

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Craig High,	:	
	:	
Petitioner	:	
	:	No. 98 C.D. 2024
	:	
v.	:	
	:	Argued: December 9, 2024
	:	
Department of Environmental	:	
Protection (Environmental Hearing	:	
Board),	:	
	:	
Respondent	:	

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE DUMAS**

FILED: January 6, 2025

Craig High (Petitioner) has petitioned this Court to review an adjudication of the Department of Environmental Protection (Environmental Hearing Board) (Board) issued on January 5, 2024. Through that adjudication, the Board affirmed in part a compliance order (Order) that the Department of Environmental Protection (Department) had issued to Petitioner regarding the unlawful excavation of a ditch at his farm. After review, we affirm.

I. BACKGROUND¹

At some point prior to August 2020, Petitioner dug a 20-inch-deep ditch through a section of his farm known as “Area 2” in order to facilitate the movement

¹ We draw our background summary from the Board’s adjudication. See Bd.’s Adjudication, 1/5/24, at 1-33.

of water from a collection area to elsewhere on his property. After receiving a complaint regarding the ditch, the Department inspected the property and ultimately issued the Order to Petitioner on April 20, 2021, concluding that Petitioner had excavated the ditch through a wetlands area in violation of the Dam Safety and Encroachments Act (DSE Act),² as well as multiple Department regulations.³ The Department ordered Petitioner to both restore the ditch to within 10 inches of the land's preexisting elevation and implement an erosion and sediment control plan.

Petitioner appealed the Order to the Board, which conducted a two-day hearing and subsequently issued its adjudication. The Board found sufficient evidence to establish that wetlands were present in Area 2, such that Petitioner was required to obtain a permit from the Department before conducting excavations thereon.⁴ Additionally, the Board was unpersuaded by Petitioner's assertions that a permit was not required because Area 2 is a prior converted cropland, rather than a wetland, and because his ditchdigging activities constituted maintenance entitled to a permit waiver.⁵ Despite this, the Board determined that Petitioner did not need to restore the ditch's elevation, because the health of the wetlands in Area 2 had largely

² Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27. The DSE Act requires individuals to obtain a permit from the Department before constructing, operating, maintaining, modifying, enlarging, or abandoning an encroachment. Section 6 of the DSE Act, 32 P.S. § 693.6. An "encroachment" is statutorily defined as "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." Section 3 of the DSE Act, 32 P.S. § 693.3. In turn, the statutory definition of "body of water" includes wetlands. *Id.*

³ These regulations pertain to dam safety and water management, as well as erosion and sediment control.

⁴ The Board also ruled that the Department had failed to offer sufficient evidence to show that there was a watercourse in Area 2 prior to Petitioner's excavations. That portion of the Board's adjudication is not the subject of this appeal.

⁵ Specifically, "the maintenance of a field drainage system or for plowing, cultivating, seeding[,] or harvesting for crop production." Bd.'s Adjudication, 1/5/24, at 18-19.

stabilized in the intervening time period, such that there was greater current concern that any additional intervention would do more harm than good. Accordingly, the Board concluded that the Department's Order had been validly issued but that Petitioner not need take any responsive action.⁶

Petitioner then appealed to this Court.

II. DISCUSSION⁷

Petitioner offers a number of arguments for our consideration, which we reorder and summarize as follows. First, according to Petitioner, the Board abused its discretion by finding that Petitioner had excavated the ditch through wetlands in Area 2. Petitioner's Br. at 35-41. Second, Petitioner challenges the Board's determination that the ditch was not exempt from the Department's permitting requirements as part of the farm's field drainage system. *Id.* at 8-24. Finally, Petitioner maintains that the farm's status as prior converted cropland obviated any need for him to obtain a Department-issued permit for the ditch. *Id.* at 24-35.

We are not persuaded by Petitioner's first argument, regarding the Board's determination that the ditch encroached upon wetlands. Petitioner challenges the Board's findings on this point on two bases; first, he asserts that the

⁶ The Board also noted that Petitioner should consult with the local conservation district and/or the Department before making any future alterations to the land in Area 2.

⁷ "Our appellate review of the Board's adjudications is limited to determining whether the Board committed an error of law [or] violated constitutional rights, [as well as] whether its material findings of fact are supported by substantial evidence. On issues of law, our standard of review is *de novo* and our scope of review is plenary." *EQT Prod. Co. v. Dep't of Env't Prot.*, 193 A.3d 1137, 1148 (Pa. Cmwlth. 2018) (cleaned up). "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dep't of Env't Res. v. Borough of Carlisle*, 330 A.2d 293, 298 (Pa. Cmwlth. 1974). "In determining whether substantial evidence of record exists to support a material factual finding, we view the record in the light most favorable to the prevailing party below, giving that party the benefit of all reasonable inferences that can be drawn from the record evidence." *EQT*, 193 A.3d at 1148-49.

Department's witnesses did not conduct a proper on-site investigation of Area 2 and, second, he claims that evidence offered by both parties proves that preexisting wetlands were not present in the portion of the farm through which the ditch runs. See Petitioner's Br. at 35-41. These allegations completely miss the mark, however. It is beyond cavil that "[r]esolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT*, 193 A.3d at 1149. In light of the Board's role as factfinder, as well as our limited standard of review, "it is irrelevant whether the record contains evidence that would support contrary findings." *Kiskadden v. Pa. Dep't of Env't Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016). Furthermore, "[t]his Court may not substitute judicial discretion for administrative discretion in matters such as these, which involve technical expertise, and which are within the special knowledge and competence of the members of the Board." *Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot.*, 316 A.3d 668, 678 (Pa. Cmwlth. 2024). Simply put, when considering a challenge to the Board's factual findings, "[o]ur critical inquiry is whether the findings are supported by substantial evidence." *EQT*, 193 A.3d at 1149.

Such substantial evidence clearly exists here. As detailed by the Board in its adjudication, a Department-employed civil engineer and a Department-employed aquatic biologist inspected Area 2 and the ditch on multiple occasions. Based on these inspections, the biologist determined that Area 2 contained wetlands "because it had hydric soil, hydrology[,] and hydrophytic plants." See Bd.'s Adjudication, Findings of Fact (F.F.), ¶¶26-60; *id.*, Discussion at 15. The Board found both of these individuals to be credible, while also deeming unpersuasive the evidence that Petitioner relied upon to support his position that those wetlands did not exist. See *id.*, F.F., ¶¶62-70; *id.*, Discussion at 16. Given this, we have no basis

for disturbing the Board's conclusion that Petitioner's ditch unlawfully encroached upon wetlands in Area 2.

We are similarly unconvinced by Petitioner's second argument, through which he asserts that the ditch is part of a permit-exempt field drainage system. The Department does not require a DSE Act permit when the activity in question constitutes the "[m]aintenance of field drainage systems that were constructed and continue to be used for crop production." 25 Pa. Code § 105.12(a)(7).⁸ In this instance, however, the Board concluded that Petitioner had failed to establish that the ditch was a preexisting part of his farm's field drainage system; rather, it concluded that the ditch had been newly cut through previously undisturbed ground. *See Bd.'s Adjudication, Discussion at 24-28.* The Board's determinations on this point are amply supported by the evidence of record. *See id.*

⁸ Per this regulation,

Crop production includes:

- (i) Plowing, cultivating, seeding, grazing or harvesting.
- (ii) Crop rotation.
- (iii) Government set aside programs.

25 Pa. Code § 105.12(a)(7). As for "field drainage system," that term is not defined in either the DSE Act or the Department's attendant regulations. However, it is discussed in Chapter 14 of the United States Department of Agriculture's Engineering Handbook (Handbook), which Petitioner entered into evidence before the Board. In relevant part, the Handbook states:

Field drainage systems, whether surface or subsurface, generally remove excess irrigation water, leaching water, storm runoff, snowmelt, excess rainfall occurring on the site, or overland flows. Surface water generally is removed by a combination of practices of open ditches, land forming, and underground outlets. Subsurface flows are removed or controlled by open ditches or buried conduits. A lateral drain or system of lateral drains are generally located to lower the water table. The alignment of the drains depends somewhat on costs, topography, design grades, an outlet conditions.

Handbook at 14-7. The Board found that the Handbook "is used in connection to designing, maintaining, and the functioning of field drainage systems[.]" as well as that the "Handbook includes figures that depict elements of field drainage systems. The figures pertaining to different surface draining systems all include an outlet drain." *Bd.'s Adjudication, F.F., ¶¶75-76.*

(discussing the lack of physical connection between the ditch and a field drainage system located in a nearby area of the farm, as well as the absence of proof that the ditch existed prior to Petitioner’s excavations). Furthermore, the Board stated that, even if it assumed *arguendo* that the ditch was part of the farm’s field drainage system, it remained that Petitioner’s ditchdigging activities went well beyond what would qualify as permit-exempt maintenance under the Department’s regulatory framework. *Id.* at 28.⁹ We find no fault in the Board’s interpretation of the relevant Department regulation, as the DSE Act generally bars permit-free wetlands encroachment and the at-issue regulation specifically exempts field drainage system “maintenance,” *but makes no reference to expanding existing or building new systems of that nature.* See *DeNaples v. Pa. Gaming Control Bd.*, 178 A.3d 262, 267 n.1 (Pa. Cmwlth. 2018) (cleaned up) (“[A] reviewing court must give considerable weight and deference to an agency’s interpretation of its own

⁹ As explained by the Board:

[E]ven if we concluded that there was a pre[]existing [ditch] in Area 2 that was a part of the farm drainage system, we think there are limits to what can be done as maintenance of that system. The Department was very clear that at least some portion of the [ditch] excavated by . . . [Petitioner] cut through existing wetlands. Encroaching on and excavating in wetlands is a highly regulated activity. The maintenance waiver arguably would allow . . . [Petitioner] to work within the boundaries of an existing ditch to clear vegetation and remove built up sediment but would not necessarily cover the lack of a permit for any activities that extended meaningfully beyond the boundaries of the [ditch]. In this case, it appears that at least some portion of the newly excavated [ditch] cut by . . . [Petitioner] encroached on wetlands adjacent to any pre[]existing [ditch]. Further, it is evident from the photographs [that were entered into evidence before the Board] that . . . [Petitioner] placed the excavated material into wetlands areas adjacent to the new [ditch]. Those actions would not qualify for the maintenance waiver in our opinion

Bd.’s Adjudication, Discussion at 28.

regulations. As such, an agency interpretation of its regulation is controlling unless clearly erroneous, inconsistent with the regulation or statute, or unreasonable.”). Accordingly, the Board did not err or abuse its discretion by determining that Petitioner was not entitled to a field drainage system-based permit exemption for his ditch.

Finally, we conclude that Petitioner’s third argument, regarding the Board’s determination that the ditch was not permit-exempt because it did not traverse prior converted cropland, is similarly without merit. Per the Department’s regulations, “prior converted cropland” constitutes

wetlands that were drained, dredged, filled, leveled[,] or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985.

25 Pa. Code § 105.452(c). The Department does not treat areas that qualify as prior converted cropland as wetlands. *See id.* Therefore, Petitioner would be relieved of any responsibility to obtain a Department-issued permit for the ditch if Area 2 qualifies as prior converted cropland under this regulatory definition. Petitioner supported his prior converted cropland claim in two ways: first, with a series of aerial photographs of the farm that were taken at various points between 1938 and 1993; second, through the testimony of Robert Baines, Petitioner’s expert witness. *See Bd.’s Adjudication, F.F., ¶¶62-77; id., Discussion at 20-21.* The Board determined that none of the photographs showed that Area 2 had been converted from wetlands to cropland prior to December 23, 1985. *Id., F.F., ¶¶68-69; id., Discussion at 20-21.* In addition, it found Baines’ testimony unpersuasive, largely because he did not assert that the photos showed that Area 2 had been used for agricultural purposes

over the years and admitted it could be difficult to use such photos to ascertain whether certain topographical features were either irrigation ditches or small streams.¹⁰ *Id.*, Discussion at 20-21. Each of these determinations comes squarely within the latitude afforded to the Board as the ultimate arbiter in this matter of evidentiary weight and witness credibility. Therefore, we decline to overturn the Board’s conclusion that Petitioner had failed to show that he was entitled to a prior converted cropland-based permit waiver for his ditch.¹¹

III. CONCLUSION

In accordance with the foregoing analysis, we affirm the Board’s adjudication.

LORI A. DUMAS, Judge

¹⁰ The Board also noted that a landowner can request that “the [United States] Department of Agriculture’s National Resources Conservation Service [(NRCS) either] certify the land is prior converted cropland[] or . . . make a prior converted cropland determination under the National Food Security Act [of 1985, 16 U.S.C. §§ 3801-3871f,]” but that there was no record evidence that NRCS had ever made such a certification or determination regarding Area 2. Board’s Adjudication, F.F., ¶¶78-84.

¹¹ Given our determination that the Board properly concluded that Petitioner failed to show that Area 2 constituted prior converted cropland, we need not address Petitioner’s argument that the Board improperly concluded in the alternative that, even assuming that Area 2 had qualified at some point as prior converted cropland, that use had been subsequently abandoned. Similarly, we also need not consider his subsidiary argument that the Board incorrectly barred him from presenting certain evidence that supported his assertion that such abandonment had never taken place.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Craig High,	:	
	:	
Petitioner	:	
	:	No. 98 C.D. 2024
v.	:	
	:	
	:	
Department of Environmental	:	
Protection (Environmental Hearing	:	
Board),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 6th day of January, 2025, the adjudication of the Department of Environmental Protection (Environmental Hearing Board), issued January 5, 2024, is AFFIRMED.

LORI A. DUMAS, Judge