COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	**Issued: May 11, 2016**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Appellant's and the Permittee's competing motions for summary judgment in an appeal from an NPDES permit. The Appellant's motion is based in part on objections that are not within the genre of the issues raised in the Appellant's notice of appeal. The motion is also based in part on alleged deficiencies in the Department's review of the permit without adequate explanation of why those alleged deficiencies have any practical significance in terms of our review of the permit. It is also clear from a review of both motions that numerous unresolved genuine issues of material disputed fact prevent summary judgment from being entered in favor of either party.

O P I N I O N

This is Chester Water Authority's ("Chester Water's") appeal from the Department of Environmental Protection's (the "Department's") issuance on April 9, 2015 of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0265951 to Old Dominion Electric Cooperative ("Old Dominion") for its Wildcat Point Generating Facility, a new gas-fired power

plant in Cecil County, Maryland. Old Dominion will discharge cooling tower blowdown to the Conowingo Pond portion of the Susquehanna River in Lancaster County. The Conowingo Pond is a 14-mile portion of the Susquehanna River that is bounded upstream by the Holtwood Dam and is impounded downstream by the Conowingo Dam in Maryland. The pond is the source and receiver of water for the Peach Bottom Atomic Power Station, the Muddy Run Pumped Storage Facility, and the York Energy Center. It also serves as the drinking water supply for the city of Baltimore and the Appellant, Chester Water, which supplies many thousands residents in Pennsylvania and Delaware. Old Dominion's plan is to withdraw water from the Pond, after which it will be clarified, chlorinated, treated with an anti-scaling agent, and then used in cooling towers where it is expected that about 90 percent will be evaporated and about 10 percent will eventually be returned to the Pond. If the Pond were a free-flowing river, Chester Water's intake, located 940 feet away from Old Dominion's discharge in the direction of about 90 degrees relative to the direction of expected flow, would probably be considered upstream of Old Dominion's discharge. The Pond, however, looks more like a lake than a river and is heavily managed and utilized, so under some conditions we are told that Old Dominion's intake and discharge could conceivably cause Old Dominion's discharge plume to spread toward Chester Water's intake. Chester Water's concern for maintaining acceptable water quality at its intake is the reason we have this appeal.

Both Chester Water and Old Dominion have moved for summary judgment. The Board is empowered to grant summary judgment where there are no genuine issues 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); *Sludge Free UMBT v. DEP*, 2015 EHB 469, 470; *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. Although summary judgment may also be granted where a party who will bear the burden of proof at the hearing on the merits has failed to produce evidence of facts essential to its case which in a jury trial would require the issues to be submitted to a jury, Pa.R.C.P. No. 1035.2(2), the Board does not often grant summary judgment on that basis. 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*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519.

Old Dominion's basic position in support of its motion for summary judgment is that all of Chester Water's objections are "nothing more than a collection of speculations, beliefs, fears, and legal conclusions without a single iota of factual support." In contrast, it refers to the expert reports of its and the Department's witnesses to show that the Department after careful consideration concluded correctly that Old Dominion's discharge will not have an adverse effect on Chester Water's supply.

Chester Water's basic position is that the permit as written allows for an unlimited discharge of bromide, haloacetic acids (HAAs), and total dissolved solids (TDS), which makes no sense since at least some of the discharge might be pulled into its water intake, which serves thousands of users. No comfort is to be had by the fact that the permit requires sampling of those substances because, in the opinion of its experts, the sampling is too infrequent and it can be performed using a methodology that allows samples to be combined in a way that will mask the highest levels of the substances. It says that the Department among other things selectively used

in-stream sampling data that understates background bromide levels, relied too heavily on Old Dominion's computer model regarding the extent to which the discharge may be diluted before it reaches Chester Water's intake, made unwarranted assumptions about the presence and persistence of HAAs and disinfection byproducts (DBPs) in the discharge, and performed a cursory review of Old Dominion's use of additives and its operating procedures. Chester Water has supplied expert reports that it believes could support all of these claims.

Before turning to some of the parties' arguments in more detail, it should already be obvious that this appeal is not ripe for summary judgment in favor of either party. When a party needs to submit volumes of exhibits and expert reports in support of its motion as these parties have done, it should send a clear signal that summary judgment is inappropriate. 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. *See also Sludge Free UMBT v. DEP*, 2015 EHB 469, 493 (summary judgment is rarely appropriate for resolving issues that are the subject of competing expert analysis).

We have every indication that this appeal will turn on a battle of the experts. There does not appear to be much disagreement on the applicable principles of law. For example, the parties agree that the Department has a duty to ensure that existing instream water uses and the level of water quality necessary to protect the existing uses must be maintained and protected notwithstanding Old Dominion's discharge. 25 Pa. Code § 93.4a(b). Chester Water's use of the Pond as a drinking water supply is a protected existing use. In addition, "[w]ater may not contain substances attributable to point or nonpoint source discharges in concentrations or

amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life." 25 Pa. Code § 93.6(a). The Department's need to analyze the potential impact of Old Dominion's discharge and monitoring requirements even where a particular numerical limit is not regulatorily mandated is consistent with its duty to enforce and protect water quality criteria under 25 Pa. Code § 93.6(a).

Issues Not Included in the Notice of Appeal

As the first basis for its motion for summary judgment Chester Water argues that Old Dominion's permit should have been denied in the first place, and now presumably revoked, because Old Dominion will not be able to comply with the permit requirement that there be no detectable discharge of trihalomethanes (THMs). Chester Water refers us to the Department's Technical Guidance Document 362-2000-001, *Permitting Policy and Procedural Manual*, which states that the Department will deny a permit application if it is clear that a new discharger will be unable to comply with effluent limitations or other permit requirements. Chester Water then points to record evidence that it believes would support a finding that Old Dominion will not be able to comply with the permit's ban on any detectable discharge of THMs.

Before pointing to considerable record evidence that Old Dominion *will* be able to meet its permit limits, the Department and Old Dominion complain in their responses to Chester Water's motion that summary judgment on this argument should be unavailable because Chester Water did not include the issue in its notice of appeal, citing 25 Pa. Code § 1021.51(e) (duty to set forth specific objections in notice of appeal). They say that Chester Water did not identify the issue in discovery or otherwise and that, in fact, the argument appears for the very first time in Chester Water's motion for summary judgment. They add that Chester Water has not moved to amend its appeal to add to this issue.

We agree with Old Dominion and the Department. We have reviewed Chester Water's lengthy and detailed notice of appeal and, not only is the issue of an unattainable permit absent, Chester Water presented the wholly incompatible objection that the permit limits that it now says cannot be met did not exist.

It is true that we have on occasion been rather indulgent in interpreting notices of appeal in the face of waiver challenges, *see e.g., New Hanover Twp. v. DEP*, 2011 EHB 645, 671; *Ainjar Trust v. DEP,* 2001 EHB 59, 65-66, but no such indulgence is called for here. It is simply not appropriate to spring an entirely new issue upon opposing parties in a motion for summary judgment. Chester Water says everybody knows that THMs are an issue in this case, but saying that THMs are generally an issue and saying Old Dominion's permit must be revoked because the THM limit in the permit cannot be met are two entirely different things. Furthermore, a general, catch-all objection like Chester Water's Objection 16 (the Department's action is otherwise contrary to law, etc.) is not sufficient by itself to excuse a failure to include a more specific objection. *Sebastianelli v. DEP*, EHB Docket No. 2016-012-L, slip op. at 8 (Opinion issued May 2, 2016); *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127; *Williams v. DEP*, 1999 EHB 708, 716.

Chester Water argues that it should be allowed to pursue its argument because the Department created unnecessary confusion regarding the issue, because the opposing parties could not possibly have been surprised by the issue and will not suffer any undue prejudice, and because the issue could not have been articulated absent revelations uncovered for the first time in discovery. However, these are arguments that relate to whether an amendment to the notice of appeal should be allowed, not whether a party may simply raise an issue for the first time in a motion for summary judgment. The proper way to go about adding a new objection is to seek

permission to amend the notice of appeal. 25 Pa. Code § 1021.53. It is in that context that the various considerations such as lack of prejudice apply.[1]

In the alternative, Old Dominion and the Department argue that the question of whether there are likely to be THMs in the discharge, which is a necessary component of Chester Water's argument, is a disputed issue of fact. We agree. Both sides have directed our attention to record evidence that would support their position on this question. We would add that further uncertainty is added by the lack of clarity, as least on our part, about exactly what the permit limits are for THMs. We discussed this issue in greater detail in our Opinion denying the Department's motion for partial summary judgment in this appeal. (Opinion and Order issued May 6, 2016.)

Another argument that Chester Water advances in support of summary judgment is that the Department failed to give due consideration and proper notice regarding the portion of Wildcat's discharge that will originate from Old Dominion's adjacent Rock Springs facility's wastewater. Wastewater from the Rock Springs facility that is currently being used for irrigation will now apparently be added to Wildcat's cooling tower water. Old Dominion and the Department complain that this objection was also raised for the first time in the motion for summary judgment. They accurately point out that it was not included in the notice of appeal. Chester Water responds that this is not really a separate objection but merely another example of how the Department failed to conduct a proper analysis of Wildcat's discharge. The difficulty with Chester Water's response is that virtually any new criticism that it could come up with could probably be described as another example of the Department's inadequate investigation.

[1] To be clear, Chester Water may pursue its objection that the Department's analysis of THMs was "deeply flawed" and that the discharge of THMs threatens its system, but if it intends to pursue the separate and distinct argument that Old Dominion cannot comply with its permit, it needs to seek permission to amend its appeal.

Its response also does not address the part of the new objection regarding public notice. In developing the pertinent facts regarding Old Dominion's discharge we fully expect that there may be evidence regarding the Rock Springs water, but if Chester Water wants to pursue this issue as an independent basis for the Board taking some action regarding the permit, it must comply with our rule regarding amendment of appeals.

Temperature

Old Dominion's permit contains a daily maximum limit of 110 degrees. Chester Water's notice of appeal contains the following objection:

> DEP failed to impose an appropriate temperature requirement on the [Old Dominion] discharge in the Permit. Temperature is a concern because, among other reasons, it can increase the probability of DBP formation. DEP imposed a temperature limit that is inconsistent with, and significantly higher than, the temperature value used in modeling of temperature effects of the [Old Dominion] discharge.

Old Dominion's motion asks us to dismiss this objection because Chester Water did not perform any modeling of its own. It continues:

> There is no factual evidence presented or referred to by [Chester Water] to contradict the findings by the Department as to the temperature. [Chester Water's] argument is, in effect, that the Department should have conducted its analysis of temperature impacts in a different manner. [Chester Water's] unsupported allegations fail to establish that the analysis completed by the Department and [Old Dominion] was unreasonable, or that a different analysis would show an adverse impact. [Chester Water] has the burden to establish—based on admissible evidence—that the permit either violated a regulation or was manifestly unreasonable based on a preponderance of the evidence. Here, [Chester Water] has offered no evidence that the discharge limitation in the permit with regard to temperature was erroneous or that it would allow or cause a violation of the standard. Nor does any evidence it has identified show that the temperature of the discharge would in fact adversely affect [Chester Water's] water treatment system, or cause an increase in DPB formation in their system.

(Brief at 16-17.) Old Dominion then goes on to describe the record evidence that it believes supports the Department's analysis and conclusions. This evidence largely consists of the technical work of the parties' experts.

Chester Water counters that its experts will show that the Department's analysis of the temperature issue was indeed flawed. It cites the following opinion from its expert in support of its motion and in opposition to Old Dominion's motion:

> The NPDES Permit includes a maximum Outfall 001 temperature limitation of 110 degrees (°) Fahrenheit and the Fact Sheet states that the Pennsylvania temperature standards at 25 Pa. Code 93.7(a) in addition to the 2 °F rise limitation at 25 Pa. Code 96.6(b) would be met. However, the details for the model that was used to demonstrate compliance with the 2 °F temperature rise are too conservative. Specifically, the model utilizes an end-of-pipe (discharge) summer temperature of 79 °F (assuming a [Wildcat] discharge temperature of 100 °F before discharge to the 5-mile underground conveyance to the discharge location) and an end-of-pipe (discharge temperature) of 58 °F winter temperature to evaluate compliance. As noted though, the NPDES Permit explicitly allows a discharge temperature of 110 °F.
>
> It is more appropriate to model compliance with a 2 °F temperature rise utilizing the authorized discharge temperature of 110 °F, not the estimated discharge temperatures.
>
> If [Wildcat], however, intends to manage temperature to comply with the 2° temperature rise, then the daily maximum discharge temperature should be lowered to a level to assure compliance; and that level is not the 110 °F discharge temperature.
>
> It is inconsistent with PADEP rules and guidance to conduct the assessment of compliance with instream water quality standards on one effluent level yet establish the limit on a higher effluent level.

(O.D. Ex. 13 at 13-14.)

We discuss the temperature issue early in this Opinion not because it is more important than the other issues in the case, but because it illustrates why both parties' motions for summary judgment must be denied. Chester Water, with considerable merit, accuses Old Dominion of

relying too heavily on its own expert reports in support of its motion. Chester Water is able to point to its own expert reports to show that there is a legitimate dispute that will require expert testimony at a hearing. Whether a particular scientific analysis has been performed in accordance with generally accepted scientific principles and is otherwise supportable is inevitably the subject of expert testimony. We depend on experts to explain a scientific investigation. As we said in *Sludge Free UMBT v. DEP*, 2015 EHB 469, 493-94,

> 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.

To a certain extent we can sympathize with Old Dominion's criticism. Chester Water criticizes the temperature limit of 110 degrees, but it does not propose a different limit. Its expert criticizes Old Dominion's model as too conservative but fails to explain that the purported errors in modeling mean that there should be a limit different than 110 degrees in the permit. Chester Water also fails to explain why a 110-degree limit is insufficiently protective of the environment in general or its water supply in particular. As we have said in many other cases but originally in *Shuey v. DEP*, 2005 EHB 657, 711, "appellants may not raise an issue and then speculate that all types of unforeseen calamities may occur." *See also Borough of St. Clair v. DEP*, 2015 EHB 290, 314; *Brockway Borough Mun. Auth., supra*, 2015 EHB 221, 238-39. We review the permit as issued, not the Department's review process leading up to the permit. That is a subtle but important distinction. "We are charged with reviewing the Department's decision,

not its conduct. Our focus is on the action itself. That is why going through the record to pick at errors the Department made along the way in reaching a decision is usually an unnecessary and unproductive distraction. *O'Reilly v. DEP*, EHB 19, 51. What really matters is whether the Department made the right call in the end." *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476.

Third-party appellants challenging the Department's issuance of a permit can prevail by showing that the Department and/or permittee have not performed an analysis that they are legally required to perform. *See, e.g., Borough of St. Clair v. DEP*, 2014 EHB 76 (failure to complete mine subsidence study); *Blue Mt. Pres. Ass'n. v. DEP*, 2006 EHB 589 (failure to perform antidegradation analysis). It is not absolutely necessary in such cases to prove a particular conclusion would have been reached if the appropriate analysis had been performed, although as we said in *Blue Mountain*, that obviously makes for a stronger case. *Blue Mt. Pres. Ass'n.*, 2006 EHB at 605-06. A weaker case is presented where, as here, the Department and/or permittee performed the required analysis but the third-party appellant who bears the burden of proof challenges some aspect of the analysis but fails to explain why the Department's final conclusion is wrong. That is not to say that a woefully inadequate investigation can be allowed to stand, but as we recently said in *Sludge Free UMBT*, 2015 EHB 469, 484, "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." (citing *Kiskadden v. DEP*, 2015 EHB 377, 410). Our review of the permit is not an academic evaluation of scientific technique divorced from reality. We will not remand the permit for a further study purely for the sake of obtaining greater knowledge.

That said, Chester Water has pointed to enough evidence in the record regarding the Department's allegedly deficient investigation regarding the temperature issue to survive Old Dominion's motion for summary judgment. Whether pointing to nothing more than limited modeling errors is of more than academic interest remains to be seen.

Bromide

Chester Water objects to the permit because it believes that the Department failed to provide for adequate control of the discharge of bromides and DBPs in the permit. Old Dominion's permit does not contain discharge limits for bromide, total dissolved solids (TDS), haloacetic acids (HAAs), or five specific HAAs (monobromoacetic acid, monochloroacetic acid, dibromoacetic acid, dichloroacetic acid, and trichloroacetic acid).[2] Similar to the temperature issue, Chester Water says there should be limits but does not tell us what those limits should be. It attacks aspects of the Department's analysis but does not explain how that analysis resulted in a defective result.

For example, Chester Water objects that the Department in measuring background levels of bromide in the river improperly relied exclusively on data from a single monitoring station with the designation WQN201 located near Marietta, Pennsylvania. It says the Department should instead have used results obtained by the Susquehanna River Basin Commission in the Conowingo Pond and/or required Old Dominion to conduct sampling in the Pond. It says that the bromide background level would have been higher if results from the Pond had been used instead of the results from the relatively more distant Marietta station upstream of the Pond. However, Chester Water has not explained why or how the use of data obtained from sampling in the Pond instead of near Marietta should have compelled the Department to impose a bromide

[2] As discussed in our separate Opinion denying the Department's motion for partial summary judgment, the precise extent to which Old Dominion's permit regulates trihalomethanes (THMs) and four specific THMs is subject to further review on our part.

limit, let alone a particular value for bromide. We understand the concern with background bromide being concentrated by the cooling tower process, but a generalized concern does not justify a remand for further study.

In any event, the Department says that it did in fact use the Susquehanna River Basin Commission's data in conjunction with the Marietta data. It cites the views of its own experts to the effect that the combined use of the data sources gives the most accurate and year-round representation of ambient bromide levels in the Conowingo Pond. In addition to making the same arguments, Old Dominion adds that Chester Water has itself measured bromide levels at its intake, and those results also support the Department's action. These arguments do not justify summary judgment in favor of Old Dominion, but they do demonstrate that there are disputed issues of material fact that prevent us from granting Chester Water's motion for summary judgment.

Chester Water complains that the Department erroneously uses a 150 parts per billion (ppb) "planning level" for bromide. Again, we understand the indeterminate concern that the "planning level" might cause the Department to discount the seriousness of the issue, but Chester Water fails to explain how the Department's use of a more appropriate "planning level" or the use of no "planning level" at all would have or could have translated into different permit terms, let alone what those terms would have been. It has failed to explain how remanding the permit to the Department for consideration not including the "planning level" would have any value. In any event, here again we need not go far before bumping into legitimate factual disputes. Old Dominion cites to record evidence that any permit limit for bromide that the Department might have imposed would have reflected a level necessary to prevent exceedances of drinking water MCLs in well-operated community water systems and would not have anything to do with the

planning level. The Department flatly states that it "did not use the planning level to arrive at its permitting decision regarding any potential impact on [Chester Water's] intake."

Chester Water argues that it is entitled to summary judgment because the Department's action on the permit was deficient in that it only evaluated the scenario where the cooling tower operates at a rate of 10 cycles, and did not either consider potential alternative scenarios or impose a requirement to operate at the assumed 10 cycles. Chester Water's argument falls well short of serving as a basis for summary judgment. As with most of its other arguments, aside from speculation that it might make a difference, Chester Water fails to explain how a remand for further consideration of the issue would translate into a change in the permit, or why it is important to hold Old Dominion to 10 cycles at all times. For all we know, the range of variability may be insignificant. For all we know, the number of cycles may be as significant or insignificant as whether water in the tower flows clockwise or counter-clockwise, or whether pipes in the plant are painted green or blue. In fact, Chester Water admits that it does not know whether or how operation of the cooling tower at greater or less than 10 cycles would make any difference. In any event, summary judgment is not appropriate because both the Department and Old Dominion cite to record evidence that would support a finding that the Department fully and adequately considered the implications of Old Dominion's multiple operating cycles.

We will not belabor the point further. There clearly are multiple disputed issues of fact on whether the Department acted reasonably when it decided not to include limits for bromide, or for HAAs for that matter, in the permit. Resolution of the issue requires a hearing.

TDS

The permit also does not include a limit for TDS. Chester Water objects that the Department "attempted" to analyze the amount of TDS in Old Dominion's discharge but failed

to "fully account" for all of the potential TDS in the discharge, including TDS introduced by the use of water treatment chemicals. It says the Department's focus on "chemical additives" as narrowly defined to exclude neutralizing additives may be well suited to the evaluation of the direct toxic effects of chemicals on the aquatic environment, but it was insufficient when it comes to protection of drinking water supplies in the current situation. Chester Water says that Old Dominion and the Department have dramatically different estimates of what TDS will be in the discharge, which shows that an inadequate analysis was performed. As usual, however, Chester Water does not provide its own estimate. It disputes the Department's conclusion that TDS contributions from chemical additives will be negligible, but it does not posit an opinion on what they will be. It does not propose any particular permit limit. It says that Old Dominion has not made the necessary information available to form a coherent estimate.

The Department and Old Dominion respond that the Department considered very high levels of TDS that are very unlikely to occur in order to see if they would have any adverse effect on Conowingo Pond or Chester Water. The Department concluded that the TDS level at Chester Water's intake will remain well below the 500 mg/L level required under 25 Pa. Code Chapter 93 for potable water supplies. The Department says its analysis of an Old Dominion TDS discharge level of 6,620 mg/L revealed that TDS at Chester Water's intake would only increase 3.1 percent from 262 mg/L to 270 mg/L.

If the Department and Old Dominion are correct, it may be that Chester Water's assignments of error even if taken altogether and assumed to be true would not change the final analysis that a permit limit is not necessary for TDS. Of course, that can cut both ways. If Old Dominion is not going to exceed it, and a limit provides some protection, why not include one?

Once again, it is obvious that this is not the sort of controversy that we are able to resolve in the context of competing summary judgment motions.

Analytical Method for HAAs

Chester Water argues in its motion for summary judgment that Old Dominion's permit must be remanded because it failed to specify the analytical method to be used for haloacetic acids (HAAs). There is no discharge limit in the permit for HAAs, but the monitoring requirement in Part A of the Permit covers both HAAs as a category and the five individual HAAs that are regulated under the Safe Drinking Water Act (monobromoacetic acid, monochloroacetic acid, dibromoacetic acid, dichloroacetic acid, and trichloroacetic acid).[3] Chester Water is correct that the analytical method to be used for HAAs is not in the permit. It complains that the analytical methods to be used should have been spelled out in the permit itself rather than in some later correspondence so that Chester Water and the public would have had an opportunity to ensure that appropriate test methods would ultimately be used.

As a general matter we understand the importance of transparency and memorializing compliance requirements in the permit itself rather than leaving important determinations to be made in side letters outside of the public eye. That said, there must be limits to that concept or permits would be 400 pages long and become unmanageable. Whether it is necessary to include the analytical method to be used for every analyte in the permit itself is not a question we need to answer at this time. On April 8, 2016, the Department by letter notified Old Dominion of the test methods that it expects to be used for the analysis of HAAs, to wit, the methods set forth in 40 CFR Part 141. In its reply brief Chester Water "acknowledges that DEP's letter creates a factual and expert opinion dispute that it is no longer appropriate for resolution for a component of

[3] As with THMs, there are more HAAs than just the five listed separately in the permit, so the reason for a separate monitoring requirement that simply says "Haloacetic Acids" is not clear, although we suspect that it is limited to the five listed HAAs (HAA5).

[Chester Water's] motion for summary judgment." Accordingly, we will not address the issue further here.

In conclusion, we have not attempted to address the salmagundi of issues that both Chester Water and Old Dominion have relied upon in support of their own motion and/or in opposition to their opponent's motion, virtually all of which are tied up in conflicting expert reports. An incomplete list of such issues not already addressed includes the significance, if any, of jar tests performed by Chester Water, whether monthly sampling is adequate, whether grab samples would be better than composite sampling, the extent to which Old Dominion's discharge will be diluted before it reaches Chester Water's intake, the amount of DBPs, if any, in the discharge, and the variability of the discharge. All of these issues are reasonably disputed. It is interesting how frequently Chester Water and Old Dominion both claim that they are entitled to summary judgment on a particular technical issue, but then in response to the other party's motion on a nearly identical issue they argue that there are disputed issues of material fact that prevent the issuance of summary judgment. Whereas Chester Water argues that it is clear as a matter of undisputed fact that the Department did not perform an adequate analysis, Old Dominion argues that it is clear as a matter of undisputed fact that the Department did perform an adequate analysis. In the end, both motions must be denied.

Accordingly, for the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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v.	:	**EHB Docket No. 2015-064-L**
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O R D E R

AND NOW, this 11th day of May, 2016, it is hereby ordered that the motions for summary judgment of the Appellant and the Permittee are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 11, 2016

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