



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**WILLIAM (STEVE) JOHNSON
AND CHRISTINA JOHNSON**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and LOWER PAXTON
TOWNSHIP, Permittee**

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EHB Docket No. 2025-077-CS

Issued: July 2, 2026

**OPINION AND ORDER ON
PERMITTEE'S MOTION FOR SUMMARY JUDGMENT**

By Sarah L. Clark, Judge

Synopsis

The Board denies a Permittee's motion for summary judgment where waiver is inapplicable, issues of material fact remain in dispute, the record contains sufficient evidence of facts for the Appellants to make out a prima facie case, and the Department opted not to participate in summary judgment proceedings.

OPINION

Background

William Steve and Christina Johnson (Johnsons or Appellants), appearing pro se, have appealed the Department of Environmental Protection's (Department) approval of a renewal application for coverage under General Permit WMGM030, Composting Yard Waste Facilities Between Five Acres and Fifteen Acres (Renewal), which authorizes the composting of yard waste and beneficial use of the compost produced at a facility (Facility) owned and operated by Permittee Lower Paxton Township (Township or Permittee) located at 6613 Conway Road, Harrisburg, PA 17111. Appellants reside on a neighboring property at 6705 Conway Road, Harrisburg, PA 17111.

The Township submitted an application for renewal on March 19, 2025. On March 26, 2025, the Department issued an administrative Incompleteness Review Letter. On June 4, 2025, the Department issued a Technical Review Deficiency Letter. The Township provided responses on June 5 and June 6, 2025. The Department approved the Renewal application on June 6, 2025. According to the approval letter issued by the Department, comments relating to noise, dust and “other public nuisances” were received from the public via the Pa-Hodges Heights Community Association and concerned residents, and a meeting was held with the Township, the Department, and representatives of concerned citizens on May 27, 2025. In acknowledgement of the comments received, the letter states: “As the Department has no outstanding violations noted from inspections related to this facility, a determination was made to renew this permit. However, a site-specific, regional permit condition has been added to your permit that will require the submission of an enhanced nuisance control plan.” Accordingly, the Department included four site-specific permit conditions in its renewal:

1. Lower Paxton Township shall prepare and submit an enhanced Compost Facility Nuisance Control Plan to the Department for review and approval by September 12, 2025, unless otherwise approved by the Department in writing.
2. Lower Paxton Township shall prepare and submit a Form 27M – Acceptance of General Permit Conditions and Certificate of Liability Insurance to the Department by June 13, 2025.
3. Any final operation, design, or other plan developed subsequent to permit issuance which exhibits changes in structures, locations, specifications, control measures or other changes of substance shall be submitted to the Department for subsequent permit action. Any deviation of plans herein approved shall not be implemented before first obtaining a permit modification or written approval from the Department.
4. Nothing herein shall be construed to supersede, amend or authorize violation of the provision of any valid and applicable law, ordinance or regulation, provided that said local law, ordinance or regulation is not preempted by the Pennsylvania Solid Waste Management Act of July 7, 1980, Act 97, 35 P.S. §6018.101, et seq.

(Permittee Exhibit C.)

The Johnsons filed their timely appeal of the Renewal on July 2, 2025, claiming that the Department should not have approved the Renewal without first addressing the nuisance concerns raised by affected residents – specifically, noise, dust, odors, hours of operation, unsightly views and safety concerns. Because the Johnsons’ Notice of Appeal did not initially contain necessary information such as the Department’s action being appealed, the Board issued an Order to Perfect the appeal on July 3, 2025, to which the Appellants filed a complete response on July 7, 2025, and the appeal was deemed perfected that day. On September 11, 2025, the Township submitted its Enhanced Nuisance Control Plan (ENC Plan) to the Department, as required by the permit authorization. Pertinent aspects of the ENC Plan include:

Noise Minimization Procedures

The facility will take the following steps to mitigate noise:

- Equipment maintenance: All equipment will be regularly inspected and maintained to ensure proper mufflers and noise reduction devices are functioning. Time restrictions: No equipment will be operated outside of designated operating hours (e.g., 7:30 AM to 5:00 PM).
- Restricted equipment operation on Fridays: Equipment is now only operated on Fridays when weather conditions require turning of windrows.
- Mulch Berms: Mulch berms are installed along the north public access roadway and on the eastern property line to visually screen the adjacent properties and act as a noise barrier.
- Equipment Operation: Compost Facility staff will be instructed to minimize idling time and operate equipment in a manner that reduces unnecessary noise.
- Monitoring: Complaints or concerns related to noise will be documented and investigated promptly.

Dust Control Procedures

To minimize dust, the facility shall immediately implement the following practices:

- Watering: The Township has purchased a used tanker truck, to retrofit as an on-site water truck, for dust control and product quality. Once the tanker truck is operational, roads and material handling areas will be wetted with water trucks or fixed sprinklers during dry or windy conditions, as needed.

- Operation of facility: The Township has installed a windsock near the commercial entrance.
- Grinding, screening, turning, and loading operations will stop when wind speeds exceed 10 knots (11.5 mph).
- Speed limits: Vehicle speed shall be limited to 5 mph on all roads within the facility. Existing speed limit signs are located along the public access roadway. Additionally, a speed bump has been installed at the commercial entrance to reduce speed of trucks entering and existing [sic] the facility.
- Material handling: Material will be handled gently to minimize drop heights and reduce dust clouds.
- Windrow placement: Windrows will be oriented perpendicular to prevailing winds where feasible to reduce windborne dust.
- Visual monitoring: Facility personnel will visually monitor for dust generation and take immediate corrective action if excessive dust is observed.

(P. Exhibit K.) The ENC Plan also includes a section entitled “future control measures,” which details future efforts to reduce noise and dust impacts, including repairs and maintenance of aging equipment to mitigate noise, and facility capital improvements to mitigate dust. (P. Exhibit K.) It is unclear from the record whether these measures have been implemented at this time.

Following a brief uncontested continuance requested by the Permittee to accommodate its counsel’s move between firms, the Township filed the present Motion for Summary Judgment and supporting brief and documents (Motion) on April 1, 2026. On April 6, 2026, the Board docketed a letter from the Department in which the Department indicated that it would not be filing a response to the Motion. The Appellants filed their Response and supporting documents (Response) to the Motion on April 29, 2026, and the Township filed its reply brief (Reply) on May 14, 2026.

Standard

Summary judgment may be granted only when the record – including pleadings, depositions, answers to interrogatories, and other related documents – shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

Pa.R.Civ. P. 1035.1- 1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. The party who brought the motion has the burden of proving that no genuine issue of fact exists. *Shoats v. Commr., Pennsylvania Dept. of Corrections*, 591 A.2d 326, 330 (Pa. Cmwlth. 1991). The Board views the summary judgment record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587; *Stedje v. DEP*, 2015 EHB 31, 33. Summary judgment is also available:

[I]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2(2); *Beech Mountain*, 2023 EHB at 223-224; *Whitehall Twp. v. DEP*, 2017 EHB 160, 163. In other words, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a prima facie case. *Longenecker v. DEP*, 2016 EHB 552, 554; *Morrison v. DEP*, 2016 EHB 717, 720. In third-party appeals of the Department's issuance or renewal of a permit, the party protesting the issuance of the permit bears the burden of proof to show that the Department erred in issuing the permit. 25 Pa. Code § 1021.122(2).

Issues involving mixed questions of fact and law should be decided at a full hearing and are typically not appropriate for summary judgment. *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 341, 347. "A motion for summary judgment is not the appropriate place for [the Board] to make decisions regarding the quality of evidence when [it has] not yet heard testimony." *Diehl v. DEP*, 2018 EHB 18, 28. Summary judgment is granted only where the right to such judgment is clear and free from doubt, *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007); *Sierra Club v. DEP*, 2023 EHB 97, 99; *Pileggi v. DEP*, 2023 EHB 288, 291, and only in the "clearest of cases." *Eighty Four Mining Company*, 2019 EHB at 587.

Discussion

By its Motion, the Township presents three reasons why it believes summary judgment should be granted in its favor. First, the Township argues that the Appellants have raised complaints through their depositions and discovery responses that were not included in their Notice of Appeal, and those complaints should therefore be waived. Second, the Township contends that, even if we find that the complaints are not waived, the Johnsons cannot establish a prima facie case based on any violation of law or regulation by the Department or lack of compliance regarding submissions on the part of the Permittee. Third, the Township asserts that the Johnsons' participation in the comment period, and the Township's subsequent submission of the ENC Plan as required by the Renewal, together sufficiently address both the Appellants' legal rights as well as their practical concerns.

Waiver

The Township argues that the Appellants did not raise complaints regarding violations of specific conditions of the General Permit in the initial notice of appeal and the arguments should consequently be waived. We have long held that issues not raised in the notice of appeal are waived. *Center for Coalfield Justice v. DEP*, 2016 EHB 523, 525; *Rhodes v. DEP*, 2009 EHB 325, 327; *Williams v. DEP*, 1999 EHB 708, 711. The purpose of the waiver rule is to "ensure that the party filing the appeal identifies the scope of the challenge to the Department's action to allow proper discovery and to prevent surprise at the time of the hearing." *Center for Coalfield Justice*, 2016 EHB at 526. However, "[s]o long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver." *Rhodes*, 2009 EHB at 327.

In its Motion, the Township states that the Appellants did not express specific health or safety concerns prior to the Permittee and Department's discovery requests. This is simply untrue. Likewise, the Township takes issue with Mr. Johnson citing "[f]or the first time" General Permit Condition No. 18 – "the activities authorized by this [G]eneral [P]ermit shall not harm *or present a threat of harm* to the health, safety, or welfare of people or environment of this commonwealth." (Brief in Support of Motion (Brief) at 5-6, (emphasis added)) – in response to a deposition question asking which specific permit condition he alleges is not being enforced. While the Notice of Appeal does not cite General Permit Condition No. 18 by name, nor particular health issues arising from the Facility's operations, it clearly mentions "safety risks" on several occasions, as well as concerns about the Appellants' well-being. In other words, the Johnsons' Notice of Appeal is replete with allegations that the Facility's continued operation *does* "present a threat to of harm to the health, safety, or welfare of people...of this Commonwealth." For example, in their Notice of Appeal, the Johnsons state:

On the day representatives from the Department of Environmental Protection (DEP) came out to inspect the Lower Paxton Township Compost site, they failed to visit my property. However, the Lower Paxton Township Director of Public Works, Mathew Jaroslowski, and a police officer who was taking sound recordings did stop by. As Mr. Jaroslowski and I stood on my back porch and the officer in the yard a few feet away while still taking readings, they started up the Windrow turner. A twig about ¼ inch in diameter and about 5 inches long came hurdling out of the sky and landed about two feet behind the officer. Mr. Jaroslowski looked at me in surprise and puzzlement. This incident highlights the safety risks and debris associated with the facility's operations.

(Notice Of Appeal (NOA) at 1.) The Johnsons' Notice of Appeal further reads: "The noise, dust, odors, and safety concerns are not just nuisances but pose real threats to our quality of life and well-being." (NOA at 2.) Under our Rules, "the appellant need only list its specific objections to the Department's action." *A.W. Long Coal Company, Inc. v. DEP*, EHB Docket No. 2025-137-L, (Opinion and Order on Motion for Partial Dismissal and to Limit Issues or, in the Alternative,

Partial Summary Judgment issued (June 8, 2026)) citing 25 Pa. Code § 1021.51(e). In their Notice of Appeal, the Johnsons make objections to the Department’s Renewal of the General Permit based on their concerns regarding the various *risks* – or “threat[s] of harm to the health, safety, or welfare of the people...of this Commonwealth” to use the General Permit’s language – of continued operations as they see it. Further, Board caselaw unequivocally requires that we “interpret notices of appeal liberally and construe them broadly.” *Id.*; *Protect PT v. DEP*, 2025 EHB 595, 600; *Rhodes*, 2009 EHB at 327.

Interpreted appropriately and within the context of the Johnsons’ actual objections, it is undeniable that the Johnsons have not waived their claims related to alleged health and safety risks associated with the Facility. Indeed, what the Permittee classifies as “Newly Established Complaints in [Appellants’] Depositions and Discovery Responses” (Brief at 5) in its Motion appear to simply be elaborations on the concerns stated in the Notice of Appeal. The Township should not have been surprised by these elaborations as they fit squarely within the genre of the issue of health and safety concerns raised in the Notice of Appeal, and, notably, it was the Permittee asking the questions that lead to these elaborations. From our perspective, this appears to be nothing more or less than discovery functioning properly. Finally, if anything, the Appellants’ discovery responses cited by the Township cut against – not in favor of – summary judgment here, as they contain material facts in dispute pertaining to the question of whether the Department should have granted the Renewal without first addressing the alleged significant impact on the local community.

Following its arguments for waiver of the Johnsons’ health and safety concerns, the Township also asks that we find that the Appellants have waived the right to make arguments under Article I, Section 27 of the Pennsylvania Constitution, as well as 25 Pa. Code Chapter 123

and the Solid Waste Management Act, because they failed to include citations to the same in their Notice of Appeal. However, “[a]ppellants are not required to cite specific regulations in their notices of appeal. Furthermore, only issues that are clearly outside the scope of challenges raised in the notice of appeal are waived, and the Board will not find a waiver unless the matter is free from doubt.” *Goheen v. DEP*, 2003 EHB 92, 95.

This question is far from “free from doubt.” In its Motion, the Township does not analyze the Appellants’ objections to show that these laws are clearly outside the scope of the challenges raised in the Notice of Appeal, and instead puts forth only the following sentence to argue that waiver applies here: “Upon review of Appellants [sic] listed objections, which are outlined as concerns of enforcement of conditions of the General Permit, there are no constitutional arguments, no mention of a violation of 25 Pa. Code Chapter 123 or the Solid Waste Management Act specifically raised in the Notice of Appeal and should therefore be deemed waived.” (Brief at 7.) But, construed broadly and in the light most favorable to the non-moving party at the summary judgment stage, objections to the Department’s alleged lack of enforcement of permit conditions intended to safeguard the health and safety of the people and environment of the Commonwealth could be read to encompass an objection to the Department’s trustee duties arising under Article I, Section 27, and objections to “noise, dirt, ... unsightly views, and odors” (NOA at 2) could be read to encompass the allegation that the Township is failing to maintain waste in violation of 25 Pa. Code Chapter 123 and the Solid Waste Management Act. This is not to say that we are reading those objections to encompass the aforementioned laws and regulations, or that the Appellants would be able to support those allegations at a hearing on the merits. We are simply indicating that we cannot find waiver where the moving party fails to provide any substantive analysis in support of its argument and instead relies on a lack of specific words in the Notice of Appeal.

Finally, the Township states: “Alternatively, if this Board finds that these arguments were not waived, complex issues such as the intricacies of the Pennsylvania Constitution or Solid Waste Management Act generally require expert testimony outside of general observations of the Appellants. The Appellants, while making statements that an expert would ultimately opine on, have not produced an expert to support their burden.” (Brief at 7.) However, whether the Appellants can support their allegations is not the question presented by the waiver rule. It is, once again, whether the arguments fit within the genre of objections listed in the Notice of Appeal, the purpose of which is to define the scope of the appeal and prevent surprises to adverse parties. Further, we have previously declined to grant summary judgment on the basis of an appellant’s failure to identify an expert witness in discovery, particularly where, as here, there are aspects of the case that can proceed without expert testimony. *Morrison*, 2016 EHB at 722; *Casey v. DEP*, 2014 EHB 439, 453. In the event that this matter advances to a hearing on the merits, the Township is invited to challenge – with specific and thoughtful analysis – whether the Appellants are precluded from presenting such evidence without an expert through the proper vehicle: a motion in limine. Unless and until that time arrives, we decline to find that the Appellants waived any of the arguments challenged by the Permittee.

Prima Facie Case

The Township next argues that we should find in its favor and dismiss this appeal because “the Appellants Cannot Establish a Prima Facie Case that the Department Violated any Law or Regulation in Granting the General Permit and the Township Complied with all Required Submissions to be Reviewed by the Department.” (Brief at 8.) But whether the Department violated any law or regulation, and whether the Permittee complied with the Renewal application terms, are only facets of our comprehensive de novo review. Rather, in third-party appeals of

Department actions such as this, the Appellants “must show by a preponderance of the evidence that the Department acted unreasonably *or* contrary to law, that its discretion is not supported by the facts, *or* that it is inconsistent with the Department’s obligations under the Pennsylvania Constitution.” *Longenecker*, 2016 EHB at 554 (emphasis added). Therefore, “contrary to law” is but one of four enumerated paths we tread as we seek to determine whether there was indeed error. By their Response, the Appellants argue that “1. DEP abused its discretion by approving and renewing a permit that **fails to prevent prohibited conditions**, and 2. Permit conditions are **inadequate as applied to this site[,]**” (Response at 3), arguments that speak to both the Department’s reasonability and the facts – or lack thereof – supporting its use of discretion. These arguments are further supported by copious record evidence that easily rise to the level of stating a *prima facie* case at summary judgment, thus clearly falling within the above-quoted standard.

However, the Township appears to have conflated the Appellants’ burden here at summary judgment to provide sufficient evidence and argument to *state* a *prima facie* case with the burden at a hearing on the merits of *proving* that case by a preponderance of the evidence. As we have said before, “[a] motion for summary judgment is not the appropriate place for [the Board] to make decisions regarding the quality of evidence when [it has] not yet heard testimony.” *Diehl v. DEP*, 2018 EHB at 28. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Longenecker*, 2016 EHB at 554. At summary judgment, we look to the record to determine if it contains sufficient evidence of facts to make out a *prima facie* case. *Morrison*, 2016 EHB at 720. We also view the record in the light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Id.* Thus far, the record here includes the Notice of Appeal, the Permittee’s Motion and attendant documents, the Department’s Letter indicating disinterest in participating in this

summary judgment action, the Appellants' Response and attendant documents, and the Permittee's Reply. While this is not a fully developed record, it is certainly a robust record.

Instead of addressing the Johnsons' arguments or engaging with their evidence, which is not insignificant in volume and relevance, the Township, in both its Motion and Reply, continually points to the Appellants' inability to name a specific law or regulation violated by the Department as evidence that they cannot establish a prima facie case. In its Reply, the Township merely parrots the same inspection notes quoted in its Motion, asserts that there are no material facts in dispute on the issue of its compliance with the Renewal terms, and states that the Appellants' basis for their claims of alleged violations is "sheer personal observation." (Reply at 2-3.) Again, this is simply untrue.

Included in the Johnsons' Response documents – and thus in the summary judgment record – are several official Lower Paxton Township Bureau of Police Incident Report Forms for noise complaints filed by Mr. Johnson that contain elevated decibel readings which appear to be above the limits contained in the Township's own ordinance regarding noise (Noise Ordinance). For example:

LP-25-005068 (March 7, 2025): I began the measurement of sound at the metal chain link fence behind [redacted] Conway Road. This was a windy day and although the meter has a wind resistant ball on top, it was showing in the readings. I had readings between 63.7-82.0 dBC. The highest of the reading did come with a strong wind. I then stood at the property line with Johnson. ... The readings at the property line were between 60 – 75 dBC. ... Johnson requested that I come inside his house and listen to the noise. I went in and the readings dropped to the low 50's. Once the windows were open, the readings came up to 60-70 dBC.

(Appellant Ex. H.)

LP-25-016324 (June 18, 2025): I could actively hear the noise coming from machinery at the compost facility. I took decibel readings from the back of Johnson's property. I took readings for several minutes and they were consistently in the mid to low 60s (between 62Db and 64Db). However for a period of time the

readings did go up and remained consistent in the high 60s (between 67Db and 68Db). The highest momentary reading I got was 69.7Db.

(Appellant Ex. F.)

LP-25-023946 (November 12, 2025): ...took readings from Johnson's back porch. The decibel reading from the facility measured between 62 and 64 decibels. The reading spiked briefly to 65.8.

(Appellant Ex. G.)

Additionally, a June 5, 2025 Department inspection report makes reference to police report LP-25-012255, which has not been included in the record. According to the inspection report, Department personnel “observed the meter while the officer was on site at the Facility and did not see the meter go past 65 decibels during either machine operation.” (Permittee Ex. N.) The inspection report further reads:

According to the police report LP-25-012255 readings were also taken on the southeast corner of the complainant’s property while the windrow turner was operating. According to the police report LP-25-012255, those readings were 55-60 dBA, and readings taken on the southwest corner of the complainant’s property while the windrow turner was operating were 60-62 dBA.

(Permittee Ex. N.)

The Lower Paxton Township Noise Ordinance provides that “No principal or accessory use, or operations or activities on its lot, shall generate a sound level exceeding the limits established in the table below, when measured at the specified locations.” Lower Paxton Ordinance No. 20-02, § 131-2 A.¹ A plain language reading of the Noise Ordinance, including the reference table, indicates that the sound level limits are designated by the *receiving* land use/district. *Id.* While it is not apparent from the record or the Motion which limit the Township considers applicable to the Johnsons’ property, a brief search of the Lower Paxton Township Code and

¹ This [link](#) to the Noise Ordinance was provided to the Board via the Permittee’s Motion and can be found on page 9 n. 4 of its Brief.

attached Official Zoning Map makes it abundantly clear that the Johnsons' property – the receiving property – is squarely within an R1 Low Density Residential District. Lower Paxton Township, Zoning Ordinance § 203-301 (2025). For a residential district, the noise limit is measured at the lot line of the receiving residential use and set at 60dBA between the hours of 7:00 am and 9:00 pm other than Sundays and certain enumerated holidays, upon which the level is 55 dBA between 9:00 pm and 7:00 am, and the Facility does not obviously fall within any exceptions listed in the Noise Ordinance. Lower Paxton Ordinance No. 20-02, § 131-2 A-B.

Although the Township asserts: “[n]otably, the Department does not have the authority to regulate noise and defers to the Township ordinance for enforcement of the same. The township does maintain a noise ordinance pursuant to Lower Paxton Township Ordinance No [sic] 20-02” (Brief at 9 n. 4), it does not appear that any enforcement action has been, or will be, taken regarding elevated readings, with each of the respective Township police reports concluding that no further action is necessary. (*See* Appellants’ Ex. F-H.) This apparent disinterest in enforcing its own Noise Ordinance evokes the proverbial fox guarding the hen house, again implicating the Johnsons’ challenges to the reasonability of the Department’s approval of the Renewal. Further, what is clear from these few examples, let alone the entirety of the record as it stands thus far, is that there is sufficient evidence of facts for the Johnsons to make out a *prima facie* case at summary judgment. What remains to be seen is if they can prove their case by a preponderance of the evidence at a hearing on the merits with a fully developed record.

Enhanced Nuisance Control Plan

The Township next argues that the Johnsons’ appeal is based on the Township’s compliance with the Permit, the requirements of which – according to the Township – have been addressed through the ENC Plan and “[t]horoughly [v]etted with Appellants.” (Brief at 13.) The

Permittee asserts that the Appellants' allegations that the Renewal was approved without addressing the significant impact on the surrounding community is inaccurate because the Appellants and other concerned community members were given opportunities to comment on the Renewal application. The Permittee then details those opportunities, concluding that: "The Township meetings, the environmental justice policy, the meeting with the Department, and notice published by the Township regarding the Facility's request for a renewal of its permit leave no doubt that the Johnsons and the surrounding community were given an opportunity to be heard." (Brief at 14.) We do not disagree that, according to the record as it currently stands, it appears as though the Johnsons and other concerned citizens were afforded, and made use of, significant opportunity to comment on, and otherwise express their reservations to, the Renewal. However, it is apparent from the record that the Johnsons are not arguing that they did not have an opportunity to comment on the Renewal, but, rather, that the Department's approval of the Renewal was improper without the ENC Plan first being submitted, reviewed, and implemented. Or, in other words – indeed, the Township's own – that "[t]he Appellants specifically allege that the renewal [sic] the General Permit was done without addressing the significant impact on the local community." (Brief at 13.) It also appears that, in addition to misclassifying the Appellants' argument, the Permittee has, once again, mistaken the summary judgment standard with that of an adjudication following a hearing on the merits and fully developed record.

To support its contention that summary judgment in its favor is proper based on the Johnsons having had the opportunity to be heard, the Township quotes our Adjudication in *Brockway Borough Municipal Authority v. DEP*, which states: "[t]o comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty, or property." 2015 EHB 221, 246. While this is an accurate recitation of law and

appropriately applied in *Brockway*, the procedural postures and Appellants' arguments in both this appeal and *Brockway* make it abundantly clear that the application of the same at *this* stage in *this* appeal would be entirely inappropriate. Indeed, a mere paragraph beyond the above quotation, we said:

In any event, the Board's jurisdiction and de novo review afford due process to all appellants such as the Authority. "Due process is provided by the Pennsylvania Environmental Hearing Board, not the Department of Environmental Protection which is a party in the case." The Department's position regarding the Authority's concerns was obviously presented in great detail in proceedings before this Board. The Authority had the opportunity to conduct discovery, depose Department witnesses, present its objections to this Board, and cross-examine the Department and [Permittee] Flatirons's witnesses. The Authority's right to due process has clearly been satisfied.

Brockway, 2015 EHB at 247 (internal citations omitted). In *Brockway*, unlike the current appeal, the Appellant did contend that its due process rights were violated, and we only concluded that they were not following two appeals before the Board, culminating in three days of hearings and extensive briefing. Here, we have only received argument and evidence from two of the three parties to this matter – the Department having chosen to forgo participation in these summary judgment proceedings – making the record far from complete, both in terms of full party participation, as well as issues and evidence not raised at summary judgment. Further, no cross-examination has occurred at a hearing on the merits, and we disagree with the Permittee's interpretation of the Appellants' arguments on this issue. Finally, the issue of compliance is nearly always a mixed question of fact and law inappropriate for summary judgment, and in this case, detailed further below, it is clear that there are many material facts in dispute on both the issue of compliance with the Renewal terms and whether the Township's ENC Plan adequately fulfills the Special Conditions, which both speak to the question of whether the Department's action was proper.

Next, the Township insists that the mere existence of the ENC Plan sufficiently addresses the myriad concerns brought by the Johnsons and other concerned residents prior to the Department's approval of the Renewal, stating:

all concerns raised by the Johnsons in their appeal were addressed prior to, during, and after the July 2025 Notice of Appeal was filed. Specifically, the Township submitted its Enhanced Nuisance Control Plan ("ENC Plan") on or before September 12, 2025. The Township has also continued its efforts of supplementing and updating the ENC Plan with the Department. Additionally, at a September 2025 Township Board of Supervisors meeting, the Township Director of Public Works presented information on the ENC Plan that was initially submitted and continued efforts of the Township in terms of addressing the Johnsons [sic] raised concerns[,] including but not limited to the installation and implementation of mechanisms for reduction of sound/noise, dust, wind, providing residents with methane detectors, installation of berms, set hours and days of operation, change in fee schedule and availability to residents, and speed bumps and speed limits.

(Brief at 15 (internal citations omitted)). Be that as it may, The Johnsons' Response alleges that, while the ENC Plan has been in place since September of 2025, much of what it seeks to accomplish – namely the reduction of dust, noise, and other public nuisances – continues to miss the mark. The Township denies allegations of continued issues following the submission of the ENC Plan, asserting: "To date and based on information currently available, the Township is unaware of any complaints since the submission of the ENC Plan and further efforts." (Brief at 15.) To the contrary, at least² one of the police reports, LP-25-023946, which reported decibel readings above the residential limit on the Johnsons' property, is dated November 12, 2025, well after the ENC Plan was submitted on September 11, 2025. It is concerning that the Township, which presumably has access to its own police reports, claims to be unaware of a report made nearly five months prior to the filing of its Motion. Indeed, this claim indicates, at best, a profound

² While the Appellants' Exhibit I, a log of Facility-related incidents maintained by Mr. Johnson, includes what appear to be numerous instances of contacting the police department, only three official police records for noise complaints have been included in the record thus far.

lack of organization and awareness regarding what the various bodies under the Township's auspices are doing, or, at worst, an intent to obfuscate to this Board. It is one thing for a party to choose not to engage with adverse evidence; it is another entirely to deny its existence.

This report, along with the library of documentary, photographic, and videographic evidence from which it came, makes it clear that there are significant issues of material fact inappropriate for disposition at summary judgment. The record not only raises questions of material fact regarding the efficacy and enforcement of the ENC Plan, but also regarding the Department's process upon receipt of the ENC Plan, including whether there is guidance on preparing an ENC Plan and whether once received, the Department need act in any way upon the ENC Plan. What we do know is that the Department found the residents' concerns sufficiently voluminous and/or serious to require the submission and enactment of an ENC Plan as a condition of the Renewal.

Conclusion

We do not opine on whether the Appellants can prove their claims at a hearing on the merits, particularly without the assistance of an expert witness. While we agree with few of the arguments put forth by the Township here at summary judgment, we do agree that the preponderance of the evidence burden held by third-party appellants such as the Johnsons is a heavy one. However, at summary judgment, it is not the respondents' burden to prove their case, but instead to show that the record contains sufficient evidence of fact and/or contested issues of material fact to require the case to proceed to a hearing on the merits. Summary judgment is really only appropriate where there are clear questions of law, not mixed questions of law and fact or questions regarding credibility. Read in the light most favorable to the non-moving party, here the



Appellants, and construing all questions of whether material facts remain in issue in their favor, it is unequivocal that the Permittee's Motion for summary judgment must be denied.

Accordingly, we issue the following Order.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM (STEVE) JOHNSON
AND CHRISTINA JOHNSON

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and LOWER PAXTON
TOWNSHIP, Permittee

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EHB Docket No. 2025-077-CS

ORDER

AND NOW, this 2nd day of July, 2026, it is **ordered** that the Permittee's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Sarah L. Clark

SARAH L. CLARK

Judge

DATED: July 2, 2026

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

For the Commonwealth of PA, DEP:
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For Permittee:
Kayla Zizzi, Esquire
Kevin Hall, Esquire
Lee Stinnett, Esquire
(via *electronic filing system*)