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: April 7, 2026**

OPINION AND ORDER ON
PETITION FOR LEAVE TO INTERVENE

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

Synopsis

The Board denies a petition to intervene in an appeal where the petitioners have not shown that they have a direct interest in the subject of the appeal.

O P I N I O N

Pennsylvania State Representative Tarah Probst ("Rep. Probst"), proceeding *pro se*, has appealed the issuance of Water Obstruction and Encroachment Permit No. MB990264-0001 by the Department of Environmental Protection (the "Department") to First Pennsylvania Resource, LLC ("First Pennsylvania"), for the Sunny Brook Mitigation Bank located in Damascus Township, Wayne County.[1] According to the permit, the mitigation bank will "reestablish an integrated stream and wetland complex" and "preserve 2,868 linear feet of stream, reestablish 10,392 linear

[1] In her Notice of Appeal, Rep. Probst described the subject of her appeal as the "401 Water Quality Certification for Sunny Brook Mitigation Bank permit (MB990264-0001)." At various points in the Notice of Appeal, Rep. Probst objects to the 401 Certification, while at other times referring to "the permit." After filing her Notice of Appeal, Rep. Probst filed a copy of Water Obstruction and Encroachment Permit No. MB990264-0001. For our current purposes we will assume this appeal relates to the permit as opposed to a 401 Certification.

feet of stream and approximately 21 acres of associated floodplains, preserve 3.10 acres of wetlands, enhance 13.32 acres of wetlands, rehabilitate 10.83 acres of wetlands, and reestablish 2.16 acres of wetlands." (Permit at 1.) The mitigation bank proposes to generate 11,110 riverine credits and 14.92 wetland credits for compensatory mitigation. (*Id.*)

Rep. Probst avers in her Notice of Appeal that the permit approval "enables or facilitates environmental impacts from the I-80 expansion project in Monroe County by providing compensatory mitigation credits." She avers that "[w]aters from Monroe County's highly scrutinized I-80 expansion project will be moved to this bank." She objects that the Department issued the 401 Certification for the mitigation bank "as a 'standalone' project, despite clear evidence that it was designed to mitigate wetland impacts caused by the I-80 expansion project." She objects that the Department did not consider the cumulative environmental impacts of the I-80 expansion project together with the mitigation bank. Rep. Probst has not provided us with an explanation of the I-80 project or provided any documentation connecting that project to the Sunny Brook Mitigation Bank, but the statements in her Notice of Appeal presume that the I-80 project will utilize mitigation credits from the mitigation bank. She does not describe the "clear evidence" of a connection.

On December 30, 2025, we issued an Opinion and Order denying a motion by Rep. Probst to amend her appeal to add Joseph Tortorelli and Lisa Wayland as appellants to the appeal. *Probst v. DEP*, 2025 EHB 780. We denied the motion because it sought to add appellants more than 30 days after notice of the action was published in the *Pennsylvania Bulletin*, the jurisdictional deadline for filing an appeal of the permit with the Board:

> 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.

Probst, 2025 EHB at 783.

Following our denial of the motion to amend, Joseph Tortorelli and Lisa Wayland filed a petition for leave to intervene. Also included on the petition was another individual, Jessica Delfino. It was subsequently revealed that Ms. Delfino is one and the same person as Jessica Smith, who works for Rep. Probst as a Constituent Advisor.[2] The petition to intervene consists of one single-spaced page together with a signature page. The Petitioners aver that they "reside in or near the area affected by the I-80 Project at Exits 303 through 307 and the Sunny Brook Mitigation Bank." (Pet. at ¶ 1.) However, the Petitioners list their addresses as being in Stroudsburg, which cannot be said to be near the mitigation bank, approximately 60 miles away. The Petitioners say they intend to present evidence and testimony to assist the Board in fully evaluating the environmental and public impacts of the project. (*Id.* at ¶ 4.)

The Department and First Pennsylvania have filed responses in opposition to the petition. Among other things, they both allege that the Petitioners are repeatedly attempting to circumvent the jurisdictional limitations of the Board. We are not unsympathetic to this argument. However, there are more compelling reasons why the petition must be denied.

Any interested party may petition to intervene in any matter pending before the Board prior to the initial presentation of evidence. 35 P.S. § 7514(e); 25 Pa. Code § 1021.81(a). Under our Rules, a petition to intervene must be verified and must contain sufficient factual averments and

[2] Ms. Delfino, identifying herself as Jessica Smith, has previously dealt with the Board's staff on multiple occasions as "Jessica Smith" including participating in a conference call we held with the parties pursuant to Paragraph 5 of our Pre-Hearing Order No. 1 to discuss the procedural status of the appeal. No party objected to her participation in that call when asked by the presiding judge. The presiding judge nevertheless cautioned Rep. Probst and Ms. Delfino/Smith about potential issues with the participation of a non-party and non-attorney in the appeal.

legal assertions to establish: (1) the reasons the petitioner seeks to intervene; (2) the basis for asserting that the petitioner's identified interest in the appeal is greater than that of the general public; (3) the manner in which that interest will be affected by the Board's adjudication of the appeal; and (4) the specific issues upon which the petitioner will offer evidence or legal argument. 25 Pa. Code § 1021.81(b). "The Board will deny the petition if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene." 25 Pa. Code § 1021.81(e).

The petition to intervene is seriously deficient under our Rules. First, the petition was not verified as required. *See* 25 Pa. Code § 1021.81(b). This is an important requirement. Intervention is typically sought early on in the appeal process when we have little to go on. A petition must include "sufficient factual averments" to establish a proper basis for intervention, *id.*, so if we are to rely on these facts and little or nothing else, it is necessary and appropriate that they be verified. Indeed, when a petitioner's standing is challenged in an answer to a petition to intervene, we accept as true all of the verified facts set forth in the petition and all the inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of law. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286 (citing *Barr Farms, LLC v. DEP*, 2022 EHB 74, 76; *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3). We have *no* verified facts here. We consider the absence of a verification to be a fatal flaw in this case. 25 Pa. Code § 1021.81(e); *Consol Pa. Coal Co. v. DEP*, 2002 EHB 879.

The petition is deficient in other respects as well. The petition consists of six conclusory, largely generic paragraphs that do not provide any real detail on the reasons the Petitioners seek to intervene or why their interests are greater than the general public's. 25 Pa. Code § 1021.81(b)(1)-(2). The Petitioners only assert that they live in or near the "area affected by the I-

80 Project" and that the "issues in the appeal" may affect their properties, community, and use of natural resources. They do not provide any explanation in the petition of how they stand to be affected. The petition also does not explain how any interest may be affected by an adjudication of the Board, or identify any specific issues upon which the Petitioners would offer evidence or legal argument. 25 Pa. Code § 1021.81(b)(3)-(4). The petition is in no way compliant with our Rules.

Following the filing of the Department's and First Pennsylvania's responses in opposition, the Petitioners filed "replies to permittee's answer in opposition" to the petition. Reply filings are not envisioned under our Rules for petitions to intervene. *See* 25 Pa. Code § 1021.81. There is nothing in the Petitioners' replies that could not have been included in their initial petition. There is a certain degree of unfairness in allowing a petitioner a second bite at the apple once the opposing parties point out in their responses that the petition fails to meet the requirements of our Rules. Our Rules exist to provide for orderly proceedings for all participants. When persons file never-ending replies, it only prolongs decisions. Absent pre-obtained leave of the Board, replies are only countenanced in limited circumstances, namely, in the context of dispositive motions and post-hearing briefing. Replies are particularly discouraged when their sole purpose appears to be trying to remedy an initially deficient filing. None of the Petitioners first sought or obtained leave to file their replies. Furthermore, just like the initial petition, the replies do not include the required verification, which once again constitutes a fatal flaw.

In any event, our review of the replies confirms our conclusion that the petition to intervene must be denied. Despite the level of ambiguity in the replies, it is abundantly clear that all three Petitioners anticipate direct harms from the I-80 project, and only in the most tangential sense from the mitigation bank. They attempt to gloss over the distinction between the two projects with

averments like their property will be impacted "by the I-80 project and related activities," and they own property "within the mitigation bank service area," which includes half of the Delaware River. None of the Petitioners live near the mitigation bank, allege that they recreate or otherwise frequent the area of the bank, or that anything about the design or construction of the bank will directly affect them.

In the context of a permit appeal, intervention will ordinarily be allowed if "(1) the person uses the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely [a]ffect that use by, e.g., lessening the aesthetic and recreational values of the area." *Giordano v. DEP*, 2000 EHB 1154, 1156. None of that is present here. None of the Petitioners have explained any interest in the mitigation bank itself or explained how they are affected by the mitigation bank, nor have they said they will offer any evidence or argument that relates to the mitigation bank There is no assertion that any of the Petitioners use the 68-acre area of the mitigation bank or that their use will be impaired by the work done to establish the mitigation bank. All three Petitioners live in Stroudsburg, Monroe County, which is located approximately 60 miles to the south of Damascus Township, Wayne County where the mitigation bank is located. We have a hard time understanding how their properties could be directly impacted by a mitigation bank so far away. While Wayne and Monroe Counties share a small border, Damascus Township is nowhere near that border. There is nothing to suggest that the Petitioners would be pursuing intervention in the absence of the perceived connection between the bank and the I-80 project, yet it is entirely the mitigation bank permit that is our sole focus in this appeal.

The Environmental Hearing Board Act provides that "[a]ny interested party may intervene in any matter pending before the board." 35 P.S. § 7514(e). However, not just any diffuse or casual interest will suffice. Rather, as we recently explained in *EQT Production Co. v. DEP*, EHB Docket

No. 2024-117-W (Opinion and Order on Petition to Intervene issued Mar. 9, 2026), a prospective intervenor must show it has a "direct" interest:

> 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." *CRG Services Management LLC v. DEP*, 2025 EHB 494, 496 (quoting *Mountain Watershed Association*, 2024 EHB at 479). While there is a relatively low burden for establishing standing for intervention in Board proceedings, the Commonwealth Court has directed that "a person seeking to intervene must have an interest that 'will either gain or lose by direct operation of the Board's ultimate determination.'" *Friends of Lackawanna v. DEP*, 2022 EHB 11, 13 (quoting *Browning-Ferris, Inc.* [*v. Dep't of Envt' Res.*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991)]). In other words, a party must have a "direct interest" in the action. *Muth v. DEP*, 315 A.3d 185, 196 (Pa. Cmwlth. 2024) (quoting *Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Board*, 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." *CRG Services Management LLC*, 2025 EHB at 496 (quoting *Muth*, 315 A.3d at 196).

Id., slip op. at 5. "The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). A remote or speculative connection between the person's interest and the Department's action is not enough. Rather, the Departmental action must be the proximate cause of the threatened harm. *Id.*; *Borough of St. Clair v. DEP*, 2015 EHB 290, 304-05; *Giordano v. DEP*, 2000 EHB 1184, 1186.

The Petitioners' interest in the mitigation bank is, at best, indirect. They have not demonstrated that they have an interest that will gain or lose by direct operation of the Board's final adjudication regarding the mitigation bank permit. Like the Notice of Appeal, no evidence has been provided of the alleged connection between the projects. The Petitioners have not shown how the mitigation bank permit or our adjudication thereof will cause direct harm to their interests. The connection between any harm caused by the mitigation bank and the Petitioners' interests is simply too remote.

In order to accept the Petitioners' view, we would need to essentially find that persons who claim to be affected by a construction project have standing to appeal any separate mitigation bank permit if there is some indication or possibility that the mitigation bank might be selected to provide credits for the construction project. This is precisely the sort of remote, speculative harm that precedents requiring direct harm are intended to guard against.

As an example of the lack of proximate connection between the Petitioners' feared harms from the I-80 project and the mitigation bank, the Petitioners are concerned that the I-80 project will harm wetlands near their properties in Stroudsburg. Of course, the mitigation bank permit does not authorize such harm. Nor do we think it materially enables it. It is difficult to imagine how anything we do with respect to the mitigation bank would alleviate the potential harm. If we were to revoke the mitigation bank permit, it does not follow and indeed seems unlikely that, as a proximate cause of that revocation, harm to the distant wetlands would somehow be avoided. But for the mitigation bank, the harm would occur anyway. The project could simply obtain credits elsewhere for example. Is it theoretically conceivable that revoking the mitigation bank permit could, like the fluttering of a butterfly in Africa, somehow cascade into less harm to the Petitioners? Of course, anything is possible, but the connection is speculative and at best remote, not direct, and certainly not direct enough to give the Petitioners a stake in the outcome of *this* appeal.

There is another problem with the petition to intervene that is perhaps more fundamental than the lack of directness. In an appeal from a permit for the I-80 project that authorized the use of credits from the mitigation bank, we anticipate that we would be in a position to rule on whether the use of those credits is appropriate because that permit would address it. However, the opposite is not true. We are not in a position in ruling on the mitigation bank permit in this appeal to assess whether the use of credits from the mitigation bank is appropriate at the I-80 project. There is

nothing upon which to predicate such a ruling in this case because there is nothing in the mitigation bank permit that addresses the use of its credits at the I-80 site, or any other construction site for that matter. The Department could not have erred in assigning credits in the mitigation bank permit because the Department made no such assignment. The Department has not made an appealable determination of where credits from the bank can be used in the permit that is currently under appeal, and we cannot presently envision a circumstance that would impel this Board to add a condition in this permit restricting the use of bank credits for the I-80 project. This permit is neither the proper time nor place for such a ruling. In short, there is no meaningful relief we can offer the Petitioners in this case.

Even assuming it is true that there is "clear evidence" that credits from the bank are intended to be used at the I-80 project, the Board's role is to review actions and determinations of the Department. Here, there is no averment in the petition to intervene that the Department has taken any action or made any official determination approving the use of such credits. The Department must make such a determination precedent to our authority to act on the issue.

If the I-80 project needs a Section 105 permit it will be because that project will involve encroachments. The permit will authorize the encroachments and perhaps require compensation. The encroachments and compensation would be the proper subject for the Board's review if the I-80 permit were appealed. The permit for the mitigation bank does not authorize any encroachments at the I-80 site. It does not authorize compensation for any encroachments. It authorizes encroachments at the bank's site, but the Petitioners have not expressed any concerns regarding those encroachments. In short, given their stated interests and concerns, the Petitioners are attempting to intervene in an appeal from the wrong permit.

If we assume *arguendo* that the Petitioners have standing with respect to any permits issued for the I-80 project, that standing does not translate to standing to challenge the mitigation bank permit. Just as we must prevent a collateral attack on one Departmental action in an appeal from a different Departmental action, *Winegardner v. DEP*, 2002 EHB 790, 793, we must also guard against an attempt to use potential standing to appeal one action to carry over to appeal a completely different action. In *Borough of St. Clair, supra*, 2015 EHB 290, we determined that a municipality's standing to appeal an earlier solid waste permit did not mean that it had standing to appeal a later water obstruction and encroachment permit for work at the landfill involving installing a pipe to accommodate a stream that no longer flowed, but which the Department might restore in the future. The municipality failed to show that it or any of its residents were adversely affected by the permitted encroachment. We held that standing needs to be established for each separate action that is appealed:

> Of critical importance here, an appellant must be aggrieved *by the action under appeal*. *Citizen Advocates United to Safeguard the Env't v. DEP* (*CAUSE*), 2007 EHB 632, 673; *Greenfield Good Neighbors*, 2003 EHB 555, 564; *Giordano*, 2000 EHB 1184, 1185. Just as a party may not challenge one Department action in an appeal from an entirely different Department action, *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 88, a party cannot use its interest with respect to one Department action as a basis for standing to challenge an entirely different Department action. *CAUSE*, 2007 EHB 632, 676. Standing does not simply carry over as a matter of course.

Borough of St. Clair, 2015 EHB at 302 (emphasis in original).

Accordingly, for all of these reasons we deny the petition to intervene and issue the Order that follows.

E-FILED
04/07/2026
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
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O R D E R

AND NOW, this 7th day of April, 2026, it is hereby ordered that the petition for leave to intervene filed by Lisa Wayland, Joseph Tortorelli, and Jessica Delfino is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 7, 2026

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