



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



REP. TARAH PROBST	:	
	:	
v.	:	EHB Docket No. 2025-114-L
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and FIRST PENNSYLVANIA	:	Issued: July 28, 2026
RESOURCE, LLC, Permittee	:	

**OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT**

By Bernard A. Labuskes, Jr., Board Member and Judge

Synopsis

The Board grants a motion for summary judgment where most of the appellant’s objections in her appeal concern a different project than the one authorized by the permit under appeal and she has not made out a *prima facie* case for her claim that the Department erred by not holding a public hearing on the permit. The appellant also lacks standing to pursue the appeal.

OPINION

Before the Board is a motion filed by First Pennsylvania Resources, LLC (“First Pennsylvania”) seeking summary judgment against Pennsylvania State Representative Tarah Probst (“Rep. Probst”), proceeding *pro se*, who has appealed Water Obstruction and Encroachment Permit No. MB990264-0001 issued to First Pennsylvania by the Department of Environmental Protection (the “Department”). The permit also contains a state water quality certification pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341(a). The permit authorizes the construction of the Sunny Brook Mitigation Bank, which involves the restoration and establishment of an integrated stream and wetland complex on 68 acres of land. The mitigation

bank proposes to preserve 2,868 linear feet of stream, reestablish 10,392 linear feet of stream and approximately 21 acres of associated floodplains, preserve 3.10 acres of wetlands, enhance 13.32 acres of wetlands, rehabilitate 10.83 acres of wetlands, and reestablish 2.16 acres of wetlands. The mitigation bank intends to generate a baseline of 11,110 riverine credits and 14.92 wetland credits to be used by other projects for compensatory mitigation in the PA Compensation Service Area 01 Upper Delaware Subbasin. The mitigation bank permit does not specify which other projects will use any of the mitigation credits generated by the bank.

The Sunny Brook Mitigation Bank is located at a site in Damascus Township, Wayne County. Rep. Probst lives in Stroudsburg, Monroe County, approximately 60 miles from the mitigation bank. Throughout this appeal, Rep. Probst has asserted that the mitigation bank is related to a project to expand the Interstate 80 highway in her community in Monroe County because the I-80 project relies on mitigation credits obtained from the Sunny Brook Mitigation Bank to compensate for wetlands affected by the I-80 project construction. Most of her arguments in this appeal have been focused almost exclusively on the I-80 project and have not discussed any of the work associated with the permit under appeal for the mitigation bank construction. For instance, we previously denied a petition for supersedeas Rep. Probst filed because, among other reasons, she asked us to supersede a different permit (one associated with the I-80 project), made no allegation of harm from the mitigation bank itself, and did not identify any provision of the mitigation bank permit that she challenged. *Probst v. DEP*, EHB Docket No. 2025-114-L (Opinion and Order on Petition for Supersedeas issued May 26, 2026).

Subsequent to the filing of First Pennsylvania's motion for summary judgment, Rep. Probst and another appellant have now appealed two permits that have been issued for the I-80 project, NPDES Permit No. PAD450214 and Water Obstruction and Encroachment Permit No. E4502125-

001. *See* EHB Docket No. 2026-059-L (consolidated with EHB Docket No. 2026-060-L). The Water Obstruction and Encroachment Permit for the I-80 project states that the I-80 project will permanently impact 0.08 acres of wetlands, and to compensate for this, the Pennsylvania Department of Transportation (PennDOT), the permittee for these permits, has provided 0.16 credit acres purchased from the Sunny Brook Mitigation Bank. We express no opinion here on the I-80 project and no opinion on the merits of those separate appeals. *This* appeal does not involve those permits, only the permit for the Sunny Brook Mitigation Bank.

In its motion for summary judgment, First Pennsylvania argues that Rep. Probst has not made any objections to the mitigation bank permit, that she has not made out a *prima facie* case for any challenge to the mitigation bank permit, and that she does not have standing to appeal the mitigation bank permit. The Department has filed a letter stating that it concurs with the relief requested in First Pennsylvania's motion. Rep. Probst opposes the motion and argues that there are disputed issues of material fact that need to be decided at a hearing on the merits.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Flatley v. DEP*, EHB Docket No. 2024-139-B, slip op. at 6 (Opinion and Order on Motion for Summary Judgment issued May 8, 2026); *Liberty Twp. v. DEP*, 2024 EHB 872, 874. Summary judgment is also available

if, 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); *Whitehall Twp. v. DEP*, 2017 EHB 160, 162-63. In other words, summary judgment may be granted if the record following the completion of all discovery contains

insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *Johnson v. DEP*, EHB Docket No. 2025-077-CS, slip op. at 5 (Opinion and Order on Motion for Summary Judgment issued July 2, 2026). A person appealing the issuance of a permit to another party, such as Rep. Probst, bears the burden of proof to show that the Department erred in issuing that permit. 25 Pa. Code § 1021.122(c)(2).

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. We should only grant the motion if the moving party is clearly entitled to relief and the matter is free from doubt. *Mountain Watershed Ass'n v. DEP*, EHB Docket No. 2024-077-B, slip op. at 3 (Opinion and Order on Motions for Summary Judgment issued July 7, 2026); *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W, slip op. at 5 (Opinion and Order on Motion for Summary Judgment issued April 16, 2026). For the reasons explained below, we conclude that First Pennsylvania is entitled to summary judgment and we grant its motion.

Rep. Probst's Appeal Objections

The main problem with Rep. Probst's appeal is that few of the objections she has raised in this appeal directly relate to the mitigation bank. Most of her objections are in some fashion aimed at the I-80 project. Her overarching claim in her notice of appeal is that the mitigation bank "enables or facilitates environmental impacts from the I-80 expansion project in Monroe County by providing compensatory mitigation credits, and was issued without adequate environmental review or public process..." (Notice of Appeal, pg. 1.) As we have said before in this appeal, our jurisdiction is confined to the action under appeal. *Probst v. DEP*, EHB Docket No. 2025-114-L, slip op. at 6 (Opinion and Order on Petition for Reconsideration issued Apr. 29, 2026) (citing

Sayreville Seaport Assocs. Acquisition Co. v. DEP, 2011 EHB 815, 819-20; *Winegardner v. DEP*, 2002 EHB 790, 793).

In an appeal from a permit for the I-80 project that authorized the use of credits from the mitigation bank, we anticipate that we would be in a position to rule on whether the use of those credits is appropriate because that permit would address it. However, the opposite is not true. We are not in a position in ruling on the mitigation bank permit in this appeal to assess whether the use of credits from the mitigation bank is appropriate at the I-80 project. There is nothing upon which to predicate such a ruling in this case because there is nothing in the mitigation bank permit that addresses the use of its credits at the I-80 site, or any other construction site for that matter. The Department could not have erred in assigning credits in the mitigation bank permit because the Department made no such assignment. The Department has not made an appealable determination of where credits from the bank can be used in the permit that is currently under appeal, and we cannot presently envision a circumstance that would impel this Board to add a condition in this permit restricting the use of bank credits for the I-80 project. This permit is neither the proper time nor place for such a ruling.

Probst v. DEP, EHB Docket No. 2025-114-L, slip op. at 8-9 (Opinion and Order on Petition for Leave to Intervene issued Apr. 7, 2026). We cannot grant any relief with respect to the I-80 project in the context of this appeal of the Sunny Brook Mitigation Bank permit. Objections that exclusively concern the I-80 project are beyond the scope of this appeal.

Turning to the specific objections in Rep. Probst’s appeal, her notice of appeal contains eight paragraphs of objections.¹ In the first paragraph, she asserts that the Department erred by issuing the Section 401 water quality certification for the mitigation bank as a standalone project. (Notice of Appeal Obj. ¶ 1.) She says the “clear evidence” shows that the bank was designed to mitigate wetland impacts caused by the I-80 expansion project. However, she has not produced any evidence that the mitigation bank was designed specifically to accommodate the I-80 project.

¹ On November 19, 2025, Rep. Probst filed a petition to amend her notice of appeal and to supplement the record. No party opposed the petition. We issued an Order on December 8, 2025 granting the petition to the extent that it added new objections to Rep. Probst’s notice of appeal but denying it to the extent that it sought to “supplement the record” since that is not a proper use of an amendment to a notice of appeal. The majority of the contentions in the petition to amend deal with the lack of a public hearing on the mitigation bank permit, discussed *infra*.

In fact, according to the water obstruction and encroachment permit for the I-80 project that Rep. Probst has attached to her appeal at EHB Docket No. 2026-060-L, out of the 11,110.88 watercourse credits and 14.92 palustrine wetland credits the Sunny Brook Mitigation Bank has available for use, PennDOT has purchased only 0.16 wetland credits from the mitigation bank to mitigate 0.08 acres of permanent wetland impacts from the I-80 project. That appears to leave the vast majority of wetland credits unused or to be used by other projects, to say nothing of the thousands of watercourse credits provided by the mitigation bank. Rep. Probst might have a more compelling argument if the I-80 project used all or most of the mitigation credits generated by the Sunny Brook Mitigation Bank, but the small utilization by the I-80 project undercuts the notion that the mitigation bank was created specifically for use by PennDOT.

Rep. Probst argues that the Department failed to evaluate the cumulative environmental impacts from the I-80 project together with the mitigation bank, including loss of wetlands, water quality impacts, stormwater runoff, and habitat disruption. (Notice of Appeal Obj. ¶ 2.) However, all of the impacts she has talked about in this appeal are entirely from the I-80 project. In her discovery responses, when asked to state the basis for this claim, Rep. Probst did not say anything about impacts from the mitigation bank. Instead, she focused only on impacts from the I-80 project. She said that the 3.5-mile I-80 reconstruction project had been divided into multiple sections and contracts for permitting and construction, and that “cumulative impacts include wetlands and water resources throughout the corridor, including in Stroud Township, and are not limited to wetlands identified in Stroudsburg Borough alone.” (First PA Ex. B (Interrog. Resp. 23).) This is not a situation where the Department has segmented a single project or facility into separate, incremental approvals. *See Clean Air Council v. DEP*, 2019 EHB 56 (Department erred in separately evaluating plan approvals for a natural gas export facility for purposes of determining

total emissions from the facility). This is not a situation where the Department failed to account for the environmental impacts from two neighboring sites. *See New Hanover Twp. v. DEP*, 2020 EHB 124 (Department erred in issuing a permit for a quarry by failing to consider the effect of pumping at the quarry on the cleanup of contaminated groundwater at a nearby hazardous site), *aff'd*, 316 A.3d 668 (Pa. Cmwlth. 2024). The impacts from the mitigation bank and the I-80 project are distinct, and Rep. Probst has not provided a convincing reason why the mitigation bank and a project using the mitigation bank's credits located 60 miles away should be evaluated together in terms of environmental impact.

In another objection in her notice of appeal, Rep. Probst claims that the mitigation bank permit lacks sufficient documentation to demonstrate that the mitigation bank “will ensure compliance with water quality standards for discharges associated with the I-80 expansion” and that, because of this, the Department violated Section 401 of the Federal Clean Water Act. (Notice of Appeal Obj. ¶ 3.) We are not entirely sure what this objection means. No discharges associated with the I-80 expansion are authorized by the permit under appeal. No discharges from the I-80 project are occurring at the site of the mitigation bank. In her discovery responses, Rep. Probst says that, because the I-80 project will use mitigation credits, “discharges associated with the I-80 expansion project may rely on mitigation credits generated by the Sunny Brook Mitigation Bank.” (First PA Ex. B (Interrog. Resp. 26).) Rep. Probst has not provided any evidence of “discharges” from the I-80 project relying on mitigation credits. Even if they did, as we explained above, we could not impose any conditions on the I-80 project's discharges through the mitigation bank permit.

Rep. Probst argues in her appeal that the Department did not consider or protect cultural or wildlife resources in issuing the Section 401 water quality certification for the mitigation bank.

(Notice of Appeal Obj. ¶ 4.) She asserts that there is “evidence of Native American artifacts and an eagle family and nest within the project area that would be moved to the Sunny Brook Mitigation Bank.” (*Id.*) In her discovery responses, she confirms that the “project area” she referred to was the “I-80 expansion corridor in Monroe County, not the Sunny Brook Mitigation Bank site.” (First PA Ex. B (Interrog. Resp. 27).) She says that the environmental and cultural resources she referenced are associated with the I-80 project corridor. (*Id.*, Interrog. Resp. 27, 28.) She admits that none of these resources will actually be moved to the mitigation bank. (*Id.*, Interrog. Resp. 29.) Once again, we cannot provide any relief in the context of this appeal regarding cultural artifacts or wildlife that may be disturbed by the I-80 project.

Rep. Probst also argues in her appeal that the Department did not disclose adequate information on the connection between the mitigation bank and the I-80 project, “including design capacity, timing, or functional relationship,” which she said prevented affected parties from adequately evaluating the project or participating in the decision-making process. (Notice of Appeal Obj. ¶ 7.) She also argues that, because the Department has asserted that the mitigation bank is unrelated to the I-80 expansion, the Department acted arbitrarily, without a rational basis, and contrary to the Administrative Agency Law. (Notice of Appeal Obj. ¶ 8.) However, the connection between the Sunny Brook Mitigation Bank and the I-80 project is much less significant than Rep. Probst suggests. Any connection appears to be limited to purchasing some mitigation credits, and only a small fraction of the mitigation bank’s credits have been shown to be allocated to the I-80 project. Rep. Probst argues that, because the mitigation bank and the I-80 project exist within the same watershed subbasin for purposes of the mitigation program, the two projects are entangled and must be evaluated together. But that fact alone cannot be used to transmute an appeal of a mitigation bank permit into a collateral attack on a highway construction project 60

miles away. Rep. Probst has not demonstrated with any evidence that the connection between the two projects is such that we should be considering objections wholly related to the I-80 project in this appeal of the mitigation bank permit.

In her response to the motion for summary judgment, Rep. Probst cites to a page on the Department's website providing information on mitigation banks and she points to language saying that a mitigation bank involves two separate water obstruction and encroachment permits, a Compensation Operation Permit and a Site Construction Permit. (Probst Ex. B.) Based on her response to First Pennsylvania's Statement of Facts, it seems that Rep. Probst believes this is evidence of a connection between the water obstruction and encroachment permit for the mitigation bank and the water obstruction and encroachment permit for the I-80 project. (Resp. to Facts at ¶ 4.) But the description from the Department's website belies that assertion. It indicates that there are two water obstruction and encroachment permits issued for the mitigation bank and its operator. The operation permit sets forth the terms and conditions governing the operation of the mitigation bank and the provision of compensatory mitigation credits "to meet a third party's compensatory mitigation obligations." (Probst Ex. B.) The construction permit governs the actual construction of the mitigation bank for the generation of credits that will be used for mitigation. This structure seems to be confirmed by the terms of the permit under appeal here, which says:

The project will generate aquatic resource compensatory mitigation credits within the PA Compensation Service Area 01 upon successfully meeting performance measures and success criteria. **The approved credits would be provided in accordance with the terms and conditions of the previously approved permit MB9915-0001.** The results of **the work performed under this permit may generate credits that the permittee could utilize through permittee's Water Obstruction and Encroachment Compensation Operations Permit MB9915-0001,** provided the permittee meets the terms and conditions of all applicable permits.

(First PA Ex. A at 1-2 (emphasis added).) The other water obstruction and encroachment permit envisioned in this two-part permit system is not the I-80 project permit, or any permit that would seek to use mitigation credits. Rather, there are two permits for the mitigation bank itself. The two-part permit system cited by Rep. Probst provides no support for her contention regarding the link between the Sunny Brook Mitigation Bank and the I-80 project.

Rep. Probst argues in the amendment to her appeal that a mitigation bank located an hour and a half away in a different watershed and geological setting cannot replicate or replace a unique, spring-fed “HQ/EV vernal Pool located in Stroudsburg.” She also says that the off-site mitigation will not adequately offset project impacts. (We presume she means the I-80 project.) However, as mentioned at the outset of our discussion, the appropriate time to contest the merits of selecting off-site mitigation for the I-80 project is in the context of an appeal of a permit for the I-80 project authorizing the use of mitigation credits, much like Rep. Probst and another appellant have done in their appeal of the water obstruction and encroachment permit for the I-80 work. That permit has a term describing from where the I-80 project will obtain its mitigation credits. The permit for the Sunny Brook Mitigation Bank contains no provision allocating any mitigation credits.

In *Winegardner v. DEP*, 2002 EHB 790, we faced a situation where an appellant made objections to different Departmental actions than the one under appeal. We granted partial summary judgment in an appeal of an update to a township’s sewage facilities plan. Many of the appellant’s objections in his notice of appeal related to earlier plan updates or revisions that were not encompassed by the current appeal. We said that “only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry.” *Id.* at 793. We held that those objections to different Departmental actions must be dismissed because they were “neither properly before us nor relevant.” *Id.* at 794.

Some of the appellant's objections in *Winegardner* could proceed, but the ones that were beyond the scope of the appeal were not permitted.

Here, the objections that Rep. Probst has made in this appeal that exclusively relate to the I-80 project are not relevant to the mitigation bank and are beyond the scope of this appeal of the mitigation bank permit. Even if we assumed that Rep. Probst's objections had some relevance to the appeal of this permit, she has not made out a *prima facie* case through those objections establishing that the Department erred in issuing this permit on the basis of its relation to the I-80 project. She has produced no evidence of anything wrong with the mitigation bank permit. She has not identified any provision of the mitigation bank permit that she finds objectionable. Summary judgment is appropriate.

New Objections in Rep. Probst's Response

Rep. Probst in her summary judgment response for the first time makes technical critiques regarding the mitigation bank, which she says is a reason for summary judgment to be denied and this case to proceed to a merits hearing. She asserts that the design of the mitigation bank's stream restoration is a "zipper-shaped" geometrically engineered channel that is "geomorphologically unstable" and cannot replicate the functions of a natural stream, and instead has been designed to maximize the aggregate length of the stream channel to in turn maximize the number of stream mitigation credits that are generated. (Resp. at 5.) She adds that the stream is an "engineered artifice" and not a natural or functioning stream system, "which the evidence strongly suggests" is incapable of performing the ecological functions required by the Chapter 105 regulations, 25 Pa. Code Chapter 105. (Resp. at 7.)

Unfortunately for Rep. Probst, there is nothing close to this sort of objection in her notice of appeal or amended notice of appeal. Nor was there anything approaching this sort of claim in

Rep. Probst's petition for supersedeas filed April 22, 2026. First Pennsylvania tells us that these arguments were not raised in Rep. Probst's discovery responses. We do not find any mention of them in the discovery responses from Rep. Probst attached to First Pennsylvania's motion. (First PA Ex. B, C.) Issues not raised in a notice of appeal are generally waived. *Morrison v. DEP*, 2021 EHB 211, 219. Although we typically allow parties to advance claims that fall within the "genre of the issue" of an objection contained in a notice of appeal, *Benmer Twp. Water Auth. v. DEP*, 2019 EHB 594, 637; *Rhodes v. DEP*, 2009 EHB 325, 327, there is simply nothing in Rep. Probst's notice of appeal or amended appeal that would encompass her new, highly technical claims about the mitigation bank's design, stream construction, ecological function, or geomorphology.

An appellant cannot spring new issues on the other parties in a response to a motion for summary judgment in an attempt to manufacture disputed issues of material fact and avoid the entry of summary judgment. "Due process requires that parties be aware of the claims or defenses which are being raised against them." *Williams v. DEP*, 1999 EHB 708, 720. In *Berks County v. DEP*, 2012 EHB 23, an appellant challenged a Title V operating permit for a lead smelter. In its notice of appeal, the appellant asserted that the permit would not comply with the National Ambient Air Quality Standard for lead and it raised more general objections that the Title V permit was contrary to federal and state air quality statutes and regulations. In response to the permittee's motion for summary judgment, the appellant asserted for the first time that the permittee should have been required to monitor and report emissions for arsenic and cadmium. Arsenic and cadmium were not identified as issues in the notice of appeal or in the appellant's discovery responses. The appellant did not move to amend its appeal to include cadmium and arsenic. We found that summary judgment was appropriate for the newly raised claims because they were not covered by the objections set forth in the appellant's notice of appeal. *See also Joshi v. DEP*, 2018

EHB 771 (granting in part motion to strike where appellant raised entirely new objections in response to a motion for summary judgment and in a cross-motion for summary judgment); *Nottingham Network of Neighbors v. DER*, 1996 EHB 4 (appellants may not raise new objections not contained in their notice of appeal in response to motions for nonsuit or directed adjudication); *Grand Central Sanitary Landfill, Inc. v. DER*, 1992 EHB 1510, 1513 n.4 (appellant barred from raising new issues not contained in its notice of appeal in responding to a motion for judgment on the pleadings).² By not including these allegations in Rep. Probst's notice of appeal, they are waived and cannot be raised for the first time in response to a motion for summary judgment.

Furthermore, these highly technical claims would undoubtedly need to be supported by expert testimony. First Pennsylvania asserts in its reply brief that Rep. Probst has not provided any expert reports or responded to discovery requests seeking the facts and opinions on which any of her experts would testify. First Pennsylvania points to Rep. Probst's responses to its discovery requests where Rep. Probst stated she had not identified any expert witnesses at the time but she reserved the right to retain experts later and supplement her response. (First PA Ex. B (Interrog. Resp. 3).) First Pennsylvania actually filed a motion to compel on April 9, 2026 seeking to compel Rep. Probst to identify any expert witnesses and provide the substance of their opinions. The same day Rep. Probst responded saying that no expert had been retained and that she "does not presently intend to call expert witnesses and instead intends to rely on fact witnesses." She said she acknowledged her obligation to supplement her discovery responses and would do that if an expert

² We have similarly held that appellants cannot raise a new issue in their own motion for summary judgment when that issue was absent from the appellants' notice of appeal. *Yoder v. DEP*, 2025 EHB 613, 618-20 (declining to consider arguments set forth in appellants' summary judgment motion when they were not contained in the notice of appeal); *Stanley v. DEP*, 2021 EHB 310, 314 ("there is nothing in the Appellants' notice of appeal or amended notice of appeal that comes close to capturing the genre of the issue of a takings claim."); *Chester Water Auth. v. DEP*, 2016 EHB 280, 285 ("It is simply not appropriate to spring an entirely new issue upon opposing parties in a motion for summary judgment.").

were retained prior to the close of discovery. We issued an Order on April 10 denying the motion but advising that “[t]he Appellant is cautioned that proposed experts not identified in discovery will not be permitted to testify. See Pa.R.Civ.P. 4003.5(b); *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72.” First Pennsylvania then attaches to its reply brief an email from a member of Rep. Probst’s staff dated April 13, 2026, four days after her response to the motion to compel, that identifies the names of two people who the email characterizes as expert witnesses for Rep. Probst and copies their biographies. (First PA Ex. H.) Those biographies mention topics of expertise such as hydrology, hydraulic analysis, and wetland ecology and restoration, but there is no information on the substance of any of their opinions for this case. The email says that the experts’ reports “will be available in the coming weeks,” but according to First Pennsylvania they have still not been provided months later.

We have held that “it is *the substance* of an expert’s testimony that is arguably of much greater importance to opposing parties than the mere identity of the expert....” *Clean Air Council v. DEP*, 2019 EHB 685, 696. Expert opinions disclosed after the close of discovery run afoul of basic discovery practice. See *McGinnis v. DEP*, 2010 EHB 489, 496 (“It is unacceptable to allow a litigant to present an expert witness whose identity and opinions have not been properly disclosed during discovery.”). Under the Pennsylvania Rules of Civil Procedure, an expert shall not be permitted to testify if they are not disclosed in response to interrogatories seeking the identity of the expert, the subject matter of their testimony, and the substance of the facts and opinions to which they will testify along with a summary of the grounds for each opinion. Pa.R.Civ.P. 4003.5(a)(1) and (b). First Pennsylvania asked for this information in discovery and even sought to compel Rep. Probst to provide more complete responses to expert discovery. Rep. Probst eventually provided names and biographies but crucially did not provide any expert opinions. She

was on notice through our Order denying the motion to compel that she needed to comply with the Rules of Civil Procedure or risk the preclusion of her experts. The closest she has come to doing so is in her response to the motion for summary judgment, well after the close of discovery on May 12, 2026. It goes without saying that this is neither the proper method nor time to seasonably supplement a prior expert discovery response. *See* Pa.R.Civ.P. 4007.4. “Discovery should not be played as a game where the ball is hidden.” *Range Resources – Appalachia, LLC v. DEP*, 2021 EHB 137, 141. Allowing Rep. Probst to come forth with new expert opinions now would be sanctioning unfair litigation practice.

Rep. Probst attaches to her response “unsworn declarations” from herself and one of her staffers, Jessica Smith (who also goes by the name Jessica Delfino and who previously attempted to intervene in the appeal). (Probst Ex. D.) The unsworn declaration of Ms. Smith states that she has conducted research into regional watershed mitigation, analyzed relevant technical studies and reports, and conducted interviews with stakeholders and experts regarding the Sunny Brook Mitigation Bank project. She says that the summaries of the technical data, historical site assessments, and ecological findings presented in Rep. Probst’s memorandum of law are based upon her analysis of these materials. She also says that she has reviewed the proposed monitoring plot map for the Sunny Brook Mitigation Bank, which is attached to the permit, and she says that her analysis of the stream geomorphology described in Rep. Probst’s memorandum of law accurately reflects the design features depicted therein. However, there is no indication that Ms. Smith has the expert qualifications to analyze technical data or make ecological findings as it relates to the mitigation bank. There is no indication that she has any experience with stream construction or geomorphology. *See Marshall v. DEP*, 2019 EHB 352, 353-54 (“The Board is not a forum in which a party can simply ‘research’ a number of studies...and expect to have those

studies admitted into the record without appropriate sponsoring witnesses and/or accompanying admissible expert testimony.”). Nor was Ms. Smith disclosed as an expert during discovery or even disclosed as a fact witness. (First PA Ex. B (Interrog. Resp. 2).) Rep. Probst identified herself as the only non-expert witness who would testify for her at a hearing. (*Id.*)

While we have held that an appellant does not necessarily need an expert witness to survive summary judgment and proceed to a merits hearing, *Marshall, supra*; *Morrison v. DEP*, 2016 EHB 717, 721-23; *Casey v. DEP*, 2014 EHB 439, 452-43, those cases generally involved claims of specific violations of regulations or statutory provisions that are absent here. Rep. Probst has not identified any regulatory or statutory provision governing water obstruction and encroachment permitting that the Department allegedly failed to comply with in issuing the mitigation bank permit.

Public Hearing

The only true objections in Rep. Probst’s notice of appeal and amended notice of appeal that relate to the Sunny Brook Mitigation Bank are her arguments that the Department erred by failing to hold a public hearing on the mitigation bank permit before it was issued. Rep. Probst contends that the Department did not provide a meaningful opportunity for public comment or a hearing before issuing the permit, and that the Department did not respond to her requests for a public hearing until after the permit had already been issued. (Notice of Appeal Obj. ¶ 5.) She argues that the Department denied procedural due process and violated Article I, Section 27 of the Pennsylvania Constitution by not responding to the requests for a public hearing until after the permit was issued. (Notice of Appeal Obj. ¶ 6.) She says that the Department effectively denied the public a meaningful opportunity to be heard because the law requires notice and an opportunity to be heard before a permit is issued. In the amendment to her appeal, Rep. Probst says that the

failure to hold a hearing specifically on the Section 401 water quality certification “deprived the affected communities and the public of the opportunity to present critical water quality and ecological evidence” that the Department is required to consider.

Rep. Probst has not directed us to any statutory requirement in the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, or regulatory requirement in the Chapter 105 regulations that mandates a public hearing for a water obstruction and encroachment permit for a mitigation bank. The regulatory public notice provision for Chapter 105 permits provides that the Department will publish notice in the *Pennsylvania Bulletin* when it receives a permit application and again when it issues or denies the permit. 25 Pa. Code § 105.21a. It does not require the Department to conduct a public hearing. The Dam Safety and Encroachments Act leaves it up to the Department to decide whether or not to hold a public hearing on any given permit application: “The department may, at its discretion, hold a public hearing on any application for the purposes of gathering information.” 32 P.S. § 693.8(c).

There is no language in the Dam Safety Act or the regulations explaining what is to guide the Department’s discretion on whether or not to hold a public hearing. *Compare* 35 P.S. § 6020.506(d) (requiring at least one public hearing on response actions under the Hazardous Sites Cleanup Act); 25 Pa. Code § 92a.82 (providing that the Department should hold a public hearing on NPDES permits when there is a request and significant public interest); 25 Pa. Code § 271.143(a) (Department may hold public hearing on municipal waste facility applications whenever there is significant public interest or the Department otherwise deems a hearing to be appropriate). Accordingly, we must assess whether or not it was reasonable for the Department to decline to hold a public hearing on the Sunny Brook Mitigation Bank permit.

Public notice and the ability to provide public comment are undoubtedly important aspects of the permitting process.

The right to public notice, by its very nature, is a right granted to everyone in the public....It is virtually definitional that the notice provisions of the law are intended to protect the right of the public to have proper notice and that protection of that right to receive public notice is the essence of the policy underlying the legal rules requiring public notice.

Everyone has the right to try to convince the Department to not issue the permit before the permit is issued.

PRIZM Asset Mgmt. Co. v. DEP, 2005 EHB 819, 838-39. Here, however, there appears to be no dispute that the Department published the required public notice of the permit application and the permit issuance in the *Pennsylvania Bulletin*. 25 Pa. Code § 105.21a. The Department published notice in the *Pennsylvania Bulletin* of receiving the application for the mitigation bank, opened a 30-day comment period, and provided information on how people could submit comments to the Department. 55 Pa.B. 4225-26 (June 21, 2025). The notice stated that the Department may schedule a fact-finding hearing or an informal conference in response to comments if deemed necessary. The Department also published notice when the Sunny Brook Mitigation Bank permit was issued. 55 Pa.B. 7464 (Oct. 25, 2025). This is not a case where there was some defect in the public notice, *Jake v. DEP*, 2014 EHB 38, 52-53 (listing wrong address for conservation district office where permit application could be reviewed), or a required public notice was never done, *Big Spring Watershed Association v. DEP*, 2015 EHB 100 (failure to publish draft NPDES permit notice required suspension and remand of permit).

There also seems to be no dispute that the Department received comments on the permit application. Rep. Probst attaches to her summary judgment response a series of emails from Rep. Probst's office to the Department from July 2025. (Probst Ex. E.) Among those emails, Rep. Probst forwarded to the Department what are identified as "Comments gathered from Rep. Probst

constituents.” Rep. Probst, through her staff, also submitted comments. The problem is that all of these comments deal with the I-80 project, not the mitigation bank. Indeed, the subject line of the emails sent to the Department states that comments are being submitted on “permit number E4502125-001,” which is not the permit number for the mitigation bank but is the permit number for the water obstruction and encroachment permit for the I-80 expansion, which Rep. Probst and another appellant have since appealed at EHB Docket No. 2026-060-L. One commenter expressed safety concerns over the lack of a safety wall separating her property from the expanded I-80 highway. One commenter opposed the closure of the Dreher Avenue I-80 exit, which the commenter said could slow down emergency response vehicles. Commenters also expressed concerns over the construction cost, the length of time the construction is expected to last, and the impact on businesses. One commenter objected to the taking of portions of her property for the highway expansion. Other commenters questioned why the highway would be expanded near Stroudsburg only to have the number of lanes reduced again farther down the highway. One commenter expressed a belief that the expansion project would have a negative impact on tourism in the area.

None of these comments have anything to do with the Sunny Brook Mitigation Bank. And while some commenters voiced concerns over the loss of wetlands from the I-80 project, loss of trees, the potential for flooding, increased erosion, and general environmental impacts, those concerns are again all about the I-80 expansion project not the Sunny Brook Mitigation Bank. None of the commenters in Rep. Probst’s Exhibit E say anything about the earth disturbance work that is occurring in Wayne County pursuant to the permit under appeal here. None of them talk about the Sunny Brook Mitigation Bank, or mitigation banks generally. None of them say anything about wetland mitigation, apart from the comments submitted on behalf of Rep. Probst herself.

Nor would we necessarily expect them to since they appear to all be Rep. Probst's constituents living near I-80, not the site of the mitigation bank.

While Rep. Probst alleges in her appeal that "[o]ver 2,000 residents and petition signers formally opposed the I-80 expansion project and requested a public hearing through Rep. Tarah Probst's office," (Notice of Appeal Obj. ¶ 5), it is not the mere volume of comments that should guide the Department over whether to hold a public hearing. "The decision to conduct a public hearing on a permit application is not one to be based solely upon the number of requests or comments received. The Department must exercise some independent judgment and assess whether a hearing should be conducted by virtue of the nature, location, and impact of a project." *County of Schuylkill v. DER*, 1989 EHB 1241, 1270. That independent judgment must also assess whether the received comments are relevant and material to the permit application under review.

The Department, in an email response to Rep. Probst after the permit was issued, explained its rationale for not holding a public hearing. The Department stated that the approval of a permit for a mitigation bank is not dependent on what projects will use the mitigation bank's credits. The Department acknowledged the same thing we have found—that many of the comments that had been submitted for the mitigation bank permit only discussed the I-80 project:

The Department made a determination that a public hearing on the bank was solely not necessary. We took what you sent [into] consideration and that was done [], however staff had looked at it [as] much of the comments were related to the I-80 project itself. The permit issuance is not wholly dependent on who is using the bank. The Sunny Brook Mitigation Bank is reviewed on the merits of the bank and not on who is using it from a review perspective.

Regarding some of the concerns that you had with specifics at the site of the I-80 permits, the Department took that in consideration when it held the public hearing last month on the I-80 permits, but again this is separate from the permit authorization for the bank. Again, the Department does not make a judgment on this authorization based on who is using it.

(Probst Ex. E, pg. 17.) Given the circumstances, and there being no evidence that the Department received any significant comments on the mitigation bank itself, we hold that it was reasonable for the Department to use its discretion to not hold a public hearing on the Sunny Brook Mitigation Bank permit.

Rep. Probst does not say what a public hearing would add, particularly if most if not all of the comments at a public hearing would be about the I-80 project. In most instances where there is some defect in public notice, the remedy is for the Department to solicit and consider additional comments and then decide whether or not those comments require any different action with respect to the permit. *See PRIZM Asset Mgmt., supra*. Even when we have found that the Department did abuse its discretion in not holding a public hearing on a permit, we have questioned the utility in remanding the permit back to the Department for purposes of conducting a public hearing where the appellant already had an opportunity to raise its concerns about the permit through its appeal before the Board. *County of Schuylkill, supra*, 1989 EHB at 1271. Since all of Rep. Probst's other issues regarding the mitigation bank are in actuality issues related to the I-80 project, we do not see what purpose would be served by requiring a public hearing on the mitigation bank to air grievances about the I-80 project. It seems clear based on Rep. Probst's own arguments that the requested public hearing had little to do with the mitigation bank itself. Rep. Probst's notice of appeal says that more than 2,000 people "formally opposed the I-80 expansion project" not the mitigation bank.

With respect to Rep. Probst's procedural due process claim, we have held that, to comport with procedural due process, a state agency must provide people with a meaningful opportunity to be heard before depriving them of life, liberty, or property. *Johnson, supra*, slip op. at 15; *Dengel v. DEP*, 2024 EHB 605, 612 (citing *Jake, supra*, 2014 EHB at 50). A person alleging a deprivation

of procedural due process rights must demonstrate that actual harm or prejudice resulted from the alleged deprivation. *Dengel, supra*. We first note that there is no allegation of any deprivation of life, liberty, or property from the permitting of the mitigation bank. The due process claim is again wrapped up in Rep. Probst's opposition to the I-80 project. Rep. Probst has not set forth a *prima facie* case for any actual harm or prejudice that has occurred from the Department's choice not to hold a public hearing on the mitigation bank permit. The Department provided opportunity for public comment, and Rep. Probst and other members of the public availed themselves of the opportunity for public comment. We reject the claim that the Department did not provide a meaningful opportunity for the public to be heard on the mitigation bank permit.

Further, "[t]he Commonwealth Court and the Board have consistently held that the Board's *de novo* review is protective of an appellant's due process rights, as it allows for the development of a full and fair record anew." *Angela Cres Trust of June 25, 1998, supra*, slip op. at 28-29 (collecting cases). *See also Cole v. Pa. Dep't of Env't Prot.*, 329 A.3d 1228, 1245 (Pa. 2025) ("The General Assembly intended that, despite their organizational independence, the DEP and the EHB work *together* in sequence to ensure sufficient process and oversight to rule soundly upon a given environmental application."). Rep. Probst has had a full opportunity to litigate her claims before the Board. She has conducted discovery. She filed a petition for supersedeas. However, instead of litigating claims related to the Sunny Brook Mitigation Bank, she has chosen to pursue claims on another project. And while due process is afforded through the right to appeal a Departmental action to the Board, due process does not automatically entitle an appellant to a hearing before the Board or guarantee that an appellant will survive dispositive motions. *Eachus v. DEP*, EHB Docket No. 2025-132-L, slip op. at 23 (Opinion and Order on Motion to Deny Supersedeas Without Hearing issued Jan. 26, 2026) (quoting *Glahn v. DEP*, 2021 EHB 347, 352). We conclude that

there is no due process violation in the public participation for the Sunny Brook Mitigation Bank permit.³

Standing

Finally, we revisit the issue of standing. We have discussed standing at length multiple times during this appeal, in the context of denying a petition to intervene for petitioners whose only interest was in the I-80 project and not the mitigation bank, *Probst, supra* (Opinion and Order on Petition for Leave to Intervene), and in the context of denying reconsideration to those same petitioners, *Probst, supra* (Opinion and Order on Petition for Reconsideration). In both of those Opinions we set forth our view that interests exclusively concerning the I-80 construction project were too remote and speculative to establish the standing necessary in this appeal of the mitigation bank permit. While we do not want to dwell inordinately on standing, we find that, even if Rep. Probst's claims were inappropriate for summary judgment for the reasons described above, she lacks standing in this appeal.

When standing is challenged in a motion for summary judgment following the conclusion of discovery, the appellant must be able to point to evidence demonstrating the basis for her standing. *Williams v. DEP*, 2019 EHB 764, 776. General factual allegations of an injury from the challenged action are not sufficient at the summary judgment stage; the specific facts establishing the basis for an appellant's standing must be set forth in affidavits or other evidence. *Muth v. Dep't of Env't Prot.*, 315 A.3d 185, 196 (Pa. Cmwlth. 2024). Nevertheless, the burden is on the moving party to show that there are no material facts in dispute that an opposing party lacks standing. *HD Holdings v. DEP*, 2025 EHB 662, 667-68 (citing *Drummond v. DEP*, 2002 EHB 413, 423).

³ Rep. Probst has not articulated with any detail or otherwise made out a *prima facie* case on her claim that the Department violated Article I, Section 27 of the Pennsylvania Constitution by not responding to the request to hold a public hearing until after the permit was issued.

To have standing, a party must have a “direct interest” in the subject matter of the appeal and show that the action they are appealing has caused harm to that interest. *Muth, supra*, 315 A.3d at 196. “The requirement that an interest be ‘direct’ simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.” *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). This ensures that the Board concerns itself with “material interests that are discrete to some person or limited class of persons” rather than “more diffuse ones that are common among the citizenry.” *CRG Services Management LLC v. DEP*, 2025 EHB 494, 496 (quoting *Muth* at 196). As we said earlier in this appeal, “A remote or speculative connection between the person’s interest and the Department’s action is not enough. Rather, the Departmental action must be the proximate cause of the threatened harm.” *Probst*, slip op. at 7 (Opinion and Order on Petition to Intervene) (citing *Wm. Penn Parking Garage, supra*, 346 A.2d at 282; *Borough of St. Clair v. DEP*, 2015 EHB 290, 304-05; *Giordano v. DEP*, 2000 EHB 1184, 1186). In an environmental case involving a third-party permit appeal, it is typically sufficient to establish standing if a Departmental action threatens a person’s use or aesthetic appreciation of an area affected by the permitted activity. *Food & Water Watch v. DEP*, 2020 EHB 229, 236, *aff’d*, 2021 Pa. Cmwlth. Unpub. LEXIS 191 (Pa. Cmwlth. Apr. 12, 2021).

Rep. Probst acknowledges that she does not recreate in the area of the mitigation bank. (Resp. at 2.) She admits in her response to First Pennsylvania’s Statement of Facts that she “has never used, visited, or recreated at the Sunny Brook Mitigation Bank Site.” (Statement of Facts at ¶ 10; Resp. to Facts at ¶ 10.) She also admitted to not using or visiting the Sunny Brook Mitigation Bank site in her discovery responses. (First PA Ex. B, Interrog. Resp. 4, 6, 7, 8.)

Nevertheless, Rep. Probst avers she has standing because the Sunny Brook Mitigation Bank is available for other projects to utilize mitigation credits across a broad area. She contends that the Sunny Brook Mitigation Bank and the I-80 project are part of a “single, integrated project” and “interconnected regional components of a singular, cumulative environmental impact.” (Resp. at 4.) In support of her standing, Rep. Probst says that “the Sunny Brook Mitigation Bank is not an isolated, localized construction project; it is a commercial credit-generating facility authorized to operate across a broad, multi-county region defined as PADEP Subbasin 01 (the Upper Delaware River Basin). Appellant’s home, property, and legislative district sit directly within this identical water basin.” (Resp. at 3.) To accept this concept of standing, we would need to hold that any person affected by any project that would utilize mitigation credits has standing to appeal the permit authorizing the construction of a mitigation bank. We would then need to entertain that appeal, not on the basis of any deficiencies with the mitigation bank itself, but based on what the mitigation bank allegedly enables to occur with the construction of an entirely separate project. “This is precisely the sort of remote, speculative harm that precedents requiring direct harm are intended to guard against.” *Probst*, slip op. at 8 (Opinion and Order on Petition for Leave to Intervene).

Rep. Probst wants to vacate the permit for the Sunny Brook Mitigation Bank because she believes doing so will in turn prevent the I-80 project from moving forward. Assuming only for purposes of argument that that is true, vacating the mitigation bank permit would also presumably halt every other project that seeks to utilize mitigation credits from the Sunny Brook Mitigation Bank, regardless of the merits of those projects. Those projects would not be halted based on any error involving the construction of the mitigation bank. Instead, they would be halted because of some potential error with respect to another project, which, like the I-80 project, could be located

60 miles away from the mitigation bank. Vacating the mitigation bank permit based entirely on the merits of the I-80 project would be a misuse of the appeal process. Requiring First Pennsylvania to defend its permit, not based on anything that it is doing at the mitigation bank but based on what a different permittee is doing for a different project, is likely violative of First Pennsylvania's own due process rights. The Sunny Brook Mitigation Bank permit must be evaluated on its own merits and not based on the relative merits of the I-80 project, or any other project that is using or proposes to use mitigation credits from the bank.

Although Rep. Probst now argues in her summary judgment response that the Sunny Brook Mitigation Bank is improperly constructed, she has no real stake in the mitigation bank. Whether the bank is constructed in one way or in another way, it will not affect her in any tangible way. If the stream reconstruction work in the mitigation bank results in a stream that is unnaturally meandering, as Rep. Probst now claims, that does not pose any greater risk to her or her interests than if the stream segment had a more gentle meander. It does not affect any use, recreational interest, or aesthetic appreciation of the stream or greater mitigation bank area by Rep. Probst because she admits she has never even visited the mitigation bank site. *See Wm. Penn Parking Garage*, 346 A.2d at 280 ("The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge."). She has no direct interest in the area of the mitigation bank. She may from a standpoint of general environmental policy desire any mitigation bank to have streams that reflect a more natural watercourse, but that is an interest that is insufficient to support standing to challenge a particular permit for a particular mitigation bank.

Fundamentally, Rep. Probst has not shown how she is affected by *this project*. Rep. Probst appears to take issue with the existence of off-site mitigation writ large. She decries a permitting

framework that allows for a construction site to utilize mitigation credits at a mitigation bank 60 miles away. Throughout her response she repeatedly refers to “systemic” harm from the mitigation bank. (*See, e.g.*, Resp. at 3; Resp. to Facts at ¶¶ 9, 11, 18.). She asserts that she “has consistently raised arguments regarding systemic environmental harm to her home watershed caused by the legal framework of this mitigation bank credit allocation.” (Resp. to Facts at ¶ 20.) But a policy disagreement divorced from any true stake in the appeal and absent any tangible injury from the challenged action does not give rise to standing. *See Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 506 (Board’s task is to review individual decisions of the Department, not general disagreements over environmental policy).

For all these reasons, summary judgment is appropriate and we dismiss this appeal in the Order that follows.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REP. TARAH PROBST

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and FIRST PENNSYLVANIA
RESOURCE, LLC, Permittee

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EHB Docket No. 2025-114-L

ORDER

AND NOW, this 28th day of July, 2026, it is hereby ordered that the Permittee's motion for summary judgment is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Board Member and Judge

s/ Sarah L. Clark

SARAH L. CLARK
Board Member and Judge

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Board Member and Judge



s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Board Member and Judge

DATED: July 28, 2026

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

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