



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



THREE RIVERS WATERKEEPER	:	
	:	
v.	:	EHB Docket No. 2025-087-W
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: October 23, 2026
PROTECTION and CALGON CARBON	:	
CORPORATION, Permittee	:	

**OPINION AND ORDER ON
MOTION TO STRIKE**

By MaryAnne Wesdock, Chief Judge and Chairperson

Synopsis

The Board denies a motion to strike the factual background material filed in the appellant’s brief supporting its response in opposition to a motion for summary judgment and the exhibits included in its response. The appellant’s response filings largely complied with the Board’s rule governing responses to motions for summary judgment. The challenged information did not prejudice the Department or prevent the Board from identifying the relevant factual disputes.

OPINION

The matter before us concerns Three Rivers Waterkeeper’s (“Waterkeeper’s”) appeal of the Department of Environmental Protection’s (“Department’s”) issuance of NPDES Permit No. PA0091227 (“Permit”) to Calgon Carbon Corporation (“Calgon Carbon”). Waterkeeper contends that the Department unlawfully issued the Permit without imposing limits on the discharge of PFAS into the Ohio River. On August 5, 2026, the Department filed a Motion for Summary Judgment.¹ Waterkeeper submitted its Response in Opposition to the Motion for Summary

¹ Calgon Carbon filed a Motion for Partial Summary Judgment that same day.

Judgment (“Opposition Response”) which included a concise statement opposing the motion for summary judgment, its response to the Department’s statement of undisputed material facts, and an accompanying brief supporting its opposition (“Opposition Brief”). On September 23, 2026, the Department filed its Reply Brief in Support of its Motion and, in addition, filed a motion to strike portions of Waterkeeper’s Opposition Brief. Waterkeeper filed its response to the motion to strike on October 7, 2026.

The motion to strike asks us to exclude portions of the “Factual Background” section of Waterkeeper’s Opposition Brief as well as several exhibits Waterkeeper included in its Opposition Response. Specifically, the Department contends that, in contradiction with the Board’s Rules, Waterkeeper improperly placed additional factual allegations and supporting exhibits in its Opposition Brief rather than including those facts in its response to the Department’s statement of undisputed material facts. The Department principally relies on 25 Pa. Code § 1021.94a(g)(2), which governs a party’s response to a statement of undisputed material facts at summary judgment. Section (g)(2) provides as follows:

A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant’s statement. Any response must include a citation to the portion of the record controverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted.

25 Pa. Code § 1021.94a(g)(2).

The Department argues that Waterkeeper’s Opposition Response failed to comply with the format laid out in Section 1021.94a(g)(2). Essentially, the Department’s legal theory is a

procedural one, asserting that Rule 1021.94a(g)(2) creates a defined place and format for factual disputes at summary judgment, and Waterkeeper cannot use its Opposition Brief as a backdoor for presenting factual allegations that should have appeared in its response to the Department's statement of undisputed material facts. Waterkeeper's formal response to the Department's statement of undisputed material facts was approximately three pages in length and added three separately numbered "Other Material Facts." However, Waterkeeper's Opposition Brief contained a roughly four-page "Factual Background" section that included numerous facts, along with cited exhibits, that were not included in the response to the statement of undisputed material facts. The Department characterizes those factual allegations as an attempt by Waterkeeper to supplement its factual response through its Opposition Brief rather than through the form required by Rule 1021.94a(g)(2). In a related page-limit argument, the Department contends that adding the Opposition Brief's four pages of additional factual material to the three-page response to undisputed facts results in a seven-page factual response, thereby violating the five-page limit imposed by Rule 1021.94a(g)(2). Finally, the Department points out that the Comment to Rule 1021.94a(g)(2) provides that "[t]he statement of material facts should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context." It argues that Waterkeeper's factual narrative is inconsistent with that directive.

In response to the Department's motion to strike, Waterkeeper posits that the Department's reading of Section 1021.94(g)(2) is overly narrow and is attempting to read in restrictions that the Rule does not impose. Waterkeeper disputes the Department's central premise that all additional facts must appear only in the five-page response to the movant's statement of undisputed material facts and argues that the Department misunderstands the different functions of the statement of

undisputed material facts and the supporting legal brief. According to Waterkeeper, the material facts statement is intended to identify the relatively limited set of facts that are truly undisputed and on which summary judgment may be granted. The accompanying brief, by contrast, may properly explain the factual background and legal context necessary to understand why the material facts, especially the disputed ones, matter. Waterkeeper also says that the Comment to Rule 1021.94a actually buttresses the way in which it organized its Opposition Response, arguing that the Comment's discouragement of placing "lengthy recitations of undisputed background facts or legal context" in the statement of material facts supports including such context in the brief rather than attempting to pack it into a five-page fact response.

After reviewing the parties' filings related to the motion for summary judgment and, of course, their arguments concerning striking certain portions of Waterkeeper's support brief, we do not believe the circumstances here warrant striking the challenged portions of Waterkeeper's Opposition Brief or the attached exhibits. Even assuming that Waterkeeper's Opposition Brief did not strictly conform to the structure contemplated by Rule 1021.94a, under the facts before us we find it inappropriate to grant the Department's motion to strike. The Board's rules governing summary judgment serve an important purpose. Among other things, they require the parties to identify with precision the material facts that are undisputed, the facts that remain in dispute, and the portions of the record supporting those requirements, and our decision here should not be understood as suggesting otherwise. However, nothing in the Rule prohibits a brief from discussing the factual background of the case or referring to evidence in the record where necessary to place the party's legal arguments in context. Notably, the Comment to Rule 1021.94a cautions that the statement of material facts should not contain lengthy recitations of background facts or

legal context, suggesting that the statement of material facts and the brief serve related but distinct functions.

That does not mean, however, that the requirements imposed by Rule 1021.94a(g)(2) may be avoided simply by relocating additional material facts to the legal brief. To the extent an opposing party relies upon additional facts as material facts which the Board must evaluate in resolving a motion for summary judgment, the Rule contemplates that those facts will be identified in the response to the statement of undisputed material facts, stated in separately numbered paragraphs, and supported by citations to the motion record. This structure enables the movant and the Board to readily distinguish those material facts that are undisputed from those that remain genuinely contested.

Waterkeeper largely complied with that procedure. It filed each of the documents contemplated by Rule 1021.94a(g), responded to the Department's statement of undisputed material facts, and identified three additional areas of factual dispute in separately numbered paragraphs supported by citations to the record. Its brief, however, contains a several-page factual background section that discusses additional facts and cites portions of the record that were not separately identified in its response to the Department's statement of undisputed material facts. To that extent, Waterkeeper's brief does not *technically* conform perfectly to the structure contemplated by Rule 1021.94a.

At the same time, the remedy for a departure from procedural rules should bear some relationship to its practical effect. We simply conclude that, in this instance, the divergence identified by the Department does not rise to a level warranting the relief requested. Our conclusion is consistent with the practical function of summary judgment procedure. The purpose of Rule 1021.94a is to enable the Board and the parties to identify the material facts relevant to the

motion, determine which of those facts are genuinely disputed, and evaluate whether the movant is entitled to judgment as a matter of law. The Department's objection principally concerns where, within Waterkeeper's otherwise authorized summary judgment filings, certain factual material and record citations appear. Waterkeeper filed a response to the Department's statement of undisputed material facts and a separate brief in opposition to the summary judgment motion. While portions of the factual discussion in Waterkeeper's brief arguably could have been more appropriately presented in the response to the Department's statement of undisputed material facts, whatever imperfections may exist in the Opposition Brief's format, the Department has failed to show how Waterkeeper's filing prevented the Department, or the Board, from identifying the relevant factual disputes and evaluating the record presented on summary judgment, or how it otherwise prejudices the Department.

Furthermore, the Board has repeatedly expressed that it favors resolving disputes on their substantive grounds rather than through procedurally based technical strategies. See *Citizens for Pennsylvania's Future v. DEP*, 2025 EHB 275, 301 (the Board reopened discovery where it was "consistent with the Board's preference to resolve cases on the merits and not through procedural maneuvering."); *Goheen v. DEP*, 2003 EHB 92, 97 ("We must remain ever mindful that the Board's primary responsibility is to decide cases on the merits."); *Cf. PQ Corp. v. DEP*, 2017 EHB 870, 876 n.4 ("the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected") (quoting *Neville Chem. Co. v. DEP*, 2003 EHB 530, 532).

That principle is not to say that compliance with the Board's procedural rules is optional. It is not. Parties should adhere to the format and limitations established by Rule 1021.94a. This Rule serves an important function by requiring parties to identify material facts relevant to

summary judgment, distinguish those that are genuinely disputed from those that are not, and cite the portions of the record supporting their positions. Complying with these requirements both facilitates efficient disposition of dispositive motions and avoids placing unnecessary burdens on the Board and opposing parties.

Under the circumstances presented here, striking pages 2 through 6 of Waterkeeper's Opposition Brief and the associated exhibits would elevate the form of Waterkeeper's presentation over the function that Rule 1021.94a is intended to serve.² We decline to do so. We conclude that any divergence from the Rule that Waterkeeper may have practiced here does not rise to a level warranting exclusion of substantive material from the Board's consideration of the merits of the summary judgment motion. We emphasize, however, that parties should endeavor to comply with the requirements governing summary judgment practice. The organization prescribed by Rule 1021.94a is not merely aspirational; it assists the Board in efficiently identifying the relevant record and determining whether a genuine issue of material fact exists. Our decision not to strike the challenged material in this instance should not be understood as approving noncompliance with the Board's summary judgment procedures.

² Waterkeeper does not object to striking the tabs for exhibits 18 through 20 because they were accidentally included as empty exhibit tabs and no actual exhibits were attached behind them.



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ORDER

AND NOW, this 23rd day of October, 2026, it is hereby ordered that the Department's Motion to strike is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Chief Judge and Chairperson

DATED: October 23, 2026

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