the historic wells and the Marcellus formation where the Drakulic wells will be drilled. Within those intervening rock layers lies the Tully Limestone, which both Ms. Mullen and Mr. Krehel identified as being a barrier to fracturing caused by hydraulic fracturing operations. However, both Mr. Krehel and Ms. Mullen conceded that the Tully Limestone was not completely impermeable. Mr. Krehel acknowledged that, while he believed the Tully Limestone is a barrier to vertical fracturing, it is not a barrier to fluid. (Tr. 1018.) When asked if there is pervasive fracturing in the Tully Limestone, Ms. Mullen stated that she did not know. (Tr. 1278.) Mr.

Barone appeared to agree that the Tully Limestone was not likely to experience large fractures; however, he felt that it was conceivable that smaller fractures could occur that would allow a small concentration of contaminants to travel from one point to another.

Nonetheless, both Ms. Mullen and Mr. Krehel believe that any potential movement of contaminants from the Drakulic wells to the conventional wells is unlikely. While Mr. Krehel conceded that vertical fractures are generated during the hydraulic fracturing process (i.e., perpendicular to the lateral wellbore rather than horizontally throughout the formation), neither he nor Ms. Mullen believe that the fractures would extend far enough vertically to intersect any fracture networks associated with the historic conventional wells or to the surface. According to Ms. Mullen, the technology currently available is not capable of creating a fracture large enough to vertically span all the intervening rock layers between the proposed Drakulic wells and the historic conventional wells.

In considering the preponderance of the evidence, Protect PT did not convince us that a communication event is likely to occur between the Drakulic wells and abandoned wells in the area. Mr. Barone's theory that a communication event could occur was based on his belief that the historic conventional wells were drilled to the same depth as the Drakulic wells. The evidence simply does not support that view. Based on Ms. Mullen's research, we are persuaded that the historic wells are located at least 3,000 feet shallower than the proposed Drakulic wells. While the testimony among the experts differed as to the extent to which the Tully Limestone may provide a barrier to the migration of contaminants, all seemed to agree that it was a barrier to large fractures. We are persuaded that a communication event between the laterals of the Drakulic wells and the abandoned wells is unlikely to occur due to the 3,000 feet of rock layers that will separate them.

We believe there is even less likelihood of a subsurface impact to groundwater aquifers used for water supplies due to the even greater distance and layers of strata between shallow groundwater and the Drakulic wells. Both Mr. Barone and Ms. Mullen testified that shallow groundwater is located no deeper than 200 feet, while Mr. Krehel believed it could go as deep as 400 feet. In either case, the distance between the shallow groundwater and the depth of the Drakulic wells at approximately 7,500 feet makes a communication event unlikely. We believe that the preponderance of the evidence suggests that the Drakulic wells are not likely to present a risk to groundwater and private water supplies.

Notably, Mr. Barone did not conclude that the Drakulic wells could not be constructed or operated in such a way that was protective of groundwater. Rather, he makes several recommendations as to ensuring protection of groundwater. According to Ms. Mullen, at least some of Mr. Barone's recommendations are addressed by the Area of Review requirements. For example, pursuant to 25 Pa. Code § 78a.52a, a well operator must submit a monitoring plan for orphaned, abandoned, and plugged and abandoned wells that penetrate within 1,500 feet measured vertically from the stimulation perforations or have an unknown true vertical depth. The monitoring plan requires visual monitoring during stimulation activities. After receiving the report, the Department may make a determination that additional measures are needed, on a case-by-case basis, to ensure protection of waters of the Commonwealth. While we have a high regard for Mr. Barone, we do not believe that the evidence demonstrates that the Drakulic wells are likely to cause groundwater contamination.

Protect PT asserts that it is not required to prove that it is more likely than not that groundwater contamination will occur, but only that there are potential environmental effects. In support of its argument, it cites to the Commonwealth Court's holding in *United Refining*,

discussed earlier in this adjudication. As we explained earlier, although the Court in *United Refining* stated that an appellant need not prove that the likelihood of a particular harm is greater than fifty percent, it nonetheless must prove, *by a preponderance of evidence*, that the issuance of the permit was arbitrary or an abuse of discretion. *Id.* Here, we do not find that the preponderance of evidence supports a conclusion that the Department acted arbitrarily or abused its discretion in issuing the permits on the basis of potential groundwater contamination.

Emergency Response Plan and PPC Plan

Protect PT argues that the Department failed to ensure that Permittee has the ability to respond in the event of an emergency. Specifically, it challenges Permittee's Preparedness, Prevention and Contingency Plan and its Emergency Response Plan. A Preparedness, Prevention and Contingency Plan (PPC Plan) contains information dealing with preparedness for and prevention of spills or releases of chemicals. (Tr. 92–93; Stipulated Ex. 13.) An Emergency Response Plan is utilized for emergencies such as a loss of well control or larger spills that cannot be immediately cleaned up. (Tr. 92; Stipulated Ex. 12.) There are two types of Emergency Response Plan: system-wide and site-specific. The system-wide plan is a blanket plan that applies to all of Permittee's sites operating in the state of Pennsylvania. (Tr. 793–94.) The site-specific plan acts like an appendix to the system-wide plan and provides specific information for the location at issue. (Tr. 794.) Permittee's site-specific plan consists of an addendum to its system-wide plan with specific information for the Drakulic location. Protect PT raises two arguments with respect to Permittee's Emergency Response Plans and PPC Plan. First, it argues that the plans are deficient and, second, that the plans should have been submitted with the permit application and made available for review and comment by the public prior to issuance of the permits.

Protect PT takes issue with the fact that safety data sheets are not part of Permittee's PPC Plan at the present time. In support of its argument, it presented the testimony of Mr. Silverio Caggiano, who was offered as an expert in emergency response as well as planning and preparedness control. Mr. Caggiano served as a fire fighter with the Youngstown, Ohio Fire Department for 39 years, retiring as battalion chief, and has been involved with HAZMAT response for 30 years. He has decades' worth of experience with emergency response plans and PPC plans. He was exceptionally well-versed in the areas of expertise for which he was offered.

Mr. Caggiano testified as to the importance of first responders having access to safety data sheets, describing them as the "keys to the kingdom." Safety data sheets provide comprehensive information regarding the chemical and physical properties of a substance, hazards associated with the substance and guidance on safe handling and storage. Of particular note, according to Mr. Caggiano, is a chemical's "CAS" or chemical abstract service number.[15] The CAS number provides important information regarding a chemical, such as its properties, what protective gear may be necessary, and information for keeping the public safe. Mr. Caggiano described a number of emergency situations and evacuation efforts in which he was involved and emphasized the importance of having safety data sheets and other sources in order to adequately address each of those situations.

Mr. Caggiano provided very helpful testimony on the importance of emergency planning and pollution preparedness. However, he was not asked and therefore did not testify about alleged deficiencies in Permittee's Emergency Response Plans and PPC Plan. He did testify as to the importance of first responders having access to safety data sheets, and, based on testimony presented at the hearing, safety data sheets will be available at the Drakulic site. Christopher Hess,

[15] The transcript incorrectly refers to the CAS number as "CAST" number.

General Counsel and Executive Vice President, testified that Permittee will have safety data sheets for every chemical that is brought onto the site and they will be located with the PPC Plan. Because the Drakulic site is not in operation nor has any construction begun, there are no chemicals being stored or used at the site and, therefore, there is no reason to have safety data sheets at the present time. Safety data sheets are provided with the various chemicals and other products when they are brought onto the site. Mr. Hess testified that, for the sake of safety and efficiency, the only safety data sheets that should be present at the site at any given time should be those that pertain to the actual products that are on-site. He explained:

> [Y]ou don't know what you're going to have on site until you're going to bring it there. So a supplier might change or you might discover that it's easier to use a particular product than another product. So you don't load this up and say, "Well, here's everything that's going to be on site," if it's not. But then also for ease of use, you wouldn't want this to be a historical document where you end up with 150 [safety data] sheets that somebody has to go through when really you've only got one chemical on site. So these will get swapped out on an ongoing basis depending on what the operation is doing.

(Tr. 805-06.)

We agree with Mr. Hess' assessment. Maintaining a collection of safety data sheets for possible chemicals that may be purchased and brought onto the site at some future date is likely to hinder efforts to quickly access information in the case of an actual emergency.

Protect PT's argument that the Emergency Response Plans and PPC Plan should have been available for public review and comment prior to issuance of the permit is based on its belief that these plans serve a different purpose than that for which they are intended. Members of Protect PT testified as to their concerns about the proposed operations at the Drakulic site and what they perceive as a lack of emergency response planning and failure to develop a plan for evacuation of nearby residents in the event of a well emergency. Dr. Larry Irr, a member of Protect PT who

lives approximately 0.45 miles from the Drakulic site testified, "I'm very concerned about my neighborhood. There's no emergency response plan to get us out." (Tr. 211) Protect PT Executive Director, Gillian Graber, who lives less than ½ mile from the site, testified that, beginning in 2015, she requested that Permittee put more detail into its emergency evacuation plan. According to Ms. Graber, earlier versions of the site-specific Emergency Response Plan failed to include a number of houses, a playground and a preschool. She testified as to her concerns about the current plan:

> It tells me nothing, you know, fire, medical, explosion, spill, it tells me nothing how residents – about how the public is supposed to get out in case of a fire or a blowout or explosion or an air event…if something is released at the site, how a resident is supposed to get out. How are residents supposed to – are we to shelter in place? Are we to leave our house? … And so not knowing is like the scariest part, that you just don't know. You don't know what to do and you don't know…what to tell your kids.

(Tr. 335-36.)

Understandably, area residents want to know what to do in the event of an emergency. These are valid concerns for anyone living in close proximity to an operation where emergency situations can and do occur. However, the purpose of a PPC Plan and Emergency Response Plans is not to establish the protocol for evacuating a neighborhood, should such action be required. Evacuations or other emergency measures taken in the surrounding community are under the control of local first responders, who are best equipped to deal with those situations, as explained in detail by Mr. Caggiano. In contrast, the purpose of a PPC Plan is to develop measures to prevent accidental discharges of polluting substances from occurring and to control such discharges when they do occur. Likewise, the purpose of an Emergency Response Plan is to provide measures for addressing emergencies that occur at the well site. 25 Pa. Code § 78.55a(i)(5). Should actions need to be taken at locations off the well site, such as evacuation of a portion of a community, such

measures would not be under the control of Permittee; rather, Permittee would be required to coordinate with first responders and ensure they are provided with all necessary information, such as the aforementioned safety data sheets.

Of particular concern to Dr. Irr and Ms. Graber was the possibility of an uncontrolled release of natural gas or fluids from a well, known as a "blowout." Mr. Hess detailed the procedure that would be followed by Permittee in the event of such an occurrence, including the fact that Permittee has a contract with a specialty first responder who would handle any such emergency at the wellhead. (Tr. 798, 943.) Additionally, the specialty first responder will hold training sessions for employees of Permittee and first responders. (Tr. 943-44.) Permittee has never experienced a blowout at any of its well sites, nor any other event that required an evacuation. (Tr. 801-02.) As part of the Consent Judgment, Permittee is also required to maintain a 24-hour emergency hotline for employees of Penn Township and volunteer fire companies. (Protect PT Ex. JJ/Apex Ex. 11, para. 9(g).)

Finally, the oil and gas regulations do not require an applicant to submit its PPC Plan or Emergency Response Plans with its application. Rather, these documents are developed after the permit approval but before operations begin. Given the purposes of these documents, described above, we agree that it makes sense from a logistical standpoint to allow for the development of these documents following the permitting process but prior to the beginning of operations. Moreover, even though these documents were not available for review by the public during the permitting process, they have been available for review by Protect PT and its members throughout this litigation, and Protect PT had the opportunity to articulate why it believes the plans are deficient by virtue of testimony presented at the hearing before the Board. We have heard Protect PT's criticisms of the plans and have given its concerns a great deal of consideration. However,

for the reasons explained herein, Protect PT has not provided evidence to support its claims with regard to the PPC Plan and Emergency Response Plans for the Drakulic site.

Public Health

Protect PT asserts that the Drakulic wells pose health risks to the community. In support of its argument, Protect PT presented the testimony of Ms. Makenzie White. Ms. White holds a Master of Public Health degree and has worked with communities impacted by oil and gas operations. She is on the staff of Protect PT as an environmental consultant and has worked on health impact assessments. Ms. White was accepted by the Board as an expert in public health.

Permittee presented the testimony of Ms. Julie Panko who holds a Bachelor of Science degree in industrial hygiene and is a certified industrial hygienist. In this role, she has evaluated gas well sites and the potential for air pollution. Ms. Panko was accepted by the Board as an expert in industrial hygiene, as well as occupational and environmental health risk assessment.

Ms. White testified regarding Hydraulic Fracturing Epidemiology Research Studies done by the University of Pittsburgh in conjunction with the Pennsylvania Department of Health (the Pitt studies). These studies were released in July and August 2023 and looked at the incidence of asthma, low birth weight and childhood cancer in connection with proximity to unconventional oil and gas development. The asthma study found that individuals living near an unconventional oil or gas well had a four to five times increased risk for asthma exacerbations, including asthma attacks leading to hospitalization. (Tr. 707.) The birth weight study found that babies born to a mother who lived near a well during pregnancy had a 20-40 grams (or approximately one ounce) lower birth weight. (Tr. 707.) The childhood cancer study found that a child living within ½ mile of a well had an increased risk for developing any type of cancer and a five to seven times higher risk of developing lymphoma. (Tr. 707.) Ms. White also testified regarding the health impacts of

volatile organic compounds (VOCs) and particulate matter 2.5 (PM2.5) which can be easily inhaled and may be associated with oil and gas operations. According to Ms. White, PM2.5 has been linked to respiratory and cardiovascular issues, as well as asthma exacerbations. Ms. White recommended increased setbacks to reduce health impacts but did not state what setbacks she felt were sufficiently protective of public health.

Ms. Panko discussed the limitations of the Pitt studies: First, the studies did not assess actual exposure; rather, they used proximity to a well site as a proxy for exposure. Second, the studies did not identify or control for alternate sources other than unconventional natural gas development. Third, the studies were based on where the subjects lived and did not take into account exposure that may have occurred in other locations such as at work. The studies themselves acknowledge these limitations. A further limitation is that the Pitt studies involved only health data from University of Pittsburgh Medical Center patients in the eight counties that were part of the study and did not include data for patients who may have used other health systems or with limited access to healthcare. (Tr. 716.) Additionally, Ms. Panko discussed three studies that applied a risk assessment paradigm that was not applied in the Pitt studies, and those studies concluded that there is low potential risk to the surrounding community from gas well sites. (Tr. 1148-51.)

While the Pitt studies suggest a correlation between proximity to unconventional gas well operations and certain health effects, they do not establish causation. This was acknowledged by the authors of the studies and by Ms. White. (Tr. 711.) Additionally, while the studies indicate that further review of setback distances may be warranted, there is nothing in the record to say what that measurement should be. The Oil and Gas Act provides for a setback distance of 500 feet for unconventional wells. 58 Pa. C.S. § 3215(a). Penn Township has expanded that setback

distance to 600 feet. (Tr. 740, 954) There was no testimony in the record regarding the nearest residence or building to the Drakulic well pad. Both Ms. Graber and Dr. Irr live well outside the 600-foot setback requirement of the Township – Ms. Graber lives approximately 2,400 to 2,500 feet from the site and Dr. Irr lives approximately .45 miles from the site, which is 2,376 feet. The evidence in the record does not establish that these are unsafe distances from the Drakulic site in terms of public health.

Disclosure of Chemicals

Protect PT asserts that the Department should have required a full disclosure of chemicals that will be used at the Drakulic site at the time Permittee submitted its permit applications. It argues that the failure to do so constitutes an abuse of discretion and violation of the Environmental Rights Amendment because it presents a risk to public safety and the environment and hampers the Department's ability to protect water supplies and air quality in the event of an emergency. (Protect PT Post-hearing Brief, p. 80-81.)

As we stated earlier in this adjudication, in determining whether the Department has fulfilled its duties under Article I, Section 27, we apply the following standard:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

Delaware Riverkeeper, 2018 EHB at 493 (citing *Friends of Lackawanna*, 2017 EHB at 1163; *Center for Coalfield Justice*, 2017 EHB at 862). "[I]n order to satisfy its obligation to act in a prudent manner, a trustee with responsibility for environmental permitting, such as the

Department, should consider the environmental effects of its permitting action before proceeding to grant a permit." *Id.* at 493.

We find it noteworthy that neither the Oil and Gas Act nor the regulations require the disclosure of chemicals until *after* hydraulic fracturing is completed. Section 3222.1 of the Oil and Gas Act requires a service provider or vendor who supplies hydraulic fracturing additives to an operator to provide chemical information within 60 days after commencement of hydraulic fracturing. 58 Pa. C.S. § 3222.1(a). That section also requires a well operator to complete a chemical disclosure form and post it on the chemical disclosure registry within 60 days after conclusion of hydraulic fracturing. *Id*. at § 3222.1(b). Section 78a.122(b) of the regulations requires a well operator to submit a completion report containing a list of chemical additives in the stimulation fluid within 30 days after completion of the well.[16] 25 Pa. Code § 78a.122(b). While Protect PT does not limit its argument regarding disclosure of chemicals to those used in hydraulic fracturing, this appears to comprise one aspect of its argument.

The question that Protect PT raises is whether the Department can satisfy its trustee duties under Article I, Section 27 and make a determination that unreasonable degradation, diminution, depletion or deterioration of the environment will not occur when it does not know what chemicals will be used on the site until after the permit is issued or what constituents will be injected into the ground until after the injection occurs.

However, Protect PT simply has not provided us with enough information here to find that the Department failed to comply with its duties under Article I, Section 27. While Protect PT tells

[16] This was also noted by the Board in an earlier opinion in this matter when it considered deposition testimony by the Department's Environmental Program Manager, Thomas Donohue, who stated that the Department does not review the chemicals to be used prior to well completion; rather this information is contained in the completion report submitted after the hydrofracturing process occurs. *Protect PT v. DEP and Apex Energy (PA), LLC*, 2024 EHB 683, 705.

us that the chemicals that will be used at the Drakulic site present a risk of harm to the public and the environment, it has not told us how the chemicals will be used on-site (for example, will they be injected into the ground or simply used as a cleaning agent) or explained a pathway to exposure (for example, how will the chemicals reach people's wells or be emitted into the air). As we explained in the Groundwater discussion, Protect PT did not meet its burden of proving how groundwater contamination is likely to occur. As we discussed in that section, Mr. Barone's testimony did not credibly support Protect PT's claim that materials injected into the Marcellus Shale formation 7,500 feet below the surface are likely to make their way to shallow groundwater or be emitted at the surface. Additionally, as we discuss in the Air Section later in this adjudication, Protect PT did not demonstrate that chemicals used at the site are likely to degrade air quality. Nor has Protect PT demonstrated that Permittee's emergency planning is likely to be hampered by the failure to disclose chemicals at the permit application stage. Without further information about what chemicals will be used, how they will be used and how they present a risk of exposure to the public or harm to the environment, we cannot find that the Department failed to meet its duties under Article I, Section 27.

Public Resources and Private Water Supplies

Protect PT argues that the Department failed to fully consider public resources when it approved the Drakulic permits, in particular, public and private water supplies, schools and playgrounds and a nearby trail. Section 78a.15 of the oil and gas regulations sets forth the requirements of a permit application, including information pertaining to public resources.

Protect PT argues first that Permittee did not conduct a search of public resources when it applied for the Drakulic permits. Protect PT relies on testimony by Mr. Hess who, in response to questioning by counsel for Protect PT, stated that Permittee did not search for public resources

prior to submitting its applications for the Drakulic wells. (Tr. 68.) He further testified that, in selecting the Drakulic site, Permittee did not perform a population analysis or identify schools, hospitals, nursing homes or parks within two miles of the Drakulic site, nor did it research endangered species on the EPA website. (Tr. 63-65.) We find this testimony by Mr. Hess to be confusing since the applications for the Drakulic wells indicate that public resources were, in fact, considered. (Stipulated Ex. 1, Bates no. 0000708; Stipulated Ex. 2, 0000682.) This was later confirmed by Mr. Hess in response to questioning from Permittee's counsel. (Tr. 123.) Based on the record as a whole, we do not believe that Mr. Hess's testimony in response to questioning by counsel for Protect PT accurately reflects the actions taken by Permittee to identify public resources as required by 25 Pa. Code § 78a.15. We believe Mr. Hess's answer was either a misstatement or a misunderstanding of the question he was being asked. Rather, we credit Stipulated Exhibits 1 and 2 as being an accurate reflection of the actions taken by Permittee in considering public resources. We also note that the Department's permit reviewer, Andrea Mullen, testified that she researched and reviewed public resources as part of her review of the permit applications. (Tr. 1307.)

Similarly, Protect PT argues that Permittee failed to identify water supplies with the plats it submitted with the permit applications in accordance with 25 Pa. Code § 78a.15(b) which requires the submission of "a complete and accurate plat." Again, Protect PT points to testimony by Mr. Hess as evidence that Permittee failed to comply with this provision. Permittee submitted plats with its permit applications that identified 96 private water supplies. (Stipulated Ex. 1 and 2.) At the hearing, Mr. Hess explained that the identification of private water supplies involves sending out surveys to landowners to locate potential water supplies. Since it is possible that a landowner may not respond to the survey, Mr. Hess acknowledged, in response to questioning by

counsel for Protect PT, that he "couldn't say that there was a definitive capture of all private water supplies for those reasons." (Tr. 59-60.) Counsel for Protect PT asked, "So it is possible that there are additional private water supplies that are not identified in [the permit application," to which Mr. Hess responded, "I don't know. There could be…" (Tr. 59.) We do not read this as a failure on Permittee's part to identify private water supplies in the area of the proposed Drakulic wells but simply an attempt by Mr. Hess to be precise in his answer and to acknowledge that some water supplies may have been omitted if the landowner did not respond to the survey. Based on the evidence, we believe that Permittee made a good faith attempt to ensure that the plats submitted with its permit applications were complete and accurate.

In further support of its argument that Permittee has not supplied complete information, Protect PT points out that the plats submitted with the applications show hundreds of parcels of property yet only 96 water supplies. However, based on testimony at the hearing, it appears that a number of the properties in the area are serviced by public water. For example, both Ms. Graber and Dr. Irr testified that they are serviced by the municipal water system. Dr. Irr stated that he did not respond to Permittee's water supply survey since he is on public water. (Tr. 228.) There is nothing to indicate that private water supplies were omitted from the information provided by Permittee to the Department. There is also nothing to indicate that public water supplies were not considered.

Protect PT further argues that the Department violated Section 3215(c) of the Oil and Gas Act by failing to consider schools and playgrounds in its review of the permit applications. That section of the Oil and Gas Act requires the Department to consider the impact of the proposed well on "public resources" when making a determination on a well permit. The Department's Environmental Program Manager, Thomas Donohue, admitted that the Department's review of the

initial permit applications did not take into consideration schools or playgrounds because the Department did not consider them to be public resources prior to the decision of the Pennsylvania Supreme Court in *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921, 923 (Pa. 2023). (Tr. 191-92; Stipulated Ex. 5.) This was confirmed by permit reviewer, Andrea Mullen. (Tr. 1298-99.) In the *Marcellus Shale* case, the Pennsylvania Supreme Court held that common areas of a school's property and playgrounds qualify as public resources under Article I, Section 27. *Id*. at 947.[17] Following this holding, the Department did begin to take these resources into consideration, and it did so in its review of Permittee's application to renew the permits. (Tr. 191-92, Stipulated Ex. 10.) Ms. Mullen testified, "After the court gave us the okay, then we started incorporating [schools and playgrounds] into our reviews." (Tr. 1298-99.)

Although the Department did not consider schools and playgrounds when it issued the permits, it did consider these resources when it decided to renew the permits. Based on the testimony presented at the hearing, there is nothing to indicate that the Department would *not* have issued the permits had schools and playgrounds been part of its initial review of the permit applications. Ms. Mullen testified that she verified setback distances for schools and playgrounds in her review of the renewal requests and found them to be in accordance with the Department's requirements.[18] When asked if her conclusions were the same for the renewal review as they were for the issuance review, even though the renewal review considered schools and playgrounds, Ms. Mullen confirmed that her conclusion was the same for both: the Drakulic wells could be developed without undue impact to the community. (Tr. 1283.) The lack of inclusion of schools and playgrounds in the initial review of the permits has no continuing relevance since they were

[17] In reaching this decision, the Court overturned the decision of the lower court invalidating the Department's regulations relating to schools and playgrounds as public resources.

[18] 25 Pa. Code § 78a.15(f)(1)(vi) addresses school properties and playgrounds.

considered in the decision to renew the permits. *Wetzel v. DEP*, 2017 EHB 548, 566-67. ("Simply identifying errors in the application process is not sufficient to sustain an appeal if the errors have been rendered immaterial or moot by subsequent events or even the passage of time"); *Kleissler v. DEP*, 2002 EHB 737, 751 (There is no basis for dwelling on the permit application review process where any alleged defects are immaterial in the final analysis); *O'Reilly v. DEP*, 2001 EHB 19, 51 ("A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.")[19]

Finally, Protect PT argues that, in its decision to issue the permits, the Department should have taken into consideration the Westmoreland Heritage Trail, which Ms. Graber testified is approximately 1/3 mile from the Drakulic site. In response to questioning by counsel for Protect PT, the Department's permit reviewer, Ms. Mullen, testified that the trail did not come up in her review of the permit applications because it was not within the 1,000-foot setback limit set forth in the regulations. No further testimony was provided regarding the trail and, therefore, there is no basis for us to conclude that the Department erred by not including it in the permit review.

Compliance History

Under Section 3211(e.1) of the Oil and Gas Act, the Department has the discretion to deny a permit based on compliance history. 58 Pa. C.S. § 3211(e.1). Protect PT argues that the Department abused its discretion in issuing and renewing the permits for the proposed Drakulic wells because, in Protect PT's opinion, Permittee is an "operator with an egregious compliance history." (Protect PT Post-hearing Brief, p. 81.) In response, the Department and Permittee assert

[19] We do not mean to imply that the Department committed an error by not considering schools and playgrounds in the review of the initial permit applications, only that the lack of inclusion of those resources in the initial review has no continuing relevance since they were included in the review of the permit renewals.

that the Department took Permittee's compliance history into consideration when reviewing the applications to issue and renew the permits and determined that Permittee was not in continuing violation of any final action of the Department at the time of review.

At the hearing, Protect PT presented testimony by its Executive Director, Gillian Graber, regarding violations that have occurred at various sites operated by Permittee. According to Ms. Graber, Protect PT regularly accesses information about the operations and compliance history of Permittee's sites by utilizing interactive reports on the Department's website. (Tr. 306, 369.) By using these Department interactive tools, an individual can input the name of the operator and the pertinent timespan, and the website will return a chart or spreadsheet that contains information about the various violations issued to the operator. (Tr. 306.) According to the report summary, the report accesses statewide compliance data as reported to the Department by the operator of the well. (Protect PT Ex. WW.) Ms. Graber testified that she is most concerned about environmental health and safety violations, rather than administrative violations.

Ms. Graber ran the interactive compliance report on the Department's website for Permittee from January 1, 2005 through August 20, 2024. The results of that search were introduced as Protect PT Exhibit WW over the objections of Permittee and the Department. The Board admitted Exhibit WW as "the results of a search performed by Ms. Graber regarding Apex's compliance history using a public facing interactive tool on the Department's website." (Tr. 1437-38.)[20]

[20] Protect PT first sought to introduce Ms. Graber's search as Exhibit EE. However, upon questioning by counsel for Permittee and the Department, it appeared that certain categories had been deleted in order to make the document more readable, printable and manageable. Protect PT provided the full printout of Ms. Graber's search as Exhibit WW. Permittee and the Department raised a number of challenges to Exhibit WW, including objections as to the reliability of the document and the fact that it was provided after Ms. Graber's testimony had concluded and after Protect PT had rested its case. As to the reliability objection, the search was conducted by utilizing an interactive tool on the Department's website that allows members of the public to search information regarding an operator's history of reported violations. While we recognize that this feature may not provide the same level of detail as the Department's internal records, it is nonetheless a tool provided by the Department which gives it some degree of reliability. As to the

Based on her search, Ms. Graber testified that if one were to add up all the individual violations set forth in the various notices of violation that have been issued to Permittee, it would amount to approximately 400 violations. As such, Protect PT believes that Permittee demonstrated a pattern of non-compliance which should have disqualified it from receiving a permit. Protect PT set forth its concerns regarding Permittee's compliance history in a letter to the Department at the time of the renewal of the permits.

Permittee and the Department raised objections as to Ms. Graber's ability to testify as to violations at sites operated by Permittee. We recognize that Ms. Graber is not a compliance specialist. Nonetheless, in her role as Executive Director of Protect PT, she routinely conducts searches of permittees' compliance, advises her membership of the results of her findings and educates her members about ongoing violations. She is able to provide testimony as to the results of her research into violations that occurred at various sites operated by Permittee. That being said, we also recognize that the evaluation of compliance history is a bit of an art; one cannot simply count the total number of violations but must look at the complete picture. For example, the cover sheet to Protect PT Exhibit WW states that an inspection report may cite multiple violations that are related to a single incident at a site, and the inspection type code may vary "as issues are being addressed and resolved to restore the site, facility, or sub-facility back to compliance." (Protect PT Ex. WW, Cover Sheet.)

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objection that Exhibit WW was introduced after the close of Protect PT's case, the parties advised the Board during the presentation of Protect PT's case that they were working on a resolution of how to address Exhibit WW's predecessor, Exhibit EE, and the Board was not advised until the next-to-last day of the hearing, at the conclusion of testimony for the day, that a resolution was not reached. Following that exchange, the Board intended to admit Exhibit EE; however, on the last day of the hearing, Protect PT provided Exhibit WW which included the categories that were missing from Exhibit EE, and Exhibit WW was admitted.

In her testimony, Ms. Graber highlighted violations[21] from three of Permittee's well sites—the Herminie, Quest, and Fatur sites. At the Herminie well site, Ms. Graber noted there were violations for failure to report a release and for failure to take the necessary measures to prevent substances from entering the waters of the Commonwealth. At the Quest well site, Ms. Graber noted that Permittee was issued a violation for having a chemical (mercaptan) on-site without notifying the Department. At the Fatur well site, Ms. Graber testified that Permittee incurred erosion and sedimentation violations for over four years before they were corrected, and a penalty was not imposed until years later due to outreach on behalf of Protect PT.

Christopher Hess, General Counsel and Executive Vice President, provided testimony on behalf of Permittee. He believes that Permittee has a good compliance history. In his opinion, "the standard is to maintain compliance and if you [are] out of compliance, to correct that noncompliance as soon as possible." (Tr. 860.) Mr. Hess provided additional information and context regarding the violations highlighted by Ms. Graber at the Herminie, Quest, and Fatur well sites. At the Herminie site, Permittee was issued a violation for a spill of drilling mud outside of its containment area. Mr. Hess stated that the bulk of the drilling mud was located within containment, but some of it went outside the area where it was supposed to be contained. He testified that the spill was immediately cleaned up. At the Quest well site, Permittee received a

[21] Much of the testimony simply referred to "violations" and it is unclear whether these are notices of violation or orders. The Department's Ms. Mullen testified, "Violations are a final action, but notices of violations are not." (Tr. 1247.) We are not convinced that notices of violation or a listing of violations in an inspection report should be considered for purposes of determining whether a permit should be withheld on the basis of compliance history. As the Board has pointed out many times, a notice of violation is not a final action of the Department and, therefore, cannot be challenged by the recipient. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 375-76 (A notice of violation containing a listing of violations and the procedure necessary to achieve compliance is not an appealable action) (citing *Lower Providence Township v. DEP,* 1996 EHB 1139, 1140-41; *M.W. Farmer Co. v. DER*, 1995 EHB 29); *Beaver v. DEP*, 2002 EHB 666, 674. An order, on the other hand, can be appealed to the Board and can be overturned where there is insufficient evidence supporting it.

violation for a spill of mercaptan.[22] According to Mr. Hess, the Quest site is located near a Peoples Natural Gas utility pipeline. Because natural gas is odorless, Peoples requested that Permittee install an odorizer at the site with a reservoir of mercaptan in it. In December of 2015, the odorizer was disconnected during maintenance and approximately two ounces of mercaptan spilled onto the ground at the pad. According to Mr. Hess, Permittee did not notify the Department when the spill occurred because mercaptan is not toxic and, therefore, it did not believe there was a risk to any third party from the spill. However, Permittee was issued a violation for failure to notify the Department of the incident when it occurred, and the matter was eventually resolved via a consent order.

Finally, Mr. Hess testified about erosion and sedimentation violations at the Fatur site, which Ms. Graber said took years to resolve. According to Mr. Hess, the Fatur site sits below a hillside with a natural seep in it, and the site was designed to accommodate the seep. Sometime between the design and construction of the site, a pipeline company constructed a project through the same area, causing physical changes to the project area and higher volumes of water on the pad than what was expected, resulting in erosion and sedimentation issues. Over the years that followed, Permittee attempted to implement interim designs to address the issue, but none were successful. Eventually, Permittee entered into a consent order with the Department to modify the site plans, which were eventually deployed. According to Mr. Hess, since the site plan was corrected, there have been no further erosion and sedimentation issues at the Fatur site.

Additionally, at the hearing Protect PT highlighted a September 2024 violation issued to Permittee for failure to submit an inventory of chemicals in its completion reports for 37 wells.

[22] Mercaptan is a concentrated substance with a strong rotten egg smell and is added to natural gas via an odorizer so that if there were to be a leak or release of natural gas, it would no longer be odorless.

Pursuant to 25 Pa. Code § 78a.122(b), within 30 days following completion of a well, an operator must provide the Department with a list of chemicals used during the hydraulic fracturing of the well. According to Mr. Hess, Permittee did in fact submit its completion reports as required. However, within the report, Permittee designated certain chemicals simply as "trade secret" or "confidential" without providing the necessary supplemental information identifying them to the Department. Mr. Hess confirmed that Permittee subsequently supplemented the report with the necessary information, and the violation was resolved.

Under 58 Pa. C.S. § 3211(e.1), the Department has discretion to deny a permit for a number of reasons, including for a violation on the site for which the permit is requested or for a continuing violation of a Department final action. 58 Pa. C.S. § 3211(e.1)(1) and (5). Because the Drakulic well pad has not been constructed and there are no ongoing operations at the site, Protect PT does not contend there are violations at the site. However, Protect PT argues that violations at other Permittee sites provide a basis, and in fact a duty, for which the Department should have denied the permits for the Drakulic site. To address this argument, the Department presented testimony by Mr. Thomas Donohue, the Environmental Program Manager for subsurface permitting across Pennsylvania, and Ms. Andrea Mullen, the lead permit reviewer, whose first position with the Department was as a compliance specialist. Mr. Donohue and Ms. Mullen explained how the Department views compliance history in the context of a permit review. In conducting a review of compliance history, the permitting staff runs a report through an internal system to assess whether an operator has any open violations. From there, the permitting staff coordinates with other Department staff with subject matter expertise, such as water quality specialists, to assess compliance in those program areas, as well as compliance specialists within the Department's compliance program to determine whether Permittee had any final actions taken against it and

whether Permittee was complying with those final actions. Ms. Mullen follows the same procedure when reviewing both issuance applications and renewal applications, and the reviews for both types of applications take place just before the time of issuance of the permits or their renewals in order to capture any violations that may have occurred between the submission of the application and the issuance of the permit.

In reviewing Permittee's compliance history for the initial issuance of the permits, the Department determined that Permittee had one outstanding consent order and agreement, with which it was in compliance, and no other final actions outstanding. The Department's Record of Decision for the issuance of the permits provided that Permittee had 22 notices of violation, 126 resolved notices of violation, 12 open enforcements, and 17 closed enforcements at the time of review. (Tr. 157; Stipulated Ex. 5.)

The Record of Decision for the renewal of the permits, undertaken approximately one year after the issuance of the permits, showed that Permittee had 41 notices of violation, 127 resolved notices of violation, 11 open enforcements, and 20 closed enforcements at the time of review. (Tr. 160; Stipulated Ex.10.) When asked by counsel for Protect PT if only one notice of violation had been resolved in the one-year period between the two Records of Decision (126 resolved notices of violation in the issuance Record of Decision versus 127 resolved notices of violation in the renewal Record of Decision), Mr. Donohue testified that he was not sure how to interpret it. (Tr. 160-161.) He also could not speak to what the Department considers to be an "open enforcement." (Tr. 157.)

The Department also provided testimony by Andrea Mullen, the lead permit reviewer for the Drakulic permits and a former compliance specialist with the Department. Ms. Mullen was able to provide some clarity with regard to how the Department views compliance history in the

context of a permitting action. Although she was not asked about open enforcements or resolved notices of violation as was Mr. Donohue, she was asked about her understanding of the term "continuing violation," which is the term used in Section 3211(e.1). She testified that a continuing violation is one where "[t]he violation has not been corrected as of the date of the inspection, but there is room for it to be corrected in the future or for it to be in the process of being corrected." (Tr. 1248.)

As the Board has recently noted, "A third-party appellant who would have us overturn a permit based on the compliance history and status of the permittee has a heavy burden. This is an area where the Department has a considerable amount of discretion." *Liberty Township,* 2024 EHB at 128-29 (citing *Concerned Citizens of Yough, Inc. Department of Environmental Protection*, 639 A.2d 1265, 1271 (Pa. Cmwlth. 1994)). The Board went on to explain:

> The purpose of the compliance review is to ensure the applicant is likely to be responsible enough to be informed of what the law and regulations require and motivated to make an effort to comply with those regulations; an applicant's past is certainly an indicator of future behavior.

Id. (citing *Perano v. DEP*, 2011 EHB 453, 494-97; *Colbert v. DEP*, 2006 EHB 90, 109-10). Where the Board has remanded a permit for further consideration of compliance history, it has generally been because the Department did not conduct a thorough review. *Id.* (citing *Colbert, supra*). We do not believe that was the case here. The issuance and renewal Records of Decision indicate that the Department took into consideration Permittee's compliance history in deciding whether to grant and renew the permits. The evidence demonstrates that the Department conducted a thorough review that incorporated program staff's knowledge of Permittee's operations as well as an internal compliance database. The permit review staff coordinated with the Department's compliance program staff to ensure that there were no final actions that had not been resolved or

that were not in the process of being resolved. Protect PT did not bring forth evidence of any violation by Permittee that had not been corrected or that was not in the process of being corrected.

Moreover, we do not believe that the record demonstrates that Permittee lacks the ability or intention to comply with statutes, regulations, and orders of the Department. In assessing whether a party's conduct shows that it cannot be trusted with a permit, the Board considers factors such as the number, duration, and severity of the violations, harm to the environment caused by the violations, and the applicant's efforts to correct the violations. *Friends of Lackawanna v. DEP*, EHB Docket No. 2021-066-L, *slip op.* at 68 (Adjudication issued (Apr. 1, 2025)); *High,* 2024 EHB at 129. With respect to the violations at the Herminie and Quest sites, the record indicates that both spills were small in size and short in duration. No evidence was presented that environmental harm resulted, and the evidence demonstrates that Permittee responded swiftly to correct the violations. With regard to the violations at the Fatur site, while it is concerning that the violations persisted for a number of years, it appears as though Permittee was working with the Department to correct the violations and had considered a number of alternative design plans until finding one that was successful. Finally, with respect to the violation regarding chemical reporting, the issue was resolved soon after receiving notice of the error, and there is no evidence that the failure to disclose was intentional. Additionally, because the chemical reporting occurs after completion of a well and there is no testimony regarding any harms that may have stemmed from the reporting violation, we do not believe that any environmental harm resulted from the Department receiving the information at a later date in time. As we have stated, "perfect compliance is not the standard for deciding whether a permit should be blocked for noncompliance." *Liberty Township*, 2024 EHB at 131. While Permittee does not have perfect compliance, as evidenced by the violations

highlighted by Protect PT, the subsequent actions taken by Permittee to correct those violations demonstrates its intent to comply with the law.

In conclusion, we do not find that the Department abused its discretion in granting and renewing the permits based on Permittee's compliance history.

Air Emissions

Protect PT contends that the proposed Drakulic wells will generate harmful emissions, including radon and particulate matter, in violation of the Environmental Rights Amendment. In support of its arguments regarding potential emissions from the site, Protect PT offered the expert testimony of Mr. Marc Glass. Mr. Glass is a member of Downstream Strategies, an environmental consulting firm, and developed the firm's environmental monitoring and remediation division. He was formerly a radon testing technician and has completed the training to be a radon safety officer. He was admitted as an expert in environmental science, fate and transport analysis, air quality monitoring, and environmental remediation. Mr. Glass reviewed a number of air studies relating to unconventional oil and gas operations in preparation of his expert report. Per Mr. Glass, all the studies he reviewed documented an increase in background levels for various pollutants including: particulate matter, petroleum hydrocarbons, and various combinations of alcohols and ketones and aldehydes. He is also concerned about potential radon emissions from the site.

<u>Radon</u>

There is no dispute among the parties that at least some amount of radon is likely to be released at the Drakulic site. Radon is naturally occurring in the Marcellus Shale, the target formation for the proposed unconventional gas wells. Mr. Glass explained that radon is formed as a decay product from naturally occurring radioactive materials in the earth, such as uranium or

thorium.[23] Uranium-238 is a primordial, or existing since the beginning of the earth, radioactive material. Uranium undergoes multiple radioactive decays before it decays into radium-226, which decays directly into radon-222 (radon), otherwise known as radon gas. Radon then decays further into its decay progeny, which are radioactive particulates. Anytime radium-226 is present, it will constantly undergo radioactive decay, and radon will be released. Because radium-226 exists in the Marcellus Shale, rocks and gases from the Marcellus that are brought to the surface will generate radon.

With regard to oil and gas development, radon will be released at the well site, either through gas or in association with solids or fluids, as soon as contact is made with the Marcellus Shale. Per Mr. Glass, radon can travel in a number of ways: It moves by traveling through the air and it can also be physically moved if it is associated with soil or water. If radon is found in a gaseous form, it is released to the air and moves with the atmosphere. It is Mr. Glass's opinion that, as gaseous radon moves in the atmosphere, it can travel thousands of feet or even miles from the site.

To Mr. Glass's knowledge, there is no known "safe level" for radon. As it decays, the decay products release ionizing radiation, which poses a risk of health effects. Mr. Glass testified that there is no specific standard to stop radon emissions from gas well sites. One of his main concerns is that as radon is carried downwind, it continues to undergo radioactive decay, not just at the well site, but offsite. Because Mr. Glass is certain that radon emissions will occur at the Drakulic site as a result of gas well development, he believes that background levels should be

[23] In Pennsylvania, the average public indoor dose of radioactive radon gas is approximately twice that of the rest of the country due to Pennsylvania's geology, which has a higher percentage of uranium, thorium, and radium in the soil than other parts of the country. Mr. Bryan Werner, a Department expert in radiation protection and health physics, utilized a graphic, created by the Department's Radon Division, that details average indoor radon levels from 1986 to 2017. While EPA recommends an indoor radon level no higher than 4.0 picocuries per liter, the average level in Westmoreland County is 7.6 picocuries per liter.

measured before operations begin and ongoing monitoring should be conducted in order to determine how much radon is being emitted.

Mr. Glass acknowledged that organizations such as the U.S. Environmental Protection Agency (EPA) are primarily concerned with indoor levels of radon. He agreed that outdoor radon exposure is less of a concern because of dispersion and dilution with the rest of the atmosphere, but still felt that outdoor radon is of some concern. However, he could not offer an opinion that the emissions would exceed any health-based or risk-based standard because there have not been any measurements taken.

The Department offered the expert testimony of Mr. Bryan Werner, a Program Manager within the Department's Bureau of Radiation Protection. More specifically, Mr. Werner is considered to be a radiation health physicist—he studies radiation physics and radiation in relation to both people's health and the environment. Mr. Werner was accepted by the Board as an expert in radiation protection and health physics, including the field of evaluation of radon air emissions.

Mr. Werner testified that radon exposure is more a concern indoors than outdoors, as an enclosed environment allows the radon to concentrate, whereas it tends to dissipate "very, very quickly" in the outdoor environment. Based on his experience as a health physicist, for radon to present a measurable risk, the radon needs to concentrate to levels higher than one would normally see in the outdoors—it typically requires a basement, home, or other confined space. Additionally, the risk is greater for individuals who have had a long-term duration of exposure, such as someone who has lived in a house with indoor radon exposure for 30 years.

Mr. Werner agreed with Mr. Glass that "[a]ll radiation, in theory, has a risk." However, health physicists do not consider low levels of radiation to be a significant health concern, as there is no quantifiable risk at low levels, i.e. below 5,000 millirem. The U.S. EPA action level for

radon for indoor air is set at 4 picocuries per liter, which falls below the 5,000 millirem level. According to Mr. Werner, the primary health concern associated with radon exposure is the potential risk of lung cancer.

With regard to radon emissions resulting from the oil and gas industry, Mr. Werner testified regarding a study conducted by the Department's Radon Division which sampled the air in 53 state parks across the Commonwealth from 2017 to 2018. The purpose of the study was to assess the levels of radon that naturally and routinely exist in the air around us on any given day. The average sample for all parks across the state was 0.3 picocuries per liter. The Radon Division then compared the sample results for the entire state with the sample results taken from counties that were deemed to be those where the most unconventional oil and gas production had occurred. In the counties where unconventional oil and gas production was the greatest, the average sample results fell at 0.3 picocuries per liter or less—which was equivalent to the statewide results. In Mr. Werner's opinion, this suggests that there is no correlation between increased outdoor radon levels and counties with greater oil and gas development.

Mr. Werner agreed with Mr. Glass that there will likely be radon gas, as well as its progeny, generated from oil and gas operations such as the proposed Drakulic wells. However, as mentioned earlier, he testified that radon dissipates very quickly in the outside air. To demonstrate this point, he referenced a study conducted by a health physicist that assessed whether radon could reconcentrate inside homes once it had been vented out of the home and exposed to outdoor air. The results of the study showed that there was no re-concentration of indoor radon in the home once it has been exposed to outdoor air. This study further supports Mr. Werner's testimony that radon needs a confined space with walls or windows in order for it to reach high levels. According to Mr. Werner, as soon as radon reaches an environment where it can spread out, it will do so.

Therefore, he concluded that even if radon emissions are generated at a well site, the radon would quickly dissipate into the surrounding air, spread out, and become indistinguishable from the radon that exists naturally in someone's backyard.

Mr. Werner agreed with Mr. Glass's assessment of how radon could be generated at the site, i.e. from any naturally occurring radioactive material (NORM) or technically enhanced naturally occurring radioactive material (TENORM) that is brought to the surface during oil and gas operations. Because of growing concerns around TENORM and the growth of unconventional oil and gas exploration, the Department undertook a study to look into this issue. In 2015, the Department released a report entitled: Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) Study Report. (Tr. 1385, Protect PT Exhibit GG.) A revised version of the report was issued in May of 2016. The collective versions of this report are referred to herein as the TENORM Study. The TENORM Study was a multi-year study conducted with the intention of taking a comprehensive look at any TENORM impacts that could be associated with the oil and gas industry in Pennsylvania. It included consultation with health physics professionals and other oil and gas experts, was peer-reviewed, and is a "widely accepted study" in the health physics community. (Tr. 1386.)

The TENORM Study looked at both conventional and unconventional wells, and a large number of overall samples were collected to cover a wide range of impacts at the well site—both to the workers and the surrounding environment. Because the study aimed to collect samples at times where there would be high levels of TENORM on-site, the samples were collected during times of flowback, as that is when the Department has seen higher levels of radium-226 at well sites. Radon progeny were also included in the study because, according to Mr. Werner, the progeny present a greater risk to human health than radon alone.

According to Mr. Werner, the results of the TENORM Study demonstrated that radon levels in the outdoor air at well pad sites are essentially background levels. In Mr. Werner's opinion, there is no discernable difference between radon levels normally found in the atmosphere and radon levels at the edge of a well pad site. Because the TENORM Study showed that there is no increase in ambient radon levels at well sites, Mr. Werner does not expect to see an increase in ambient radon levels from operations at the proposed Drakulic site. Even in the hypothetical case of two unconventional gas wells existing next to one another, and 50 other conventional oil and gas wells in close proximity, Mr. Werner did not believe that there would be an increase in radon levels. Because the results of the radon sampling in the TENORM Study were sufficiently low, even when sampling was done at times when levels were expected to be the highest, Mr. Werner expected that any radon generated from such wells would dissipate and quickly become part of the background levels.

Mr. Werner's opinion regarding the lack of risk presented by radon at oil and gas well sites was further supported by data from the Department's Radon Database when comparing first-floor indoor radon levels in people's homes for years before and after hydraulic fracturing became widely utilized in Pennsylvania. The first time period covers the late 1980s through 2009, prior to widespread unconventional exploration in Pennsylvania, and the second time period covers 2011 to 2024, when unconventional development increased. The purpose in comparing the data for those two time periods was to see if there was any increase in radon levels in people's homes once there was an increase in unconventional well sites. In most counties with a high number of unconventional wells, the average and median radon levels stayed the same or decreased despite the increase in unconventional well development.

Mr. Werner believes the levels of radon that might be generated from the proposed Drakulic sites will not reach a level that constitutes any level of harm to the workers on-site or to the surrounding community. Therefore, it is his opinion there is no need for radon to be measured or monitored as a prerequisite to permitting.

In comparing Mr. Werner's testimony with that of Mr. Glass, we believe that there is much agreement between the two. Both Mr. Glass and Mr. Werner agree that radon is likely to be released by the operation of the proposed Drakulic site given the target formation of the Marcellus Shale. Both agree that there is no "safe" level of radon. Both also agree that indoor radon presents a much greater risk than outdoor levels of radon. While Mr. Glass did not believe there was zero risk associated with outdoor levels of radon, he did agree, as did Mr. Werner, that indoor radon presents a much greater risk. The only difference in opinion appears to be the speed at which outdoor radon dissipates. While Mr. Glass opined that any increase in the background levels of radon has the potential to cause harm and should thus be monitored, it was Mr. Werner's opinion that radon disperses and dissipates quickly and, therefore, is not a health concern to workers or the public.

While we found both Mr. Werner and Mr. Glass to be knowledgeable and their testimony helpful to the Board on this topic, we are persuaded that radiation from the Drakulic site will not be at a level that presents a health concern to workers at the site or the surrounding community. Based on the various studies cited by Mr. Werner assessing the relationship between radon emissions and the oil and gas industry, we do not believe that radon emissions will concentrate to a level of concern at this site nor present a risk to the surrounding community.

In particular, with regard to the study conducted by the Department's Radon Division in 2017 and 2018 throughout Pennsylvania's state parks, we find it significant that the state parks

located in counties with high rates of oil and gas development did not see increased rates of radon in the ambient air. Additionally, we find the data pulled from the Department's Radon Database with respect to radon levels on the first floor of homes both before and after the increase in unconventional gas well development to be relevant as well. For the average radon levels in homes in counties with high levels of oil and gas exploration to stay the same or decrease after the start of unconventional drilling indicates that an increase in oil and gas development does not necessarily equate to increased levels of radon emissions within people's homes. Finally, we also found the results of the TENORM Study to be compelling. Because the results of the study showed no increase in ambient radon levels even while sampling at wells during times in which radon and its progeny were expected to be found at the highest levels, we are convinced that any radon emissions from the proposed Drakulic wells will not increase ambient radon levels to a point of causing harm to the workers or the public. While we agree with Mr. Glass that radon sampling at the site can provide helpful information, we do not believe that the lack of such monitoring is a basis for overturning the permit.

Particulate Matter and Other Air Emissions

While Mr. Glass stated that he was primarily concerned with the monitoring of radiological airborne emissions (Tr. 666-67), discussed in the previous section, he is also concerned about ultra-fine particulates and particulate matter that he believes will be emitted from the site. EPA regulation of particulate matter is generally focused on particle sizes of 2.5 micrometers and smaller. According to Ms. Makenzie White, a public health expert for Protect PT, particulate matter presents health risks to individuals because it is small and can be easily breathed deeply into a person's lungs. She testified that exposure to particulate matter has been linked to respiratory

and cardiovascular health impacts, such as asthma exacerbations, increased variability in heart rates, and heart attacks.

As with radon, while Mr. Glass believes that particulate matter will be emitted from the Drakulic site, he could not offer an opinion that the emissions would exceed any applicable health-based or risk-based standard because there have not been any measurements taken. The site has not been constructed; the wells are not in operation. Once operations begin at the site, he believes particulate matter should be monitored. In Mr. Glass's opinion, if particulate matter were to be measured at the site, it "very well could exceed health-based standards," but also noted that it is possible that the risk to residents could be inconsequential.

In addition to particulate matter, Mr. Glass expressed concern regarding the potential release of site-specific chemicals that will be stored and used at the Drakulic well pad. He testified that anything that has been added to the wellbore and then returns to the surface in either liquid or gaseous form has the potential to be released as a contaminant to the environment. Some of the chemicals to be used on the site are not disclosed to the public because they are protected as trade secrets. Per Mr. Glass, "it is impossible to assess the risk from exposure to those chemicals" because it is unknown how they will be used, in what quantity they will be used or released, the fate and transport mechanisms that may be involved, the chemical affinities present, or the toxicology impacts.

Permittee offered the expert testimony of Mr. Tom Muscenti to address issues raised by Mr. Glass. Mr. Muscenti is the regional director of an environmental consulting firm that specializes in air quality consulting. Mr. Muscenti is a registered professional engineer and approximately 75% of his air quality consulting work is focused on the oil and gas industry, mostly in Pennsylvania. It is Mr. Muscenti's opinion that the proposed Drakulic wells will be a source of

minor significance with regard to air emissions and not expected to cause an exceedance of an air quality standard that is designed to be protective of human health. (Tr. 1066.) Mr. Muscenti bases this opinion on the nature of the operations at the Drakulic site and the fact that only dry gas will be produced.

None of the parties dispute that dry gas will be produced at the Drakulic well site. The Drakulic site is located in a "dry gas area" of the Marcellus Formation, and the gas analyses from Permittee's operations in Westmoreland County are generally consistent with dry gas. Because the proposed Drakulic wells will produce dry gas, VOC emissions are likely to be well below regulatory levels.

As to other potential emissions, including particulate matter, Mr. Muscenti discussed the "extensive monitor network" that exists in Pennsylvania that shows that gas operations do not cause an exceedance of air standards. Pursuant to the Federal Clean Air Act, EPA has established National Ambient Air Quality Standards (NAAQS) for various pollutants, including particulate matter. To monitor compliance with the NAAQS, the Department maintains a network of monitors throughout the Commonwealth that capture air quality concentrations. Within that network, monitors are designed to focus on specific industries, including oil and gas operations. While it was unclear from the testimony whether Westmoreland County is currently in attainment of the 2024 NAAQS standard of 9 micrograms per cubic meter for particulate matter, the "three-year average" for the county was 7.8 micrograms per cubic meter. Additionally, both Mr. Muscenti and Mr. Glass agreed that Westmoreland County was in attainment for the 2006 and 2012 standards. In addition to Westmoreland County, Mr. Muscenti also looked at monitors in Wyoming and Bradford counties, where dry gas is produced. The air monitoring for both of those counties showed they were in attainment with NAAQS. In Mr. Muscenti's opinion, this is

evidence that the regulatory structure in place allows unconventional natural gas operations to exist without causing an exceedance of the NAAQS.

Mr. Muscenti also discussed a 2012-2013 study conducted by the Department that assessed emissions from oil and gas operations. The study found that the concentrations did not exceed any NAAQS, were consistent with background levels, and would not cause a health concern. Since the time of that study, there have been "significant regulatory advancements in the control of emissions from oil and gas operations," according to Mr. Muscenti. (Tr. 1083-84.) Therefore, he would expect current-day emissions levels to be even lower than that which existed at the time the study took place.

EPA has also adopted more stringent regulations for oil and gas wells constructed or modified after December 2022 under the New Source Performance Standards (NSPS) at 40 CFR Part 60, Subpart OOOOb (NSPS OOOOb). The objective of those modifications was to lower particulate matter, methane, and VOC emissions to the atmosphere. The requirements under NSPS OOOOb include: capturing gas from completions operations; eliminating pneumatic controllers; being subject to audio, visual, and olfactory inspections; and complying with leak detection and repair, storage vessel, and liquid unloading requirements. The leak detection and repair requirements include inspections employing the use of an infrared camera to identify leaks that are not visible to the naked eye and ensuring gas remains in the pipes and is not released to the atmosphere. The elimination of the pneumatic controllers and use of other controllers, such as air or nitrogen, are intended to eliminate all emissions from controllers to the atmosphere.

Additionally, under NSPS OOOOb an annual report must be submitted to EPA and the Department that includes the reporting of hazardous air pollutants, particulate matter and VOCs, and how many pounds or tons of that pollutant were emitted. The proposed Drakulic wells will be

subject to NSPS OOOOb. Mr. Glass agreed that the aim of NSPS OOOOb is to "significantly lower particulate matter emissions over what they have been in the past." (Tr. 639-40.) However, he also stated that there are pieces of equipment present on oil and gas sites that are not regulated by those standards, meaning that some emissions are not captured within the set standard.

In addition to the federal standards, Pennsylvania imposes its own emissions standards, including emissions limitations specifically applicable to the oil and gas industry. In lieu of obtaining a general permit or individual plan approvals for air emissions, an operator is eligible for a conditional exemption if it meets certain qualifying conditions. The Drakulic wells are expected to operate under Department Air Quality Permit Exemption 38(c) (exemption 38(c)), which exempts unconventional gas well operators from air quality plan approval and permitting requirements if they are determined to be a "source of minor significance" for purposes of air emissions. This means that the operator's emissions for certain pollutants must be below a certain level. 25 Pa. Code § 127.14(a)(8).

To operate under exemption 38(c), a variety of criteria must be met. These include: leak detection and repair requirements, VOC limitations, methane limitations per source, internal combustion engine requirements, and requirements for non-road engines as well. (Apex Ex. 24.) Additionally, operators are required to comply with all other applicable state and federal requirements, such as the state requirements regulating visible emissions and malodors at 25 Pa. Code §§ 123.31 and 123.41. Compliance with exemption 38(c) is evaluated by the Department, which can do inspections of the facility as well as record requests. Additionally, Permittee will be required to calculate emissions on a rolling 12-month basis. However, based on Mr. Muscenti's testimony, actual emissions are not monitored. Rather, emissions are calculated by considering the specific equipment on the site, taking into consideration any site-specific conditions or parameters

that may apply in terms of operating the equipment, incorporating any control devices that further reduce emissions, and utilizing a published emissions factor from the EPA to quantify emissions on a 12-month rolling basis. If emissions reporting shows that an operator is failing to comply with the requirements of the exemption, the operator is deemed ineligible for the exemption and will be required to obtain an air permit from the Department.

While Mr. Muscenti conceded that federal NSPS OOOOb and Pennsylvania's exemption 38(c) only require air monitoring at the Drakulic site during the production phase (Tr. 1101-02), the Consent Judgment to which Permittee is a party also requires air monitoring at the Drakulic site during the drilling and completion phases. Pursuant to the Consent Judgment, testing is required to occur no less than once per week, and if any monitoring reveals exceedance of an OSHA emissions standard, Permittee is required to notify the Township. Notably, Protect PT's expert, Mr. Glass, acknowledged that, pursuant to the Consent Judgment, particulate matter, VOCs, and hazardous air pollutants such as benzene and formaldehyde will, in fact, be monitored. (Tr. 666-67.) Thus, the federal and state requirements and the Consent Judgment all appear to address Mr. Glass's concerns with regard to the need for air monitoring at the Drakulic site.

However, Protect PT also argues that a number of site-specific chemicals will be stored and used at the proposed Drakulic site in connection with the hydraulic fracturing of the wells and they, too, should be monitored. Mr. Muscenti disagreed and testified that the mere presence of a chemical at the site does not necessarily mean that it will generate air emissions. He stated that there must be some mechanism by which the chemical is emitted.

In support of its argument that the operations of an unconventional gas well have the potential to emit harmful pollutants, Protect PT highlights the case of *EQT Prod. Co. v. Borough of Jefferson Hills*. 208 A.3d 1010 (Pa. 2019). In that case, residents challenging a proposed natural

gas production complex to be constructed and operated by EQT sought to introduce testimony at the hearing before the Borough Council from residents of another neighborhood who alleged they had experienced smells and health-related issues due to an EQT well site in their own neighborhood. The trial court and Commonwealth Court found that the evidence from the neighboring residents was not admissible. The Pennsylvania Supreme Court overturned the decisions of the lower courts and held that the evidence was admissible because the two operations were of a similar nature. The Supreme Court did not, however, make any findings on the merits of the neighboring residents' claims, but simply found that their testimony should have been admitted.

Here, there is nothing to indicate that the conditions at the EQT site in *Jefferson Hills* are similar to what will be at the Drakulic site. Rather, the Department highlighted the differences between the EQT site and the Drakulic site in its post-hearing brief: The EQT site was constructed in 2007 and subject to different emission standards than gas wells constructed today; the EQT site had 12 wells while the Drakulic site will have only two; the EQT site had a storage impoundment for water whereas the Drakulic site will have no impoundments; and the EQT site utilized trucks to haul water to the site whereas the Drakulic site will obtain water from a municipal water supply. Given these differences, we cannot find that the operation at issue in *Jefferson Hills* is similar in nature to the Drakulic site, nor can we say that the testimony referenced in *Jefferson Hills* is probative here.

We believe that air quality monitoring during the drilling and hydraulic fracturing of the Drakulic wells, as detailed in paragraph 9(h) of the Stipulation adopted by the Consent Judgment, will ensure protection of air quality during those phases of the operation. [24] We further believe

[24] The air monitoring requirements of the Consent Judgment are discussed in more detail in the next section.

that state and federal requirements regulating emissions during the production phase will ensure continued protection of air quality while the wells are in production.

The Consent Judgment

As discussed in the previous section, the Consent Judgment requires the monitoring of air emissions and particulate matter during the drilling and hydraulic fracturing of the Drakulic wells. Both Permittee and the Department rely, in part, on the air monitoring provision of the Consent Judgment as support for their position that the operations authorized by the permits will not degrade air quality.

The Department also relies on several provisions in the Consent Judgment as support for its position that it has not permitted a nuisance in violation of Section 3259 of the Oil and Gas Act. That section makes it unlawful for an operator to conduct any activity related to drilling or production of gas "in any manner as to create a public nuisance or adversely affect public health, safety, welfare or the environment." 58 Pa. C.S. § 3259(2)(ii). A nuisance is defined as "an unreasonable interference with a right common to the general public." *Kwalwasser v. DER*, 1986 EHB 24, 43. The Consent Judgment contains provisions addressing, among other things, noise, light, dust and truck traffic by requiring sound walls and noise monitoring during construction, drilling and completion; light shields and other equipment to mitigate light sources at the site; and measures to minimize truck traffic, including coordination with the local school district to minimize traffic during school bus stop times. (Ex. Protect PT Ex. JJ/Apex Ex. 11 – Consent Judgment adopting para. 9(c), (d), (i) and (j) of Stipulation.)[25]

[25] This listing provides a succinct summary; the actual language of the Consent Judgment provides additional details on how these provisions are to be carried out.

Protect PT does not believe that the Consent Judgment goes far enough to address its concerns or to ensure compliance with Article I, Section 27. However, while Protect PT presented testimony by Ms. Graber regarding her concerns related to noise, light pollution and traffic safety, it did not demonstrate why the terms of the Consent Judgment do not sufficiently address those concerns. Further, while Protect PT presented testimony regarding air monitoring through its expert, Mr. Glass, it did not demonstrate that the air monitoring required by the Consent Judgment fails to address its concerns. In fact, Mr. Glass acknowledged that the Consent Judgment requires monitoring of particulate matter and air quality emissions during the construction, drilling and hydraulic fracturing stages of the wells.

However, Protect PT argues that, to the extent the Department relies on the Consent Judgment to fulfill the requirements of Article I, Section 27, it should have included those conditions in the permits:

> In order to have any credible argument that the public could rely on Permittee's obligations under the Consent Judgment to protect the environment and human health, the Department could have, and should have, incorporated the terms of the Consent Judgment as special conditions in the Permits to, like Penn Township, protect the health, safety, and welfare of Penn Township residents and to comply with the Environmental Rights Amendment.

(Protect PT Post-hearing Brief, p. 75.) By failing to incorporate the terms into the permits, Protect PT argues the Department has no mechanism for enforcing them since it is not a party to the Consent Judgment.[26] We believe that Protect PT raises a valid point.

[26] As noted earlier, the Consent Judgment adopted a Stipulation entered into among Permittee, Penn Township, the Penn Township Zoning Hearing Board and the Penn Township Board of Commissioners (Penn Township) in settlement of a lawsuit brought by Permittee against Penn Township in Federal District Court. The Department was not a party to that action, nor is it a party to the Consent Judgment.

The Department's lead permit reviewer, Andrea Mullen, testified that she considered the Consent Judgment in her review of the permit applications and determined that many of the objections the Department had received from Protect PT and other objectors were addressed by the Consent Judgment. (Tr. 1286, 1288.) She contacted Penn Township to make sure that Permittee was in compliance with the Consent Judgment and determined that it was. (Tr. 1289.)[27]

Ms. Mullen testified that she factored the Consent Judgment into her decision of whether to add special conditions to the permits. She stated that she did not include conditions in the permits dealing with air quality, noise, light and truck traffic because she felt those issues were addressed in the Consent Judgment and she did not see a need to duplicate them in the permits. She testified as follows:

> A. The consent judgment addressed many of the objector's concerns with regards to dust, noise, light, aesthetics and air quality.
>
> Q. Did you factor that into whether -- to your decision as to whether or not to meet your recommendations for additional permit conditions?
>
> A. Yes.
>
> Q. Why?
>
> A. Well, if Apex was already required to take these measures by another entity, there was no reason for us to put it in the permit.

(Tr. 1288-89.)

In its post-hearing brief, the Department addresses the decision not to include the terms of the Consent Judgment as conditions of the permits. The Department states:

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[27] It is unclear how compliance with the Consent Judgment was demonstrated since the Drakulic site has not begun construction, nor did Ms. Mullen elaborate. However, corporate designee, Mr. Hess, testified that Permittee had provided an air modeling and hydrogeological study to Penn Township as required by paragraph 9(b) of the Stipulation adopted by the Consent Judgment. (Tr. 815.)

> Where the Department has determined special conditions are warranted or the parties have agreed to include them, the Department has inserted them into well permits. *See, Del. Riverkeeper Network v. Dept. of Env't Prot., et al*., 2018 EHB 447, 479-80, 496-97. Here, that was not necessary given the Department's coordination with Apex and Penn Township, and the existence of the Consent Judgment.

(DEP Post-hearing Brief, p. 62.)

Based on Ms. Mullen's testimony and the Department's explanation in its post-hearing brief, we understand that the Department could have included the terms of the Consent Judgment in the permits, but it elected not to do so – not because they were unnecessary, but because the Department felt they were addressed elsewhere. While we understand the Department's reasoning, we nevertheless believe it would be prudent for the Department to include the aforesaid conditions of the Consent Judgment in the permits in order to ensure compliance with them. While it was important for the Department to ensure compliance with the pre-construction requirements of the Consent Judgment prior to issuing the permits, its responsibility does not end with permit issuance. It must have a mechanism for ensuring that the mitigation measures are carried out as the project goes forward. As Protect PT points out, it is unclear how the Department would enforce these provisions since the Department is not a party to the Consent Judgment. As we understand it, if Permittee were to fail to comply with the provisions of the Consent Judgment, the Department must rely on Penn Township to enforce them. This would entail Penn Township going to federal court to obtain an order compelling action on the part of Permittee. While Penn Township has a vested interest in ensuring compliance with the Consent Judgment, it does not have the resources or the enforcement authority of the Department.

Furthermore, while the Stipulation between Penn Township and Permittee provides that Permittee's acceptance of the conditions of the Consent Judgment ensures that "*Apex* will be

considered to have satisfied all requirements to protect the health, safety, and welfare of Penn Township residents and Article I, Section 27," the Board's role is to determine if the *Department* has met the requirements of Article I, Section 27. In order to comply with its duties under Article I, Section 27, the Department must, at a minimum, ensure that Permittee's operation at the Drakulic site does not "create a public nuisance or adversely affect public health, safety, welfare or the environment." 58 Pa. C.S. § 3259(2)(ii). We believe that the mitigation measures discussed above ensure that this requirement is met, and, therefore, it is prudent for them to be contained within the permit.

Moreover, these are terms that Permittee has already agreed to and indicates it intends to comply with at the Drakulic site. Permittee is a signatory to the Stipulation that was adopted by the Consent Judgment. While Ms. Mullen testified that she did not see a need to duplicate the terms by including them in the permits, we see no downside to doing so. On the contrary, we see a compelling reason for including them. The Department has a duty to ensure compliance with the requirements of the permits it issues. By incorporating these terms into the permits, it adds an extra layer of assurance that the requirements will be met and will provide the Department with enforcement oversight without having to rely on involvement by Penn Township.

The Department and Permittee have presented no reason for *not* including the terms of the Consent Judgment in the permits, other than the risk of being repetitive. As stated above, we do not see this as a compelling reason, particularly where both the Department and Permittee relied on the Consent Judgment in their assurances to the Board that issues of air quality, truck traffic, noise and light pollution were fully addressed. While we have no reason to doubt that Permittee intends to comply with the terms of the Consent Judgment – and, indeed, according to Ms. Mullen and Mr. Hess, it has already implemented some of them – nevertheless, in order to ensure

continuing compliance by Permittee and enforcement oversight by the Department, we believe that the terms of the Consent Judgment addressing air quality, noise, light and truck traffic should be included as conditions of the permits.

Exercising our discretion, we amend the permits to incorporate paragraphs 9 (c), (d), (h), (i), and (j) of the Stipulation adopted by the Consent Judgment addressing air quality, noise, light and truck traffic. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998) (The Board may substitute its discretion for that of the Department and order the issuance of permits with different terms and conditions than those originally imposed by the Department) (citing *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975)); *United Refining*, 163 A.3d at 1136 (The Board can properly substitute its own discretion for that of the Department and order the issuance of permits subject to certain special conditions); *Smedley*, 2001 EHB at 156. *See also Carey v. DEP*, 2019 EHB 722 (Board exercised its discretion to allow appellant additional time to comply with an order of the Department.) We find it unnecessary to remand the permits to incorporate these provisions since they are clearly spelled out in the Consent Judgment.

Conclusion

This was a hard-fought case, and we commend counsel for their efforts, particularly in light of the expedited schedule leading up to the hearing. We thank all counsel for the courtesy and professionalism they demonstrated to the Board throughout these proceedings. Strong arguments have been presented on all sides. However, as we recognized at the beginning of this adjudication, Pennsylvania has adopted a legislative scheme that allows oil and gas production, including that of unconventional well drilling. The Department of Environmental Protection, in its role as the regulatory authority, has a duty to ensure that gas well permits are issued in accordance with the

Oil and Gas Act and underlying regulations and in accordance with its constitutional duties under Article I, Section 27. Permittee has a right to pursue oil and gas activities in accordance with that legislative and regulatory framework. Oil and gas operations are an important part of Pennsylvania's economy. Likewise, the members of Protect PT and the residents of Penn Township and Trafford have a right to the safe enjoyment of their neighborhoods. Inevitably, those competing interests will at times conflict.

In conclusion, we uphold the permits issued to Permittee, with the inclusion of paragraphs 9 (c), (d), (h), (i), and (j) of the Stipulation adopted by the Consent Judgment as discussed herein. We find that Protect PT has not demonstrated by a preponderance of the evidence that the permits should be overturned.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Pa. Trout v. Department of Environmental. Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *Warren Sand & Gravel Co. v. Department of Environmental. Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley, supra; New Hanover Township v. DEP*, 2020 EHB 124, 201.

3. "The Board's de novo review allows it to admit and consider evidence that was not before the Board when it made its initial decision, including evidence developed since the filing of the appeal." *United Refining*, 163 A.3d at 1136. *See also Gibraltor Rock, Inc. v. Department of Environmental Protection*, 316 A.3d 668, 677 (Pa. Cmwlth. 2024).

4. In third-party appeals, the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47

5. The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Friends of Lackawanna*, EHB Docket No. 2021-066-L, *slip op*. at 70 (Adjudication issued April 1, 2025); *Friends of Lackawanna*, 2017 EHB at 1156.

6. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *New Hanover Township v. DEP*, 2020 EHB 124, 174; *EQT Production Co. v. Department of Environmental Protection*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Department of Environmental Protection,* 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

7. The Department did not violate its duties and obligations under Article I, Section 27 of the Pennsylvania Constitution. *Delaware Riverkeeper*, 2018 EHB at 493.

8. The preponderance of the evidence does not demonstrate that the Department failed to consider public resources.

9. The preponderance of the evidence does not demonstrate that the Drakulic permits are likely to cause pollution to the waters of the Commonwealth.

10. The preponderance of the evidence does not demonstrate that Permittee's operations under the permits will cause harm to human health.

11. Protect PT has not established that additional air monitoring should be required beyond that which is required by state and federal law and the Consent Judgment.

12. Protect PT has not demonstrated that the Department erred by not requiring Permittee to submit its system-wide and site-specific emergency response plans with the permit applications and permit renewal applications

13. The Department properly evaluated Permittee's compliance history and exercised its discretion pursuant to 58 Pa. C.S. § 3211 (e.1). *Liberty Township v. DEP*, 2023 EHB 50, 54.

14. Where it believes it is prudent to do so, the Board may substitute its discretion for that of the Department and order the issuance of permits with additional conditions than those originally imposed by the Department. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998 (citing *Warren Sand & Gravel, supra.*

15. The Board exercises its discretion and amends the permits to add paragraphs 9 (c), (d), (h), (i), and (j) of the Stipulation adopted by the Consent Judgment addressing air quality, noise, light and truck traffic. *Pequea Township, supra.*

16. Protect PT has not met its burden of proof in demonstrating that the well permits and renewals for the Drakulic site should be overturned. 25 Pa. Code § 1021.122(c)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-074-W**
	:	**(Consolidated with 2022-072-W)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WCAA UPSTREAM, LLC, Permittee	:	

O R D E R

AND NOW, this 3rd day of June, 2025, it is hereby ordered as follows:

1) Paragraphs 9 (c), (d), (h), (i), and (j) of the 2016 Stipulation entered as a Consent Judgment by the District Court of the Western District of Pennsylvania in the matter of *Apex Energy (PA), LLC v. Penn Township*, Civil Action No. 16-759 (December 16, 2016), are incorporated into the permits for the Drakulic 1H and 7H wells.
2) The permits for the Drakulic 1H and 7H wells are upheld in all other respects
3) The appeal of Protect PT is **dismissed.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: June 3, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

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Kathleen Ryan, Esquire
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Allison L. Ebeck, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRG SERVICES MANAGEMENT LLC	:	
	:	
v.	:	**EHB Docket No. 2025-018-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 2025**

OPINION AND ORDER ON
PETITION TO INTERVENE

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board ("Board") grants Lowhill Township's ("Township") Petition to Intervene as the Township has a direct interest in the current appeal. The Township's intervention will be limited to the parameters of the current appeal.

O P I N I O N

Introduction

This appeal centers around CRG Services Management, Inc.'s ("Appellant") plans to construct a 50-foot tall, 299,880 square-foot warehouse at 2951 Betz Court, Lowhill Township, Lehigh County, Pennsylvania with an on-lot sewage disposal system. (*See* Notice of Appeal ("NOA") objections at ¶ 1 & March 14, 2025 Correspondence at pg. 18). As outlined in Appellant's NOA, this project has a history dating back to 2022. For purposes of brevity, this opinion only outlines the most recent and notable dates.

On June 28, 2024, Appellant, through its counsel, submitted a private request ("Private Request") pursuant to Section 5(b) of the Sewage Facilities Act, to the Department of

Environmental Protection's Clean Water Program ("the Department"), requesting the Department order the Township to revise its Official Sewage Facilities Plan ("537 Plan") to provide adequate sewage disposal for the proposed warehouse. (NOA objections at ¶ 33). Specifically, the Private Request asked the Department to mandate the Township to review its 537 Plan, complete a Component 4A Module, and issue a resolution of approval of the Sewage Facilities Planning Module-Component 2 prepared by Snyder, Secary & Associates dated June 9, 2022 and last revised March 18, 2024. (NOA at ¶ 2(a)).

The Department reviewed Appellant's Private Request as well as the Township's Response. (NOA, March 14, 2025 Correspondence at pg. 18). On March 14, 2025, the Department issued a denial letter directed to both the Township and the Appellant, notifying both parties that the Department was denying Appellant's Private Request due to the long-term sewage needs of the development not being up to date with 25 Pa. Code § 71.52(a)(4). (*Id*.) The Department stated that despite its recommendation that a municipality review their Official Plan every ten years, the Township had not had a municipality-wide 537 Plan approved since 1966. (*Id*.) The Department found that the submission of CRG's Component 2 Planning Module for on-lot sewage disposal was a self-evident indication that sewage disposal needs within the Township were not being met. (*Id*.) Through the March 14, 2025 letter, the Department additionally ordered the Township to submit a full 537 Plan Revision within 180 days. (*Id*.)

On April 14, 2025, Appellant filed a timely appeal of the March 14, 2025 denial letter. The same day, the Board issued Pre-Hearing Order No. 1, serving a copy on the Township as a potential intervenor. On May 13, 2025, the Township filed a Petition to Intervene. On May 27, 2025, both Appellant and the Department, separately, filed Responses to the Township's Petition. In its Response, the Department stated that while it does not oppose the Petition to Intervene generally,

it requests that the issues on appeal be limited in scope to the Appellant's Notice of Appeal. Appellant's Response opposed the intervention, arguing that the Township did not state sufficient factual averments to allow intervention pursuant to 25 Pa Code. § 1021.81.

Standard of Review

The Environmental Hearing Board Act and Pennsylvania Code permit any interested person to petition the Board to intervene in any pending matter prior to the initial presentation of evidence. 35 P.S. § 7514(e); 25 Pa. Code § 1021.81. However, this Board has held that "[t]he right to intervene in a pending appeal is comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing." *Mountain Watershed Assoc. v. DEP*, 2024 EHB 476, 479; citing *Lananger v. DEP*, 2024 EHB 891, 892.

Although it is a relatively low burden to establish standing for intervention, "[t]he interest required to demonstrate standing to intervene 'must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination.' " *Mountain Watershed Assoc.*, 2024 EHB at 479 (citing *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 879, 880); *PA General Energy Co. v. DEP*, 2021 EHB 7, 12; *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166. Stated more specifically, a party must have a "direct interest"[1] in the action. *Muth v. DEP*, 315 A.3d 185, 196 (Pa. Cmwlth. 2024) (quoting *Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd.,* 916 A.2d 624, 628 (Pa. 2007). The requirement of a "direct interest" ensures that the Board concerns itself with "material interests that are discrete to some person or limited class of persons" rather than "more diffuse ones that are common among the citizenry." *Id.*

[1] A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Muth,* 315 A.2d at 196.

It is within the Board's discretion whether to grant or deny intervention in accordance with the standard of Section 4(e) of the Environmental Hearing Board Act. *Quigley v. DEP*, 2024 EHB 339, 345 (citing *Browning Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991).

Discussion

The Board finds that the Township has a direct interest in the subject matter of this appeal; and thus, has standing to intervene. The Township clearly has more than a general interest in the proceedings as Appellant's Private Request directly affects the Township's actions. If Appellant is successful in its appeal, the Township will be required to revise its 537 Plan to complete a Component 4A Module as well as issue a resolution of approval of the proposed Sewage Facilities Planning Module Component 2.[2] This interest is discrete to the Township alone and not one that would affect the common citizenry.[3] Thus, the Township has established a sufficiently direct interest in this appeal to meet the threshold for intervention.

In granting intervention, the Board is mindful of the Department's concerns that the Township did not file its own appeal. As we understand it, the March 14, 2025 Correspondence effectually provided two different final actions. The first action was denying Appellant's Private Request, which was timely appealed by Appellant. (NOA, at ¶ 2(a)). The Department could have stopped there, but instead took a second action, which requires the Township to submit an Official

[2] The Township argues in its Petition to Intervene that it "seeks to intervene in Appellant's appeal to the Board to protect its rights with respect to Appellant's attempts to force the Township to amend its official plan." (Petition to Intervene at ¶ 7). The Township further argues its "interest may be affected by the Board's adjudication if the Board determines to reverse the Decision of the Department and/or rule in a manor adverse to the Township." (*Id.* at ¶ 9).

[3] The Township argues in its Petition to Intervene that its "interest is greater than that of the general public because Appellant specifically seeks to compel the Township to take action that the Township considers to be detrimental to its policies and functions." (Petition to Intervene at ¶ 8).

Plan Revision within 180 days. This action was not appealed, and therefore, issues relating to the Official Plan Revision order are not properly before this Board.

There is no dispute that the Township did not file a timely appeal in this matter. Indeed, pursuant to Board Rules, 25 Pa. Code § 1021.52(a), the Township had until April 16, 2025 to file an appeal of the March 14, 2025 Correspondence, but failed to do so. (*See* DEP's Resp. to Petition Ex. A, March 17, 2025 e-mail). Therefore, the Township will not be permitted to backdoor its own appeal of the Official Plan Revision or use this appeal as a conduit to air its own grievances against the denial of the Private Request. 25 Pa. Code § 1021.81(f); *See Coyne v. DEP*, 2020 EHB 118, 120 ("Our precedent makes clear that a petitioner may not use intervention as a tool for circumventing the time constraints of 25 Pa Code § 1021.52."); *Wilson v DEP*, 2010 EHB 192, 197 ("an appellant of one Department action may not use its appeal to attack a separate Department action."); *Jefferson Twp. Supervisors v. DEP*, 1999 EHB 693, 695 ("Usually a petitioner may not use intervention as a means of circumventing the time constraints of 25 Pa. Code§ 1021.52."). Accordingly, the Township is granted intervention but will not be permitted to expand the limited scope of Appellant's appeal of the Private Request denial.

We issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRG SERVICES MANAGEMENT LLC	:	
	:	
v.	:	**EHB Docket No. 2025-018-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of June, 2025, it is hereby **ordered:**

1. Lowhill Township's Petition to Intervene is **granted** with respect to the issues raised in Appellant's Notice of Appeal.

2. Henceforth the caption shall read as follows:

CRG SERVICES MANAGEMENT LLC	:	
	:	
v.	:	**EHB Docket No. 2025-018-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOWHILL TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

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

DATED: June 4, 2025

c: **DEP, General Law Division:**
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(via electronic mail)

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(*via electronic filing system*)

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Sean G. Livesey, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES and BARBARA ULLOM	:	
	:	
v.	:	**EHB Docket No. 2024-114-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CNX GAS COMPANY, LLC, Intervenor	:	**Issued: June 11, 2025**

OPINION AND ORDER ON
MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By MaryAnne Wesdock, Judge

Synopsis

The Appellants' motion for leave to amend their appeal is granted where the Board finds that amendment of the appeal will not result in undue prejudice to the Department or Intervenor.

O P I N I O N

Introduction

This matter involves an appeal filed by James and Barbara Ullom (the Ulloms) challenging a Negative Determination by the Department of Environmental Protection (Department) under Section 3218 of the Oil and Gas Act, 58 Pa. C.S. §3218, in connection with an investigation of alleged water loss by the Ulloms. Pursuant to Section 3218(b), a landowner who suffers diminution or pollution of a water supply as a result of the drilling or operation of an oil or gas well may request that the Department conduct an investigation. *Id.* at 3218(b). Here, the Ulloms contend that they suffered diminution of their water supply as a result of oil and gas operations by CNX Gas Company, LLC (CNX).

On November 3, 2023,[1] the Ulloms made a water loss complaint to CNX in connection with operations at CNX's NV110 oil and gas well pad in East Finley Township, Washington County. CNX submitted the complaint to the Department which conducted an investigation pursuant to Section 3218. On June 28, 2024, the Department issued the results of its investigation, stating as follows: "Based on the sample results and other information obtained to date, the Department cannot conclude that the Water Supply was adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well." (Exhibit to Notice of Appeal, Docket 2024-114-W, entry no. 5; CNX Response, Ex. 2.)

On July 26, 2024, the Ulloms filed an appeal, *pro se*, with the Environmental Hearing Board (Board). After filing their appeal, the Ulloms sought the assistance of counsel and secured representation through the University of Pittsburgh School of Law's Environmental Law and Policy Clinic (Environmental Law Clinic). On October 1, 2024, the Director of the Environmental Law Clinic entered an appearance on behalf of the Ulloms. On May 16, 2025, the Ulloms filed a Motion for Leave to Amend Appeal (motion to amend) and Proposed Amended Notice of Appeal (amended appeal). Both CNX and the Department have filed responses in opposition to the motion to amend.

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. The decision of whether to allow a

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

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

CNX and the Department assert that the motion to amend should be denied outright on the basis that it does not comport with the Board's rule at 25 Pa. Code § 1021.53(c) which states that the "motion shall be verified and supported by affidavits." Here, the motion is "verified and supported by an affidavit" signed by the Ulloms, as those terms are defined in Pa. R.C.P. 76 (Definition of "affidavit" and "verified").

The Department and CNX take issue with what they say is a lack of detail provided by the Ulloms as the basis for amending their appeal. In their motion, the Ulloms state that "the assistance of counsel has allowed the Ulloms to frame their objections in a manner which more precisely frames the legal issues raised in their Notice of Appeal" and "[h]aving retained counsel [they] now wish to amend their Notice of Appeal to clarify the legal and factual bases for their objections to the Department's Negative Determination." (Motion to Amend, para. 7 and 8.) They also state that they have learned information through discovery which necessitates the amending of their appeal. CNX and the Department assert that the Ulloms' affidavit should set forth precisely what they have learned in discovery that justifies the amending of their appeal.

However, that is not the standard by which we judge whether an amendment of appeal should be allowed. We agree that the prior version of Rule 1021.53 did impose this requirement on an appellant wishing to amend its appeal. That rule stated as follows:

> (b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be

> granted if appellant establishes that the requested amendment satisfies 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).

The Preamble to the final rule change was even more explicit in explaining why the Board chose to eliminate the requirements for amendment set forth in the original rule:

> The Board elected to change the standard for amendment of an appeal from one of "good cause," specifically enumerated in the rule, to one of "no undue prejudice" subject to the Board's discretion to be more in line with civil practice in the courts of common pleas. The standard for allowance of an amendment in civil court is one of "no undue prejudice." Under the previous standard, it was virtually

> impossible for a party to amend its appeal after the initial 20-day amendment as of right period had passed. The Board felt it was not good practice to have a standard that was virtually impossible to meet. The Board also recognized that an amendment very early in the appeal period may not be prejudicial, while the same amendment later in the litigation process could very well be prejudicial. For that reason, *the decision as to whether a proposed amendment would result in prejudice to the opposing parties must be left to the discretion of the Board, rather than setting forth a rigid standard in the rule.*

36 Pa.B. 709 (Preamble) (Feb. 11, 2006) (emphasis added). As we held in *Borough of St. Clair v. DEP*, 2013 EHB 171, following adoption of the 2006 rule:

> Our rule, with a heavy emphasis on a determination of prejudice, "was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult. *Groce v. DEP*, 2006 EHB 289, 291. So long as a party is seeking to amend its grounds or objections to a timely appealed action and not seeking to extend the Board's jurisdiction, '[r]egardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion.'" *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379.

Id. at 172 (quoting *Henry v. DEP*, 2012 EHB 324, 325). Thus, the decision of whether to allow the Ulloms' amendment comes down to whether the Board believes it will cause undue prejudice to the Department and CNX. Notably, in *Borough of St. Clair*, although the Board "tended to agree" with opposing counsel that the appellant had "offered no excuse for its eleventh-hour amendment," the Board nonetheless allowed the amendment because it did "not discern that the opposing parties [would] suffer any undue prejudice by allowing the amendment." *Id.* at 172.

The factors the Board considers in assessing whether opposing parties will suffer undue prejudice include the following:

1) The reason for the amendment.

2) The time when amendment is requested relative to other developments in the litigation, including but not limited to the hearing schedule.
3) The scope and size of the amendment and the extent to which it diverges from the original appeal.
4) Whether the opposing party had notice of the issue, including whether it was raised in other filings.

Borough of St. Clair, 2013 EHB at 173 (citing, *inter alia, Rhodes v. DEP*, 2009 EHB 325, 328-29.)

Here, the reason for the amendment is rather straightforward: The Ulloms filed their appeal without the benefit of counsel and now, having retained counsel, they wish to set forth "their objections in a manner which more precisely frames the legal issues raised in their Notice of Appeal" and "clarify the legal and factual bases for their objections to the Department's Negative Determination." (Motion, para. 7 and 8.) The Board has consistently encouraged *pro se* litigants to be represented by counsel and has explained the risks of failing to do so. *See, e.g., Cooley v. DEP*, 2005 EHB 761, 776 (citing *Kilmer v. DEP*, 1999 EHB 846, 849-53); *Van Tassel v. DEP*, 2002 EHB 625, 627-28; *Lucchino v. DEP*, 1998 EHB 1070, 1081. Judge Clark recently pointed out the pitfalls of an appellant proceeding *pro se*:

> The reality is that many *pro se* appellants do not understand that the initiation of an appeal to the Board is akin to filing a lawsuit; rather, many seem to believe that the Board is the Department's complaint box and simply do not understand that their continued participation in the appeal and compliance with our Rules is necessary to protect their rights. And even for those more sophisticated *pro se* appellants who do understand that they have initiated a legal process, understanding and complying with the intricacies of our Rules can be a procedural minefield, often resulting in dismissal of their appeals before the merits can be reached.

354 Broadway, LLC v. DEP, EHB Docket No. 2024-139-B, *slip. op* at 13-14 (Opinion issued March 18, 2025) (J. Clark concurring in part and dissenting in part). Where a *pro se* appellant heeds the advice of the Board and obtains legal representation, we need not make that process unduly burdensome.

CNX and the Department, however, contend that the request for amendment is untimely. They point out that counsel for the Ulloms entered his appearance in October yet the motion to amend was not filed until May. The Department further states that counsel for the Ulloms discussed a possible amendment to the appeal in February but filed nothing until months later. For their part, the Ulloms state that additional details needed to be gained through discovery before they could amend their appeal.[2]

While the Department and CNX are correct that the timing of the request for amendment is one factor to be considered in assessing undue prejudice, it is not necessarily dispositive. *Robachele*, 2006 EHB at 379 (Late-filed amendments may be appropriate depending on the circumstances of the case). Moreover, we look at the timing of the request "relative to other developments in the litigation," including the hearing schedule. *Borough of St. Clair*, 2013 EHB at 173. Under certain circumstances, the Board has found no undue prejudice even when a hearing is pending. *See, e.g., Borough of St. Clair, supra* (Board allowed amendment where hearing was months away); *Williams v. DEP*, 2020 EHB 277, 282-83 (Board granted motion to amend appeal which was filed "on the eve of trial" and which "deviate[d] substantially" from the original notice of appeal); *Baker v. DEP*, 2015 EHB 535 (Amendment of appeal was allowed two months prior

[2] It is not unusual that information gained in discovery may lead to the need for amending one's appeal since "[t]he purpose of discovery is to learn about each other's case" and "obtain all the potential evidence that the other side may possess." *Range Resources – Appalachia, LLC v. DEP*, 2020 EHB 364, 370. Indeed, even the stricter, pre-2006 version of Rule 1021.53 contemplated amendment where it was based upon facts "discovered during discovery of hostile witnesses or Department employees." 25 Pa. Code § 1021.53(b) (1996).

to hearing). Here, no hearing has been scheduled and dispositive motions have not been filed. Although discovery is soon coming to an end, a short extension of discovery will not cause undue delay should it be needed.

Moreover, based on our review, we find that the amendments sought by the Ulloms are generally within the scope of the original appeal. In the appeal which the Ulloms filed *pro se*, they made the following general averments: CNX is responsible for their water loss which they believe is related to vibrations caused by drilling through a longwall panel located below the Ulloms' property; the Department failed to establish that CNX was not responsible for the water loss; and CNX should be subject to a rebuttable presumption of liability based on where its drilling took place in relation to the Ulloms' property and alleged verbal assurances made by a representative of CNX. By comparison, in their amended appeal, the Ulloms expand upon these arguments, again discussing drilling in relation to the longwall panel and providing more detailed information as to why they believe CNX is responsible for their water loss. They also expand upon their argument that the Department should have found a rebuttable presumption of liability on the part of CNX on the basis of various legal theories. These proposed amendments appear to us to be a more detailed "iteration of legal issues that [have] been in dispute since the inception of the appeal." *Pruden v. DEP*, EHB Docket No. 2024-023-BP, *slip op*. at 11 (Opinion issued May 19, 2025) (citing *Chester Water Authority v. DEP*, 2016 EHB 358, 359).

Moreover, even if the proposed amendments expand the litigation, as CNX and the Department suggest, that, by itself, does not mean the motion to amend cannot be granted. 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. The Board rejected this suggestion on the basis that:

> [s]uch 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.

36 Pa.B. 709 (Preamble) (Feb. 11, 2006) (emphasis added).

In particular, the Department and CNX take issue with the Ulloms' theories on why Section 3218(c)(2) of the Oil and Gas Act should apply. That section contains a rebuttable presumption that an unconventional well operator is responsible for *pollution* of a water supply "if (i) the water supply is within 2,500 feet of the unconventional vertical well bore; and (ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well." 58 Pa. C.S. § 3218(c)(2). In their original appeal, the Ulloms simply state that CNX's operations fall within the rebuttable presumption zone "of [their] home." In the proposed amendments to the appeal, the Ulloms put forth various legal theories as to why they believe the rebuttable presumption should apply in this case, even though it involves a claim of water diminution, and not water pollution.[3] CNX argues that these legal theories are "wholly without any legitimate legal basis to pursue." (CNX Memorandum, p. 14.) However, as we held in *Borough of St. Clair*, "A motion to amend does not provide an occasion for debating the underlying merits of the objections that are the subject of the proposed amendment. The merits of the new objections are not a factor in considering whether to allow an amendment." 2013 EHB at

[3] The Ulloms' legal theories as to why the rebuttable presumption of Section 3218(c)(2) should apply include the following: 1) elevated levels of coliform bacteria that showed up in the Department's sampling of Well 2 should have triggered Section 3218(c)(2) (Proposed Amended Notice of Appeal, para. 24); 2) Tort and property law, as well as Article I Section 27 of the Pennsylvania Constitution, require application of the rebuttable presumption in the case of water supply diminution (*Id.* at para. 25); and 3) a representative of CNX made an oral promise to Mr. Ullom to compensate him for any loss to his water supply that might occur during CNX's drilling operations (*Id*. at para. 26).

173-74. The merits of the amended objections are properly addressed in a dispositive motion or after a hearing on the merits.[4]

The Department and CNX argue that additional discovery will be needed if the amendments to the appeal are allowed. To the extent that additional discovery is needed, we do not believe it will be extensive and it can be conducted with a short extension of the discovery period. Moreover, a small amount of delay to conduct further discovery, should it be necessary, will not be prejudicial to CNX or the Department. This is not a situation where CNX is subject to an order to provide water to the Ulloms and is seeking relief from this obligation. Rather, the Department has determined that CNX is not responsible for the Ulloms' water loss and therefore, CNX is under no obligation to take any action at this time.

CNX argues that the burden should not be on it to show that it will be prejudiced. We agree that the burden is on the appellant seeking to amend its appeal to show there will be no undue prejudice. However, as the Board explained during the amendment of Rule 1021.53:

> The rule will clarify that the burden is on the moving party to demonstrate there is no undue prejudice to the opposing parties. Nonetheless, the Board recognizes there will be some shifting of the burden to the responding party to show that it will unduly suffer prejudice if the amendment is permitted. However, even under the previous rule there was some burden on the responding party under subsection (b)(3) to show it would suffer undue prejudice if an amendment were allowed.

[4] However, to the extent the Ulloms are claiming that this appeal involves a complaint of water contamination, that claim is precluded. Based on the record before us, the Ulloms did not file a complaint of water contamination with the Department nor notify CNX of alleged water contamination. While the Department's investigation into the Ulloms' complaint involved testing the water for certain constituents, the investigation was in response to the Ulloms' claim of water diminution and not water contamination. We understand paragraph 24 of the Ulloms' amended appeal to simply be an argument in support of why it believes the rebuttable presumption of Section 3218(c)(2) should have been applied in the Department's investigation of its complaint of water loss.

36 Pa.B. 709 (Preamble) (Feb. 11, 2006). Here, we are unconvinced that CNX and the Department will be unduly prejudiced by granting the amendment.

The Board has held that, when possible, "the right to amend should be liberally granted to secure determination of cases on their merits." *Williams*, 2020 EHB at 281 (quoting *Chester Water Authority*, 2016 EHB at 362 and citing *William Penn Parking Garage, Inc. v. City of Pittsburgh.*, 346 A.2d 269, 279 (Pa. 1975)). "Where, as here, we ultimately believe the parties will not be prejudiced by [amendment of the appeal], fairness dictates that an appellant be given the opportunity to…amend [the] initial notice of appeal with the assistance of counsel." *Henry*, 2012 EHB at 327.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 11th day of June, 2025, it is hereby ordered as follows:

1) The Motion for Leave to Amend Notice of Appeal is **granted**.

2) All deadlines set forth in the Board's Case Management Order of May 2, 2025 are *extended by 45 days*.

3) Should the parties wish to propose alternate dates for the close of discovery, the submission of expert reports and the filing of dispositive motions, they may file a Joint Proposed Case Management Order with the Board.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: June 11, 2025

c: DEP, General Law Division:
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For Intervenor
Rodger L. Puz, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	**Issued: June 16, 2025**

OPINION AND ORDER ON THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE MONTGOMERY COUNTY CONSERVATION DISTRICT'S UNCONTESTED MOTION TO DISMISS

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board grants the Department of Environmental Protection and the Montgomery County Conservation District's Uncontested Motion to Dismiss as the current appeal is now moot.

O P I N I O N

Background

This third-party appeal centers around a National Pollutant Discharge Elimination System ("NPDES") general permit, PAC460811 ("the Permit") issued to 222 Church Road, LLC ("Permittee") authorizing earth disturbance activities to construct an eight-home single-family subdivision and cul-de-sac ("Project") on 3.73 acres at 222 Church Road, Elkins Park, PA ("Site"). (*See* DEP Mot. to Dismiss at pg. 2; DEP-Ex. 1). Appellant David C. Bernstein filed two appeals with the Environmental Hearing Board ("Board") regarding the subject permit. The first Board

appeal was filed in November 2023 and challenged the Montgomery County Conservation District's ("MCCD") issuance of the Permit. The second appeal was filed in January 2024 and challenged the Department of Environmental Protection's ("Department" or "DEP") determination, after an informal hearing, that the MCCD's issuance of the Permit was valid. The Board consolidated the two appeals by Order dated January 22, 2024 at EHB Docket No. 2023-090-BP.

The Permit at issue in both appeals became effective on October 9, 2023 and expired on December 7, 2024. (*See* Ex. DEP-1; Ex. DEP-2 at ¶¶ 5, 13). To date, no earth disturbance work has commenced under the Permit, and Permittee did not renew the Permit or apply for a new permit. (*See* Ex. DEP-2). On May 9, 2025, Appellee Agencies filed a Motion to Dismiss asking the Board to dismiss the consolidated appeals for mootness. Responses to the Motion to Dismiss were due on June 9, 2025. On June 9, 2025, Appellant filed a Responsive Letter advising he did not oppose the motion. Permittee did not file any Response.

Standard of Review

As "mootness is a prudential limitation related to justiciability," it is properly resolved by a motion to dismiss. *Protect PT v. DEP*, EHB Docket No. 2024-092-W, *slip op*. at 3 (Opinion issued March 18, 2025) citing *Lancaster Against Pipelines v. DEP*, 2019 EHB 134, 135; *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. A motion to dismiss is appropriate where there are no material facts in dispute and 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. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*,

2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Winner v. DEP*, 2014 EHB 135, 136-37. As a matter of practice, where there are no facts at issue that touch jurisdiction, a motion to dismiss may be decided on the facts of record without a hearing. *Beaver v. DEP*, 2002 EHB 666, 671 n. 4; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Discussion

The Department argues in its motion that the Board should dismiss the case as moot because the Permit at issue in the subject appeals expired on December 7, 2024, no site activity has occurred under the Permit, and no exceptions to mootness exist in this matter. The Board agrees.

"A matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Protect PT v. DEP*, 2024 EHB 154, 157 citing *Citizens for Pennsylvania's Future v. DEP*, 2024 EHB 624, 626; *Scott v. DEP*, 2023 EHB 138, 140 (quoting *Horsehead Resource Development Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001)); *Clean Air Council v. DEP*, 2018 EHB 164, 165; *South v. DEP*, 2015 EHB 203, 206. "There are exceptions to mootness, including the following: (1) where the action complained of is capable of repetition but likely to evade review, (2) where issues of great public importance are involved, or (3) where a party will suffer a detriment without a decision by the Board." *Protect PT,* 2024 EHB at 157 citing *Sierra Club v. Pennsylvania Public Utility Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 133 (Pa. 1999); *Center for Coalfield Justice v. DEP*, 2017 EHB 713, 718.

In the instant matter, there is no dispute that the appealed permit expired in December 2024.

Permittee was aware of this fact as MCCD sent three permit authorization letters. On October 9, 2023, MCCD sent a permit authorization letter to Permittee advising that if stormwater discharges were expected to continue beyond December 7, 2024, Permittee would need to renew its coverage at least 180 days prior to the expiration date. (*See* DEP Mot. to Dismiss at pg 2; Ex. DEP-4 at 1). MCCD electronically mailed two additional notices, on August 28, 2024 and on November 15, 2024, informing Permittee that it needed to renew its Permit if it wanted to conduct activities at the Site after December 7, 2024. (*See* DEP Mot. to Dismiss at pgs. 2-3; Ex. DEP-5; Ex. DEP-6). Permittee did not respond to those notices. (*See* DEP Mot. to Dismiss at pg. 3; Ex. DEP-2 at ¶¶ 18, 22). Additionally, MCCD District Engineer Elise Eggert-Crowe, P.E., reviewed MCCD's permit renewal database several times after December 7, 2024 to see if the Permittee had submitted a renewal Notice of Intent to continue coverage under the Permit. (Ex. DEP-2 ¶¶ at 14-18). On March 13, 2025, she concluded that the Permittee had not submitted a renewal. (*Id.* at ¶ 18). On May 6, 2025, she reaffirmed this finding. (*Id.* at ¶ 22).

On March 13, 2025, MCCD conducted an inspection at the Site and confirmed no earth disturbance activities have taken place. (Ex. DEP-7). On March 14, 2025, MCCD sent an e-mail to Permittee notifying it that Permit coverage had expired, and it is no longer authorized to conduct earth disturbance activities at the Site. (Ex. DEP-8). The Board is not aware of any response received by Permittee.

Conclusion

Therefore, based on the above factual averments - that no earth disturbance activities have occurred at the Site, the Permit has expired, and Permittee has not applied to renew its permit coverage - the Board finds this case to be moot. No party has argued for any exceptions to mootness and, under the facts presented, the Board finds that no exceptions to the mootness

doctrine apply in this appeal.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. BERNSTEIN	:	
	:	
v.	:	**EHB Docket No. 2023-090-BP**
	:	**(Consolidated with 2024-006-BP)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MONTGOMERY COUNTY CONSERVATION DISTRICT, and 222 CHURCH ROAD LLC, Permittee	:	

O R D E R

AND NOW, this 16th day of June, 2025, it is hereby **ordered** that the Department of Environmental Protection and the Montgomery County Conservation District's Uncontested Motion to Dismiss is **granted**. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: June 16, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP & Montgomery County Conservation District:
William J. Gerlach, Jr., Esquire
Patrick J. Donovan, Esquire
(via electronic filing system)

For Appellant:
Aaron S. Mapes, Esquire
Robert J. Schena, Jr., Esquire
(via electronic filing system)

For Permittee
Zvi Bloom
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509 Cedar Hill Road
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(via first class U.S. mail & email)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2023-019-CP-B**
COUNTRY VIEW ESTATES MHP, LLC	:	**Issued: June 18, 2025**

OPINION AND ORDER
ON THE DEPARTMENT'S MOTION FOR ENTRY OF DEFAULT JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants the Department's motion for sanctions in part by entering a default judgment as to the liability of the defendant but reserves its ruling regarding the assessment of civil penalties until an evidentiary hearing is held.

O P I N I O N

The present matter before the Environmental Hearing Board ("Board") arises from a complaint filed by the Department of Environmental Protection ("the Department") requesting the Board to assess $34,877.75 in civil penalties against the Defendant, Country Estates, MHP, LLC ("Country Estates"), the owner of a mobile home park in Jefferson Township, Mercer County, PA. Country Estates operates the sewage treatment plant that serves the mobile home park. Country Estates has a Water Quality Management Permit No. 4373402 A-1, ("WQM Permit") that authorizes certain units to treat up to 15,000 gallons per day of sewage flow. In 2019 and 2020, the Department conducted several inspections where it found that certain components of the treatment plant were either not operational, improperly installed, or were operating improperly. The violations identified in the initial 2019 inspection were corrected by Country Estates within a

week. Other violations were related to the failure to install certain equipment at the treatment plant but following the submittal of an application to amend the WQM Permit in 2021, the Department removed the requirement to construct the equipment relieving Country Estates of the construction obligation.

Country Estates also has a National Pollutant Discharge Elimination System Permit No PA0033588 ("NPDES Permit") which authorizes it to discharge treated sewage effluent to an unnamed tributary to the Lackawannock Creek. Between March 2018 and March 2022, Country Estates filed multiple monthly Discharge Monitoring Reports ("DMRs") that identified discharges that exceeded the effluent limitations set forth in the NPDES Permit. The Department issued notices of violation to Country Estates for exceeding the effluent limitations.

On February 27, 2023, the Department filed a Complaint for Civil Penalties ("the Complaint") requesting that the Board assess a civil penalty pursuant to Section 605 of the Clean Streams Law 35 P.S. § 691.605, against Country Estates in the amount of $34,877.75. The Complaint contains two separate counts and seeks civil penalties for inoperable and missing treatment units and effluent discharge exceedances self-reported by Country Estates in the DMRs. The first count alleges violations of Section 611 of the Clean Streams Law and the terms of the WQM Permit. The second count alleges violations of Section 611 of the Clean Streams Law and the terms of the NPDES Permit. As of the date of this Opinion and Order, Country Estates has not filed an answer to the Complaint. On May 6, 2025, the Department filed its Motion for Default Judgment ("Motion") as to both Country Estates' liability and an assessment of civil penalties.[1]

[1] The Department does not explain why it waited over two years after Country Estates failed to respond to the Complaint to file its Motion for Default Judgment.

Again, as of the date of this Opinion and Order, Country Estates has not filed a response to the Department's Motion. The Board is now ready to rule on the Department's Motion.

Pursuant to Rule 1021.76a of the Board's Rules of Practice and Procedure, the Department moved the Board to enter default judgment against Country Estates and assess a civil penalty in the amount of $34,877.75. The Department argues that under 25 Pa. Code 1021.76a, it is entitled to default judgment and an entry of a civil penalty because of Country Estates' failure to answer the Complaint. The Board's rule on default judgment provides in relevant part as follows:

> (a) The Board, on motion of the plaintiff, may enter default judgment against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.
>
> [...]
>
> (d) When default judgment is entered in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim or may assess the amount of the penalty following an evidentiary hearing, as directed by the Board, at which the issues shall be limited to the amount of the civil penalties.

25 Pa. Code § 1021.76a.

As the language of our Rule makes clear, when a defendant fails to file an answer to a complaint, the Board is authorized to enter default judgment without a hearing as to both a defendant's liability and the assessment of civil penalties. There have been numerous instances where the Board has granted the Department's motion for default judgment and assessed the civil penalties without conducting a hearing. See, *DEP v. Froehlich*, 2022 EHB 309, 312; *DEP v. Jackson Geothermal HVAC and Drilling, LLC,* 2016 EHB 397, 398*; DEP v. Turnbaugh,* 2014 EHB 124, 125*; DEP v. Comp,* 2012 EHB 343, 344*; DEP v. White Oak Reserve Ltd. P'ship,* 2012 EHB 75, 76-77*; DEP v. Danfelt,* 2011 EHB 839, 842*; DEP v. Wolf,* 2010 EHB 611, 613-15.

However, in a complaint for civil penalties, even in instances where the defendant failed to answer a complaint, the Board is not obliged to take the Department's penalty amount at face-value. While we have the authority to assess civil penalties in the amount of the Department's claim when entering a default judgment, we may also "assess the amount of the penalty following an evidentiary hearing […]" 25 Pa. Code § 1021.76a(d). Therefore, even when a defendant fails to respond to a complaint for civil penalties, the Board has the discretion to assess the civil penalties with or without a hearing.

The amount the Department sets forth in its complaint is a suggestion and purely advisory. *DEP v. Keck*, 2019 EHB 322, 332; *DEP v. Seligman*, 2014 EHB 755, 763. Our role in a complaint action is to make an independent determination of the appropriate penalty amount. *Keck*, 2019 EHB at 332. We make this determination based on applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *Id.*; (citing, *DEP v. EQT Production Company*, 2017 EHB 435, 480). Following our review of the Department's Complaint, accompanying exhibits, and the Motion, we enter default judgment as to Country Estates' liability but for the reasons explained below, we decline to grant a default judgment on the requested civil penalty.

The civil penalty section of the Clean Streams Law provides that a civil penalty shall not exceed $10,000 per day for each violation. Further, it outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and "other relevant factors." 35 P.S. § 691.605(a). We have previously held that other relevant factors include costs incurred by the Department to undertake enforcement, the cost savings to the violator, the volume of pollution released, and the deterrent effect of the penalty. *EQT Production Company,* 2017 EHB at 480. We have also said that civil penalties should be no less than what it

would have cost to comply with the law. See, e.g., *Perano*, 2011 EHB at 879 ("[T]he Board's civil penalty should, at a minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law."); *DEP v. Breslin*, 2006 EHB 130, 141 n.6 ("[I]t should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law." (emphasis in original)).

In support of the penalty amount the Department suggests, it asserts in Count I of the Complaint that Country Estates violated Section 611 of the Clean Streams Law and its WQM by having inoperable and missing treatment units and requests the Board to assess a civil penalty in the amount of $1071. The Department states that it arrived at this amount by calculating a civil penalty of $100 for each time inspections revealed that the treatment units were inoperable and a separate civil penalty of $100 for each instance of missing treatment units. Additionally, in Count I, the Department states that it incurred $371 of costs including personnel time and mileage. Count II also asserts violations of Section 611 and violations of its NPDES Permit for effluent discharge exceedances and requests us to assess $33,806.75 in civil penalties for these violations. In support of the requested penalty under Count II, the Department included a copy of its Standard Operating Procedure for Clean Water Program Determining Civil Penalties attached as Exhibit E to the Complaint. The Department also describes the method it applies when calculating civil penalties for both conventional pollutants and other pollutants to support the assessment amount. (See Complaint at 7, ¶¶ 39, 40). In addition, the Department claims $332.75 in costs related to Count II.

Following our review of the Complaint and the accompanying exhibits, we have questions and concerns regarding the amount of the civil penalty requested by the Department and how the

Department arrived at that amount. Under the specific language of the Clean Streams Law, the Department, and ultimately the Board, are required to consider the willfulness of the violation, the damage or injury to the Commonwealth's waters, and the costs of restoration and other relevant factors in determining the appropriate civil penalty. 35 P.S. § 691.605(a). In the Complaint and the Motion, the Department provides no information regarding these factors or how it applied them when it calculated the proposed civil penalty against Country Estates. As best we can tell based on the information before us, the Department almost exclusively, if not entirely, relied on its internal penalty policy and the mathematical formula set forth in Exhibit E. Our caselaw makes clear that the "guidance the Department uses in determining a suggested civil penalty is not binding on the Board." *United Refining Company v. DEP*, 2006 EHB 846, 849-50.

While the guidance document that the Department relies on discusses the statutory factors when calculating a civil penalty for pollution incidents, it is not apparent how it addresses these factors when considering the effluent violations that are the basis for the majority of the civil penalty in the instant matter. (Complaint Ex. E, p. 3-4). Instead, the section of the guidance document addressing effluent violations states that "the Commonwealth Court of Pennsylvania and the Environmental Hearing Board have both held that DEP's approach to determining civil penalties for effluent violations is reasonable[.]" and cites *The Pines at West Penn, LLC v. DEP*, 24 A.3d 1065 (Pa. Cmwlth. 2011) and *The Pines at West Penn, LLC v. DEP*, 2010 EHB 412 to support this assertion. But even a cursory review of these two opinions shows that in the *The Pines* case, the Department considered the statutory factors in arriving at the proposed civil penalty that was ultimately approved by the Board and then affirmed by the Commonwealth Court.

For instance, in *The Pines*, the Department considered the appellant's willfulness of the violation, damage to the receiving resource and volume of discharge. *The Pines*, 2010 EHB at

416-17**,** (FOF Nos. 31, 32). The Department determined the penalty amount based on its conclusion that the appellant's "violations resulted from negligence, as opposed to something more serious, and they resulted in "low" damage to the environment." *Id*. at 422. On appeal to the Commonwealth Court, White Pines argued that the penalties the Board assessed did not "reasonably fit the violations, as the record lack[ed] evidence of harm to the receiving stream, evidence of a sufficient deterrent effect, and evidence that a monthly average violation warrant[ed] a higher penalty amount than a daily violation." *The Pines*, 24 A.3d at 1070. The Court rejected these arguments. It stated that "we cannot agree with Petitioner that the record lacks evidence of harm to the receiving stream" and pointed to the evidence presented by the Department that demonstrated the frequency of violations, the nature of the stream flow and the classification of the affected waters. *Id*., at 1072-73. Additionally, the Court reviewed the evidence that supported a negligence finding and the deterrent effect. The Court ultimately determined that "the record supports the Board's findings and conclusions" and held that "the penalties assessed by the Board reasonably fit Petitioner's established violations […]" *Id*. at 1074.

Because it is our role to make an independent determination of the appropriate penalty amount based upon applicable statutory criteria, and because we lack any information pertaining to the factors the Clean Streams Law requires us to consider, we decline to grant the Department's Motion requesting a default judgment as to the civil penalty amount. We do, however, grant a default judgment against Country Estates as to its liability for the violations identified in the Department's Complaint as a result of Country Estates' failure to file an answer to the Department's Complaint. We will proceed to schedule an evidentiary hearing in this matter. The hearing will be limited to testimony and evidence concerning the amount of civil penalties to award in this case and will not extend to issues regarding liability.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2023-019-CP-B**
COUNTRY VIEW ESTATES MHP, LLC	:	

O R D E R

AND NOW, this 18th day of June, 2025, following review of the Department's Motion for Sanctions and having received no response from Country Estates, it is hereby ORDERED as follows:

1. The Department's Motion for Sanctions in the form of default judgment as to the liability of Country Estates is **granted**.
2. The Department's Motion for Sanctions as to the assessment of civil penalties is **denied**. The Board will schedule a hearing to address the reasonableness of the amount of the civil penalty.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ Maryanne Wesdock
Maryanne Wesdock
Judge

s/ Paul J. Bruder
Paul J. Bruder
Judge

DATED: June 18, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Angela Erde, Esquire
(via electronic filing system)

For Defendant:
Country View Estates MHP, LLC
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Mifflinburg, PA
17844
(via U.S. first class mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES BRUMAGE	:	
	:	
	:	**EHB Docket No. 2024-104-B**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 23, 2025**
	:	

OPINION AND ORDER ON
DEPARTMENT'S MOTION FOR SANCTIONS IN THE FORM OF DISMISSAL

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants the Department's Motion for Sanctions in the Form of Dismissal against Appellant for failure to answer discovery and comply with Board orders. In addition, Appellant has stated a lack of intent to pursue his appeal. The appeal is dismissed.

O P I N I O N

Before the Board is the Department of Environmental Protection's ("Department's") Motion for Sanctions in the Form of Dismissal. On June 17, 2024, James Brumage ("Mr. Brumage") filed an appeal with the Environmental Hearing Board ("Board") of an Order issued by the Department of Environmental Protection ("Department") pursuant to the Oil and Gas Act, 58 Pa. C.S. §§ 3201-3274; and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003. Mr. Brumage is an operator of a conventional oil and gas well that is located in Richhill Township, Greene County, Pennsylvania. The Order alleges that, on or before April 23, 2024, there was a release of fluids at the well.

After Mr. Brumage filed his Notice of Appeal, the Board issued its standard Pre-Hearing Order No. 1 setting deadlines for discovery and dispositive motions. The initial discovery deadline was December 16, 2024. The Department served its first set of interrogatories and first request for production of documents on October 18, 2024. On November 18, 2024, the Department agreed to a thirty-day extension for Mr. Brumage to respond to the pending discovery. During the course of these proceedings, the Board has granted two joint requests for a 60-day extension of discovery. The first extension set February 14, 2025, as the deadline for the close of discovery. On January 31, 2025, the Department contacted Mr. Coneby, Mr. Brumage's counsel, notifying him that Mr. Brumage had yet to respond to the first requests for discovery. On February 5, 2025, Mr. Coneby informed the Department that Mr. Brumage intended to provide his response to the discovery requests by the first week of March. On February 25, 2025, upon the parties' joint request, the Board issued a second order extending the discovery deadline again by 60-days.

After failing to receive Mr. Brumage's responses by the first week of March 2025, the Department filed a Motion to Compel on March 14, 2025. On March 27, 2025, in response to the Motion to Compel, Mr. Coneby filed a letter with the Board that stated Mr. Brumage advised him that he intended "to provide complete and meaningful responses to the Department's outstanding requests" by April 14, 2025. (Brumage's Letter to Judge Beckman Regarding Motion to Compel, Docket Entry No. 14). The next day, the Board granted the Motion to Compel. After Mr. Brumage again failed to respond to the outstanding discovery requests, the Department contacted Mr. Coneby, asking that Mr. Brumage submit his discovery responses by April 21, 2025. As of the date of this Opinion and Order, Mr. Brumage has not responded to the Department's discovery despite being granted multiple extensions and stating repeatedly that he intended to do so.

On April 23, 2025, The Department filed its Motion for Sanctions in the Form of Dismissal ("Sanctions Motion"). Upon request from Mr. Coneby, the Board held a conference call on May 27, 2025, to discuss the status of this appeal and the possibility for an additional stay to respond to the Sanctions Motion. Following the call, the Board ordered the matter stayed until June 9, 2025, requiring the parties to file a status update that same day. Mr. Coneby filed the required status update and stated the following:

> I have been in touch with Mr. Brumage and have advised Mr. Brumage regarding the immediate need to respond to the Department's outstanding discovery requests. Unfortunately, as of the date of this filing, Mr. Brumage has not provided responses to the outstanding discovery. However, is it my understanding that Mr. Brumage has recently undertaken significant steps to remove all alleged contaminated soil around the well at issue and is in preliminary discussions with an individual regarding a potential sale of this well. I have advised Counsel for the Department of the steps which Mr. Brumage has recently taken with respect to the well and Department's Counsel has informed me that the potential purchaser of the well recently reached out to the Department's representatives to discuss the purchase of the well.
>
> At this time, Mr. Brumage has advised me that he intends to focus his time and resources on continuing to address the alleged contamination at the well site and completing a possible sale of the well in lieu of responding to the discovery or preparing an Answer to the Department's Motion to Dismiss.

(Brumage's Status Update, Docket No. 21).

This Board may impose sanctions – including dismissal of the appeal – for failure to comply with our orders. 25 Pa. Code § 1021.161; *Wilkonson v. DEP*, 2024 EHB 401, 402; (citing, *Martin v. DEP*, 1997 EHB 158). The Board's Rule on Sanctions provides as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

The Board enjoys broad authority to impose sanctions upon parties for violating its rules and orders. *Swistock, Jr. v. DEP*, 2006 EHB 398, 400. Dismissal is warranted where the appellant clearly demonstrates a lack of intent to pursue the appeal by failing to comply with Board orders. *Wilkonson* 2024 EHB at 402., *Blackwood v. DEP*, 2020 EHB 442; *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628; (citing *Bishop v. DEP*, 2009 EHB 260; *Miles v. DEP*, 2009 EHB 179; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 396; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54).

The Board has consistently imposed sanctions, including granting dismissal requests, where a party has completely failed to comply with the rules of discovery or abide by Board orders. *See, e.g., Slater v. DEP*, 2016 EHB 380, 381-82 (dismissing appeal as a sanction where appellant failed to file a pre-hearing memorandum in accordance with the Board's Pre-Hearing Order No. 2 and subsequently failed to respond to a Rule to Show Cause); *Schlafke*, 2013 EHB 678, 735-36 (dismissing appeal as a sanction for appellant's repeated failure to comply with the Board's Rules and orders); *Pearson v. DEP*, 2009 EHB 628, 629-30 (dismissing appeal as a sanction where appellant failed to abide by Board orders, including an order to provide discovery responses to the Department); *Swistock, Jr.*, 2006 EHB at 398 (dismissing appeal as a sanction where appellant failed to respond to discovery requests and abide by Board orders); *Kennedy v. DEP*, 2006 EHB 477, 479 (dismissing appeal as sanction where appellant ignored his discovery obligations and failed to comply with Board order); *Recreation Realty, Inc. v. DEP*, 1999 EHB 697 (dismissing appeal as sanction where appellant failed to respond to discovery requests and abide by Board orders).

Over the course of these proceedings, Mr. Brumage has refused to cooperate with the Department's discovery requests and Board orders. As detailed above, Mr. Brumage has indicated to his attorney on multiple occasions that he would provide full and meaningful responses to discovery and has failed to follow through on his part in each instance. Mr. Coneby's latest communication with Mr. Brumage reflects that he has apparently abandoned interest in pursuing his appeal. In Mr. Brumage's latest update, he has advised his attorney in no uncertain terms that he neither intends to provide discovery responses nor respond to the present Sanctions Motion. Instead, Mr. Brumage has chosen to "focus his time and resources on continuing to address the alleged contamination at the well site and completing a possible sale of the well" rather than pursuing his appeal. In light of Mr. Brumage's disregard of the Department's discovery requests, the Board's orders, and having notified Mr. Coneby of his lack of interest in pursuing this matter, we grant the Department's motion for sanctions and dismiss the appeal. Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES BRUMAGE	:	
	:	
	:	
v.	:	**EHB Docket No. 2024-104-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	

O R D E R

AND NOW, this 23rd day of June, 2025, it is hereby ORDERED that the Department's Motion for Sanctions in the Form of Dismissal is **granted** and the above-matter is **dismissed**. The docket shall be marked as **closed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ Maryanne Wesdock
Maryanne Wesdock
Judge

s/ Paul J. Bruder
Paul J. Bruder
Judge

DATED: June 23, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Kathleen Ryan, Esquire
Richard Watling, Esquire
(via electronic filing system)

For Appellant:
Brandon Coneby, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2024-134-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 26, 2025**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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

Synopsis

The Board denies an appellant's motion for summary judgment where the appellant has not shown that the Department erred in denying the appellant's permit application for the construction and operation of a municipal waste landfill.

O P I N I O N

PA Waste, LLC has appealed a letter dated September 4, 2024 issued by the Department of Environmental Protection (the "Department") that denied PA Waste's application for the construction and operation of a new municipal solid waste landfill on property located in Boggs Township, Clearfield County. The Department's denial is premised on the Department's position that PA Waste did not demonstrate compliance with the municipal waste regulation at 25 Pa. Code § 271.123 requiring permit applicants to show through appropriate documentation that they have the legal right to enter and operate a landfill on the property that makes up the permit area. The Department stated that there was an unresolved property dispute with a neighboring landowner, Camp Rattlesnake, regarding an access road across PA Waste's proposed permit area.

PA Waste has spent years trying to permit and develop its proposed landfill. *See PA Waste, LLC v. DEP*, 2010 EHB 874. This appeal concerns the same issue that was raised in an appeal filed by Camp Rattlesnake of a permit the Department previously issued to PA Waste in 2020 (EHB Docket No. 2020-018-L). In that appeal, Camp Rattlesnake said it had a four-acre property located on the western boundary of the proposed landfill site and PA Waste's permit application had not acknowledged the right-of-way Camp Rattlesnake said it held for a road that crossed PA Waste's property and provided access to Camp Rattlesnake. Camp Rattlesnake's deed, which is dated December 27, 1995, was included with PA Waste's permit application. The deed is between Al Hamilton Contracting Company, Grantor, and Camp Rattlesnake, in care of Eugene Lender, Grantee, and it grants to Camp Rattlesnake a four-acre parcel of land. Importantly for our current purposes, the deed also contains the following provision addressing an access road to Camp Rattlesnake:

> Also granted to the GRANTEE is the right to use the current existing access road from Pennsylvania Route 153 to the property hereby conveyed. The GRANTEE shall in no way interfere with the GRANTOR's right to use the said road.

(PA Waste Ex. 5.)

We denied a motion for summary judgment filed by PA Waste asserting that it had supplied all the necessary documentation to the Department regarding maps and property interests required by the regulations. *Camp Rattlesnake v. DEP*, 2020 EHB 375. We identified the apparent property dispute with Camp Rattlesnake and noted Camp Rattlesnake's contention that development of the landfill would mean Camp Rattlesnake would lose its ability to use the access road. We found that PA Waste had not accounted for the access road in its maps and plans. Camp Rattlesnake later withdrew its appeal without a decision on the merits from the Board. In a separate appeal we vacated PA Waste's permit and remanded it back to the Department for further consideration.

Clearfield County v. DEP, 2021 EHB 144, *aff'd*, *Dep't of Env't Prot. v. Clearfield County*, 283 A.3d 1275 (Pa. Cmwlth. 2022).

During the remand, the Department and PA Waste went back and forth on the Camp Rattlesnake property dispute. On November 30, 2022, the Department issued a deficiency letter to PA Waste, which, *inter alia*, sought information to address the Camp Rattlesnake issue. (PA Waste Ex. 10.) PA Waste responded on May 1, 2023 and submitted a supplemental response on July 26, 2023. (PA Waste Ex. 11, 12.) A map attached to PA Waste's July 2023 submission shows the existing access road to Camp Rattlesnake running across PA Waste's proposed waste disposal area. (PA Waste Ex. 12 (at Ex. 3).) The map also shows an alternative access road PA Waste proposed that would generally run along the eastern and northern edges of the disposal area. On August 11, 2023, the Department sent a letter to PA Waste noting that Camp Rattlesnake's purported access road went through PA Waste's proposed disposal area, and stating that the Department did not consider PA Waste's submissions to have resolved the issue. (PA Waste Ex. 13.)

Having apparently heard nothing further from PA Waste, the Department issued another letter on June 14, 2024 requesting information from PA Waste addressing the Camp Rattlesnake dispute and giving PA Waste 30 business days to respond. (PA Waste Ex. 14.) PA Waste then sent a letter to the Department on July 26, 2024 saying that it was attempting to resolve the property dispute with Camp Rattlesnake by having initiated legal action against Camp Rattlesnake in the Court of Common Pleas of Clearfield County. (PA Waste Ex. 15.) PA Waste asked that the Department hold off any decision on the permit application until the litigation was resolved. The Department waited another month and then issued the denial letter that is the subject of this appeal. The Department justified its denial by explaining that Camp Rattlesnake raised a legitimate dispute

regarding PA Waste's property rights, which, if upheld, would preclude PA Waste from constructing and operating the proposed landfill, and therefore, PA Waste had been unable to demonstrate a clear property right to engage in the activities for which it seeks a permit, as required by 25 Pa. Code § 271.123. (PA Waste Ex. 16.) This appeal followed.[1]

PA Waste has now moved for summary judgment, arguing that it has satisfied the requirements of 25 Pa. Code § 271.123. PA Waste contends that it has provided all the documentation needed to satisfy the requirements of the regulation. Alternatively, it argues that the Department erred in denying the application instead of waiting for the property issue to play itself out. The Department opposes the motion.[2] For the reasons explained below, we deny PA Waste's motion.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 2-3 (Opinion and Order on Motion for Summary Judgment issued Apr. 4, 2025). In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Id.,* at 99 (citing *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587). Summary judgment may only be granted

[1] Camp Rattlesnake has not sought to intervene or otherwise participate in this appeal.

[2] On May 13, 2025, the Department belatedly filed a motion for leave to include within its response a cross-motion for summary judgment. PA Waste filed a response in opposition to the Department's motion. We denied the motion.

in cases where the right to summary judgment is clear and free from doubt. *Scrubgrass Creek Watershed Ass'n v. DEP*, 2024 EHB 747, 749.

At the crux of PA Waste's motion and the Department's denial of PA Waste's permit application is the regulatory right of entry provision for municipal solid waste landfills at 25 Pa. Code § 271.123. That regulation provides in relevant part as follows:

> (a) An application shall contain a description of the documents upon which the applicant bases the legal right to enter and operate a municipal waste processing or disposal facility within the proposed permit area. The application shall also state whether that right is the subject of pending litigation.
>
> (b) The application shall provide one of the following for lands within the permit area:
>
> (1) A copy of the written consent to the applicant by the current landowner to operate a municipal waste processing or disposal facility.
>
> (2) A copy of the document of conveyance that expressly grants or reserves the applicant the right to operate a municipal waste processing or disposal facility and an abstract of title relating the documents to the current landowner.

25 Pa. Code § 271.123(a)-(b).

"PA Waste argues that section 271.123 requires a straightforward demonstration that the applicant has the right to enter and operate within the permitted area." (PA Waste Reply Brief at 1.) We completely agree. However, PA Waste has yet to make that demonstration in this case. Camp Rattlesnake's access road goes right through PA Waste's proposed waste disposal area. Camp Rattlesnake's deed providing for the use of an access road predates by more than a decade the conveyance of title to PA Waste in 2006. PA Waste does not clearly say what would happen to the road once PA Waste begins construction of the landfill, but the fact that PA Waste has proposed constructing an alternative route to Camp Rattlesnake that circumvents the disposal area suggests that PA Waste's construction would eliminate the existing access road. From what we can tell, PA Waste has not provided any assurance to the contrary.

There is pending litigation in the Court of Common Pleas of Clearfield County, a quiet title action initiated by PA Waste against Camp Rattlesnake. (DEP Ex. 2.) The fact that PA Waste apparently could not resolve the issue regarding its right to enter and operate at the property without resorting to litigation by way of a quiet title action reinforces the rather obvious conclusion that it has yet to make a "straightforward demonstration" that it has the right to obliterate Camp Rattlesnake's access road.

The question still remains whether the Department, in exercising its discretion, should have taken some action other than denying the permit application. PA Waste says that, rather than denying the permit outright, the Department should have awaited the resolution of the quiet title action. The Department, for its part, provides little in response to this argument, perhaps intimating that it has waited long enough and the application cannot be allowed to sit indefinitely. There is certainly precedent for the notion that a permit application that has festered for years at some point should be denied as stale, necessitating a new application based on fresh information. *New Hanover Twp. v. DEP*, 2020 EHB 124, *aff'd*, *Gibraltar Rock, Inc. v. Dep't of Env't Prot.*, 316 A.3d 668 (Pa. Cmwlth. 2024); *New Hanover Twp. v. DEP*, 2014 EHB 834.

We dealt with an analogous situation in *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324. There, we considered a motion for summary judgment filed by intervenors aligned with the Department, asserting that the Department acted reasonably in denying a landfill's permit application in light of a zoning conflict that limited the height of the proposed 140-foot landfill to 40 feet. The landfill argued that, instead of the Department denying the permit application, the landfill should have been given a chance to modify its permit application to comply with the height restriction, or the Department could have issued the permit with an appropriate condition. We recognized that, like a property dispute, once a potential zoning conflict is identified, the

Department must decide what to do about it. We found that the Department had options in the face of a zoning conflict: "It may be appropriate in some cases to deny the permit, but it might be appropriate in other cases to suspend review of the permit, as was previously done with respect to this project….It may be appropriate under other circumstances to issue the permit with conditions." *Id.* at 331. We held that a conditioned permit would not have been appropriate since the zoning issue was resolved and there was no dispute that the landfill could not be constructed as it was then designed. Nevertheless, we were not convinced that the Department was required to deny the permit. We denied the motion for summary judgment because "once we enter the world of reviewing the Department's *discretion*, we tend to exit the world where summary judgment is appropriate." *Id.* at 333 (emphasis in original).

The same is true here. In light of the lingering property issue, whether the Department acted appropriately in declining to wait any further for PA Waste to resolve the dispute is a matter of the Department's discretion, which, at least for now, goes beyond the appropriate scope of a summary judgment motion.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2024-134-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 26th day of June, 2025, it is hereby ordered that PA Waste, LLC's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

DATED: June 26, 2025

c: **DEP, General Law Division:**
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(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.*, and EMMA WRIGHT, *et al.*, Intervenors	:	**EHB Docket No. 2024-016-B (Consolidated with: 2024-017-B, 2024-018-B, 2024-019-B, 2024-020-B, 2024-021-B, 2024-026-B, 2024-027-B, 2024-028-B, 2024-029-B, 2024-030-B, 2024-031-B, 2024-032-B, 2024-033-B, 2024-034-B, 2024-035-B, 2024-037-B, 2024-038-B, 2024-041-B, 2024-042-B, 2024-043-B, 2024-044-B, 2024-045-B, 2024-046-B, 2024-047-B, 2024-048-B, 2024-049-B, 2024-050-B, 2024-051-B, 2024-052-B, 2024-053-B, 2024-054-B, 2024-055-B, 2024-056-B, 2024-057-B**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CATALYST ENERGY LLC, Permittee	:	
	:	**Issued: June 30, 2025**

OPINION AND ORDER ON
DEPARTMENT'S AND PERMITTEE'S MOTIONS FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

Under the unique procedural and factual circumstances of this case, the Board denies the Department's and the Permittee's motions for summary judgment. Despite having held an extensive post-discovery supersedeas hearing that resulted in a denial of the Appellants' and Intervenors' supersedeas petition, the Board's de novo review allows parties to present additional evidence related to actions arising after the supersedeas hearing. Based on the existing record, the Board cannot conclude that the Department and Permittee are entitled to summary judgment as a

matter of law, therefore, the motions for summary judgment are properly denied. The Board exercises its authority to set parameters for the merits hearing in light of the extensive litigation of issues that took place in the supersedeas hearing.

O P I N I O N

Background

The Appellants and Intervenors (collectively, "Ms. Lananger") appealed the Department of Environmental Protection's ("Department's") issuance of a change in use permit at Permit No. 37-083-46237-00-01 ("Permit") to Catalyst Energy, Inc. ("Catalyst"). The Permit authorizes Catalyst to convert an existing conventional oil and gas well to an underground injection well in Keating Township, McKean County ("Injection Well"). The Injection Well is located at 4505 State Route 646, Cyclone, PA (the "Site"). Between February 15, 2024, and February 26, 2024, the Board received, via U.S. mail, thirty-eight individual appeals of the Permit. On March 28, 2024, the majority of the appeals were consolidated under EHB Docket No. 2024-016-B, and the remainder of the appeals were eventually consolidated on April 18, 2024. On May 6, 2024, sixteen individuals collectively filed a petition to intervene and the Department subsequently filed an answer in opposition to their petition. On May 30, 2024, the Board issued an Opinion and Order granting the Intervenors' petition[1].

After several extensions of the pre-hearing deadlines, discovery ultimately concluded on October 11, 2024. On November 7, 2024, Ms. Lananger filed an Application for Temporary Supersedeas and a Petition for Supersedeas ("Supersedeas Petition"). On November 11, 2024, the Board granted in part and denied in part the temporary supersedeas. Our November 11th order, addressing the temporary supersedeas, allowed Catalyst to conduct activities related to the

[1] Some of the Appellants and Intervenors have subsequently withdrawn from the case.

preparation for injection, however, it prohibited injection of oil and gas related fluids and prevented Catalyst from conducting any earth disturbance activities. The supersedeas hearing was held over the course of five nonconsecutive days and concluded on December 10, 2024, after closing arguments. On December 27, 2024, we issued an order denying the Supersedeas Petition and lifting the Temporary Supersedeas (the "Order"). On January 17, 2025, we issued an Opinion in Support of the Order (the "Supersedeas Opinion").

Following the issuance of the Supersedeas Opinion and a conference call with the parties' counsel, we set the deadline for dispositive motions. On April 4, 2025, the Department and Catalyst each filed a Motion for Summary Judgment with supporting documents (collectively, the "SJ Motions"). Ms. Lananger timely filed Responses to each of the SJ Motions (collectively, "Lananger's Responses"). On June 3, 2025, the Department and Catalyst filed their respective replies to Lananger's Responses. We are now in a position to rule on the SJ Motions.

Standard of Review

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, show that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Protect PT v. DEP*, 2024 EHB 683, 684 (citing *Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 351–52). Summary judgment may also be available "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." *Pileggi v. DEP*, 2023 EHB 288, 290 (quoting Pa. R.C.P. No. 1035.2(2)). In other words, the party bearing the burden of proof must make out a prima facie case. *Dengel v. DEP*, 2024 EHB 605, 608. In a

motion for summary judgment challenging whether there is sufficient evidence to make out a prima facie case, the Board will not gauge the quality of the evidence but will simply determine whether there is enough evidence to form a prima facie case. *Sunoco Pipeline, L.P. v DEP*, 2021 EHB 43, 51 (citing *Diehl v. DEP and Angelina Gathering Company, LLC*, 2018 EHB 18, 24). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, 2024 EHB 318, 319. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Id*. at 99 (citing *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587).

Analysis

In their SJ Motions, the Department and Catalyst raise the standard arguments. They assert that the record in this case demonstrates that there are no genuine issues of material fact and that they are entitled to prevail as a matter of law and/or that Ms. Lananger has failed to provide sufficient evidence to establish a prima facie case. However, the procedural stage that the Department and Catalyst filed their SJ Motions on is different than the usual one before us when evaluating summary judgment motions. We held a lengthy supersedeas hearing and, based on our determination that she was unlikely to succeed on the merits of her claim at a full hearing, denied Ms. Lananger's supersedeas petition. In most cases involving a supersedeas petition, our denial of a supersedeas request usually results in the appeal being withdrawn prior to summary judgment motions or a full merits hearing. Ms. Lananger, as is her right, decided to proceed with her appeal despite the unfavorable ruling on her petition. This is particularly notable since discovery was completed in this case, whereas in the majority of supersedeas cases, the supersedeas petition is

filed early in the proceedings prior to the completion of discovery. Her decision to move forward with the appeal, in addition to the Department's and Catalyst's subsequent decision to file the SJ Motions, create an unusual procedural setting in deciding the pending motions.[2]

The SJ Motions rely, at least in part, on the transcripts and exhibits from the supersedeas hearing as well as the Board's Supersedeas Opinion. Rule 1035.1 of Pennsylvania's Rules of Civil Procedure, which is incorporated into the Board's rule on summary judgment at 25 Pa Code §1021.94(a)a, provides the definition of "record" as used in the context of a motion for summary judgment. It states that:

> As used in Pa. R.C.P. 1035.1 et seq., the term "record" includes any
>
> (1) pleadings,
>
> (2) depositions, answers to interrogatories, admissions, affidavits and
>
> (3) reports signed by an expert witness […].

Pa. R.C.P. 1035.1.

Rule 1035.1 does not address whether hearing transcripts and/or exhibits should be included in the record for our consideration when evaluating summary judgment motions. It is our view that the transcripts and admitted exhibits from the supersedeas hearing are properly part of the record which we may consider in evaluating the SJ Motions. We reach this decision because the transcripts and exhibits from the supersedeas hearing are generally identical in both form and reliability to the testimony taken during a deposition, which Rule 1035.1 explicitly includes in the

[2] *Delaware Riverkeeper Network et al v. DEP and PennDOT,* Docket No. 2021-108-L was the only recent case we identified where the matter proceeded to a full hearing after the denial of the supersedeas petition following an opportunity to conduct discovery prior to the supersedeas hearing. Summary judgment motions were filed in the case and were denied in a Board order that was issued without a supporting opinion. The adjudication issued in this case on August 27, 2024 (2024 EHB 549) is currently on appeal to the Commonwealth Court. (Commonwealth Court Docket No. 1272 C.D. 2024)

term "record." The transcript testimony is presented under oath and recorded by a court reporter and, like a deposition, counsel for each party has an opportunity to question the witnesses.

It is a more difficult question whether we should consider the Supersedeas Opinion as part of the record in reviewing a motion for summary judgment. The supersedeas hearing and decision had many, but not all, of the features of a full merits hearing by the Board. As such, that tips the scale in favor of finding that the Supersedeas Opinion as something we can rely on in reaching our summary judgment decision. However, there are at least two points that suggest we should not give it significant weight. First, the term "record," as defined by Rule 1035.1, does not explicitly include an opinion as a part of its definition and the items that Rule 1035.1 identifies as making up the record are unlike a judicial decision. The more important point is the nature of a supersedeas decision. The Board has repeatedly pointed out that a decision in a supersedeas is a limited decision, where a single judge makes a reasoned decision that attempts to predict the likely outcome of an adjudication decided by the entire Board following a merits hearing. We have stated that, "a Board ruling on a petition for supersedeas is a limited decision that addresses the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits of the appeal. It is not, nor is it intended to be, the final word on the legality of the Department's action." *Erie Coke v. DEP*, 2019 EHB 481, 484; See 25 Pa. Code § 1021.2. When we view the inherent limitations of a supersedeas decision while also considering the specific facts surrounding the supersedeas proceeding in this case, we hold that we should not put significant weight on the Supersedeas Opinion as part of the record for deciding the SJ Motions.

Our decision on the Department's and Catalyst's SJ Motions is a close call in light of the extensive record, however, we hold that the SJ Motions must be denied. Viewing the record in the

light most favorable to Ms. Lananger, there are genuine issues of material fact remaining, therefore, the Department and Catalyst are not entitled to judgment as a matter of law. Further, we conclude that Ms. Lananger, who bears the burden of proof in her appeal, has produced evidence of fact that is sufficient to establish a prima facie case. We are not to gauge the quality of the evidence in the record at this point. The record contains just enough uncertainty that we are unable to rule in the Department's and Catalyst's favor absent a full hearing and without having the benefit of the entire Board's consideration of the record before making our final decision as to the legality of the Department's permit decision.

A significant factor in reaching this decision is that our rulings are de novo. The Board's de novo review means that the Board can consider evidence that was not considered by the Department at the time it took the action that is being challenged in the appeal. *PennEnvironment et. al, v. DEP*, 2024 EHB 254, 279; *Reed v. DEP*, 2024 EHB 417, 426; *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In third-party permit appeals, such as here, each party to the dispute may present evidence of things that occurred between the filing of the appeal and the start of the hearing. Rather than waiting until the Board makes a final decision, permittees, as is their prerogative including in cases where the Board denies a supersedeas, frequently begin construction and/or operations of the permitted project while the challenge to the permit is ongoing. Where a permitted project has begun, evidence is routinely presented to the Board concerning the impacts caused by construction and/or operation activities. How that evidence plays out in our ultimate decision obviously depends on the facts of the case. When the facts show the permit is functioning as intended, i.e., protecting the environment, and/or the harms anticipated by the permit opponents have not come to fruition, such evidence can help the Department and permittee defend the permit decision. Alternatively, if the facts demonstrate

that there are actual environmental problems arising from the permittee's activities, the appellant can raise those issues to support their challenge to the permit. In the end, our de novo review allows the Board to weigh all of the relevant evidence in deciding the appeal.

In this case, in late December 2024, following the Board's denial of the Supersedeas Petition, Catalyst undertook several actions at the Site including the disposal of waste fluids into the Injection Well. Ms. Lananger asserts that these actions constitute "New Issues" and thereby defeat the SJ Motions. Among the alleged actions she argues create new issues are 1) circumstances that arose in late January/early February regarding a slipped packer and its impact on the mechanical integrity of the Injection Well; 2) construction of a French drain at the Site; 3) installation of two additional 500 bbl fluid tanks; and 4) loss of power at the seismic monitoring station for a period of time in December 2024. Ms. Lananger states that under our de novo review standard, she should have the opportunity to present the facts on each of these actions as they, according to her, constitute material facts that are in dispute and, therefore, properly prevent us from granting summary judgment.

The Department and Catalyst do not dispute that the activities described by Ms. Lananger as "new issues took" place at the Site but contest some of the particulars of the surrounding facts as well as Ms. Lanager's and her counsel's interpretation of the facts. The Department and Catalyst argue that the events Ms. Lanager points out as problematic are merely typical operational issues that the Board should not consider at this point since they were not part of the Department's permit decision. They also challenge whether the facts that Ms. Lananger describes as "new issues" are material and relevant. Our de novo review standard makes short work of the argument that the Board should not consider these new facts/issues since they were not part of the Department's permit decision. By way of analogy, if the Department issued a permit for a dam that was then

constructed and subsequently failed prior to the Board holding a hearing on the challenged permit, no one would argue that the Board should not review evidence surrounding the dam failure when determining whether the Department's permit decision was reasonable, consistent with the law and supported by the facts. We are not saying that any failure did or did not occur here, but instead that the facts concerning the actions at the Injection Well post the Board's decision on the Supersedeas Petition are fair game for our consideration so long as Ms. Lananger shows that they are material and relevant.

The materiality and relevance of the so-called New Issues is difficult to judge at this point. In her Responses, Ms. Lananger attached correspondence, inspection reports, and other documents that relate to her new issues and her counsel offered an interpretation of that information. In their Replies, the Department and Catalyst respond to that information and their counsel puts their own spin on how the Board should view that information. None of the parties provide affidavits or other sworn testimony supporting their reading of the evidence. At this point, the Board is faced with opposing views of how this information should be read and whether it is material and relevant. In light of the evidence and the contrasting interpretations offered by the parties, it is not clear and free from doubt that this information should be excluded as immaterial and/or not relevant and, as a result, the Department and Catalyst are not entitled to summary judgment as a matter of law. Further testimony under oath will assist the Board in its understanding of the significance of this evidence to the issues on appeal.

In the same way that these post-supersedeas developments create a dispute of material facts sufficient to deny the SJ Motions, these facts, along with the record evidence, are supportive of Ms. Lananger's prima facie case. To establish a prima facie case, Ms. Lananger must put forward sufficient evidence for a trier of fact to find in her favor. It is not clear and free from doubt that

the full Board viewing the current record, including the supersedeas hearing transcripts and exhibits, would reach the same conclusion as the single judge who presided over that hearing. Further, at this point, there has been no sworn testimony presented about the activities that have taken place at the Site since the supersedeas hearing. Ms. Lananger argues that some of that evidence calls into question the mechanical integrity of the Injection Well and a concern for a potential release of waste fluid. She also takes issue with the installation of a French drain and what it may mean for the development of the Site as well as its potential impact on the surrounding watershed. Catalyst and the Department contest her arguments but at this point the Board lacks a sufficient record to evaluate these issues. If, and it may be a big if, Ms. Lananger can prove that this evidence supports her positions, the evidence would help establish her prima facie case and arguably allow the trier of fact to rule in her favor. It would not be appropriate for the Board to pre-judge that evidence prior to taking actual testimony.

Much of this decision relies on the rather singular procedural and factual circumstances presented by this case. This decision should not be read to mean that summary judgment can never be granted following a supersedeas decision because of our de novo review standard. Instead, reading the record in this case in the light most favorable to Ms. Lananger, as we are required to do when considering a summary judgment motion, we deny the SJ Motions. Ms. Lananger has presented sufficient evidence setting forth a prima facie case and there are material facts that remain in dispute at this point. In light of those findings, the better course of action is to proceed to a merits hearing where Ms. Lananger will be given an opportunity to present her case, including any new information from activities after the supersedeas hearing, for the full Board's consideration.

At the same time, given that we held an extensive supersedeas hearing and in light of our inherent authority to control the scope of our hearings, we intend to place constraints on the testimony at the upcoming hearing, specifically, by limiting the number of witnesses upon an issue as set forth in the Board's Rules of Practice and Procedure. See 25 Pa. Code § 1021.126. For the sake of efficiency, and in fairness to all parties, we shall incorporate the transcript and evidence from the supersedeas hearing into the record of the merits hearing and to set limits on repetitive testimony addressing issues that have already been extensively litigated in the supersedeas hearing. The Board will work out the exact nature of the limiting parameters in consultation with the parties as we proceed to a merits hearing.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIRANDA LANANGER, *et al.*, and EMMA WRIGHT, *et al.*, Intervenors	**:**	**EHB Docket No. 2024-016-B**
	:	**(Consolidated with: 2024-017-B,**
	:	**2024-018-B, 2024-019-B,**
v.	**:**	**2024-020-B, 2024-021-B,**
	:	**2024-026-B, 2024-027-B,**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CATALYST ENERGY LLC, Permittee	**:**	**2024-028-B, 2024-029-B,**
	:	**2024-030-B, 2024-031-B,**
	:	**2024-032-B, 2024-033-B,**
	:	**2024-034-B, 2024-035-B,**
	:	**2024-037-B, 2024-038-B,**
	:	**2024-041-B, 2024-042-B,**
	:	**2024-043-B, 2024-044-B,**
	:	**2024-045-B, 2024-046-B,**
	:	**2024-047-B, 2024-048-B,**
	:	**2024-049-B, 2024-050-B,**
	:	**2024-051-B, 2024-052-B,**
	:	**2024-053-B, 2024-054-B,**
	:	**2024-055-B, 2024-056-B,**
	:	**2024-057-B**

O R D E R

AND NOW, this 30th day of June 2025, following review of the Department's and Catalyst's Motions for Summary Judgment, Ms. Lananger's Responses and the Replies thereto, it is hereby ORDERED that the Motions for Summary Judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: June 30, 2025

c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Jennifer N. McDonough, Esquire
Paul J. Strobel, Esquire
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(via electronic filing system)

For Appellants and Intervenors:
Lisa Johnson, Esquire
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For Permittee:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID KEPHART and THE ESTATE OF TIMOTHY L. KEPHART and KEPHART TRUCKING CO.	:	
v.	:	**EHB Docket No. 2024-132-BP (Consolidated with EHB Docket No. 2024-133-BP)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 1, 2025**

OPINION AND ORDER ON DISMISSAL OF PARTY FOR FAILURE TO OBTAIN COUNSEL

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board ("Board") dismisses Kephart Trucking Co. as a party appellant pursuant to 25 Pa. Code § 1021.161 as a sanction for the failure to obtain counsel in violation of Board Orders, Board Rules of Practice and Procedure, and Pennsylvania law.

O P I N I O N

Background

This consolidated appeal concerns three appellants, David Kephart, the Estate of Timothy L. Kephart, and Kephart Trucking Co., contesting the Department of Environmental Protection's ("Department") August 28, 2024 Administrative Order ("Administrative Order")[1] for violations of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S.

[1] The Administrative Order is addressed to Kephart Trucking Co., David Kephart, individually, and Timothy L. Kephart, individually.

§§ 6021.101 – 6021.110. On September 26, 2024, Timothy L. Kephart[2] appealed the Administrative Order to the Board individually and on behalf of Kephart Trucking Co. On September 27, 2024, David Kephart appealed the Administrative Order to the Board individually and on behalf of Kephart Trucking Co. On October 15, 2024, the Board consolidated the appeals at docket no. 2024-132-BP.

Five months after the appeals were filed, on February 28, 2025, the Department filed a status report advising of Timothy L. Kephart's death. At that time, no counsel had yet entered an appearance for Kephart Trucking Co. On March 3, 2025, the Board issued an Order mandating that a successor be appointed for Timothy L. Kephart and that Kephart Trucking Co. obtain counsel by March 31, 2025, in compliance with the Board's Rules of Practice and Procedure and Pennsylvania law. *See* 25 Pa. Code § 1021.21(a). As of March 31, 2025, Kephart Trucking Co. had not complied with that Order.

On April 1, 2025, the Board issued a Rule upon Kephart Trucking Co. to show cause as to why the Board should not dismiss it for failure to obtain counsel. The Board ordered the entry of appearance by an attorney on behalf of Kephart Trucking Co. or the filing of a statement addressing Kephart Trucking Co.'s progress toward obtaining counsel on or before April 25, 2025. The Board further advised that failure to comply with the Rule could result in dismissal of the appeal for Kephart Trucking Co. On April 25, 2025, David Kephart electronically filed a letter stating that he made attempts to secure representation for himself and Kephart Trucking Co. through legal aid and the Pennsylvania Bar Association; however, he was told that this type of legal proceeding had

[2] The appeal docketed at 2024-133-BP was initially filed by Timothy L. Kephart on September 26, 2024. Mr. Kephart passed away on January 2, 2025. Thereafter, a representative was appointed to substitute the Estate of Timothy L. Kephart for Timothy L. Kephart. The substitution of parties and the amendment of the caption was finalized by a June 20, 2025 Board Order.

no legal aid option for individuals or corporate entities. Mr. Kephart requested additional time to discuss settlement with the Department.

On April 28, 2025, the Department filed a status report with the Board outlining discussions it had with David Kephart. In the report, the Department re-stated that David Kephart confirmed he did not obtain counsel for Kephart Trucking Co. The Department also discussed the issues it had with reaching a mutually agreeable settlement agreement without a substitute successor for Timothy L. Kephart. On April 29, 2025, the Board issued an Order for the case to be stayed until June 3, 2025. The Order also mandated that a successor be named for Timothy L. Kephart and that counsel be obtained for Kephart Trucking Co. by June 3, 2025. On June 3, 2025, a Motion for Substitution was filed by the Estate of Timothy L. Kephart. No response was received by any party concerning efforts to obtain counsel for Kephart Trucking Co. On June 3, 2025, the Department filed a status report advising of settlement discussions had with both the Estate of Timothy L. Kephart and David Kephart. The Department respectfully requested that Kephart Trucking Co. be dismissed as a party.

On June 10, 2025, the Board issued a second Rule upon Kephart Trucking Co. to obtain counsel by June 23, 2025. The Rule stated that failure to comply would result in the dismissal of Kephart Trucking Co. As a follow up, on June 13, 2025, Judge Bruder's Assistant Counsel e-mailed David Kephart recapitulating to him that if Kephart Trucking Co. did not obtain counsel by June 23, 2025 it would be dismissed as a party appellant. Assistant Counsel also provided David Kephart with the name of a non-profit, Citizens for PennFuture, to contact. On June 23, 2025, no response was received by any party to the Rule.

Discussion

Under Pennsylvania law, a corporation or limited liability company must be represented by legal counsel in a judicial proceeding and may not appear *pro se*. *See The Spirit of the Avenger Ministries v. Commonwealth*, 767 A.2d 1130 (Pa. Cmwlth. 2001); *Walacavage v. Excell*, 480 A.2d 281, 284-85 (Pa. Super 1984) ("a corporation may appear in court only through an attorney at law admitted to practice before the court. . . . The reasoning behind the rule is that a corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control. . . . [A] person who accepts the advantages of incorporation for his or her business must also bear the burdens, including the need to hire counsel to sue or defend in court.") Additionally, under Board Rules of Practice and Procedure, "[p]arties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint[,]" and "[c]orporations shall be represented by an attorney of record." 25 Pa. Code § 1021.21(a)-(b). As such, "this Board has regularly dismissed appeals filed by non-individuals for failure to obtain counsel once such entities have been given a reasonable opportunity to secure representation and have not done so." *River Hill Coal Co., Inc. v. DEP*, EHB Docket No. 2024-173-CS, *slip op*. at 3 (Opinion issued May 16, 2025); *Lizabella Mining, LLC v. DEP*, 2024 EHB 783, 786-787; *Waroquier Coal Co. v. DEP*, 2024 EHB 396, 397- 398; *Earth First Recycling, LLC v. DEP*, 2018 EHB 819, 820-821; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210.

Further, this Board may impose sanctions, including dismissal, for where an appellant demonstrates a clear lack of intent to comply with Board orders. 25 Pa. Code § 1021.161; *Waroquier*, 2024 EHB at 397; *Blackwood v. DEP*, 2020 EHB 442; *Scottie Walker v.* DEP, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151. The Board has imposed dismissal as a

sanction when entities required to be represented by an attorney in good standing have failed to retain counsel. *Waroquier*, 2024 EHB at 398 (dismissing an appeal as a sanction where a coal company failed to obtain counsel and ceased all communications with the Board); *Mann Realty v. DEP*, 2015 EHB 110 (dismissing an appeal as a sanction where a corporation refused to comply with Board orders requiring it to be represented by an attorney); *Falcon Coal & Constr. Co. v. DEP*, 2009 EHB 209 (dismissing an appeal of a company for failure to obtain legal representation in accordance with the Board's Rules of Practice and Procedure).

There is no dispute that Kephart Trucking Co. has been provided numerous opportunities over the past nine months to obtain counsel. This Board has exercised its discretion and exhibited leniency toward Kephart Trucking Co. by issuing several Orders and Rules upon it to obtain counsel, while no responsive action was received. While the Board acknowledges David Kephart's efforts to obtain counsel for Kephart Trucking Co., the Board cannot permit a party to engage in the unauthorized practice of law because of its failure to obtain non-profit assistance.

Moreover, based on the statements made by the parties, the Board understands that the Department is in active settlement discussions with David Kephart and the Estate of Timothy L. Kephart to resolve this matter. Given David Kephart's representations regarding Kephart Trucking Co.'s financially and operationally distressed condition,[3] we do not believe that the company can contribute meaningfully to any settlement negotiations or satisfy the obligations set forth in the Administrative Order.

[3] David Kephart's April 25, 2025 letter addressed to the Board states that Kephart Trucking Co. has been in a highly distressed financial condition since 2011. In 2013, the board members resigned their positions and Kephart Trucking Co. ceased all motor carrier operations. At that point, Kephart Trucking Co.'s operating capital bank attempted to collect on their receivable assets and discovered that the company's receivables had been overstated by several million dollars. They immediately froze all assets. In 2014, the IRS levied a tax lien of over 1 million dollars on the property where the subject tanks are sited for unpaid 2013 trust fund taxes.

As the Board has not received any responses to its March 3, 2025 and April 29, 2025 Orders and its June 10, 2025 Rule to Show Cause, Kephart Trucking Co. has established a lack of intent to pursue its appeal by failing to comply with Pennsylvania law and Board Rules of Practice and Procedure. Thus, Kephart Trucking Co. shall be dismissed as a party appellant.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID KEPHART and THE ESTATE OF TIMOTHY L. KEPHART and KEPHART TRUCKING CO.	:	
	:	**EHB Docket No. 2024-132-BP**
v.	:	**(Consolidated with EHB Docket No. 2024-133-BP)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of July, 2025, following Kephart Trucking Co.'s failure to comply with Board Orders, Board Rules of Practice and Procedure, and Pennsylvania law, it is hereby **ordered** that Kephart Trucking Co. is **dismissed** as a party appellant. The consolidated appeals will now be captioned as follows:

DAVID KEPHART and THE ESTATE OF TIMOTHY L. KEPHART	:	
	:	**EHB Docket No. 2024-132-BP**
v.	:	**(Consolidated with EHB Docket No. 2024-133-BP)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

* **Judge Bernard A. Labuskes, Jr. is recused in this matter and did not participate in the decision.**

DATED: July 1, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

DEP, Office of Chief Counsel:
Robert Cronin, Esquire
Glenn Masser, Esquire
(*via electronic filing system)*

For Appellants:
David Kephart, *pro se*
(*via electronic filing system)*

Kephart Trucking Co.
P.O. Box 386
Bigler, PA 16825
(via first class U.S. mail)

The Estate of Timothy L. Kephart
Martin R. Siegel, Esquire
(via electronic filing system)

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	:	**Issued: July 1, 2025**

OPINION AND ORDER ON
MOTION TO DISMISS OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ERIE COUNTY CONSERVATION DISTRICT

By MaryAnne Wesdock, Judge

Synopsis

The Department of Environmental Protection and Erie County Conservation District's motion to dismiss an appeal of a water obstruction and encroachment general permit issued by the Conservation District is denied. The Department and Conservation District assert that the Board lacks jurisdiction because an appeal must first go to the Department. Because there are a number of issues in dispute and this matter is not free of doubt, dismissal is not appropriate at this time.

O P I N I O N

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

Background

On January 14, 2025, the Erie County Conservation District (Conservation District), by letter, acknowledged receipt of and registered the Millcreek Township School District's (School District) 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 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 Environmental Hearing Board (Board). That appeal was docketed at EHB Docket No. 2025-005-W.

On April 10, 2025, the Conservation District, by letter, approved modifications to the previously authorized Permit (the Modified Permit). On April 18, 2025, the Trust filed an appeal of the Modified Permit at EHB Docket No. 2025-022-W.[1] On May 6, 2025, the Trust filed an "informal mandatory appeal" of the Modified Permit with the Department, and an informal hearing was scheduled for May 30, 2025. (Memorandum in Reply to Motion to Dismiss, p. 4.)[2]

[1] The Conservation District's April 10, 2025 approval letter states that the revisions covered by the Modified Permit "supersede" the previously approved design. During a conference call held on April 24, 2025, the Board asked the parties whether the approval of the modified design superseded the January 14, 2025 approval of the original design. The School District answered that only one permit existed, i.e., the Modified Permit, while the Trust argued that there were two permits. This question was not addressed in the parties' filings.

[2] The Trust submitted the request for informal hearing in Docket No. 2025-022-W after the Department and Conservation District filed the motion to dismiss that is the subject of this Opinion.

On April 23, 2025, the Department and Conservation District filed a motion to dismiss the matter at EHB Docket No. 2025-005-W on the basis that this Board lacks jurisdiction to hear the appeal. On May 23, 2025, the Trust filed a response to the motion to dismiss and on June 9, 2025, the Department and Conservation District filed a reply to the Trust's response to the motion to dismiss.[3] The School District did not weigh in on the motion.

Standard of Review

A motion to dismiss is generally appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or other preliminary concern. *Protect PT v. DEP*, 2024 EHB 191, 193 (quoting *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015)). Here, the Department has filed its motion on the grounds that the Board lacks jurisdiction to hear this appeal. The Board evaluates motions to dismiss in the light most favorable to the non-moving party and accepts the non-moving party's version of events as true. *Kelosky v. DEP*, 2024 EHB 662, 664; *Latkanich v. DEP*, 2023 EHB 299, 302; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt and the moving party is clearly entitled to judgment as a matter of law. *Montgomery Township Friends of Family Farms v. DEP*, 2024 EHB 240, 244; *Popovich v. DEP*, 2023 EHB 35, 36. A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant's claims; rather, the "operative question is: even assuming everything the non-moving party states is true, can – or should – the Board hear the appeal." *Tighe v. DEP*, 2024 EHB 451, 455 (quoting *Protect PT v. DEP*, 2023 EHB 191, 198).

[3] Because the motion was filed jointly by the Department and Conservation District and because both parties are being represented by the same counsel in this matter, we will simply refer to the "Department" when discussing the arguments made in the motion and reply.

Discussion

Under Section 17(a) of the Dam Safety Act, the Department may delegate one or more of its regulatory functions, including permitting, to a county conservation district. 32 P.S. § 693.17(a). When acting pursuant to such a delegation, the county conservation district has the same powers and duties otherwise vested in the Department. *Id.*

Where a person is aggrieved by an action taken by a county conservation district pursuant to its delegated powers, Section 17(c) of the Dam Safety Act sets forth the process for challenging it:

> Any provision of the "Local Agency Law," notwithstanding, any person aggrieved by an action of a county conservation district or other agency pursuant to a delegation agreement may appeal such action to the department within 30 days following notice of such action. Any action of the department pursuant to such an appeal may be appealed to the Environmental Hearing Board in accordance with section 24.[4]

32 P.S. § 693.17(c).

The Department contends that, pursuant to the language of Section 17(c), the Trust was first required to appeal the Permit to the Department before filing its appeal with the Board. Because it failed to do so, the Department asserts that the Board has no jurisdiction to hear this appeal. In response, the Trust argues that the use of the word "may" in Section 17(c) implies that an appeal may be filed with either the Department or the Board. It argues that the language is discretionary rather than mandatory, and therefore, there is no requirement that appeals must first go to the Department before being taken to the Board.

[4] Section 24(a) of the Dam Safety Act states, "Any person who shall be aggrieved by any action of the department under this act shall have the right within 30 days of receipt of notice of such action to appeal to the Environmental Hearing Board." 32 P.S. § 693.24(a).

In addressing this issue, we turn to Pennsylvania's Statutory Construction Act, which directs that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage . . . ." 1 Pa. C.S. § 1903(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b).

Here, there is ambiguity surrounding the word "may" within Section 17(c). Generally, when the word "may" is used in the context of a statute, it confers discretionary power, and is permissive rather than mandatory. *Schindler Elevator Corp. v. Dep't of Labor & Industry,* 303 A.3d 874, 881 (Pa. Cmwlth. 2023) (citing *Commonwealth v. Garland*, 142 A.2d 14, 17 n.5 (Pa. 1958); *Commonwealth v. A.M. Byers Co.*, 31 A.2d 530, 532 (Pa. 1943)). Here, however, it is unclear whether the word "may" connotes discretion as to whether one may file an appeal or the forum in which to file it.

When the words of a statute are ambiguous, the General Assembly's intention may be ascertained by considering the following factors:

> (1) The occasion and necessity for the statute.
>
> (2) The circumstances under which it was enacted.
>
> (3) The mischief to be remedied.
>
> (4) The object to be attained.
>
> (5) The former law, if any, including other statutes upon the same or similar subjects.
>
> (6) The consequences of a particular interpretation.
>
> (7) The contemporaneous legislative history.
>
> (8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. § 1921(c).

There appears to be no Board case law directly on point.[5] Nor have we found any legislative history behind this particular provision explaining the General Assembly's use of the word "may." Therefore, we turn to the other factors outlined above, including the object to be obtained, the consequences of a particular interpretation, and other relevant statutes.

The Department asserts that Section 17(c) of the Dam Safety Act must be read *in pari materia* with Section 4 of the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, at § 7514, which establishes the Board's jurisdiction. Under the EHB Act, the Board "has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). The Department points out that Section 4(a) of the EHB Act refers specifically to 2 Pa. C.S. Ch. 5 Subch. A, which governs the practice and procedure of Commonwealth agencies, such as the Department, whereas 2 Pa. C.S. Ch. 5 Subch. B, which governs the practice and procedure of local agencies, such as the Conservation District, is not mentioned. The Department argues that when Section 17(c) is read in conjunction with Section 4(a) of the EHB Act, the logical conclusion is that an appeal from an action of a county conservation district under the Dam Safety Act cannot go directly to the Board; rather, it must first go to the Department, and only after the Department acts may an appeal go to the Board. It also points out that Section 17(b) of the Dam Safety Act gives the Department the

[5] The Department relies on *McKeesport Municipal Water Authority v. DER*, 1987 EHB 775. In that case, the Board cited to 32 P.S. § 693.17(c) and noted that the Dam Safety Act "expressly provides for a review mechanism for actions taken by delegated local agencies." 1987 EHB at 779–80. The *McKeesport Municipal Water Authority* case concerned a civil penalty issued by a county health department to a municipal water authority under the Safe Drinking Water Act. The Board referenced the review mechanism for actions taken by delegated agencies outlined in the Dam Safety Act because the Safe Drinking Water Act was entirely silent as to a right of review for delegated actions. As such, the Board was merely using 32 P.S. § 693.17(c) as an example of a statute that does provide such a review mechanism. The procedure to be followed pursuant to that review mechanism, however, was not discussed by the Board.

authority to "monitor and supervise" the activities of county conservation districts conducted pursuant to a delegation agreement. 32 P.S. § 693.17(b). The Department argues that this includes the right to review those activities pursuant to an appeal by an aggrieved party.

In reviewing this matter, we are guided by the Board's holding in *Tighe*, 2024 EHB at 457: "The Board's jurisdiction is limited by statute and regulation." The Environmental Hearing Board Act provides us with jurisdiction over "final actions of the Department affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations." *Id.* (citing 35 P.S. § 7514 and 25 Pa. Code § 1021.2(a).) When Section 17(c) is read *in pari materia* with Section 4(a) of the EHB Act, it is clear that the General Assembly intended the Board to have jurisdiction over actions of the Department. This is further supported by Section 24 of the Dam Safety Act, which provides: "Any person who shall be aggrieved by any action of the department under this act shall have the right within 30 days of receipt of notice of such action to appeal to the Environmental Hearing Board." 32 P.S. § 693.24(a).

Thus, a reasonable reading of Section 17(c) is that the General Assembly intended to provide the Department with an opportunity to weigh in on delegated actions of county conservation districts prior to an appeal to the Board. However, the Trust argues that these appeals to the Department do not happen in practice. It asserts that the *de facto* practice that has developed is that appeals of county conservation district actions have gone directly to the Board without a prior appeal to the Department or that appeals to the Board have been filed at the same time as appeals to the Department. According to the Trust, the "acknowledged procedure before the Board is to name both the Conservation District and the Department, given the fact that the District is the agent of the Department for these processes." (Memorandum in Reply to Motion to Dismiss, p. 12.) The Trust asserts that this practice has developed with the knowledge and acquiescence of

the Department. To the Trust's knowledge, this is the first time the Department has sought to have an appeal before the Board dismissed pursuant to Section 17(c).

The Trust further points out that when the Department publishes notices of general permit authorizations by county conservation districts in the Pennsylvania Bulletin, the notices state that appeals should be filed with the *Board*, not the Department. Specifically, the Trust directs our attention to the May 3, 2025 issue of the Pennsylvania Bulletin, in which notice of two general permits issued by the Erie County Conservation District was published. The notice states that persons aggrieved by these actions "may appeal such action to the Environmental Hearing Board." (Ex. 5 to Trust's Reply to Motion to Dismiss.) Thus, even the Department appears to believe that appeals of these actions should go to the Board.[6]

We note that the Pennsylvania Bulletin notices and appeals referenced by the Trust do not involve general permits issued under the Dam Safety Act; rather, they involve general permits issued by a delegated agency under the Clean Streams Law and Chapter 102 of the Department's regulations. However, the appeal language for such permits, set forth at 25 Pa. § 102.32(c), is similar to that of Section 17(c) of the Dam Safety Act except that Section 102.32(c) states that a person aggrieved by an action of a county conservation district *shall* request an informal hearing with the Department:

> A person aggrieved by an action of a conservation district under this chapter [25 Pa. Code Chapter 102] shall request an informal hearing with the Department within 30 days following the notice of the action. The Department will schedule the informal hearing and make a final determination within 30 days of the request. Any final determination by the Department under the informal hearing may be

[6] We were unable to locate any Pennsylvania Bulletin notice for the Permit issued in this matter. It is our understanding that such notices are to be published pursuant to 32 P. S. § 693.7(d) and 25 Pa. Code § 105.446(a)(1). If a notice were published and if it directed aggrieved parties to file an appeal with the Department, we believe the Department would have stated so in its reply.

> appealed to the EHB in accordance with established administrative and judicial procedures.

25 Pa. Code § 120.32(c). Thus, even though this regulatory provision states that an informal hearing shall be requested with the Department, the Department's notices in the Pennsylvania Bulletin state that an appeal should be taken to the Board.

The Trust contends that this situation is compounded by the fact that there is no established regulatory procedure for appealing a delegated agency action to the Department. The Trust points to deposition testimony by Ron Lybrook, the Department's Program Manager for Waterways and Wetlands. Mr. Lybrook was asked about the process for appealing delegated agency actions to the Department pursuant to Section 17(c) of the Dam Safety Act:

> Q Is there a procedure that the department requests when a person asks for an appeal?
>
> A There is no formal procedure that I'm aware of.
>
> Q …Who do they write when they appeal the issuance of a general permit?
>
> A We haven't received one, but I would expect that they -- the statute indicates that they write to the department, and I would suspect that they would write to me as the program manager.
>
> Q So would they write to the regional office or the central office? And if they write to one of those offices, who do they send the letter to?
>
> A They would write to the regional office and I would expect them to send that to me. Or perhaps it could be sent to our assistant regional director or our regional director who would provide --
>
> Q There's no written procedure for that, in other words?
>
> A No.
>
> Q It doesn't say who gets the -- either the central office gets it or the regional –

A That's correct. That's correct.

Q Is there a form that should be used when a person appeals a general permit decision from the conservation district to the department?

A Not that I'm aware of.

(Ex. 4 to Trust Reply, p. 29-30.)

The Trust argues that dismissing its appeal for failing to meet undefined and unidentified appeal requirements violates its right to due process, especially here where it is now too late to appeal the Permit issuance to the Department. Given the lack of an established procedure, it argues that the service of its Notice of Appeal in *this* appeal should have constituted notice to the Department that the Trust wished to appeal the Conservation District's authorization of the Permit.[7]

We agree with the Trust that the Department's lack of a process for filing an appeal of a delegated agency action pursuant to Section 17(c) creates uncertainty for anyone wishing to challenge such actions. According to Mr. Lybrook's testimony, not only is there is a lack of procedure but it is unclear where such appeals should even go. There appears to be no process for where an appeal should be filed; what form it should take or what information it should contain; whether a hearing will be held; or whether there is a process for accepting an appeal *nunc pro tunc*. We find it noteworthy that, according to Mr. Lybrook, the Department has not received any appeals of a general permit under Section 17(c). (Ex. 4 to Trust Reply, p. 29, line 23.) Dismissing the Trust's appeal for failing to follow a procedure that does not exist seems to us to raise a question of fundamental fairness. This is especially true here where it is now too late for the Trust to appeal

[7] The Trust also asserts that it requested a meeting with the Department regarding the Permit. However, that request was made by letter dated February 24, 2025, which was outside the 30 day-timeframe set forth in Section 17(c) for taking an appeal to the Department.

the Permit issuance to the Department, and dismissal of the appeal before the Board would leave the Trust without recourse. The only procedure that seems to exist is set forth in the Department's Pennsylvania Bulletin notices and it directs aggrieved parties to file appeals of county conservation district actions with the *Board.*[8] The Department does not address these issues in its reply. Without hearing from the Department on these fundamental issues leaves us with questions as to whether the Department's motion can be granted without violating the Trust's right to due process. Such unresolved issues must be weighed against the moving party, the Department.

We note that, once the Department learned that the Trust had filed an appeal of the Permit with the Board on February 5, 2025, the Department could have acted to advise the Board and the parties that an appeal first needed to be filed with the Department, particularly given the lack of an established procedure for filing such appeals with the Department. At the time the Trust filed its appeal with the Board, there were still nearly two weeks in which an appeal could have been filed with the Department.[9] However, the Department took no action until it filed its motion to dismiss on April 23, 2025, well outside the timeframe in which the Trust could have appealed the Permit to the Department.[10]

Finally, we note that even though the Trust did not appeal the issuance of the original Permit to the Department, it *did* appeal the issuance of the Modified Permit.[11] Thus, there is a

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[8] The Permit and cover letter are silent as to where appeals should be filed. (Ex. A to Notice of Appeal.)

[9] The Trust received notice of the Permit issuance on January 16, 2025. Under Section 17(c) of the Dam Safety Act, an appeal could have been filed with the Department up to February 18, 2025, accounting for the intervening weekend and Presidents' Day holiday.

[10] The Trust asserts that its counsel raised the question of jurisdiction on a conference call on March 24, 2025 and the Department stated it had no objection. (Trust's Memorandum in Reply, p. 3.)

[11] There appears to be no dispute that the Trust has appealed the Modified Permit to the Department. In its response, the Trust states that it notified the Department by letter on May 6, 2025 that it was seeking to appeal the Modified Permit and the Department held an informal hearing on May 30, 2025. The Department does not challenge these statements.

question as to whether the Department's motion to dismiss is now moot in light of the appeal of the Modified Permit. It is unclear to the Board whether the Modified Permit supersedes the original Permit. This issue was not addressed by the parties in their filings.

The Board is reluctant to grant motions to dismiss in all but the clearest of cases. *Thomas v. DEP*, 1998 EHB 93,98. See also *M&M Realty Partners v. DEP*, 2024 EHB 406, 410 (citing *Kopko v. DEP*, 2019 EHB 179) (Any doubt must be resolved in favor of the non-moving party) and *Kelosky*, 2024 EHB at 664 (When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true). Because the Department's motion leaves a number of questions unresolved, dismissal is inappropriate at this time.

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	:	

O R D E R

AND NOW, this 1st day of July, 2025, the Motion to Dismiss of the Department of Environmental Protection and the Erie County Conservation District is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: July 1, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Dearald W. Shuffstall, Esquire

Jennifer N. McDonough, Esquire
David R. Hull, Esquire
(*via electronic filing system*)

For Appellant:
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For Erie County Conservation District:
Dearald W. Shuffstall, Esquire
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David R. Hull, Esquire
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For Permittee:
Michael J. Musone, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. YODER AND LAURA D. YODER	:	
v.	:	**EHB Docket No. 2024-097-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 8, 2025**

OPINION AND ORDER ON
MOTION TO EXCEED PAGE LIMIT

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board ("Board") grants the Department of Environmental Protection's ("Department") Motion for Leave to Exceed the Page Limit, as set forth by 25 Pa. Code § 1021.94a(g)(2) governing responses to statements of undisputed material facts.

O P I N I O N

Discussion

This appeal pertains to the Appellants' challenge of the Department's April 10, 2024 Administrative Order addressing alleged violations of the Solid Waste Management Act. On June 5, 2025, Appellants filed a Motion for Summary Judgment. On July 1, 2025, the Department filed a Motion to Exceed the Page Limit in its response to Appellants' statement of undisputed material facts. On July 7, 2025, Appellants filed their Opposition to the Motion to Exceed. Upon review of the filed materials, the Board grants the Department's Motion.

The Board[1] has routinely granted extensions of page limits for dispositive motions and responses to dispositive motions despite direct opposition by opposing parties and without seeing a preview of the assertions claimed to be necessary. *See Amerikohl Mining, Inc. v. DEP*, 2023-002-CS (Sept. 28, 2023) (granting Appellant's request to extend response period and to file a statement of undisputed material facts of up to seven (7) pages); *Glahn v. DEP*, 2022-013-L (Sept. 28, 2022 Order) (granting Appellants' request to file a statement of undisputed material facts of up to 20 pages and a brief in support of their motion of up to 45 pages); *Three Rivers Waterkeeper and Sierra Club v. DEP, et. al.,* 2018-088-R (July 29, 2019 Order) (granting Permittee's request to exceed the page limit requirements in both its Response to Appellants' statement of undisputed material facts and its Brief in Opposition to Appellants' Motion for Partial Summary Judgment). The Board's leniency in these matters directly results from Pennsylvania's summary judgment standard. In evaluating whether summary judgment is appropriate, the Board must determine whether any genuine issues of material facts exist. *Stedge v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (*citing Clean Air Council v. DEP*, 2013 EHB 404, 406). This includes an analysis into any and all relevant material facts at issue, even if they exceed a five (5) page limit.

Upon review of the Department's assertions in its Motion to Exceed - that there is a "substantial history in this matter that dates back to 2017, which includes five complaints, several

[1] We note for the record Appellants and their counsel's statements throughout these proceedings questioning the independence and neutrality of the Environmental Hearing Board. To be clear, the Board is NOT an arm of the Department. The Board was created by the PA General Assembly to be completely independent of the Department by the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516. The Board's primary, though not sole, function is to review final actions of the Department when appeals of those actions are properly and timely filed. In those cases where the Board concludes that the Department incorrectly took an action, it has the authority to rule in favor of the appellants' appeal and further, it may substitute its own discretion for the Department's incorrect action or remand the case to the Department for corrected action.

separate investigations and inspections, and additional records obtained from commercial facilities and local fire companies by the Department during the pendency of this matter" – as well as Appellants' objections thereto, we find that in order for the Board to conduct a fair and meaningful review of Appellants' Motion for Summary Judgment, the Department's version of the undisputed facts and the factual history of the Site at issue should be considered. We do not find that the Department needs to outline in specific terms or examples why or how its factual averments are relevant to Appellants' Motion for Summary Judgment, as argued by Appellants. Rather, relevancy of facts will be for the Board to decide after review of all the materials.

Therefore, the Department may exceed the five (5) page limit in its response to Appellants' statement of undisputed material facts. If requested, Appellants will be afforded similar leniency by the Board in their Reply Brief, pursuant to 25 Pa. Code § 1021.94a(k).

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. YODER AND LAURA D. YODER	:	
v.	:	**EHB Docket No. 2024-097-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of July, 2025, upon consideration of the Department's Motion for Leave to Exceed the Page Limit set forth by 25 Pa. Code § 1021.94a(g)(2) governing responses to statements of undisputed material facts and Appellants' Response thereto, it is hereby ordered that the motion is **granted**. The Department's Response to Appellants' Motion for Summary Judgment is due by **July 11, 2025**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 8, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Robert Cronin, Esquire
Geoffrey Ayers, Esquire
(*via electronic filing system*)

For Appellants:
Kurt D. Mitchell, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LLC and JESSE JONES, JONES MANURE HAULING, LLP, and JONES FAMILY FARMS	:	
v.	:	**EHB Docket No. 2023-034-B (Consolidated with 2023-035-B, 2024-119-B, and 2024-121-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THOMAS CLOPPER, ET AL., Intervenors	:	**Issued: July 15, 2025**

OPINION AND ORDER ON
INTERVENORS' MOTION IN LIMINE

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies a motion in limine to preclude the expert report and testimony of an expert witness for the appellant where the expert will assist the Board in understanding the evidence in the case.

Background

This matter involves the consolidated appeals of Jesse Jones, Jones Manure Hauling, LLP, and Jones Family Farm (collectively, "Jones") and Barr Farms, LLC ("Barr Farms") of the Department of Environmental Protection's ("Department's") issuance of a Water Supply Notification and Administrative Order. Jones' operations that are relevant to this matter involve the transport of Food Processing Residuals ("FPR") to Pennsylvania farms where they are stored and eventually applied as fertilizer. On June 30, 2021, Jones transported FPR via a tanker truck to Barr Farms where a release of FPR occurred due to a torn hose. In August 2021 and September 2021, the Department received complaints about contaminated well water from residents located

in the area of Barr Farms. The Department investigated the complaints and concluded the June 2021 FPR release at Barr Farms caused the contamination of the surrounding wells.

On March 22, 2023, the Department issued a Water Supply Replacement Notification ("2023 Notification") to Jones and Barr Farms requiring them to provide a temporary water supply to the impacted residents and to restore or replace the impacted water supplies within 90 days. On August 12, 2024, the Department issued an Administrative Order ("2024 Order") to Jones and Barr Farms for their failure to comply with the 2023 Notification directives. The 2024 Order directed Jones and Barr Farms to pay the costs for temporary and permanent water supplies and to replace the water supplies. Both Jones and Barr Farms timely appealed the 2023 Notification and the 2024 Order. The Board consolidated the appeals of the 2023 Notification and 2024 Order and also granted intervention to Thomas Clopper, Lori Clopper, Anthony Grove, Stacie Grove, Brad Kershner and Kayla Kershner (collectively, the "Residents"), the impacted residents, allowing them to participate in the consolidated appeals. The consolidated appeals of Jones and Barr Farms challenge the Department's issuance of the 2023 Notification and the 2024 Order.

The hearing on the merits in this matter is scheduled to begin on July 28, 2025. The parties have filed their prehearing memoranda. Jones states in their prehearing memorandum that they intend to call Patrick Crawford, P.G. to offer testimony "consistent with his Expert Report." (Jones' Prehearing Memorandum at 9.) The Residents have now filed a Motion in Limine (the "Motion") asking us to preclude Mr. Crawford from testifying and to preclude his expert report.[1]

[1] The expert report is signed by two individuals: Ryan B. Beebe and Mr. Crawford. The Residents' Motion more specifically requests us to preclude both individuals from testifying. However, Jones' prehearing memo does not list Mr. Beebe as an expert witness they intend to call. To the extent Mr. Beebe is called as an expert witness, our ruling in this matter would permit him to be called but the failure to list him in a prehearing memo would allow the Residents to raise that issue challenging his ability to testify.

A copy of the expert report dated November 14, 2024, is attached to the Motion as Exhibit A. ("Report").

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93 (citing *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635). *See also* 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine."). The Board generally only accepts expert testimony if the testimony will assist us in understanding the evidence or determining a fact in issue. Pa.R.E. 702. "[T]he first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert's specialized knowledge will aid us in understanding the evidence or determining a fact in issue." *Rhodes v. DEP*, 2009 EHB 237, 239.

The Residents assert that we should exclude the Report [2] proffered by Jones[3]. They take issue with the Report's statement that "[p]erformance of additional testing and sampling on and off the Barr Farms property is the only way to confirm the origin of the contamination found in the offsite residential wells." (Motion at 2-3, citing the Report at Sec. 7.1). They assert that Mr. Crawford did not perform additional testing and sampling in order to determine the contamination

[2] The Judge presiding over this case as a rule does not admit full expert reports as exhibits in cases he is hearing. Parties may seek to admit portions of their expert reports in conjunction with supportive testimony from their experts who have been admitted at the hearing after any objections to their testimony have been addressed. Therefore, we read the Residents' Motion as seeking a ruling that no portion of the expert report may be presented at the upcoming hearing.

[3] We note that in its prehearing memorandum Barr Farms also listed Mr. Crawford as an expert witness and the Report as an exhibit. (Barr Farms' Prehearing Memorandum, Dkt. No. 46, at 10, 13). Because we deny the Motion as filed, we do not need to decide whether the failure to file a motion in limine challenging the listing of Mr. Crawford and the Report in Barr Farms' prehearing memorandum would provide an alternative basis for allowing testimony from Mr. Crawford and potential admission of portions of the Report.

source. The Residents argue that the Report fails to offer any opinion as to the source of the contamination of their wells and that it "offers no additional information, offers nothing to assist the trier of fact to determine facts at issue […], and applies no methodology to reach a conclusion as to the contamination of the Intervenors' water on their properties." (Motion at 2). They summarize their arguments by stating that the expert testimony should be precluded "due to the failure to offer any expert opinion within their report and concurrent failure to offer any opinion based on specialized knowledge to assist in determining a fact in issue – instead, merely identifying facts purportedly at issue." (Motion at 3). We disagree with the Intervenors' characterization of the Report and hold that there is no basis for excluding it or Mr. Crawford's testimony at this point in the proceeding.

The Residents' arguments about the Report are not well founded. In making their argument, the Residents appear to dismiss certain language in the Report while focusing on some sections while ignoring other parts of it. For instance, the Residents question Mr. Crawford's methodology. The Report states that Mr. Crawford's review included a review of the location, geography, geology, and history of where the release took place, review of the Department's 2024 Order and its manual pertaining to FPR management, sampling of FPR holding tanks, reviewing lab results of the FPR and well samples, reviewing the report of Department staffer Timothy Long, taking measurements of groundwater elevations from water wells, and a review of the legal depositions in this matter. (Report at 1). In matters in front of the Board, this is the type of information and method of review that is typically conducted by an expert as the basis for an expert report. The Residents may want to cross-examine Mr. Crawford about what he did and did not do to investigate the situation, but it does not provide a reason for excluding Mr. Crawford's testimony.

The Residents also argue that Jones' experts took "no steps to perform any additional analysis, geologic analysis, well video observation testing or sampling of the affected sites." (Motion at 3). According to the Report, on November 8, 2023, Crawford personnel conducted a site visit at the Barr Farms property to collect samples from the tanks and to observe and photograph the area of the FPR spill. The samples collected from the tanks were analyzed and compared to the samples previously collected by the Department and Groundwater Sciences. A second site visit was conducted by Crawford personnel on August 24, 2024, for the stated purpose of measuring the water table elevations in supply wells located on Barr Farms. This information was used to construct a potentiometric surface map to analyze groundwater flow direction. (Report at 7-9). Clearly, this work by Mr. Crawford belies the Residents' claim that Jones' experts had no scientific methodology nor performed any additional analysis, etc. To the extent that the Residents' arguments are that other types of testing or analysis should have been conducted, or that the work by Mr. Crawford was limited to the Barr Farms site and did not involve new sampling or new analysis of the Residents' wells, those arguments are not persuasive. Again, those may be points worth raising on cross-examination but hardly support excluding Mr. Crawford's expert testimony through a motion in limine.

The Residents' main argument that Mr. Crawford offers no opinions in the Report is simply not supported by a reading of the Report. At two points in the Report, Mr. Crawford specifically uses the term "Crawford's opinion" to offer an opinion based on his review of the situation and the information gathered during the site visits and sampling analysis. (Report at 6, "In Crawford's opinion, the decrease in well volume […]" and Report at 15, "It is Crawford's opinion that PADEP made conclusions that […]") Other text in the Report clearly constitutes opinions even though that terminology is not directly used. Those opinions include criticism or rebuttal of the

Department's expert report. The Report and its language are consistent with the type of expert rebuttal report that the Board receives and admits in many cases. The Residents argue that Mr. Crawford only sets forth additional work that he believes should have been conducted but was ultimately lacking from the Department's investigation and that this does not qualify as expert testimony. An expert report that offers an opinion in the form of a rebuttal to an opposing parties' expert does not make it any less of an expert opinion. Rebuttal testimony and evidence is not outside the purview and character of expert testimony as the Residents argue. Finally, the Residents assert that any statements or "opinions" should be disregarded because the Report never indicates that they were made "within a reasonable degree of scientific certainty." (Motion at 2). While using that language is certainly helpful, we have repeatedly stated that using those specific words is not a pre-requisite to including an expert opinion in the record. See *High v. DEP*, 2023 EHB 331, 335 ("the absence of "magic words" like "reasonable degree of scientific certainty" or "reasonable degree of certainty" does not necessarily discount or reduce the weight of [the expert's] testimony."); *Blythe Township and FKV, LLC v. DEP and Borough of St. Clair*, 2011 EHB 433, 435 ("there is actually no absolute requirement that the phrase "reasonable degree of scientific certainty" be used at the hearing, let alone in an expert report, so long as the testimony, when taken in context and a whole, reflects the requisite level of confidence."); *City of Harrisburg v. DER, and Pennsylvania Fish and Boat Commission*, 1996 EHB 709, 715 (an expert's failure to recite the words "to a reasonable degree of scientific certainty" does not render his testimony inadmissible so long as his testimony is expressed with reasonable certainty.").

Based on our review of the Report and the Residents' challenges to it, we conclude that Mr. Crawford's testimony will assist the Board in understanding the evidence in this matter. The fundamental issue in this case is one of causation. The Department and the Residents contend that

the FPR spill caused the contamination of the Residents' wells. In support of this position, the Department and the Residents each offer their own expert witness and expert report. Mr. Crawford and his Report challenge the Department's conclusion about causation. The Report includes additional observations and data and raises alleged shortcomings with the Department's investigation. We believe that the testimony from all of the parties' experts, including Mr. Crawford, will allow the Board to fully evaluate the issue of causation and determine whether the Department's conclusion in this case is adequately supported by the facts. For that reason and the others set forth above, the Motion is denied.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LLC and JESSE JONES, JONES MANURE HAULING, LLP, and JONES FAMILY FARMS	:	
v.	:	**EHB Docket No. 2023-034-B (Consolidated with 2023-035-B, 2024-119-B, and 2024-121-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THOMAS CLOPPER, ET AL., Intervenors	:	

O R D E R

AND NOW, this 15th day of July, 2025, the Intervenors' Motion in Limine is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: July 15, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

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For Appellants, Jesse Jones, Jones Manure Hauling, LLP, and Jones Family Farms:
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Anthony J. Gabriel, Esquire
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For Intervenors:
William G. Roark, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-085-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: July 23, 2025**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By MaryAnne Wesdock, Judge

Synopsis

Motions for summary judgment are denied where the issues involve complex questions of law and fact. Additionally, the Appellant's motion is denied because the Appellant did not file a reply to the Department's and Permittee's responses and, therefore, did not address arguments raised by them in opposition to the Appellant's motion.

O P I N I O N

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Protect PT seeking recission of permits for five unconventional gas wells issued to Olympus Energy, LLC (Olympus) by the Department of Environmental Protection (Department) in connection with Olympus' Aphrodite well pad in Penn Township, Westmoreland County.

Background

On August 21, 2023, Olympus submitted permit applications to the Department for five unconventional gas wells to be drilled at its Aphrodite well pad in Penn Township, Westmoreland County. On September 25, 2023, the Department issued permits for the 1M, 2M, 3M, 4M, and 6M

wells (Aphrodite wells or permits). On October 24, 2023,[1] Protect PT filed an appeal of the issuance of the five well permits with the Board.

Pursuant to 58 Pa. C.S. § 3211(i), a well permit expires one year after issuance if drilling has not commenced or if the permit has not been renewed in accordance with Department regulations. To obtain a renewal, an operator may submit a request accompanied by a fee, a surcharge, and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b). If issued, the renewal is valid for two years. *See id.*

On August 6, 2024, Olympus submitted renewal applications for the 2M, 4M, and 6M wells, and on August 29, 2024, the Department issued the renewal permits for those wells. Because drilling had not commenced for the 1M and 3M wells and Olympus did not seek renewal of those permits, the 1M and 3M well permits expired on September 25, 2024.[2] (Olympus Statement of Undisputed Material Facts, para. 6.) Protect PT did not appeal the issuance of the renewal permits for the 2M, 4M, and 6M wells.

On February 19, 2025, the parties filed a Stipulation with the Board providing that "Appellant is limiting the scope of this Appeal and is proceeding only on the objections stated in Paragraphs 46–50 of the Notice of Appeal." (Stipulation, EHB Docket No. 2023-085-W, Docket Entry No. 25, p 3). Pursuant to this stipulation, the five objections remaining in this appeal are as follows:

> 46. Protect PT objects to the Department's approval of the Well Permit [sic] which allow hydraulic fracturing, well drilling, and natural gas production in close proximity to sensitive receptors and populations such as residential homes, and a school, without taking

[1] The appeal was filed on October 24, 2023, although docketed on October 25, 2023 due to technical issues.

[2] While the permits for the 1M and 3M wells have expired, Protect PT has not withdrawn its claims pursuant to those permits.

> into account the cumulative effects of all well permits in the area, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.
>
> 47. The Department has failed to consider all related facilities in the area as a single facility, and failed to review them in the aggregate, and is therefore in violation of applicable law.
>
> 48. Additionally, the existence of, and proximity of the compressor station, and associated pipelines, to the well pads must be considered, in the aggregate with all of the drill and operate permits that were issued, and are currently the subject of this appeal.
>
> 49. Because the Department has failed in its obligation to enforce Federal Regulations as they apply to NSPS and as described above, the permit applications must be denied, and/or subject to further review.
>
> 50. The Permits do not place limits on or require a permit for air emissions of Hazardous Chemicals or TENORM, as the activities authorized under the Permits are exempt from regulation by 25 Pa. Code § 127.14(8)(38c). This exemption violates the ERA.

(Notice of Appeal, EHB Docket No. 2023-085-W.)

Pending before the Board are motions for summary judgment filed by all three parties. The Department and Olympus each filed a response in opposition to Protect PT's motion, but Protect PT did not file a reply. Additionally, while Protect PT filed a brief in response to the Department's and Olympus' motions, it did not respond to the Department's and Olympus' statements of undisputed material facts and, therefore, we may deem certain facts admitted by Protect PT. *Merck Sharp & Dohme Corp. v. DEP*, 2016 EHB 411, 411, n.1; *Macyda v. DEP*, 2011 EHB 526, 531–32 (citing *Blue Marsh Labs. v. DEP*, 2007 EHB 777, 779); *Kraft v. DEP*, 2011 EHB 50, 51, n.2.

Standard of Review

Summary judgment may be granted when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of

material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Scrubgrass Creek Watershed Association v. DEP*, 2024 EHB 747, 748 (citing *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223). In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Liberty Township v. DEP*, 2024 EHB 872, 874 (citing *Stedge v. DEP*, 2015 EHB 31, 33); *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Barr Farms, LLC v. DEP,* EHB Docket No. 2023-034-B, *slip op.* at 3 (Opinion and Order on Motion for Summary Judgment (issued Apr. 4, 2025)) (citing *Sierra Club*, 2023 EHB at 99). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, 2024 EHB 318, 319; *Amerikohl Mining Inc. v. DEP,* 2023 EHB 348, 352 (citing *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217).

The Board's rules specify that a summary judgment record shall contain a motion, supporting brief, statement of undisputed material facts, and evidentiary materials relied upon by the movant. 25 Pa. Code § 1021.94a(b). A party opposing the motion shall file a response to the motion, a response to the statement of undisputed material facts and a brief containing legal argument in opposition to the motion. *Id.* at § 1021.94a(g). Pursuant to § 1021.94a(k), the moving party may file a reply brief to the opposing party's response. *Kazmierczak v. DEP*, 2016 EHB 124, n. 2. Although a reply brief is not required by the Board's rules, it is strongly encouraged since it provides the moving party with an opportunity to address the arguments raised in opposition to the motion and to demonstrate that there are no material issues in dispute. As former Judge Coleman stated, "[t]he reply brief is intended as the 'last word.'" *Williams v. DEP*, 2019

EHB 764, 771. Where the moving party chooses to forego having the "last word," it runs a greater risk of having its motion denied.

1M and 3M Wells

Before turning to the specific arguments made by the parties in their motions, we first address an argument highlighted by Olympus in a footnote. As noted earlier, according to Olympus, the 1M and 3M well permits were not renewed and expired on September 25, 2024. In footnote 2 of its brief in support of its motion for summary judgment, Olympus requests that the Board find Protect PT's appeal moot as to the 1M and 3M permits. While the appeal of these permits does appear to be moot, raising this issue in a footnote is not the proper procedure for seeking dismissal of the appeal as to these permits. If Olympus wishes to dismiss the appeal as to the 1M and 3M wells, it must set forth this argument in a properly supported motion as required by 25 Pa. Code §§ 1021.94 and 1021.94a.

We now turn to the issues on which the parties seek summary judgment.

Public Resources

In its motion for summary judgment, Protect PT argues that the Department violated Article I, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment, as well as 25 Pa. Code § 78a.15(g),[3] by failing to consider "potential impacts on public resources from the issuance of the Permits, whether privately or publicly owned, including those resources that are essential to the quality of life, including areas of purely aesthetic

[3] While Protect PT's motion refers to 25 Pa. Code § 78(g), we believe it to mean 25 Pa. Code § 78a.15(g) given the context regarding consideration of public resources. Section 78a.15(g) sets forth a number of items that the Department must consider prior to adding conditions to a well permit based on impacts to public resources

or historical concern." (Brief in Support of Protect PT's Motion, p. 4.) In response, the Department and Olympus argue that the public resources argument is outside the scope of this appeal because it was not included in the notice of appeal. They further assert that the argument is not supported by record evidence.

Allegations and issues that are not raised in a notice of appeal are generally waived. *Citizens for Pennsylvania's Future v. DEP*, 2024 EHB 624, 630 (citing *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637). However, objections raised in general terms are typically sufficient to avoid waiver. *Clean Air Council v. DEP*, 2022 EHB 291, 294 (citing *Croner, Inc. v. Department of Environmental Protection*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991)). Notices of appeal are to be read broadly. *Citizens for Pennsylvania's Future v. DEP*, 2024 EHB 232, 234. "So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver." *Protect PT v. DEP*, 2024 EHB 838, 843 (quoting *Rhodes v. DEP*, 2009 EHB 325, 327).

It is true that none of the objections set forth in paragraphs 46-50 of the notice of appeal discuss "public resources." However, in paragraph 46 of its notice of appeal, Protect PT states that it objects to the issuance of the permits because the Department failed to consider the proximity of the wells to "sensitive receptors." It is unclear whether this objection is intended to include "public resources" since Protect PT does not expand on this term in its notice of appeal or its motion. Nor did Protect PT file a reply addressing the arguments made by Olympus and the Department in their responses to its motion. For this reason alone, we may deny summary judgment to Protect PT on this issue since questions of law and fact remain. Moreover, even if we

were to find that the public resources argument is subsumed within Objection 46 of the notice of appeal, Protect PT has not presented the level of analysis or factual detail in its motion that is necessary to obtain summary judgment on its claim. Protect PT did not identify the potential impacts on public resources it believes the Department failed to consider, nor which public resources it believes will be impacted. It simply makes a general argument that public resources should have been considered, which is insufficient to carry its motion. Accordingly, we deny summary judgment on this issue.

Cumulative Impact

In paragraph 46 of its notice of appeal, Protect makes the following claim:

> Protect PT objects to the Department's approval of the Well Permit [sic] which allow hydraulic fracturing, well drilling, and natural gas production in close proximity to sensitive receptors and populations such as residential homes, and a school, without taking into account the cumulative effects of all well permits in the area, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

(Notice of Appeal, para. 46.)

In their motions, the Department and Olympus contend that Protect PT's claim regarding cumulative effects should be dismissed due to lack of evidentiary support. The Department argues that Protect PT's cumulative effects claim is not tethered to any evidence. Per the Department, Protect PT failed to "produce actual evidence as to *what* are the cumulative effects specifically, or *how* the cumulative effects from the well site will combine in any cumulative detrimental effect to sensitive receptors, much less cause unreasonable degradation, diminution, depletion or deterioration of the public natural resources of the Commonwealth." (Brief in Support of the Department's Motion for Summary Judgment, p. 19) (emphasis in original). Olympus also argues

that the cumulative effects claim should be dismissed due to a lack of evidence supporting the claim. Olympus notes that while Protect PT identified other permitted well sites in the area that it believes should have been considered in its cumulative effects argument,[4] Protect PT did not provide evidence regarding emissions from the Aphrodite well site or any other oil and gas facility in the vicinity, the fate and transport of contaminants from those sites, or the environmental or health impacts associated therewith. (Brief in Support of Olympus' Motion for Summary Judgment, p. 8.) Additionally, Olympus points out that Protect PT did not depose anyone from the Department or Olympus on this topic.

In its response brief, Protect PT argues that it is the Department's duty under the Environmental Rights Amendment "to review the entirety of the proposed development and not allow piecemeal application[s] for permits." (Protect PT's Brief in Response to Olympus' and DEP's Motions for Summary Judgment, p. 5.)[5] It asserts that the permits issued by the Department allow introduction of heavy-duty industrial activities, including hazardous and radioactive waste, noise, dust, the presence of drilling equipment, 24-hour operation of the site, and truck traffic, among others.

This Board has previously held that, under certain circumstances, it may be appropriate to take other nearby sites or operations into consideration when assessing a new project's potential impact on natural resources. *See, e.g., New Hanover Township v. DEP*, 2020 EHB 124, *rev'd sub*

[4] Olympus identifies the other permitted well sites as: Metis, Gaia, Titan, Poseidon, Potts, Stewart, Quest, Drakulic, Fatur, and McIlvaine. (Brief in Support of Olympus' Motion for Summary Judgment, p. 7, n. 3.)

[5] Protect PT's brief in response to the Department's and Olympus' motions does not contain page numbers, which would have been helpful in citing thereto. The page reference herein is derived from counting the number of pages in Protect PT's brief. *See Karnick v. DEP*, 2018 EHB 346, n. 15; *West Norriton Township v. DEP*, 2009 EHB 9, n. 6.

nom. Gibralter Rock, Inc. v. Pa. Dep't of Envtl. Prot, 258 A.3d 572 (Pa. Cmwlth. 2021), *vacated and remanded*, 286 A.3d 713 (Pa. 2022), *aff'd*, 316 A.3d 668 (Pa. Cmwlth. 2024) (finding that the Department did not consider the full environmental effects of its action where it did not consider the impact a proposed quarry would have on a nearby site undergoing remediation under the Hazardous Sites Cleanup Act); *Valley Creek Coalition v. DEP*, 1999 EHB 935 (finding that where the Department has issued a series of permits authorizing discharges into the same watershed, it is logical to take those other permits into consideration). *See also Davailus v. DEP*, 1991 EHB 1191, 1196 (in evaluating the environmental impact of a project, the cumulative impact of piecemeal habitat losses must be considered).

Here, Protect PT asserts that *all effects,* such as noise, dust, and truck traffic, of the various well permits in the area should be considered. In the cases in which the Board has assessed such arguments previously, we have addressed and analyzed a number of factors that play a role in the determination of whether the effects of the project should have been cumulatively considered. *New Hanover Township*, 2020 EHB at 192; *Valley Creek Coalition*, 1999 EHB at 951. As such, cases involving cumulative impact arguments are typically complex and technical. We have repeatedly held that complex and technical issues are inappropriate for summary judgment. *Scrubgrass Creek Watershed Association v. DEP*, 2024 EHB 747, 761; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 499. We believe that statement holds true here and that this claim would be better addressed at a hearing on the merits. Accordingly, the Department and Olympus' motions for summary judgment with respect to Protect PT's cumulative effects claim is denied.

"Aggregation"

In paragraphs 47 and 48 of its notice of appeal, Protect PT makes the following claims:

> 47. The Department has failed to consider all related facilities in the area as a single facility, and failed to review them in the aggregate, and is therefore in violation of applicable law.
>
> 48. Additionally, the existence of, and proximity of the compressor station, and associated pipelines, to the well pads must be considered, in the aggregate with all of the drill and operate permits that were issued, and are currently the subject of this appeal.

(Notice of Appeal, para. 47-48.)

At first glance, Protect PT's "aggregation" claims appear to relate to the air permitting requirements of the federal Clean Air Act and the underlying regulations. Under federal and state air regulations, multiple pollutant-emitting sources are to be aggregated and considered a single stationary source for purposes of air quality regulation if they: (1) are under common control; (2) belong to the same major industrial grouping; and (3) are located on one or more contiguous or adjacent properties. *Clean Air Council v. DEP*, 2013 EHB 346, 348-49 (citing 40 C.F.R. § 71.2; 25 Pa. Code § 121.1). For oil and natural gas facilities, pollutant-emitting activities are considered to be "adjacent" if they are located on the same surface site or located on surface sites that are within ¼ mile of one another and share equipment. 40 C.F.R. § 52.21(b)(6)(ii).

Protect PT seems to rely on the definition of "adjacent" in Section 52.21(b)(6)(ii) of the federal regulations when it asserts, "The DEP is aware that the Guardian Compressor Station and Poseidon wells are also planned for this parcel and around ¼ mile away from the Aphrodite well pad." (Protect PT's Brief in Support of Motion for Summary Judgment, p. 7) (relying on Protect PT's Statement of Undisputed Material Facts, para. 8 and 9).[6] Olympus is the permittee of the

[6] Olympus and the Department dispute Protect PT's assertion that the Poseidon well pad is within ¼ mile of the Aphrodite site and point to evidence in the record demonstrating that it is, in fact, ¾ mile from the Aphrodite site. (Olympus' Brief in Opposition to Protect PT's Motion, p. 9, citing Ex. 3 to Protect PT's Motion; Department's Response to Protect PT's Statement of Undisputed Material Facts, para. 8.) They also assert that the Guardian Compressor Station had not been constructed, nor had a permit been submitted,

Poseidon well pad (Ex. 3 to Protect PT's Motion), and Hyperion Midstream, LLC, a subsidiary of Olympus, is the permittee of the Guardian Compressor Station (Olympus Statements of Undisputed Material Facts, para. 10, 13).

However, Protect PT does not cite to the Clean Air Act, the federal air regulations or the state air regulations in making the argument that the Department should have considered all related facilities in the area of the Aphrodite well pad in the aggregate, and, therefore, we do not believe that Protect PT is asserting that the Department violated those laws in permitting the Aphrodite wells. Rather, Protect PT's "aggregation" claims seem to be an extension of its "cumulative impact" argument discussed earlier. Indeed, in its brief in support of its motion, under the section entitled "Aggregation," Protect PT argues, "By piecemealing the project into separate parts, Olympus is able to avoid the environmental ramifications of the project *as a whole* being considered by the Department during the approval of the wells." (Protect PT's Brief in Support of Motion for Summary Judgment, p. 6) (emphasis added). Specifically, Protect PT argues that the impact of the Poseidon wells, Guardian Compressor Station and related facilities should have been aggregated with that of the Aphrodite wells under the Environmental Rights Amendment, stating, "Appellant contends that the proximity of the well pads and the compressor station creates a pollution source that should have been analyzed as a whole, and . . . the DEP's failure to do so is therefore in violation of Article 1, Section 27 of the Pennsylvania Constitution." *Id.*

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at the time the Aphrodite wells were permitted. (Olympus' Brief in Support of Motion for Summary Judgment, p. 21-22; Department's Brief in Support of Motion for Summary Judgment, p. 22.)

As we stated earlier, cases involving cumulative impact arguments are typically complex and technical in nature and are better addressed at a hearing on the merits. Accordingly, summary judgment on Protect PT's "aggregation" claim is denied.

New Source Performance Standards

In paragraph 49 of its notice of appeal, Protect PT raises challenges relating to federal air regulations and argues that the Department failed to properly apply the federal New Source Performance Standards, stating as follows:

> 49. Because the Department has failed in its obligation to enforce Federal Regulations as they apply to [New Source Performance Standards] and as described above, the permit applications must be denied, and/or subject to further review.[7]

(Notice of Appeal, para. 49.)

New Source Performance Standards (NSPS) are developed under the Clean Air Act for any category of air contamination sources that may endanger the public's health or welfare. 42 U.S.C.A. § 7411(b); 40 C.F.R. Part 60. The NSPS are incorporated into the Department's air regulations by reference at 25 Pa. Code § 122.3. Because the Aphrodite wells will be constructed after December 6, 2022, they will be subject to NSPS, OOOOb, the most stringent NSPS standard thus far for the oil and natural gas source category. Although Protect PT does not expand on its NSPS claim in its motion or in response to the Department's and Olympus' motions, in answers to interrogatories it describes its argument as follows: "Protect PT believes that the DEP does not have and has not requested information from Olympus Energy regarding air pollution produced

[7] While Protect PT utilizes the word "enforce" in its objection, based on the discovery responses regarding this claim that were highlighted in the Department's motion, we believe that Protect PT is actually arguing that the Department failed to properly apply the NSPS with respect to the site at issue. (*See* Brief in Support of the Department's Motion for Summary Judgment, p. 15, 16.)

during the flowback stage of horizontal well completion and therefore compliance with NSPS standards cannot be evaluated." (Ex. G to Department's Motion, Response to Interrogatory 37.)

As noted earlier, where a matter involves complex questions of law and fact, summary judgment may not be granted. We find that the air issues relating to NSPS raised by Protect PT fall into this category. We simply do not have enough information at this stage to make a determination that any party is clearly entitled to judgment as a matter of law.

Radiation/TENORM and Exemption 38(c)

Protect PT also argues that the Department violated Article I, Section 27 by not placing limits on or requiring a permit for air emissions of hazardous chemicals or technically enhanced naturally occurring radioactive material (TENORM):

> 50. The Permits do not place limits on or require a permit for air emissions of Hazardous Chemicals or TENORM, as the activities authorized under the Permits are exempt from regulation by 25 Pa. Code § 127.14(8)(38c). This exemption violates the ERA.

(Notice of Appeal, para. 50.) Pennsylvania exemption 38(c) allows a source determined to be of minor significance to operate without obtaining plan approval or an operating permit under state air regulations, so long as certain qualifications are met.

The Department and Olympus argue that Protect PT has not offered any evidence to show that TENORM will be present in dangerous concentrations at the Aphrodite well site. According to the Department, while Protect PT's expert, Marc Glass, raises the potential for TENORM to be generated at the site, his report does not show how that generation is specific to the Aphrodite well pad or any other Olympus well site. Likewise, Olympus argues that Mr. Glass' report is little more than speculation. Protect PT responds that it has, in fact, introduced evidence in support of its radiation claims by virtue of Mr. Glass' expert report. It disputes Olympus' characterization of Mr.

Glass' report and points out that the report discusses how TENORM is generated by the oil and gas production process and that over time, this can result in deleterious health effects.

Upon review of Mr. Glass' report, we do believe that Protect PT has provided evidence of facts essential to its cause of action. While the Department and Olympus highlight that Mr. Glass' report is more generalized to the oil and gas industry, rather than specific to the Aphrodite site, we recognize Mr. Glass' explanation that "[r]adiological gaseous emissions from oil and gas infrastructure are not generally directly measured or reported by operators or regulatory agencies." (Protect PT's Brief in Response to Olympus' and DEP's Motions for Summary Judgment, Ex. 1, p. 14.) As such, generalized data and information may be the best information available to Protect PT at this time.

The Department relies heavily on the Board's opinion issued in *Protect PT v. DEP*, 2024 EHB 683, in support of its argument that Protect PT failed to offer evidence sufficient to support its radiation claims. In that opinion, the Board dismissed Protect PT's claim regarding the presence of PFAS at the site in question. We want to make clear that an appellant need not definitively or absolutely prove its entire case to survive a motion for summary judgment. *See Diehl v. DEP*, 2018 EHB 18, 25 ("In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument.") (citing *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 724); *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, *slip op.* at 11 (Opinion and Order on Motion for Summary Judgment (issued Apr. 4, 2025)). It simply must present sufficient evidence in support of its claim to move forward to a hearing. *Sunoco Pipeline L.P. v. DEP*, 2021 EHB 43, 53 ("Where the Department can muster sufficient facts to demonstrate that the danger of pollution is not purely theoretical or that an implausible series of events is not

required to reach that conclusion, it will likely be able to establish a *prima facie* case when challenged in the context of a summary judgment motion."). In the *Protect PT* matter concerning PFAS, there was simply no evidence that supported PFAS use at the site, and evidence was provided by the opposing parties that PFAS would not be used. Here, however, Protect PT's expert report addresses how TENORM is likely to be generated at the Aphrodite site given its location in the Marcellus Shale formation, and the Department and Olympus have offered no evidence that TENORM will not be generated. In fact, the Department attached to its motion the Department's 2016 TENORM Study, a study aimed at collecting data regarding TENORM associated with oil and gas operations in Pennsylvania. This study serves as support for Protect PT's claim that TENORM is commonly associated with oil and gas well sites in Pennsylvania. As such, we find that Protect PT has produced evidence sufficient to make out a *prima facie* case on its TENORM claim. *See Sunoco Pipeline L.P.*, 2021 EHB at 50–51; *Belitskus v. DEP*, 1997 EHB 939, 952. Accordingly, summary judgment is denied on this claim.

Burden of Proof

Finally, based on statements made in Protect PT's briefs, it seems that Protect PT believes the burden should be on the Department and Olympus to show that the permits issued in this matter will not cause harm. It is well-established both in caselaw and under the Board's rules that the party seeking recourse (i.e. the overturning of a permit) has the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Friends of Lackawanna v. DEP*, EHB Docket No. 2021-066-L, *slip op.* at 70 (Adjudication (issued Apr. 1, 2025)); *Delaware Riverkeeper Network v. DEP*, 2024 EHB 549, 564; *Reed v. DEP*, 2024 EHB 417, 438. While all that Protect PT must provide in order to overcome a motion for summary judgment under Pa. R.C.P. 1035.2(2) is sufficient evidence on

which to move forward, the burden is still on Protect PT to produce evidence to prove its claim at a hearing on the merits.

In conclusion, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-085-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	

O R D E R

AND NOW, this 23rd day of July, 2025, it is hereby ORDERED that the parties' motions for summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: July 23, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Jeffrey Bailey, Esquire
Sharon R. Stritmatter. Esquire
Elena Papadakos, Esquire
(*via electronic filing system*)

For Appellant:
Tim Fitchett, Esquire
(*via electronic filing system*)

For Permittee:
Maureen O'Dea Brill, Esquire
Craig P. Wilson, Esquire
Travis L. Brannon, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. YODER AND LAURA D. YODER	:	
v.	:	**EHB Docket No. 2024-097-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 8, 2025**

OPINION AND ORDER ON
APPELLANTS JOHN E. YODER AND LAURA D. YODER'S MOTION FOR SUMMARY JUDGMENT

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board ("Board") denies appellants John E. Yoder and Laura D. Yoder's ("Appellants") Motion for Summary Judgment as genuine issues of law and material fact exist regarding the Department of Environmental Protection's ("Department") issuance of its April 10, 2024 Administrative Order.

O P I N I O N

Background

This appeal pertains to the Appellants' challenge of the Department's April 10, 2024 Administrative Order addressing alleged violations of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101- 6018.1003 ("Solid Waste Management Act").

Appellants jointly own real property in Chest Township, Clearfield County, identified in the Clearfield County Tax Assessment Office as Tax Parcel Number 1090F1700000079 ("Site"). (*See* April 10, 2024 Admin. Order ¶ C). The Site is used for the operation of a sawmill, where

logs are sawed into lumber for use in wood products.

The Department has alleged that after the logs are sawed, remnants of the timber unusable for wood products ("wood waste") are then burned at the Site without a permit or approval by the Department, in violation of the Solid Waste Management Act. (*See* April 10, 2024 Admin. Order ¶ D). Appellants do not dispute that timber is burned. Alternatively, they assert that the timber is not "waste" and that they beneficially use the ash from the burned timber as fertilizer for their soil. (NOA Objections, ¶¶ 3-4).

After a number of inspections at the Site by the Department and a February 9, 2024 Notice of Violation, the Department issued the subject April 10, 2024 Administrative Order ("Administrative Order") mandating that the Appellants: (1) cease and desist all dumping, processing, or burning of residual waste; (2) remove all ash from the Site and dispose of the ash at a permitted disposal facility in accordance with federal and state law; and (3) submit documentation to the Department that all remaining ash was properly disposed of at a facility authorized by the Commonwealth. (*See* April 10, 2024 Administrative Order, pg. 6).

On May 1, 2024, Appellants filed their appeal of the Administrative Order asserting that the timber/wood ash burned is non-hazardous agricultural waste that is used to fertilize Appellants' soil. Appellants further challenge the Administrative Order on the basis that the Appellants are Amish, and the Order violates the Religious Freedom Protection Act, 71 P.S. § 2401, et seq. (*See* May 1, 2024, NOA Objections).

Procedurally, this appeal has undergone a series of deadline extensions and discovery disputes. The current discovery deadline is in a stay[1] until several pending motions are ruled upon.

[1] Prior to the stay, the discovery deadline was July 31, 2025 and the dispositive motion deadline was September 2, 2025. (*See* March 14, 2025 Order).

(*See* July 8, 2025 Order). On June 5, 2025, Appellants filed a Motion for Summary Judgment ("Motion"). On July 11, 2025, the Department filed its Response.[2] Under Board rules, Appellants had a right to file a Reply Brief, which was due July 28, 2025, but no Reply was filed. *See* 25 Pa. Code § 1021.94a(k). This matter is ready for disposition.

Standard of Review[3]

Summary judgment is appropriate when the record - including pleadings, depositions, answers to interrogatories, and other related documents - shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. Summary judgment is also available if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. Pa.R.Civ.P. 1035.2(2); *Whitehall Twp. v. DEP*, 2017 EHB 160, 163. In other words, the party bearing the burden of proof must make out a *prima facie* case for its claims. *Longenecker v. DEP*, 2016 EHB 552, 554; *Morrison v. DEP*, 2016 EHB 717, 720.

Summary judgment is granted only in the clearest of cases, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Liberty Twp. v. DEP*, 2022 EHB 324, 326; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106. Cases

[2] On July 1, 2025, the Department filed a Motion to Exceed the Page Limit in its Response to Appellants' Undisputed Material Facts. On July 8, 2025, the Board granted the Motion and permitted the Department to file its Response to the pending Motion for Summary Judgment by July 11, 2025. (*See* July 8, 2025 Order).

[3] We note that Appellants' Brief in Support of their Motion for Summary Judgment failed to set forth a statement of their view of the appropriate standard for summary judgment as it applies to the matter before the Board.

that involve complex issues of fact and law are not appropriate for summary judgment as they require a fully developed record. *Three Rivers Waterkeeper v. DEP*, 2020 EHB 87; *Protect PT v. DEP and Apex Energy (PA), LLC*, 2020 EHB 27; *Center for Coalfield Justice v. DEP, et. al.*, 2016 EHB 341, 347; *Clean Air Council v. DEP*, 2013 EHB 404, 410-11. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (*citing Clean Air Council v. DEP*, 2013 EHB 404, 406).

Discussion

Appellants' allege they are entitled to summary judgment because: (1) the Department's administrative action violates their constitutional right to a jury trial pursuant to the Pennsylvania Constitution; (2) the Department's administrative action violates their constitutional right to due process, pursuant to the United States Constitution, because the same entity is acting as a prosecutor and trier of fact; and (3) the Department has failed to establish a *prima facie* case. (*See* Appellants' Summ. J. Motion at 1-2).

In response, the Department asserts that Appellants are not entitled to summary judgment because: (1) Appellants' constitutional due process claims are raised for the first time in their Motion, and are therefore waived, and (2) Appellants' arguments involve disputed questions of fact and law in which the Department has made out a *prima facie* case. (*See* DEP's Brief in Resp. to Summ. J. at 4).

Waiver of claims set forth in the Motion for Summary Judgment

Under Board rules, a motion for summary judgment must contain a concise statement of the relief requested and the reasons for granting that relief. 25 Pa. Code § 1021.94a(c). A motion for summary judgment must also include a brief *in support of* the motion that contains an

introduction, summary of the case, and any legal argument supporting the motion. 25 Pa. Code § 1021.94a(b)(iii) & (e) (emphasis added).

At the outset, Appellants do not comply with Board rules or Board precedent regarding dispositive motions. Appellants advance several due process and evidentiary arguments in their supporting brief that are not included in their Motion, without citing to any relevant Board case law that permits them to do so. Notably, the Board will not entertain a variety of allegations and theories sprinkled about in a supporting brief that are not set forth within the original motion. Any motion filed must set forth the specific grounds for the requested relief, and as such, the Board finds that parties must include all legal claims within the four corners of that motion. *See North American Oil & Gas Drilling Co. v. DER*, 1991 EHB 22, 26 ("counsel should be sufficiently aware of proper procedure before this Board and in the Courts of Pennsylvania to know that attorneys do not raise an argument for the first time in a supporting brief. Briefs are filed to support contentions advanced initially in motions..."). The legal memorandum or brief is used merely as a supplement to the motion, *i.e.,* to enhance the theories set forth in the motion with citations to supporting case law and evidentiary support. *See Barkman v. DER*, 1993 EHB 738, 745 ("The purpose of the supporting memorandum is simply to explain the motion, not to augment it. The Board has held previously that motions for summary judgment must set forth, with adequate particularity, the reasons for summary judgment and that representations in the legal memoranda alone are insufficient."). It is a procedural defect to do otherwise. *See Chestnut Ridge Conservancy v. DEP*, 1997 EHB 45, 49 ("By raising the issue in its supplemental brief, [Appellant] is attempting to expand the scope of its motion for summary judgment beyond that set forth in the motion itself. One cannot expand the scope of a motion in this manner."). Accordingly, the Board will only entertain and discuss arguments set forth in Appellants' Motion.

In light of the above, the Department argues that the due process and constitutional arguments Appellants make in their Motion are waived, as they are not included in their Notice of Appeal. (*See* DEP's Brief in Resp. to Summ. J. at 4-6). Pursuant to Pennsylvania Code and Board regulations, a notice of appeal to the Board must set forth separate specific objections – either factual or legal - to the action of the Department for which review is being sought. 25 Pa. Code § 1021.51(e). It is a longstanding rule that allegations not raised in the notice of appeal are waived. However, this Board has consistently held that notices of appeal are to be read broadly, and an issue will not be considered waived if it falls within a "broadly worded objection" or the "genre of an issue." *See Bennner Twp. Water Authority v. DEP*, 2019 EHB 594, 637; *New Hanover Twp. v. DEP*, 2011 EHB 645, 671 (quoting *Rhodes, et al. v. DEP*, 2009 EHB 325, 327).

Appellants' Notice of Appeal lists the following five (5) objections:

1) The Department is acting in an *ultra vires* fashion by attempting to enforce the solid waste act against the Appellants.

2) The Department's position that timber is "solid waste" is nonsensical. Timber is regularly burned in this commonwealth for heat and agricultural purposes;

3) Even if timber is "solid waste" Mr. Yoder's disposal of it is exempt pursuant to the Department's regulations 25 Pa. Code § 287.101(b)(1) exempting agricultural waste. . . . The timber being burned by Mr. Yoder is nonhazardous agricultural waste as defined by the Department and therefore, exempt from permitting pursuant to its regulations.

   Mr. Yoder is using the ashes from the burning for a beneficial purpose i.e. to fertilize his soil. Thus, the requirement that Mr. Yoder remediate the ash pile by disposing of it with a permitted disposal facility is both wasteful and beyond the authority of the Department.

4) The Department's action is at odds with *Gaspari v. Board of Adjustment of Muhlenberg Twp*., 139 A.2d 544 (Pa. 1958) which held that the manufacture of synthetic compost for use on the manufacturer's farm was not a commercial activity. Mr. Yoder's burning of timber to create ash for his fields is legally indistinguishable from the creation of synthetic compost for use as a fertilizer. Because Mr. Yoder is using the timber to create fertilizer for his crop he is conducting an agricultural activity;

   Mr. Yoder is not selling this ash to third-parties which would be a commercial activity

and subject to regulation. *See Tinicum Twp. v. Nowicki*, 99 A.3d 586 (Pa. Commw. 2014); and

5) The Department's action is substantially burdening the Appellant's exercise of his religion as engaging in agricultural type vocations is vital to the Amish lifestyle of self-reliance and reliance on one's community. Moreover, this substantial burden is not narrowly tailored to further a compelling government interest. As preventing the burning of wood and the removal of wood ash does not rise to the level of compelling interest. As such the Department actions are in violation of the Religious Freedom Protection Act 71 P.S. 2401, *et seq*.

(*See* May 1, 2024, NOA Objections).

Upon review of Appellants' listed objections, we agree with the Department that any constitutional arguments concerning the right to a jury trial and a fair and neutral tribunal[4] are not specifically raised in the Notice of Appeal. Indeed, even in the Board's attempt to be extraordinarily indulgent to Appellants' arguments, we cannot find that Appellants' due process claims fall within the genre of issues discussed in the Notice of Appeal objections.[5] We anticipated that Appellants would file a Reply Brief to address the Department's claims in its Response and argue that its claims were somehow included in the Appeal objections, but no such Reply was filed.[6] Thus, for the reasons stated above, the Board will not address the merits of Appellants'

[4] To the extent that Appellants' argue a former Department employee cannot act as a fair and neutral trier of fact, the Board finds this assertion to be without merit and any legitimate basis. The Environmental Hearing Board is a quasi-judicial agency **wholly separate** from the Department. Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516. Many Board Judges have served at one time as Department employees as well as litigators against the Department, which affords them the expertise to handle the appeals that come before them. Any allegations of bias are unfounded.

[5] If Appellants wished to pursue these arguments, they might have chosen to file a motion for leave to amend their notice of appeal. *See Pruden v. DEP*, EHB Docket No. 2024-023-BP, slip. op. at 7-13 (Opinion and Order May 19, 2025); *Chester Water Authority*, 2016 EHB 280, 285-87; *Joshi v. DEP*, 2018 EHB 771, 775.

[6] The Board has recently discussed the importance of the filing of a Reply Brief when dealing with dispositive motions. Specifically, Judge Wesdock stated:

> Although a reply brief is not required by the Board's rules, it is strongly encouraged since it provides the moving party with an opportunity to address the arguments raised in opposition to the motion and to demonstrate that there are no material issues in dispute. As former Judge Coleman stated, "[t]he reply brief is intended as the 'last word.'" *Williams v.*

constitutional due process claims[7] since we cannot say they are properly before the Board.

The Department's Prima Facia Case

Appellants further argue that they are entitled to judgment as a matter of law because the Department failed to establish a *prima facie* case against them for violations of the Solid Waste Management Act. (*See* Appellants' Summ. J. Motion at 2). In response, the Department argues the Motion is premature because discovery has not yet closed, and alternatively, they have met their burden of proof to overcome summary judgment. (*See* DEP's Brief in Resp. to Summ. J. at 11-12).

While we acknowledge that the Motion was filed before the close of discovery, if Appellants are satisfied that they have requested and received all discovery relevant to their claims, we find that there is no reason Appellants cannot bring their Summary Judgment Motion before the Board. *See* Pa.R.Civ.P. 1035.2(2) ("after the completion of discovery *relevant to the motion*…"). For these reasons, we do not believe the motion is premature, and we conclude it is properly before the Board.

In regard to the merits, Appellants argue the Department has failed to establish a *prima*

DEP, 2019 EHB 764, 771. Where the moving party chooses to forego having the "last word," it runs a greater risk of having its motion denied.

Protect PT v. DEP, EHB Docket No. 2023-085-W, slip op. at 4-5 (Opinion and Order July 23, 2025)

[7] Alternatively, we note that the Department argues that *Security and Exchange Comm'n v. Jarkesy*, 603 U.S. 109 (2024) is inapplicable to this matter as it involves the Seventh Amendment of the United States Constitution; whereas, the current appeal deals with violations of a statute, and neither the Pennsylvania Constitution nor the Pennsylvania General Assembly provide any statutory requirement for a jury trial under the Solid Waste Management Act. (*See* DEP's Brief in Resp. to Summ. J. at 7-8 *citing* Pa. CONST. art. I, § 6; *Wertz v. Chapman*, 741 A.2d 1272, 1276 (Pa. 1992) (finding plaintiff was not entitled to a jury trial under the Pa Constitution nor the PHRA statute)). As Appellants have provided no Reply to the Department's arguments concerning this matter, we conclude that there are genuine issues of material fact and law surrounding this matter.

facie case against them. Specifically, Appellants argue in their supporting brief that the Department has no evidence of what was allegedly burned at the Site, for what purpose it was being burned, the source of the material that was allegedly being burned, or evidence of any noxious materials leaving the property. (*See* Appellants' Summ. J. Brief at 4-5).

Board case law is clear in that a party need not definitively or absolutely prove its entire case to survive a motion for summary judgment. *Protect PT v. DEP*, EHB Docket No. 2023-085-W, slip op. at 14 (Opinion and Order July 23, 2025) *citing Diehl v. DEP*, 2018 EHB 18, 25 ("In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument."); *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 11 (Opinion and Order Apr. 4, 2025); *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 724. In order to establish a *prima facie* case, the Department, who has the burden of proof in this matter, is only required to put forward sufficient evidence of facts essential to their cause of action that would justify moving forward to a hearing. 25 Pa. Code § 1021.122(b)(4); *Protect PT*, at 14 *citing Sunoco Pipeline L.P. v. DEP*, 2021 EHB 43, 53; *Dengal v. DEP*, 2024 EHB 605, 620. This burden of proof is contrasting to the standard at a hearing on the merits, where the Department bears the burden of demonstrating by a preponderance of the evidence that its actions were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251.

At this stage in the proceedings, the Board does not assess the quality or the merits of the evidence[8] but simply whether there is enough evidence presented to overcome summary judgment.

[8] Any discussion that the Department's evidence should be prohibited because it was obtained without a search warrant, violating the 4th Amendment, was not addressed in the motion for summary judgment, and is therefore not properly before the Board. Regardless, issues of evidentiary exclusions are not appropriate for summary judgment motions but are best left to motions *in limine*. *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93; 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion *in limine*.").

Sunoco Pipeline, at 51. After a thorough examination of the documents and records produced, including the Department's Responsive Brief, which contains thirteen (13) pages of factual and legal averments of how and why the Appellants violated Sections 301, 302(a), 501(a), 610(2), 610(3), and 610(4) of the Solid Waste Management Act, with accompanying investigation reports, receipts, discovery responses, and photographs, we conclude that the Department has met its burden of establishing a *prima facie* case to overcome summary judgment. (*See* DEP's Brief in Resp. to Summ. J. at 11-24).

With respect to Appellants' claims that the Department has no evidence of what was allegedly burned, for what purpose it was being burned, and the source of the material that was allegedly being burned, Appellants themselves admit in their Notice of Appeal that timber is burned at the Site to turn into fertilizer for their soil. (*See* NOA objections at ¶ 3 "*The timber being burned by Mr. Yoder is nonhazardous agricultural waste as defined by the Department. . . . Mr. Yoder is using the ashes from the burning for a beneficial purpose i.e. to fertilize his soil*."). Additionally, several documents produced by the Department detail Mr. Yoder or sawmill workers stating that they burn residual wood waste from the sawmill.

For example, a Department Report dated August 29, 2017 documents that the Department was told by sawmill workers that clean wood scraps are burnt daily because they get overrun with wood and have no other way of disposing of it. (*See* DEP Ex. 7). More recently, a Complaint Investigation Report dated February 1, 2024 details Mr. Yoder stating that he burns slab scraps from the sawmill to clear space in his yard. Mr. Yoder also specified the burning was for agricultural reasons.[9] (*See* DEP Ex. 10 & 11). Additionally, a Department General Inspection

[9] Any evidentiary issues, such as hearsay, are not appropriately ruled upon in motions for summary judgment. Appellants will be afforded opportunities for evidentiary objections and/or cross examination at the time of a hearing.

Report details a March 1, 2024 complaint inspection at the Site where Dustin Karschner and Tony Pennington of the Department spoke with Mr. Yoder and some of his helpers for approximately 20 minutes. The report states that the sawmill has continued to burn waste slabs, and a pile was beginning to burn at the time of the Department's visit. The Department advised Mr. Yoder that burning of the waste slabs was a violation of the Solid Waste Management Act, and Mr. Yoder quantified that he believes he is agriculturally exempt. (*See* DEP, Ex. 13). The Department also produced invoices, a bill of lading, and a check documenting that Arrow Forest LLC provides logs to Appellants' sawmill, and assertions that wood products from the sawmill are sold to Harzell Hardwoods, Inc. (*See* DEP Ex. 2 & 6).

In regard to Appellants' claims that there is no evidence of any noxious materials leaving the property, the Department has also produced incident reports by Irvona Fire Company, with accompanying photographs, documenting the firefighters extinguishing smoldering burn piles of wooden slabs at the Site. (*See* DEP, Ex. 4 & 5). Irvona VFC Incident Reports document that on January 22, 2024 a neighbor called in to complain that there was smoke 400 ft. from his house. The cause of the fire was documented as "burning slabs." (*See* DEP, Ex. 4). Additionally, DEP complaint reports document neighboring property owners' grievances of fumes leaving the Site and creating sawdust coatings on their cars and smoke entering their homes. (*See* DEP Ex. 8 & 10). Moreover, the Department, on at least three separate occasions, was able to visit the Site and allegedly able to observe a pile of wood waste burning/smoldering at the time of the visit. (*See* DEP Ex. 7, 9, 10).

Therefore, based on the documents produced, the Board finds that the Department has produced sufficient evidence to create a *prima facie* case that wood waste is burned at the Site to reduce the volume of residual waste from the sawmill without a permit, in violation of the Solid

Waste Management Act.

Conclusion

For the reasons stated above, we deny Appellants' Motion for Summary Judgment. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. YODER AND LAURA D. YODER	:	
v.	:	**EHB Docket No. 2024-097-BP**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of August, 2025, it is hereby **ordered** that Appellants John E. Yoder and Laura D. Yoder's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 8, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Robert Cronin, Esquire
Geoffrey Ayers, Esquire
(via electronic filing system)

For Appellant:
Kurt D. Mitchell, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2024-005-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WCAA UPSTREAM, LLC, Permittee	:	**Issued: August 20, 2025**

OPINION AND ORDER ON
DEPARTMENT'S AND PERMITTEE'S MOTIONS FOR SUMMARY JUDGMENT

By MaryAnne Wesdock, Judge

Synopsis

Summary judgment is denied to the Department and Permittee under Pa. R.C.P. 1035.2(2) where it is not clear that the Appellant has failed to make a prima facie case and where certain claims involve complex questions of law and fact.

O P I N I O N

Introduction

This matter involves an appeal filed by Protect PT, challenging the Department of Environmental Protection's (Department) issuance of several unconventional gas well permits to WCAA Upstream, LLC (WCAA).[1] The permits were issued in connection with WCAA's Draftina well pad located in Penn Township, Westmoreland County. Pending before the Environmental Hearing Board (Board) are motions for summary judgment filed by the Department and WCAA. In addition, the Department filed a memorandum of law in support of WCAA's motion, joining in

[1] The permits were issued to Apex Energy (PA), LLC (Apex) on December 7 and December 11, 2023. On May 13, 2025, the parties filed a Joint Stipulation to Amend Caption, advising the Board of Apex's name change to WCAA Upstream LLC.

certain arguments made by WCAA while declining to join in others. Protect PT filed responses in opposition to both motions, and the Department and WCAA filed replies to Protect PT's responses.

Protect PT's appeal challenges the Department's issuance of permits for the following wells: the Draftina 2H, 3H, 4H, 7H, 9H, 11H and 13H. However, in its response to the motions for summary judgment, Protect PT states that it has withdrawn its objections regarding the Draftina 2H well permit. (Protect PT Response Brief in Opposition to Permittee's Motion for Summary Judgment, p. 1.) Therefore, this appeal involves only the permits for the Draftina 3H, 4H, 7H, 9H, 11H and 13H wells, which we shall refer to as "the Draftina permits."

Standard of Review

Pursuant to the Pennsylvania Rules of Civil Procedure and in accordance with Board caselaw, there are two scenarios under which summary judgment may be granted:

(1) When the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2(1).

(2) If, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense – in other words, where the party bearing the burden of proof has failed to make out a prima facie case. Pa. R.C.P. 1035.2(2).

See Yoder v. DEP, EHB Docket No. 2024-097-BP, slip op. at 3 (Opinion and Order on Motion for Summary Judgment issued Aug. 8, 2025) (citing *Whitehall Twp. v. DEP*, 2017 EHB 160, 163); *Protect PT v. DEP*, EHB Docket No. 2023-085-W, slip op. at 3 (Opinion and Order on Motions for Summary Judgment issued July 23, 2025); *Barr Farms, LLC. v. DEP*, EHB Docket No. 2023-034-B) (Consolidated), slip op. at 2-3 (Opinion and Order on Motion for Summary Judgment

issued April 4, 2025); *Kinsey v. DEP*, 2020 EHB 105, 107-08; *Marshall v. DEP*, 2019 EHB 352, 352-53; *Diehl v. DEP*, 2018 EHB 18, 23-24.

In evaluating whether either summary judgment scenario is appropriate, the Board views the record in the light most favorable to the non-moving party. *Liberty Township v. DEP*, 2024 EHB 872, 874 (citing *Stedge v. DEP*, 2015 EHB 31, 33); *Sierra Club v. DEP*, 2023 EHB 97, 98–99; *Kinsey*, 2020 EHB at 108. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Barr Farms,* slip op. at 3 (citing *Sierra Club*, 2023 EHB at 99). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, 2024 EHB 318, 319; *Amerikohl Mining Inc. v. DEP,* 2023 EHB 348, 352 (citing *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217).

Pa. R.C.P. 1035.2(2) – Prima Facie Case

The Department's motion for summary judgment relies on Pa. R.C.P. 1035.2(2) which states that summary judgment may be granted when the party with the burden of proof fails to produce facts essential to the cause of action. The Department argues that it is entitled to summary judgment because Protect PT, which bears the burden of proof in this matter, has failed to present evidence supporting any of its claims. In this section we address the Department's argument as it relates to Protect PT's claims regarding radiation/TENORM,[2] Air Quality Exemption 38(c), cumulative impact, and proximity to sensitive receptors and populations. While the Department also asserts that Protect PT failed to factually support its claims regarding PFAS and enforcement of the New Source Performance Standards, we address those arguments separately since Protect PT has withdrawn a portion of its claims relating to those two objections.[3]

[2] TENORM is technologically enhanced naturally occurring radioactive material.

[3] WCAA makes a similar argument with respect to Protect PT's PFAS claim, which is addressed separately.

In response, Protect PT argues that summary judgment is not appropriate because there are genuine issues of material fact in dispute. In reply, the Department argues that Protect PT has conflated the standard for summary judgment under Pa. R.C.P. 1035.2(2), under which the Department's motion was made, with that of Pa. R.C.P. 1035.2(1), which prevents the granting of summary judgment when there are genuine issues of material fact. The Department argues that Pa. R.C.P. 1035.2(1) is inapplicable to its motion.

We agree with the Department that Protect PT's response addresses the standard for summary judgment set forth in Pa. R.C.P. 1035.2(1), which was not relied upon by the Department in its motion. As the Board explained in *Diehl,* 2018 EHB at 24, "Under the first scenario [Pa. R.C.P. 1035.2(1)], the record must show that the material facts are undisputed. Under the second scenario [Pa. R.C.P. 1035.2(2)], the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a prima facie case."

However, we also believe that Protect PT has responded to the Department's contention that it has failed to produce evidence in support of its claims regarding TENORM/radiation, Air Quality Exemption 38(c), cumulative impact, and proximity to sensitive receptors and populations. As to the first issue, Protect PT asserts that the report of the Department's own expert and the Department's TENORM study provide support for its TENORM claim. It also asserts that the report of its expert, Marc Glass, provides further support for its claim. As to the second issue, Air Quality Exemption 38(c), Protect PT asserts that the report of Mr. Glass discusses air emissions that will be generated at the well site. It responds to the Department's assertion that Mr. Glass's report is speculative by pointing out that neither WCAA nor the Department has provided a list of the chemicals that will be used at the site and, therefore, it is difficult for an expert to offer an opinion on the exact emissions that will be generated. As to the final two issues, i.e. cumulative

impact and proximity to sensitive receptors and populations, Protect PT asserts that an expert report is not required on these topics and points to discovery responses that it believes provide support for its claims. In reply, the Department argues that, while Protect PT may point to pieces of evidence that it believes support its claims, it is not enough to carry its burden.

Judge Bruder recently explained the standard for reviewing a motion for summary judgment brought under Pa. R.C.P. 1035.2(2):

> Board case law is clear in that a party need not definitively or absolutely prove its entire case to survive a motion for summary judgment. *Protect PT v. DEP*, EHB Docket No. 2023-085- W, slip op. at 14 (Opinion and Order July 23, 2025) citing *Diehl v. DEP*, 2018 EHB 18, 25 ("In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument."); *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 11 (Opinion and Order Apr. 4, 2025); *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 724. In order to establish a prima facie case, the [party] who has the burden of proof in this matter, is only required to put forward sufficient evidence of facts essential to their cause of action that would justify moving forward to a hearing. 25 Pa. Code § 1021.122(b)(4); *Protect PT*, at 14 citing *Sunoco Pipeline L.P. v. DEP*, 2021 EHB 43, 53; *Dengal v. DEP*, 2024 EHB 605, 620. This burden of proof is contrasting to the standard at a hearing on the merits …. At this stage in the proceedings, the Board does not assess the quality or the merits of the evidence [] but simply whether there is enough evidence presented to overcome summary judgment. *Sunoco Pipeline*, at 51.

Yoder, slip op. at 9-10.

Here, we are not convinced that Protect PT's evidence necessarily falls short of a prima facie case. While it is unclear whether Protect PT can prevail on its claims, at this stage we do "not assess the quality or the merits of the evidence." *Id*. at 9.[4] Dismissal of a party's case on

[4] In *Delaware Riverkeeper Network v. DEP*, 2018 EHB 447, cited in the parties' filings, the Board held that an appellant had failed to demonstrate that air emissions from unconventional gas wells permitted under Exemption 38(c) would be exceeded or that emissions at those levels would unreasonably degrade, diminish, deplete or deteriorate the environment. However, *Delaware Riverkeeper* involved an assessment of the appellant's claim after a merits hearing, not in a motion for summary judgment.

summary judgment may only occur when it is absolutely clear that the moving party is entitled to summary judgment. We believe it is appropriate to allow Protect PT to move forward to a hearing on its claims.

Article I, Section 27 Claims

A number of Protect PT's objections involve Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. These include:

> The Department issued the Well Permits without consideration of the cumulative impact that this well site and all other well sites already permitted by the Department in Penn Township would have on the public's constitutional rights to clean air, pure water, and natural, scenic, historic, and esthetic values of the environment under the [Environmental Rights Amendment].
>
> Protect PT objects to the Department's approval of the Well Permits which allow hydraulic fracturing, well drilling, and natural gas production in close proximity to sensitive receptors and populations such as residential homes without taking into account the cumulative effects of all well permits in the area, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.
>
> The Permits do not place limits on or require a permit for air emissions of Hazardous Chemicals or TENORM, as the activities authorized under the Permits are exempt from regulation by 25 Pa. Code § 127.14(8)(38c). This exemption violates the [Environmental Rights Amendment].

(Notice of Appeal, para. 3, 42, 44.)

In its motion, WCAA argues that these claims must fail because they require the Board to "create and apply new regulations under the guise of the [Environmental Rights Amendment.]" (WCAA's Memorandum of Law in Support of Motion, p. 10.) It further argues that, to the extent the Environmental Rights Amendment is found to authorize changes in the regulatory scheme, Protect PT's construction of the Amendment is violative of the U.S. Constitution. (*Id.* at 18.)

Protect PT disputes WCAA's assertion that it is asking the Board to alter the existing statutory and regulatory scheme and contends that it is simply asking the Board to examine whether the Department fulfilled its obligations under the Environmental Rights Amendment. It argues that summary judgment is not appropriate on this question because genuine issues of material fact exist. The Department concurs with some of the assertions made by WCAA, including that Article I, Section 27 does not expand the agency's statutory and regulatory powers, but it does not join in the constitutional arguments raised by WCAA.

The Environmental Rights Amendment 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.

To the extent that WCAA is arguing that compliance with the applicable statutes and regulations ensures that the obligations of Article I, Section 27 have been satisfied, the Pennsylvania Supreme Court has rejected such an approach, as we explained in *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 860 (*CCJ*) and *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1161. In *Friends of Lackawanna* we stated:

> In *[Center for Coalfield Justice]*, we expressly rejected the notion . . . that "the Article I, Section 27 Constitutional standard [is] coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *[Pa.Environmental Defense Foundation v. Commonwealth,* 161 A.3d 911 (Pa. 2017)] clearly rejected such an approach when it rejected the *Payne* [*v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978)] test." *Id.*, slip op. at 62. Thus, in theory, an operation may be compliant with all specific regulatory requirements and yet not be permittable due to the unreasonable degradation it will cause.

2017 EHB at 1161. *See also Delaware Riverkeeper Network v. DEP*, 2022 EHB 103, 139 ("[A]gencies' duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations ….").[5]

However, as Judge Labuskes, writing for the Board, recently explained in *Citizens for Pennsylvania's Future v. DEP*, EHB Docket No. 2023-026-L (Adjudication issued May 16, 2025):

> [A]s a practical matter, an appellant challenging a Department action that is otherwise compliant with the applicable statutes and regulations needs to explain what more the Department should have done to fulfill its responsibilities under the [Environmental Rights Amendment]. It will generally not be enough to merely restate the other arguments in the case relating to regulatory violations and reframe them as constitutional violations. *Liberty Twp. v. DEP*, 2024 EHB 36, 140; *Del. Riverkeeper Network,* [2022 EHB at 139-40].
>
> The [Environmental Rights Amendment] requires the Department to fully consider the environmental effects of its action, but that duty will often be described in the regulations. The [Environmental Rights Amendment] precludes actions that result in an unreasonable degradation, diminution, depletion, or deterioration of the environment, but what is reasonable or unreasonable will often be established and delineated by regulation. There may be some

[5] WCAA relies on an unpublished decision of the Commonwealth Court in *Delaware Riverkeeper Network v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 42, 247 A.3d 1188 (Pa. Cmwlth. 2021) in support of its argument. Per the guidelines of the Commonwealth Court, an unreported panel decision of the Court issued after January 15, 2008 may be cited for its persuasive value, but not as binding precedent. In that case, the Delaware Riverkeeper Network *et al*. (Riverkeeper), asserted that the agencies at issue had a mandatory duty to evaluate and respond to a rulemaking petition under the Safe Drinking Water Act (SDWA), and their failure to respond constituted a violation of the Environmental Rights Amendment. The Commonwealth Court concluded that because the SDWA did not impose a mandatory duty on the agencies to respond to the rulemaking petition, Article I, Section 27 did not require that action. 2021 Pa. Commw. Unpub. LEXIS at *25-26. The Court reasoned that the relevant statute embodied the General Assembly's judgment about the agencies' duties under Article I, Section 27 and the "legislative process produces a statute that already reflects and incorporates agencies' relevant duties under the Environmental Rights Amendment." *Id.* at *24 and *26. As such, it concluded that the Environmental Rights Amendment "does not authorize [the Department] to disturb the legislative scheme." *Id.* at *25 (quoting *Funk v. Wolf*, 144 A.3d 228, 250 (Pa. Cmwlth. 2016)). However, in reaching its decision, the Court found it significant that Riverkeeper had based its claim solely upon the "mandatory duty" it purported to find in the SDWA, rather than arguing that the Act itself was inconsistent with the Environmental Rights Amendment or that the agencies' compliance with the Act would be insufficient to meet their constitutional obligations. *Id.* at *25. The Court appeared to leave open the possibility that the claim could move forward had Riverkeeper argued the latter.

> daylight between full compliance with the applicable regulatory programs and acting with prudence, loyalty, and impartiality, but a successful appellant will need to explain.

Slip op. at 71-72.

The analysis that the Board applies in determining whether the requirements of Article I, Section 27 have been satisfied is as follows: We first determine whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next, we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Stocker v. DEP*, 2022 EHB 351, 445.

An assessment of Protect PT's Article I, Section 27 arguments necessarily involves complex questions of law and fact. We find that these questions would be better addressed after the development of a full record, rather than in the context of a summary judgment motion. *Scrubgrass Creek Watershed Association v. DEP*, 2024 EHB 747, 761; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 499.

One point raised by WCAA in its memorandum bears mentioning. In footnote 6 it states, "The Board has previously rejected the suggestion that a proper harms/benefits analysis under a permit review requires a 'holistic view' by the Department," citing the Board's prior decision in *Protect PT v. DEP*, 2024 EHB 683. In that decision, the Board was tasked with determining whether objections raised by Protect PT in its appeal of the *renewal* of gas well permits – but not raised in the *initial* appeal of the permits – were outside the scope of review of the appeal of the permit renewal. Those objections included claims that the Department should have conducted a harms/benefits analysis and a "holistic review" that took into consideration the cumulative impact

of the permits when it approved the renewal of the permits. The Board found that those objections were outside the very limited scope of the appeal of the gas well permit *renewal. Id.* at 694-96. It did not address whether those objections could have been properly raised in an appeal of the issuance of the permits in the first place.

PFAS

In paragraph 45 of its notice of appeal, Protect PT raises the following objection:

> Appellant objects to the Department's approval of the Permits because the Permits do not limit and instead allow the introduction of Hazardous Chemicals, including PFAS, PFOAS [sic], and related chemicals into the environment through hydraulic fracturing, which do not break down and which are known to cause deleterious health effects, without properly limiting or regulating their use, in violation of the Department's responsibilities under the [Environmental Rights Amendment].

(Notice of Appeal, para. 45.) [6]

Both the Department and WCAA assert that they are entitled to summary judgment on this claim pursuant to Pa. R.C.P. 1035.2(2) because discovery is complete and Protect PT has failed to produce evidence that PFAS are likely to be used at the Draftina site.

In response to the Department's and WCAA's motions, Protect PT states that it is withdrawing its claim as to the usage of PFAS at the Draftina site, but is reserving a portion of its claim as to the Environmental Rights Amendment: Specifically, in its response to the Department's motion, Protect PT states that it "withdraws its objections solely as to PFAS specifically existing on the well site but reserves the right to include PFAS in its objections related to the Department's violation of the Environmental Rights Amendment." (Protect PT's Response

[6] PFAS and PFOA are defined in the Department's drinking water regulations at 25 Pa. Code § 109.1. For the sake of brevity, we refer to "PFAS, PFOAS [sic] and related chemicals," as "PFAS" as do the parties in their briefs.

Brief in Opposition to Department's Motion, p. 8.) Using similar, but not identical, language, Protect PT responds to WCAA's motion by stating it "has withdrawn its objections to the specific use of PFAS on the Draftina Wells but reserves its right to objections related to the Department's failure to obtain this information prior to issuing the Permits…" (Protect PT's Response Brief in Opposition to Permittee's Motion, p. 3.) Reading these two responses together and in conjunction with paragraph 45 of the notice of appeal, we understand Protect PT's argument to be that the Department violated its duty under the Environmental Rights Amendment by issuing permits for the Draftina wells without knowing what hazardous chemicals, including PFAS, will be used at the site and without placing limits on their usage. In their replies, the Department and WCAA renew their request for summary judgment, and argue that, without producing evidence that PFAS are likely to be used at the site, Protect PT cannot make out a prima facie case on this claim.

The Department and WCAA rely heavily on the Board's decision in *Protect PT v. DEP*, 2024 EHB 683, which dismissed Protect PT's claim regarding PFAS usage at another well site which was permitted by WCAA's predecessor, Apex. The Board dismissed Protect PT's PFAS claim pursuant to Pa.R.C.P. 1035.2(2) for failure to make out a prima facie case. However, that case involved a very particular set of circumstances that included the following: 1) The corporate designee for the permittee testified in a deposition that PFAS would not be used at the site, and Protect PT had no evidence to the contrary, 2) the permittee provided test results for the water source that would be used in the fracking operation that showed no presence of PFAS, and 3) the permittee provided safety data sheets from one of its recently constructed well sites showing that no PFAS were present. Those facts, in conjunction with the fact that Protect PT had not filed a motion to compel the permittee to provide information on the chemicals it intended to use at the site, led the Board to grant summary judgment to the Department and permittee under Pa. R.C.P.

1035.2(2) on the sole issue of PFAS usage at the site. We do not find those circumstances to be present here.

Moreover, here we understand Protect PT's argument to be that it is the Department's duty to know what chemicals, including PFAS, are likely to be used at the site, and the failure to obtain this information is a violation of its duty under the Environmental Rights Amendment. As we noted earlier, this issue necessarily involves complex questions of law and fact that would be better addressed after the development of a full record. *Scrubgrass*, 2024 EHB at 761; *Sludge Free,* 2015 EHB at 499.

NSPS

In paragraph 43 of its notice of appeal, Protect PT raises the following objection pertaining to the federal New Source Performance Standards (NSPS):[7]

> Because the Department has failed in its obligation to enforce Federal Regulations as they apply to NSPS . . . the permit applications must be denied, and/or subject to further review.

(Notice of Appeal, para. 43.)

In its motion, the Department asserts that summary judgment should be granted pursuant to Pa. R.C.P. 1035.2(2) because Protect PT has produced no evidence in support of this claim. Additionally, WCAA argues that NSPS are not triggered until operations commence and, therefore, there was nothing for the Department to "enforce" when it considered the applications for the Draftina wells.

In its response to the Department's motion, Protect PT states that it "withdraws its objection solely related to the Department's enforcement of the Federal [NSPS]" but "reserves it objections with respect to the application of these standards as they apply to the Draftina Wells as well as

[7] These standards are addressed at 42 U.S.C. § 7411 and 40 C.F.R. Part 60.

their objections related to the Department's violations of the Environmental Rights Amendment." (Protect PT Response Brief in Opposition to Department's Motion, p. 8.) It expands on this statement in its response to WCAA's motion, stating as follows:

> With respect to the Department's obligation to "vet" NSPS compliance during review of the well permit applications, Protect PT reserves its objections related to the Department's violation of the Environmental Rights Amendment with respect to failing to obtain the requisite information regarding air emissions that are contemplated under the NSPS prior to issuing the Permits, health impacts, and cumulative effects.
>
> *****
>
> As Apex aptly notes, the Department only requires NSPS are not triggered until the wells are completed [sic]. At that point, the damage to the environment and risks to public health have already taken place. The Department should have evaluated the emissions contemplated by the NSPS that will be generated from the Draftina Wells prior to issuing the Well Permits by obtaining site specific data, including baseline testing. The failure to do so is a violation of the Environmental Rights Amendment. The fact that the NSPS is not triggered until completion is irrelevant to the Department's obligation under the Environmental Rights Amendment to obtain information related to air emissions prior to the issuance of the Permits.

(Protect PT's Response Brief in Opposition to Permittee's Motion, p. 3-4.)

While it is not clear, Protect PT appears to be preserving a claim similar in nature to its PFAS claim discussed above, i.e., that it believes the Department violated its Article I, Section 27 duties by not obtaining sufficient information during the permitting process. Summary judgment may only be granted in the clearest of circumstances, and it is not entirely clear to us exactly what claim Protect PT is preserving; therefore, we decline to grant summary judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2024-005-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WCAA UPSTREAM, LLC, Permittee	:	

O R D E R

AND NOW, this 20th day of August 2025, it is hereby ordered the motions for summary judgment filed by the Department and WCAA are **denied.**

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: August 20, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

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Jeffrey Bailey, Esquire
Kathleen Ryan, Esquire
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For Appellant:
Lisa Johnson, Esquire
Tim Fitchett, Esquire
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For Permittee:
Jeffrey Wilhelm, Esquire
Megan S. Haines, Esquire
Allison L. Ebeck, Esquire
Casey J. Snyder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARIAN FLATLEY	:	
	:	
v.	:	**EHB Docket No. 2024-139-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 8, 2025**
	:	

OPINION AND ORDER ON
MOTION FOR SANCTIONS IN THE FORM OF DISMISSAL

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies the Department's motion to dismiss the appeal as a sanction for appellant's failure to comply with a Board order compelling discovery but grants the Department's request for discovery sanctions and precludes the appellant from presenting testimony of fact and expert witnesses, evidence or documents at the hearing on matters not disclosed in discovery.

O P I N I O N

This matter involves an appeal filed by Darian Flatley ("Mr. Flatley") of an Administrative Order issued on September 23, 2024, by the Department of Environmental Protection ("Department"). Mr. Flatley owns and operates a mobile home park located at 126 Kerr Road, Shenango Township, Lawrence County (the "Site"). The Site sits near Big Run, a stream, that borders a portion of the Site. The Administrative Order requires Mr. Flatley to take corrective actions in order for the Site to achieve compliance with The Clean Streams Law and the Dam Safety and Encroachments Act. During the course of this appeal, Mr. Flatley has repeatedly failed to comply with the Department's various discovery requests. On April 11, 2025, the Department filed a Motion to Compel for Mr. Flatley's failure to respond to outstanding discovery requests

and for him to appear for a deposition. On April 18, 2025, the Board issued an Order ("April 18th Order") that compelled Mr. Flatley to respond to the Department's interrogatories and request for production of documents and to answer the request for admissions within ten days. The April 18th Order also compelled Mr. Flatley to appear for a deposition at a reasonable time and place noticed by the Department.

On April 23, 2025, the Department sent Mr. Flatley a second deposition notice, scheduling the deposition to take place on May 2, 2025, at 1:30 p.m. On April 28, 2025, the day of the deadline for Mr. Flatley to serve his discovery responses on the Department, Mr. Flatley filed a request to stay the proceedings in this matter which the Board denied. Mr. Flatley renewed his request for a stay with the Board on the day of his scheduled deposition. Mr. Flatley failed to appear for his deposition and the Board denied the renewed request for stay. On July 18, 2025, the Department filed its Motion for Sanctions in the Forn of Dismissal ("Motion"), the matter currently before us. Mr. Flatley has not responded to the Motion.

In its Motion, the Department requests that the Board dismiss Mr. Flatley's appeal or, in the alternative, preclude him from introducing fact and expert testimony and from presenting evidence or documents not disclosed in discovery at the hearing in this matter. The Department argues that Mr. Flatley has not complied with the requirements of the Board's April 18th Order by failing to answer interrogatories, not responding to its request for production, and not providing answers its request for admissions. As a result, the Department asserts that Mr. Flatley has prejudiced the Department in its attempts to properly litigate this appeal to a resolution on its merits. Further, the Department asserts that Mr. Flatley has filed a related suit in the Lawrence County Court of Common Pleas and argues that by pursuing this matter in another tribunal, along with his failure to comply with the April 18th Order and his repeated requests to stay this

proceeding, all demonstrate a lack of intent to pursue his appeal, therefore, warranting the dismissal of it.

When evaluating a motion to dismiss, the Board has stated that it views the motion "in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law." *Protect PT v. DEP*, 2024 EHB 154, 155 (citations omitted). It has further stated that, "the Board accepts the non-moving party's version of events as true" and that "[m]otions to dismiss will be granted only when a matter is free from doubt." *Id*., at 156 (citations omitted). Under Section 1021.161 of the Board's Rules, sanctions may be imposed upon a party for failure to abide by a Board order or Board rule of practice and procedure, including those pertaining to discovery. 25 Pa. Code § 1021.161; *Robert Wilkinson d/b/a Wilkinson Contracting v. DEP*, 2024 EHB 401; *DEP v. Frank Colombo d/b/a/ Glenburn Services*, 2012 EHB 370; *Smith v DEP*, 2010 EHB 547; *DEP v. Tate*, 2009 EHB 295; *Swistock v. DEP*, 2006 EHB 398*; Kennedy v. DEP*, 2006 EHB 477. These sanctions may include dismissal of the appeal, entrance of adjudication against the offending party, disallowing introduction of evidence or documents not disclosed, precluding witnesses that were not identified as such, or other appropriate sanctions. 25 Pa. Code § 1021.161; *Schlafke v. DEP*, 2013 EHB 678, 680.

Review of the record in this case clearly shows Mr. Flatley's repeated failure to comply with the Board's discovery rules and the April 18th Order. Due to his initial failure to respond to the discovery requests, the Department filed a motion for compel. His continued refusal to produce discovery in defiance of our April 18th has now prompted the Department to move for sanctions in the form of dismissal. Although the Board has dismissed an appeal as a sanction when an appellant has failed to respond to discovery and a Board Order granting a motion to compel, *Smith v. DEP*, 2010 EHB 547, we will not impose that sanction in this case, notwithstanding the Department's

request that we do so. We disagree with the Department's position that Mr. Flatley's other legal proceedings, his requests for stay, and his overall lack of cooperation in the discovery process shows he lacks any intent to pursue his appeal. While Mr. Flatley's actions certainly demonstrate his unwillingness to abide by the Board's rules and orders, we do not view his action, or in this case inaction, as an abandonment of all interest in pursuing his appeal. Over the course of these proceedings, Mr. Flatley has submitted multiple filings with the Board, albeit on his own timeline, that included, in part, requests for extensions and responses to Board orders. However, Mr. Flatley's refusal to produce the responses and answers responsive to the Department's discovery requests, including his failure to appear to a scheduled deposition, prejudices the Department's case. Pursuant to Section 1021.161 of the Board's Rules, we will preclude Mr. Flatley from introducing any evidence or documents not disclosed to the Department during discovery and further bar him from calling any witnesses other than himself at a hearing on the merits if such a hearing takes place.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARIAN FLATLEY	:	
	:	
v.	:	**EHB Docket No. 2024-139-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of September, 2025, it is hereby ordered that the Department's Motion for Sanctions is **granted in part** as follows:

1. The Appellant may not call any fact witnesses other than himself.
2. The Appellant may not call any expert witnesses.
3. The Appellant may not present any evidence or documents at the hearing unless produced to the Department during discovery.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: September 8, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

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Dearald Shuffstall, Esquire
Vegas Katsberg, Esquire
(via electronic filing system)

For Appellant:
Darian Flatley, *Pro se*
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD AND MICHELLE LOGAN	:	
	:	
v.	:	**EHB Docket No. 2024-159-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 10, 2025**
	:	

OPINION AND ORDER ON
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION FOR SANCTIONS IN THE FORM OF DISMISSAL

By Paul J. Bruder, Jr., Judge

Synopsis

The Board grants the Department of Environmental Protection's Motion for Sanctions in the Form of Dismissal as Appellants have demonstrated a lack of intent to pursue their appeal. Appellants have failed to respond to discovery and have disregarded Board Rules of Practice and Procedure as well as a Rule to Show Cause. The appeal is dismissed.

O P I N I O N

Background

On November 4, 2024, Donald and Michelle Logan ("Appellants") filed the instant appeal challenging the Department of Environmental Protection's ("the Department") October 4, 2024 denial of Appellants' Act 537 planning application for their proposed subdivision and construction of a single family home. (*See* Notice of Appeal, Objection #1). After Appellants filed their Notice of Appeal, the Board issued its standard Pre-Hearing Order No. 1 setting the discovery deadline to May 6, 2025.

On April 4, 2025, the Department served its First Set of Interrogatories, First Request for Production of Documents, and First Set of Requests for Admissions ("Department's Discovery Requests") on Appellants by First-Class Mail and email. The Appellants failed to respond to any of the Department's Discovery Requests. Thereafter, the Department afforded the Appellants additional time to answer discovery, but again, the Appellants did not respond. On May 18, 2025, the Department filed a Motion to Compel. On May 28, 2025, the Board held a conference call to discuss the pending Motion to Compel. During the call, Judge Bruder explained to Appellants that they have a responsibility to respond to the Department's Discovery Requests in a timely fashion. As a result of this conference, the Board issued a May 28, 2025 Order that stayed the proceedings until June 27, 2025 and set a new discovery deadline to July 16, 2025.

On or around June 12, 2025 and June 24, 2025, the Department and the Appellants met to discuss options for the property. According to the Department, at the end of the June 24, 2025 meeting, Mr. Logan represented that Appellants were not interested in pursuing their appeal. Subsequently, on July 10, 2025, the Department spoke to Mr. Logan to remind the Logans of the Board's July 16, 2025 discovery deadline. The Department has represented that during the call, Mr. Logan again re-stated he and Mrs. Logan were not interested in pursuing their appeal.

After receiving no response to discovery, on August 13, 2025, the Department filed a Motion for Sanctions in the Form of Dismissal. According to Board Rules of Practice and Procedure, Appellants' response to said Motion was due on August 28, 2025. 25 Pa. Code § 1021.93(c). No response was received by Appellants. On September 2, 2025, this Board issued a Rule to Show Cause on Appellants advising if they did not respond by September 9, 2025, the current appeal would be dismissed. No response was received.

Standard of Review

The Board has broad authority to impose sanctions, including the dismissal of an appeal, when a party fails to comply with the rules of discovery, follow Board Rules of Practice and Procedure, and/or comply with Board orders. 25 Pa. Code § 1021.161; *See Brumage v. DEP*, EHB Docket 2024-104-B, *slip. op.* 4-5 (Opinion and Order issued June 23, 2025) (granting DEP's Motion for Sanctions in the Form of Dismissal for Appellant's failure to answer discovery and comply with Board orders) *citing Pearson v. DEP*, 2009 EHB 628, 629-30 (dismissing appeal as a sanction where appellant failed to abide by Board orders, including an order to provide discovery responses to the Department); *Swistock, Jr. v. DEP*, 2006 EHB 398, 398-400 (dismissing appeal as a sanction where appellant failed to respond to discovery requests and abide by Board orders); *Kennedy v. DEP*, 2006 EHB 477, 479 (dismissing appeal as a sanction where appellant ignored his discovery obligations and failed to comply with Board order); *Recreation Realty, Inc. v. DEP*, 1999 EHB 697 (dismissing appeal as a sanction where appellant failed to respond to discovery requests and abide by Board orders). Additionally, dismissal as a sanction is warranted when a party clearly demonstrates a lack of intent to pursue its appeal. *See Wilkinson v. DEP*, 2024 EHB 401, 402 (dismissing an appeal as a sanction when Appellant has not responded to Board orders and ceased communication with the Board); *Blackwood v. DEP*, 2020 EHB 442, 444 (dismissing an appeal where a party failed to respond to Board orders and failed to attempt any communication with the Board); *Walker v. DEP*, 2011 EHB 328, 330 (dismissing an appeal as a sanction where a party failed to follow Board rules of practice and procedure and ignored Board orders); *K H Real Estate, LLC v. DEP*, 2010 EHB 151, 153 (granting the Department's Motion for Sanctions in the Form of Dismissal because Appellant had failed to comply with Board orders and shown a lack of intent to pursue its appeal).

Discussion

In the current matter, Appellants have clearly demonstrated a lack of intent to pursue their appeal. Specifically, Appellants have failed to respond to discovery after numerous reminders by the Department and Judge Bruder that they have a responsibility to respond to the Department's Discovery Requests, ignored the Board's May 28, 2025 Order setting a new discovery deadline, and failed to respond to the Board's September 2, 2025 Rule to Show Cause. Furthermore, the Logans have represented, more than once, to the Department that they have no intention of pursuing this appeal.

Accordingly, for the reasons stated above, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD AND MICHELLE LOGAN	:	
	:	
v.	:	**EHB Docket No. 2024-159-BP**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of September, 2025, it is hereby **ordered** that the Department of Environmental Protection's Motion for Sanctions in the Form of Dismissal is **granted**. The appeal is **dismissed**. The docket shall be marked as **closed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: September 10, 2025

c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

c: For the Commonwealth of PA, DEP:
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Angela S. Bransteitter Davis, Esquire
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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.

O P I N I O N

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.[1]

[11] 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).[2] On September 11, 2025, the Trust supplemented its motion with a verification and affidavit. The Department and Conservation District,[3] 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

[2] Because the Motions for Leave to Amend Appeal are virtually identical, we refer to them in the singular as "motion."

[3] 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.[4] 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.

[4] 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.[5]

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.
>
> *****
>
> 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

[5] 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:

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	:	

O R D E R

AND NOW, this 19th 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
MARYANNE WESDOCK
Judge

DATED: September 19, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Dearald W. Shuffstall, Esquire
Jennifer N. McDonough, Esquire
David R. Hull, Esquire
(*via electronic filing system*)

For Appellant:
Philip L. Hinerman, Esquire
Sharon Oras Morgan, Esquire
Jana Walshak, Esquire
(*via electronic filing system*)

For Erie County Conservation District:
Dearald W. Shuffstall, Esquire
Jennifer N. McDonough, Esquire
David R. Hull, Esquire
(*via electronic filing system*)

For Permittee:
Michael J. Musone, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HD HOLDINGS AND KIM HERMAN	:	
	:	
v.	:	**EHB Docket No. 2024-179-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 30, 2025**
	:	

OPINION AND ORDER ON
DEPARTMENT'S MOTIONS TO DISMISS

By Sarah L. Clark, Judge

Synopsis

The Board grants the Department's Motions for partial dismissal due to untimeliness, dismissal of an LLC for failure to obtain counsel, and dismissal of an LLC member in her individual capacity for lack of standing where there is no dispute on the questions of timeliness and counsel and the Appellants provided no evidence of individual standing of the LLC member.

O P I N I O N

Background

This matter concerns an appeal of the Department of Environmental Protection's ("Department") denials of two requests for waiver of certain monitoring requirements for a public water system. On December 9, 2024, the Board received a filing consisting only of the two denial letters at issue here, one dated October 2, 2024 ("October 2 Denial Letter"), and the other dated November 19, 2024 ("November 19 Denial Letter"). Both denial letters were addressed to HD Holdings LLC, the operator of the public water system, and Kim Herman, a member of the LLC ("HD Holdings" and "Ms. Herman" respectively or "Appellants" collectively). Because this filing lacked all required information other than the denial letters, on December 10, 2024 the Board

issued an Order to Perfect Appeal ("Order to Perfect") along with its standard Pre-Hearing Order No. 1. When that Order went unanswered, the Board issued an Order to Comply with the Order to Perfect Appeal, and on February 12, 2025, the Appellants filed a Response that, while scant, did answer the Order to Perfect sufficiently to deem the Appeal perfected. This filing stated when notice of the Department's action had been received (October 2, 2024 and November 19, 2024), objections to the Department's action, and a statement that no outside counsel would be hired and members Kim and James Herman would be representing HD Holdings. Shortly thereafter, Board staff spoke with Ms. Herman by phone and explained that LLCs such as HD Holdings are required to be represented by counsel, as well as where to find information on obtaining counsel.

In May, the Appellants and the Department jointly requested a thirty day stay to allow HD Holdings and Ms. Herman to continue seeking counsel, as they had not yet succeeded in doing so and the lack of counsel was stymieing the parties' attempts to meaningfully discuss settlement. The stay was granted, and upon its expiration, the parties filed a Joint Status Report indicating that no settlement had been reached and that no further stay was requested. The Joint Status Report included a proposed case management order setting new deadlines for discovery and the filing of dispositive motions, which the Board granted. While the Joint Status Report did not make mention one way or the other of the Appellants' progress toward obtaining counsel, no attorney entered an appearance following the lifting of the stay, and so the Board Ordered HD Holdings to obtain counsel, requiring either that an attorney enter an appearance on its behalf, or, to the extent the Appellants were still seeking counsel, a filing detailing progress made toward that goal by July 18, 2025. The Board received no response to the Order.

On August 4, 2025, the Department concurrently made two filings: 1) a Motion for Partial Dismissal due to untimeliness, and 2) a Motion for Sanctions in the form of a Dismissal for Failure

to Obtain Counsel and Motion to Dismiss for Lack of Standing ("Motion for Partial Dismissal" and "Motion to Dismiss" respectively or "Department's Motions" collectively). Under the Board's rules, a response to a dispositive motion must be filed within 30 days of service, here September 3, 2025. 25 Pa. Code § 1021.94 (c). To date, the Appellants have not filed a response to the Department's Motions.

Standard

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and only grants the motion where the matter is free from doubt and the moving party is entitled to judgment as a matter of law. *Protect PT v. DEP*, 2024 EHB 154, 155-156; *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, 2023 EHB 203, 206 (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Where the non-moving party does not file a response to a motion to dismiss, the Board "will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.91(f); *Ongaco v. DEP*, 2023 EHB 239, 241; *Burnside Twp. v. DEP*, 2002 EHB700, 701.

The First Denial Letter

The Department moves for partial dismissal of the appeal for lack of jurisdiction due to untimeliness as it relates to the October 2 Denial Letter. According to the Board's rules, for jurisdiction to attach, the individual or entity appealing the Department's action must file its appeal with the Board within 30 days of receipt of written notice of the action, unless otherwise provided by statute. 25 Pa. Code § 1021.52(a)(1); *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Ongaco v. DEP*, 2023 EHB 239, 242 *Mon View Mining Corp. v. DEP*, 2003 EHB

542; *Burnside Twp. v. DEP*, 2002 EHB 700, 703; *Ziccardi v. DEP*, 1997 EHB 1, 3. The Safe Drinking Water Act does not contain language that extends the time period for appealing a denial of a request to waive monitoring requirements.

According to the Department, the October 2 Denial Letter was issued and emailed to Ms. Herman and Mr. Herman in their capacity as members of HD Holdings on October 2, 2024, and receipt of that email was acknowledged by return email on October 4, 2025. (DEP Ex. B.) The Appellants' Response to the Board's Order to Perfect also states that notice of the Department's action was received on October 2, 2024. Therefore, there is no dispute that the October 2 Denial Letter was received by Ms. Herman on behalf of HD Holdings on October 2, 2024.

The Appellants filed the present appeal challenging both the October 2 Denial Letter and the November 19 Denial Letter on December 9, 2024, or 68 days after receiving written notice of the October 2 Denial Letter. While both denial letters pertain to the same water system, they are separate actions that concern different monitoring requirements. Consequently, the appeal with respect to the October 2 Denial Letter was not timely filed and the Board therefore lacks jurisdiction to hear the appeal as it relates to the October 2 Denial Letter. For these reasons, the Department's Motion for Partial Dismissal is granted.

Failure to Obtain Counsel

The Department next seeks dismissal of HD Holdings from the appeal as a sanction for failure to comply with this Board's Rules and our Order to Obtain Counsel. The Board's Rules of Practice and Procedure require parties, other than individuals appearing on their own behalf, to be represented by an attorney in good standing at all stages of the appeal following the filing of a notice of appeal. 25 Pa. Code § 1021.21(a).

As detailed above, the Board issued an Order to Perfect requesting, among other things, contact information for counsel for HD Holdings. The Appellants' Response to the Order to Perfect stated that Ms. Herman and Mr. Herman, as members of HD Holdings, would represent HD Holdings in the appeal and no outside counsel would be engaged. The filing did not indicate that either Ms. or Mr. Herman is an attorney, and when Board staff spoke to Ms. Herman, she likewise did not identify herself or Mr. Herman as an attorney. During that conversation, Board staff explained that proceeding *pro se* following the filing of the notice of appeal is not an option for business entities such as LLCs, and Ms. Herman expressed understanding of the explanation, but no attorney entered an appearance on behalf of HD Holdings at that time.

On May 2, 2025, the Board granted a stay that was jointly requested by the parties for the purpose of allowing HD Holdings additional time to obtain counsel. The stay lifted on June 2, 2025, at which time no entry of appearance was filed on behalf of HD Holdings, nor did the parties request an additional stay or provide any update on Ms. Herman's search for an attorney to represent HD Holdings. As such, on June 18, 2025, the Board issued an Order to Obtain Counsel, which required HD Holdings to either have an attorney enter an appearance or file a statement addressing the Appellants' progress toward obtaining counsel by July 18, 2025. To date, no attorney has entered an appearance on behalf of HD Holdings, nor has HD Holdings responded to the Order.

The Board has held that entities such as LLCs that fail to obtain counsel risk dismissal of their appeals. *Lizabella Mining, LLC v. DEP*, 2024 EHB 783, 786-787; *Waroquier Coal Co. v. DEP*, 2024 EHB 396, 397-398; *Earth First Recycling, LLC v. DEP*, 2018 EHB 819, 820-821; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210. As we said in *River Hill Coal Company, Inc. v. DEP*, "[i]ndeed, we have regularly dismissed appeals filed by non-individuals

for failure to obtain counsel once such entities have been given a reasonable opportunity to secure representation and have not done so." EHB Docket No. 2024-173-CS, *slip op.* at 3 (Opinion and Order on Motion to Dismiss issued May 16, 2025.)

HD Holdings has been given multiple opportunities to obtain counsel – including a thirty day stay that was requested specifically for the purpose of seeking counsel – and has declined to do so. Therefore, the Department's Motion to Dismiss HD Holdings from this appeal for failure to obtain counsel is granted.

Standing

The Department further moves to dismiss Ms. Herman from the appeal for lack of standing, arguing that the injury alleged in the appeal would be suffered by HD Holdings alone, and not by Ms. Herman in her individual capacity as a member of HD Holdings.

The purpose of the standing doctrine is simply to determine whether an appellant, in this case Ms. Herman, is an appropriate party to appeal the action of the Department at issue. *Hendryx v. DEP*, 2011 EHB 127, 141 *quoting Ziviello v. DEP*, 2000 EHB 999, 1005 *citing Valley Creek Coalition v. DEP*, 1999 EHB 935, 944. An appellant need not demonstrate or even allege standing in the notice of appeal. *Winner v. DEP*, 2014 EHB 135, 140; *Cooley v. DEP*, 2004 EHB 554, 559. The Board has held that when standing is challenged in a dispositive motion[1] the burden is on the moving party to show that there are no material facts in dispute that an opposing party lacks

[1] We have often stated that a motion to dismiss is typically not the appropriate vehicle in which to challenge standing as such motions are generally made prior to discovery being served, let alone completed. *Winner*, 2014 EHB at 140-141 *quoting Cooley*, 2004 EHB at 559; *Kelosky v. DEP*, 2024 EHB 662, 666 n. 1. However, here discovery concluded on July 9, 2025, making the Department's choice to file motions to dismiss on August 4, 2025 rather than a motion for summary judgment – the more common instrument for a standing challenge – reasonable under the circumstances. And while the majority of our jurisprudence on the standards by which we analyze challenges to standing in dispositive motions has developed in the summary judgment context, applying those standards here is appropriate as the Department's challenge was made following the completion of discovery.

standing. *Drummond v. DEP,* 2002 EHB 413, 423. In the context of a dispositive motion, a challenge to standing must be viewed in the light most favorable to the non-moving party. *Matthews Int'l Corp. v. DEP*, 2011 EHB 402, 404; *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 563. Once standing is adequately challenged, appellants must provide evidence to support their standing. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 894.

As discussed above, responses to dispositive motions must be filed within thirty days of service. 25 Pa. Code § 1021.94 (c). To date, Ms. Herman has not filed a response to the Department's Motion to Dismiss challenging her individual standing. As the Board has previously held, "No response is clearly not an adequate response, and the Board may grant the motion 'if the adverse party fails to adequately respond.'" *Thomas v. DEP*, 2019 EHB 347, 349 *quoting RES Coal, LLC v. DEP*, 2017 EHB 1239, 1244. As the Department has challenged Ms. Herman's individual standing and provided evidence following the close of discovery in support of that challenge, and Ms. Herman has not provided evidence to support her standing[2], we grant the Department's Motion and dismiss Ms. Herman in her individual capacity from this appeal.

Conclusion

In addition to failing to respond to the Department's Motions, Ms. Herman – whether on her own behalf or on behalf of HD Holdings – has ceased responding to Orders of the Board, and all attempts to contact the Appellants have gone unanswered since June of 2025. When an appellant fails to respond to multiple Orders, to the motions of adverse parties, and generally stops

[2] In its Motion, the Department states that while the Appellants did provide responses to requests for documents and interrogatories on or about June 4, 2025, it served the Appellants with requests for admissions on May 22, 2025 and provided US Mail tracking showing those requests were received on May 30, 2025, but as of the filing of the Motions on August 4, 2025 had not received responses. The Department further states that on May 22, 2025 the request for admissions was also sent to the Appellants via email, and on May 28, 2025, after the Department emailed requesting acknowledgement of receipt of the May 22 email, the Appellants did respond, indicating that they had mailed responses to the Department's requests, but the Department states that it has yet to receive those responses.

participating in the appeal, it is reasonable to determine that such appellant has abandoned their appeal. *River Hill Coal Company, Inc. v. DEP*, EHB Docket No. 2024-173-CS, *slip op.* at 4 (Opinion and Order on Motion to Dismiss issued May 16, 2025); *Citizens Advocating a Clean Healthy Environment v. DEP*, 2017 EHB 1077, 1078; *KH Real Estate, LLC v. DEP*, 2012 EHB 155, 156-157; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 261. HD Holdings and Ms. Herman have been silent for more than three months, thus showing a lack of interest in pursuing this appeal. Therefore, we grant the Department's Motions and dismiss this appeal in its entirety.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HD HOLDINGS LLC AND KIM HERMAN	:	
	:	
v.	:	**EHB Docket No. 2024-179-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 30th day of September, 2025, it is hereby **ordered** that the Department's Motions are **granted** and the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: September 30, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Alexander Langan, Esquire
(via electronic filing system)

For Appellant:
HD Holdings and Kim Herman
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF HIGH POINT LAKE	:	
	:	
v.	:	**EHB Docket No. 2025-102-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee	:	**Issued: October 6, 2025**

OPINION AND ORDER ON
MOTION TO DISMISS

By MaryAnne Wesdock, Judge

Synopsis

In this appeal involving a permit to fully drawdown a reservoir/lake which was reviewed by both the Department of Environmental Protection and the Fish and Boat Commission, and which is signed by both agencies, the Department's motion to dismiss on jurisdictional grounds is denied. A motion to dismiss may only be granted where a matter is free from doubt.

O P I N I O N

Introduction

This matter involves a notice of appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Friends of High Point Lake (the Appellant) challenging an authorization to drain High Point Lake in Somerset County. The Appellant also filed an Application for Temporary Supersedeas and Petition for Supersedeas. A temporary supersedeas was granted on September 30, 2025, and a hearing on the Petition for Supersedeas has been scheduled for October 8-9, 2025.

The matter currently before the Board is a motion to dismiss filed on September 25, 2025 by the Department of Environmental Protection (Department), asserting that the Board does not

have jurisdiction to hear this appeal. The Appellant responded to the motion on September 26, 2025, and the Department filed a reply on October 2, 2025. The Pennsylvania Fish and Boat Commission filed a concurrence to the Department's motion on September 29, 2025. Due to the impending supersedeas hearing, the motion has been given expedited consideration.

Background

Based on the parties' filings, the background of this matter is as follows: The Pennsylvania Fish and Boat Commission (the Commission) owns and operates High Point Lake Dam (the dam) in Somerset County pursuant to a permit issued in March 1963 by the Water and Power Resources Board, a predecessor of the Department. (Ex. A to Motion, para. 7.) The reservoir associated with the dam is known as High Point Lake. The Appellant is an association consisting of over 170 individuals who enjoy recreational activities and the scenic environment of High Point Lake, including boating, fishing, bird watching and wildlife appreciation. (Appellant's Statement of Facts in Support of Petition for Supersedeas, para. 1.)[1] According to the notice of appeal, the Appellant was formed after members learned of plans to drain High Point Lake in connection with a rehabilitation project proposed for the dam.

On August 11, 2025, Ruth Hocker, a Senior Civil Engineer with the Commission, submitted to the Commission an "Application to Draw Off Water from Impoundments" (drawdown application) in connection with the planned full dewatering of High Point Lake.[2] (Ex. 2 to Appellant's Opposition to DEP Motion.) Data from the drawdown application was transmitted

[1] The Appellant incorporates its Statement of Facts in Support of Petition for Supersedeas into its response to the Department's motion to dismiss. (Appellant's Response to Motion, para. 2.)

[2] During a conference call held with the Board on September 24, 2025, counsel for the Commission explained that it is standard practice for an application for a permit such as the one at issue here to be submitted to the Commission by an employee of the Commission. Additionally, the Commission's Reply in Opposition to Petition for Supersedeas and Temporary Supersedeas provides helpful insight into the Commission's procedure for handling applications to draw off water from an impoundment.

to the Department for review by virtue of a spreadsheet that is accessible by staff of both the Commission and the Department's Division of Dam Safety. Two days later, on August 13, 2025, a Permit to Draw Off Water from Impoundments (the permit) was signed by Kirk Kreider, Chief of the Department's Division of Dam Safety. (Ex. to Notice of Appeal.) On August 19, 2025, the permit was signed by Commission Fisheries Biologist Benjamin D. Lorson. (*Id*.) According to the Commission and Department, the drawdown of High Point Lake, which was originally scheduled to begin in the Spring of 2026, was commenced in August 2025 due to what the Commission and the Department contend are safety concerns with the dam.

The Department has moved to dismiss the appeal on the grounds that there is no "action" of the Department and, therefore, the Board lacks jurisdiction to hear the appeal. It is the Department's contention that the permit is solely an action of the Commission, with the Department playing only an advisory role.[3] In response, the Appellant asserts that the permit was issued jointly by the Department and the Commission, and it is asking the Board to review the Department's approval of the permit. The Commission concurs with the motion filed by the Department.

Standard of Review

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern, and there are no material facts in dispute. *Heights Plaza Materials, Inc. v. DEP*, EHB Docket No. 2024-170-BP, slip op. at 3 (Opinion and Order on Motion to Dismiss and Petition to File an Appeal Nunc Pro Tunc issued Jan. 28, 2025); *Kelosky v. DEP*, 2024 EHB 662, 664. The

[3] According to the Department and the Commission, the Commission is both the permittee, i.e., the holder of the permit, as well as the issuer of the permit.

Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Bernstein v. DEP*, EHB Docket No. 2023-090-BP, slip op. at 2 (Opinion and Order on Motion to Dismiss issued June 16, 2025); *Lizabella Mining, LLC v. DEP*, 2024 EHB 783, 785. *See also Carlisle Pike Self Storage v. DEP*, 2022 EHB 25 (denying a motion to dismiss arguing that the Board lacks jurisdiction because it was not clear as a matter of law); *Perano v. DEP*, 2010 EHB 439 (denying a motion to dismiss arguing lack of jurisdiction because the facts must be viewed in the light most favorable to the non-moving party).

For the purposes of resolving motions to dismiss, the Board accepts the non-moving party's version of factual events as true. *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W, slip op. at 3 (Opinion and Order on Motion to Dismiss issued July 1, 2025); *Protect PT v. DEP*, 2024 EHB 154, 156. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *River Hill Coal Company, Inc. v. DEP*, EHB Docket No. 2024-173-CS, slip op. at 2 (Opinion and Order on Motion to Dismiss issued May 16, 2025); *Clean Air Council v. DEP*, 2023 EHB 203, 206; *Scott v. DEP*, 2023 EHB 138, 140; *Popovich v. DEP,* 2023 EHB 35, 36. *See also Downingtown Area Regional Authority*, 2022 EHB 153 (denying a motion to dismiss on jurisdictional grounds because the matter is not free from doubt).

The Board's Jurisdiction

The Board's jurisdiction is established by statute and regulation. *Tighe v. DEP*, 2024 EHB 451, 457. The Board is authorized by the Environmental Hearing Board Act to hold hearings and issue adjudications "on orders, permits, licenses or decisions of the [D]epartment." 35 P.S. § 7514(a). No action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board. *Id*. at § 7514(c). An

"action" of the Department is defined as "[a]n 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 (definition of "action.") There is no bright line rule for determining what constitutes an "action" of the Department. *HJL, LLC v. Department of Environmental Protection*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008). The appealability of Department decisions needs to be assessed on a case-by-case basis. *Carlisle Pike Self Storage*, 2022 EHB at 29.

Discussion

The Department argues in its motion that there is no action by the Department that provides the Board with jurisdiction in this matter. In determining whether there has been an action of the Department, we shall first consider the language of the permit itself. *See, e.g., Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121 (In determining whether a communication is an action of the Department, "[w]e always start with the wording..."). The permit is entitled "Permit to Draw Off Water from Impoundments," below which it reads "Commonwealth of Pennsylvania" and then "Fish and Boat Commission – Department of Environmental Protection." (Ex. to Notice of Appeal.) The first paragraph of the permit states, "Information submitted by the applicant has been reviewed by the Pennsylvania Fish and Boat Commission (PFBC) and Department of Environmental Protection – Division of Dam Safety (DEP), and upon approval, becomes a permit under Section 3506 of the Fish and Boat Code, Title 30 Pa. C.S. and Section 51.81 of the Fishing and Boating Regulations, Title 58, Pa. Code." (*Id.*)

The body of the permit states, "This permit is subject to the specifications listed above and the conditions and requirements indicated below. Failure of the permittee or agents acting on behalf of the permittee to follow approved specifications, conditions and requirements

immediately renders this permit null and void." (*Id*.) Below that statement, the permit is signed by the Department's Chief of the Division of Dam Safety, Kirk Kreider, and dated August 13, 2025. Below Mr. Kreider's signature are set forth conditions, including "The permittee must follow DEP's best management practices for 'Minimizing Sediment Pollution to Downstream Channels During Impoundment Dewatering.'" (*Id*.) Below this section of the permit is a section that is signed by the Commission's Fisheries Biologist, Benjamin D. Lorson, dated August 19, 2025. There is an "X" under the designation "Approve." (*Id.*)

It is the Appellant's contention that the issuance of the permit was a joint action by the Department and the Commission, and, by this appeal, the Appellant is seeking review of the Department's approval of the lake drawdown. The Appellant argues that the proper forum for this review is this Board. The Appellant points out that, while the Commission has a procedure for challenging decisions of the Commission, it is an internal review and does not involve the type of due process safeguards that are present in a proceeding before the Environmental Hearing Board. 58 Pa. Code §§ 51.44 and 51.45.

It is the Department's position that the permit was issued solely by the Commission. It specifically points to the language of the permit, stating that the permit is issued "under Section 3506 of the Fish and Boat Code, Title 30 Pa. C.S. and Section 51.81 of the Fishing and Boating Regulations, Title 58, Pa. Code." Section 3506 of the Fish and Boat Code states that "[n]o person shall draw off dam waters inhabited by fish without first applying for written permission from the [C]ommission…" 30 Pa. C.S. § 3506(a). Section 51.81 of the Fishing and Boating regulations contains similar language, stating that a permit from the Commission is required under Section 3506 of the Fish and Boat Code to draw down impounded waters inhabited by fish. 58 Pa. Code § 51.81.

The Department argues that its role here was that of providing consultation and input, and the Commission is free to include its recommendations or not, at its sole discretion. The Department asserts that the only time its permission is needed for the drawdown of an impoundment is where the drawdown will exceed one foot per day, citing 25 Pa. Code § 105.96(c). Here, the Commission has stated that the drawdown will not exceed one foot per day, and the Appellant has not disputed this statement. The Department finds further support in Section 105.122 of its Dam Safety regulations, which states, "Impounded waters which are inhabited by fish may not be drawn down except with the written approval of the Fish and Boat Commission under 30 Pa. C.S. § 3506." The Department views the agencies' approval functions for drawdown as being bifurcated: a permit is required from the Commission where fish are present in the impoundment and prior approval is required from the Department if the drawdown will proceed faster than one foot per day. Where the second prong of the process is not present, it is the Department's position that only the Commission is the decision-maker. The Department argues that the inclusion of Mr. Kreider's signature on the permit is largely ministerial. According to Mr. Kreider, his signature is affixed electronically by the Commission following the Department's review and submission of recommendations. (Ex. A to Motion, para. 14.)

The Commission concurs with the Department's motion that the Board lacks jurisdiction to hear this appeal. It describes the Department's role as "provid[ing] comments at the request of the Commission in order to help the Commission be fully aware of any other water-related regulation that may be indicated during a drawdown process" and "to ensure there is not some additional dam safety regulation that may need to be considered in conjunction with the drawdown of water." (Commission Concurrence, para. 5 and 6.)

In response, the Appellant argues that both agencies play a role in the permitting process, and the approval is not limited to the Commission. It asserts that Mr. Kreider's signature on the permit was more than merely a rubber stamp indicating that the application had been reviewed, as asserted by the Department. Rather, the Appellant argues that Mr. Kreider was actively involved in the decision to allow a full drawdown of the lake, as evidenced by copies of emails submitted with the Appellant's response. The Appellant further argues that the Department's involvement in this matter included the decision to incorporate permit conditions which, according to the language of the permit, would render the permit "null and void" if not followed by the Commission. (Ex. to Notice of Appeal.)

We agree that the Department appears to have played an active and important role in the decision to issue the permit that goes beyond simply giving advice that the Commission was free to ignore. Notably, the Department's signature appears on the permit, indicating its approval of the action authorized by the permit. Secondly, the Department included conditions in the permit which, according to the language of the permit itself, were mandatory. On its face, the permit indicates that the Department was clearly and actively involved in the issuance of the permit.

As to the Department's argument that it merely played an advisory role, we recognize that it is not unusual for Commonwealth agencies to consult with other government agencies in the issuance of a permit. Indeed, in many cases before the Board, the record shows that the Department has consulted with other agencies, such as the Department of Transportation as to truck safety before issuing a permit for a landfill, mining operation or oil and gas well, or the Department of Health before issuing a permit that could have an impact on public health in the surrounding community, or any number of other agencies whose input is critical to determining whether the Department should issue a particular permit. However, in none of those instances are we aware of

the permit being co-signed by *both* the Department and the "consulted" agency, nor does the language of the permit give the appearance that it is a joint permit of both agencies.

The Department acknowledges that the format of the permit gives the impression that it is a permit issued jointly by both it and the Commission. However, it argues that the appearance of the document should not be controlling and we should look beyond it in determining whether there has been an action by the Department. We agree that the wording of a document is not necessarily determinative of whether an action has been taken by the Department, but it is certainly one factor that must be considered. *See Borough of Kutztown*, 2001 EHB at 1121 (in determining whether a letter from the Department was an appealable action, the Board stated that one factor to consider was the wording of the letter.) The Department argues that we should look beyond the format of the permit and consider the actions taken in this matter. Specifically, it relies on the affidavit of Dam Safety Division Chief, Kirk Kreider. Mr. Kreider states that the Commission is free to disregard the Department's recommendations. (Ex. A to Motion, para. 15.) However, this statement is countered by the very language of the permit itself which states that the "[f]ailure of the permittee … to follow approved specifications, conditions and requirements immediately renders this permit null and void." (Ex. to Notice of Appeal.) It is important to keep in mind that the Commission is the permittee here, and therefore, any failure on its part to follow the conditions set forth by the Department renders the permit null and void.

Mr. Kreider further states that the Commission merely affixed his signature to the permit following the Department's review and that neither he nor anyone at the Department approves or denies drawdown applications. (Ex. A to Motion, para. 13.) However, the record indicates that the Department, and particularly Mr. Kreider, was actively involved in this matter, and there is no indication that the Commission would have gone forward with the drawdown of High Point Lake

without the Department's consent. If the Department had disagreed with the decision to fully drawdown High Point Lake, we question whether the Department's signature would have appeared on the permit.

In addition to the wording of the document being one of the factors that the Board considers in determining whether the document constitutes an action of the Department, the Board also considers the practical impact of the document in question. *Borough of Kutztown, supra*. Here, Mr. Kreider's signature on the permit leads to the logical conclusion that the Department approved the permit. At a minimum, it raises doubt as to the Department's argument that the Department played no role in the decision to issue the permit.

The Department argues that it could not possibly have played a role in the issuance of the permit because there is no regulatory scheme that requires action by the Department with regard to the drawdown of an impoundment.[4] However, Section 51.84 of the Fishing and Boating regulations specifically requires review by both the Commission and the Department for the issuance of a drawdown permit. That section states, "A permit application *will* be reviewed by the Commission's Division of Environmental Services and by the Department of Environmental Protection, Bureau of Dams and Waterways Management." 58 Pa. Code § 51.84 (emphasis added). Although the Department states that the permit may be issued even without the Department's approval, that is not clear from the language of this regulation.

The Department relies on the second sentence of Section 51.84 which states, "The Division of Environmental Services will issue permits for the Commission." The Department views this as evidence that the issuance of the permit is solely within the domain of the Commission. However,

[4] As noted earlier, the Department acknowledges that it must approve drawdowns of greater than one foot per day, but there has been no allegation that the current drawdown exceeds this limit.

we read this language as clarifying who issues drawdown permits for the Commission, not as excluding the Department's role in the process. The language of the permit itself indicates that the Department's approval is required before the permit can be issued. The permit states "Information submitted by the applicant has been *reviewed by the Pennsylvania Fish and Boat Commission (PFBC) and Department of Environmental Protection – Division of Dam Safety (DEP), and upon approval,* becomes a permit…" (Ex. to Notice of Appeal.) This language creates the impression that approval of both agencies is needed for issuance of the permit. Likewise, the drawdown application states, "The application *will be reviewed jointly* by the Pennsylvania Fish and Boat Commission (PFBC) and the Department of Environmental Protection (DEP) Bureau of Waterways Engineering *and if acceptable*, a permit will be issued under the PFBC Fishing and Boating Regulations…" (Ex. 2 to Appellant's Opposition to Motion.) Reading Section 51.84 in conjunction with the language of the permit and application reasonably leads to the conclusion that, upon review *and approval* by the Department (and the Commission), a drawdown permit may be issued.

The Appellant asserts that the Department's own regulations provide support for the conclusion that the Department's role here was more than merely advisory. The Appellant directs us to Section 105.131(b) of the Department's Dam Safety regulations which states that "[a] permittee or owner of a dam or reservoir may not modify or cease implementation of all or part of the approved plans and methods of operation or monitoring without the prior approval of the Department by permit, Letter of Amendment, or Letter of Authorization." 25 Pa. Code § 105.131(b). The Department counters that the facts of this case do not fall under subsection (b) but rather subsection (c) of Section 105.131 which states that "routine maintenance" of a dam or reservoir's design storage capacity does not require authorization, except that the drawdown of

impounded waters inhabited by fish requires written approval of the Commission. 25 Pa. Code §§ 105.131(c) and 105.122. In response, the Appellant argues that "[t]he sudden and full drawdown of a long-valued, unique public lake with an abundance of fish and wildlife resources" cannot be seen as normal and routine dam operations and therefore it invokes the need for the Department's prior approval.[5] (Appellant Response, para. 1.) We see merit to both parties' arguments. However, while the Department's regulations state that routine maintenance, including the drawdown of water in an impoundment, does not require Department approval, it is not clear that the long-term,[6] full drainage of an impoundment used as a lake constitutes routine maintenance. Without further information, it is unclear what approval may or may not be necessary.

Finally, the Department argues that there is no relief that the Board can provide. We agree that the Board has no authority to overturn a decision of the Fish and Boat Commission. However, to the extent that the issuance of the permit required the approval of the Department, that approval is subject to the Board's review and can be overturned if the Board finds that the Department acted unreasonably or contrary to law or its action is not supported by the facts. *Liberty Township v. DEP*, 2024 EHB 36, 76, *rev'd on other grounds*, 107 CD 2024 (Pa. Cmwlth. Aug.7, 2025).

While the Department and Commission have raised a number of strong arguments in support of their position, the Appellant has also raised compelling arguments in favor of finding that this appeal involves an action of the Department over which the Board has jurisdiction. At a

[5] In its response, the Appellant references the file name attributed to the electronic copy of the permit application, "High Point Lake Drawdown Permit Modification 48-25," as evidence that the permit is a modification issued pursuant to Section 105.131(b). However, we believe that the reference to "modification" in the title of the application pertains to the fact that the permit modifies an earlier drawdown permit.

[6] The Appellant avers that the lake will remain dry for an extended period of time, likely years, while the rehabilitation work to the dam is being completed. The parties' filings state that no permit has yet been issued for the dam rehabilitation work, and, therefore, there is no indication as to when this work would begin or be completed.

minimum, it is unclear that the Board does *not* have jurisdiction over this appeal. We are hesitant to dismiss an appeal on the basis of jurisdiction where the matter is not entirely free from doubt. As we held in *Downingtown Area Regional Authority,* 2022 EHB at 155:

> The requirement that the matter be free from doubt applies to jurisdictional disputes such as the one raised by the Department in this case. The Board is in most cases the only forum where aggrieved parties can find due process. We should hesitate to dismiss appeals on jurisdictional grounds when the matter is not free from doubt.

This is especially true here where, under the scenario propounded by the Department and the Commission, the Commission serves three roles: the permit applicant, the permit issuer, and the reviewing authority in the case of a challenge to the permit.

Where the permit in question contains the name and signature of the Department, as well as mandatory conditions imposed by the Department, it is reasonable to conclude that the issuance of the permit constitutes an action of the Department. At a minimum, it raises questions which prevent us from granting the Department's motion.[7] Where it is unclear that the Board is *not* the proper forum to hear this appeal, we must err on the side of caution, deny the motion to dismiss and allow the appeal to proceed.

[7] While there are matters in dispute that prevent the granting of the motion to dismiss, we do not intend the parties to address those matters at the supersedeas hearing to be held on October 8-9, 2025. Rather, the purpose of the hearing is to address the issues raised in the Appellant's Petition for Supersedeas and the Department's and Commission's responses thereto.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF HIGH POINT LAKE	:	
	:	
v.	:	**EHB Docket No. 2025-102-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee	:	

O R D E R

AND NOW, this 6th day of October, 2025, it is hereby ordered that the Department's Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: October 6, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Christopher L. Ryder, Esquire
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For Appellant:
Matthew L. Wolford, Esquire
R. Timothy McCrum, Esquire
(via electronic filing system)

For Permittee:
Robert J. Schefter, Esquire
Penny V. Ayers, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF HIGH POINT LAKE	:	
	:	
v.	:	**EHB Docket No. 2025-102-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee	:	**Issued: October 30, 2025**

OPINION SUPPORTING ORDER
DENYING PETITION FOR SUPERSEDEAS

By MaryAnne Wesdock, Judge

Synopsis

Although the Appellant has made a reasonable showing of irreparable harm, its Petition for Supersedeas must be denied where there is a credible risk of injury to the public if the supersedeas is granted.

O P I N I O N

Introduction

This matter involves a notice of appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Friends of High Point Lake (the Appellant) challenging an authorization to drain High Point Lake in Somerset County. The Appellant filed a Petition for Supersedeas and an Application for Temporary Supersedeas in connection with its appeal. By Order dated September 30, 2025, the Board granted the Application for Temporary Supersedeas until a hearing on the Petition for Supersedeas could be held. A hearing on the Petition for Supersedeas was held on October 8 and 9, 2025. Following the hearing, on October 10, 2025, the Board issued an Order

denying the Petition for Supersedeas and lifting the temporary supersedeas. This Opinion is issued in support of that Order.

Background

The Pennsylvania Fish and Boat Commission (the Commission) owns and operates High Point Lake Dam (the dam) in Somerset County pursuant to a permit issued in March 1963 by the Water and Power Resources Board, a predecessor of the Department of Environmental Protection (Department). (Appellant Ex. 3, p. 1-3.) The reservoir associated with the dam is known as High Point Lake. The Appellant is an association consisting of over 170 individuals who enjoy recreational activities and the scenic environment of High Point Lake, including boating, fishing, bird watching and wildlife appreciation. (Appellant's Statement of Facts in Support of Petition for Supersedeas, para. 1.) According to the notice of appeal, the Appellant was formed after members learned of the Commission's plans to drain High Point Lake in connection with a rehabilitation project proposed for the dam.

High Point Lake Dam is categorized as a high hazard dam. This means that due to its location and size, if there were a failure of the dam, it presents the highest risk for loss of human life and property. High Point Lake Dam was constructed in 1965. Dams are generally constructed with a service life of 50-100 years, with many dams in Pennsylvania exceeding 100 years. (Tr. 369, 645.)[1] However, as is the case with many dams over a certain age, High Point Lake Dam was constructed with materials or features that are no longer deemed acceptable for use in high hazard dams, such as corrugated metal pipes in the spillway and drainage system, and seepage collars within the principal spillway outlet. (Tr. 369.) Additionally, High Point Lake Dam is not in

[1] "Tr. __" refers to a page in the transcript of the supersedeas hearing.

compliance with current Dam Safety regulations because it does not have a device that allows for a two-foot drawdown of the reservoir within 24 hours. (Tr. 488.)

Due to these issues, the Commission has targeted High Point Lake Dam and a number of other Commission-owned dams in Pennsylvania for dam rehabilitation projects. The proposed rehabilitation of High Point Lake Dam includes the reconstruction of the auxiliary spillway, installation of a new drainage filter system and improvements to the principal spillway. (Tr. 488-89.) The Commission submitted an application to the Department for the dam rehabilitation project in February 2023. The Department has conducted a technical review and provided comments to the Commission but no permit has been issued. In order to prepare for the anticipated rehabilitation work, the Commission planned a complete drawdown of the reservoir, which was expected to begin Spring 2026. (Tr. 257.) In anticipation of the project, the Commission temporarily lifted fishing regulations in order to reduce the number of fish in the lake.

However, in August 2025, the Commission determined that a full drawdown of the lake should happen sooner than the targeted Spring 2026 date. The High Point Lake Dam is inspected by Commission personnel every three months. During a routine inspection in 2024, Commission engineers evaluated a known wet area in the grass to the right of the auxiliary spillway. According to the Commission, between the months of September 2024 and July 2025, the wet area increased in size by approximately 10 times. (Tr. 460.) Additionally, in July 2025, a deposit of aggregate, sand and fine material was observed below the auxiliary spillway drain. Due to these observations, the Commission initiated a one-foot drawdown of the reservoir on July 7, 2025 for evaluation of the spillway. A five-foot drawdown of the reservoir was initiated on July 16, 2025 for further evaluation.

After consultation with its professional dam design engineering consultant, Michael Baker International, who performed testing and calculations, the Commission made the decision to fully drain the lake. On August 11, 2025, Ruth Hocker, Senior Civil Engineer - Hydraulic with the Commission, submitted to the Commission an "Application to Draw Off Water from Impoundments" (drawdown application) requesting a full dewatering of High Point Lake.[2] Data from the drawdown application was transmitted to the Department's Division of Dam Safety for review. Two days later, on August 13, 2025, a Permit to Draw Off Water from Impoundments (the permit) was signed by Kirk Kreider, Chief of the Department's Division of Dam Safety. (Commission Ex. 9.) On August 19, 2025, the permit was signed by Commission Fisheries Biologist 3 Benjamin D. Lorson. (*Id*.)

The Appellant filed a notice of appeal with the Board on September 19, 2025, challenging the issuance of the permit, and on September 22, 2025, the Appellant filed a Petition for Supersedeas. A conference call was held on September 24, 2025 to discuss the scheduling of a supersedeas hearing and later that day, the Appellant filed an Application for Temporary Supersedeas. After receiving responses in opposition to the Application for Temporary Supersedeas from the Department and Commission on September 29, 2025, the Board granted the Application for Temporary Supersedeas on September 30, 2025, which was to remain in effect until October 10, 2025. The Department filed a Motion to Dismiss on September 25, 2025 and the Appellant filed a response in opposition on September 26, 2025. The Commission filed a concurrence to the Department's motion on September 29, 2025, and on October 6, 2025, the Board issued an Opinion denying the Motion to Dismiss. The hearing on the Petition for

[2] During a conference call held with the Board on September 24, 2025, counsel for the Commission explained that it is standard practice for an application for a permit such as the one at issue here to be submitted to the Commission by an employee of the Commission.

Supersedeas was held on October 8 and October 9, 2025. On October 10, 2025, the Board issued an Order denying the Petition for Supersedeas. This Opinion is issued in support of the Order denying the Petition for Supersedeas.

Standard of Review

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). A supersedeas, as defined by the Board's regulations, is a "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. The standard for obtaining a supersedeas is high. *Hopewell Township Board of Supervisors v. DEP*, 2011 EHB 732, 737. The petitioner bears the burden of demonstrating that a supersedeas should be granted. *Erie Coke Corp. v. DEP*, 2019 EHB 481, 484; *Center for Coalfield Justice v. DEP*, 2018 EHB 323, 327; *Tinicum Twp. v. DEP*, 2008 EHB 123, 126.

The grant or denial of a supersedeas is committed to the Board's discretion as guided by relevant judicial precedent and the Board's own precedent and the balancing of relevant criteria applied to the specific facts of the case. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a); *Lananger v. DEP*, EHB Docket No. 2024-016-B, slip op. at 4–5 (Opinion Supporting Order Denying Petition for Supersedeas issued Jan. 17, 2025) (citing *Erie Coke Corp.*, 2019 EHB at 484; *Center for Coalfield Justice v. DEP*, 2017 EHB 38, 43, *appeal dismissed*, 2017 Pa. Commw. Unpub. LEXIS 565, 174 A.3d 1204 (Pa. Cmwlth. Aug. 2, 2017)). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Delaware Riverkeeper Network v. DEP*, 2022 EHB 103, 110 (citing *Erie Coke Corp.*,

2019 EHB at 485); *Abercrombie v. DEP*, 2020 EHB 293, 295. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three factors and must be able to demonstrate that its chance of success on the merits is more than speculative. *Protect PT v. DEP*, 2024 EHB 154, 160 (citing *Teska v. DEP*, 2016 EHB 541, 544; *Global Eco-Logical Services., Inc. v. DEP*, 2000 EHB 829, 831).

Where a petitioner fails to satisfy any one of the supersedeas criteria, the Board is not obligated to consider the remaining criteria. *Liberty Township v. DEP*, 2023 EHB 170, 172; *Liberty Township v. DEP*, 2023 EHB 158, 160–62 (citing *Spencer v. DEP*, 2019 EHB 756, 760). In considering whether the criteria have been met we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals, Inc. v. DEP*, 2021 EHB 104, 106 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB, 41, 43). Importantly, "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2). *See also* 25 Pa. Code § 1021.63(b).

Discussion

In order for the Board to grant the Appellant's Petition for Supersedeas, the Appellant must make a credible showing that it will suffer irreparable harm if the supersedeas is not granted, that the Appellant is likely to win on the merits, and that there is no likelihood of harm to the public if the supersedeas is granted. *Lananger*, slip op. at 4 (citing *Delaware Riverkeeper Network*, 2022 EHB at 110; *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Association v. DEP*, 2011 EHB 689, 690-91). For the reasons set forth below, while we find that the Appellant has made a credible showing of irreparable harm if the supersedeas is not granted, it is outweighed by the potential risk to the public if the supersedeas is granted.

Irreparable Harm – Loss of Aquatic Life and Wildlife

"The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal." *Center for Coalfield Justice*, 2017 EHB at 55. For the reasons set forth below, we find that the Appellant has made a credible showing of irreparable harm with regard to the loss of aquatic life and wildlife.

The Appellant presented the testimony of Mr. Keith Hetrick, who lives approximately one-half mile from the south access to High Point Lake. He testified as a representative of Friends of High Point Lake and as a member of the community. At age 66, Mr. Hetrick has fished in the area of High Point Lake nearly his entire life, since he "was old enough to hold a pole." (Tr. 32.) He has held a Pennsylvania fishing license for over 50 years. High Point Lake is one of his two favorite spots to fish.

Mr. Hetrick discussed the impact that the full dewatering of High Point Lake will have on the members of the Friends of High Point Lake and those who live in the community surrounding the lake, as well as the impact that the current drawdown has already had. He described what the loss of the lake will mean to the community which has enjoyed its use for decades. In particular, Mr. Hetrick testified regarding the following concerns: loss of fish and mussels in the lake, loss of habitat for migratory birds, and the impact on fish in Glade Run.

While the Commission and the Department acknowledge a loss of aquatic life, wildlife and scenic resources, they argue that the harm is not irreparable because the fish, mussels, birds and use of the lake will return once the dam rehabilitation is completed and the lake is refilled. They also assert that active measures will be put into place to minimize siltation affecting downstream fish.

<u>Mussels</u>

Mr. Hetrick testified that paper pondshell mussels have been present in High Point Lake and Glade Run since the time when he fished those areas with his father as a child. He testified that they have become more abundant in the last few decades. Although the Commission has not done a survey to identify paper pondshell mussels in the lake, it does not dispute their presence. Mussels can serve to improve the water quality of the lake by removing algae, bacteria and sediment. According to exhibits provided by the Appellant and testimony by the Commission's Watershed Analysis Section Chief and Fisheries Biologist 3, Ben Lorson, paper pondshell mussels are not an endangered species but are considered to be imperiled in certain areas such as West Virginia.

It is the position of the Commission that, once the lake is restored following rehabilitation of the dam, the mussels will return to High Point Lake, just as they managed to find their way there in the first place. The Commission has no plans to restock the lake with mussels but asserts that the mussel community will easily re-propagate due to their hermaphroditic nature. (Tr. 527-28.)

Birds

Mr. Hetrick testified as to birds in the area of the lake. He has seen herons which he said are commonplace at High Point Lake, as well as bald eagles which he has seen many times. The Commission and Department did not disagree with the Appellant's position that multiple species of birds are present at High Point Lake.

Mr. Hetrick raised a concern that migratory birds will leave the area once the lake is dewatered. According to the Commission's Mr. Lorson, migratory birds stop in an area to rest and forage before moving on. It is Mr. Lorson's position that the migratory birds will simply seek another water body that is close by. In this case, all parties agree that the nearest water body is the Deer Valley YMCA Lake, located approximately one-half mile away. However, Mr. Lorson

acknowledged that the YMCA Lake is only one-third the size of High Point Lake. Another suitable waterway, in Mr. Lorson's opinion, is Yough Lake, which is five to six miles from High Point Lake at its closest point.[3]

As with the mussels, the Commission asserts that the loss of birds at the lake is temporary; it contends that migratory birds will return to the lake once the dam repairs are completed and the lake is refilled, just as they came to the lake initially when it was first constructed.

Fish

Mr. Hetrick testified as to the loss of fish that will occur if the lake is fully drained. According to Mr. Hetrick, High Point Lake has a robust fish population and is "about as good a fishery [as] you could ask for." (Tr. 33-34.) As a fisherman, he is affected by the loss of the fishery at the lake. He also testified that the loss is deeply felt by the surrounding community. He provided a moving story of a young boy in the neighborhood trying to save the fish as the lake was being drawn down. The Commission's Director of the Bureau of Engineering, Paul Urbanik, acknowledged that the draining of a lake can be very upsetting to a community.

The Appellant also presented the testimony of Larry Mayton, who routinely fishes High Point Lake, including several summers of bass fishing tournaments. Mr. Mayton lives approximately 1 ½ hours from High Point Lake but enjoys fishing there and ranks High Point Lake as one of his favorite lakes to fish. Due to its vegetative growth, he described it as follows: "You really don't think you're on a reservoir or a dam. You're almost on…a natural type lake." (Tr. 134.) Mr. Mayton got involved when he heard that High Point Lake was going to be drained and would be out of operation for several years.

[3] We understand Mr. Lorson's estimation of 5-6 miles from High Point Lake to Yough Lake to be "as the crow flies," based on testimony by the Commission's David Nihart that the driving distance from High Point Lake to the "Youghiogheny reservoir," is 13-15 miles. (Tr. 550.)

In response, the Commission provided testimony as to the active role it will play in saving many of the fish that are present in High Point Lake. Once the lake is drawn down sufficiently, the Commission will conduct a fish salvage whereby it will attempt to rescue fish in High Point Lake and transport them to a nearby compatible body of water. The Commission's Chief of the Division of Fishery Management, David Nihart, was recognized as an expert in fisheries management, and he provided extensive testimony as to the details of the fish salvage operation. First the Commission locates a suitable water body to which to transport the fish. The ideal water body is in close proximity and is appropriate for the type of fish to be transferred there. In this case the Commission has selected the Youghiogheny reservoir[4] which is approximately 13-15 miles from High Point Lake. (Tr. 550.) When High Point Lake is sufficiently drawn down, Commission staff will use one of two methods – either seining or electrofishing – to catch the fish for transport. Seining involves the use of a large net to corral the fish. Electrofishing involves the use of electricity to temporarily stun the fish and allow capture. According to Mr. Nihart, the use of electrofishing does not hurt the fish and they quickly return to their active state once removed from the electricity source. The seining and electrofishing are performed both in the lake itself as well as in the settling basin at the bottom of the spillway. The captured fish will then be transported within "5 to 6 full size hatchery trucks" to the Youghiogheny reservoir. (Tr. 550.) Mr. Nihart testified that he has been involved in a handful of fish salvage operations and all have been successful.

Mr. Nihart conceded that not all fish in High Point Lake will be rescued or transferred to a new location. He stated that the Commission will use this opportunity to weed out species of fish

[4] We understand this to be same body of water as "Yough Lake" which was referenced in Mr. Lorson's testimony.

that are considered to be "undesirable." For example, in the case of High Point Lake, the Commission considers the chain pickerel that are present in High Point Lake to be an undesirable invasive species. They will not be transported to the receiving water body, but, rather, will be allowed to perish. Additionally, not all "desirable" fish will be rescued during the salvage operation but, when pressed on the point, Mr. Nihart felt that a large number would be rescued.

It is the contention of the Commission that any loss of fish is not irreparable since the Commission will simply restock the lake when the dam repairs are completed and the lake is refilled. Mr. Nihart anticipates that the drawdown and eventual refilling and restocking of the lake will have a beneficial effect, something he called "new lake effect," due to new vegetative growth, as well as the restocking of the lake with appropriate species of fish. (Tr. 560-63.)

Furthermore, the Commission is concerned that leaving the lake at its current level provides more risk of harm to the fish. Mr. Nihart explained that the salvage cannot take place until the lake is nearly drained. It is Mr. Nihart's opinion that if the fish are left in place at the current drawdown level there is a likelihood they will not survive a winter freeze. This was also conceded by the Appellant's Mr. Hetrick. The Appellant asserts that it is not asking for the lake to stay at the drawdown level that was in effect during the temporary supersedeas but, rather, for the lake to be refilled. However, given our findings regarding the safety of the dam, which will be discussed later in this opinion, the Board is not inclined to order a refilling of the lake.

Conclusion Regarding Irreparable Harm – Loss of Aquatic Life and Wildlife

The Commission and the Department acknowledge that there will be some harm to the Appellant during the time in which High Point Lake is drained. However, as stated above, they do not believe the harm is irreparable. It is their position that once the dam is rehabilitated and the lake refilled, wildlife will return to the area of the lake, either naturally, as in the case of the mussels

and birds, or with the assistance of the Commission, as in the case of the fish. Additionally, once the lake is reopened, boating and other recreational activities may resume. It is the position of the Appellant, however, that there is no guarantee that the wildlife and aquatic life will return to the lake at the level at which it now exists and that any such restoration of wildlife to the area will not happen quickly but will be a long-term process, likely taking years. The Appellant points out that there is not even a permit in place to begin the rehabilitation work to the dam, nor any indication as to when that will occur. Additionally, the Appellant referenced other dam rehabilitation projects that resulted in problems such as downstream sedimentation or other issues delaying a full restoration of activities at the lake.

In considering the question of irreparable harm, we find this matter to be similar to that of *Center for Coalfield Justice v. DEP*, 2017 EHB 38 (*CCJ*), *appeal dismissed*, 2017 Pa. Commw. Unpub. LEXIS 565, 174 A.3d 1204 (Pa. Cmwlth. Aug. 2, 2017), in which the appellant sought a supersedeas to prevent mining under a stream located within a state park. In *CCJ,* as in this case, the Department and permittee did not dispute that harm to the stream would occur. Rather, they argued that any negative impacts to the stream would be temporary and could be addressed by the mining company through mitigation. They argued, as the Department and Commission do here, that any harm that occurs can be repaired and, therefore, it is not irreparable. The Board was not persuaded by the argument put forth by the Department and the permittee in *CCJ* because there was no guarantee that the stream could be fully repaired, and any such repairs would alter the stream from its original state. Pertinent to the matter here, the Board recognized the value of the stream as a source of public recreation:

> There is no question that the public use of Kent Run will, at a minimum, be impacted during any repair work on Kent Run. Longer term, if the repairs are not successful, the public use of Kent Run, along with its environmental value, will be harmed. In the context

> of a petition for supersedeas, such as this, we think that there is a strong argument that Kent Run may suffer actual irreparable harm and that such harm would affect [the appellants], their members and the general public.

Id. at 57.

Here, no one disputes that there will be a long-term impact on aquatic life, wildlife and the enjoyment of the lake by Appellant's members and the surrounding community while High Point Lake is drained. While we agree with the Commission that wildlife is likely to return to the area and activities such as fishing and boating may resume once the lake is refilled and restocked, there, of course, is no guarantee as to what that will look like or how long it will take. Moreover, although Commission witnesses discussed the return of wildlife and the restocking of the lake with fish once the dam rehabilitation project is complete and the lake is refilled, it is important to point out that there is no permit authorizing the dam rehabilitation at High Point Lake at this time. A permit application was submitted by the Commission in February 2023 and remains pending.[5] Without a permit, the dam cannot be rehabilitated; without the dam rehabilitation, the lake cannot be refilled. Although witnesses for both the Commission and Department were confident that a permit will be issued for the dam rehabilitation project, there is no estimate as to when this is likely to occur. Moreover, even if the permit is obtained, the Commission explained that the actual work to be done to the dam must go through a bidding process with a separate state agency. Until there is an actual permit in place for the rehabilitation of High Point Lake Dam which will then eventually allow the restoration of High Point Lake, we cannot say that the harm to the Appellant

[5] During a conference call with the Board held on October 17, 2025, the Department and Commission advised the Board that a technical review is ongoing and the Department has provided comments to the Commission. The Department is awaiting a response from the Commission's consultant, Michael Baker International.

is reparable. As such, we find that the Appellant has made a credible showing of irreparable harm resulting from the full drainage of High Point Lake.[6]

Irreparable Harm – Sedimentation and Glade Run

The Appellant also raised a concern about the draining of the lake causing issues with the brook trout population in Glade Run, the downstream receiving water. Mr. Hetrick testified that he has caught native brook trout in Glade Run as recently as June of 2025. While fishing in Glade Run in June 2025, Mr. Hetrick noted the presence of stocked trout in addition to the native trout. Mr. Hetrick testified that he is concerned that if the water level were to get too low in Glade Run, due to the dewatering of High Point Lake, the trout could become "landlocked" and unable to travel to deeper pools if needed.

According to the Commission's Mr. Nihart, while Glade Run is a native, or wild, brook trout stream, it has a very low-density population of wild brook trout. (Tr. 554.) He noted that the Commission does stock Glade Run with non-native trout as well. In Mr. Nihart's opinion, the presence of High Point Lake on Glade Run has a negative impact on the stream's ability to support a higher density brook trout population. Brook trout are a thermally intolerant species and require cool waters to survive. (Tr. 555.) The water that comes out of the dam and enters Glade Run is generally coming from the top of the reservoir's water column, and that surface water is warmer in temperature from exposure to sunlight. (Tr. 555.) As such, in Mr. Nihart's opinion, the presence of the dam on Glade Run causes a negative thermal impact with respect to the brook trout.

With respect to Mr. Hetrick's concerns over reduced flow and the water level becoming too low in Glade Run, it was noted that pursuant to Department regulations, the Commission is

[6] However, based on our findings on the other two elements of a supersedeas – i.e., likelihood of success on the merits and risk of harm to the public, we find that the Appellant's showing of irreparable harm cannot warrant the issuance of a supersedeas.

required to maintain a flow through the dam for the purpose of feeding Glade Run. (Tr. 83.) Specifically, the Commission is required to maintain a base flow, or the flow necessary to maintain biological and ecological integrity, in Glade Run. (Tr. 362.)

With respect to sedimentation or siltation, in Mr. Nihart's opinion, any impacts from the lake drawdown on the brook trout in Glade Run will be minimal. Mr. Nihart provided the following explanation: Brook trout start the spawning process in mid-to-late September, continuing into early November. (Tr. 556, 571.) As part of the spawning process, brook trout pair up and create a redd where they will lay their eggs. (Tr. 556.) Brook trout generally lay their eggs at the bottom of a ripple or run, as they require flowing water, and do not typically create redds in areas where sediment is expected to load, such as in deeper pools of water. (Tr. 556.)

Additionally, as the lake is being drawn down, the Commission will be working to implement sediment and erosion control measures, such as seeding exposed soil, to help eliminate the threat of harmful sedimentation or erosion. (Tr. 552–53.) Finally, sedimentation concerns are also mitigated by the settling basin that intercepts sediment coming out of the dam prior to entering Glade Run. (Tr. 556.)

Moreover, according to Mr. Nihart, even if there were to be impacts, he does not believe that repopulation or reintroduction of brook trout into Glade Run would take a very long period of time. Because Glade Run is a tributary to McClintock Run, which has other wild brook trout tributaries and thus a brook trout population, the proximity would assist in repopulating Glade Run. (Tr. 557.) Mr. Nihart noted that brook trout often occur in small headwater streams prone to drought or flooding events and as such, are a very resilient fish species. (Tr. 557.) We find Mr. Nihart's testimony to be persuasive. Accordingly, we do not find that the Appellant met its burden

of showing that the lake drawdown will cause irreparable harm to Glade Run or its associated brook trout population.

Likelihood of Success on the Merits

While the petitioner bears the burden of proof in a supersedeas hearing and thus must demonstrate a likelihood of success on the merits, a discussion of the Commission's investigation and the Department's review leading up to the issuance of the permit provides helpful background:

Construction of the Dam

High Point Lake Dam is approximately 300 acres in size. At normal pool the lake holds approximately 2.1 billion gallons of water and the depth is 34 feet where it is closest to the dam. (Tr. 368.) One of the various components of a dam is an auxiliary spillway, the purpose of which is to convey water during large storms up to and including the probable maximum precipitation event. The spillway is comprised of eight-inch-thick concrete slabs placed on top of drainage. There is a stone subbase beneath the slabs. The auxiliary spillway contains a 12 inch-HDPE[7] plastic pipe that serves to drain water coming under the spillway. (Tr. 367.)

From the ogee weir at the top of the spillway to the spillway drain it is gently sloping. Then, the slope becomes steeper. At the bottom of the spillway is a stilling basin; as water exits the spillway, it is given a chance to still and lower the velocity before entering the outlet channel. The stilling basin protects the receiving stream — by minimizing the velocity of the water, it minimizes the potential for erosion and scouring. (Tr. 365.)

There are two potential modes of failure for an auxiliary spillway such as the one at High Point Lake Dam: One such situation is where water pressure below the spillway creates a force that could cause uplifting and overturning of the concrete slabs of the spillway. (Tr. 365-66.) A

[7] High density polyethylene.

second failure mode would be the collapse of the spillway due to internal erosion, i.e., water entering beneath the spillway slabs and moving material such as stone and compacted soil out from below the slabs. (Tr. 366.) If the auxiliary spillway fails, any water that is held within the reservoir will exit the reservoir at once. (Tr. 366-67.)

The Commission's Investigation

Ruth Hocker is a Senior Civil Engineer – Hydraulic. She acts as the Commission's Dam Safety Program Manager. In this position she is responsible for the inspection, oversight, maintenance, rehabilitation and construction of the Commission's 33 high hazard dams across the Commonwealth. She is also responsible for developing and enacting emergency action plans. Ms. Hocker was recognized by the Board as an expert in high hazard dams and hydraulic engineering. She estimates the life of High Point Lake Dam as being closer to 50 years, rather than 100, in part due to the materials used to construct the dam. Specifically, the dam contains corrugated metal pipe which Ms. Hocker estimates as having a service life between 25-50 years (Tr. 369.) Corrugated metal is not approved for use in construction of high hazard dams today. (Tr. 370.)

The decision to drawdown High Point Lake was based on the following areas of concern observed by Commission personnel: an area of ground saturation near the dam designated as the "wet area," areas of pressurized water coming through the spillway slab, the presence of aggregate and fine material in the stilling basin below the areas of pressurized water, and the presence of a small void in the area below the spillway.

The Wet Area:

An area of ground saturation identified during the hearing as "the wet area" or "wet spot" is located near the dam. The wet area is approximately 25 to 30 feet from the auxiliary spillway. (Commission Ex. 1 and 2; Tr. 377.) In elevation it is approximately 10 to 15 feet below the

drainpipe in the center of the spillway. (Tr. 377.) The wet area is located in an area that was constructed of compacted fill at the same time as the dam construction in 1965. (Tr. 377.) The Commission has known about this wet area since at least 2020 and began to document it in annual inspection reports at that time. (Tr. 375.)

During an inspection in September 2024, Ms. Hocker and other Commission personnel noted the wet area felt "like you were walking on a waterbed" which she described as being "different from prior inspections." (Tr. 378.) During the September 2024 inspection, Commission personnel inserted a probing rod into the ground in the wet area. Based on Ms. Hocker's notes taken at the time of the inspection, the wet area measured 30 feet by 15 feet in size and the probe was able to reach depths of five inches to 12 inches. (Commission Ex. 3.) Following the September 2024 inspection, Ms. Hocker and her team continued to monitor the area. They noted that the surface area of the wet area was expanding and the probe depths, where probing could occur without resistance, were increasing. (Tr. 381.)

During an inspection on April 9, 2025, the wet area was measured as being 66.5 feet by 36 feet with a probe depth of 12 to 19 inches. (Tr. 381; Commission Ex. 3.) Additionally at that time, a small amount of clear water was observed flowing from the area as well as a minor plume of cloudy water in one of the standing puddles. (Tr. 381.) During an inspection on May 19, 2025, the area measured slightly larger at 80 feet by 38 feet; probe depths remained at 12 to 19 inches, and holes left by the probe quickly refilled with cloudy water. (Tr. 382; Commission Ex. 3.)

Ms. Hocker could not eliminate rainfall as impacting the wet area with 100% certainty and agreed it could be a limited factor. However, it is her opinion that the presence of the wet area, in conjunction with other factors discussed herein, is "indicative of a problem with the dam's normal operation." (Tr. 377.) Engineers with the Commission's consultant, Michael Baker International

(MBI), also determined the wet area to be an area of concern, but in an email dated August 4, 2025, admitted they did not know where the connection was between the lake and the wet area.

Pressurized Water Exiting the Spillway & Presence of Aggregate Deposit in Stilling Basin:

On July 3, 2025, Ms. Hocker and her team observed what appeared to be pressurized water exiting the steeper portion of the auxiliary spillway near the stilling basin. (Tr. 387-89; Commission Ex. 4 and 5.) The water appeared to be pumping out between two joints on the spillway. She felt that the spouting water was a concern because it might indicate that water was moving up through the concrete of the spillway from somewhere other than over the top, and spillways are designed to convey water over the top, not below them. (Tr. 388.) Also in July 2025, Ms. Hocker and her team observed what appeared to be a large aggregate deposit in the stilling basin below the auxiliary spillway. (Tr. 388.) The deposit consisted of a reddish colored stone that ranged in size from ¾ inch to two inches. (Tr. 397.) She stated that neither she nor her team had noticed a similar deposit on prior inspections. (Tr. 390, 397.) Its location led her to hypothesize that the stone came from beneath the upper spillway slabs through the spillway drain. (Tr. 397-98.)

Following these observations, Ms. Hocker requested a one foot-drawdown in order to allow an evaluation of the auxiliary spillway. Thereafter, in consultation with engineers from MBI, Ms. Hocker then requested a five foot-drawdown in order to assess conditions observed at and around the spillway. (Tr. 393–94.) After the five-foot drawdown, they observed no further expansion of the wet area and no further change in the depths of the probes. (Tr. 405.)

In July 2025, MBI performed a sounding technique on the spillway, which involved striking the concrete with a hammer and listening for differences in sound, to determine the

likelihood that voids were present. (Tr. 395–96.) According to Ms. Hocker, MBI's sounding technique indicated that voids were likely present. (Tr. 396.)

In early August, Ms. Hocker contacted MBI and asked that it perform hydraulic and hydrologic calculations to determine to what elevation the reservoir would need to be drawn down so as not to exceed the control elevation in the event of various large storm scenarios. (Tr. 400–01.) For three out of the six scenarios, the reservoir would exceed the control elevation and as such, MBI recommended that High Point Lake be drained to reduce the possibility of failure in either the embankment or the spillway. (Tr. 402–03; Commission Ex. 8.) Ms. Hocker testified that the full drawdown of the lake was requested due to what she believed to be the beginning of an active failure mode beneath the auxiliary spillway. (Tr. 405.) The Commission's Director of the Bureau of Engineering, Mr. Paul Urbanik, was kept apprised of Ms. Hocker's investigation and agreed with the decision to drawdown High Point Lake. The Department was also involved in the review of the Commission's findings and concurred with the drawdown of the lake.

Ms. Hocker acknowledged that, under normal circumstances, when the Commission is planning to do dam rehabilitation projects that require a full drawdown of a reservoir, the Commission does not request the drawdown until it has a Dam Safety permit from the Department in hand. Here, however, she believes the condition of the dam necessitated the drawdown at this time. (Tr. 407.) She submitted the application for the drawdown permit on August 11, 2025, and it was approved a few days later.

The Void:

Following the issuance of the permit, on August 21, 2025, a push camera was run into the drainpipe under the spillway. The video shows a deteriorated metal screen that had been affixed to the end of the pipe. The video also shows a void space under the spillway slab and drainpipe.

Although the void has not been measured, based on the video and photograph of it, Ms. Hocker estimates that it is approximately six inches in height and 12 inches in width. (Tr. 411; Commission Ex. 11.) From the video it is impossible to determine the depth. It is the position of the Commission that the void indicates an active failure of the auxiliary spillway and the potential for full failure of the dam. As noted above, sound testing performed by MBI indicates that other voids are likely present.

The Department's Review

The Department presented the testimony of Kirk Kreider, Chief of the Division of Dam Safety and senior civil engineer. He has held this position for 3 ½ years and has 25 years' experience working with dams. Mr. Kreider was recognized by the Board as an expert in the field of civil engineering, including the engineering aspects of dams and dam safety. Throughout his career he has been involved in the review of engineering plans for approximately 1,000 earthen dams and was the primary reviewer for approximately half of them.

The Department was involved in the review of the request to drawdown High Point Lake, and Mr. Kreider's signature, along with that of the Commission's Ben Lorson, appears on the drawdown permit. It is the opinion of Mr. Kreider that High Point Lake Dam is in an unsafe condition and the drawdown needs to continue.

Mr. Kreider provided a helpful description of the auxiliary spillway: The auxiliary spillway is built on an earthen foundation, i.e., dirt. There is a drain that runs under the spillway that is built of sand and stone aggregate. (Tr. 589.) Mr. Kreider described how the drain is critical to the function of the dam: He explained that earthen dams and earthen foundations seep. The point of the drain is to collect that seepage and have it safely collected in a controlled manner. (Tr. 593.)

He testified that the sand and the aggregate should remain in place for the proper and safe functioning of the dam.

It is Mr. Kreider's opinion that the pile of aggregate, sand and fine material observed in the stilling basin came from portions of the drain that are breaking away and loss of the spillway's foundation material. Based on Mr. Kreider's observation of the aggregate pile in the stilling basin, he estimates that the size of the void is at least the size of the aggregate pile or even larger since some of the finer material has likely washed downstream. It is also his opinion, based on his experience, that there are likely to be multiple voids in the spillway subsurface, not just the one observed with the camera. He testified that anytime aggregate material or fines are observed, that is "a very large red flag." (Tr. 598.) Mr. Kreider also provided testimony regarding the pressurized water seen shooting out of the spillway. He testified that it is caused by water building up in the area, likely due to portions of the drain breaking away.

Mr. Kreider also provided an assessment of the wet area. In particular he disagreed with the Appellant's assertion that the wet area is not on the dam embankment. Because the wet area is not located on natural ground but on a constructed berm that acts as a buttress to the main dam embankment, he considers it to be on the dam embankment. (Tr. 603.) Based on the location of the wet area, it is Mr. Kreider's opinion that it would be highly unlikely for it not to be hydraulically connected to the dam. However, even if the wet area were not hydraulically connected, in his opinion the loss of foundation material and drain material from underneath the spillway is enough reason for draining the dam. With the continuation of that process, he believes erosion will continue to occur. If that occurs, he testified that the spillway slabs will no longer be supported by the foundation and the slabs will collapse and fall into the growing void, resulting in dam

failure. Based on this analysis, Mr. Kreider stated that if the Commission had not voluntarily undertaken steps to drain High Point Lake, the Department would have insisted upon it. (Tr. 625.)

The Appellant's Petition for Supersedeas

The Appellant does not dispute that repairs need to be made to the dam but argues that the repairs can be done much more modestly and do not require a full drawdown of the lake. The Appellant contends that the "areas of concern" relied upon by the Commission and Department, i.e., the wet area, the void and the presence of aggregate and fine material in the stilling basin,[8] are not connected to an active failure of the dam and, therefore, the decision to drawdown the lake was arbitrary and capricious.

Appellant's Argument: The Wet Area

The Appellant presented the testimony of Mr. Larry Mayton and Mr. Ronald Musser with regard to the area near the dam that has been designated as "the wet area." Mr. Larry Mayton is a retired mining engineer and a frequent fisherman at High Point Lake. He conducted a visual inspection of High Point Lake Dam in July 2024. It is his testimony that on the day of his inspection the dam was full. [9] If seepage is occurring, he believes it would be more likely to occur when the dam is full, yet he saw no evidence of any seeps from the dam embankment or downstream of the dam embankment. He also did not see evidence of the wet area as described by Commission personnel. Mr. Mayton took photographs of the dam on the day of his visit, and they

[8] The Appellant did not address the pressurized water shooting out of the spillway because, as the Board understands it, that was not provided by the Commission as a primary reason for the drawdown of the lake prior to the testimony at the supersedeas hearing. However, as outlined in the section addressing the Department's Review, the pressurized water was a factor considered by the Department in its assessment of the safety of the dam. Additionally, the Board may consider this information pursuant to its *de novo* review authority. *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

[9] Based on Ms. Hocker's review of photographs taken by Mr. Mayton on the day of his visit, it appears that the dam was somewhat less than full.

show that the area was mowed and there were no ruts which one might observe if the area were wet. Mr. Mayton visited the dam again in August 2025 as part of a site visit with Commission personnel and other officials. This was around the time when the Commission announced it would be implementing a full drawdown of the lake. Mr. Mayton observed no seeps at that time.

Mr. Ronald Musser is a senior geologist and Vice President of Musser Engineering. The bulk of his work is in the field of hydrogeology. Musser Engineering was retained by the Appellant to look into the proposed rehabilitation of High Point Lake Dam. Mr. Ronald Musser is the co-author of two reports, along with Mr. Randall Musser, providing an assessment of High Point Lake Dam. It is the opinion of Mr. Ronald Musser that the wet area is not the result of seepage from the dam embankment. Mr. Musser relied, in part, on Google Earth photographs dating back to 2005 showing, in his opinion, that the wet area has existed since at least that time and that the size of the area fluctuates. It is the professional opinion of Mr. Musser that the wet area is caused by seasonal precipitation and water movement in the vadose zone and is unconnected to the dam itself. (Tr. 122-24.) According to Mr. Musser, the wet area lies in a valley bounded by two steep mountains on either side. Water moves down the mountains as surface runoff toward the wet area, and, in his opinion, water movement in the vadose zone would follow topography. (Tr. 124.) His opinion was further supported by rain data for the spring of 2025, which included heavy rainfall amounts. (Tr. 118.)

Mr. Musser was the only geologist to testify with regard to the wet area and, therefore, we assign a high degree of weight to his testimony regarding whether there is a likely hydrogeological connection between the dam and the wet area. Additionally, the Commission's consultant, MBI, was unable to establish where a connection existed between the dam and the wet area. However, the observations of Commission engineer Ruth Hocker and the analysis of Department Dam Safety

Division Chief Kirk Kreider present a strong argument that a connection may exist. As Mr. Kreider testified, based on his 25 years of experience in the field of dam safety, "when you have in this case a 34 foot wall of water being impounded just a hundred feet or whatever that distance is upstream, and you have wet areas, it is highly unlikely there is not some sort of connection." (Tr. 603-04.) There appears to be no definitive answer, and even Ms. Hocker and Mr. Kreider acknowledge that if the wet area were the only area of concern, it would likely not provide a basis for draining the lake. However, when viewed in conjunction with the other areas of concern, we agree with the Commission and the Department that the presence of the wet area provides added support for the decision to drawdown the lake.

Appellant's Argument: The Void and Presence of Aggregate/Fine Material in Stilling Basin

The Appellant asserts that the presence of aggregate and fine material in the stilling basin does not support the decision to fully drain the lake. It further argues that the presence of the void behind the area of the drainpipe, while indicative of repairs needed for the dam, does not provide a basis for draining the entire lake. In support of its position the Appellant presented the testimony of engineers Larry Mayton and Randall Musser.

Mr. Mayton is a retired mining engineer. He served as a mine superintendent and subsequently as an engineer with the Mine Safety and Health Administration. Mr. Mayton was recognized by the Board as an expert on dam impoundments and dam facility inspections. Mr. Mayton conducted a visual inspection of High Point Lake Dam in July 2024. At that time, he stated he observed aggregate material in the stilling basin, but it was difficult to see due to the murkiness of the water. In other testimony, it was pointed out that the stilling basin had not been drained since 2018. (Tr. 468.) It is the position of the Appellant that the aggregate material observed by Commission personnel in July 2025, and relied upon as a reason for draining the lake,

had been there all along but was not visible due to the murkiness of the water and was not evidence of the dam beginning to fail. However, it is Ms. Hocker's opinion that the material shown in Mr. Mayton's photographs of the stilling basin on the day of his site visit in July 2024 was biological material, such as algae, and not the aggregate material that her team observed in July 2025. While it is unclear what material Mr. Mayton may have observed in the stilling basin in July 2024, there appears to be no question that aggregate, sand and fine material was observed by Commission personnel in July 2025, and that such material appeared below the areas of pressurized water. Moreover, even if the material observed by Mr. Mayton in July 2024 were aggregate material, we do not believe this disproves the position of the Commission and the Department that parts of the spillway may be breaking away — it is possible that aggregate material has been breaking away from the spillway since as early as July 2024.

In addition to Mr. Mayton's testimony, the Appellant relied heavily on the testimony of Mr. Randall Musser, a Licensed Professional Engineer and founder of Musser Engineering. Musser Engineering was retained by the Appellant in the spring of 2024 after Appellant learned of proposed plans by the Commission to conduct a large-scale rehabilitation of High Point Lake Dam which involved draining the lake. During his long career, Mr. Musser has carried out inspections of impoundments associated with coal mines as well as dams regulated by the Department. Mr. Randall Musser is co-author of two reports, along with Ronald Musser, which provide an assessment of High Point Lake Dam following the Mussers' visual inspection of the dam and surrounding area in June 2024.

In his testimony, Mr. Musser addressed the void space found under the spillway during the video inspection. While Mr. Musser agrees that prompt remedial action should be taken to address the void, he does not agree that the first course of action should be to drain the lake; rather, he

suggested using a concrete saw to cut a portion of the spillway slab, approximately three feet by three feet, in order to assess the void. He suggested that one method of repairing the void would be with grout. (Tr. 259.) The Commission's Ms. Hocker and the Department's Mr. Kreider acknowledged that grouting may be a viable option for filling a void. (Tr. 434, 642.) Mr. Musser also recommended replacing the rusted metal cap to the drainpipe with a screen in order to prevent aggregate and other materials from traveling through the pipe. (Tr. 243-44.) He felt that this type of repair would be far less costly than the dam rehabilitation that has been proposed for High Point Lake Dam. In Mr. Musser's opinion, the discovery of a modest sized void in the spillway subsurface and what he considers to be a modest amount of gravel in the stilling basin does not warrant the sudden and full drawdown of High Point Lake. At a minimum, Mr. Musser believes that further investigation should be done before taking the drastic step of draining the lake. Indeed, the Appellant points to other dam rehabilitations, including one that involved the reconstruction of a spillway, which did not require the full drainage of the reservoir associated with the dam.

While Mr. Musser presented viable options for providing repairs to the dam, we are not convinced that the dam would remain in a safe state if it were allowed to remain full while the assessment and repairs were being conducted. The Commission and Department presented credible testimony that the dam may very well be in an active state of failure. In particular, Mr. Kreider's testimony regarding the pressurized water shooting through the spillway, the presence of aggregate material in the stilling basin below the areas of pressurized water, and the likelihood that more voids exist under the spillway was persuasive that the dam may present a safety risk if allowed to remain full.

Risk to Public Safety

The Appellant argues that there cannot be a risk to public safety because, at the time of the issuance of the permit to drawdown the lake, the Commission was still allowing fishing, boating, kayaking and other activities to continue on the lake. Thus, argues the Appellant, there cannot be an imminent risk to public safety if activities on the lake are still permitted. In response, both the Commission and Department presented testimony that the risk is to downstream populations due to flooding in the case of a major storm event. In particular, the Department and Commission presented what they referred to as an inundation map showing the likely path of downstream flooding and the areas that would be affected in the event of a dam failure. The Commission and Department estimate that downstream flooding could impact approximately 1,500 people living downstream of the dam and another 700 who work in that area.

While the Commission acknowledges that the risk of a major storm event of the size that could cause the dam to fail is low, it is not zero. (Tr. 372-73.) Any risk to the public prevents us from granting a supersedeas. Moreover, we are persuaded by the testimony of Mr. Kreider that the dam will only continue to erode as time goes on, and under such circumstances the risk will continue to increase.

Conclusion

While the Appellant has made a credible showing of irreparable harm to its members and the community resulting from the decision to dewater High Point Lake, ultimately the Board cannot grant a supersedeas where there is a risk to public safety. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b) (where injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect, the Board may not grant a supersedeas.) Here, the Commission and the Department are responsible for the integrity of High Point Lake Dam and the safety of those living and working downstream of the dam. We find that they have presented

compelling evidence that the decision to drawdown High Point Lake was a reasonable use of their discretion in order to avoid the risk of a dam failure in the event of a major storm event. While there is no question that the loss of the lake will have a deep impact on the Friends of High Point Lake and the surrounding community, we ultimately must find in favor of public safety. Therefore, the Petition for Supersedeas must be denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF HIGH POINT LAKE	:	
	:	
v.	:	**EHB Docket No. 2025-102-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee	:	

O R D E R

AND NOW, this 30th day of October, 2025, this Opinion is hereby issued in support of our Order of October 10, 2025 denying the Petition for Supersedeas.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: October 30, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Christopher L. Ryder, Esquire
Melanie Seigel, Esquire
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(via electronic filing system)

For Appellant:
Matthew L. Wolford, Esquire
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For Permittee:
Robert J. Schefter, Esquire
Penny V. Ayers, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2023-019-CP-B**
COUNTRY ESTATES MHP, LLC	:	**Issued: December 18, 2025**

ADJUDICATION

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Defendant is liable under the Clean Streams Law for violations of its Water Quality Management Permit and for effluent violations of its NPDES permit. The Board assesses a civil penalty of $23,696.68 against the Defendant for the identified violations of the Clean Streams Law.

Background

The present matter before the Environmental Hearing Board ("Board") arises from a complaint filed by the Department of Environmental Protection ("the Department") requesting the Board to assess $34,877.75 in civil penalties against the Defendant, Country Estates MHP, LLC ("Country Estates"), the owner of a mobile home park in Jefferson Township, Mercer County, Pennsylvania. On February 27, 2023, the Department filed a Complaint for Civil Penalties ("the Complaint") requesting that the Board assess a civil penalty pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, against Country Estates in the amount of $34,877.75. The Complaint alleged violations of the Clean Streams Law and of the terms of two permits for a sewer treatment plant owned and operated by Country Estates. The Complaint contained two separate counts, the first alleging violations of Section 611 of the Clean Streams Law and the terms of Country Estates' Water Quality Management Permit ("WQM Permit"). The second count alleged

additional violations of Section 611 of the Clean Streams Law as well as the terms of Country Estates' National Pollutant Discharge Elimination System Permit ("NPDES Permit"). Country Estates never filed an answer to the Complaint.

On May 6, 2025, the Department filed a Motion for Default Judgment ("Motion") as to both Country Estates' liability and an assessment of civil penalties.[1] After Country Estates failed to respond to the Motion, the Board issued an Opinion and Order dated June 18, 2025 ("June 2025 Opinion") granting a default judgment as to Country Estates' liability but denied the Department's request for a default judgment as to the amount of the civil penalty. Following the review of the Motion, the Board stated that it was its "role to make an independent determination of the appropriate penalty amount based upon the applicable statutory criteria." *Country Estates MHP, LLC v. DEP*, EHB Docket No. 2023-019-CP-B, slip op. at 7 (Opinion issued June 18, 2025). Moreover, because questions and concerns remained regarding how the Department arrived at its proposed penalty amount, the Board held that an evidentiary hearing was appropriate to conduct a closer evaluation of the penalty.

On July 9, 2025, the Board issued an order setting a hearing date for August 21, 2025, and scheduling deadlines for the filing of pre-hearing memorandum by the Department and Country Estates. The Department timely filed its pre-hearing memorandum, but Country Estates failed to file a pre-hearing memorandum as ordered by the Board. The evidentiary hearing proceeded on August 21, 2025. After receipt of the hearing transcript, we issued a schedule for the filing of post-hearing briefs. The Department filed its post-hearing brief on October 16, 2025. Country Estates did not file a post-hearing brief by November 14, 2025 as ordered, and the Department

[1] The Department does not explain why it waited over two years after Country Estates failed to respond to the Complaint to file its Motion for Default Judgment.

elected not to file a reply brief. With the deadlines for post-hearing filings now past, the matter is ripe for decision.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1- 691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations"). (Complaint at ¶ 1).

2. Country Estates MHP, LLC is a Pennsylvania limited liability company with a mailing address of 378 Red Bank Road, Mifflinburg, PA 17844 ("Country Estates"). (Complaint at ¶ 2).

3. Country Estates was the owner of real property located at 1101 South Lake Road, in Jefferson Township, Mercer County. (Complaint at ¶ 4).

4. Country Estates operated a sewer treatment system that served the Country Estates mobile home park. (Complaint at ¶ 5).

5. Country Estates held a Water Quality Management Permit No. 4373402 A-1 ("WQM Permit") that authorized the following units to treat sewage flows of up to 15,000 gallons per day: (1) bar screen, (3) 15,000 gallon aeration tanks in series, (1) 1,567 gallon clarifier, (1) approximately 1,600 gallon dosing tank, (1) 7,200 square foot sand filter and (1) 8,208 square foot sand filter in parallel, (1) 3,000 gallon sludge holding tank, and (1) 3,275 gallon chlorine contact tank with tablet disinfection. (Complaint at ¶¶ 6-7).

6. During an inspection of the sewage treatment system on October 30, 2019, the Department found that the treatment plant aeration, sludge returns, and clarifier skimmers were not operating, due to an inoperable blower. At this inspection, the Department additionally

identified that the wastewater treatment plant's chlorinator was not properly installed. (Complaint at ¶ 8; DEP Ex. 3).

7. The October 30, 2019, inspection also noted issues with the sand filters but no violation was listed. (DEP Ex. 3).

8. On November 4, 2019, the Department inspected the Country Estates' site and found that the violations that it had identified five-days earlier at the previous inspection had been corrected. (Complaint at ¶ 9; DEP Ex. 4).

9. During another inspection conducted on December 10, 2019, the Department identified that the comminutor, alum chemical addition, and effluent cascade aerator, equipment that the WQM Permit required, were not installed. Additionally, the sand filters were not properly draining, and one blower was nonoperational. (Complaint at ¶ 10; DEP Ex. 5).

10. The Department inspected the Country Estates' system again on December 3, 2020, and observed that the comminutor, alum chemical addition, and effluent cascade aerator remained uninstalled, and one blower was nonoperational. (Complaint at ¶ 11; DEP Ex. 6).

11. The inspector noted in the inspection report dated December 3, 2020, that the issue concerning the east sand filter that the Department observed nearly a year earlier, had been addressed by replacing the filter's sand. The west filter's sand had not been replaced. (DEP. Ex. 6).

12. On March 26, 2021, Country Estates filed an application with the Department, that sought to amend the WQM Permit by removing the requirement to construct the comminutor, alum chemical addition, and effluent cascade aerator. (Complaint at ¶ 12).

13. On September 30, 2021, the Department issued an amendment to the WQM Permit that removed the requirement to construct the comminutor, alum chemical addition, and effluent cascade aerator. (Complaint at ¶ 13).

14. On January 18, 2023, during an inspection of the Country Estates' site, the Department observed that the treatment system's blower was operational. (Complaint at ¶ 14; DEP Ex. 7).

15. In the inspection report dated January 18, 2023, the inspector noted that Country Estates' treatment plant operator reported that the sand filters had additional drainage issues and the west filter's sand was replaced in 2022. (DEP. Ex. 7). At the time of the inspection, the east filter's sand was being replaced. (*Id.*).

16. Country Estates holds NPDES Permit No. PA0033588 ("NPDES Permit"), authorizing it to discharge treated sewage effluent from the sewage treatment plant to an unnamed tributary to Lackawannock Creek. The NPDES Permit sets forth the effluent limitations for the Plant. (Complaint at ¶ 16, DEP Ex. 2).

17. The NPDES Permit set forth effluent limits and required that Country Estates submit monthly Discharge Monitoring Reports (DMRs). (DEP Ex. 2).

18. Between March 2018 and March 2022, Country Estates' DMRs reported that, during various months, it had exceeded the effluent limitations prescribed by the NPDES Permit. (Complaint at ¶ 18; Exhibit A to the Complaint).

19. On October 25, 2018, and September 19, 2019, the Department issued Notices of Violation to Country Estates for the discharge of treated sewage effluent in violation of the NPDES Permit. (Complaint at ¶ 19).

20. Eric Kicher ("Mr. Kicher"), an Environmental Group Manager for the Department's Clean Water Program, calculated the proposed civil penalty amount sought in the Complaint against Country Estates. (Notes of Testimony at ("T.") 11).

21. Mr. Kicher has been employed with the Department's Clean Water Program since 1998 and has calculated between 50 and 100 civil penalties for violations of the Clean Streams Law and has reviewed over 100 civil penalty calculations prepared by others under the Clean Streams Law during his tenure with the program. (T. 6-8).

22. Mr. Kicher used the Department's Standard Operating Procedures ("SOPs") and a penalty matrix spreadsheet to calculate the proposed civil penalty for Country Estates' violations. (T. 9-10; DEP Ex. 1).

23. The SOPs list categories of violations of the Clean Streams Law and the penalty matrix spreadsheet contains multiple tabs that correspond with those violations. (DEP Ex. 1).

24. The penalty matrix spreadsheet is a multi-tab spreadsheet used to calculate penalty amounts using various data inputs. (T. 13-15).

25. Mr. Kicher categorized the missing and inoperable treatment units at Country Estates' sewage treatment plant as "single event violations" of the WQM Permit. (T.15).

26. The penalty matrix provides for a penalty range of $100 to $10,000 per day for single event violations. (T. 15).

27. The Department identified a total of seven single event violations of the terms and conditions of Country Estates' WQM Permit. (Complaint at ¶ 24)

28. Mr. Kicher calculated a penalty of $700 for the seven violations of the WQM Permit. (T. 16).

29. Each time the Department observed a single event violation during an inspection, Mr. Kicher applied a penalty amount of $100 for each violation as he did not consider the single event violations to be deliberate or reckless. (T. 15-16).

30. Mr. Kicher calculated that the Department's costs in relation to the violations of the WQM Permit totaled $371.00. (DEP Ex. 9). These costs derived from the Department's five inspections related to single event violations observed on October 30, 2019, November 4, 2019, December 10, 2019, December 30, 2020, and January 18, 2023. (T. 17; DEP Ex. 9).

31. Mr. Kicher used the inspection reports to obtain the arrival and departure time at each inspection to determine the amount of Department time spent on the WQM Permit violations. (T. 27; DEP Exs. 3, 4, 5, 6, and 7).

32. To calculate the Department's personnel costs, Mr. Kicher input the time spent on the inspection and the hourly compensation rate of the Department employee conducting the inspection into the penalty matrix. (T. 26-27).

33. The penalty matrix spreadsheet only allows whole hour inputs. (T. 28).

34. Mr. Kicher rounded the Department's time to whole numbers when calculating personnel costs. (T. 28).

35. Mr. Kicher also calculated that the one-way mileage from the Meadville Regional Office to Country Estates was 35 miles. He then multiplied that distance by the federal mileage rate to obtain a total mileage cost for each inspection. (T.18; DEP Ex. 9).

36. During his testimony, Mr. Kicher could not recall what the exact federal mileage rate was at the time he calculated the mileage costs, but estimated it was close to 56 cents per mile. (T. 20).

37. Mr. Kicher calculated a total of $33,806 for the effluent violations of the NPDES Permit. (T. 51).

38. To calculate a penalty amount for the effluent violations, Mr. Kicher entered the water quality parameter, the NPDES Permit limit, and the reported sample result into the penalty matrix spreadsheet. (T. 41).

39. The penalty matrix spreadsheet begins with a $1000 base amount for monthly average parameters and adjusts that value up or down depending on the parameter and the concentration amount that is over the NPDES permit limit. (T. 41).

40. A technical review criteria constant of 1.4 is used for conventional pollutants, and 1.2 for nonconventional pollutants. (T. 42-43).

41. For pollutants with monthly averages, the penalty matrix spreadsheet calculates the reported sample result divided by the permit limit; that value is then divided by the technical review criteria constant; and then multiplied by the base amount of $1000. (T. 43).

42. There is a presumption built into the penalty matrix spreadsheet calculation that the effluent exceedances have a damaging effect on the receiving water. (T. 44, 52).

43. The matrix calculation uses a higher base penalty for monthly averages because that indicates a chronic condition versus a daily result. (T. 44).

44. The penalty calculations Mr. Kicher used for the effluent exceedances are used statewide by the Department. (T. 45-46).

45. At the time Mr. Kicher calculated the penalty for the NPDES violations, the penalty matrix spreadsheet did not include a separate entry to account for willfulness when addressing effluent violations. (T. 52, 56).

46. The Department did not conduct any on-site investigation to determine the extent of injury the effluent exceedances caused the unnamed tributary. (T. 56-57).

47. Mr. Kicher did not include restoration costs in the proposed penalty because he concluded that there was nothing applicable with regards to restoration costs. (T. 52).

48. Mr. Kicher considers the deterrence effect of a civil penalty to be one of the major reasons to seek a civil penalty. (T. 52).

49. Mr. Kicher calculated that the Department incurred $332.75 in costs related to the effluent violations for the preparation of notices of violation and the drafting of a consent order and agreement. (T. 46, 52).

50. Mr. Kicher used his experience to estimate the amount of time it would have taken to perform administrative inspections, prepare notices of violation, and to draft a consent order and agreement. (T. 47).

51. Based upon his experience, Mr. Kicher estimated that the administrative inspections and notices of violation preparation would have taken at least one hour each, and the drafting of the consent order and agreement would have taken a minimum of four hours. (T. 47-48).

52. Mr. Kicher entered the estimated times spent by each employee and their respective pay grades into the penalty matrix spreadsheet to determine the Department's costs for the effluent violations. (T. 47).

DISCUSSION

Legal Standard

The Board's role in evaluating a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. *DEP v. Percora*, 2007 EHB 545. The

Department has the burden of proof in a case where it files a complaint for civil penalty assessments. *DEP v. EQT Production Company*, 2017 EHB 435, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The Department must show by a preponderance of the evidence that there is a lawful basis for the civil penalty assessed against Country Estates. *Id*., (citing *DEP v. Seligman*, 2014 EHB 755, 763); *DEP v. Simmons*, 2010 EHB 262, 276. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Id*., (citing *Seligman*, 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007)). The guidance the Department uses in determining a suggested civil penalty is not binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company*, 2017 EHB 435, 480 (citing *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

Analysis

The civil penalty section of the Clean Streams Law provides that a civil penalty shall not exceed $10,000 per day for each violation. Further, it outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and "other relevant factors." 35 P.S. § 691.605(a). We have previously held that other relevant factors include costs incurred by the Department to undertake enforcement, the cost savings to the violator, the volume of pollution released, and the deterrent effect of the penalty. *EQT Production Company,* 2017 EHB at 480. Additionally, civil penalties should be no less than what it would have cost to comply with the law. See, e.g., *Perano*, 2011 EHB at 879 ("[T]he Board's civil penalty

should, at a minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law."); *DEP v. Breslin*, 2006 EHB 130, 141 n.6 ("[I]t should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law." (emphasis in original)).

Here, we determined that it was appropriate to hold an evidentiary hearing because it was unclear to us, based on the information in the Department's Complaint and Motion, how the Department applied the factors outlined in the Clean Streams Law and as discussed in our prior cases to arrive at its proposed penalty. As best we could tell, the Department almost exclusively, if not entirely, relied on its internal guidance document and a mathematical formula therein. (See Complaint Ex. E). As we noted in our June 2025 Opinion, the guidance document fails to discuss any of the statutory factors when describing the process that the Department uses to calculate a penalty for effluent violations. While Mr. Kicher, the Department's only witness, attempted to address the concerns raised in our June 2025 Opinion, it is clear from his testimony that the way the Department arrived at the proposed penalty involved a rote application of the penalty formula set out in its guidance document. Any effort to incorporate the statutory factors set forth in the Clean Streams Law and precedential case law was perfunctory at best.[2]

Water Quality Management Permit Violations

Country Estates is liable for seven violations of its WQM Permit. These violations related to missing or inoperable treatment equipment at Country Estates' wastewater treatment plant that

[2] It is not our intention that our conclusions cast aspersions on Mr. Kicher or his efforts in this case. In fact, we commend him for his honest and straight forward testimony in response to the Board's questions during the hearing. The issue we have is not with Mr. Kicher, but with the method set forth in the Department's guidance document that is, as best we can tell, lacking in transparency and is unclear about how to apply the statutory factors set out in the Clean Streams Law.

the Department identified during three onsite inspections. Under its guidance document, the Department classified these equipment violations as individual single events and proposed a total penalty of $700 for the resulting WQM Permit violations. Mr. Kicher assigned the minimum penalty of $100 per violation even though he recognized that the inoperable equipment was likely not functioning for multiple days. In support of using the minimum penalty amount, he testified that the effects of these violations "are going to be seen at the effluent violation end of things." (T. 16). The implication being that the additional effluent limitation penalties associated with the NPDES violations would address, to some extent, the WQM Permit violations. He further explained that he applied the minimum penalty amount because he did not consider the violations either deliberate or reckless in any manner. (T. 16).

When reviewing the facts regarding the WQM Permit violations, we agree with the Department on some of the penalty amounts but find that a higher penalty amount is warranted for some of the identified violations. Two violations described in the December 10, 2019, (DEP Ex. 5) and December 3, 2020 (DEP Ex. 6) inspection reports relate to equipment required by the WQM Permit that Country Estates left uninstalled. Specifically, the WQM Permit required construction/installation of a comminutor, alum chemical addition and effluent cascade aerator. (See Complaint, ¶¶ 10, 11). The Department proposed a $100 penalty for each of the violations. We agree that a minimal penalty in that amount is appropriate, in light of the fact that following Country Estates' submission of the appropriate application in 2021, the Department revised the WQM Permit and removed the requirement for the construction/installation of the three pieces of equipment. There is no evidence in the record that Country Estates' failure to install this equipment caused any injury or damage to the waters of the Commonwealth. While some penalty is appropriate because Country Estates failed to comply with the terms of its WQM Permit and

failed to timely request a permit revision, we find that anything greater than the minimum penalty is unwarranted where the Department eventually determined that the missing equipment that formed the basis for the violation, was ultimately unnecessary for the operation of the wastewater treatment plant. Therefore, we hold that a $200 penalty is appropriate for these two violations that arose from the failure to install equipment in violation of the terms of the WQM Permit.

On October 30, 2019, during a Department inspection, the inspector discovered two violations involving inoperable equipment. Specifically, a blower belt had failed and there were issues with Country Estates' chlorinator. The non-functioning blower belt prevented the operation of the treatment plant aeration, sludge returns and clarifier skimmers, resulting in solids floating/bulking on the surface of the clarifier. The issue with the chlorinator resulted in a chlorine level of 0.00 ppm at Outfall 001. On November 4, 2019, five days later, the Department conducted a follow up inspection and found that Country Estates had corrected both violations. (DEP Ex. 4). Country Estates had replaced the blower belt and the Department observed that the aeration, sludge returns, and clarifier skimmers were operational. The chlorinator was properly operating and the residual chlorine level was 0.57 ppm at Outfall 001 at the time of the follow-up inspection.

In evaluating an appropriate penalty for these two violations involving inoperable equipment, the Department did not provide certain information that would assist us in determining whether the $200 penalty that the Department proposes is a suitable amount for those violations. For instance, the Department did not present any evidence concerning the potential impact on the waters of the Commonwealth. We also have no information suggesting Country Estates benefited from any significant cost savings, or that there were any restoration costs associated with these violations. Based on the limited record in front of us, we find that there were no substantial cost savings or necessary restorations costs since we presume that if there were, the Department would

have presented those to us to sustain its burden. As for Country Estates' degree of willfulness in committing the violations, Mr. Kicher testified that he did not consider the violations either reckless or deliberate. (T. 16). We have no reason to disagree with his determination. That leaves us to choose between either accidental or negligent when looking at the willfulness factor. The broken belt could certainly be treated as accidental, while the chlorinator issue, as described in the inspection report, seems to be a result of poor practice by the operator which strikes us as negligent behavior. We also need to consider the penalties' deterrence effects on Country Estates from preventing future violations of this type.

In consideration of the statutory factors and how best to apply them to these facts, we find the Department's $100 penalty per violation is too low, particularly in addressing the deterrence factor. Instead, we find that a $300 penalty is warranted for the violation resulting from the failed blower belt and a $400 penalty is appropriate for the chlorinator issues. These heightened amounts are meant to serve as a deterrent from Country Estates repeating these types of violations. These penalties further account for Country Estates swift corrective actions but also consider that the corrective actions only took place after the Department identified the violations. Our overall decision to keep these amounts modest in nature reflects that we have no indication that these violations injured or damaged the waters of the Commonwealth or provided any monetary benefit to Country Estates.

The next two WQM Permit violations refer to a malfunctioning blower. The only information provided in the December 10, 2019, inspection report states that "one of the blowers was not operational." (DEP Ex. 5). In the December 3, 2020 inspection report, Department personnel reported again that one blower was nonoperational but the report fails to clarify whether it was the same blower that was nonoperational a year earlier. (See DEP Ex. 6). The December

2020 report also states that the electric motor of the blower needed replacing. The next inspection of the Country Estates wastewater treatment plant for which we have a report, took place on January 18, 2023. (DEP Ex. 7). It identified that the previously noted violations had been corrected, apparently including the non-operating blower or blowers. The Department inspector observed that the motor on the west blower had been replaced and the east blower was operating for the duration of the inspection. Based on the reported information, it appears that the blower(s) remained nonoperational for at least one year and potentially longer. Again, although we are not provided any evidence concerning the nonoperational blower(s) impact on the waters of the Commonwealth, it is apparent that this issue persisted over an extended period before being resolved. We find that the failure of Country Estates to timely address this violation warrants more than the minimal $100 penalty per violation suggested by the Department. Therefore, we assess a penalty of $500 for each of the two violations involving the nonoperational blower(s). Deterrence is an important factor in setting a penalty amount and we conclude that a higher penalty than the minimal amount the Department proposed will better deter the obvious delay in addressing the equipment issues evident in the record of these two violations.

The final WQM Permit violation involves the sand filters at Country Estates' wastewater treatment system. Issues with the sand filters are first mentioned in the inspection report dated October 30, 2019, but no violation was listed. The December 10, 2019 inspection report identified a violation pertaining to the sand filters improperly draining. (DEP Ex. 5). Almost a year later, the Department inspector noted in a report dated December 3, 2020, that the issue with the east sand filter had been addressed by replacing the sand but that the sand in the west filter had not been replaced. (DEP Ex. 6). In the final inspection report dated January 18, 2023, the inspector comments that Country Estates' operator reported that further drainage issues had occurred and

the sand in the west filter was replaced in 2022. (DEP Ex. 7). He further noted that the sand in the east filter was being replaced again at the time of the inspection. The Department proposed a $100 penalty for the sand filter related violation identified in the December 2019 report.

It is clear from our review of the inspection reports that once again, equipment issues, in this instance with the sand filters, persisted over multiple years and were only slowly addressed by Country Estates. This suggests a higher level of willfulness and likely constituted a cost savings to Country Estates by delaying maintenance and repair costs. Given those facts, it is our determination a more substantial penalty is warranted and, therefore, we assess a penalty of $1,000. With this penalty, it is our aim to further deter Country Estates from allowing problems to linger rather than swiftly addressing them. Because we neither have information concerning the impact to the waters of the Commonwealth, nor about the potential cost savings, we find it is appropriate to cap the penalty at $1,000.

In summary, we determine $2,900 is the appropriate amount of a civil penalty for the seven violations of the WQM Permit. The Department's proposed penalty of $700 ($100 per violation) does not appear to distinguish the unique facts of each violation and does not adequately consider the factors that are set out by the Clean Streams Law. In particular, we are concerned that such a low amount fails to act as an adequate deterrent. As Mr. Kicher stated, it may well be accurate that the WQM Permit violations are also penalized to an extent via the penalty amounts arising from the NPDES Permit violations. However, we think that is not necessarily the best way to look at this issue. Permittees should avoid exceeding the discharge limits set forth in the permit in the first instance. If equipment issues are contributing to the exceedances, it is important that Country Estates promptly address those equipment issues and that the Department exercise its authority when that does not happen. As such, the penalty amounts should act as a deterrent for Country

Estates from ignoring maintenance and delaying repairs. Waiting on equipment issues to eventually result in exceedances of an NPDES permit and then addressing the operational problems via penalties for effluent violations is not, in our opinion, the proper approach to protecting the waters of the Commonwealth.

Effluent Violations

Over a four-year span, from March 2018 through March 2022, Country Estates violated the monthly permit limits in its NPDES Permit 25 times, exceeding the ammonia-nitrogen effluent limit 20 times, the total suspended solids limit four times, and the carbonaceous biochemical oxygen demand (CBOD5) limit one time. The Department proposed a penalty of $33,474 for these violations.[3] The Department used an internal guidance document to calculate the proposed penalty by applying its standard operating procedures for determining civil penalties under the Clean Streams Law. (DEP Ex. 1). Mr. Kicher testified that the procedures in the guidance document provide for the use of a penalty matrix. He described the penalty matrix as a multi-tab spreadsheet where various information is entered concerning the category of violation and specific information about the actual violations that occurred. The penalty matrix then runs calculations in the background and generates an actual dollar amount for the violation. (T. 10-11). Specifically, when using the penalty matrix to address effluent violations, Mr. Kicher described that he inputs the NPDES permit limits, along with the facility's sample results that exceeded those limits, into the spreadsheet. (T. 14). As we noted in our June 2025 Opinion where we rejected the Department's motion for a default judgment on the penalty amount, our concern was that the guidance document and the spreadsheet did not make clear how the Department applied the

[3] In his testimony, Mr. Kicher stated that the amount of the proposed penalty for the effluent violations themselves was $33,806 but the record clearly demonstrates that this amount also includes the Department's costs associated with these violations. (T. 51)

statutory factors and precedential case law in determining the proposed penalty amounts for effluent violations.

The Department guidance document provides a formula for calculating penalties for effluent violations. The formula starts by assigning a minimum base penalty of $1,000, $250, or $100 depending on whether the violation is for an average monthly limit, an average weekly limit, or a daily limit, respectively. (DEP Ex. 1, at 3). Mr. Kicher testified that he has never used an amount other than $1,000 when setting the base penalty amount for an effluent violation of an average monthly limit. (T. 55). No clear explanation was provided why the base penalty is set in the amount of $1,000 other than Mr. Kicher's testimony that since a violation of the average monthly limit reflects a chronic condition, the penalty is higher than the amount for a single daily violation of a maximum or minimum limit ($100 per each violation) or for violation of an average weekly limit ($250 per each violation).

The remaining formula in the guidance document calls for the sample result for the parameter to be divided by the permit value for that parameter with the resulting number then divided by EPA's technical review criteria (1.4 for conventional pollutants and 1.2 for all other pollutants). The individual penalty amounts proposed by the Department reflect that the three pollutants are conventional pollutants based on the use of a technical review criteria of 1.4 in the calculations. The guidance document does not explain the basis for using the EPA technical review criteria constant or what statutory penalty factor in the Clean Streams Law it is intended to address. In response to a question about the constant's significance and how it relates to the statutory criteria, Mr. Kicher was unable to clarify where the 1.4 constant comes from or what it represents. (T. 63-64). The dollar amount that resulted from running the calculation set out in the formula is the Department's proposed penalty amount for the effluent violation. An example of how this

calculation works for Country Estates initial violation of the ammonia-nitrogen effluent limit in March 2018 is as follows:

$1,000 x ((Sample Result/Permit Value)/EPA technical review criteria constant) = Penalty

$1,000 x ((10.8/9)/1.4) = $857

(See Complaint, Ex. F). The same formula was applied to each of the 25 effluent violations identified in the Department's Complaint to calculate the individual effluent violation proposed penalty. The individual amounts were added together to arrive at the Department's proposed penalty of $33,474 for the effluent violations.

We understand the Department's desire to standardize the calculations for effluent violations to ensure that a facility in one part of the Commonwealth is treated similarly to those located in other parts of the Commonwealth. However, we are concerned that the Department guidance document is not transparent in how, or, even if the formula accounts for the statutory factors set forth in the Clean Streams Law. The Board is required to consider the statutory factors when determining penalty amounts. The two main statutory factors identified in the Clean Streams Law, the willfulness of the violator and the resulting damage or injury to the waters of the Commonwealth, are not discussed in the effluent violations section of the guidance document. (DEP Ex. 1, at 3-4). Mr. Kicher testified that at the time he calculated the proposed penalty in this case, there was no way to incorporate the violator's willfulness into the penalty matrix. (T. 51). As a result, willfulness was not a factor in calculating the proposed penalty. He did note that the penalty matrix was revised in 2024 and that the revised version now includes a willfulness input that allows the Department to categorize effluent violations as either accidental, negligent, reckless, or deliberate as a part of the penalty calculation. (T. 51).

We are also not clear how the penalty matrix fully addresses the impact of the effluent violations on the receiving stream. The formulaic approach set out in the penalty matrix does, to some degree, account for the potential for injury or damage to the waters of the Commonwealth since the more the sample results that are submitted in exceedance of the permit limit, the higher the resulting penalty amount. (See DEP Ex. 8, showing the penalty amounts for the March 2018 ammonia-nitrogen violation (exceedance of 1.8 mg/L - $857 penalty) and for the May 2018 ammonia-nitrogen violation (exceedance of 7.7 mg/L - $2,548 penalty)). This approach relies on the reasonable presumption that the permit limits are set at levels that are protective of the water quality in the receiving stream and, therefore, any exceedance, at the very least, has the potential for a negative impact on the stream and its water quality. It also accounts for the volume of the pollutants, another statutory factor that the Board must consider. At the same time, it appears that the penalty matrix looks at the specific types of pollutants and their unique potential to cause injury or damage to the waters of the Commonwealth in a very broad manner. The formula applies a technical review criteria of either 1.4 or 1.2 based on whether the pollutant is classified as a conventional pollutant or not.[4] It seems unlikely to us that the range of potential injury or damage that individual pollutants may cause to the waters of the Commonwealth can be accurately quantified by applying a binary choice of the technical review criteria of either 1.4 or 1.2 as a major factor in the guidance document formula. If there is a rational basis for treating the pollutants in this manner, Mr. Kicher did not explain it to the Board.

[4] We note for the record that the main pollutant violation in this case involved ammonia-nitrogen. The Department's penalty calculations applied the 1.4 conventional pollutant factor for the ammonia-nitrogen penalties even though it is not specifically identified in the list of conventional pollutants found in the guidance document. (See DEP Ex. 1, at 4).

As we said, we recognize that the NPDES permit limits are set at levels intended to protect the receiving stream which, in this case, is an unnamed tributary to Lackawannock Creek. We acknowledge that any violation of the permit limits, at a minimum, has the potential to cause injury or damages to the tributary and, therefore, warrants a penalty. Unfortunately, in our efforts to determine an appropriate penalty, the Department has not presented us with any direct evidence demonstrating that the excess discharges from Country Estates wastewater treatment plant caused actual injuries or damage to the unnamed tributary. Further, we lack any information about the classification of the unnamed tributary. Mr. Kicher acknowledged that the Department inspectors did not observe any harm to the unnamed tributary. The only direct observation concerning effluent quality and stream conditions is found in the report for the inspection that took place on December 10, 2019. The inspector reported that "[t]he effluent appeared clear and there were no odors or accumulation of solids observed. There were no differences in upstream or downstream observations." (DEP Ex. 5). The effluent violation closest in time to this observation was an exceedance of 0.88 mg/L in July 2019 in the ammonia-nitrogen limit. The majority of the violations occurred after this observation of the stream conditions. There was no evidence presented that showed the conditions in the tributary caused any problems downstream in Lackawannock Creek. When asked about costs of restoration, Mr. Kicher responded that "I didn't think that there was anything applicable with regards to restoration costs." (T. 52). This suggests that the violations did not create any long-term injury or damage to the waterways that would require the Department or Country Estates to take remedial action.

Following a thorough review of the evidentiary record, it is our determination that Country Estates' effluent violations warrant a civil penalty in the amount of $20,500. In arriving at this amount, we considered multiple factors specific to this case that informed our decision. First,

Country Estates' violations transpired over a number of years. As such, the persistent nature of the exceedances leads us to conclude that these violations were not accidental in nature but resulted, at a minimum, from Country Estates' negligence. Although the record does not make clear the exact role the various equipment issues played in the effluent violations, our overall sense from the testimony and evidence is that Country Estates was not attentive to the maintenance and operations of its wastewater treatment plant in a manner that could have prevented ongoing effluent violations. At the same time, we recognize that this is a relatively small system and is classified in the NPDES Permit as a Minor Sewage Facility (less than 0.05 MGD), the classification just above an individual small flow treatment facility. (DEP Ex. 2 at 16). The effluent limitations at the single outfall were determined using a discharge rate of 0.015 MGD, putting this system at the lower end of the Minor Sewage Facility classification. (DEP Ex. 2 at 3). Further, while we are mindful that the violations clearly create the potential for harm and may very well have caused actual harm to the unnamed tributary, we cannot ignore the fact that we received no direct evidence of any injury or damage to the stream. In our opinion, the small size of the system and the lack of direct evidence of impact or damages to the unnamed tributary mitigates the amount of a civil penalty that is appropriate for these violations

Lastly, the final major factor to consider in deciding a penalty amount for the effluent violations is deterrence to discourage Country Estates and other similarly situated permit holders from repeating these types of violations. We are particularly concerned that the ammonia-nitrogen violations occurred multiple times over the course of several years, including in nine of the first ten months of 2021. However, the Department stated in the Complaint, which was filed in February 2023, that Country Estates had not reported any effluent exceedances since March of 2022, a period of just under one year. (Complaint, ¶ 20). This at least suggests that Country

Estates is paying closer attention to its operations and doing a better job of avoiding violations. While we still find that a reasonable penalty is necessary to prevent backsliding and to deter future violations, we also account for the fact that Country Estates did not commit any new violations in the months prior to the Department filing its Complaint in setting the penalty amount.

We calculated the $20,500 penalty by assigning a $500 penalty for each of the 17 violations where the sample value exceeded the permit value by a factor of two or less. These violations are as follows: Ammonia-Nitrogen – Mar 18, Mar 19, Jun 19, Jul 19, Jun 20, Jan 21, Feb 21, Mar 21, Apr 21, Jun 21, Aug 21, Sep 21 and Oct 21; Total Suspended Solids – Jun 18, Jul 18 and Dec 21 and Carbonaceous Biochemical Oxygen Demand (CBOD5) – Mar 22). To account for the greater volume of pollutant discharge and for the greater likelihood of injury or damage to the stream from the increased pollution, we assigned a $1,500 penalty to each of the 8 violations where the sample value exceeded the permit value by a factor greater than two. These violations are as follows: Ammonia-Nitrogen – May 18, Jun 18, Jul 18, May 19, May 20, Jul 20, and Jul 21 and Total Suspended Solids – May 19.

Costs

Consistent with our case law, the Department included a claim for costs in the amount of $704 as part of its proposed penalty. The costs the Department sets forth can be addressed in two separate categories: 1) Office Work and 2) Onsite Inspections. We turn first to the Department's claim for costs associated with office work. According to Mr. Kicher's testimony and the Department's Exhibit 9 detailing its costs, the costs associated with office work involved administrative inspections, drafting of notices of violation, and development of a proposed consent order and agreement that took place on three separate dates. Exhibit 9 set forth the office cost claim as follows:

1) 10/25/2018 - Admin. Inspection/Drafting NOV – 1 hr. at $50.06 – Total $50.06

2) 9/19/2019 - Admin. Inspection/Drafting NOV – 1 hr. at $50.06 – Total $50.06

3) 11/17/2021 – Development of Proposed COA – 4 hrs. at $43.78 – Total $175.48

4) 11/17/2021 – Development of Proposed COA – 1 hr. at $57.51 – Total $57.15

The total of the above costs is $337.75. Mr. Kicher testified that the hourly rates are based on the pay grade of the individual performing the work. (T. 47). The Department did not present any time records in support of the hours claimed for the office work. Instead, Mr. Kicher testified that the hours associated with the costs were "based on an estimate of what we normally utilize to generate a Notice of Violation." (T. 47). In discussing the four hours the Department spent on the drafting of the proposed COA, Mr. Kicher acknowledged that based on his experience, the amount of time involved varies but stated that "I guess four hours would probably be the absolutely minimum if you are lucky to get it done that fast." (T. 48).

The Board has previously raised its concern with the lack of time records to support claims for personnel costs sought by the Department. See *Spencer v. DEP*, 2024 EHB 524, 539-540; Keck *v. DEP*, 2019 EHB 322, 343-44; *Schlafke v. DEP*, 2019 EHB 1, 43; *Whiting v. DEP*, 2015 EHB 799, 813-814. Once again, we have no time records supporting this portion of the claim. Further, we were not presented copies of the work product, specifically the NOVs, or the proposed COA. Those documents could have been submitted to the Board as exhibits and would have allowed us to verify the work and, to some degree, evaluate the reasonableness of the time claim. We are left with Mr. Kicher's uncontested testimony in which he acknowledged that the time claimed is based on his estimate of how long the tasks would normally take as opposed to any actual time keeping for the specific work product related to Country Estates. He stated that the "hours, it's based on an estimate […]. Because, as we discussed, we don't really keep, you know,

case-specific time records for what we do." (T. 47). We are not comfortable awarding the requested costs based on the thin record in front of us and, therefore, we deny this portion of the Department's request. Once again, we encourage the Department to take seriously our request for better time records and supporting documents when seeking an award of personnel costs.

The second category of costs the Department claims arise from the five inspections it completed at Country Estates' wastewater treatment plant from late 2019 through early 2023. The costs include both personnel costs and vehicle mileage costs. The details of the inspection costs as set forth in the Department's Exhibit 9 are as follows:

1) 10/30/2019 – Inspection – 2 hrs. at $38.43 – Total $76.86
2) 11/4/2019 – Inspection – 1 hr. at $38.43 – Total $38.43
3) 12/10/2019 – Inspection – 2 hrs. at $76.86 – Total $76.86
4) 12/3/2020 – Inspection – 1 hr. at $38.43 – Total $38.43
5) 1/18/2023 – Inspection – 1 hr. at $38.43 – Total $38.43
6) Mileage to Facility from DEP – 35 miles x 5 trips = 175 miles

(DEP Ex. 9).

The Department's claimed personnel costs associated with the five inspections is $269.01 and its' claimed vehicle mileage costs total $102.00. Mr. Kicher testified that in calculating the personnel costs, he determined the amount of time claimed based on the time the Department spent on site as recorded in the inspection reports. (T. 17-18). The time was then multiplied by the hourly rate of $38.43 for the personnel who conducted the inspection.[5] He further testified that he calculated the vehicle mileage based on the one-way trip distance from the Meadville Regional

[5] Given that the inspections occurred over a span of over three years, we are unclear why the Department's claimed hourly rate for its inspection personnel remained unchanged during this period. However, since we have no other evidence in the record, we have to rely on that information.

Office to the Country Estates' site that he determined was 35 miles per inspection. (T. 18). The total miles were then multiplied by the federal mileage rate. Mr. Kicher could not recall the specific federal mileage rate he used but testified that it was an amount close to 56 cents per mile. (T. 20).

Based on Mr. Kicher's testimony, we find it necessary to adjust some of the Department's requested costs arising from the inspections. He testified that he used the arrival time and departure time listed in each inspection report to determine the Department's time for his cost calculations. We find that an acceptable methodology.[6] He then went on to explain that when entering time amounts into the penalty matrix spreadsheet, which he is required to use in calculating the costs to include in penalty requests, he can only enter whole numbers resulting in the personnel hours being rounded up or down to a whole number. (T. 28). That raises a concern for us in relying on the Department's personnel cost calculations presented in this case. Clearly an inspection taking 31 minutes and a second inspection that takes 1 hour and 29 minutes should not both be treated as 1 hour when determining personnel costs, but that would appear to be what is required by the spreadsheet. To address this, we revise the requested personnel costs to reflect the actual time spent on site during the inspections as opposed to the rounded number the Department used. Our calculations are as follows:

1) 10/30/2019 – Inspection – 1.75 hrs. at $38.43 – Total $67.25

2) 11/4/2019 – Inspection – 0.75 hr. at $38.43 – Total $28.82

3) 12/10/2019 – Inspection – 2.25 hrs. at $76.86 – Total $86.47

4) 12/3/2020 – Inspection – 1.00 hr. at $38.43 – Total $38.43

[6] Mr. Kicher testified that he did not include travel time to and from the site as part of the time claimed in determining the costs. If the Department has adequate records to support the travel time, we have no issue with including travel time as part of a request for costs.

5) 1/18/2023 – Inspection – 0.42 hr. at $38.43 – Total $16.14

Based on our revised calculations, we award $198.68 in personnel costs for the five inspections. Although this is a small reduction from the amount the Department proposed ($269.01), we think that using a proper and defensible methodology matters and could potentially make a larger difference in future cases.

We also calculate a slightly lower amount than the $102 the Department claims for the vehicle mileage costs. When we multiply 175 miles by 56 cents per mile, the amount testified to by Mr. Kicher, we calculate a vehicle mileage cost of $98. Therefore, we hold that the Department is entitled to a total award of costs in the amount of $296.68 as part of the penalty against Country Estates for the violations of the Clean Streams Law.

Conclusion

Country Estates is liable for the violations of the Clean Streams Law identified in the Department's Complaint. Following a hearing to determine the appropriate civil penalty against Country Estates for the identified violations, we assess a civil penalty in the amount of $23,696.68. We arrived at this amount by adding the totals for the three following categories:
1) Water Quality Management Violations - $2,900; 2) Effluent Violations - $20,500 and 3) Department Costs - $296.68. We conclude that $23,696.68 as a civil penalty fairly addresses the statutory requirements set out in the Clean Streams Law and discussed in our prior cases and is generally consistent with the penalties we have awarded in other similar cases in front of the Board. See *DEP v. Breslin,* 2006 EHB 130 ($25,000 civil penalty for 25 Clean Streams Law violations at a mobile home park wastewater treatment system; DEP requested $94,000); *DEP v. Kennedy,* 2007 EHB 867 ($35,000 civil penalty for 87 Clean Streams Law violations at a mobile home park wastewater treatment system; DEP requested $26,800) and *DEP v. Perano,* 2011 EHB

867 ($78,000 civil penalty for Clean Streams Law violations at a mobile home park wastewater treatment system with evidence of significant cost savings by violator for failure to repair a 376,000 gallon equalization tank among other issues.)

CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1- 691.1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

2. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Seligman*, 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

3. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company*, 2017 EHB 435, 480 (citing, *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

4. The Clean Streams Law includes specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and "other relevant factors." 35 P.S. § 691.605(a).

5. Other relevant factors include the deterrent effect of the penalty. *EQT Production Company*, 2017 EHB at 480.

6. Country Estates is liable under the Clean Streams Law for seven violations of its Water Quality Management Permit and 25 violations of its NPDES Permit. *Country Estates MHP, LLC v. DEP*, EHB Docket No. 2023-019-CP-B, slip op. at 7 (Opinion issued June 18, 2025).

7. The Board assesses a civil penalty in the amount of $23,696.68 against Country Estates for its violations of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2023-019-CP-B**
COUNTRY ESTATES MHP, LLC	:	

O R D E R

AND NOW, this 18th day of December, 2025, it is hereby ORDERED that Country Estates MHP, LLC is assessed a civil penalty in the amount of $23,696.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

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

DATED: December 18, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Angela Erde, Esquire
Paul Strobel, Esquire
(via electronic filing system)

For Defendant:
Country Estates MHP, LLC
378 Red Bank Rd.
Mifflinburg, PA
17844
(via U.S. first class mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES and BARBARA ULLOM	:	
	:	
v.	:	**EHB Docket No. 2024-114-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CNX GAS COMPANY, LLC, Intervenor	:	**Issued: December 29, 2025**

OPINION AND ORDER ON
MOTION TO EXCLUDE EXPERT TESTIMONY

By MaryAnne Wesdock, Judge

Synopsis

The Permittee's motion to exclude the Appellants' expert report and expert testimony is denied. The objections relate to the weight to be given the expert testimony rather than its admissibility.

O P I N I O N

Introduction

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

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

Act, which provides that a landowner who suffers diminution or pollution of a water supply because of the drilling or operation of an oil or gas well may request an investigation by the Department. 25 Pa. Code § 3218(b). On June 28, 2024, the Department issued the results of its investigation, stating, "Based on the sample results and other information obtained to date, the Department cannot conclude that the Water Supply was adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well." (Exhibit to Notice of Appeal, Docket 2024-114-W, entry no. 5.) On July 26, 2024, the Ulloms filed this appeal of the Department's Negative Determination. On June 11, 2025, the Ulloms were granted leave to amend their appeal. A hearing in this matter has been scheduled for April 13–17, 2026.

On November 13, 2025, CNX filed a Motion to Exclude Expert Testimony (motion) seeking to exclude the expert testimony and expert report of Andrew M. Herrmann, LPG, Senior Manager and Geologist, and Christopher S. Abel, CHMM, Director and Senior Environmental Chemist, both with August Mack Environmental, with regard to the alleged water loss at the Ullom property (the Herrmann/Abel report). It is the contention of CNX that the opinions and information set forth in the report do not constitute competent and admissible expert testimony because they are not set forth to a reasonable degree of scientific certainty. The Ulloms filed a response in opposition to the motion on December 13, 2025. The Department did not weigh in on the motion. While none of the parties have filed prehearing memoranda at this time listing the expert witnesses or exhibits they intend to present at trial, we shall treat CNX's motion as a preemptive motion in limine seeking to preclude Mr. Herrmann's and Mr. Abel's expert testimony at trial and seeking to preclude the introduction of the Herrmann/Abel expert report into evidence.[2]

[2] The Board does not have a specific procedural rule or practice regarding the admission of expert reports at hearing. Rather, it is left to the discretion of the presiding judge. *See, e.g., Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 162. In some matters, the presiding judge may admit all or a portion of an expert report, alongside the associated expert testimony, where the judge determines it is a useful aid in

Standard of Review

A motion to strike an expert report or expert testimony is generally treated as a motion in limine. *Protect PT v. DEP*, 2024 EHB 352, 353 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161). The purpose of a motion in limine is to provide the Board an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at hearing. *Citizens for Pennsylvania's Future v. DEP,* 2024 EHB 232, 234; *Kiskadden v. DEP*, 2014 EHB 634, 635. In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. *McCauley v. DEP*, 2020 EHB 448, 450; *Morrison v. DEP*, 2020 EHB 404, 405.

The Parties' Arguments

CNX argues that the opinions set forth in the Herrmann/Abel report do not constitute competent and admissible expert testimony because they do not state to a reasonable degree of scientific certainty that CNX's drilling activities caused the Ulloms' water loss. In particular, CNX takes issue with the introduction to the report which states that the report provides "opinions as to *potential* causes and/or scenarios which were not considered by the PADEP during their recent Water Supply Investigation . . . ." (Ex. 5 to Motion, p.1) (emphasis added), as well as the following summary of opinions contained therein:

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understanding the testimony. *Compare Protect PT v. DEP*, 2024 EHB 853, 858 ("So long as the report's author testifies at the hearing and is subject to cross-examination and the Rules of Evidence…it is prudent to exercise judgment regarding the admissibility of expert reports on a case-by-case basis."), *and Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 98, 100–01 (So long as certain criteria are met, "we will exercise our judgment regarding the admissibility of expert reports on a case-by-case basis."), *with Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 3 n.2 (Opinion and Order on Motion in Limine issued July 15, 2025) ("The Judge presiding over this case as a rule does not admit full expert reports as exhibits in cases he is hearing. Parties may seek to admit portions of their expert reports in conjunction with supportive testimony from their experts who have been admitted at the hearing after any objections to their testimony have been addressed.")

Opinion 1: The date of loss of yield from affected well W-1 should be confirmed.[3]

Opinion 2: Affected wells at the Property were susceptible to potential water loss as a result of the installation of fracking wells nearby.

Opinion 3: There are multiple scenarios in which CNX fracking well installation practices could have created new groundwater migration pathways resulting in water loss at the Property.

Opinion 4: PADEP did not adequately evaluate the potential for CNX installation activities to cause a loss of water at the affected wells on the Property.

Id.

With respect to the potential causes of the water loss set forth in the report, CNX argues that "[i]t is not enough to say that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could properly account' for the result, or even that it was 'very highly probable' that it caused the result." (Brief in Support of Motion, p.8 (citing *Niggel v. Sears, Roebuck & Co*., 281 A.2d 718, 719 (Pa. Super. 1971)).) CNX points out that, as the party challenging the Department's Negative Determination, the Ulloms bear the burden of proof in this proceeding and must demonstrate that the Department's determination was an error of law or abuse of discretion. In order to meet this burden, CNX argues, first, that the Ulloms may not simply assert that the Department's investigation was inadequate but must demonstrate, through expert testimony stated to a reasonable degree of scientific certainty, that CNX's drilling activities with regard to the NV110 oil and gas well pad caused the loss of their water well and, second, that any information the Department allegedly failed to consider would have caused the Department to reach a different conclusion.

[3] The Amended Notice of Appeal, filed by the Ulloms on May 16, 2025, states, "The Ulloms hereby withdraw Objection 1 (pertaining to the date when Well 1 went dry) from their Notice of Appeal. . . . All other objections from the Notice of Appeal are incorporated into this Amended Notice of Appeal." Thus, there appears to be no dispute as to the date of water loss at Well 1 (also referred to in the filings as "W-1.")

It is CNX's contention that the Herrmann/Abel report does neither of these things. Rather than opining that CNX caused the water loss, CNX argues that the report simply floats "potential" causes without any degree of scientific certainty. It further argues that the report fails to demonstrate that the information set forth in the report would have changed the Department's ultimate determination. Finally, CNX disagrees with a number of the factual premises on which the conclusions in the report are based.

In response, the Ulloms assert that CNX conflates the burden of proof needed to succeed at trial with the burden of proof needed to *get to* trial. While the Ulloms agree that they must establish by a preponderance of the evidence presented at trial that the Department erred or abused its discretion, they argue that this standard is not relevant in overcoming CNX's motion in limine. Rather, they assert that the appropriate standard in considering a motion in limine is whether the testimony or evidence is likely to cause undue prejudice. They point out that CNX has made no argument that the expert testimony and report are prejudicial; rather, CNX focuses on its disagreement with the validity of the report and its conclusions.

The Ulloms further assert that CNX's motion misinterprets the role of expert testimony in challenging the adequacy of the Department's investigation. They argue that it is the responsibility of the Department to investigate the cause of the water loss, and where the Department reaches a negative determination without adequate evidence, it cannot defer its investigatory responsibilities to those who are impacted by the activity in question. The Ulloms argue that it is "neither practical nor possible for average citizens impacted by regulated industries to investigate complex scientific harms like those at issue here" since such citizens "lack[] the access to data, scientific expertise, and financial means of the Department and/or industry." (Appellants' Brief in Opposition, p. 4.) Nonetheless, the Ulloms assert that the Herrmann/Abel report lays out numerous conclusions

which not only explain how the Department's determination was erroneous but also why the Board should reach a different conclusion; they further assert that these conclusions are supported by "studies, geological maps, evidence produced in discovery, and relevant expertise by the report's author." *Id.* at 5. The Ulloms argue that the expert testimony of Mr. Herrmann and Mr. Abel will indeed assist the Board in understanding the technical issues in this case and, therefore, should not be excluded. They assert that CNX's objections go to the weight to be assigned the testimony, which CNX will be able to point out at trial.

Discussion

A motion in limine should generally be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison*, 2020 EHB at 405. "[T]he first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert's specialized knowledge will aid us in understanding the evidence or determining a fact in issue." *Montgomery Township Friends of Family Farms v. DEP*, 2024 EHB 442, 445 (quoting *Rhodes v. DEP*, 2009 EHB 237, 239). A threshold determination for whether expert testimony will be an aid to us is whether the testimony will be relevant. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Pa.R.E. 401. Whether evidence has a tendency to make a given fact more or less probable is determined by the Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal. *Liberty Township v. DEP*, 2024 EHB 490, 493 (citing *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 474). Here, we agree with the argument put forth by the Ulloms that the testimony of their experts is relevant and the objections raised by CNX go to the weight to be assigned to the testimony, not its admissibility.

In support of its argument that we should exclude the expert report and opinions of Mr. Herrmann and Mr. Abel, CNX relies on the Board's decision in *O'Reilly v. DEP*, 2001 EHB 19, 45, for the proposition that it is generally not enough to argue that the Department conducted an inadequate investigation but rather, the appellant is required to convince the Board that it should overturn the Department's decision based on the record developed at a hearing. It is important to note that *O'Reilly* was an adjudication by the Board, issued after a hearing on the merits. *O'Reilly* did not deal with the exclusion of expert testimony but, rather, considered whether the testimony presented at the hearing was sufficient to meet the appellant's burden of proof.[4]

CNX cites a number of other Board decisions in support of its argument that the Herrmann/Abel report and testimony should be excluded: *Kiskadden v. DEP*, 2015 EHB 377; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221; *Marshall v. DEP*, 2020 EHB 60; and *Shuey v. DEP*, 2005 EHB 657. However, like *O'Reilly*, they are adjudications assessing the merits of the case after a hearing — they discuss the burden of proof that appellants must meet and what evidence is generally necessary to meet that burden at the hearing on the merits. In all of the cited cases, the Board found that the appellant had not produced adequate expert testimony to sustain its burden following a hearing. None of the cases found that the expert testimony or reports should have been excluded prior to the hearing; rather, they address the weight to be given to the testimony and whether the testimony was sufficient to meet the appellant's burden. In *Kiskadden*, while the Board acknowledged that "it is normally not enough for the Appellant to argue that the Department has conducted an inadequate investigation," it pointed out that "the Appellant must convince the

[4] We further note that *O'Reilly* involved a third-party appeal of the Department's issuance of an NPDES permit. The language referenced in CNX's brief, i.e., the Board's admonishment that the appellant must do more than simply assert that the Department had conducted an inadequate investigation, concerned the Department's investigation into the permittee's compliance history in connection with the permit application. That is substantially different from the investigation at issue here, i.e. the Department's investigation into the Ulloms' claim of water loss, which is the very action that is the subject of the appeal.

Board that, *based on the record developed at trial*, we should overturn the Department's decision." *Kiskadden,* 2015 EHB at 410 (emphasis added).

In *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B (Opinion and Order issued July 15, 2025), the Board recently considered a motion in limine to preclude an appellant's expert report and expert witness testimony. That matter involved an appeal of a water supply replacement notification and administrative order issued in connection with the Department's finding that the appellants' activities had resulted in contaminated well water of area residents. A number of the affected residents intervened in the appeal and sought to exclude an expert report and expert testimony offered by the appellants. They argued, similar to CNX's reasoning here, that the expert failed to perform his own testing and analyses and simply addressed what he believed was lacking in the Department's investigation, which, they asserted, did not qualify as expert testimony. The Board disagreed and stated that "those may be points worth raising on cross-examination but hardly support excluding [the witness'] expert testimony through a motion in limine." *Barr Farms, LLC*, slip op. at 5.

Likewise, in *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 68, the Board considered a motion in limine filed by the appellant seeking to exclude the testimony of the Department's expert witnesses on several grounds including the appellant's contention that the testimony did not meet the requisite standard of professional certainty and did not have a proper factual basis. In response, the Department argued that the basis for the appellant's motion was simply that the appellant disagreed with the opinions of the Department's experts. The Board rejected the appellant's motion, finding that the arguments went "to the weight that should be accorded the testimony and not its admissibility." *Id.* at 71. The Board noted that "the credibility

of the expert witnesses is best resolved by live testimony rather than in the context of a motion." *Id.* at 68.

As we explained in *Blythe Township v. DEP*, 2011 EHB 433, the use of a motion in limine as a vehicle for disputing an expert's opinions goes beyond the limited scope of such a motion. There, the Board stated:

> The Township uses its motion as a vehicle for arguing that [the expert's] opinions are simply wrong. This, of course, goes well beyond the limited scope of a motion in limine. "Where there is a dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment motions." *CMV Sewage Company, Inc. v. DEP*, 2010 EHB 540, 543; *Pileggi v. DEP*, 2010 EHB 244, 250; *ADK Development v. DEP*, 2009 EHB 251, 253- 54. The same approach applies to motions in limine. *Pine Creek Valley Watershed Association v. DEP*, [2011 EHB 90, 94].

Id. at 437. To the extent that CNX's criticisms of the Herrmann/Abel opinions have any validity, they go to the weight and credibility to be assigned to the experts' testimony, not its admissibility. *Id*. at 436.

CNX raises a valid point that the role of expert testimony is to aid the trier of fact in understanding complicated matters requiring specialized expertise, and where such testimony is not presented to a reasonable degree of certainty it may fail to achieve this purpose. However, while safeguards have been put into place to protect jurors who may be impressionable when presented with speculative testimony, the Board "operates in a nonjury setting. We deal with scientific theories every day." *Pine Creek Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 778. As we explained in *Range Resources – Appalachia, LLC*, 2022 EHB at 70 (quoting *Kiskadden v. DEP*, 2014 EHB 618, 623), "The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility

should be given to expert testimony presented at trial."[5] As fact finder, "weighing credibility and selecting among competing expert testimony is one of our most basic and important duties." *Pine Creek*, 2011 EHB 90, 93–94 (quoting *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544–45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)).[6]

To the extent that CNX contends that the Herrmann/Abel expert report and opinions are not specific enough, "this criticism goes to the weight and credibility to be afforded to [the Ulloms'] experts, not the admissibility of their expert testimony." *Protect PT*, 2024 EHB at 361 (citing *Blythe Township*, 2011 EHB at 436).

In conclusion we enter the following order:

[5] While *Range Resources*, *Kiskadden* and *Pine Creek* involved a challenge to the expert's credibility under *Frye v. United States*, 293 F. 1013 (D.C. 1923), we believe that the same rationale applies to the argument made here by CNX.

[6] Moreover, while using the phrase "to a reasonable degree of scientific certainty" is helpful, there is nothing magical about those words, and the Board has repeatedly held that the use of this phrase "is not a pre-requisite to including an expert opinion in the record." *Barr Farms*, slip op. at 6 (citing, *inter alia, High v. DEP*, 2023 EHB 331, 335 ("the absence of 'magic words' like 'reasonable degree of scientific certainty' or 'reasonable degree of certainty' does not necessarily discount or reduce the weight of [the expert's] testimony."); *Blythe Township*, 2011 EHB at 435 ("there is actually no absolute requirement that the phrase 'reasonable degree of scientific certainty' be used at the hearing, let alone in an expert report, so long as the testimony, when taken in context and a whole, reflects the requisite level of confidence.")).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 29th day of December, 2025, it is hereby ordered that the Motion to Exclude Expert Testimony filed by CNX is **denied** for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: December 29, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Kathleen A. Ryan, Esquire
Forrest M. Smith, Esquire
(via electronic filing system)

For Appellants, James and Barbara Ullom:
Joshua Ash, Esquire
(via electronic filing system)

For Intervenor, CNX Gas Company, LLC:
Rodger L. Puz, Esquire
J.R. Hall, Esquire
(via electronic filing system)

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

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[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

c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

c: For the Commonwealth of PA, DEP:
Angela N. Erde, Esquire
Jennifer N. McDonough, Esquire
(*via electronic filing system)*

For Appellant:
Matthew L. Woolford, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REP. TARAH PROBST	:	
	:	
v.	:	**EHB Docket No. 2025-114-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FIRST PENNSYLVANIA RESOURCE, LLC, Permittee	:	**Issued: December 30, 2025**

OPINION AND ORDER ON
MOTION TO AMEND NOTICE OF APPEAL

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

Synopsis

The Board denies an appellant's motion to amend her notice of appeal to add additional appellants after the jurisdictional deadline for appealing the Department's action has passed.

O P I N I O N

Pennsylvania State Representative Tarah Probst ("Rep. Probst"), proceeding *pro se*, has appealed the issuance of Permit No. MB990264-0001 by the Department of Environmental Protection (the "Department") to First Pennsylvania Resource, LLC ("First Pennsylvania"). The permit is associated with the establishment of what is known as the Sunny Brook mitigation bank located in Damascus Township, Wayne County.[1] The appeal was filed on October 29, 2025. According to Rep. Probst, the mitigation bank is related to construction work for an expansion of the I-80 interstate highway. On December 5, 2025, Rep. Probst filed a motion to amend her notice

[1] Rep. Probst's notice of appeal identifies Permit No. MB990264-0001 as a Section 401 Water Quality Certification. On November 5, 2025, Rep. Probst filed on the docket a copy of Permit No. MB990264-0001, which is a water obstruction and encroachment permit.

of appeal to add additional appellants.[2] The motion seeks to add Joseph Tortorelli and Lisa Wayland to the appeal because Rep. Probst contends that Mr. Tortorelli and Ms. Wayland have an interest that is directly and adversely affected by the permit under appeal and "would have had standing to appeal at the time the original Notice of Appeal was filed." Rep. Probst asserts that allowing the amendment to her appeal will promote efficiency by permitting all affected parties to be part of one appeal instead of there being multiple appeals of the same permit.

First Pennsylvania and the Department oppose the motion. First Pennsylvania argues that a motion to amend an appeal is not an appropriate vehicle to add new appellants to an existing appeal, and that the Board does not have jurisdiction over the prospective appellants because the deadline for filing an appeal of its permit has already passed. The Department did not file its own response to the motion but instead filed a letter stating that it concurred in First Pennsylvania's response.

An appeal may be amended as of right within 20 days of the appeal being filed. 25 Pa. Code § 1021.53(a). After 20 days, an appellant must seek leave of the Board to amend its appeal and show that no undue prejudice will result to the opposing parties. 25 Pa. Code § 1021.53(b); *Dengel v. DEP*, 2024 EHB 466, 469. However, it is well-settled that new appellants cannot be added to an appeal via an amendment to that appeal after the time for appealing a Department action has expired. This is because, under the Environmental Hearing Board Act and our regulatory Rules, the Board does not jurisdiction over an appeal from an action of the Department unless the appeal is timely filed with the Board. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a); *Pickford v. Dep't of Envtl. Prot.*, 967 A.2d 414, 418-19 (Pa. Cmwlth. 2008); *Rostosky v. Dep't of*

[2] On December 8, 2025, we granted in part an earlier unopposed petition filed by Rep. Probst to amend her notice of appeal to the extent that she identified new objections in her petition. We denied the petition in all other respects, including Rep. Probst's request to "supplement the record" with comment letters from organizations and a consultant's report.

Envtl. Res., 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *HD Holdings v. DEP*, EHB Docket No. 2024-179-CS, slip op. at 3 (Opinion and Order issued Sep. 30, 2025); *Arpino v. DEP*, 2009 EHB 579. For actions of the Department where notice of the action is published in the *Pennsylvania Bulletin*, a third-party appellant has 30 days from the publication of notice to file a timely appeal unless a different period of time is provided by statute. 25 Pa. Code § 1021.52(a)(2)(i). The appeal period is jurisdictional and cannot be extended as a matter of grace. *Anspach v. DEP*, 2018 EHB 523, 525-26 (citing *Ametek, Inc. v. DEP*, 2014 EHB 65, 68).

In *Stedge v. DEP*, 2014 EHB 549, third-party appellants were appealing the Department's approval of coverage under a general permit. The appellants filed an amendment to their notice of appeal within the 20-day period to amend as of right, revising their objections and adding six new appellants to the nine existing appellants in the appeal. The permittee filed a motion to dismiss the newly added appellants. Notice of the Department's approval had been published in the *Pennsylvania Bulletin*, so any appeals needed to be filed within 30 days of the publication of the *Pennsylvania Bulletin* notice to be timely. We found that the appellants added via amendment of the appeal were added more than two weeks after the deadline for filing a timely appeal. Therefore, we dismissed the six new appellants from the appeal.

In *Weaver v. DEP*, 2013 EHB 381, we denied a motion for leave to amend an appeal that sought to add an appellant who had received the Department order under appeal but who did not file an appeal within 30 days. We held that the appellant's failure to file a timely appeal deprived the Board of jurisdiction and that "[t]his jurisdictional defect may not be overcome by way of an amendment to another party's timely appeal." *Weaver*, 2013 EHB at 382. *See also Gemstar Corp. v. DEP*, 1997 EHB 367 (striking appellants sought to be added to an appeal via amendment after the 30-day appeal period).

The permit under appeal here was issued on October 3, 2025. Notice of the permit's issuance was published in the *Pennsylvania Bulletin* on October 25, 2025. 55 Pa.B. 7464 (Oct. 25, 2025). Accordingly, under our Rules, the latest that someone could have appealed the permit was November 24, 2025, 30 days after publication of the notice. 25 Pa. Code § 1021.52(a)(2)(i). Rep. Probst's motion to amend was filed on December 5. At that point, it was too late to add new appellants, just as it would have been too late for a prospective appellant to appeal the permit. Rep. Probst has not identified any statute governing the permit under appeal that would extend the timeframe to appeal the permit. *See* 32 P.S. § 693.24 (Dam Safety and Encroachments Act providing 30 days from receipt of notice of Department action to appeal to the Board). "[N]ew appellants cannot circumvent the 30-day window by way of an amendment of another party's appeal. Allowing an amendment to add one or more appellants after the 30-day appeal period has run to those prospective appellants would 'effectively vitiate the 30-day jurisdictional requirement.'" *Stedge*, 2014 EHB at 551 (quoting *Weaver*, 2013 EHB at 382).

Accordingly, we issue the Order that follows.[3]

[3] Although Rep. Probst filed a reply to First Pennsylvania's response, such replies are not permitted under our Rules for motions to amend an appeal. *See* 25 Pa. Code § 1021.91(g). Nevertheless, we have reviewed the reply and nothing therein changes our ruling.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 30th day of December, 2025, it is hereby ordered that the appellant's motion to amend her notice of appeal is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

DATED: December 30, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
Austin Grace, Esquire
Erika Uebelhor, Esquire
(*via electronic filing system*)

For Appellant:
Rep. Tarah Probst, *Pro se*
(*via electronic filing system*)

For Permittee:
Andrew T. Bockis, Esquire
John R. Dixon, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSIAH LEISHER	:	
	:	
v.	:	**EHB Docket No. 2025-120-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROCKWOOD STONE, LLC, Permittee	:	**Issued: December 31, 2025**

OPINION AND ORDER ON APPELLANT'S REQUEST FOR SUPERSEDEAS AND PROMULGATION OF REGULATIONS AND PERMITTEE'S MOTION TO DENY REQUEST FOR SUPERSEDEAS

By MaryAnne Wesdock, Judge

Synopsis

The Board grants the permittee's motion and denies a petition for supersedeas in an appeal of the Department's approval of a permit to expand a quarry and related NPDES permit, where the petition does not meet the requirements for a supersedeas. The Board also denies that portion of the petition requesting the Board to promulgate regulations pursuant to the Surface Mining Act and Department technical guidance documents as being outside the scope of the Board's authority.

O P I N I O N

Introduction

This matter involves a notice of appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Josiah Leisher (Mr. Leisher), *pro se*, challenging the Department of Environmental Protection's (Department) issuance of a noncoal surface mining permit and NPDES permit to Rockwood Stone, LLC (Rockwood) for its Rockwood Quarry in Black Township, Somerset County. The permits authorize the expansion of the current noncoal quarry operation.

Factual and Procedural Background

On October 8, 2025, the Department issued the following permits to Rockwood: Noncoal Surface Mining Permit No. 56250301 and National Pollutant Discharge Elimination System (NPDES) Permit No. PA0279935 (hereinafter referred to as "the quarry permits" or simply "the permits"). Notice of issuance of the permits was published in the *Pennsylvania Bulletin* on October 25, 2025. According to the Department, the permits enable Rockwood to expand the operational area of its current quarry and extract a higher volume of sandstone. (Department's Response to Appellant's Request for Supersedeas, p. 1.) Mr. Leisher filed a notice of appeal on November 7, 2025 challenging the issuance of the permits.

On November 26, 2025, Mr. Leisher electronically filed with the Board a letter which he labeled "request for supersedes [sic] and a promulgation of regulations." (EHB Docket No. 2025-120-W, Docket Entry no. 4.) For identification purposes, we shall refer to this document as the "petition for supersedeas." On December 9, 2025, the Board held a conference call with the parties to discuss Mr. Leisher's petition. At that conference, the presiding judge explained that the Board would be treating Mr. Leisher's filing as a petition for supersedeas and directed the Department and Rockwood to file responses on or before December 23, 2025. The presiding judge also explained the Board's practice and procedure to Mr. Leisher and advised him that individuals appearing before the Board are strongly encouraged to be represented by an attorney. At that conference, the Department and Rockwood offered to make their technical staff available to Mr. Leisher to answer questions in an attempt to see if this matter could be resolved. The parties held a conference call on December 16 with no resolution of the matter. On December 23, 2025, the Department and Rockwood filed responses to the petition for supersedeas. Rockwood's response also includes a motion to deny the petition for supersedeas without a hearing.

Standard of Review

The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). A supersedeas, as defined by the Board's regulations, is a "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. Among the factors to be considered in ruling on a petition for supersedeas are the following: (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Friends of High Point Lake v. DEP*, EHB Docket No. 2025-102-W, slip op. at 5 (Opinion Supporting Order Denying Petition for Supersedeas issued Oct. 30, 2025); *Delaware Riverkeeper Network v. DEP*, 2022 EHB 103, 110 (citing *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485).

In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three criteria, with a strong showing of a likelihood of success on the merits. *Protect PT v. DEP,* 2024 EHB 154, 160 (citing *Teska v. DEP*, 2016 EHB 541, 544). With regard to irreparable harm, the first factor, mere speculation that a petitioner will suffer irreparable harm is not enough for a supersedeas. *Liberty Township v. DEP*, 2023 EHB 158, 160 (citing *Guerin v. DEP*, 2014 EHB 18, 24). "General assertions of irreparable harm without greater specificity are not sufficient to establish irreparable harm." *Mellinger v. DEP*, 2013 EHB 322, 328.

Given the fact that a supersedeas is an extraordinary measure that is not to be taken lightly, we have held that it is critical for a petition for supersedeas to plead facts and law with particularity and to be supported by affidavits setting forth facts upon which the issuance of a supersedeas may

depend. *Dougherty v. DEP*, 2014 EHB 9, 12 (citing 25 Pa. Code § 1021.62(a)). Where a petition and its supporting documentation do not provide the Board with a basis for granting a supersedeas, it will be denied. *Mellinger, supra*.

Discussion

As the person seeking the supersedeas, Mr. Leisher has the burden of proving that it should be issued. *Erie Coke*, 2019 EHB at 484; *Center for Coalfield Justice v. DEP*, 2018 EHB 323, 327. Section 1021.62 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.62, explains what must be included in a petition for supersedeas. This section requires that a petition for supersedeas shall set forth the specific facts and legal authority the petitioner believes justify the grant of supersedeas. *Id*. at § 1021.62(a) and (b). The petition must make a credible showing on the following factors: 1) a likelihood that the petitioner will prevail on the merits; 2) irreparable harm if the petition is not granted; and 3) the likelihood of harm or injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a).

A petition for supersedeas may be denied without a hearing for any 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.
>
> (4) A failure to state grounds sufficient for the granting of a supersedeas.

25 Pa. Code § 1021.62(c); *Vanduzer v. DEP*, 2018 EHB 696, 699; *Morrison v. DEP,* 2016 *EHB* 149, 153.

The Department and Rockwood assert that the petition filed by Mr. Leisher should be denied for all the reasons set forth above.[1] As we explain below, we agree that the petition does not meet the requirements necessary for proceeding to a supersedeas hearing. While Mr. Leisher's petition makes broad assertions as to why he believes the permits should not have been granted, it does not set forth the grounds necessary for a supersedeas.

Initially, it is not apparent exactly what Mr. Leisher is asking for in his petition. He begins his petition by stating:

> I request a motion for supersedeas and a motion to promulgate regulations. In respect for the rules established for these proceedings pertaining to the filing motions and requests of the board. Please excuse me of the formatting procedures.[2] I believe that the substantive nature of my writing is in line with the guidance provided, however if I need correction or clarification please advise. Acts of blasting by the permittee have commenced, and disturbance has been witnessed in the waters, lands, and buildings surrounding the industrial mineral extraction site of Rockwood Stone LLC. **In accordance with 25 Pa. Code §§ 1021.71–1021.76a I hereby request the board to the review of the Acts of environmental contamination described and adjudicate nunc pro tunc.**

(Petition for Supersedeas, p. 1) (emphasis added).

25 Pa. Code §§ 1021.71—1021.76a, cited by Mr. Leisher in his petition, deal with "special actions" such as complaints for civil penalty filed by the Department and complaints filed by other persons against the Department when authorized by statute. Mr. Leigsher has cited no statutes

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[1] The Department and Rockwood also assert that the petition for supersedeas should be denied because it fails to contain any affidavits as required by 25 Pa. Code § 1021.62(a). While it is true that Mr. Leisher does not include an affidavit in support of his petition, as required by 25 Pa. Code § 1021.62(a), we need not address this deficiency since we find that the document filed by Mr. Leisher does not meet the substantive requirements of the rules governing supersedeas.

[2] While we appreciate Mr. Leisher's qualification that he may not be familiar with the Board's requirements, he is nonetheless expected to follow the applicable rules. "The right of self-representation is not a license . . . not to comply with relevant rules of procedure and substantive law." *Goetz v. DEP*, 2002 EHB 976, 978 (quoting *Faretta v. California*, 422 U.S. 806, 834 n. 6, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975)).

authorizing the filing of a complaint against the Department in this matter, nor has any such complaint been filed.

The petition goes on to state:

> Due to the inherent public risk that is associated with the disturbance of waters emanating from Abandoned mines associated with the ongoing activities of Rockwood Stone LLC, I petition the courts for Supersedeas. I believe that criteria on all 3 levels of this request are complete. **I request the board to promulgate regulations in accordance with the Surface Mining Conservation and Reclamation Act. Specifically, but not limited to the application of both Policy and Procedure outlined by the PA DEP document 562-4000-101 and its applicable laws.** The application of this document provides the framework for the bonding policy in accordance with the highly complex legal structure of laws that strongly discourage any industrial activity that could result in the contamination of public waters.

Id. at p. 4 (emphasis added). The petition further states: "I also request a **motion to promulgate regulations** in regard to 5600-PM-BMP0315-14 Rev. 1/2014 Modules 14 and 16, and the attached PNDI." *Id*. at p. 6 (emphasis added).

Mr. Leisher appears to be asking the Board to promulgate regulations pursuant to the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.19b (Surface Mining Act)[3] and two unidentified documents referred to simply as "PA DEP document 562-4000-101" and "5600-PM-BMP0315-14."[4] We are aware of no authority that would allow the Board to take the action requested by Mr. Leisher, nor has he cited to any. The Environmental Hearing Board Act established the Board as a "quasi-judicial

[3] Although the mining permit at issue here is a noncoal surface mining permit issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, Act of Dec. 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301 – 3326, the permit was also issued pursuant to the Surface Mining Act. (Attachment to Rockwood's Memorandum of Law in Support of Motion to Deny Supersedeas.)

[4] We believe Mr. Leisher may be referring to the Department's Water Supply Replacement and Compliance Technical Guidance Document and Module 14: Streams/Wetlands of the Department's Application for Large Noncoal Industrial Minerals Mine Permit, respectively.

agency" with "the power and duty to hold hearings and issue adjudications. . . ." 35 P.S. §§ 7513(a); 7514(a). Thus, we act in a judicial capacity – we review actions of the Department that have been challenged (here, the quarry permits), we hold hearings, and we issue opinions and, where applicable, adjudications (final decisions on the merits of an appeal). While Section 5(c) of the Environmental Hearing Board Act enables the Board to adopt regulations, such regulations must address *practice and procedure before the Board*. *Id.* at § 7515(c).[5] In contrast, the power to promulgate regulations relating to statutes administered by the Department of Environmental Protection is held by the Environmental Quality Board (EQB), a separate and distinct entity from the Environmental Hearing Board. Pursuant to the Administrative Code:

> The Environmental Quality Board shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department, and such rules and regulations, when made by the board, shall become the rules and regulations of the department.

71 P.S. § 510-20. *See also, Tire Jockey Service, Inc. v. Department of Environmental Protection*, 915 A.2d 1165, 1185 (Pa. 2007) (The EQB is the administrative "legislative branch" responsible for promulgating rules and regulations for the Department, while the Board is the administrative "judicial branch" empowered to hold hearings and issue adjudications); *Northampton, Bucks County Municipal Authority v. DER*, 1986 EHB 638, 643 ("The regulations of [the Department] are promulgated by the EQB . . . ."); *Candela v. DEP*, 2001 EHB 263, 266 ("The authority to promulgate regulations lies exclusively with the EQB.")

While the Board has the power to review the validity of a Department regulation in the context of an appeal from a Department action, we do not have the authority to promulgate such

[5] Indeed, the Board has an extensive and comprehensive set of Rules of Practice and Procedure located at 25 Pa. Code Chapter 1021.

regulations unless authorized to do so by statute. *Northampton, supra.* Mr. Leisher has directed us to no provision in the Surface Mining Act that would authorize the Board to promulgate regulations thereunder.

As the Board explained in *Eagle Environmental, L.P. v. DEP*, 1997 EHB 733, 741:

> The overall legislative design of environmental regulation in Pennsylvania is for the Environmental Quality Board (EQB) to promulgate regulations for the guidance of the Department in administering the various environmental statutes enacted by the General Assembly. The Department's exercise of discretion in administering those statutes is controlled by both the standards set forth in the regulations by the EQB and this Board's determination of whether the Department has properly applied the standard set forth by the EQB.

Thus, while the Board has the authority to review regulations of the Department adopted pursuant to the Surface Mining Act, we do not have the authority to *promulgate* regulations as requested here by Mr. Leisher.

The petition goes on to state:

> My second request of the board is about the acts of blasting within the permitted area. **If it pleases the board to clarify whether the threshold for presumptive liability of any contamination to the surrounding waters in relation to the use of explosives for the act of Industrial Mineral Extraction can be assessed nunc pro tunc**. Issuance of the large permit has transferred liability for actions and environmental damages of the small operation to the larger permit. Abandoned mine entrances match the SMCRA definition for point source pollution and acts by the permit are associated with recognized Acts of Disturbance. If Acts of Disturbance have commenced and there are barriers in procuring satisfactory water quality data as defined in § 88.491. "Minimum requirements for information on environmental resources.". The Baseline Pollution Load calculation pertaining to bonding is not satisfactory, and even the alternative financial assurance Mechanisms appear incongruous. How would the board direct Financial Assurance Mechanisms for the point source pollution areas surrounding the three abandoned mines, as well as the other point source pollution areas affected by this Surface Mining activity?

(Petition for Supersedeas, p. 4-5) (emphasis added).

It is unclear what Mr. Leisher is asking. Given Mr. Leisher's use of the term "nunc pro tunc," to the extent that Mr. Leisher is asking the Board to review previous permits issued by the Department to Rockwood, those actions are administratively final and not subject to review at this time. *See DEP v. Angino*, 2005 EHB 905, 909 (quoting *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.,* 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied,* 434 U.S. 969 (1977)) ("Under the doctrine of administrative finality, 'one who fails to exhaust his [or her] statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his [or her] statutory remedy.'") Accordingly, if Mr. Leisher wished to challenge previous permits issued to Rockwood, the time to do so was when those permits were issued.

We turn now to Mr. Leisher's request for a supersedeas. As noted, a petition for supersedeas may be denied without a hearing for a lack of particularity in the facts pleaded (§ 1021.62(c)(1)) and the legal authority cited (§ 1021.62(c)(2)). *Vanduzer,* 2018 EHB at 699. As to § 1021.62(c)(1), while there are a number of facts pleaded in Mr. Leisher's petition, there are gaps in the information provided. As to § 1021.62(c)(2), while there are a few legal provisions cited, many are inapplicable and there is no explanation or analysis as to how they serve as the basis for granting a supersedeas. While the petition quotes sections of the Surface Mining Act and surface mining regulations and sets forth what Mr. Leisher believes to be deficiencies in the permit application materials submitted by Rockwood and approved by the Department, there is no discussion of why Mr. Leisher believes a supersedeas is warranted.

A supersedeas petition may also be denied for failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(4). Mr. Leisher does not make a credible

showing of irreparable harm, nor does he even allege it. While he alludes to "disturbances" to nearby waters, land and buildings due to blasting, he does not indicate what those disturbances are, much less that they are irreparable. Although Mr. Leisher raises a number of environmental concerns – such as risk of water pollution, abandoned mines, and PCB contamination from a nearby power substation – it is unclear from his petition how these concerns relate to the quarry permits at issue in this appeal, or whether they are related at all. While he provides a picture of a foamy substance in Rhoades Creek, he does not say how he thinks the quarry and the foam are related. Importantly, he offers no clear analysis of how specific activities at the quarry, undertaken pursuant to the permits at issue in this appeal, will cause irreparable harm or a likelihood of injury to the public.

The petition also does not demonstrate a likelihood of success on the merits. While Mr. Leisher outlines what he believes are a number of deficiencies with the permit application for the quarry, he does not adequately explain why the deficiencies are relevant, nor does he allege that the Department would have come to a different outcome if the application had contained additional or different information. While everything he raises could be a valid point, there is simply not enough information provided here to fully understand Mr. Leisher's argument. As we stated earlier, a request for a supersedeas carries a heavy burden. Here, Mr. Leisher's petition simply has not met that burden.

Before concluding, we again caution Mr. Leisher that proceeding in this matter without an attorney presents challenges. "We have repeatedly held that appellants opting to appear before this Board [without an attorney] assume the risk that their lack of legal expertise may be their undoing." *Kilmer v. DEP*, 1999 EHB 846, 852 (citing *Santus v. DER*, 1995 EHB 897, 923; *Taylor v. DER*, 1991 EHB 1926; *Welteroth v. DER*, 1989 EHB 1017). As stated in *Dellinger v. DEP,* 2000 EHB

976, “The Board is a legal forum which follows legal procedure and precedent. [Practice before] the Board is governed by legal doctrines and proscriptions which can be difficult for persons not trained in the law. [Therefore], competent and experienced legal counsel is highly recommended.” 2000 EHB at 977, n. 1.

Because the petition for supersedeas fails to meet the requirements outlined in 25 Pa. Code § 1021.62 and because Mr. Leisher has not made a showing that he should be granted supersedeas relief under § 1021.63, we enter the following order denying the request for supersedeas without a hearing pursuant to 25 Pa. Code § 1021.62(c).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSIAH LEISHER	:	
	:	
v.	:	**EHB Docket No. 2025-120-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROCKWOOD STONE, LLC, Permittee	:	

O R D E R

AND NOW, this 31st day of December, 2025, it is hereby ordered that the Motion to Deny Appellant's Request for Supersedeas, filed by Rockwood, is **granted,** and the Request for Supersedeas and Request to Promulgate Regulations, filed by Mr. Leisher, is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: December 31, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Alicia R. Duke, Esquire
(via electronic filing system)

For Appellant:
Josiah Leisher, pro se
(via electronic filing system)

For Permittee:
David A. Rockman, Esquire
Michelle M. Skjoldal, Esquire
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