PENNSYLVANIA ENVIRONMENTAL HEARING BOARD DECISIONS 2015-2016

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DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts, EHB Docket No. 2011-105-CP-C, Opinion and Order on Motion for Nonsuit (January 2, 2015)

The Board granted the Defendants' motion for nonsuit because the Department improperly named the individual shareholders and officers of a corporation in its complaint and did not name the corporate entity itself. The Department filed a complaint for the assessment of civil penalties against the Defendants for alleged violations of both the Clean Streams Law (35 P.S. §§ 691.1 – 691.1001) and the erosion and sedimentation control regulations (25 Pa. Code Chapter 102) arising from earth disturbance activities involving the relocation of a creek. In its complaint, the Department named Francis Schultz, Jr. and David Friend as Defendants in their individual capacities. During a hearing on the merits, the Defendants made a motion for nonsuit, arguing that they were not responsible in their individual capacities for any alleged violations, but rather their company was responsible.

The standard for granting a motion for nonsuit is high and typically granted in circumstances where the nonmoving party has failed to present almost any evidence in support of its case. Although Mr. Schultz signed an application submitted to the Conservation District for earth disturbance activities at the site, the Board determined that there was nothing to suggest that Schultz and Friend were applying in anything but their *representative* capacities of their company. The words "Responsible Official" appearing under their names on the application indicated that they were authorized to act for a corporation or organization and suggested the existence of a business entity for which Schultz and Friend were acting.

Rostraver Township v. DEP and Tervita, LLC, EHB Docket No. 2014-085-R, Opinion and Order on Motion to Compel (January 7, 2015)

The Board granted the Permittee's motion to compel responses to interrogatories and requests for production of documents. The Appellant rejected the motion, asserting that such a request was voluminous and would require extensive research to complete. The Appellant also requested an additional sixty days to provide full and complete answers to the discovery requests. The Board disagreed, holding that the interrogatories and requests for production of documents sought clearly discoverable information based on the Pennsylvania Rules of Civil Procedure. Pursuant to the discovery provisions of the Pennsylvania Rules of Civil Procedure, which have been adopted by the Board, responses to interrogatories and requests for production of documents are due thirty days after service. The Appellant had months to file responses, and some of the interrogatories and requests for production reference information raised by the Appellant in its appeal.

Richard L. Stedge, et al. v. DEP and Chesapeake Appalachia, LLC, Permittee, EHB Docket No. 2014-042-L, Opinion and Order on Motion for Partial Summary Judgment (January 8, 2015)

The Board granted the Permittee's motion for partial summary judgment concerning certain objections against the Appellants who failed to respond to the motion as required by the Board's Rules. The Appellants challenged the Department's approval of a registration under a general permit for the processing and beneficial use of oil and gas liquid waste at a storage facility. The Permittee filed a motion for summary judgment, arguing that the Appellants failed to produce any evidence to support their claims that the Radiation Protection Action Plan submitted by the Permittee had inadequate monitoring or testing protocols or was otherwise deficient. The Permittee then withdrew the motion as to two of the Appellants who filed a response, yet maintained the motion with respect to the remaining five Appellants who did not file a response.

The Board frequently grants summary judgment against a party who has failed to respond to a summary judgment motion. The Board Rules at 25 Pa. Code § 1021.94a(f) require that a response to a motion for summary judgment shall be filed within 30 days of service. The Rule further provides that in the absence of a response, the Board may grant summary judgment against the non-responsive party. (Former Rule 25 Pa. Code § 1021.94a(k); Current Rule 1021.94(a)(l)). Therefore, the Board granted the motion for partial summary judgment on certain objections against the unresponsive Appellants.

Andrew Lester v. DEP, EHB Docket No. 2014-025-B, Opinion and Order on Motion to Strike (January 15, 2015)

The Board granted the Department's motion to strike the Appellant's amended notice of appeal where: the Appellant failed to seek leave to amend under 25 Pa. Code § 1021.53; the amended notice of appeal sought to add an additional appellant; and the addition of a new claim at that stage in the proceedings would be prejudicial to the opposing party. The Appellant challenged a Department order issued under the Storage Tank and Spill Prevention Act that directed the Appellant and his father to close underground storage tanks located on the Appellant's property. The Appellant's father did not appeal the Department's order. The Appellant amended his notice of appeal, seeking to add a claim on behalf of his father that the Department's order constituted a taking of property in violation of both the United States Constitution and the Pennsylvania Constitution.

The Board granted the Department's motion to strike because while the Department's original order directed both the Appellant and his father to close the storage tanks, the father did not file an appeal with the Board. Because the father was not a party to the appeal, the Board was jurisdictionally barred from adjudicating his takings claim. The Board has discretion to grant a party leave to amend its notice of appeal in situations where there is no undue prejudice to the opposing parties. The Appellant neither moved for leave to amend its appeal, nor did he support the amended notice of appeal with an affidavit. The Appellant also made no effort to

show that the Department would not be prejudiced by the addition of an entirely new claim on the eve of the hearing that arguably implicated a person who was not a party to the appeal.

Richard L. Stedge, et al. v. DEP and Chesapeake Appalachia, LLC, Permittee, EHB Docket No. 2014-042-L , Opinion and Order on Motion for Summary Judgment (January 29, 2015)

The Board denied the Permittee's motion for summary judgment because it was not clear as a matter of undisputed material fact that the Appellant did not have standing. Nine Appellants appealed the Department's approval of the Permittee's registration under a General Permit for the processing and beneficial use of oil and gas liquid waste at a storage facility. The Permittee filed a motion for summary Judgment against one individual Appellant, arguing that this Appellant lacked standing to pursue his appeal because the Appellant did not use or enjoy any portion of the environment near the facility that could give rise to standing, nor did he live in sufficiently close proximity to the site to be adversely affected for purposes of standing.

The Board denied the Permittee's motion. The Board disagreed with the Appellant's contention that it had standing based on a threat of contamination to its property from the Permittee's operation. The Board held that that there was no objectively reasonable threat of contamination to the Appellant, who lived six miles away from the facility and failed to allege any recreational or aesthetic interests in the area immediately surrounding the facility. However, the Board did find a genuine issue of material fact as to whether the Appellant received adequate notice of the permitting of the facility and whether the Appellant had adequate opportunity to voice his concerns. The Board determined that an inquiry into the merits was not appropriate at that juncture in the proceeding, explaining that the Board does not know if the Appellant was in fact deprived of the opportunity to provide meaningful comment. The Board noted that it was somewhat unsettled as to whether concerns over deficient public notice alone could be enough to confer standing.

DEP v. Allegheny Enterprises, Inc., EHB Docket No. 2013-187-CP-C, Opinion in Support of Order Granting Motion for Leave to Withdraw as Counsel (February 10, 2015)

The Board granted an unopposed motion asking the Board to allow counsel to withdraw from representing the Defendant and ordered the Defendant to obtain new counsel. After a hearing on the matter, counsel for the Defendant filed a motion to withdraw as counsel for the Defendant, a corporation, alleging that the Defendant failed to pay for services rendered thus far. Counsel filed the motion at a stage in the proceeding when all that remained for the Defendant to do was file a post-hearing brief. Pursuant to 25 Pa. Code § 1021.21, the Board requires that corporations be represented by counsel. Pennsylvania Rule of Professional Conduct 1.16(b) provides that a lawyer may withdraw from representing a client if "withdrawal can be accomplished without material adverse effect on the interests of the client." The Board held that withdrawal did not prejudice the litigants or impede the efficient administration of justice because the Defendant's new counsel only had to compose a post-hearing brief covering a hearing that lasted a portion of a day.

Consol PA Coal Co., LLC v. DEP and Center For Coalfield Justice, Intervenor, EHB Docket No. 2014-027-B, Opinion and Order on Department's Motion to Dismiss, Concurring opinion of Judge Mather with Judge Coleman, Dissenting opinion of Judge Labuskes with Chief Judge Renwand (February 12, 2015), *aff'd*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015)

The Board dismissed an appeal for mootness where the Appellant complied with the obligations of a special condition contained in a revised permit and the Department thereafter deleted the special condition from the permit. After the Appellants challenged the Department's revision of a Coal Mining Activity Permit, the Department filed a motion to dismiss, as moot, the Appellant's appeal of the permit revision. The Department argued that after the Appellant complied with a certain special condition in the permit, the condition was deleted from the permit and because it was deleted, the Appellant no longer had a stake in the outcome of the appeal and the Board could not provide effective relief. The Appellant responded that the appeal was not moot because despite its compliance with the special condition by submitting monitoring data, the data submission raised potential future obligations. According to the Appellant, submitting such information could allow the Department to order the Appellant to restore those streams to pre-mining levels of health if the streams are damaged by mining.

The Board held that the Appellant's contentions were speculative and inconsistent with the plain language of the special condition. The plain language of the special condition in the permit only imposed pre-mining obligations. This fact was not changed by speculation that the Department may compare the *pre-mining* information the Appellant submitted in response to the special condition to *post-mining* data obtained from the Appellant, or any other source. The Board determined that no exceptions to the mootness doctrine applied, explaining that speculation about a hypothetical future Department action does not create the type of exceptional circumstances that warrants overcoming a finding of mootness. The Board also denied a motion for leave to amend a notice of appeal which failed to conform to the Board's Rules or to show that no prejudice would result to opposing parties.

Writing separately, Judge Richard P. Mather, Sr. concurred, asserting that the Department should not have issued the permit until all monitoring information was submitted. Judge Mather explained that permit decisions should not be made before the Department has received and renewed all necessary biological monitoring information. Judge Bernard A. Labuskes, Jr. and Presiding Judge Thomas W. Renwand dissented, asserting that the appeal is not moot because of a real possibility that submission of the monitoring information will create a future obligation for the Appellant to remediate the streams.

Big Spring Watershed Association and Cumberland Valley Chapter of Trout Unlimited v. DEP and Lewis Martin, Permittee, EHB Docket No. 2014-028-L, Opinion and Order on Motion to Strike (February 20, 2015)

The Board ruled that certain emails between Department program staff and Department attorneys that were attached as an exhibit to the Appellants' motion for summary judgment were protected from disclosure by the attorney client-privilege. In an appeal of an NPDES Stormwater Construction Permit, the Appellants filed a motion for partial summary judgment

claiming inadequate public notice, relying in part on an email exchange between the Department program staff and Department attorneys. The Department filed a Motion to Strike the email exchange from the Appellants' Motion, asserting that the emails constitute communications covered by the attorney-client privilege. The Appellants responded that the communications were not privileged due to the crime-fraud exception to the general rule that attorney-client communications are privileged, as well as stating that the privilege should be tempered because government lawyers were involved.

The Board granted the Department's motion to strike and ruled that the privileged emails may not be used during the course of the appeal. According to the Board, the crime-fraud exception did not apply because Department personnel were not engaged in anything constituting a criminal or fraudulent scheme. To the contrary, the Board found that the Department's program person was doing what he was supposed to do: seek legal advice on how to properly implement a complicated regulatory program. Attorney-client communications involving government lawyers are entitled to the same level of protection as any other attorney-client communications. The Board also dismissed claims of alleged ethics violations, noting that the Board has limited authority to address purported violations of the Rules of Professional Conduct and saw no merit in any of the accusations.

Patricia A. Wilson, et al. v. DEP and Newtown Township, Permittee, EHB Docket No. 2013-192-M (cons. w/13-200-M), Opinion and Order Denying Petition to Reopen the Record (February 23, 2015)

The Board denied the Appellants' petition to reopen the record prior to adjudication. The Appellants argued that the record must be reopened to include evidence that the Intervenor did not withdraw its intervention because the Township had not given it a final copy of the settlement agreement for execution. The Board held that the Appellants' petition was moot because the Board had issued orders granting both the Intervenor's request to withdraw its intervention and the DeRita Appellants' request to withdraw their appeal. Both Counsel for the Intervenors and Counsel for the DeRita Appellants communicated in letters to the Board that they agreed that there was a complete settlement of their clients' appeals. Even if the petition was not moot, it would fail to satisfy the criteria for reopening the record because it did not demonstrate that there was newly discovered evidence that conclusively established a material fact.

Big Spring Watershed Association and Cumberland Valley Chapter of Trout Unlimited v. DEP and Lewis Martin, Permittee, EHB Docket No. 2014-028-L, Opinion and Order on Motion for Partial Summary Judgment (March 3, 2015)

The Board suspended and remanded an NPDES permit because the Department never published notice of the draft permit. The Appellants appealed the Department's issuance of an NPDES Permit authorizing discharge of stormwater associated with the construction of a poultry operation into a High Quality Water of the Commonwealth and a cold water trout fishery. The Appellants filed a motion for partial summary judgment, alleging that the Department failed to publish notice of a draft permit. Instead of denying its error to publish notice, the Department argued that failure to publish notice of the draft permit was not a basis for overturning or revoking the permit, characterizing its lapse as nothing more than a minor procedural error. The

Board disagreed with the Department, asserting that failure to publish notice that the Department had prepared a draft permit was hardly a minor error. The Board held that the Department's compliance with a requirement that it provide notice of a permit application and the fact that it held a public hearing regarding that application did not compensate for the Department's failure to provide notice of the draft permit or render that failure a harmless error. The Appellants were deprived of their basic right to receive notice of a draft permit and be provided with an opportunity to comment thereon. As a remedy, the Board suspended and remanded the permit to the Department for further consideration.

Mann Realty Associates Inc. v. DEP, EHB Docket No. 2013-153-M, Opinion and Order Dismissing Appeal (March 10, 2015)

The Board dismissed an appeal because the corporate Appellant did not comply with Board orders and Rules requiring it to be represented by an attorney in its appeal. After two attorneys withdrew from representing the Appellant, the Board issued an order and subsequent Rule to Show Cause ordering the Appellant to retain counsel. The Appellant still did not retain counsel and the Board dismissed the appeal as a sanction pursuant to 25 Pa. Code § 1021.16 due to the Appellant's repeated failures to comply with Board orders.

Consol PA Coal Co., LLC v. DEP and Center For Coalfield Justice, Intervenor, EHB Docket No. 2014-027-B, Opinion and Order on Appellant's Petition for Reconsideration, Dissenting opinion of Judge Labuskes with Chief Judge Renwand (March 13, 2015)

The Board denied the Appellant's petition for reconsideration of a Board Opinion and Order granting the Department's motion to dismiss because the Appellant failed to show compelling and persuasive reasons warranting reconsideration of the Board's prior order. The Board accepted the Appellant's facts as true, yet found no future obligations that arose specifically from the permit condition and rejected the Appellant's arguments to the contrary. According to the Board, it was clear that the Appellant simply disagreed with the Board's decision and used the petition for reconsideration to re-argue its case. The Board ruled that petitions for reconsideration may be appropriate when the Board misses a key legal or factual point, but are not appropriate for mere disagreement with the Board decision or as a vehicle for arguing issues that should have been raised previously. The Appellant's arguments in its petition were based upon misunderstandings of the Board's Opinion and Order.

Robinson Coal Company v. DEP, EHB Docket No. 2010-186-M, Adjudication, Concurring and Dissenting Opinion of Judge Labuskes (March 16, 2015)

The Board dismissed an appeal of the Department's compliance order which enforced a Consent Order & Agreement ("CO&A") to treat a post-mining discharge on a surface mine, finding that treatment of the discharge at the mine site was still necessary and will remain necessary until the discharge meets the applicable effluent limitations for such post-mining discharge without further treatment. In 1994, the Department determined that the Appellant's operations at the mine site turned the discharge acidic. The Appellant entered into a CO&A with the Department and agreed to upgrade the temporary water treatment system, consider different methods for treating the discharge, and submit permanent treatment plans. The Appellant

constructed a treatment system that converted acidic groundwater into alkaline water. A treatment trust CO&A was issued in 2002, which again held the company responsible for treating the mine discharge until it was no longer necessary. The agreement required annual meetings between the Appellant and the Department to discuss the treatment system and sampling results. The Department then issued an order to compel the Appellant to comply with its obligations to treat the mine discharge under the CO&A and imposed obligations on the Appellant regarding its continuing obligation to provide treatment for the post-mining discharge from the mine site.

The Appellant argued that discharge treatment was no longer needed and that the treatment system and monitoring requirements should be discontinued. The Department responded that treatment of the mine discharge will always be necessary because no means exist to measure whether water entering the drain is within allowable limits. The Board agreed with the Department and ruled that the record clearly established that treatment of the mine discharge under the 2002 CO&A was still necessary at the time. The Appellant agreed in the 1994 CO&A that it had liability for and responsibility to treat the mine discharge and is required to operate and maintain the mine treatment system because treatment of the discharge is still necessary to remove excess iron. The Board noted that the record also showed that the quality of the discharge improved over time, and if and when the discharge meets the applicable effluent limitations at 25 Pa. Code § 87.102 without additional treatment on a consistent basis, treatment will no longer be necessary. Thus, the Department's position that treatment of the mine discharge will always be necessary was unreasonable and an abuse of discretion under the facts of the appeal.

Judge Bernard A. Labuskes, Jr., concurred in part and dissented in part, objecting to the Majority's use of the appeal from a compliance order to review the lawfulness and reasonableness of the 2002 CO&A, an entirely different action, which the parties voluntarily entered into 13 years ago. According to Judge Labuskes, this was the first time the Board found no abuse of discretion regarding the Department action under appeal, but went on to find an abuse of discretion in another action not under appeal.

Tri-Realty Co. v. DEP and Ursinus College, Permittee, EHB Docket No. 2014-107-L, Opinion and Order on Motion for Protective Order (March 20, 2015)

The Board granted in part and denied in part a non-party's motion for protective order seeking protection from a subpoena served on the non-party by the Appellant requesting the production of documents. The Appellant challenged the Department's approval of a Remedial Investigation Report submitted by the Permittee, a college, following the release of fuel oil from an underground storage tank. The Appellant alleged that the release of the oil contaminated its property located adjacent to the college. ICF international, a non-party in the appeal, filed a motion for a protective order requesting that the Board enter an order relieving ICF from fulfilling requests for document production.

The Board held that the documents sought by the Appellant were in fact relevant and likely to lead to the discovery of admissible evidence. The Board's *de novo* review allows it to consider evidence not considered by the Department when it took the action under the appeal. The Board was satisfied with the Appellant's contention that the documents are relevant or likely to lead to the discovery of admissible evidence because ICF reviewed, analyzed, or investigated the remediation plans submitted by the Permittee to the Department, and these are the same plans

the Appellant alleged were deficient in its appeal. The Board also ruled that an expert report by the non-party that was produced in anticipation of litigation in a separate yet related litigation was relevant and discoverable to the extent that ICF is in possession of any hard data that the expert collected or measured, and to the extent that the expert's report identifies hard data.

Sarabeth Brockley and Dan Poresky v. DEP and Delta Thermo Energy A, LLC, Permittee, EHB Docket No. 2014-092-L, Opinion and Order on Motion to Dismiss (April 3, 2015)

The Board granted the Department's unopposed motion to dismiss a third-party appeal. The third-party appeal of the issuance of a Waste Management General Permit was filed more than thirty days after notice of the action being appealed was filed in the Pennsylvania Bulletin. The appeal was filed one day too late and the Appellants did not dispute that point or oppose the motion to dismiss.

Bonne Natale South, Breena Holland and Rich Fegley v. DEP and Delta Thermo Energy A, LLC, Permittee, EHB Docket No. 2014-082-L, Opinion and Order on Motion to Dismiss (April 16, 2015)

The Board denied a motion to dismiss as moot an appeal from a general permit because it was not clear whether the Department revoked the permit in its entirety or it merely revoked the application of the general permit to a particular project. The Department issued a general permit authorizing processing by size reduction and thermal treatment using a hot pressurized stream of municipal solid waste mixed with sewage sludge prior to its beneficial use as pulverized fuel for electricity generation. The Appellants, a group of local citizens who opposed the issuance of the permit, argued that the general permit was actually a facility-specific permit and the Department should have instead issued an individual permit to the Permittee. The Department argued that the appeal was moot because the Department sent a revocation letter to the Permittee. The Board held that it was not clear what the Department intended in its revocation letter. In the Board's opinion, the Department's revocation letter appeared to be couched in terms that recognized that the general permit retained vitality. The Department stated in its revocation letter that the Permittee does not have a site available "at this time," indicating that review may be limited to site selection and bonding.

Cecilia Baker Viti, et al. v. DEP and Sunoco Partners Marketing & Terminals, Permittee, EHB Docket No. 2015-019-M, Opinion and Order on Failure to Perfect (April 20, 2015)

The Board, in accordance with 25 Pa. Code § 1021.161, dismissed several Appellants from an appeal as a sanction following certain Appellants' failure to perfect their appeals pursuant to 25 Pa. Code § 1021.161 and a Board order. The Board also determined that several other Appellants complied with the Board's earlier order and perfected their appeals. The Appellants that complied with the Board's earlier order were added to the appeal.

DEP v. EQT Production Co., EHB Docket No. 2014-140-CP-L, Opinion and Order on Motion for Protective Order (April 22, 2015)

The Board granted the Defendant's motion for a protective order, finding that there was sufficient financial information regarding the Defendant that was readily available in the Defendant's Securities and Exchange Commission filings, and that the Defendant's recent tax returns need not be produced. The Department filed a complaint for civil penalties against the Defendant seeking at least $4.5 million for alleged violations of the Clean Streams Law. The Department requested the Defendant's corporate parent's tax returns and supporting documents for the tax years 2012, 2013, and 2014. In its motion, the Defendant argued that producing the tax records would produce confidential information that would be useless in the litigation. The Board held that that tax records would not provide any marginal value in this particular case. The Board has explicitly declined to establish any bright line rules for the discovery of tax records in recognition that such situations are best decided on a case-by-case basis. In this appeal, the Defendant already produced a 10-K form and a financial report showing operating income. In the Board's opinion, the tax returns could not provide additional information that would be potentially useful to the Board in evaluating the deterrent effect of a penalty.

Borough of Brockway Municipal Authority v. DEP and Flatirons Development, LLC, Permittee, EHB Docket No. 2013-080-L (Consolidated with 2014-086-L), Adjudication (April 24, 2015), *aff'd*, No. 789 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Jan. 6, 2016)

The Board dismissed a water authority's appeal of a well permit for an unconventional gas well that would be drilled on an existing well pad on the authority's property. The Appellant argued that the permit will cause pollution and a nuisance and that the permit's issuance was unreasonable and contrary to law. In the Department's review of the permit application, the Department determined that it would be possible to drill the well safely, and any temporary water loss would not harm the quality or quantity of the well water beyond a short interruption during drilling.

The Board held that the Appellant did not demonstrate that the permitting of the well presented an unreasonable risk to one of its ancillary water supplies, that the drilling and operation of the well would negatively affect the Appellant's ability to meet its customers' needs for water, or that the drilling and operation of the well would violate any provision of the law. The Appellant failed to present anything but conjectural evidence that the gas well proposed by the Permittee would negatively impact the flow and quality of water from a nearby water well. By contrast, the Permittee and the Department provided ample credible testimony from six expert witnesses that refuted all of the Appellant's allegations.

The Board also rejected the Appellant's argument that the Department violated Article I, Section 27 of the Pennsylvania Constitution by renewing the well permit. Although any loss of flow is unquestionably of concern, Article I, Section 27 allows for "controlled" development of resources rather than no development. *Payne v. Kassab*, 312 A.2d at 94. In the Board's opinion, the Department reasonably concluded that the brief interruption in flow that would not be felt in any way by the Appellant's customers did not constitute a violation of any "applicable statute or regulation relevant to the protection of the Commonwealth's public natural resources," which is the first question to be asked under *Payne*.

South Fayette Township v. DEP and Range Resources-Appalachia, LLC, Permittee, EHB Docket No. 2014-071-R, Opinion and Order on Appellant's Motion to Extend Discovery and the Department's Motions to Strike and for Sanctions (April 27, 2015)

The Board granted the Department's motion to strike the Appellant's objections and ordered the Appellant to serve its answers and produce documents. After being ordered to file full and complete responses to discovery requests, the Appellant filed objections to nearly every interrogatory, request for production, and request for admission. According to the Board, the Appellant's objections stymied the Department's legitimate discovery requests. The Department's discovery process sought information discoverable under the Pennsylvania Rules of Civil Procedure. The Board denied the Department's motion to dismiss the appeal, opining that it was a severe sanction at this early point in the litigation.

National Fuel Gas Midstream Corp. and NFG Midstream Trout Run, LLC, Appellants, and Seneca Resources Corp., Intervenor v. DEP, EHB Docket No. 2013-206-B, Opinion in Support of Order Granting Appellants' and Intervenor's Motions in Limine to Exclude the Department's Expert Testimony (May 8, 2015)

The Board granted the Appellants' and Intervenor's motions in limine to exclude the testimony of the Department's expert witness. One of the fundamental issues contested in this appeal was whether the Appellants and the Intervenor were under "common control" for the purposes of aggregating air emission sources. In its prehearing memorandum, the Department stated that a particular expert witness would be called to provide an expert opinion that the corporate relationships among the business entities established common control. Board agreed with the Appellants and the Intervenors that this expert testimony must be excluded because it constituted a legal opinion. The Board does not allow experts to give opinions on questions of law. The finding of facts regarding the relationship between the Appellant and the Intervenor, and the application of those facts to the regulations to determine whether common control existed in this appeal, was solely the Board's responsibility.

National Fuel Gas Midstream Corp. and NFG Midstream Trout Run, LLC, Appellants, and Seneca Resources Corp., Intervenor v. DEP, EHB Docket No. 2013-206-B, Opinion in Support of Order Granting the Department's Motion in Limine to Preclude Calling Department Counsel as Fact Witnesses (May 8, 2015)

The Board granted the Department's motion in limine to preclude the Appellants and the Intervenor from calling the Department's counsel as fact witnesses. During the pendency of the appeal, the Parties conducted discovery and attempted to negotiate a settlement. During that time, the Department reevaluated the original Determination based on new information obtained from the Appellants. The Appellants argued that testimony from a Department attorney was necessary to explore the Department's determination of common control in the reevaluation. The Board ruled that legal analysis and advice given by Department attorneys to the client as part of the decision-making process is protected from discovery or being subject to testimony at a hearing except in circumstances that did apply in this case.

Borough of St. Clair v. DEP and Blythe Township, EHB Docket No. 2013-118-L, Adjudication (May 20, 2015)

The Board dismissed a neighboring municipality's appeal from an encroachment permit. The Permittee, a neighboring Township, planned to build a construction and demolition waste landfill partially located on abandoned mine lands where a creek used to run. The Department ordered the Permittee to install a pipe at its landfill site to direct and channelize a portion of the hypothetical creek should the currently obliterated creek ever be restored, as well as comply with an encroachment permit. The Appellant, a neighboring Township whose border was approximately two miles away from the site of the encroachment, objected to the encroachment and appealed the issuance of the permit.

The Board held that the Appellant lacked standing to challenge the encroachment permit because there was no evidence that the Appellant Township or any of its citizens used the currently nonexistent creek, therefore the Appellant did not suffer any adverse impact. There was also no evidence that the nonexistent creek would ever be restored. While the landfill threatened harm to the Borough and its citizens, the pipe itself was the subject of this appeal. The Borough's standing with respect to the landfill permit does not carry over to the separate encroachment permit.

Turning to the merits, the Board held that the Appellant would not have prevailed even if it had standing because the Appellant failed to show that the Department's analysis or conclusions regarding the merits of the permit were incorrect. The Appellant failed to explain how an error on the face of the permit was of any consequence and why the error created grounds for overturning the permit. In addition, the Board held that the Appellant was precluded on the basis of collateral estoppel from litigating issues that it previously litigated in *Borough of St. Clair v. DEP*, 2014 EHB 76. The Appellant had an opportunity to raise, and did in fact raise, some of the issues regarding the interrelationship between the landfill project and a hypothetical creek restoration project in a separate appeal of a landfill permit, which the Board Adjudicated in the previous litigation.

Tri-County Landfill, Inc. v. DEP and Pine Township and Grove City Factory Shops, LP, Intervenors, EHB Docket No. 2013-185-L, Opinion and Order on Motion for Summary Judgment (May 22, 2015)

The Board denied a motion for summary judgment because it was not clear as a matter of law that the Department acted lawfully and reasonably when it denied an application for a landfill permit instead of giving the applicant an opportunity to modify its application in light of final and unappealable determinations by local zoning hearing boards and the courts that the landfill as currently designed would violate local zoning requirements. The Department denied the Appellant's application for a permit to reopen and expand its closed landfill. The Appellant appealed the permit denial. The Intervenors filed a motion for summary judgment, arguing that the Department was constitutionally compelled to deny the permit pursuant to Article 1, Section 27 of the Pennsylvania Constitution. The Department joined the Intervenors' motion, but disagreed that it is bound by Article 1, Section 27 to comport its action with local zoning requirements.

The Board evaluated the first prong of the *Payne v. Kassab*, 313 A.2d 86, 94 (Pa. Commw. Ct. 1973) rule, which is used to determine when an action violates Article 1, Section 27 of the Pennsylvania Constitution by asking "[w]as there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" The Board ruled that local zoning ordinances were considered "applicable statutes and

regulations" because the Municipal Planning Code expressly states that one of the purposes of local zoning is the "preservation of this Commonwealth's natural and historic resources and prime agricultural land." 53 P.S. § 10105. The Board denied the motion for summary judgment, finding that there were disputed issues of fact and law surrounding the Department's decision to deny the permit based upon the zoning issue, namely whether the Department's determination that the Appellant's compliance history would have compelled denial of the permit in any event. According to the Board, the Department was not required to deny the permit outright, as it may be lawful and reasonable in some cases to issue a permit with a condition that issuance of the permit does not substitute for or excuse compliance with all local land use requirements. The Board rejected the parties' request to bifurcate the proceedings to focus on the zoning issue, to the exclusion of the compliance history of entities associated with the applicant, which formed another basis for the permit denial, as well as possibly the other issues raised by the Intervenors in support of a permit denial.

LAG Wrecking Inc. v. DEP, EHB Docket No. 2014-126-C, Opinion and Order on Motion to Dismiss (May 29, 2015)

After a corporation appealed a Department order, the corporation's counsel withdrew his appearance as counsel due to a potential conflict of interest. The Board issued an order directing the corporation to obtain counsel. The corporation failed to obtain counsel and the Board dismissed the corporation's appeal as the corporation failed to obtain counsel as required by the Board's Rules at 25 Pa. Code § 1021.21(b), and where it failed to abide by or to respond to the Board's orders.

Sidney and Debra Miles v. DEP, EHB Docket No. 2014-146-B, Opinion and Order on Motion to Dismiss (June 3, 2015)

The Board dismissed an appeal for failure to comply with a Board order pursuant to 25 Pa. Code § 1021.161, as the Appellants repeatedly demonstrated a lack of intent to pursue their appeal. The Appellants failed to perfect their appeal, respond to discovery requests, and respond to a motion to compel.

PA Waste LLC v. DEP and Clearfield County, Intervenor, EHB Docket No. 2015-056-M, Opinion and Order on Petition to Intervene (June 4, 2015)

The Board granted a petition to intervene where the Intervenor demonstrated a substantial, direct, and immediate interest in the appeal. The Appellant challenged the Department's denial of an application for a landfill permit. The Intervenor, a county in which the proposed landfill was to be sited, filed a petition to intervene in support of the Department's decision to deny the landfill permit. The Board held that as the host county for the Appellant's proposed landfill, the Intervenor had a substantial, direct, and immediate interest in protecting the environment and quality of life within its borders, as well as the quality of life of its citizens. The county's interest in potential harm associated with the action is sufficient. According to the Board, the landfill could potentially have a deleterious impact on the county's use of the area in the vicinity of the landfill as well as the county's economic and environmental well-being. The county has an interest in preventing odor, litter, noise, traffic and pollution from the landfill. The

Board also ruled that the fact that a particular person supports a Department decision to either issue or deny a permit does not automatically prevent that person from intervening in an appeal. The Board rejected the Appellant's broad argument that no person who supports a Department action has standing to intervene and participate in an appeal of that action by another party.

David W. Russell v. DEP, EHB Docket No. 2014-031-B, Adjudication (June 10, 2015)

The Board reduced a civil penalty assessment against the Appellant for failing to obey Department administrative orders because under the circumstances, the Board found it unreasonable to assign the Appellant with elevated levels of culpability. The Appellant challenged the Department's assessment of a civil penalty in the amount of $17,162.00 for alleged violations of the Pennsylvania Safe Drinking Water Act, contesting the amount and reasonableness of the penalty as it applied to him. The Department determined that the Appellant, the operator of the water supply in question, was reckless in his management of the water supply and compliance with Department orders. The Board instead found that the Appellant was negligent, a lesser standard of culpability. The basic day-to-day operations of the water supply during the time period at issue were conducted by the Appellant's wife. Because of marital discord occurring at the time, the Appellant was not in position to fully carry out his responsibilities under the permit. Given the Appellant's wife's level of involvement and in light of the facts of this case, the Board concluded that the Department's penalty was unreasonable and should be reduced to the amount of $7,400.00.

Loren Kiskadden v. DEP and Range Resources-Appalachia, Permittee, EHB Docket No. 2011-149-R, Adjudication (June 12, 2015)

The Board held that the Appellant did not meet his burden of proving by a preponderance of the evidence that his water well was impacted by gas drilling operations conducted by the Permittee. The Appellant challenged the Department's determination that natural gas drilling activities conducted by the Permittee at a drill site in Washington County, PA, did not pollute the Appellant's water supply, a well situated on the Appellant's property located approximately one half mile from the drill site. After the Permittee failed to produce information about the products used in its operation during discovery, the Board granted the Appellant a rebuttable presumption that the contaminants found in his well were also present at the drill site.

The Board held that the Appellant did not introduce the necessary factual testimony, lab results, or expert testimony to prove by a preponderance of evidence that a hydrogeological connection existed between his water well and the drill site. According to the Board, it was not enough that the Appellant showed that the Department was not aware of all the leaks or spills at the drill site or that the Department had not reviewed all of the sampling data when it made its determination. Simply because problems occurred at a drill site does not mean that a water well located one half mile away was impacted by those drilling operations. The Appellant had no predrilling samples to show the quality of his water prior to the Permittee's drilling operations.

In addition, the Appellant's hydrogeology expert testified in a conclusory manner on a number of issues. In the Board's view, the expert failed to prove that (1) an underground network of fractures linked the drill site and Appellant's well, that (2) a surface connection existed between the drill site and Appellant's well despite an absence of water samples, and (3) also failed to coincide his deep migration theory with the timeline involved in the case. The

Board did not agree that the presence of methane and the ethane in the Appellant's well was evidence of a deep upward migration because there are various sources of methane and ethane that are not necessarily the result of gas drilling. Chloride levels, which can be a good indicator that drilling operations have contaminated a water source, never exceeded 44 mg/l at the Appellant's well compared to chloride readings in drill site samples that measured in the thousands. The Board also took note of the fact that the Appellant never performed maintenance on his water well, which was located adjacent to a salvage yard containing solid waste products.

Lana and William Boyer and David and Judith Badger v. DEP and SWEPI LP, Permittee and RE Gas Development, Intervenor, EHB Docket No. 2014-111-B (cons. w/15-004-B), Opinion and Order on Intervenor's Motion to Dismiss (June 18, 2015)

The Board granted an Intervenor's motion to dismiss where a permit that was appealed was cancelled, thereby rending the appeal moot. The Appellants appealed the issuance of a well permit to the Permittee. After the Department cancelled permit, the Intervenor made a motion to dismiss the appeal as moot. When the Department cancelled the permit, it informed the company that it would need to apply for a new permit if it subsequently intended to drill in that location. The Board held that because the Department cancelled the permit, there was no case or controversy for the Board to decide and there was no relief that the Board could provide the Appellants. Absent unusual circumstances, the Board generally finds that the Department's rescission of an action under appeal renders the appeal moot.

Andrew Lester v. DEP, EHB Docket No. 2014-025-B, Adjudication (June 24, 2015)

The Board dismissed the appeal of a Department order directing the Appellant to permanently close underground storage tanks. The Board concluded that the Department reasonably determined that the Appellant was an "Operator" under the Storage Tank and Spill Prevention Act ("the Act") because the Appellant took actions consistent with exercising control over and responsibility for the tanks. Both operators and owners are subject to the closure requirements of the Act. The Appellant referred to himself as an "Owner" in Department tank inspection documents and also listed his title on a signature line of an inspection report as "Manager." According to the Board, the record demonstrated that the Appellant exercised sufficient control and responsibility for the operation of the tanks. Even though the Appellant did not have an ownership interest in the tanks, the Appellant was still responsible under the Act because the Appellant acted as an "operator" of the tanks.

Beaver Valley Slag, Inc. and Bet-Tech International Inc. v. DEP, EHB Docket No. 2014-147-R, Opinion and Order on Motion to Dismiss (June 29, 2015)

The Board denied the Department's motion to dismiss where the Department's letter rejecting the Appellants' proposals and directing the Appellants to submit a plan regarding effluent limitations compliance was a final action over which the Board had jurisdiction. The Department wrote a letter to the Appellants directing the Appellants to submit a plan to the Department within 60 days detailing how they intend to comply with pH effluent limitations. The Department argued that the letter was not a final action, but rather a continuance of an ongoing conversation with the Appellants and a request for continued discussions. The

Appellants responded that the letter was a final Department action because the practical impact of the letter's rejection of the proposals left the Appellants with few viable alternatives and that the letter imposed requirements that the Appellants submit a plan to the Department. The Board held that the Department's letter was in fact an appealable final action over which the Board had jurisdiction. According to the Board, the Department's letter not only directed the Appellants to take an action but also imposed an obligation upon the Appellants to do so, thus creating a final action.

Sludge Free UMBT, et al., Appellants and Delaware Riverkeeper Network and Maya Van Rossum, Intervenors v. DEP and Synagro, a.k.a. Synagro Mid-Atlantic, Inc., Permittee, EHB Docket No. 2014-015-L, Opinion and Order on Motions for Partial Summary Judgment (July 1, 2015)

The Board denied motions for partial summary judgment from the Department the Permittee where it was clear there were numerous disputed issues of material fact and mixed fact and law that could only be appropriately resolved upon the consideration of a record fully developed at a hearing on the merits. The Appellants filed an appeal of the Department's approval of three site suitability notices submitted by the Permittee for land application of treated biosolid sewage sludge on three different sites. The Appellants alleged that the Department failed to fully consider the environmental impacts of the project, failed to ensure compliance with State and Delaware River Basin Commission environmental mandates, and failed to protect environmental rights as articulated in Article 1, Section 27 of the Pennsylvania Constitution. The Permittee and the Department characterized the appeal as an improper "generalized assault" on state biosolid regulations and argued that they complied with all of the applicable regulatory criteria.

The Board rejected the Permittee's assertion that compliance with the environmental statutes and regulations without more necessarily constitutes compliance with Article I, Section 27 of the Pennsylvania Constitution. According to the Board, the Department's action must also evince a reasonable effort to reduce to a minimum the environmental incursion of the project under review, and the environmental harm that will result from that action must not clearly outweigh the benefits to be derived therefrom. The Board's review of Department actions has always included a determination of not only whether those actions are supported by the facts and whether they are lawful, but also whether they constitute a reasonable exercise of discretion. The Board looked to the *Payne v. Kassab* test and determined that applying the test and assessing whether the Department acted reasonably will involve numerous disputed issues of material fact and mixed fact and law that makes summary judgment impossible. The Appellants did not make any clear facial challenge to the regulations, but instead asserted that these particular sites are not suitable for land application and the Department erred by concluding otherwise. Among the specific allegations that survived summary judgment was that the Department should not have approved the permits because the use of biosolids at the farms would threaten the endangered blue-spotted salamander and its habitat. While the Department argued that it properly accounted for the species' presence in the area when it issued the permits, the Board determined that the Appellants came forward with enough potential evidence to survive summary judgment that biosolid application could degrade the species' living conditions.

Consol PA Coal Co. LLC v. DEP, EHB Docket No. 2014-110-R, Opinion and Order on Motion to Compel Production of Documents (July 6, 2015)

In response to the Appellants' motion to compel the production of a compliance manual, the Board ordered the production of the compliance manual in discovery where the deposition testimony of the Department's former Monitoring and Compliance Section Chief stated that the compliance manual was relied upon in issuing the order subject to the appeal. The Department argued that the entire compliance manual was irrelevant. The Board ruled that relevancy for purposes of discovery is to be broadly construed and the Department may raise objections at trial as to the compliance manual's relevance or admissibility at that stage of the proceedings.

Tri-Realty Co. v. DEP and Ursinus College, Permittee, EHB Docket No. 2014-107-L, Opinion and Order on Ursinus College's Motion to Compel Entry Upon Property (July 7, 2015)

The Board denied a discovery motion filed by a party performing a Land Recycling and Environmental Remediation Standards Act ("Act 2") cleanup to compel the neighboring property owner to allow access onto its property to install two monitoring wells. The Appellant challenged the Department's approval of a Remedial Investigation Report submitted by the Permittee, a college, pursuant to Act 2 following the release of fuel oil from two underground storage tanks on the Permittee's property. The Permittee filed a motion to compel entry onto the Appellant's property to drill and sample two more monitoring wells. The Board determined that the Permittee failed to provide the Board with compelling reasons justifying such an invasion of property. The Permittee failed to convince the Board that its discovery is warranted, and it failed to show that two more wells are needed to assess whether the Act 2 process can move forward based on the information already available from the existing wells.

Tri-Realty Co. v. DEP and Ursinus College, Permittee, EHB Docket No. 2014-107-L, Opinion and Order on Motions for Protective Orders and to Quash Subpoenas (July 9, 2015)

The Board granted a motion for protective order and a motion quash subpoenas because the discovery requests at issue were disproportionate to any showing of need. The Appellant challenged the Department's approval of a Remedial Investigation Report submitted by the Permittee, a college, pursuant to the Land Recycling and Environmental Remediation Standards Act following the release of fuel oil from two underground storage tanks on the Permittee's property. The Appellant served subpoenas on the Pennsylvania Insurance Department and the Underground Storage Tank Indemnification Fund, both of which were nonparties to the appeal. The Permittee, the Insurance Department, and the Fund argued that the information requested by the Appellant was not relevant or reasonably calculated to lead to the discovery of admissible evidence and that the information was protected by the common interest privilege. The Board utilized the five factor proportionality standard for discovery disputes and granted the motions because the discovery requests at issue were disproportionate to any showing of need.

Wayne K. Baker v. DEP and Amerikohl Mining, Inc., Permittee, EHB Docket No. 2014-151-R, Opinion and Order on Motion for Leave to Amend Notice of Appeal and Motion to Conduct Depositions (July 10, 2015)

The Board granted the Appellant's motion to amend its appeal, finding no undue prejudice to the Department and Permittee since they were aware of new allegations in the amended appeal for several months. The Appellant sought to amend its appeal to add objections regarding the alleged disposal of waste oil and debris on his property by the Permittee. If granted leave to amend its appeal, the Appellant also sought to conduct depositions of representatives of both the Department and the Permittee. The Permittee opposed both the motion to amend and the motion to conduct depositions, arguing that allowing both motions at a date slightly more than one month before a hearing and after filing of pre hearing memoranda amounts to undue prejudice. Although the Board is normally reluctant to allow the amendment of an appeal to add new factual grounds at a late stage in the proceeding, the Board found no undue prejudice because both the Department and the Permittee were aware of the Appellant's new allegation for several months. The Board also granted leave to depose the Department's Bureau of Investigations Specialists, but ruled that the deposition shall be limited in length.

Merck Sharp & Dohme Corp. v. DEP, EHB Docket No. 2015-011-L, Opinion and Order on Motion for Partial Dismissal (July 14, 2015)

The Board denied the Department's motion for partial dismissal because the Department's disapproval of the Permitee's Preparedness, Prevention and Contingency Plan ("PPC Plan") in connection with its issuance of an NPDES permit to the Permittee was a final, appealable action. In connection with its permit application, the Appellant sought permission to revise its PPC plan, which it must maintain pursuant to the permit. The Board determined that the Appellant's application for a permit and proposed revisions were viewed as a package and acted upon as a package within the formal regulatory process for permit reviews. By attaching its determination to the final permit action, the Department's plan disapproval took on a finality of its own.

Tri-Realty Co. v. DEP and Ursinus College, Permittee, EHB Docket No. 2014-107-L, Opinion and Order on Motion to Compel Depositions (July 17, 2015)

The Board granted in part a motion to compel depositions because, although the information sought by the Appellant appeared to have limited relevance, the incremental burden of allowing most of the discovery was slight in comparison to the efforts already expended by the parties. The Appellant challenged the Department's approval of a Remedial Investigation Report submitted by the Permittee, a college, pursuant to the Land Recycling and Environmental Remediation Standards Act ("Act 2") following the release of fuel oil from two underground storage tanks on the Permittee's property. According to the Board, Act 2 is a forward thinking statute and the important consideration under Act 2 is that a release was discovered and now the responsible party must determine the extent of the release and how to proceed with a cleanup. The Board held that the Appellant may not inquire further into the Permittee's past communications with the Pennsylvania Department of Insurance, the Underground Storage Tank

Indemnification Fund, or IFC International considering the extremely low value of the information regarding those communications.

Stanley Boinovych v. DEP, EHB Docket No. 2015-090-L, Opinion and Order on Motion to Dismiss (August 6, 2015)

The Department filed a motion to dismiss an appeal of an assessment of a civil penalty on grounds that the appeal was filed more than thirty days after the Appellant received the assessment. The Board granted the Department's motion because the Appellant filed his appeal eight days after the thirty day filing deadline, therefore depriving the Board of jurisdiction over the appeal.

DEP v. EQT Production Co., EHB Docket No. 2014-140-CP-L, Opinion and Order on Motion for In Camera Review and to Compel (August 13, 2015)

The Board denied a motion for an *in camera* review of documents withheld as privileged by the Department because the movant failed to make a preliminary showing that the documents were discoverable. The Department requested that the Board impose a civil penalty against the Defendant for alleged violations of the Clean Streams Law. The Defendant filed a motion asking the Board to perform an *in camera* review of documents in the Department's privilege log used to calculate the penalty and to determine whether the Department's claim of privilege was justified. The Defendant asked the Board to compel production of those documents. The Board explained that *in camera* inspection to assess whether a privilege applies does not follow automatically simply because a party asks for it. The Board denied the motion, ruling that the Defendant failed to explain how access to the information was relevant and how the information would aid the Board in calculating a penalty should the Board decide a penalty is warranted. The Defendant also did not provide a reason to suspect that the documents referenced in the Department's log were not privileged.

Richard L. Stedge, et al. v. DEP and Chesapeake Appalachia, LLC, Permittee, EHB Docket No. 2014-042-L, Adjudication (August 21, 2015)

In an appeal of the Department's approval for coverage under a general permit for an oil and gas liquid waste storage and beneficial use facility, the Board modified the coverage approval slightly to clarify that the facility in question was limited to storage. A group of Appellants filed an appeal of the Department's approval of the Permittee's registration under a general permit for the storage and beneficial use of oil and gas liquid waste at a farm facility. The Permittee argued that its erosion and sediment control plans, which were approved when it had its permits approved, included the necessary engineering and institutional controls to adequately protect the environment.

The Board determined that there were no technical deficiencies in the overall permit approval. The Appellants did not give the Board reason to believe that the Department was misrepresenting its position that the facility would be used for anything other than storage. Furthermore, the Appellants did not outline a course of action that would allow the Permittee to process or manufacture fluids at the facility based on the current permit. Still, the Board appreciated how residual allusions to manufacturing and processing in the permitting materials

could instill concern from residents. The Board also noted that there was less than perfect attention to detail on the Permittee's part in preparing the permit application The Board ordered that the authorization for coverage under the permit shall be modified to clarify that the facility in question is limited to storage, and that any change that would expand operations beyond storage must be the subject of a permit modification application with personal notice given to the remaining Appellants.

Thomas Peckham v. DEP, EHB Docket No. 2014-074-B, Adjudication (August 31, 2015)

The Board dismissed an appeal of an administrative order directing the Appellant to permanently close a compartmentalized underground storage tank which consisted of two tanks, Tank 001 and Tank 002. According to the Department, Tank 002 was required to be closed under the Department's regulations, and closing Tank 002 would destroy the integrity of the Compartmentalized Tank and make it impossible to leave Tank 001 open for use. The Appellant was the owner/operator of the tank in question and is subject to the closure requirements of the Storage Tank and Spill Prevention Act. The record before the Board showed that Tank 002 was registered as temporarily out-of-service and under the regulations was required to be permanently closed, which the Appellant failed to do. The Board held that the Department reasonably determined that closure and removal of Tank 001 was required because the closure and removal of Tank 002 would destroy the outer wall of the Compartmentalized Tank and would prevent Tank 001 from meeting the requirements for the safe operation of an underground storage tank.

Patricia Wilson et al. v. DEP and Newtown Supervisors, EHB Docket No. 2013-192-M (cons. w/13-200-M), Adjudication (August 31, 2015)

The Board dismissed a challenge to the Department's approval of the Township's Act 537 Sewage Plan Update. The Appellants first argued that public notice of the Plan Update was insufficient and that both the Township and the Department failed to adequately respond to and consider public comments. The Board determined that the Appellants had access to the appropriate modules to comment on the Plan Update and the revised plan proposals. According to the Board, notice was adequate considering the Plan Update's publication in a newspaper and the extensive public outreach and participation efforts concerning the development and adoption of the revised Plan Update. The record showed that the Appellants took full advantage of both opportunities to submit public comments. The Board also determined that the Township adequately considered all public comments, ruling that the Appellants' facial objection to the general response that "your comment is noted" was insufficient to satisfy the Appellant's burden of proof without more.

The Appellants also argued that the Plan Update was not financially feasible to implement. The Board disagreed, holding that the Plan was in fact financial feasible at the planning stage pursuant to 25 Pa. Code § 71.21(a)(5)(v). The Township identified a financial alternative of choice to finance the proposed alternative, and also identified a contingency financial plan to be used if the preferred method of financing was not able to be used. In response to the Appellants' argument that the Township was not committed to implementing the Plan, the Board disagreed and determined that the Township was in fact committed to implement the Plan despite settlement agreements with a certain group of Appellants and Intervenors.

Ronald Teska and Giulia Mannarino v. DEP and EQT Production Co., Permittee, EHB Docket No. 2015-088-B, Opinion and Order on Motion to Dismiss (August 31, 2015)

The Board granted a motion to dismiss for mootness where the Department action under appeal was withdrawn by the Department. After the Appellants filed a notice of appeal objecting to the Department's approval of an alternative plugging of a well and petition for supersedeas, the Permittee filed a motion to dismiss stating that, upon its request, the Department had withdrawn its approval of the alternative method for plugging the well and, therefore, the matter was moot. Despite the Department's withdrawal of the approval, the Appellants argued that the matter was not moot because the issues surrounding the Permittee's proposed plugging of the well were broader than the Department's approval of the alternate plugging method and that these issues were raised in their notice of appeal. The Board disagreed and held that the only action taken by the Department and the subject of the appeal was the approval of the alternate plugging method. Therefore, the approval was the only action properly in front of the Board. Because the approval was withdrawn, the Board ruled that the matter was moot.

Marjorie Hudson, Lorne Swope, David Lippert, And Delores Steiner v. DEP and CFC Fulton Properties LLC, Permittee, EHB Docket No. 2015-096-L, Opinion in Support of Order Granting Petition for Supersedeas (September 1, 2015)

The Board granted a petition for supersedeas of the Department's coverage approval of a stormwater permit for a concentrated animal feeding operation ("CAFO"). The Appellants appealed the Department's authorization of the Permittees' notice of intent for coverage under an NPDES permit for stormwater discharges associated with construction activities at an animal feeding operation. The Appellants were neighbors of the proposed facility. The Board determined that the Department approved coverage even though the applicant failed to conduct appropriate infiltration and geotechnical studies to demonstrate that its system would meet regulatory criteria and be protective of the environment. The plan was not based on predevelopment or appropriate infiltration and geotechnical studies that provided enough information to make a scientifically sound, data-based demonstration that BMP's would meet regulatory criteria and otherwise be protective of the environment.

The Appellants also argued that the Department's approval for coverage under the PAG-2 permit violated the Department's obligations under Article 1, Section 27 of the Pennsylvania Constitution. The Board held that this argument may have some merit, but cautioned that the Appellants' likelihood of success on this important issue would not have by itself justified issuance of a supdersedeas. Although the Board was of the view that the Department may not have considered the broader implications of a CAFO at the location when it approved the stormwater coverage, the Board will have to assess the Department's attempts to reduce environmental incursion by focusing on the entire project as opposed to individual components of the project. The Department did not act consistently with the applicable regulations when it approved the Permittee's plan, which constitutes irreparable harm *per se*.

Citizens for PA's Future v. DEP and Anadarko E&P Onshore LLC, Permittee, EHB Docket No. 2014-117-B, Opinion and Order on Motion for Summary Judgment (September 10, 2015)

The Board denied a joint motion for summary judgment brought by the Department and the Permittee because the Appellant organization had standing to challenge an ESCGP-2 permit where one of its members had standing. The Appellant challenged both the Department's issuance and authorization of an ESCGP-2 Permit issued to the Permittee. The authorization under appeal allowed earth disturbance activities associated with the Permittee's project in the Frozen Run Watershed of the Loyalsock State Forest. The Department and the Permittee filed a joint motion for summary judgment asserting that the Appellant lacked standing to pursue the appeal. The Appellant responded that its basis for standing was the recreational use of the Frozen Run Watershed by one of the Appellant's members ("Member"). The Department and Permittee argued that representative standing has little meaning or justification when the potentially represented parties are a party of one. The Board ruled that where there is only one member who has standing, the organization is entitled to standing as well. The Member was an avid hiker and has hiked in the affected area of Frozen Run and in the general area of the Permittee's construction project on several occasions since April 2013. The Board held that the Member had standing because potential harm from the construction project presented a realistic potential harm to the Member's aesthetic and recreational interest.

Darryl Herner et al. v. DEP, EHB Docket No. 2015-098-M, Opinion and Order on Rule to Show Cause (September 14, 2015)

The Board dismissed the appeals of fourteen appellants for failure to provide a complete notice of appeal in compliance with the Board's Rules and orders. The Appellants filed an appeal objecting to the inclusion of the Appellants' village, Lamberson, in Hegins and Hubley Townships Act 537 Sewage Management Plan. The Board issued an order notifying the Appellants that its notices of appeal were missing nearly every piece of information required by the Board's Rules. After failing to comply with the order, the Board issued a Rule to Show Cause upon the Appellants to show cause why their appeals should not be dismissed. The Appellants did not file any correspondence with the Board or perfect their appeals, and therefore the Board dismissed the appeals as a sanction.

Borough of St. Clair v. DEP and Blythe Twp., Permittee, EHB Docket No. 2015-017-L, Opinion and Order on Motion in Limine (September 15, 2015)

The Appellant challenged the Department's reissuance of a solid waste permit to a neighboring Township authorizing the construction and operation of a landfill. The Township's primary consulting geologists contracted with Dr. Christopher Bise, P.E., to evaluate whether the landfill's liner could withstand the potential stress of subsidence in the portion of a cell underlain by mine workings that may not have already collapsed. The consulting geologists concluded in a subsidence report that based on Dr. Bise's conclusion, no remedial measures were necessary with respect to potential mine subsidence related to a portion of the Buck Mountain Coal deep mine. Dr. Bise died after preparing his report and the Appellant filed a motion in limine on grounds that Dr. Bise's statements in his report were inadmissible hearsay. The Board ruled that because there was nothing in Dr. Bise's report other than his conclusions, the report can neither be admitted to prove the truth of his conclusions directly or indirectly though expert testimony. However, the Board found that Dr. Bise's report can be admitted for other purposes

because it is part of the permit under appeal. Specifically, the report is admissible as part of the record of decision if for no other purpose than to show the basis for the Department's action.

Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc. Permittee, EHB Docket No. 2015-063-L, Opinion and Order on Motion to Compel (September 16, 2015)

The Board granted in part and denied in part the Permittee's motion to compel more complete responses to discovery. The Appellant challenged the Department's issuance of a solid waste management renewal permit to the Permittee for the operation of a municipal waste landfill. The Permittee's motion sought more complete responses to six interrogatories served on the Appellant. The Permittee sought the identification of members that, according to the Appellant, allegedly gave the Appellant organizational standing in the appeal, and the identification of potential fact witnesses. The Board found no compelling reason for the Permittee's request that the Appellant disclose its full membership list or the names of all of its officers. Other interrogatories requested what persons other than counsel assisted in the preparation of the notice of appeal or what role they played in crafting it. The Board determined that these interrogatories were irrelevant and unlikely to lead to the discovery of admissible evidence. However, the Board did order the Appellant to make a reasonable effort to identify persons with knowledge of the factual matters giving rise to the appeal.

West Buffalo Township Concerned Citizens v. DEP and Edward H. Martin, Permittee, EHB Docket No. 2014-078-L, Opinion and Order on Motions to Dismiss (September 28, 2015)

The Board denied two motions to dismiss because a transfer of an NPDES permit did not render a third-party appellant's appeal of the underlying permit moot. The Appellant appealed the Department's issuance of an individual NPDES permit to the Permittee for a concentrated animal feeding operation. The Appellant alleged that the Permittee's operation did not comply with applicable regulations, that the NPDES permit was not protective of waters of the Commonwealth, and that the Department failed to comply with the public notice requirements associated with the permit. The Department and the Permittee each moved to dismiss the appeal, asserting that the appeal was moot because the NPDES permit under appeal was transferred to another individual. The Board held that despite the transfer, the permit had not been superseded and it remains in full force and effect. The fact that there may be another party interested in the fate of the permit did not affect the Board's continuing jurisdiction over the permit.

Friends of Lackawanna v. DEP and Keystone Sanitary landfill, Inc., Permittee, EHB Docket No. 2015-063-L, Opinion and Order on Motions to Compel (October 29, 2015)

The Board granted, in part, the Appellant's two motions to compel more complete discovery responses from the Department and a Permittee where the responses were made based on an erroneous conception of the scope of the appeal. The Appellant challenged the Department's issuance of a solid waste management permit renewal to the Permittee for the operation of a municipal waste landfill. The Appellant argued that the Department and the Permittee improperly withheld discovery on the basis of their contentions that the Appellant's appeal was limited to the permit renewal and the discovery requests extended beyond what was

strictly involved in the renewal. The Board has repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. The Board did not specifically define the exact scope of the Department's review of the permit renewal, but determined that the scope was indeed broader than what the Department and the Permitee were advancing. Having provided guidance on the scope of the appeal, the Board ordered the Department and the Permittee to supplement their responses accordingly and make reasonable efforts to identify people who may have knowledge of discoverable information beyond those strictly involved in the permit renewal. However, the Board ordered that where discovery may encompass decades of information, the discovery requests must be appropriate with respect to the proportionality standard in terms of the burden imposed on other parties.

Whiting and Whiting Roll-Off, LLC v. DEP, EHB Docket No. 2014-090-B, Adjudication (November 5, 2015)

The Board upheld the majority of a civil penalty assessment by the Department pursuant to the Solid Waste Management Act. The Department alleged that the Appellant owned and operated a transfer and disposal facility without a permit and stored waste in improperly labeled containers that were not covered or leak proof. The Board held that with the exception of alleged violations in December, 2013, the Department demonstrated by a preponderance of evidence that the violations that formed the basis of the civil penalty occurred as asserted by the Department. The Board did not find the Appellant to be personally liable under the participation theory because the Department failed to demonstrate by a preponderance of evidence that the Appellant personally participated in the actions that led to the violations.

Wetzel v. DEP and Hegins Township and Hubley Township, Permittees, EHB Docket No. 2015-071-M, Opinion and Order Granting Motion for Continuance (November 6, 2015)

The Board granted in part the Appellants' motion for continuance to extend the case management deadlines concerning discovery and dispositive motions to provide the Appellants with additional time to conduct discovery with a recently obtained expert witness. A group of Appellants challenged the Department's approval of a Joint Act 537 Sewage Facilities Plan Update for two townships. The Appellants filed a motion for continuance to extend case management deadlines for purposes of discovery to allow their recently retained expert the additional time necessary to handle discovery requests and responses. The Permittee argued that the Appellants failed to meet their burden to show that an extension is warranted because the Appellants failed to conduct discovery over the last five months. The Board ruled that a party who seeks to extend the deadline for conducting discovery must ordinarily show the Board either that it has prosecuted the appeal with due diligence or that there are legitimate reasons why it has failed to proceed with due diligence, especially when other parties oppose the request. The Board found no evidence to suggest that the Appellants failed to act diligently in pursuing their pretrial obligations and did not doubt that the recently obtained expert may require additional time to properly proceed with the appeal. In an attempt to reconcile the Permittee's preference to move the appeal towards resolution, the Board granted the Appellants a thirty day extension as opposed to the requested sixty days.

Peter K. Edwardson v. DEP, EHB Docket No. 2014-029-M, Opinion and Order on Motion to Dismiss (November 6, 2015)

The Board granted the Department's motion to dismiss where the record before the Board demonstrated that the Appellant filed its appeal of a Department order more than thirty days after the Appellant received the order. A pro se Appellant appealed a Department order that directed the Appellant to undertake certain restoration measures concerning realignment of a stream channel located on the Appellant's property. Notwithstanding its appeal, the Appellant complied with certain portions of the Department's Order and the parties executed a Consent Order and Agreement ("CO&A") to attempt to resolve the appeal without further litigation. The Department filed a motion to dismiss, arguing that the Appellant filed his appeal in an untimely fashion and that the appeal was moot because the CO&A resolved all of the issues in the appeal. The Appellant deposited its appeal with the Postal Service within thirty days after the receipt of the order, yet the Board did not receive the appeal until seven days after the thirty day deadline. The Board ruled that an appeal must be received by the Board within the thirty day limitation period, and not merely mailed within that time frame, therefore the Appellant's appeal was filed untimely and the Board had no jurisdiction. In assessing the Department's mootness argument, the Board found that the Department incorrectly assumed that the CO&A had the effect of superseding the Department's original Order. The Department did not cite any provision of the CO&A which indicated that the original order was withdrawn. However, the Board did not conclude whether the appeal was in fact moot because the untimely filed appeal formed sufficient grounds to grant the Department's motion to dismiss.

David Vanscyoc and Anna P. Vanscyoc v. DEP and Emerald Coal Resources, LP, Permittee, EHB Docket No. 2013-052-R (consolidated with 2015-053-R), Opinion and Order on Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings (December 8, 2015)

The Board held that a Department order directing a monetary payment to landowners for alleged damage caused by mining, which was appealed by the landowners, did not fall within the Section 362 exceptions to the automatic stay of bankruptcy. The Appellants challenged a Department order directing the Permittee to pay the Appellants compensation for alleged subsidence damage to structures on the Appellants' property. The Appellants argued that the amount ordered by the Department failed to adequately compensate the Appellants for the damage to their property. The Permittee filed with the Board a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings, which advised the Board that the Bankruptcy Court had issued an order granting automatic stay protections afforded under Section 362 of the Bankruptcy Code, 11 U.S.C. § 362. The Board held that the Department's order did not fall within any of the Section 362 exceptions to the automatic stay of bankruptcy. The Board explained that in this case, what was being sought from the Permittee was monetary payment. Where a duty to repair or clean up a site has been reduced to a monetary obligation, it does not fall under the Section 362(b) exceptions to the automatic stay.

John Joseph Contracting v. DEP, EHB Docket No. 2015-046-R (consolidated with 2015-107-R, 2015-114-R, 2015-142-R and 2015-155-R), Opinion and Order on Motion to Compel (December 8, 2015)

The Board granted in part the Department's motion to compel. Following an investigation of the dumping of waste-like material on the Appellant's property, the Department ordered the Appellant to provide the Department with the identities of the generators of waste-like material found on the Appellant's property and also required the Appellant to submit a plan to remove and properly dispose of waste on the property. The Board granted, in part, and denied, in part, the Department's motion to compel the Appellant's complete responses to certain interrogatories. The Board ruled that parties are under a duty to provide full and complete answers to interrogatories setting forth all discoverable information. The Board ordered the Appellant to make a reasonable effort to identify persons with knowledge of the factual matters giving rise to the appeal and to provide a privilege log itemizing all documents withheld under a claim of privilege. Where the Department is attempting to narrow the scope of the Appellant's contentions and where the scope is unclear, as in this appeal, the use of contention interrogatories is appropriate. The Board also ruled that the parties must timely answer discovery seeking information about experts and cannot wait until the filing of their Prehearing Memoranda to set forth this information.

Snyder, et al. v. DEP and Columbia Gas Trans., LLC, Permittee, EHB Docket No. 2015-027-L, Opinion and Order on Motion to Dismiss (December 21, 2015)

The Board denied the Permittee's motion to dismiss because the Permittee did not show, as a matter of undisputed fact, that the Department properly approved an Air Quality Plan Approval for a natural gas compressor station. A group of Appellants appealed the Department's issuance of an Air Quality Plan Approval to the Permittee for a compressor station. The Permittee filed a motion to dismiss. The Appellants first argued that the Plan Approval would allow the compressor station to emit air pollutants in violation of the Air Pollution Control Act because the Plan did not require the implementation of Best Available Technology ("BAT").

The Board explained that BAT applies to "sources." The Parties had different, yet reasonable, interpretations of what constitutes a source. According to the Board, whether to evaluate BAT as it relates to individual equipment, a facility as a whole, or even as it relates to both, would seem to allow for the exercise of reasoned discretion on a case-by-case basis. Whether the Department chose the appropriate approach is a factual question that is inappropriate to resolve in the context of a motion to dismiss. Next, the Appellants argued that the Department should have required a temperature inversion study, along with a general criticism that the location of the facility would trap residents in case of a catastrophic incident. The Board declined to assess these issues, explaining that evaluating such a discretionary decision is not the appropriate subject of a dispositive motion.

The Permittee also asked the Board to dismiss the Appellants' objection that the Permittee has failed to obtain the necessary local zoning approvals for the project. The Appellants cited Article 1, Section 27 of the Pennsylvania Constitution in support of the proposition that the Department had an obligation to at least consider local land use in the course of its review. Assuming the Appellants' contention that the Department had, in fact, ignored local land use requirements was true, the Board rejected the Permittee's argument. The Board

explained that while the Department has considerable discretion regarding what to do if there appears to be legitimate land use concerns, the Department does not have discretion to simply ignore such legitimate concerns once they are brought to its attention. The Board also rejected the Permittee's argument that the Department's compliance with all statutory and regulatory requirements automatically constitutes compliance with Article 1, Section 27. The Board's review considers more than whether the Department followed the laws and regulations in taking an action. The Board 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.

Sludge Free UMBT, et al., and Delaware Riverkeeper Network, Intervenors v. DEP and Synagro Mid-Atlantic, Inc., Permittee, EHB Docket No. 2014-015-L, Opinion in Support of Order Denying Motion to Dismiss (December 22, 2015)

The Board denied a joint motion to dismiss an appeal as moot filed by the Permittee and the Department because certain exceptions to the mootness doctrine applied. The Appellants, a citizens group and some of its individual members, appealed the Department's approval of three site suitability notices submitted by the Permittee for the application of biosolids on three farms in a Township. The Permittee and the Department filed a joint motion to dismiss the appeal as moot, asserting that the Permittee withdrew the thirty day notices that were covered by the site suitability determinations subject to this appeal. The Board denied the motion because certain exceptions to the mootness doctrine applied. The Board determined that notices of the first land application of biosolids that precipitated the site suitability notices, which were the subject of this appeal, and which were later withdrawn by the Permittee, are likely to be repeated yet evade review, and the Appellants were likely to suffer detriment without a decision from the Board. The Permittee and the Department expressed indications in a news article that biosolids will be applied to the farms in the future, which provided a reasonable expectation that the Appellants will be subjected to the same action again. The Board also determined that the duration of the challenged action was too short to be fully litigated prior to its expiration and that the Appellants would suffer a detriment absent Board action as a result of re-litigating an already long and expensive litigation process. The Board also rejected the argument that there is no effective relief the Board can provide because the Permittee no longer had authority to apply Class B biosolids. In the Board's opinion, the Department's determination of suitability has continuing vitality as the Board could decide that the sites are suitable or not suitable for the application of biosolids, or that there has been an insufficient investigation to show that they are suitable.

Borough of St. Clair v. DEP and Blythe Township, Permittee, EHB Docket No. 2015-017-L, Opinion and Order on Motion for Summary Judgment (December 28, 2015)

The Board denied the Permittee's motion for summary judgment, determining that a factual dispute still existed as to whether underground mining created a subsidence issue which could affect public safety or the environment, as well as issues regarding the adequacy of meteorological data that cannot be resolved in the context of a motion for summary judgment. The Permittee also raised a collateral estoppel issue due to concerns that this appeal may be used as a vehicle to re-litigate issues that have already been addressed in prior appeals. The Board did not find any effort on the Appellant's part to exceed the main issues presented in this appeal or

re-litigate matters already decided or waived after the Appellant had withdrawn a number of objections from its appeal.

National Fuel Gas Midstream Corp. and NFGL Midstream Trout Run, LLC and Seneca Resources Corp., Intervenor v. DEP. Docket No. 2013-206-B, Adjudication (December 29, 2015)

The Board upheld a Single Source Determination in a GP-5 permit issued by the Department because all three regulatory requirements were satisfied and the pollutant-emitting sources collectively met the common sense notion of a plant. The Appellant and Intervenor challenged the Department's determination that the Appellant's compressor station and the Intervenor's well pad should be treated as a single source for air permitting purposes. This determination was incorporated in a GP-5 permit authorization issued to the Appellant. The Department determined that the three part test for aggregation was satisfied and that the compressor station and well pad comported with the common sense notion of a plant. The Board turned to the three main factors that regulators must consider when deciding whether separate emissions sources should be evaluated as one source: (1) the facilities must share the same industrial designation, (2) be under the common control of the same company, and (3) be located on contiguous or adjacent properties. The Board held that both the Appellant's and Intervenor's natural gas facilities were properly classified as a single source of pollution for air emissions purposes.

First, the Board determined that the well operated by the Intervenor and the compressor station operated by the Appellant were in the same industrial grouping because they were both involved in gas compression at the field level and share the first two digits of their standard industrial classification (SIC) Codes. Next, the Board determined that the two sites were under the common control of the same parent company because there was "ample evidence" that the Appellant had the power to direct the behavior of its subsidiaries in their decisions regarding the Appellant's compressor station and the Intervenor's well pad. Finally, in determining adjacency, the Board ruled that based on physical proximity, the well pad and compressor station sites were "close enough" to meet the general definition of adjacent. The Board concluded that the two sites were adjacent by measuring from fence line to fence line, not compressor station to well. In this case, there was .24 miles between the closest edges of developed area at each side. The Board also rejected the Appellant's contention that the three-prong single source test was irrelevant because the two facilities did not "comport with a common-sense notion of a plant." The Board agreed with the Department that the proper way to think about the common sense notion of the plant is in the context of the requirements of each of the three parts of the regulatory test and the overall definition of a stationary source.

Judge Bernard A. Labuskes, Jr. and Judge Richard P. Mather, Sr. penned concurring opinions. Judge Labuskes was not entirely convinced that the Department had no choice but to rigidly apply the three-part test in the first place. Judge Labuskes also worried that continued rigid application of the test will often result in inconsistent, sometimes result-oriented decisions based on strained analyses dependent upon arbitrary distinctions. Rather than focus exclusively on the three-part test, Judge Labuskes believed that the better and more basic question to ask is whether the compressor station and the well pad belong in one permit. Judge Mather also agreed with the majority opinion to dismiss the appeal, but disagreed with the Department's view of deference and cautioned that the Board should not start down a path of granting deference to

Department interpretations of regulations in a general, non-specific manner. Judge Mather explained that deference is a question that should be evaluated in the context of a particular regulation and a specific Department interpretation of that identified language.

Peter Karnick v. DEP and Wayco EHB Docket No. 2015-128-M, Opinion and Order on Motion to Dismiss (January 22, 2016)

The Board granted the Department's motion to dismiss where the record before the Board demonstrated that the Inspection Report which the Appellant appealed was not a final appealable action of the Department. A pro se Appellant appealed a Noncoal Inspection Report issued by the Department to the Permittee. The Permittee had a noncoal surface mining permit to operate a sand and gravel processing facility on land owned by the Appellant, which the Appellant leased to the Permittee. The Department approved the Permittee's reclamation plan, which provides for post-reclamation land use as forestland. After inspections to the land, the Department issued an Inspection Report in which the Department's inspector indicated that the Permittee completed reclamation on the property in accordance with the approved reclamation plan and that the site was ready for Stage I and Stage II bond release.

The Department filed a motion to dismiss, asserting that the Inspection Report did not constitute a final appealable action. The Board agreed with the Department, finding that the Inspection Report did not direct or require the Appellants or the Permittee to undertake any specific action. The Inspection Report merely recorded the inspector's observations and included the inspector's opinion that the site was ready for bond release. The inclusion of the Department's standard appeal language in the Inspection Report did not in itself make the otherwise unappealable Department action appealable. The Appellant will have an opportunity to appeal once the Department makes a final determination that the site is ready for Stage I and Stage II bond release.

Mirkovich v. DEP and Emerald Coal Resources, LP, Permittee, EHB Docket No. 2015-153-M (Consolidated with 2015-156-M and 2015-181-M), Opinion and Order on Motion to Dismiss (January 28, 2016)

The Board denied the Permittee's motion to dismiss the initial appeal of the third-party Appellants. The Department ordered the Permittee to take certain steps to address the loss or diminution of an agricultural water supply on property owned by the Appellants. The Appellants appealed this order. The Permittee then submitted a water supply replacement plan to the Department for review. The Department approved the plan, finding that the plan provided an adequate permanent replacement water supply for the Appellants. The Appellants appealed the Department's approval of the plan, which the Board consolidated with their earlier appeal. After the Department approved the Permittees' permanent water supply replacement plan for the Appellants' water supply, but before the Appellants filed their appeal of this approval, the Permittee filed a motion to dismiss the Appellants' initial appeal. The Permittee argued that the Board did not have jurisdiction over the appeal because the Appellants objected to a proposed plan that was not part of the order under appeal.

The Board held that there was a material fact dispute as to whether the Department's order included a requirement to submit a plan. In the Board's view, the Appellants' concerns about the adequacy of the approved plan was clearly part of the consolidated appeal. Therefore,

the Appellants were entitled to pursue both of their appeals in this consolidated appeal. According to the Appellants, the Department refused to take action for three years and only did so to prevent the Federal Office of Surface Mining Reclamation and Enforcement's more direct involvement in the enforcement of the Permittees' obligation to address undisputed adverse impacts on the Appellant's water supply. Both the Department and the Permittee asserted that the Department's intentions or motivations were irrelevant to the challenged order. The Board explained that at this preliminary stage of the appeal, this appeal may be a rare case in which the Department's motivation in taking the appealed action has a role in the Board's review.

Cabot Oil & Gas Corp v. DEP, EHB Docket No. 2015-131-L, Opinion and Order on Motion to Quash Subpoena (February 3, 2016)

The Board granted in part and denied in part a non-party's motion to quash a subpoena and motion for a protective order. The Department issued an order to an Appellant oil and gas operator requiring the Appellant to provide temporary water to a place of worship ("Temple") and then develop a plan to restore and/or replace the water supply located on the property. The Appellant contested the Department's finding of pollution and argued that any issues concerning the water quality at the Temple water well existed before the Appellant began developing the gas wells. Vera Scroggins, a non-party in this appeal, who was directly involved in the management of the property and was personally associated with the property itself, its owner, and the circumstances related to the Department's Order and this appeal, filed a motion *pro se* asking the Board to quash a subpoena served upon her by the Appellant.

Under Board Rules, a party may obtain through subpoena on a non-party documents normally within the scope of discovery. A person who is the subject of a subpoena may move for a protective order. Ms. Scroggins claimed that the Appellant's subpoena served upon her was an example of the Appellant's vindictive campaign against her because of her anti-fracking activism. The Appellant sought to prove that Ms. Scroggins initiated a false complaint about a change in water quality to further her anti-drilling agenda. The Board found no relevance in such character attacks, explaining that this case will likely turn in part on statutory and regulatory interpretation as well as scientific evidence explained by experts. To the extent the subpoena delves into evidence regarding Scroggins's and the Appellant's feud, the Board granted the motion to quash. The Board held that Scroggins was not required to produce every communication she has ever had about the Temple, the property, or the Appellant. However, to the extent she had communications relating to the water supply, they should be produced.

Finally, the Board denied the protective order, rejecting Ms. Scroggins's claim that she was a journalist protected by the reporters' privilege and that the materials in question were entitled to protection from disclosure as the fruits of her journalistic labors. The reporters' qualified privilege grounded in the Constitution provides that reporters have a qualified right to refuse to disclose their sources of materials. The Board was hesitant to conclude that Scroggins is a "reporter" entitled to withhold any materials on that basis. Furthermore, Ms. Scroggins did not identify any materials she was required to produce pursuant to the subpoena that were obtained in her journalistic capacity separate from her role as a property manager and representative of the owner of the water supply.

Delaware Riverkeeper Network v. DEP and RE Gas Development, LLC, EHB Docket No. 2014-142-B (Consolidated with 2015-157-B), Opinion in Support of Order Denying Petition for Supersedeas (February 4, 2016)

The Board denied a petition for supersedeas of the issuance and renewal of six permits for unconventional gas wells where the third-party Appellant's failed to show that they had a strong likelihood of success on the merits. The Appellants, consisting of two environmental groups and four individuals, filed an appeal of the Department's approval of six well permits. The Appellants argued that the unique geologic setting of the well site along with the presence of numerous abandoned wells in proximity to the well site created a substantial risk of groundwater contamination and gas migration issues. The Board determined that given the speculative nature of that risk and the fact that the regulations contained performance standards incorporated into the permits designed to address those risks, there was no fault on behalf of the Department in issuing the permits. The Appellant's expert witness offered conclusions that relied on the expert's claim that drilling unconventional gas wells in the unique geologic setting of the well site created an extraordinary risk. In the Board's opinion, the expert's claim of uniqueness was not consistent with the facts, was speculative, and did not amount to a greater level of risk than exists with any other unconventional gas drilling project. The expert did not look to see whether any other unconventional gas wells were located in a similar proximity to the unique geologic setting as the well site in question. In addition, the Department testified that there were four unconventional well sites located closer to the unique geologic setting than the actual well site in dispute.

Next, the Appellants argued that the potential for noise at the well site constituted a nuisance that was not adequately considered by the Department during the permit review process and that there was actual noise during a two week period that in fact created a public nuisance in violation of several statutes and regulations. The Board held that the permits issued by the Department appear to address the noise issue, and therefore, there was no basis to rule that the permit application review conducted by the Department was inadequate on the issue. The Board also determined that actual noise from the well site did not constitute a public nuisance because testimony during the hearing demonstrated a wide variance in the witnesses' perception of noise generated from the well site.

Heywood Becker v. DEP, EHB Docket No. 2013-038-C, Opinion In Support of Order Denying Request for Certification of Appeal (February 19, 2016)

The Board denied the Appellant's request to certify two orders for interlocutory appeal, which denied the Appellant's request to reopen the record prior to adjudication and denied reconsideration thereof. The Appellant challenged a Department order based on inspection reports alleging, among other things, that the Appellant rerouted a stream channel without a permit, which caused sediment pollution to waters of the Commonwealth in violation of the Clean Streams Law. After a hearing on the merits, the Department filed a motion requesting an extension of the briefing schedule. The Department represented that it was in discussions with the current owner of the site at issue, Mr. Peter Edwardson, who earlier in 2014 filed an appeal with the Board, and that these discussions might lead to settlement for both appeals. *See Edwardson v. DEP*, EHB Docket No. 2014-029-M. The Board granted the motion, as well as subsequent requests by the parties for an extension to reach settlement. Despite several

extensions, settlement never materialized. The Board dismissed Mr. Edwardson's separate appeal due to it having been untimely filed.

The Appellant field a motion to reopen the record to introduce new evidence, which the Board denied. The Board also denied the Appellant's motion for reconsideration of the Board's order denying the Appellant's motion to reopen the record. The Appellant then filed a request to certify those two orders for interlocutory appeal with the Commonwealth Court. The Board denied the Appellant's request because the Appellant did not establish than an appeal of the orders presented a controlling question of law, or that an immediate appeal would materially advance the termination of the matter. Interlocutory appeals are primarily designed to allow the Commonwealth Court to consider pure questions of law. According to the Board, its decisions to not reopen the record and to not grant reconsideration did not involve issues that get to a controlling question of law on the merits of the appeal– whether the Appellant conducted unlawful activity without a permit and caused pollution to waters of the Commonwealth.

M.C. Resource Development Co. a/k/a M.C. Resources Development, Inc. v. DEP, EHB Docket No. 2015-023-C, Opinion and Order on Request for Extension of Time (February 25, 2016)

The Board denied a joint request for an extension of the dispositive motion deadline in a matter concerning a public water supply. The Appellant appealed a Department letter revoking the Appellant's public water supply permit because, according to the Department, the Appellant no longer met the definition of a public water system. After granting a petition for supersedeas and subsequently granting two requests to extend discovery and dispositive motion deadlines, the Board denied the parties' third request for an extension. The Board reasoned that it was hesitant to indefinitely extend the supersedeas further absent a more robust showing of diligent prosecution of the matter from the parties. The parties' request did not provide any indication of progress regarding the remaining issues in the appeal.

Borough of Kutztown and Kutztown Municipal Authority v. DEP and Maxatawny Township, Permittee and Advantage Point, LP, Intervenor, EHB Docket No. 2015-087-L, Adjudication (February 29, 2016)

The Board dismissed an appeal filed by a municipality and its municipal authority challenging a revision to a neighboring municipality's Act 537 plan because, among other things, the appellant failed to prove that the plan revision was not able to be implemented under the Sewage Facilities Act and the corresponding regulations. The Intervenor planned to build an apartment complex in Maxatawny Township (Permittee), which was projected to generate about 69,000 gallons per day of sewage. The original plan was for the sewage to flow through a sewer interceptor line owned by the Appellant that currently handles sewage from both the Appellant and Permittee Townships. The Appellant refused to allow the use of its line for handling the additional sewage from the Intervenor's project. As a result, the Permittee determined that its existing sewage facilities official plan was inadequate to meet the sewage needs of the new land development and sought to revise its plan.

Kutztown argued that the Permittee's new plan revision is not "able to be implemented," as required by 25 Pa. Code § 71.32(d)(4) because the Permittee's legal right to cross a parcel of

the Appellant's land had not been established. The Board was not entirely sure that there was a property dispute in the appeal. Regardless, the Board explained that at the planning stage, potential issues need to be identified and carefully evaluated, but there is no requirement that the methods selected and proposals made for sewage treatment need to be absolutely certain of implementation. Furthermore, there is no statute, regulation, or case law that clearly requires a municipality engaged in sewage facilities planning to prove that it has property access at the planning stage.