



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 BY :
AND THROUGH ITS TRUSTEE LAUREL A :
HIRT and LAUREL A. HIRT, Individually :

v. :

EHB Docket No. 2025-005-W
(Consolidated with 2025-022-W
and 2025-118-W)

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and ERIE COUNTY :
CONSERVATION DISTRICT and :
MILLCREEK TOWNSHIP SCHOOL :
DISTRICT, Permittee :

Issued: July 1, 2026

OPINION AND ORDER ON
APPELLANTS' MOTION TO COMPEL DIRECTED TO MILLCREEK TOWNSHIP
SCHOOL DISTRICT

By MaryAnne Wesdock, Judge

Synopsis

Where a party asserting a privilege in response to a motion to compel the production of documents fails to provide sufficient information to establish that the asserted privilege applies, the Board may require the production of a privilege log to permit meaningful evaluation of the privilege claim.

OPINION

Introduction

This matter involves three consolidated appeals filed with the Environmental Hearing Board (Board) by Angela Cres Trust of June 25, 1998 by and through its trustee Laurel A. Hirt and by Laurel A. Hirt, individually (collectively, the Trust). The appeals challenge the grant of

coverage under Chapter 105 Bureau of Waterways Engineering and Wetlands General Permit-4 (the general permit or GP-4) to Millcreek Township School District (School District) by the Erie County Conservation District (Conservation District), as delegated by the Department of Environmental Protection (Department). Registration under the general permit authorizes the School District to construct an outfall for stormwater on property adjacent to that owned by the Trust. The project is known as the Asbury Storm Sewer Relocation Project (project) and is part of a larger system aimed at managing stormwater in the area across from the Trust property along Sterrettania Road in Millcreek Township, Erie County.

The history of this matter was recently set forth in Opinions issued by the Board on April 16, 2026 and June 25, 2026. *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W (Consolidated) (Opinion and Order on Motion for Stay issued June 25, 2026); *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W (Consolidated) (Opinion and Order on Motions for Summary Judgment issued Apr. 16, 2026). There is also separate yet related litigation regarding the project and the Trust property before the Erie County Court of Common Pleas (the 2013 litigation).

Background

On March 4, 2026, the Trust filed a motion to compel (March 2026 motion) directed at the School District seeking the production of documents and communications related to revised erosion and sediment control (E&S) plans prepared by the School District's environmental consultant, Mr. Michael Sanford. On March 19, 2026, the School District filed a response in opposition to the motion to compel, arguing that the documents and communications were privileged and/or not relevant to the appeal because the Conservation District did not rely on the documents when approving the general permit. The Trust then filed a motion for permission to file a reply, to which the proposed reply was attached, and the School District filed a response in

opposition. On April 3, 2026, this Board issued an Opinion and Order (April Opinion) granting the Trust's motion for permission to file a reply and granting the motion to compel in part. Specifically, the Board found that because our review is de novo, we may consider evidence that was not presented to the Conservation District and as such, there was no merit to the School District's relevancy argument. Recognizing the privilege argument, however, the Board ordered the School District to produce all non-privileged documents pertaining to the revised E&S plans.

On May 1, 2026, the Trust filed a second motion to compel (May 2026 motion) directed at the School District, arguing that the School District failed to adequately comply with the Board's April Opinion. The School District filed a response in opposition to the May 2026 motion, arguing that the motion should be treated as a petition for reconsideration of the Board's April Opinion and that it has produced all documents, not privileged, regarding the revised E&S plans. Just as it did with its first motion to compel, the Trust filed a motion for permission to file a reply with the proposed reply attached as an exhibit and because the School District did not file a response in opposition, the Board issued an Order granting the motion for permission to file a reply on June 8, 2026. We now rule on the May 2026 motion to compel.

Parties' Arguments

In its May 2026 motion, the Trust alleges that in response to the Board's April Opinion, the School District produced primarily drafts of E&S plans, but no other documents concerning the revisions. The Trust contacted the School District to confirm that the School District was withholding documents pursuant to a claimed privilege, namely the work product doctrine, which the School District confirmed. (Trust Motion, Exhibit 2.) The Trust argues that the School District has not provided adequate justification in support of the claimed privilege. It contends that because the School District is the party asserting a privilege against a discovery request, it "bears the burden

of proving that its withheld materials are actually protected from disclosure” and the failure to do so “means that the documents are not in fact protected.” (Trust Motion, paras. 16, 17 (citing *King v. Kappa Sigma Fraternity*, 331 A.3d 695, 700 (Pa. Super. 2025); *Fisher v. Erie Ins. Exch.*, 258 A.3d 451, 461 (Pa. Super. 2021); *Ignelzi v. Ogg, Cordes, Murphy and Ignelzi, LLP*, 160 A.3d 805, 813 (Pa. Super 2017)).)

The Trust also alleges that the School District’s communications with Mr. Sanford are not protected by the attorney work product privilege, which is designed to protect the mental impressions and processes of an attorney acting on behalf of a client. The Trust notes that the School District has previously stated that Mr. Sanford was engaged “to prepare the plans and technical specifications for the relocation [of the pipe]” and as such, argues that his role extends beyond that of a non-testifying expert. (Trust Motion, Exhibit 1.) Accordingly, the Trust argues that the attorney work product privilege only extends to documents where Mr. Sanford was assisting the lawyers in providing legal advice.

The School District devotes a large portion of its response toward arguing that the Trust’s motion to compel should be treated as a petition for reconsideration of the Board’s April Opinion. It asserts that the May 2026 motion makes identical arguments to the Trust’s March 2026 motion. The School District argues that the motion should be denied because the May 2026 motion is substantively the same as the March 2026 motion and was filed more than 10 days after the Board’s April Opinion. Therefore, a petition for reconsideration would be untimely under 25 Pa. Code § 1021.151(a). We disagree that the Trust is asking the Board to reconsider its April Opinion and rather find that the Trust’s May 2026 motion asserts that the School District has failed to appropriately comply with the Board’s April Opinion.

The School District also re-asserts its argument that documents and communications exchanged between the School District and Mr. Sanford are privileged because “documents prepared for—and communications with—attorneys by their agents in anticipation of litigation are privileged.” (School District Response, p.6 (citing *U.S. v. Nobles*, 422 U.S. 225 (1975); *Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. Ct. 1995).). The School District maintains that it retained Mr. Sanford in anticipation of the 2013 litigation before the Erie County Court of Common Pleas and refers the Board to Mr. Sanford’s verified affidavit outlining his engagement with the School District that was filed as an attachment to its response to the March 2026 motion.

Finally, the School District asserts that it has already produced all non-privileged documents that it has regarding the E&S plan revisions. It contends that the Trust’s assertion that the School District is withholding *non-privileged* documents is speculative, utilizing language that it “thinks” additional documents exist and “expects” that additional documents might include those that are outlined in the motion to compel.

Standard of Review

With only limited exceptions, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Lananger v. DEP*, 2025 EHB 130, 133; *Protect PT v. DEP*, 2020 EHB 326, 333. “[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required.” *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

The Rules of Civil Procedure establish that generally, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the case. Pa.R.Civ.P. 4003.1; *Ullom v. DEP*, 2025 EHB 375, 377. One limitation on that rule is set forth in Rule 4003.3,

which provides that “discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.Civ.P. 4003.3. Another limitation on that rule is set forth in Rule 4003.5, which limits the manner in which a party may discover facts known and opinions held by an expert “acquired or developed in anticipation of litigation or for trial.” Pa.R.Civ.P. 4003.5(a). Further under Rule 4003.5, a party may not discover communications between another party’s attorney and their expert absent circumstances warranting the disclosure of privileged communications. Pa.R.Civ.P. 4003.5(a)(4).

“Pennsylvania law generally applies a burden-shifting framework to assertions of . . . privilege, where the party invoking the privilege must first set forth facts establishing that the privilege is properly invoked, and the party seeking the information must then set forth facts establishing that disclosure will not violate the privilege.” *Tri-Realty Company v. DEP*, 2015 EHB 184, 189 (citing *St. Luke's Hosp. of Bethlehem v. Vivian*, 99 A.3d 534, 542 (Pa. Super. 2014)). Our Commonwealth Court has held:

"The party asserting the privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome the privilege has the burden to prove an applicable exception to the privilege." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Cmwlth. 2001) (emphasis added). Our federal courts have held that "[t]o sustain this burden of proof, the party asserting the privilege **must show**, by record evidence such as affidavits, **'sufficient facts as to bring the [communications at issue] within the narrow confines of the privilege.'**" *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 688 (E.D. Pa. 1986) (bold emphasis added) (quoting *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 636 (E.D. Pa. 1979)).¹⁰ "[T]he attorney client-privilege must be asserted with respect to each question sought to be avoided or document sought to be withheld, 'rather than as a single, blanket assertion.' [U.S. v.] *Rockwell Int'l*],

897 F.2d [1255,] 1265 [(3d. Cir. 1990).]" *Yang v. Reno*, 157 F.R.D. 625, 636 (M.D. Pa. 1994).

Twp. of Neshannock v. Kirila Contrs., Inc., 181 A.3d 467, 474 (Pa. Cmwlth. Ct. 2018).

Discussion

As a preliminary matter, we note that a number of privileges and protections are discussed throughout the parties' various filings and associated exhibits: the attorney work product doctrine, the attorney client privilege, and protections afforded to non-testifying experts. Here, the School District appears to rely upon protections afforded by Pennsylvania Rules of Civil Procedure 4003.3 (attorney work product) and 4003.5 (non-testifying expert retained in anticipation of litigation) in support of its decision to withhold certain documents and communications as privileged. Regardless of which of these protections the School District invokes, the threshold issue for purposes of this motion is whether it has provided sufficient information to establish that the asserted protections have been properly invoked.

In asserting its privilege claims over the documents and communications at issue here, the School District relies entirely on an affidavit supplied by Mr. Sanford to establish that the privileges were properly invoked. In the affidavit, Mr. Sanford avers that he was retained by the School District in March 2024 to provide assistance for a project that would relocate the stormwater pipe along Sterrettania Road, i.e. the Asbury Storm Sewer Project, because of the pending 2013 litigation involving the validity of an easement on the Trust property. He states that his work on the project included preparing technical specifications, applying for the GP-4, and preparing the E&S plan. Specifically, in January 2025 he submitted the GP-4 to the Conservation District, in April 2025 he modified the technical specifications for the project by adding riprap to the project, and in December 2025 and January 2026 he prepared and submitted revised E&S plans

to the Conservation District. He states that other than those activities, he has not provided any documents regarding the project to the Conservation District or the Department.

Where a party makes a claim of privilege, the Board presumes that the claim is justified and made in good faith. *Primrose Creek Watershed Association v. DEP*, 2013 EHB 187, 191. Nevertheless, where that claim is challenged, the Board must assess whether the privilege applies, and the party asserting the privilege bears the burden of providing sufficient information to permit that determination.

Here, we do not believe that the affidavit supplied on behalf of Mr. Sanford completely meets the School District's burden of establishing facts sufficient to show that either an attorney work product or a non-testifying expert privilege applies to the documents and communications at issue. Mr. Sanford's affidavit was primarily focused on the materials or documents he directly provided to the Conservation District, which aligns with the School District's arguments regarding relevancy of materials not reviewed by the Conservation District in its response to the March 2026 motion. However, as we noted in our April Opinion, because the Board's review is de novo, we are not limited to reviewing only materials reviewed by the Conservation District or Department and as such, materials not reviewed by those parties may still be relevant in an appeal before the Board. The affidavit does not make clear what other communications were had between Mr. Sanford and any other individual, including counsel, nor does it identify what other documents not reviewed by the Conservation District may have been prepared.

Moreover, while we do acknowledge that Mr. Sanford appears to have been retained in anticipation of litigation related to the project, the affidavit does not establish that all withheld documents and communications fall within the protections afforded by Rules 4003.3 and 4003.5. Although he appears to have been retained in anticipation of litigation and to assist in resolving

separate but related litigation through the design of an alternative project, the affidavit also reflects that he performed ordinary engineering and permitting functions associated with the project. The present record does not permit the Board to determine which withheld documents reflect litigation-related communications or opinion work product and which reflect discoverable factual or technical information. *Cf. Tri-Realty Company v. DEP*, 2015 EHB 184 (recognizing that materials prepared in anticipation of litigation may contain both protected opinion work product and discoverable factual information).

The School District has conceded to the Trust that it is withholding certain documents or communications as privileged, although we do not know how many documents and communications there may be and specifically what privilege applies to each. We do not believe that a blanket assertion of privilege regarding a consultant who appears to serve both litigation support and project engineering roles on behalf of the School District satisfies the School District's burden of establishing that protections under Rules 4003.3 and 4003.5 have been properly invoked. The present record does not permit the Board to evaluate the asserted privileges without document-specific information. As the Trust noted, "Only [the School District] knows how many documents it is withholding and how the privilege might apply to each. [The School District] has produced no log or description of the universe of withheld documents." (Trust Reply, p.2.)

Privilege logs are routinely used to identify withheld documents and provide information to evaluate whether an asserted privilege applies and this Board has previously ordered the production of a privilege log where necessary to evaluate asserted claims of privilege. *See Pennsylvania Trout v. DEP*, 2003 EHB 199, 205. Accordingly, we believe it is appropriate to direct the School District to provide a privilege log for any communications or documents that it claims are privileged and to file the log with the Board. The privilege log must provide enough

information to enable this Board to assess why the privileges raised are applicable. *See Fisher v. Erie Ins. Exch.*, 258 A.3d 451, 462 (Pa. Super. 2021) (finding that for a party asserting a privilege to meet its burden, a privilege log must “provide enough useful information in the log to enable the trial court to rule on the relevance of the items listed or explain why privileges raised were applicable.”). Only after the School District has provided sufficient information to establish the factual basis for its asserted privileges can the Board meaningfully evaluate any challenge to those assertions. Following production of the privilege log, if the Trust continues to challenge the withholding of particular documents, it may supplement its motion to compel by identifying the specific documents or communications it contends the School District should be compelled to produce.

To the extent the School District cannot establish that a withheld document or communication is subject to a valid claim of privilege or other protection from discovery, that document or communication shall be produced.



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CONSERVATION DISTRICT and
MILLCREEK TOWNSHIP SCHOOL
DISTRICT, Permittee

ORDER

AND NOW, this 1st day of July, 2026, it is hereby ORDERED that, on or before **July 22, 2026**, the Permittee shall produce a privilege log as set forth in this Opinion and shall produce any documents for which it cannot establish that a privilege applies.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

DATED: July 1, 2026

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