COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	**Issued: July 1, 2015**

OPINION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for partial summary judgment from the Department and a Permittee where it is clear that there are numerous disputed issues of material fact and mixed fact and law that can only be appropriately resolved upon the consideration of a record fully developed at a hearing on the merits.

O P I N I O N

On or about November 7 or 8, 2013, Synagro, a.k.a. Synagro Mid-Atlantic, Inc. ("Synagro"), submitted three Notices of First Land Application of exceptional and non-exceptional quality biosolids (the "30-day Notices") to the Department of Environmental Protection (the "Department"). Synagro is a biosolids management company. The 30-day Notices are associated with the placement of biosolids, also known as sewage sludge, on the Potomac, Sunrise, and Stone Church Farms, which are located in Upper Mount Bethel Township, Northampton County. Ron Angle is the owner of all three farms. The parties

sometimes refer to the farms as Angle I (Potomac), Angle II (Sunrise), and Angle III (Stone Church). The Angle Farms are being farmed by Paul Smith.

On December 12, 2013, the Department conducted an inspection of the farms. By letters dated December 23, 2013, the Department advised Synagro that it found the farms to be suitable for the land application of biosolids. The Department's December 23, 2013 determination letters required Synagro to raise the pH to 6.0 or greater on the Potomac and Sunrise Farms. On January 18, 2014, notice of the Department's determinations was published in the *Pennsylvania Bulletin*. 44 Pa.B. 375-77. On February 18, 2014, Sludge Free Upper Mount Bethel Township ("Sludge Free UMBT"), Jim and Donna Dellatore, Mike and Diane Zimmerer, Debra and Tom Bodine, John and Tracy Gorman, and Bob and Terry Schneider filed this appeal of the Department's determination letters. The Appellants amended their notice of appeal on March 10, 2014. The Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper, have intervened on the side of the Appellants. To date no biosolids have been applied to the Angle Farms.

Synagro and the Department have now filed separate but overlapping motions for partial summary judgment. They attack many of the 124 paragraphs contained in the Appellants' amended notice of appeal. The Appellants and Intervenors (hereinafter collectively referred to as "Appellants") have filed an extensive response in opposition to the motions. The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Global Eco-Logical Servs., Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also Cnty. of Adams v. Dep't of Envtl. Prot.*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP,* 2003 EHB 636, 641. Summary

judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106. We review the Department's actions *de novo* to determine whether they constitute reasonable exercises of the Department's discretion that are lawful, supported by the facts, and consistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 6 (Adjudication, Apr. 24, 2015); *Solebury School v. DEP*, 2014 EHB 482, 519. We find that the standard for granting summary judgment has not been met and this matter would benefit greatly from a consideration of the factual and legal issues following a hearing on the merits.

Article I, Section 27

Synagro (but not the Department) has asked us to enter summary judgment against the Appellants on their claim, as manifested in several of the objections in their amended notice of appeal, that the Department's action was inconsistent with Article I, Section 27 of the Pennsylvania Constitution. Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

Synagro and the Appellants construct very different analytical approaches to how we should evaluate compliance with Article I, Section 27, both of which are wrong. For their part, the Appellants cite several reasons why we should disregard the test announced in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), in analyzing whether

the Department's action is consistent with Article I, Section 27 of the Pennsylvania Constitution. However, as we said in *Brockway Borough Municipal Authority*, *supra*, and *Tri-County Landfill v. DEP*, EHB Docket No. 2013-185-L, slip op. at 4 (Opinion, May 22, 2015), the Commonwealth Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth* unequivocally held that the *Payne* test is still good law until "a majority opinion from the Supreme Court or a decision of [Commonwealth] Court overruling *Payne*" comes along. *Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015) (*"PEDF"*).

Synagro for its part argues that Article I, Section 27 is satisfied so long as the Department's action complies with the statutes and regulations that were adopted pursuant to that constitutional provision. However, *all* environmental statutes and regulations since 1971, as far as we know, were at least in part adopted pursuant to Article I, Section 27 and were designed to implement that constitutional provision, so Synagro's argument can be shortened to a contention that compliance with the environmental statutes and regulations without more necessarily constitutes compliance with Article I, Section 27. This is incorrect. Synagro only refers us to one of the three questions that we must evaluate under the *Payne* test in analyzing whether the Department's action comports with Article I, Section 27. Those three questions are:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 312 A.2d 86, 94. *See PEDF*, 108 A.3d 140, 158 (reaffirming the *Payne v. Kassab* test); *Brockway Borough Mun. Auth.*, slip op. at 29. Synagro would have us answer only the first

question, but we cannot assume that the last two parts of the *Payne* test as reaffirmed in *PEDF* are mere surplusage. In order to pass constitutional muster the Department's action must not only comply with all applicable statutes and regulations, it must also evince a reasonable effort to reduce to a minimum the environmental incursion of the project under review, and the environmental harm that will result from that action must not clearly outweigh the benefits to be derived therefrom. *PEDF*; *Payne*; *Brockway*. If the Court in *Payne* believed that regulatory compliance could substitute for a three-pronged inquiry, it would not have created a three-pronged inquiry that very clearly goes beyond an examination of regulatory compliance. Strict compliance with all regulatory requirements is not *necessarily* coextensive with a reasonable effort to reduce the environmental incursion to a minimum, and notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project.

It is true that Synagro's position is consistent with our holding in *City of Scranton v. DEP*, 1997 EHB 985, where we held that the Department is not required to minimize the environmental harm of a project or balance harm against putative benefits if the Department acts pursuant to a statute that implements Article I, Section 27. 1997 EHB at 1020-21. We do not think this holding, which was not disputed by either party in that case, is consistent with *PEDF*, which clearly stated that *Payne* requires us to ask and answer three questions, not one. If compliance with regulatory requirements were enough by itself, we would not have been instructed to answer the second two questions. The Court in *PEDF* repeatedly referred to its "multifactorial test," and it cited with evident approval the parts of the plurality opinion of the Supreme Court in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), that discussed

the need to avoid unreasonable degradation of the environment and balance environmental protection with the benefits of development. 108 A.3d at 156-59. A holding that compliance with Article I, Section 27 requires nothing more than compliance with applicable regulations is also not entirely consistent with the Commonwealth Court's holding in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Cmwlth. 1972), *aff'd*, 311 A.2d 588 (Pa. 1973), also reaffirmed in *PEDF*, 108 A.3d at 158 n.38, that Article I, Section 27 has its own value, i.e. that it is self-executing and thus does not require any implementing legislation.

To be sure, environmental regulations are themselves designed to reduce environmental incursions to a minimum and balance harms and benefits. The statutes, regulations, and general permit governing the application of biosolids (as with most environmental programs) broadly require a high degree of environmental protection. For example, under the regulations, "[a] person may not apply sewage sludge in a way that will cause surface or groundwater pollution…." 25 Pa. Code § 271.902. Sewage sludge may not be applied in a way that will cause or allow the attraction, harborage, or breeding of vectors, cause or allow malodorous emissions, adversely affect private or public water supplies, or cause a public nuisance. *Id.* Sludge application may not adversely affect threatened or endangered species or their habitat. 25 Pa. Code § 271.915(a). Nevertheless, the constitutional inquiry may inform the Department's and our application of these broadly worded regulations, and we cannot, as Synagro would have us do, rule out as a matter of law the possibility that the constitutional inquiry may compliment the regulatory inquiry in some cases.

Synagro says it is "inappropriate and unrealistic" to consider the extent of the environmental incursion and balance harms and benefits in a judicial forum such as our own, but

the three-part *Payne* test is actually consistent with the Board's longstanding, overriding standard for reviewing Departmental actions. Our review of the Department's actions has always included a determination of not only whether those actions are supported by the facts and whether they are lawful, but whether they constitute a *reasonable* exercise of its discretion as well. *Solebury School*, 2014 EHB at 519; *Stevens v. DEP*, 2002 EHB 249, 255; *Smedley v. DEP*, 2001 EHB 131, 160; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, 1054. Even if we put Article I, Section 27 aside, perfect compliance with minimum regulatory requirements may not always be enough even under our traditional review criteria if the Department is shown to have unreasonably exercised its discretion. As far back as 1983 we held that an "overly blind reliance" on the regulations can constitute an abuse of discretion, particularly where the natural conditions are quite complex. *Coolspring Twp. v. DER*, 1983 EHB 151, 178.

Thus, despite Synagro's and the Appellants' efforts to truncate or disregard the *Payne v. Kassab* test, we will apply it as written. We will address all three questions set forth in *Payne*, not just the first one. In applying the second and third prongs of the test, we will keep in mind the Commonwealth Court's admonition that Article I, Section 27 is a "thumb on the scale," which compels us to give greater weight to the environmental concerns in the decision-making process. *PEDF*, 108 A.3d at 170.

It is instantly apparent that the application of the *Payne* test and determining whether the Department acted reasonably will involve numerous disputed issues of material fact and mixed fact and law that make summary judgment impossible. Not only are there disputed issues relating to whether there has in fact been compliance with all applicable statutes and regulations relevant to the protection of the environment, the first prong of the *Payne* test, the Appellants

also have referenced numerous facts that could support its position that the Department's determinations did not evince a reasonable effort to reduce the environmental incursion to a minimum, the second prong of test, and that the unavoidable harms of the projects clearly outweigh their benefits, the third prong of the test.

With respect to the second prong—reducing the environmental incursion to a minimum—the Department points out that it did in fact go beyond the minimum regulatory requirements in this case, such as imposing buffers larger than what otherwise may have been required. Thus, the Department itself has recognized that minimal compliance with the regulations was not enough in this case. Although it did not address Article I, Section 27 directly in its motion, the Department in effect says it has evinced a reasonable effort to reduce environmental incursions to a minimum.

Synagro, while sticking to its position that nothing more than regulatory compliance is required, argues in the alternative that the record demonstrates that the Department made a reasonable effort to reduce the environmental incursion to a minimum. The Department gave careful attention to the details of the proposed biosolids application and did not rely solely upon the observations and assessments conducted by Synagro, but performed many assessments on its own. The Department conducted its own site inspection on December 12, 2013. In approving the Synagro application, Synagro says the Department performed a comprehensive review of the Angle Farms, and excluded environmentally sensitive application areas, provided additional buffers from wells and other sensitive areas, and otherwise properly applied the regulations to ensure the protection of the values advanced by Article I, Section 27. Thus, there was compliance with the second prong of *Payne* in Synagro's view.

The Appellants respond that the Department did not go far enough. Indeed, in some respects this is the essence of the parties' dispute in this appeal. The Appellants do not believe the sites satisfy the regulatory criteria, but beyond that, they downplay the Department's purported efforts to reduce the environmental incursion to an acceptable level. They say that measures not strictly required by the regulations but more protective of properties, waters, wetlands, and endangered species could have been imposed. They also say the Department's analysis should have addressed such questions as the cumulative impact of closely related projects, the long-term impact of the projects, the impact of the projects on wildlife and wildlife habitat, and the impact of the projects on the natural, scenic, historic, or esthetic values of the environment. As an example of the cumulative impact that the Department is said to have failed to consider, the Appellants note that the three farms of 74, 149, and 43 acres all drain at least in part into the same stream, yet there is no evidence that the Department considered this cumulative impact. What might be suitable if only one site were involved may not be suitable when this cumulative impact is considered, in the Appellants' view. The Department acknowledged that it did not consider this issue, saying only that the regulations do not require it. In our view, we can only fairly resolve this disputed question based upon a complete record developed at a hearing on the merits.

The Appellants similarly complain that the Department failed to assess whether the unavoidable harms of the project will outweigh the benefits, the third part of the *Payne* test.[1] They say that there is sufficient evidence for the Board to find that risks associated with the use of these unsuitable sites clearly outweigh any "benefit that is derived from having a place to put

[1] Although a strong argument can be made that balancing of harms and benefits, if done at all, should be done on the regulatory level as opposed to a site-specific level, the Supreme Court has essentially put that view to rest. *Cf. Eagle Envtl. II, LP v. Dep't of Envtl. Prot.*, 884 A.2d 867, 880 (Pa. 2005) (upholding regulatory harms-benefits test).

biosolids and to make use of the little nutrient content that is in the material." (Appellants' Memo. at 52.)

As previously mentioned, Article I, Section 27 is not part of the Department's motion, so the Department does not address balancing. Synagro stands on its position that no balancing is required, but argues alternatively that, in contrast to the total lack of environmental harm associated with its projects, Commonwealth Court has recognized that "use of sewage sludge to reconstitute soil is a well-established agricultural practice that is encouraged by the U.S. Environmental Protection Agency." *Cmwlth. v. East Brunswick Twp.*, 980 A.2d 720, 724 (Pa. Cmwlth. 2009). The same conclusion holds true here, in their view. Again, although balancing is required we are not ready to perform that balancing in the immediate context. *See generally Gilbert v. Synagro Central, LLC*, 90 A.3d 37 (Pa. Super. 2014), *pet. for allowance of appeal granted*, 101 A.3d 1149 (Pa. 2014) (whether biosolids application is a "normal agricultural operation" involves questions of fact).

Endangered Species

The blue-spotted salamander is an endangered species in Pennsylvania. 58 Pa. Code § 75.1(c)(9). "Sewage sludge may not be applied to the land if it is likely to adversely affect a Federal or Pennsylvania threatened or endangered species, or its designated critical habitat…" 25 Pa. Code § 271.915(a). There does not appear to be any dispute that the blue-spotted salamander and/or its habitat are likely to be present at or near the site(s). The Appellants object that biosolids application should not have been approved because it is likely to adversely affect the blue-spotted salamander and its habitat.

Synagro and the Department move for summary judgment on the Appellants' allegation, saying that the Department adequately accounted for the possible presence of the blue-spotted

salamander. As background, they explain that Synagro's representative conducted a search of the Pennsylvania Natural Diversity Inventory ("PNDI") to determine if there were any species that may be impacted by the proposed land application of biosolids. They concede that the PNDI records showed that, based on documentation maintained by the Pennsylvania Fish and Boat Commission ("PAFBC"), Synagro's proposed land application had a "potential impact" to an endangered species. As a result, Synagro contacted the PAFBC, provided the required documentation, including a signed copy of the PNDI Review Receipt and the Conservation Plan for the Angle Farms, and inquired about "management practices" that could be implemented to reduce the impact of farming operations on the endangered species and/or its habitat. In response to Synagro's inquiry, the PAFBC responded with a finding that "we do not anticipate direct adverse impacts from proposed farming activities on the Blue-Spotted Salamander." PAFBC provided further guidance and suggestions on how to further minimize any impact to the blue-spotted salamander. PAFBC felt that upon review of the documentation thereafter submitted by Synagro, that the management practices proposed by Synagro's Conservation Plan would sufficiently protect the blue-spotted salamander. PAFBC's November 25, 2013 letter was considered a PNDI clearance confirming that Synagro had complied with its obligations for the species under the PAFBC's purview.

In addition, a search of the PNDI records indicated that an avoidance measure was required by the U.S. Fish and Wildlife Service ("Fish and Wildlife"). Synagro agreed to implement the avoidance measure. The Department ensured that the measures required by Fish and Wildlife were reflected in the application areas approved for Synagro. Synagro and the Department conclude that the PAFBC, the agency that is in the best position to make a determination whether the biosolids application would affect a threatened or endangered species,

has advised that it does not anticipate "direct adverse impacts" on the identified threatened or endangered species, that the Department is entitled to rely on the PAFBC's finding, and that the Appellants' objections regarding this issue should be dismissed by way of summary judgment, in their view.

Synagro and the Department's argument essentially boils down to a claim that they are entitled to rely on the clearance provided by PAFBC. At a minimum, once the clearance is in hand, they say it is incumbent upon the Appellants to come forward with evidence of an actual threat, and the Appellants have failed to do so.

The Appellants, of course, disagree. They say that the clearance was based on a woefully inadequate investigation by a PAFBC representative who is not qualified to assess, and who did not assess, such critical things as the chemical constituents of the biosolids or the amount of those constituents that would enter the pertinent habitat, even though it is conceded that the species has a low tolerance for certain substances. They argue that the representative's heavy reliance on buffer zones between the habitat and the areas where biosolids will be applied as her basis for saying the species will not be harmed is misplaced, and they cite expert opinion to support that claim.

It is not clear whether Synagro or the Department intend to present expert opinion testimony on this issue. We do not have a sense based on the limited record currently before us that any of the parties have much in the way of scientific support based on actual field data in support of their positions. Although the record is rather sparse, if it is agreed that the salamander must continue to have pristine conditions in order to thrive, and the Appellants are prepared to present expert testimony that biosolids application will degrade those pristine conditions, it appears that the Appellants have come forward with enough potential evidence to survive

summary judgment. Although the expert opinion that the Appellants rely on appears to relate more to hydrology than the threat to the salamander *per se*, it is enough to fend off summary judgment.[2]

The Appellants add that there is at least one other species of concern that they say may be threatened by the biosolids application. Among other things, they refer to a July 2014 email from Fish and Wildlife, only obtained by a subpoena and not produced in discovery, requesting further investigation regarding that species. The Appellants did not specifically refer to this species in their amended notice of appeal, and they have not asked to amend their appeal. Neither the Department nor Synagro mention any species other than the blue-spotted salamander in their motions or briefs. At this point we know very little about this particular issue. Among other things, we do not know whether the same habitat is implicated. We are not in a position to address the issue any further at this time.

Finally, with respect to endangered species, the Appellants argue that, because the site or sites involve the habitat for endangered species, the Department should have required an individual permit rather than following the site suitability process under a general permit. The Appellants' argument goes something like this: Under 25 Pa. Code Chapter 93, a water source will qualify as "Exceptional Value" if it is a "surface water of exceptional ecological significance." 25 Pa. Code § 93.4b(b)(2). A "surface water of exceptional ecological significance" includes "[w]etlands which are exceptional value wetlands under §105.17(1)." 25 Pa. Code § 93.1. Wetlands can qualify for such status if, *inter alia*, they "serve as habitat for fauna or flora listed as 'threatened' or 'endangered'" under federal or state law, and/or "are hydrologically connected to or located within 1/2-mile of wetlands" that serve as habitat for

[2] As we move forward, one question that we have is why the PAFBC limited its findings to a conclusion that it does not anticipate any "direct" adverse impact. We are not told what that means. The operative regulation cited above, 25 Pa. Code § 271.915(a), is not limited to "direct" impacts.

endangered or threatened species "and that maintain the habitat of the threatened or endangered species within the wetland identified" as habitat. 25 Pa. Code § 105.17(1)(i) & (ii). Under the Clean Streams Law and associated regulations, they say an individual permit is required for biosolids application that impacts EV waters.

The Department concedes the presence of EV wetlands, but argues that the "watershed" as a whole must be designated as EV before an individual permit is required. The "watershed" is not EV unless the stream for the "watershed" is EV, according to the Department. The Allegheny Creek, the receiving stream in this case, is not designated as EV.[3] The Department points out that the sewage sludge regulations specifically say that sludge may not be applied within 100 feet of an EV wetland, 25 Pa. Code § 271.915(c)(6), but that does not answer the issue raised by the Appellants; namely, whether an individual permit or coverage under a general permit is required. The Department refers us to language in the general permit itself, which states that it may not be used in EV watersheds, but again, that does not tell us whether an individual permit was necessary under the regulations and the law for any of these sites. The issue calls for further elucidation after a hearing. If the Department has an institutional interpretation, as opposed to argument of counsel, we need to hear it.

Acts 67 and 68

The Appellants argue that the Department failed to comply with Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, by not sufficiently considering local comprehensive plans and zoning ordinances in approving the 30-day Notices. As authority for their objection the Appellants cite the Municipalities Planning Code at 53 P.S. § 10619.2(a), which states:

[3] The Appellants suggest that the stream would qualify for a higher designation. The Department disputes that claim on the facts. Synagro says this is not the appropriate forum for redesignating a stream. We note that the Appellants have argued generally that the Department failed to conduct an adequate antidegradation analysis, but neither Synagro nor the Department moved for summary judgment on that objection. (Notice of Appeal ¶ 121.)

> When a county adopts a comprehensive plan in accordance with sections 301 and 302 and any municipalities therein have adopted comprehensive plans and zoning ordinances in accordance with sections 301, 303(d) and 603(j), Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

The Department and Synagro both argue in their motions that this provision is not applicable to the land application of biosolids. They focus on the final clause of the provision and argue that the land application of biosolids does not fit under the "funding or permitting of infrastructure or facilities" because biosolids application cannot be considered either infrastructure or facilities. In support of their argument, the Department and Synagro point to the Department's Land Use Policy guidance document. The Department's latest version of the guidance defines "facilities and infrastructure" as "includ[ing] buildings, and permanent structures for transportation, sewer and water, waste management systems, schools, parks and recreation, electric and gas delivery systems, and telecommunications networks." (DEP Ex. 27.)

The Appellants respond that the guidance document is not binding. The Appellants focus on the term "includes" in the guidance definition and argue that what follows is not an exclusive list of what is to be considered to fall under the definition. The Appellants also contend, somewhat in passing, that the Angle Farms are part of a waste management system as that term is used in the guidance definition.

As an initial matter we agree that Departmental guidance is not a legally binding regulation that has the force of law; it is not binding on the Department, let alone the Board. *See DEP v. Weiszer*, 2011 EHB 358, 382; *Thebes v. DEP*, 2010 EHB 370, 407; *Clearview Land Dev. Co. v. DEP*, 2003 EHB 398, 427-28 (citing *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521). Accordingly, the proper interpretation of "infrastructure or facilities" will not exclusively turn on

the Department's interpretation as expressed in its own guidance document. Although a guidance document provides good evidence of the Department's institutional interpretation, in this case it does not fully answer the question because the document uses the term "including." The parties do not refer us to anything in the document that specifically addresses land application of biosolids one way or the other. It is interesting to note that an earlier version of the guidance document (Synagro Ex. KK) did not contain the word "including."

We are reluctant to delve into this legal issue any further at this stage because the Appellants have not alleged that there are any zoning ordinances that potentially apply here. We are loath to decide purely academic questions. *Milco Indus. v. DEP*, 2002 EHB 723. On this and on some of their other arguments, the Appellants complain that the Department should have considered something, but they do not tell us how that consideration would have made any difference. It is certainly possible for an appellant challenging a Departmental decision to prevail in some cases simply on the basis of a claim that the Department failed to conduct an adequate investigation and analysis. *Blue Mountain Pres. Ass'n v. DEP*, 2006 EHB 589, 605-06 (no showing necessarily required that project will degrade waters; only need to show Department failed to perform proper analysis). However, given the Board's extensive *de novo* review, an appellant who rests on the fact of an inadequate investigation or analysis alone often does so at its peril. *Kiskadden v. DEP*, EHB Docket No. 2011-149-R, slip op. at 34 (Adjudication, Jun. 12, 2015). If Appellants wish to pursue this issue further, they are encouraged to explain why it makes a difference.

Delaware River Basin Commission

Synagro and the Department target certain of the Appellants' objections relating to the Delaware River Basin Commission ("DRBC") and argue that the land application of biosolids is

not an activity that triggers any DRBC review or involvement. They point out that Section 3.8 of the Delaware River Basin Compact provides that no project having a substantial effect on the water resources of the Delaware River basin shall be undertaken unless it is first submitted to and approved by the DRBC. Synagro and the Department then say that, under the DRBC's regulations at 18 C.F.R. § 401.35, the land application of biosolids is not one of those activities deemed to have a substantial effect on the basin's water resources. They point to the affidavit of William Muszynski, Manager of the Water Resources Management Branch of the DRBC, who averred that during his eleven years working at the DRBC it has never reviewed a project for the land application of biosolids. Synagro adds that DRBC's regulations also do not apply because there will be no discharge from the sites. Synagro and the Department conclude that the DRBC has no role in reviewing a biosolids project, and therefore, they are entitled to summary judgment on the Appellants' objections relating to the DRBC.

The Appellants respond that Synagro and the Department misunderstand their objections. They contend that they are not saying that the Angle Farms project should have been referred to the DRBC for its review and approval, but rather that the Department's own anti-degradation regulations obligate *the Department* to ensure that the project complies with the DRBC's water quality standards. They argue that, under Section 93.2 of the Pennsylvania water quality standards regulations, the Department must follow and enforce the DRBC's water quality standards where they are more stringent and otherwise apply. Section 93.2 provides in part, "When an interstate or international agency under an interstate compact or international agreement establishes water quality standards regulations applicable to surface waters of this Commonwealth, including wetlands, more stringent than those in this title, the more stringent standards apply." 25 Pa. Code § 93.2(b). The general permit used for these sites also cites

Chapter 93. The Appellants also cite the chapter of Pennsylvania's regulations that specifically addresses the DRBC. Section 901.2 provides, "The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A (2014) and the Water Code and Water Quality Standards as set forth in 18 CFR Part 410 (2014) are hereby incorporated by reference and made a part of this title." 25 Pa. Code § 901.2. The Appellants argue that the DRBC's water quality standards are in fact incorporated into Pennsylvania's regulations and, by virtue of the two cited provisions, the Department must apply the DRBC's water quality standards when reviewing projects, even if a project is not one deemed to have a substantial effect on the basin's water resources, thereby triggering *the DRBC's* review.

The Appellants bring their argument full circle by stating that the DRBC's regulations prohibit any detrimental change to existing water quality in Special Protection Waters,[4] that the Angle Farms sites ultimately drain into a portion of the Delaware River that is classified as Special Protection Waters, and that the Department should have evaluated the sites accordingly. The Appellants cite to their expert's opinion that runoff from the biosolids application will in fact measurably degrade the water quality of the receiving streams and the Delaware River, in violation of DRBC's regulations. Finally, the Appellants point to evidence in the record where both Department officials and Synagro representatives confess unfamiliarity with the DRBC regulations and admit not evaluating the regulations during the application preparation and its subsequent review.

In their respective replies, neither Synagro nor the Department addresses the two regulations cited by the Appellants. In fact, the Department did not address the Appellants'

[4] "The applicable state environmental agency shall assure to the extent possible that existing water quality in Special Protection Waters is not measurably changed by pollution discharged into the intrastate tributary watersheds within its jurisdiction." DRBC Water Quality Regulations at Section 3.10.3 A.2.f, http://www.nj.gov/drbc/library/documents/WQregs.pdf.

DRBC arguments anywhere in its reply. Similarly, the DRBC representative's affidavit does not address the Appellants' point. For its part, Synagro maintains that the DRBC should not be involved in a project for the land application of biosolids, and it asserts that the Appellants have not produced any facts or provided any legal basis to support the applicability of the DRBC's water quality standards. In light of our discussion above, this is obviously untrue. Synagro avoids any discussion of 25 Pa. Code § 93.2 and 25 Pa. Code § 901.2. Synagro provides us with no meaningful response to contest the applicability of those provisions.

The Delaware River Basin Compact has been codified into the law of the Commonwealth of Pennsylvania at 32 P.S. § 815.101. Under the Compact, the Department has explicitly agreed to protect the waters of the Delaware River Basin from pollution.[5] If the Appellants are correct, their interpretation of the law could have broad-reaching impacts on the way the Department evaluates projects proposed within the Delaware River Basin. The parties do not refer us to any case law on point. With regard to this specific case, if the Appellants are correct we are left to decide, among other things, whether the Department's review of the Angle Farms biosolids project in the context of the DRBC's water quality standards would make any difference in the final decision. *See Kiskadden, supra*, slip op. at 33 (citing *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476); *O'Reilly v. DEP*, 2001 EHB 19, 51. For instance, assuming for the

[5] *See* Compact at Section 5.3:

> Each of the signatory parties covenants and agrees to prohibit and control pollution of the waters of the basin according to the requirements of this compact and to cooperate faithfully in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the basin which flow through, under, into or border upon any of such signatory states, and in order to effect such object, agrees to enact any necessary legislation to enable each such party to place and maintain the waters of said basin in a satisfactory condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits and adaptable to such other uses as may be provided by the comprehensive plan.

moment that the DRBC's more stringent water quality standards apply, it still remains unresolved at this point whether any potential runoff from the Angle Farms sites that reaches streams draining to portions of the Delaware River classified as Special Protection Waters would measurably change those waters through pollution. *See supra* note 4. At this juncture, the movants have failed to convince us that they are entitled to summary judgment on this question. The Appellants did not move for summary judgment. This issue, like many others, will benefit from further consideration.

Groundwater Contamination

We do not view the 124 paragraphs set forth in the Appellants' amended notice of appeal as 124 stand-alone, independent bases for overturning the Department's action. The Department and Synagro treat the objections that way, but we do not. A good example of this is the Appellants' fundamental objection that biosolids application on the farms will contaminate the groundwater, which will in turn contaminate their nearby drinking water wells. Several paragraphs in their notice of appeal relate to this basic concern. Rather than face this basic concern head on, Synagro and the Department have looked to the fringes of the issue in an understandable attempt to narrow the issues for hearing, but we believe that attempt has been unsuccessful. For example, Synagro and the Department say that, contrary to the 70th paragraph in the amended notice of appeal, nitrate levels in the Appellants' drinking water are below the Maximum Contaminant Level (MCL) of 10 mg/l, and therefore, are not "elevated" as the Appellants claim. The Appellants answer that Synagro misses their point, that point being that the test results show that the land application of fertilizer on the Sunrise Farm is already negatively impacting drinking water supplies. The test results in their view evidence interconnected groundwater, i.e., groundwater vulnerable to nearby surface activities. Biosolids

application will not only exacerbate the nitrate problem, but whatever other contaminants are in the biosolids will also find their way into the wells in their view.

On another underlying point, wells were apparently drilled on the Sunrise Farm years ago that were used to conduct a pumping test for a potential golf course. The golf course was never developed, but the wells are still there. The Appellants object that these and perhaps other wells were not properly identified and considered. Whether the details regarding map preparation are true or not, the overarching question of concern is whether groundwater at the sites has been properly accounted for and protected, in their view. As explained by the Appellants' expert, Matthew Mulhall, P.G., these wells possibly relate to the groundwater issue more generally. He says that the new wells were drilled "to depths ranging from 200 to 400 feet below ground surface and required the installation of casing to depths ranging from 63 to 100 feet below ground surface." "The need to install casing to [these] depths…," he states, "indicates a high likelihood that bedrock beneath the site is not competent and it was difficult to obtain a secure seal between the rock and casing to minimize potential impacts to the quality of water in the wells from shallow or near ground surface concerns." Mulhall also says that "[t]hese wells and any others installed at the sites are potential vertical conduits for contaminants to migrate from ground surface to water-bearing zones used for water supply." He adds that data from the pumping test revealed that "the pumping of the water-supply wells proposed for the golf course affected water levels in the other wells including the residential wells." He concludes that "the multi-layered aquifer beneath the Sunrise site is highly interconnected beneath the site and neighboring properties," and "a significant potential exists for contaminants introduced at the Sunrise Farm site to affect the quality of water derived from nearby residential wells."

Interestingly, the Department and Synagro do not cite any contrary expert opinion. They essentially concede that the Department did not consider site-specific groundwater issues, instead taking the view that it is not required to do so because compliance with the regulatory operating requirements (such as maintaining a 300-foot buffer around water sources) is guaranteed to protect groundwater. The Department, somewhat oddly, also refers us to a fact sheet apparently prepared by the Pennsylvania Biosolids Recycling Alliance in support of the rather bald proposition that "studies have indicated that the use of biosolids will not harm groundwater."

The Appellants' expert appears to have done an extensive study of the matter and concluded that this particular project at these particular sites presents a credible risk to groundwater. He analyzed the local geology, including soils, bedrock, and structural features, such as faults and the general characteristics of the Martinsburg Formation, which underlies the area in question. He concludes that "the bedrock is not sufficiently competent at shallow depths to prevent migration of contaminants applied at or near ground surface from migrating into water-bearing zones used for water supply." Mulhall also noted that, due to characteristics of the geology and hydrogeology, if contamination were to occur, "it would likely be very difficult to replace a well in which the quality of groundwater has been affected by biosolids applied to the fields."

We are certainly not endorsing or adopting any of the Appellants' findings, analyses, or conclusions at this time. We merely cite to them to show that the Appellants, with respect to groundwater contamination and, for that matter, the other technical issues raised in Synagro's and the Department's motions, have pointed to sufficient evidence in the record "which in a jury trial would require the issue to be submitted to a jury," Pa.R.C.P. No. 1035.2, thereby defeating the motions for summary judgment.

The parties also raise an interesting issue of regulatory interpretation regarding the wells on the Sunrise Farm and whether isolation distances must be maintained around those wells. The regulation at 25 Pa. Code § 271.915(5) says that biosolids may not be applied (absent a waiver) within 300 feet of a "water source." A "water source" is defined as "[t]he site or location of a well, spring or water supply stream intake which is used for human consumption." 25 Pa. Code § 271.1. The question presented is, what does the phrase "which is used for human consumption" modify? The Appellants say it only modifies "water supply stream intake." The Department and Synagro argue that it also modifies "wells" and "springs."

This question presumably comes up because Synagro wants to land-apply biosolids within 300 feet of the golf course wells. There is no dispute that the wells are not themselves used for human consumption. Under certain circumstances we must defer to the Department's *institutional* interpretation of an ambiguous regulation if that interpretation is reasonable[6] and consistent with the enabling statute, *Gadinski v. DEP*, 2013 EHB 246, 294-95, but the Department failed to provide us with any record support that it has such an institutional interpretation. The Appellants' interpretation is certainly not unreasonable on its face. Furthermore, as just discussed, the Appellants' greater concern is that these wells provide a conduit for groundwater contamination that will reach their wells, which justifies an isolation distance regardless of whether the regulations require it or a waiver is obtained. The movants have not convinced us that they are entitled to summary judgment on this issue.

Finally, with respect to groundwater issues, Synagro and the Department contest the Appellants' objection that the Department did not adequately consider the depth of local and

[6] Even when applying a deferential standard, we must ensure that the agency operates within the bounds of reasonable interpretation. *Waste Mgmt. Disposal Servs. v. DEP*, 2005 EHB 433, 459-60. *See also Michigan v. EPA*, No. 14-46, 2015 U.S. LEXIS 4256, at *10 (U.S. Jun. 29, 2015) (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014)).

regional water tables. *See* 25 Pa. Code § 971.915(c)(7) (prohibiting placement of biosolids to land within 11 inches of seasonal high water table and 3.3 feet of regional high water table). They cite field testing done by Department personnel who used a shovel to dig into certain portions of the sites to assess the saturation of soils. The Appellants note what they view as inadequacies in the field testing. They state that the field test only assessed the depth of the seasonal high water table and then used that to extrapolate the presumed depth of the regional high water table without any actual testing. The Appellants further take issue with the fact that the Department did not document the number or location of the shovel tests. At this point, we agree with the Appellants that Synagro and the Department have not met their burden for summary judgment on this issue. While it may be true that the Department's shovel test is adequate, at this juncture that is not clear.[7] We think that issues regarding the adequacy of the field test and the depths of the water tables across the entirety of the sites are technical issues that need to be addressed at a hearing. Further, regardless of the water table depths, it remains to be seen whether the application of biosolids at the sites will have an adverse impact on shallow subsurface or regional groundwater.

Runoff

One of the overarching concerns lying at the heart of the Appellants' case is the potential impact from polluted runoff. The Appellants say that there is already excessive runoff coming off of the sites onto neighboring properties and into waters of the Commonwealth. They argue, with expert support, that, after biosolids are applied to the sites, runoff will pick up whatever pollutants are contained in the biosolids and carry the pollutants beyond the boundaries of the

[7] The Department and Synagro frequently cite cases that hold that, when technical issues are raised, parties must substantiate their claims with technical evidence. *See, e.g., Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L, slip op. at 25 (Adjudication, May 20, 2015). While we are not disputing this precept, we think that its invocation may often be premature in the context of summary judgment.

sites onto nearby properties and into nearby waters. They cite to expert opinion that none of the purported control measures, whether regulatory required or otherwise required by the Department, are sufficient to prevent this polluted runoff from migrating offsite and causing harm. The Department is also apparently concerned about potential runoff because it has imposed setbacks greater than those required under the regulations.

Synagro and the Department have once again picked at individual components of the Appellants' runoff argument, in a similar way to how they attacked the Appellants' objections relating to groundwater contamination. They seek summary judgment on objections relating to slope analysis, a conservation plan, distance buffers, and cumulative and long term impacts. The Appellants respond with a variety of evidence in the record to rebut the requests for summary judgment. The Appellants have expert opinion that runoff will be a problem at the sites. They have video of water coming off the Angle Farms and onto one of their properties. They have accounts of runoff washing out a gravel driveway, and of a pond overflowing after receiving a high amount of runoff. The Appellants tell us that the Township needed to repair a road to prevent it from caving in due to runoff. While we are not saying that all of this is true, it is more than sufficient evidence to defeat summary judgment. The Appellants have clearly set forth specific facts in the record that show there is a genuine issue for a hearing. 25 Pa. Code § 1021.94a(l).

All of the issues related to runoff present us with the challenge of weighing competing expert opinions from the parties. The resolution of issues that are the subject of competing expert analyses is rarely appropriate for summary judgment. *See Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 90, 94 ("Where there is a legitimate dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment

motions.") Our ultimate decision on these issues will be grounded in weighing the credibility of the various experts and assessing the soundness of their analyses after they have been subjected to direct and cross examination. We are unwilling to conduct a trial on paper to reach these assessments. *Pileggi v. DEP*, 2010 EHB 244, 249. Therefore, while we briefly address each of the issues below, we deny summary judgment for these common reasons.

With regard to slopes, Synagro and the Department both point to paragraphs in the notice of appeal that allege the Department failed to adequately consider and account for slopes in excess of 15% on the Sunrise Farm and Stone Church Farm sites. Synagro and the Department argue that, under the regulations, Synagro is only prohibited from applying biosolids to areas with slopes in excess of 25%. 25 Pa. Code § 971.215(d)(1). They argue that no areas with slopes in excess of 25% will receive biosolids and that the Appellants have shown no evidence of environmental harm that would prompt the Department to impose a more stringent requirement. The Department says that it received a report from the Appellants' expert raising concerns over slope steepness, and that in response the Department went out to the sites and collected measurements of the areas identified within the report to confirm that none had slopes in excess of 25%.[8] The Appellants contend that engineering plans of Sunrise Farm from 2005 note certain slopes as being 25% and that even under the Department's new measurements the slopes register just under the threshold at 23% and 24%. The Appellants believe that these slopes are steep enough to warrant additional consideration and/or protective measures.

The Appellants further argue that there has been no analysis of the relationship between slope and other aspects of the sites. For instance, they cite one of their experts who opines that

[8] In its reply, the Department contests the Appellants' assertion that the Department cannot rely on these slope measurements because they were done after the close of discovery. As the Department recognizes, under the Board's *de novo* review, evidence generated after the date of the action under appeal, including tests and sampling, is clearly appropriate for the Board's consideration. *Kiskadden, supra*; *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L, slip op. at 5-6 (Opinion, Mar. 20, 2015).

soil characteristics such as limited water retention and slow water movement in combination with steep slopes make these sites poor choices for the application of biosolids, presumably because these characteristics will only exacerbate the runoff problem. It is clear that there is a factual dispute regarding the steepness of the slopes on the sites and whether that steepness, in combination with other factors, renders these sites unsuitable for biosolids. Such factual disputes are not suited for resolution in the context of a summary judgment motion and must instead be resolved through a factual record developed at a hearing. *Vanscyoc v. DEP*, 2014 EHB 560, 562; *Lower Paxton Twp. v. DEP*, 2001 EHB 753, 769. Further, we anticipate that the consequence of applying biosolids to slopes of this steepness will be the subject of competing expert testimony.

The Department argues that any concerns over runoff have been addressed through a conservation plan. The Department says it relied on a conservation planner certified by the Natural Resource Conservation Service to develop a conservation plan for the Angle Farms, and that this conservation plan did not identify any areas where erosion from runoff was an issue. The Appellants respond that the conservation plan does not actually address runoff, rather it only discusses the movement of soil via erosion, which is not the same as stormwater runoff. The Appellants raise additional issues with the plan. They say that the plan does not analyze the movement of biosolids, only the soil underneath the biosolids. They cite portions of an expert report to support their contention that the plan will not prevent polluted runoff to nearby waterways. According to John A. Miller, P.E., "Sludge sitting bare is exposed to rainfall, causing erosion, and carrying sludge sediment, ungerminated seeds, and contaminants downstream prior to seed germination." The Appellants also argue that there has been no independent review of the adequacy of the conservation plan; instead, they construe it as merely a checklist item for the Department.

The Department argues in its reply that Miller does not have any expertise in the creation or review of a farm conservation plan. This argument all but exemplifies why we are denying summary judgment. Questioning an expert's qualifications goes to the weight and credibility that we afford expert opinion. What we have are differences of opinion between Miller, Eric Rosenbaum of Rose Tree Consulting, and Tim Craven, the Department's soil scientist. These opinions can only be properly considered after a full hearing on the merits. In addition, we find the Department's attack on the Appellants' expert somewhat bizarre when juxtaposed with the Department's reliance on the fact sheet prepared by the Pennsylvania Biosolids Recycling Alliance to support the claim that it is an established fact that biosolids application will not cause harm to surface water and groundwater when done in accordance with regulations. We find the fact sheet almost certainly inadmissible hearsay and far from sufficient to support summary judgment.

The Department also seeks summary judgment on the Appellants' objections that the Department did not establish appropriate distance buffers between areas that will receive biosolids, and dwellings, intermittent streams, and wetlands. The Department argues that the regulations establish isolation distances from, among other things, occupied dwellings, wetlands, water sources, and streams, and that the Angle Farms sites fully comply. 25 Pa. Code § 271.915(c). The Department says that upon inspecting the sites it identified features not previously identified on Synagro's maps, and the Department accordingly required appropriate distance buffers from those features.

The Appellants take issue with the propriety and protectiveness of distance buffers on the whole. They say that the distances required by the regulations do nothing to prevent runoff from flowing over those distances and reaching the features the buffers are intended to protect. The

Appellants say that a more appropriate and protective buffer would include some type of erosion and sediment control mechanisms such as silt socks or hay bales.[9] We view the Appellants' claim as essentially an argument that, regardless of whether all of the regulations were satisfied in terms of distance buffers, it was still unreasonable at these particular sites for the Department to allow the application of biosolids to go forward without requiring measures that are more protective of the adjacent property owners and waters of the Commonwealth. As previously discussed, the wisdom of the Department's decision to not require measures that go above and beyond the minimum regulatory requirements for these particular sites is a question that will need to be decided on a full record. Whether runoff will in fact travel beyond the distance buffers is another area for expert opinion.

Relatedly, Synagro joins the Department in contesting the Appellants' objection that the Department did not require Synagro to adhere to a property line buffer to protect nearby properties. Synagro and the Department point out that the regulation cited by the Appellants in support of this objection, 25 Pa. Code § 275.202, applies only to site specific biosolids permits and not authorizations for coverage under general permits. The Appellants respond that they cited that regulation merely to illustrate what a property line distance requirement might potentially look like if the Department had exercised its discretion to impose one. Furthermore, the Appellants contend that an individual permit should have been required in this case. We are satisfied by the Appellants' response for purposes of summary judgment and we do not believe that extensive discussion on the issue is required at this juncture. As mentioned above, we liberally construe the objections within a notice of appeal.

[9] The Appellants also take issue with proposed vegetated buffers that will be installed to protect wetlands. The Appellants' expert John Miller says that it will be impossible for the vegetated buffers to completely eliminate all pollutants from reaching wetlands. He argues that "[o]ver time, the vegetated buffers will become overloaded and decrease in functionality." This is another issue more appropriately decided on a full record.

Synagro and the Department also move for summary judgment on the Appellants' claims that the Department did not consider and account for the cumulative and long term impacts of applications of biosolids. Synagro and the Department argue that the regulatory and permitting schemes contemplate the effects of successive applications of biosolids. In support of their argument, Synagro and the Department point to regulations governing cumulative pollutant loading rates. *See* 25 Pa. Code § 271.914. They say that the PAG-08 general permit establishes pollutant concentration levels for a spectrum of pollutants that cannot be exceeded. They also cite a requirement for the submission of representative soil chemical analyses for each of the sites so that current pollutant levels of the soils can be assessed against the constituents of the biosolids to be applied. If any of the pollutant levels are reached, biosolids cannot be applied. They further argue that the regulations limit the rate at which biosolids can be applied and tie it to the agronomic rate.[10]

The Appellants respond that Synagro and the Department are construing their objections too narrowly. They say that they are not concerned only with cumulative and long term impacts in terms of pollutant loading and nitrogen amounts, but also with the effects that successive applications of biosolids will have on water quality, e.g., the impact of continued runoff from all three sites on the Allegheny Creek watershed. The Appellants dispute the arguments put forth by Synagro and the Department. They say that the cumulative pollutant loading rates only address pollutant impacts on soil, not impacts on waterways or groundwater. They argue that there is no practical way for Synagro or the Department to determine the pollutant levels in each batch of

[10] Agronomic rate is defined as:

> The annual whole sludge application rate (dry weight basis) designed to do the following:
> (1) Provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, silvicultural crop, cover crop, horticultural crop or vegetation grown on the land.
> (2) Minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the groundwater.

25 Pa. Code § 271.907.

biosolids from the 38 sources that will supply Synagro's operation unless the Department or Synagro sample each batch. They also argue that agronomic rates only deal with the leaching of nitrogen into the groundwater, not any other pollutants, and that those rates are not suited for assessing anything beyond nitrogen. Much like all of the runoff issues, this is another complex technical issue that is not suited for summary judgment. Whether there is a risk of excessive pollutant loading or a threat to water quality through years of biosolids applications on multiple nearby sites is a dispute that will be the subject of competing expert testimony.

Of course, whether there is runoff, excessive or otherwise, would not be of any particular concern if the runoff is innocuous, but the parties obviously disagree on that aspect of the runoff issue as well. Synagro and the Department rely on the two-part process whereby sludge sources are approved as safe for land application pursuant to a separate process without regard to any particular site, and individual sites are determined to be suitable for any approved source. The Appellants, however, among other things complain that 38 different sources for one site is too much, distinguishing our holding in *Stevens v. DEP*, 2002 EHB 249, which involved only one source of sludge for the site at issue. They generally aver that the Department needs to more thoroughly consider impacts to waters from so many different sources that may or may not be adequately tested, and that the Department is too focused on the appropriateness of the sludges from an agricultural point of view. Given the number of sources approved here, the unknowns and variability of sludge quality required greater attention, in their view. They complain that Synagro has not been forthcoming in discovery regarding this issue, which has hampered their ability to develop issues regarding sludge quality. *Cf. Kiskadden v. DEP*, 2014 EHB 380 (sanctions imposed for failure to disclose chemicals used in fracking). The Appellants cite

expert opinion in support of their position regarding sludge quality. The Appellants have shown us enough to defeat the movants' summary judgment motions.

Soil Sampling

The Appellants contend that soil at the three sites is simply too acidic for land application. They question the practice and timing of resolving this problem by raising pH, and they point out that the Department did not do its own soil sampling. Synagro argues that there is no legal requirement for the Department to conduct independent sampling to verify the sampling submitted by Synagro. However, we do not think that is what the Appellants are arguing. Rather, they seem to be arguing that the Department has an obligation to ensure that soil conditions are already or can be made suitable for land application, and the Department has failed to fulfill that obligation, either by having sufficient data upon which to base a scientifically sound decision or by otherwise ensuring that soils are suitable. We do not understand the Appellants to be arguing that the Department has some sort of an independent duty to perform its own sampling, which it clearly does not.

With respect to pH addition, the pertinent regulation states:

> A person may not apply sewage sludge unless the soil pH is 6.0 or greater prior to land application unless the Department allows the increase of pH by application of sewage sludge or other material in which case the soil pH shall be 6.0 or greater within 6 months following the application of sewage sludge, or unless otherwise approved in writing by the Department.

25 Pa. Code § 271.915(e). Synagro and the Department argue that the regulation only requires the Department to ensure a 6.0 pH before biosolids application begins and no biosolids have been applied yet. They also state that the Department's 30-day Notice determination letters are conditioned on Synagro raising pH to 6.0 prior to the first application of biosolids. (DEP Ex. 7.) Section 271.915(e) seems to create a general rule, but allows the Department to approve

exceptions to that rule in its discretion. The Appellants are entitled to challenge the exercise of that discretion, and that is how we interpret their objection.

At a more fundamental level, the Appellants tell us that instead of focusing on how Synagro may have achieved minimal compliance with individual suitability and operational criteria, as Synagro and the Department have done, we should take a more holistic approach. They argue that it is not the acidity question alone that independently justifies a reversal of the Department's action. Rather, they argue that the Department's decision was flawed when one considers *in combination* the acidity, the slopes on the site, the proximity of wells and residential properties, wetlands, waters, and endangered species habitat, and the nature of the sludge to be applied. Based on these and other factors, the sites should have been disapproved, more thoroughly studied, more constricted, and/or subject to individual permitting, they say. This approach is certainly worth considering as we move forward.

Department's Enforcement Authority

Finally, Synagro and the Department point to two objections in the Appellants' notice of appeal that state that the Department has not adequately ensured that Synagro will comply with distance buffers. Synagro and the Department interpret the Appellants' objections to mean that the Department going forward will not ensure compliance, and they argue that the Department's enforcement authority is sufficient to ensure that Synagro will comply with all regulations. The Appellants respond that the Department has a responsibility to prevent environmental harm from occurring in the first place. This suggests that the Appellants are looking backward, not forward, which makes sense. Whether the Department will initiate enforcement action against Synagro in the future is neither here nor there at this point. For our current purposes, we presume that

Synagro will comply with the law and the Department will enforce the law. Without further clarification of the issue we are asked to decide, summary judgment is premature.

Conclusion

The movants view the Appellants' appeal as a "generalized assault" on the Department's regulation of biosolids, but that is not our impression. We do not see any clear facial challenges to the regulations in the Appellants' materials. Instead, we see many variants of the same basic theme, which is that *these particular sites* are not suitable for land application and the Department erred by concluding otherwise. With respect to these particular sites, the essence of the dispute in this case is that the Department and Synagro claim that they complied with all of the applicable regulatory criteria and then some. The Appellants respond that, even if that is true, and even if that is an acceptable approach in most cases, "here the Department had a substantial amount of information that told it that it needed to either prevent sludge application in full at these three sites, require substantial reductions in the acreage that could receive biosolids, and/or require Synagro to employ more protective measures. The most that was done was extend the isolation distances slightly. Movants even refused to include a berm that [Appellant] Ms. Zimmerer requested as a protective measure to divert runoff away from Price Lane." (citations omitted). "Simply because a site is not automatically excluded under the regulations, it does not follow that the site is suitable." (Appellants' Memo. at 58.)

Although we sympathize with the movants' effort to narrow the issues by way of motions for summary judgment, there are simply too many open questions and disputed facts for us to grant the motions. We have carefully reviewed the motions for partial summary judgment in their entirety and all of the contentions contained therein and we have not found anything in the filings to convince us to grant the motions. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	

O R D E R

AND NOW, this 1st day of July, 2015, it is hereby ordered that the motions for partial summary judgment filed by Synagro and the Department are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: July 1, 2015

c: **DEP, General Law Division:**
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