COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARIAN FLATLEY	:	
	:	
v.	:	**EHB Docket No. 2024-139-B**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: May 8, 2026**
PROTECTION	:	

OPINION AND ORDER
ON THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants the Department's motion for summary judgment where the Appellant's response to the motion does not demonstrate that any material facts are in dispute and where the Department is entitled to judgment as a matter of law.

O P I N I O N

Background

This matter involves an appeal filed by 354 Broadway, LLC ("Broadway") and Darian Flatley ("Mr. Flatley") of an Administrative Order ("2024 Order") issued by the Department of Environmental Protection ("Department") on September 23, 2024. The 2024 Order concerns a mobile home park located on a 6-acre property in Shenango Township, Lawrence County (the "Site"), owned by Broadway. The Site is partially bordered by the Big Run stream. The 2024 Order identifies violations under the Dam Safety Act and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act") and under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law") involving mobile homes and other items that the Department alleges constitute

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unpermitted water obstructions and encroachments and that create a threat of pollution. Similar issues concerning the Site have been brought before the Environmental Hearing Board ("the Board") before. Prior to Broadway's ownership, the Site was owned by Geraldine Kerr and operated by Dan Gordon. According to the 2024 Order, the Department issued an administrative order to Mr. Gordon on April 12, 2021, after conducting an inspection where multiple mobile homes and items were observed in the floodway of Big Run. Following another Department inspection that showed the same objects remained in the floodway, the Department issued a second administrative order on July 25, 2022, to Ms. Kerr and Mr. Gordon. Ms. Kerr and Mr. Gordon appealed the second administrative order to the Board in August 2022 (EHB No. 2022-059-B) but ultimately withdrew their appeal in October 2023 without ever having complied with the administrative order. On June 22, 2023, Broadway purchased the Site from Ms. Kerr and Dan's Mobile Home Park, LLC. Mr. Flatley is the sole member of Broadway and executed the 2023 deed on behalf of Broadway. (Department's Motion for Summary Judgment ("Motion"), Exs. D and I).

The Department alleges that following Broadway's purchase of the Site, the issues raised in the prior administrative order were not addressed by Broadway and/or Mr. Flatley. This led the Department to issue a Notice of Violation in November 2023 (Department's Reply, Ex. O) and then to hold an onsite meeting in May 2024, in which Mr. Flatley participated (Department's Motion, Ex. K). Several months after this meeting, the Department issued the 2024 Order. The 2024 Order asserts that the mobile homes and other items at the Site constitute unpermitted water obstructions and encroachments under the Dam Safety Act and, pursuant to the Clean Streams Law, pose a threat of pollution to Big Run. To achieve compliance with the Clean Streams Law and the Dam Safety Act, the 2024 Order requires Mr. Flatley and Broadway to either obtain a

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permit or take corrective action by removing the mobile homes and items from the floodway of Big Run.

Broadway and Mr. Flatley filed a Notice of Appeal, *pro se*, on October 22, 2024, ("Appeal") with the Board. The Board ordered Broadway and Mr. Flatley to perfect the Appeal as it lacked a list of objections and, in addition, ordered Broadway to retain legal counsel in accordance with Section 1021.25 of the Board's Rules. After the Board granted an extension for Broadway and Mr. Flatley to comply with these orders and following a second request by Broadway and Mr. Flatley for an additional extension, the Department ultimately filed a Motion to Dismiss on January 16, 2025. On March 18, 2025, the Board issued its Opinion and Order dismissing Broadway's appeal for its failure to retain counsel but denied the Department's request to dismiss Mr. Flatley's appeal as he ultimately perfected his appeal by filing his list of objections to the 2024 Order. His objections, filed on February 13, 2025, are as follows:

> 1. Removal of Darian Flatley from the Case: Object to the inclusion of Darian Flatley in the case, as liability should rest with 354 Broadway LLC, a separate legal entity. Under Pennsylvania law, an LLC is a distinct entity from its members (15 Pa. C.S. § 8921), and members are not personally liable for the debts or obligations of the LLC. Inclusion of Darian Flatley individually is improper and should be removed from the case.
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> 2. Penalties for Prior Owner Violations: Object to penalties attributed to violations committed by previous owners, citing the Administrative Code of 1929 (71 P.S. § 510-17), which protects current owners from being held liable for prior infractions without direct involvement or continued noncompliance[.]
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> 3. Pre-Existing Nonconforming Use Argument: Object to DEP's order as Kam Mobile Home Park was established before floodplain zoning regulations, protected under the Pennsylvania Municipalities Planning Code (53 P.S. § 10601) and Act 166 of 1978 (32 P.S. § 679.101 et seq.), which does not mandate removal of pre-existing structures.
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> 4. Challenge to DEP Enforcement Actions: Object under the Clean Streams Law (35 P.S. § 691.1 et seq.) and Dam Safety Act (32

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P.S. § 693.1 et seq.), asserting DEP's actions fail to consider the park's historical use and must demonstrate substantial public necessity.

5. Request for Variance or Rezoning: Object to DEP's order by citing Shenango Township Zoning Ordinance § 1105.5, which allows variances for hardship, mitigating economic loss and resident displacement. 6.

6. Environmental and Structural Compliance Plan: Object to forced removal, proposing an engineered plan compliant with NFIP standards and Act 166 to elevate homes and install flood barriers.

7. Financial Commitment for Compliance: Object to immediate compliance deadlines, noting a business loan proposal for flood mitigation under Act 166 and Shenango ordinances.

8. Ceasing Occupancy of Vacant Mobile Homes: Object under Pennsylvania Municipalities Planning Code (53 P.S. § 10601) protecting nonconforming uses.

9. Obtaining a DEP Permit or Restoring the Site: Object based on pre-existing nonconforming use under the Floodplain Management Act (32 P.S. § 679.101 et seq.) and economic hardship. Also, regarding the requirement for a Water Obstruction and Encroachment Permit under 25 Pa. Code § 105.11, the park predates these regulations.

10. Prohibitions on Filling Vacant Lots: Object under MPC protections for ongoing lawful use.

11. Procedural Compliance Defense: Object citing Pennsylvania Administrative Code provisions for due process and reasonable accommodations due to financial hardship.

12. Civil Penalties Imposed: Object under 25 Pa. Code § 1021.161, requesting mitigation for financial hardship and efforts to comply.

13. Site Survey Submission: Object to DEP's immediate demand but note that a photo of the site survey can be provided due to its large size.

14. Timeline for Compliance: Object to unreasonably short deadlines, requesting a realistic schedule under 1 Pa. Code § 35.61.

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15. Floodplain Designation Challenges: Object to DEP's floodplain designation for the park, seeking review under the Floodplain Management Act (32 P.S. § 679.101 et seq.).

16. Appeal Rights Waiver: Object to any provision that seeks to limit appeal rights under 25 Pa. Code § 1021.51.

17. Immediate Removal of Mobile Homes: Object under the Pennsylvania Municipalities Planning Code (53 P.S. § 10601) and Floodplain Management Act (32 P.S. § 679.101 et seq.), protecting pre-existing nonconforming uses.

18. Penalties Imposed: Object under the Dam Safety Act (32 P.S. § 693.21) and Clean Streams Law (35 P.S. § 691.605), citing excessive penalties.

19. Financial Hardship: Object to immediate compliance deadlines, citing economic hardship under 1 Pa. Code § 35.61, requesting reasonable time extensions.

20. Classification of Items as Pollutants: Object to the inclusion of propane tanks and concrete blocks as pollutants under the Clean Streams Law (35 P.S. § 691.1), arguing they are standard infrastructure items for mobile home parks.

(Department's Motion, Ex. M; Dkt. Entry No. 16).

On the same day that Mr. Flatley filed his objections, he also filed a limited discovery response on the Board's Docket (Dkt. Entry No. 18). On April 11, 2025, the Department filed a motion to compel, seeking complete responses to its discovery requests. Despite an order from the Board requiring a response, Mr. Flatley failed to respond to the motion to compel. In the absence of any response from Mr. Flatley, we granted the motion to compel, ordering him to, amongst other things, respond to the Department's requests for admissions, specifying that his failure to respond would deem such requests admitted ("Order to Compel"). Rather than complying with our Order to Compel by providing the required discovery responses, Mr. Flatley filed a series of motions requesting further stays that the Board denied along with submitting a petition for review to the Commonwealth Court that was eventually quashed. On July 18, 2025,

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the Department filed a Motion for Sanctions in the Form of Dismissal arguing that Mr. Flatley had not complied with the requirements of the Order to Compel and, therefore, had prejudiced the Department in its attempts to properly litigate the appeal to a resolution on its merits. In an Opinion and Order dated September 8, 2025, we granted the Department's motion in part by imposing sanctions on Mr. Flatley that, in the event of a hearing on the merits of the case, would prevent him from 1) calling any fact witnesses other than himself; 2) calling any expert witnesses; and 3) presenting any evidence or documents unless those items were produced to the Department during discovery. See *Flatley v. DEP*, Docket No. 2024-139 (Opinion and Order on Motion for Sanctions issued Sept. 8, 2025).

Discovery in this matter closed on June 20, 2025. On October 10, 2025, counsel entered a notice of appearance on behalf of Mr. Flatley.[1] After the deadline for dispositive motions was extended several times upon joint requests from the parties, the Department moved for summary judgment on February 6, 2026 ("Motion"). After the Board denied Mr. Flatley's requests to extend the deadline to respond to the Motion and to reopen discovery, he submitted his Response to the Motion ("Response") on March 13, 2026. The Department filed its Reply to the Response ("Reply") on March 30, 2026. The briefing is now complete and the issue is ripe for decision.

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

[1] On April 8, 2026, counsel for Mr. Flatley, Attorney Jake Oresick, filed a Motion to Withdraw as Counsel. Having received no response from the Department, the Board granted leave to withdraw to Attorney Oresick on April 27, 2026.

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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*, 2025 EHB 256, 258 (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).

Discussion

The Board will uphold an administrative order where the Department shows that (1) the facts support the order; (2) its order is authorized by law; and (3) the order constitutes a reasonable exercise of the Department's discretion. See *High v. DEP*, 2024 EHB 1, 12; *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; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75. In its Motion, the Department asserts it is entitled to summary judgment where the findings of its 2024 Order are not in dispute and that the requirements detailed within are lawful, reasonable, and appropriate. The Department systematically addresses Mr. Flatley's wide-ranging list of objections and its arguments can be summarized as follows: 1) Mr. Flatley's operation and maintenance of items in the floodway without a permit violates the Dam Safety Act; 2) the items maintained and operated within the floodway create a danger of pollution and violate the Clean Streams Law; 3) Mr. Flatley is individually liable for the violations of the Dam Safety Act and Clean Streams Law under the

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participation theory; and 4) the remaining objections rely on inapplicable law and misplaced legal defenses. Mr. Flatley disputes the assertion that there are no material facts at issue and argues that most of the material facts of this case are contested, including those concerning individual liability, the location of the items, his involvement in operating and maintaining the items, and whether the items constitute pollution or pose a danger of pollution. He further asserts that the motion relies on vague and unsubstantiated legal conclusions, and that certain Requests For Admissions that were deemed admitted due to his failure to respond are, in actuality, legal conclusions and cannot be admitted in accordance with Pennsylvania law. For the reasons set forth below, we grant the Department's Motion for Summary Judgment.

Requests For Admissions

Before addressing the substantive arguments related to specific material facts, we want to first address Mr. Flatley's challenge to the Motion's reliance on Requests for Admissions ("RFAs") that were deemed admitted per our Order to Compel. The Order to Compel instructed that in the event of Mr. Flatley's failure to respond to certain RFAs within ten days of the order, we would deem those requests admitted. Since Mr. Flatley failed to respond in any manner to the Order to Compel, the RFAs were deemed admitted. Mr. Flatley now argues that RFAs Nos. 2, 10, 11, 12, 13, and 14 constitute legal conclusions making their admission impermissible under Pennsylvania law. (Flatley's Response Brief at 2, (citing *American Elec. Power Serv. Corp v. Commonwealth*, 184 A.3d 1031, 1038-1039 (Pa. Cmwlth. 2018)). Therefore, he argues we should not consider these specified deemed admissions as established facts of record.

Rule 4014 of Pennsylvania's Rules of Civil Procedure govern requests for admissions. It provides in relevant part that "[a] party may serve upon any other party a written request for the admission […] of the truth of any matters […] that relate to statements or opinions of fact or of

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the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request." Pa.R.C.P. 4014(a). While we agree with Mr. Flatley that under Pennsylvania law RFAs should generally not be used for the purpose of eliciting a legal conclusion, the Rule also instructs parties who receive RFAs containing conclusions of law to either object to the requests on those grounds or deny the requests. See Pa.R.C.P. 4014(b). Mr. Flatley did not object to the RFAs nor did he deny them. Instead, he simply ignored the discovery request and the Board's Order to Compel.[2] Rule 4014 is self-executing, thus, a party that fails to respond within the designated timeframe results in the RFAs automatically being deemed admitted. See Pa.R.C.P. 4014(d). Even if RFAs are deemed admitted for a party's failure to respond to them, Rule 4014 permits the unresponsive party to move to withdraw or amend their admission. *Id*. Mr. Flatley has not taken those steps. After he ignored the Department's RFAs, thereby, failing to abide by the rules of discovery, Mr. Flatley then disregarded our Order to Compel. Now, rather than following the proper procedure outlined in Rule 4014 that would have allowed him to correct his procedural errors, Mr. Flatley instead, for the first time, raises this issue in his Response and asks us to set aside his deemed admissions because they are, according to him, improper. Because of his initial failure to respond to the RFAs and in the absence of a motion to withdraw the RFAs deemed admitted, we are hesitant to allow Mr. Flatley to benefit from his failure to comply with the rules which would, in our opinion, unfairly prejudice the Department. We think the better approach is to closely scrutinize any deemed admitted RFAs that the Department relies on. We may disagree with Mr. Flatley's

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[2] To the extent Mr. Flatley attempts to argue that the Board should not consider his actions when he was acting without the benefit of counsel, the Board has said on numerous occasions, that parties proceeding *pro se* in Board cases are bound by our rules and are expected to comply with them. See *Goetz v. DEP,* 2002 EHB 976 (noting that *pro se* appellants are not excused from following the rules of procedure); *Kleissler v. DEP,* 2002 EHB 737; *Van Tassel v. DEP,* 2002 EHB 625.

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position that a particular RFA exclusively sought a legal conclusion, in which case we can treat any facts or application of the law to those facts as admitted. Further, we will consider other evidence of record other than purely relying on the admitted RFAs in reaching our decision. Only where the evidence or argument is limited to the admitted RFAs will we find that it cannot be relied on to conclusively establish the material fact the Department seeks to demonstrate. We think this approach is consistent with the case law and fair to each of the parties in this case.

Violations of the Dam Safety and Encroachments Act

The Department's 2024 Order expressly lists nine mobile homes ("Mobile Homes"), aboveground and underground utility services, propane fuel tanks, concrete blocks and piles of debris (collectively, the "Items"), a stormwater catch basin ("Catch Basin") and a stormwater outfall pipe ("Outfall Pipe") as the objects of concern. The Department asserts that the Mobile Homes and Items at the Site are unpermitted water obstructions and the Catch Basin and Outfall Pipe are encroachments within the Big Run Floodway, thereby violating the Dam Safety Act. Section 6(a) of the Dam Safety Act states, "[n]o person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the Department." 32 P.S. § 693.6(a). The Dam Safety Act defines a "water obstruction," as "any […] structure located in, along, across or projecting into any watercourse, floodway or body of water," and an "encroachment," as "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3. In the implementing regulations, "floodway" is defined as "[t]he channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood. Unless otherwise specified, the boundary of

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the floodway is as indicated on maps and flood insurance studies provided by FEMA." 25 Pa. Code § 105.1.

Here, there is no dispute that neither Broadway nor Mr. Flatley have a permit from the Department covering any of the structures at the Site. (Department's Statement of Undisputed Material Facts ("SUMF"), ¶ 10; Flatley's Response to SUMF, ¶ 10). Further, under the Dam Safety Act, the Mobile Homes and the Items are structures that satisfy the statutory definition of a "water obstruction" as long as they are located in, along, across or projecting into the Big Run floodway. The Catch Basin and Outfall Pipe are "encroachments" if they change, expand or diminish the course, current or cross-section of the Big Run Floodway. In his Response, however, Mr. Flatley claims that there is a significant dispute of the material facts as to the Department's allegations that he has violated the Dam Safety Act. He claims that the Department has not met its burden by demonstrating: 1) the location of the Big Run Floodway in relation to the Mobile Homes and other infrastructure at the Site; 2) that certain encroachments, specifically the Catch Basin and Outfall Pipe, change, expand or diminish the Big Run Floodway; and 3) that he or Broadway operated and maintained the Mobile Homes and infrastructure at the Site. He argues that because the Department has failed to provide conclusive proof of these elements of the Dam Safety Act violations, summary judgment is inappropriate.

The first issue is where exactly the Big Run Floodway boundary lies in relation to the Mobile Homes, Items, Catch Basin and Outfall Pipe at the Site. The Dam Safety Act's definition of floodway provides, in part that, "[u]nless otherwise specified, the boundary of the floodway is as indicated on maps and flood insurance studies provided by FEMA." 25 Pa Code § 105.1. Consistent with this regulation, the Department relies principally on a FEMA map to establish the location of the Big Run Floodway at the Site. Exhibit J attached to the Motion is a map clearly

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labeled as a FEMA document and shows that a significant portion of the Site is within the Big Run Floodway. This is the same map attached to the 2024 Order and that Mr. Flatley admitted as being a true and accurate depiction of the Big Run Floodway at the Site.[3] The legend of the FEMA map identifies the Site as a Special Flood Hazard Area. Exhibit J shows several mobile homes that are visible within the area designated as a floodway and within a Special Flood Hazard Area. Only a small portion of the Site along the southern and western edge near the road are located outside of the floodway and Special Flood Hazard Area. In its Reply Brief, the Department attached Exhibit P that, according to the affidavit in support of Exhibit P, is a Lawrence County FEMA Map that depicts the same regulatory floodway shown on Exhibit J at a magnified aspect ratio. (Department's Reply, Affidavit of Jared Prokopchak.) Apparently, the Department filed the map depicted in Exhibit P because Mr. Flatley argued in his Response that the scale of the FEMA Map (Exhibit J) made it difficult to determine from the map alone which parts of the Site may be in the Big Run Floodway. We disagree with this argument but recognize that Exhibit P focuses in on the Site and presents a closer look at the structures and the specific locations of the Mobile Homes, Items, the Catch Basin and the Outfall Pipe, that are not as readily visible on the larger scale map presented as Exhibit J. Again, Exhibit P clearly shows that several of the Mobile Homes as well as the Items, Catch Basin and Outfall Pipe are located within the Big Run Floodway and in close proximity to Big Run.

Mr. Flatley's attempts to dispute the location of the floodway and the structures to create a factual issue are without merit. He asserts that the FEMA map produced by the Department does not include the Site's specific boundaries and that without a professional survey it is impossible to

[3] The Department's RFA No. 4 was deemed admitted pursuant to our April 2025 Order. Mr. Flatley did not raise RFA No. 4 as one of the RFAs that called for a legal conclusion. Therefore, we do not need to address that issue when considering this admission.

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determine from the map alone whether the structures are within the floodway. The FEMA map is clear. The Site, the location and boundaries of the floodway, and the relevant structures are readily identifiable on the map. We see no need for a professional survey to confirm the boundaries of the Big Run Floodway and the location of the Mobile Homes, Items, Catch Basin, and Outfall Pipe in relation to those boundaries when all that information is easily ascertained by viewing the FEMA Map. Further, because of his failure to respond to the RFAs, Mr. Flatley has admitted the FEMA map accurately portrays the Big Run Floodway and that the Site is predominantly within the floodway of Big Run as depicted on the FEMA map. (Department's Motion, Ex. B, RFAs Nos. 4 and 11, at 44, 47). He challenges the Department's use of his admission to RFAs No. 11, arguing that it constitutes a legal conclusion. We disagree with this position. In our opinion, because RFAs No. 11 only seeks a factual admission regarding the location and scale of the floodway in relation to the Site based on a FEMA map, it does not constitute a legal conclusion. Moreover, we need not rely on his admission to establish the location of the Big Run Floodway, so its use is only supportive and not determinative in our decision. We find that there is no issue of material fact and the Department's evidence establishes that Mobile Homes, Items, the Catch Basin and the Outfall Pipe are located within the FEMA-designated floodway of Big Run at the Site. Under the Dam Safety Act, we find that the Mobile Homes and Items are water obstructions since they are structures within a floodway and require a Department permit to construct, operate, maintain, modify, enlarge or abandon. We also find that the Catch Basin and Outfall Pipe satisfy the definition of a water obstruction even though the Department failed to identify them as such in its 2024 Order.

Next, Mr. Flatley questions the Department's decision to designate the Catch Basin and Outfall Pipe as encroachments in the 2024 Order. He argues that the Catch Basin and Outfall Pipe

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are not encroachments under the Dam Safety Act because the Department has not provided evidence that these structures change, expand or diminish the course, current or cross-section of the Big Run Floodway. He argues that the Department has offered no supporting facts that these structures satisfy the definition of an encroachment. He asserts that this "naked conclusion cannot form the basis of summary judgment." (Flatley's Response at 7).

We find that Mr. Flatley is incorrect in his argument. First, we have already found that the Catch Basin and the Outfall Pipe are located in the Big Run Floodway. As evident from our above discussion regarding the FEMA map and the cited evidence, there is no issue of material fact that these structures are located in the Big Run Floodway. Whether the structures qualify as encroachments as that term is defined in the Dam Safety Act is the only legal question that remains. The definition of encroachment set forth in the Dam Safety Act is "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3. Any structure located in a floodway necessarily changes the course, current and cross-section of that floodway, hence the Catch Basin and Outfall Pipe in the Big Run Floodway are de facto encroachments. The definition does not require that the change in these attributes meet a minimum size requirement for a structure to qualify as an encroachment. The Catch Basin and Outfall Pipe are physical structures located in the Big Run Floodway at the Site and therefore, as a matter of law, we are satisfied that they are encroachments under the Dam Safety Act contrary to any arguments set forth by Mr. Flatley.

Mr. Flatley also challenges the Department's position that he "operates and maintains" the Mobile Homes, Items, Catch Basin and Outfall Pipe within Big Run Floodway. Again, Mr. Flatley opposes this assertion by arguing that the Department's evidence is insufficient to support the claim that he participated in the operation or maintenance of the water obstructions and

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encroachments. We reject this argument. The Dam Safety Act defines the term "operation" in relevant part as "the use, control and functioning of a […] water obstruction or encroachment during the lifetime of the […] water obstruction or encroachment […]" 32 P.S. § 693.3. We will discuss Mr. Flatley's control of the water obstructions and encroachments in greater detail in our discussion regarding the issue of his personal participation in the violations set forth in the 2024 Order. At this point, it suffices to point out that all the available evidence demonstrates that Mr. Flatley is the person in control of the Site and all the relevant structures located at the Site including the water obstructions and encroachments. No other individual, other than counsel representing him for a limited time in this matter, has played any role in addressing the issues in this case. In response to discovery requests, Mr. Flatley has not identified any other individual involved in decision making at the Site. He is the sole member of Broadway and there is no evidence of record that Broadway has any employees who operate the Site on behalf of it. Mr. Flatley's blanket denial that he operates and maintains the water obstructions and encroachments is not supported by the record.[4]

Violations of the Clean Streams Law

The 2024 Order found that unpermitted structures in the Big Run Floodway create a danger of pollution. In its Brief, the Department states that Mr. Flatley's unpermitted operation and maintenance of the mobile homes and other items at the Site create a danger of pollution to Big Run. Under Section 402(a) of the Clean Streams Law, the Department may issue orders to regulate activities that pose such a risk. 35 P.S. § 402(a). Big Run is clearly a water of the Commonwealth

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[4] We note for the sake of completeness that RFAs Nos. 10, 13 and 14 ask for admissions that Mr. Flatley operated the mobile home park at the Site and specifically operated and maintained the Mobile Homes, Items, Catch Basin and Outfall Pipe in the Big Run Floodway. Each of these RFAs were deemed admitted as a result of Mr. Flatley's failure to respond. We do not rely on these admissions in reaching our decision that the violations cited in the 2024 Order are factually supported in the record.

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under the definition found in the Clean Streams Law. 35 P.S. § 691.1. The definition of pollution under the Clean Streams Law is defined as:

> […] contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

35 P.S. § 691.1. The Clean Streams Law definition of pollution is broad and gives the Department a large amount of latitude in determining what constitutes pollution.

In his Response, Mr. Flatley raises in part the same arguments he relied on in his challenges to the Dam Safety Act, including issues of material fact about the location of the floodway relative to the mobile homes and the other items, as well as the operation and control he exerted at the Site. He also argues that the Department has not alleged the release of any actual pollution. He asserts the Department must demonstrate the presence of pollution or that an actual danger of pollution exists to Big Run which, he contends, it has not done. He also disputes the Department's conclusion that the various items are pollutants. In his list of objections, he specifically objects to the classification of propane tanks and concrete blocks as "pollutants," countering that these are instead "standard infrastructure items" for a mobile home park and that their presence alone is not enough to create a violation of the Clean Streams Law. (See Department's Motion, Ex. M, ¶ 20).

Mr. Flatley's arguments arising from the alleged Clean Streams Law violations do not raise any issues of material fact and, furthermore, lack legal merit. We reject his arguments concerning

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the location of the floodway and the operation and control of the Mobile Homes and infrastructure at the Site for the same reasons we discussed in addressing the Dam Safety Act violations. His assertion that the propane tanks and concrete blocks are standard infrastructure items and cannot constitute pollution reflects a fundamental misunderstanding of the scope of the Clean Streams Law. A violation of the Clean Streams Law does not require a showing of actual pollution since the danger of pollution constitutes a violation. The facts which show that the Mobile Homes and Items are in close proximity to Big Run and they are located in the floodway are adequate to support the finding that they pose a danger of pollution. In the event of a flood, the Mobile Homes and Items clearly pose a risk of contamination to Big Run where they may be displaced into the stream and/or result in the discharge of a liquid, gaseous, solid or other substance into Big Run. We find that there are no issues of material fact regarding the violation of the Clean Streams Law and the evidence of record supports the finding of Clean Stream violations in the 2024 Order.[5]

Personal Liability

The 2024 Order names Mr. Flatley in his individual capacity, thereby making him liable for the Dam Safety Act and Clean Streams Law violations. He asserts that liability should be limited to Broadway as it is a separate legal entity and, as an LLC, is distinct from its members. The Department contends that while Pennsylvania law does recognize that a limited liability company is a separate legal entity distinct from its members, pursuant to the participation theory, Mr. Flatley remains liable for wrongful conduct he commits on behalf of Broadway. Under the

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[5] The Department also argues that RFA No. 12 establishes that these items create a danger of pollution to Big Run. RFA No. 12 asked Mr. Flatley to: Admit that the Mobile Homes, Items, Catch Basin, and Outfall Pipe located within the Big Run Floodway, or debris from them, have the potential to be discharged into Big Run during a flood event and cause "pollution," as that term is defined [in] Section 1 of the Clean Streams Law, 35 P.S. § 691.(Department's Motion, Ex. B, at 48). RFA No 12 was deemed admitted by our April 2025 Order. We think that this RFA arguably constitutes a legal conclusion and as such, do not rely on this admission for our determination regarding the Clean Streams Law violations.

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participation theory, "a corporate officer can be liable in tort for his own wrongful conduct on behalf of the corporation, even though the corporation is not a sham and there is no basis for piercing the corporate veil." *B&R Resources, LLC v. Dep't of Env't Prot.*, 180 A.3d 812, 817 (Pa. Cmwlth. 2018) (citation omitted). A court, via this theory, can allocate liability to an individual as an actor rather than as an owner. *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983). "Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity." *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983). In addition, "[t]he participation theory applies to officers of limited liability companies." *B&R Resources, LLC v. Dep't of Env't Prot.*, 180 A.3d 812, 818 (Pa. Cmwlth. 2018) (citation omitted).

Furthermore, "the participation theory applies to statutory violations and is a basis for imposition of individual liability on company officers in DEP administrative orders." *Id*. Moreover, "intentional and knowing inaction can be sufficient to support participation theory liability for a statutory violation." *Id*., at 819. Finally, "[a] corporate or limited liability company officer is liable for a statutory violation under the participation theory only if there is a causal connection between his wrongful conduct and the violation." *Id*., at 821. In other words, to establish that Mr. Flatley can be held liable in his individual capacity, the Department must show that he: 1) had knowledge of Broadway's violations; 2) failed to make reasonable efforts to address the violations and/or actively avoided addressing the violations; and 3) had the necessary authority and duty to act to address the violations. See *Maria Schlafke v. DEP*, 2019 EHB 1, 25 (*citing B&R Resources, LLC v. DEP*, 180 A.3d 812, 821 (Pa. Cmwlth. 2018)).

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In response, Mr. Flatley argues that the Department's Motion should be denied as there is a genuine issue of material fact as to his liability under the participation theory. He says that "[f]or the Department to meet its burden, it would have to demonstrate the specific facts underlying [his] alleged participation in [Broadway], including discrete actions or omissions […]." (Flatley's Response Brief at 4). He asserts that aside from showing he is a member of Broadway, the Department failed to provide any proof of his actions or omissions relating to Broadway's violations. We disagree. The Department has demonstrated to our satisfaction that not only did Mr. Flatley continually fail to act and correct the violations, but that he was aware of the violations and had the necessary authority and duty to address them.

The evidence shows that Mr. Flatley was notified of the violations shortly after purchasing the property, that he met with Department staff to discuss the violations, and also engaged in direct negotiations regarding the violations. Based on the record before us, the first instance that the violations were brought to his attention was through a Notice of Violation letter ("NOV"), dated November 30, 2023, from the Department addressed to him. The NOV, marked as the Department's Exhibit O, explicitly informs Mr. Flatley that prior to his ownership of the Site, the Department had previously identified numerous violations and that "he may be liable for any continued violations." (Department's Reply, Ex. O). The NOV also included a copy of the previous administrative order issued to the prior owners, Ms. Kerr and Mr. Gordon. Further evidence shows various communications between Mr. Flatley and the Department. Exhibit K, an internal Department memo dated June 4, 2024, describes the meeting that occurred on May 9, 2024, between the Department and Mr. Flatley. The memo states that a Department representative informed Mr. Flatley of the ongoing violations and of the corrective actions that would need to be taken which included either removing the items from the floodway or by applying for a permit.

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(See Department's Motion, Ex. K). The memo further describes that during the meeting, Mr. Flatley stated that he wished for the mobile homes to remain in place and that he intended to speak with a consultant regarding flood protection. *Id*. Additionally, an email that is dated August 18, 2024, shows that Mr. Flatley was actively negotiating with the Department over the terms of a consent order and agreement. (See Department's Motion, Ex. F). In his email, he offered detailed feedback on the proposed COA's references to "placement of material" and "civil penalties" showing that he was fully aware of the Department's allegations. *Id.* He also explicitly requested for "a minimum of 90 days to complete the restoration," thus acknowledging that corrective action was required. ***Id.*** The information provided by the Department shows that Mr. Flatley was well-aware of the ongoing violations and that corrective action needed to be taken.

Mr. Flatley failed to have Broadway take reasonable steps to address the violations. The corrective actions the 2024 Order sets forth are either removal of the structures from the floodway or to obtain the appropriate permit for the structures to remain in place. He does not dispute that he has failed to undertake either action. The 2024 Order, Mr. Flatley's own statements, his discovery responses, and his Response to the Motion further demonstrate his avoidance and inaction in this matter. The above-mentioned NOV informed Mr. Flatley of the violations and also requested that he contact the Department to schedule a meeting to discuss the violations. Mr. Flatley ignored this request and did not follow up with the Department. When the Department eventually met with Mr. Flatley at the Site in May 2024, it found that the Mobile Homes, Items, Catch Basin, and Outfall Pipe remained in the floodway despite the Department's NOV stating that these items had to be removed. (See Department's Motion, Exs. A, K; Department's Reply, Ex. O). Further, over one and a half years after receiving the 2024 Order and nearly two and half years after receiving the NOV, there is still no indication that Mr. Flatley has attempted to apply

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for the appropriate permit. In response to the Department's First Request for Admissions, he admits that he has not obtained a permit. (Department's Motion, Ex. E, RFAs No. 15 ("admit no DEP permit")). Moreover, in his Response, Mr. Flatley admits that "[n]either Mr. Flatley, 354 Broadway, nor any other person has a permit from the Department for the operation and maintenance of the Mobile Homes, Items, Catch Basin, and Outfall Pipe within the Big Run Floodway." (Flatley's Response, ¶ 10). Some of Mr. Flatley's most recent pleadings are illuminating as to his continued failure to address his and Broadway's obligations under the 2024 Order. In a motion to extend the dispositive motion deadline filed on January 22, 2026, he asks the Board to grant him "additional time to engage a consultant who can provide expert technical advice regarding the reasonableness of any remediation deadlines." (Motion to Extend, ¶ 7, Dkt. No. 47). First, the deadlines set forth in the 2024 Order have long since passed so whether a consultant deems those deadlines "reasonable" at this point carries no water. Second, Mr. Flatley made a similar statement back in May 2024 at the meeting with the Department and in his early filings with the Board. At this point, Mr. Flatley's sentiment about hiring a consultant has been ongoing for nearly two years without any proof he has made any actual effort to retain a consultant. When viewing the above actions, or rather inaction, it is clear that Mr. Flatley failed to have Broadway take reasonable steps to correct the violations.

The last inquiry we must address to determine whether Mr. Flatley is liable under the participation theory is whether he had both the authority and duty to address the violations. It is undisputed that Mr. Flatley is the sole managing member of Broadway. While Mr. Flatley concedes that he participates in the overall operation of the mobile home park, he denies any participation concerning the obstructions or encroachments described in the 2024 Order. The Department argues that he is the sole decision maker for Broadway and as such, is the only person

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who can authorize corrective action. The evidence before us shows that Mr. Flatley is the only person with the necessary authority to make decisions on behalf of Broadway, including those involving compliance.

The LLC Operating Agreement establishes Mr. Flatley's absolute authority over Broadway, showing that he owns 100% of the units, 100% of the voting capital, and 100% of the total capital. (See Department's Motion, Ex. D). Mr. Flatley further confirms in his discovery responses that he is the sole member of Broadway. (Department's Motion, Ex. E). His discovery responses also reveal his role as the primary person in charge of Broadway. He admits that he is the "managing member" of Broadway, that the decision to file the Appeal was "[m]ade solely by Darian Flatley," and further confirmed that all responses to the discovery requests were "prepared solely by Darian Flatley." (Department's Motion, Ex. E). Finally, Mr. Flatley participated in active direct negotiation with the Department concerning the violations. Exhibit F contains an email written by Mr. Flatley to the Department that demonstrates him exercising his authority to set terms for corrective action on Broadway's behalf. In this written communication, he personally requested specific revisions to the restoration plan, such as the "necessary placement of material" and a "minimum of 90 days to complete the restoration." (Department's Motion, Ex. F). Moreover, in this email, he describes the requested revisions "necessary to protect both *my business interests* and *my rights*." (*Id*., emphasis added). The language Mr. Flatley uses that describe the interests and rights involved in this dispute as being his own rather than Broadway's, undermines the distinction between him and the business. All of the above evidence demonstrates that Mr. Flatley has the sole authority to direct the corrective action required by the 2024 Order. After reviewing the record, we find that Mr. Flatley had knowledge of the ongoing violations, failed to take any corrective action to remove the items from the floodway, and had the necessary

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authority and duty to bring Broadway into compliance. As such, he can be held personally liable for Broadway's violations under the participation theory. The same evidence also shows that he controls the operations of the Site, the Mobile Homes, Items, Catch Basin and Outfall Pipe.

Miscellaneous Objections

The remainder of Mr. Flatley's objections pertaining to the violations rely on inapplicable laws and codes. Mr. Flatley neither argued these points in his Response, nor did he provide any evidence in support of these objections. Further, in light of the record in front of us and given the limitations placed on him as a sanction for his discovery violations, we conclude that he would be unable to sustain any of these objections at a merits hearing. However, we will briefly address these arguments that can be easily disposed of at this point. In Objections numbers 3, 6, 7, 8, 9, 10, and 17, Mr. Flatley says that the mobile home park is protected by the Floodplain Management Act and the Pennsylvania Municipalities Planning Code. These statutes, he argues, do not mandate the removal of pre-existing structures. This argument fails for two reasons. First, these statutes regulate floodplains, not floodways. The Dam Safety Act, not the Floodplain Management Act, governs water obstructions within floodways. 32 P.S. § 693.4(4). Second, the Dam Safety Act explicitly requires owners of existing unpermitted structures to apply for and receive a permit. 32 P.S. § 693.6(c); 25 Pa. Code § 105.11(c). A provision allowing for the "grandfathering" of structures that would excuse the failure to obtain a permit for structures within the floodway does not exist under the Dam Safety Act. Therefore, Objections Nos. 3, 6, 7, 8, 10, 9, and 17 fail as a matter of law.

In Objection No. 4, Mr. Flatley asserts that the Department's action failed to consider the mobile home park's historical use and that the Department was obligated to show a "substantial public necessity." (Department's Motion, Ex. M). Such a requirement does not exist in either the

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Dam Safety Act or Clean Streams Law. In Objection No. 5 he contends that local zoning ordinances allow for variances in certain contexts. However, the section of the code he cites does not exist and he has never offered evidence that he either obtained or applied for a variance. Additionally, he fails to put forth an argument that such a variance would be legal under the Dam Safety Act and Clean Streams Law.

Mr. Flatley mistakenly invokes the Floodplain Management Act again in Objection No. 15 where he argues that the Department wrongfully designated the mobile home park as being within the floodplain. As we already iterated above, the Floodplain Management Act applies to floodplains rather than floodways and seeing that this matter involves the Big Run Floodway, this objection is categorically misplaced. Lastly, addressing Objections Nos. 2, 12 and 18, Mr. Flatley disputes the Department's imposition of civil penalties on the grounds that the penalties are for violations attributable to the prior owners, they impose a financial hardship, and that they are excessive. However, the 2024 Order by its very terms does not impose civil penalties, thus, this challenge is not relevant to the appeal at hand. To summarize, Mr. Flatley's Objection Nos. 2-10, 12, 15, 17, and 18 fail as a matter of law.

Conclusion

The Department's 2024 Order was lawful, reasonable, and supported by undisputed facts. There are no material facts at issue regarding the violations of the Dam Safety Act and Clean Streams Law that form the basis of the 2024 Order. Mr. Flatley is individually liable for Broadway's environmental violations under the participation theory where he was aware of the violations, failed to take corrective action, and had the necessary authority and duty to do so. Mr. Flatley's theories that rely on the Floodplain Management Act and the Pennsylvania Municipal Planning Code are misplaced. Mr. Flatley did not present any evidence that contested the

Department's evidence. Overall, we find that the 2024 Order that required Mr. Flatley as an individual to either obtain a permit or remove structures from the Big Run Floodway to resolve the violations was a reasonable approach by the Department. As no genuine issues of material fact remain, and the 2024 Order was lawful, reasonable and supported by facts, summary judgment is appropriate. 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 May, 2026, the Department's Motion for Summary Judgment is **granted** and it hereby ORDERED that the above-referenced matter 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 8, 2026

c: DEP, General Law Division:
Attention: Maria Tolentino

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