COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 5, 2024**
	:	

A D J U D I C A T I O N

By Steven C. Beckman, Chief Judge and Chairperson,

Synopsis

The Board upholds the Department's issuance of a compliance order in part addressing a wetlands encroachment as legal and reasonable when issued. The defenses offered by the appellant did not eliminate the requirement for a permit from the Department for the actions that were undertaken by the appellant. However, the circumstances on the ground have changed since the compliance order was issued and the remedy required by the order is no longer necessary or appropriate.

Background

This matter involves the appeal of a compliance order that the Department of Environmental Protection ("the Department") issued to Craig High ("Mr. High"), citing violations arising from work he conducted on his farm property ("the High Farm"). The Department alleged that Mr. High violated certain requirements of Chapter 105 and the Dam Safety and Encroachments Act and ordered him to restore an excavated ditch and to develop and implement an erosion and sediment control plan or conservation plan. The High Farm is located in Anthony Township, Montour County, Pennsylvania at 23 PPL Farm Road, Danville, PA where Mr. High

grows organic produce. At an unspecified time prior to August 20, 2020, Mr. High excavated a ditch through an area of wetlands in order to convey water that was collected in part through a field drainage system. Upon receiving a complaint, the Department conducted several inspections of the High Farm and ultimately, issued a compliance order ("the Compliance Order") on April 20, 2021, pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. § 693.1 et seq.; the Dam Safety and Waterway Management Regulations, 25 Pa. Code § 105.1 et seq.; and the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.1 et seq. The Compliance Order ordered Mr. High to restore the ditch to within ten inches of the pre-existing ground elevation and to develop and implement an erosion and sediment control plan.

Mr. High filed his Notice of Appeal, *pro se*, with the Environmental Hearing Board ("the Board") on May 17, 2021. The Board granted several joint requests for stay and extensions of prehearing deadlines before counsel appeared on behalf of Mr. High on July 25, 2022. Mr. High and the Department submitted their prehearing memorandums on February 6, 2023, and February 27, 2023, respectively. On March 2, 2023, the Department filed a Motion in Limine requesting the Board to preclude the admission of any exhibits that Mr. High intended to introduce into evidence at the hearing. The following day, the Department filed a motion requesting the Board to conduct a site visit of the High Farm. On March 14, 2023, Mr. High submitted a supplemental prehearing memorandum. Mr. High responded to the Department's motion for a site visit on March 17, 2023, essentially arguing that a site visit was not necessary in this matter. On March 20, 2023, Mr. High filed his response to the Department's motion in limine along with a cross motion in limine. After holding a conference call with the parties, the Board issued two orders on March 29, 2023. The first order denied Mr. High's motion in limine and the Department's motion

in limine with exception to Exhibit 10, which was an expert report, as it was consistent with the judge's practice to not admit expert reports in their entirety. The second order granted the Department's motion for a site visit.

On May 16, 2023, the Board visited the High Farm and observed the area that is the subject of this appeal. A two-day hearing was held in this matter on May 17th and 18th of 2023, at the Board's courtroom in Harrisburg. The Department and Mr. High filed their post-hearing briefs on August 11, 2023, and September 15, 2023, respectively. On September 29, 2023, the Department submitted its post-hearing reply brief and a motion to strike exhibits that were attached to Mr. High's post-hearing brief. On October 10, 2023, Mr. High filed his reply to the Department's motion to strike. The Board issued an opinion and order on the motion to strike October 18, 2023, striking all but one of Mr. High's exhibits. The Board granted the Department's motion where two of the exhibits were not introduced at the time of hearing on the merits. The Board held that while the other exhibit was also not introduced at the hearing, the exhibit itself was referenced in the Department's own regulations and post-hearing brief, thereby making it appropriate for the Board to consider in its ruling. This matter is now ripe for decision.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001; the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended* , 71 P.S. § 510-17, and the rules and regulations promulgated thereunder.

2. The Appellant, Craig High ("Mr. High"), owns and resides on property within Anthony Township, Montour County, Pennsylvania at 23 PPL Farm Road, Danville, PA ("the High Farm").

3. The High Farm is located in an agricultural area and it is actively farmed by Mr. High. (T. at 12).

4. The High Farm contains multiple fields, including a field that is located at the southeastern intersection of PPL Farm Road and PPL Road ("Field 14"). (T. at 296; Ex. D-1).

5. The eastern side of Field 14 is bordered by a stretch of land that has a watercourse with a definable bed and bank ("Area 1"). (T. at 96; Ex. D-1).

6. Field 14 slopes to the south and is bordered on its southern edge by a vegetated buffer area ("Area 2"). (T. at 324; Ex. D-1).

7. The western side of Field 14 is bordered by a stretch of land ("Area 3") that runs parallel with PPL Road and contains an unnamed tributary of the Chillisquaue Creek that emanates from a pond on the High Farm, north of PPL Farm Road. (T. at 135; Ex. D-1)[1].

8. The unnamed tributary in Area 3 has a definable bed and bank. (T. at 135).

9. The High Farm contains field drainage systems that were installed prior to Mr. High's ownership. (T. at 297, 387-388).

10. The field drainage system on the High Farm consists of tiles and drainpipes that intercept water to direct it away from the fields. (T. at 299-301, 388).

11. Field 14 has a field drainage system. (T. at 39, 298, 394; Ex. A-12).

[1] One of the difficulties for the Board in evaluating this case is that the Department separated the portions of the High Farm that were impacted by Mr. High's activities into three separate but adjacent areas identified as Areas 1, 2 and 3. The Compliance Order only addressed Area 2. However, the testimony at the hearing involved all three areas and it was not always clear to the Board which area was being referenced at any given time.

12. Area 1 contains three drain outlets and Area 3 contains two drain outlets. Area 2 does not contain any direct drainage lines or outlet points. (T. at 326; Ex. A-12).

13. Prior to Mr. High taking ownership of the High Farm, PP & L, and its successor organization, Talen Energy, owned the High Farm. (T. at 145).

14. The High Farm was leased from PP & L and its successor organization by Mr. Lynn Appelman. (T. at 148).

15. Mr. Appelman enrolled the High Farm in the Pheasants Forever Program from 2009 through 2016. (T. at 149). Under this program, the High Farm was used to grow warm season grasses to provide habitat for pheasants. (T. at 147).

16. At least since 2009, and throughout the remainder of the time that PP & L/Talen Energy owned the High Farm, the High Farm was not used to grow or harvest crops. (T. at 152).

17. Mr. High purchased the High Farm from Talen Energy in September 2017. (T. at 293).

18. At some point prior to August 20, 2020, Mr. High excavated a ditch/channel in the vegetated buffer area contained within Area 2. (T. at 132, 238-9, 329, 334-35).

19. Mr. High performed the excavation work in Area 2 in order to channel water away from Field 14. (T. at 327).

20. Mr. High excavated a ditch in Area 2 that was approximately 20 inches deep. (T. at 329).

21. The ditch in Area 2 receives water from the outlets and stream located in Area 1. The ditch in Area 2 flows east to west. The water conveyed from Area 2 meets the unnamed tributary emanating from Area 3 and then flows underneath PP & L Road. (T. at 350-52; Ex. A-12).

22. Mr. High placed excavated material from the new ditch into the wetlands area of Area 2. (T. at 67; Exs. D-20, D-21).

23. Mr. High never planted crops in or tilled Area 2. (T. at 339).

24. Mr. High did not have a permit in relation to the clearing and excavation work he conducted. (T. at 339).

25. The Department was made aware of the excavation work at the High Property after receiving a complaint. (T. at 12).

26. George Grose ("Mr. Grose") is employed as a senior civil engineer with the Department in its waterways and wetlands program in the northcentral regional office. (T. at 10).

27. Mr. Grose and staff from the Montour County Conservation District visited the High Farm on August 20, 2020 to determine whether any potential violations had occurred. (T. at 11-12).

28. During the August 20th site visit, Mr. Grose observed dredged material on the left side of the bank of the unnamed tributary in Area 1 and the presence of mottled soils and cattail plants. (T. at 13).

29. Mr. Grose believed that Area 2, where the excavation took place, was wetlands. (T. at 53-54).

30. Mr. Grose did not see any crops being grown in Area 2 at the August 2020 site visit. (T. at 20).

31. Following the site visit, Mr. Grose drafted an Inspection Report ("August 20th Report"), listing violations for failure to obtain a Chapter 105 permit and of 25 Pa. Code § 105.46 for failure to implement an erosion and sediment control plan. (T. at 16; D-17).

32. The August 20th Report recommended that no further work be performed at the High Farm until a further assessment of the nature and the extent of the violations could be conducted. (T. at 19; D-17).

33. After failing to contact Mr. High by phone, Mr. Grose mailed the August 20th Report to Mr. High. (T. at 21; D-17).

34. Jared Jacobini ("Mr. Jacobini") is an aquatic biologist employed by the Department and works in the Waterways and Wetland Engineering program. (T. at 208, 209; Ex. D-3).

35. Mr. Jacobini has been a biologist for 19 years and received an Associate's Degree in Wildlife Technology from Pennsylvania State University, and a Bachelor of Science degree from Mansfield University. He has taken graduate courses from Delaware State University including courses related to conservation and restoration biology and habitat management restoration. (T. at 209, 210; Ex. D-3).

36. Mr. Jacobini has participated in several trainings in the identification and delineation of wetlands. (T. at 218, 219; Ex. D-3).

37. Over the last 3 years, Mr. Jacobini has made approximately 25-30 determinations as to the presence or absence of wetlands. (T. at 213).

38. Mr. Jacobini is qualified and is recognized by the Board as an expert in wetland identification. (T. at 223).

39. Mr. Jacobini uses the Federal Manual for Identifying and Delineating Jurisdictional Wetlands when he inspects a site for the presence or absence of a wetland. (T. at 211, 233).

40. Mr. Jacobini's responsibilities at the Department include reviewing permits for waterways and wetlands, conducting inspections, investigating complaints, and confirming the presence or absence of wetlands. (T. at 209, 211; Ex. D-3).

41. On September 23, 2020, Mr. Jacobini accompanied Mr. Grose to the High Farm to conduct a site inspection ("September 2020 Inspection"). (T. at 226).

42. During the September 2020 Inspection, Mr. Jacobini determined that wetlands were present at the High Farm in Area 2. (T. at 227).

43. Mr. Jacobini determined that the wetlands on the High Farm had been encroached upon through unpermitted excavation. (T. at 227).

44. Mr. Grose did not observe any crops being grown in Area 2 at the September 2020 Inspection. (T. at 31).

45. Mr. Jacobini assisted Mr. Grose in drafting the September 23, 2020 Inspection Report ("September 23rd Report") and recommended the ditch be restored to a maximum depth of 10 inches in order to prevent the wetland from being "robbed" of hydrology. (T. at 229; Ex. D-2).

46. The September 23rd Report outlined the wetlands boundary as extending between 20-30 feet from the top of the ditch on the right side and to the existing tree-shrub line on the left side of the excavated ditch in Area 2. (Ex. D-2).

47. The September 23rd Report requested the restoration work be completed in 60 days. (T. at 347; Ex. D-2).

48. Mr. High did not undertake the restoration work requested in the September 23rd Report. (T. at 347).

49. Mr. Grose and Mr. Jacobini did not observe the condition of Area 2 prior to Mr. High's excavation. (T. at 113, 259).

50. Mr. Grose reviewed recent aerial photographs of Area 2 and did not see evidence that there was a definitive ditch. (T. at 113).

51. In an email exchange between Mr. Grose and Mr. Jacobini dated October 2, 2020, Mr. Jacobini recommended that the ditch should be no deeper than 12-inches. (T. at 101, 105; Ex. A-19).

52. During winter, in either late 2020 or early 2021, Mr. Grose drove by the High Farm and observed that no restoration work had been conducted in Area 2. (T. at 34; Ex. D-23).

53. Mr. Grose conducted a visual drive-by of Area 2 on April 19, 2021. (T. at 109; Ex-D-1).

54. The Department issued the Compliance Order on April 20, 2021. (Ex. D-1).

55. The Compliance Order required Mr. High to complete the restoration work by May 31, 2020. (T. at 347; Ex. D-1).

56. On May 6, 2022, Mr. Jacobini returned to the High Farm to conduct a more detailed inspection of Area 2. (T. at 115, 231; Ex. D-4).

57. There are three components considered to establish the presence of a wetland. Those components are hydric soil, hydrology, and hydrophytic plants. (T. at 233).

58. Mr. Jacobini determined all three components for a wetland were present on May 6, 2022 and documented his findings on a U.S. Army Corps of Engineers data sheet. (T. at 236; Ex. D-14).

59. Mr. Jacobini observed encroachment into the wetlands located in Area 2 during his May 6, 2022 inspection and the encroachment was in the same area that he inspected on September 23, 2020. (T. at 237-38).

60. Mr. Jacobini took photographs during his May 6, 2022 inspection, detailing the conditions of Area 2 on that day. The photographs depicted the ditch, the water within the ditch, and vegetation growing in and around the ditch. (Exs. D-5, D-6, D-7, D-8).

61. Mr. High has not undertaken the work specified as required "remedial action" at Paragraphs 3 and 5 of the Department's Compliance Order regarding the implementation of restoration and the submission of a full and complete restoration plan. (Parties' Stipulation of Facts, para. 1).

62. Robert Baines ("Mr. Baines") is a founder of Sovereign Environmental Group in Coatesville, Pennsylvania which primarily focuses on environmental regulations. (T. at 358-59; Ex. A-11).

63. Mr. Baines received a Bachelor of Science in Biology in 1987 from Randolph-Macon College and a Master's Degree in 1989 from Duke University that focused on environmental policy. (T. at 354-55; Ex. A-11).

64. Mr. Baines' experience includes the review of aerial photography, soils, maps, wetland studies, federal, state, and local regulation and regulatory compliance; and Phase I and II environmental site assessments. (T. at 335-39; Ex. A-11).

65. Mr. Baines was recognized by the Board as an expert in the review of historic property uses and the application of guidance, policies, regulations, and law related to environmental property use, including forest environments. (T. at 360-361).

66. Aerial photographs associated with the High Farm were obtained by Mr. Baines from EDR and Historic Aerials. (T. at 362, 372; Exs. A-1, A-22, A-23).

67. Mr. Baines has been involved with approximately 100 properties that contain wetlands over his career. (T. at 361).

68. EDR Aerial photographs from 1938, 1959, 1969, 1977, 1981, 1993, 2005, 2010, 2015, and 2019 depict the High Farm including Field 14, Area 1, Area 2, and Area 3 at these

respective times. The aerial photos show a distinct boundary between Field 14 and Area 2. (Ex. A-1).

69. None of the EDR Aerial photographs show that Area 2 underwent draining, dredging, filling, or leveling, or any other manipulation in order for Area 2 to allow for the production of an agricultural commodity. (Ex. A-1).

70. In reviewing the National Wetland Inventory, Mr. Baines found that it did not indicate that Area 2 contained wetlands. (T. at 386; Ex. A-13).

71. EMap Pennsylvania is a GIS based mapping tool that can be used to identify bodies of water in Pennsylvania. (T. at 384; Ex. A-16).

72. Mr. Baines reviewed FEMA Flood Maps which did not show evidence of a watercourse in Area 2 (T. at 383-84; Ex. A-14).

73. Mr. Baines reviewed three renderings from eMap Pennsylvania which showed a blue line that indicated the unnamed tributary that travels through Area 3. The eMap renderings did not identify any unnamed tributaries in Area 1 or Area 2. (T. at 384-85; Ex. A-16).

74. Chapter 14 Water Management (Drainage) of the Part 650 Engineering Field Handbook ("National Engineering Handbook") provides guidance for the planning and implementation for artificial agricultural drainage practices. The United States Department of Agriculture and the Natural Resources Conservation Service maintain the National Engineering Handbook. (T. at 389; Ex. A-15).

75. The National Engineering Handbook is used in connection to designing, maintaining, and the functioning of field drainage systems. (T. at 390; Ex. A-16).

76. The National Engineering Handbook includes figures that depict elements of field drainage systems. The figures pertaining to different surface draining systems all include an outlet drain. (T. at 396; Ex. A-16).

77. Mr. Baines testified that he has never seen a diagram of a surface draining system without an outlet drain or has observed a functioning field surface draining system that has not included an outlet drain. (T. at 396; Ex. A-16).

DISCUSSION

Legal Standard

The Department has the burden of proof in this matter. Under the Board's rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3. Here, the Department issued an order and must show by a preponderance of the evidence that (1) the facts support the order, (2) its order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75. The appellant, however, bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32. The Board can consider evidence that

was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

Analysis

The basic facts of this case are not in dispute. Mr. High purchased a farm property in Montour County from Talen Energy in 2017. The High Farm has multiple farm fields on which Mr. High grows crops. The farm field at issue in this case, which is identified by Mr. High as Field 14, is located at the intersection of PPL Farm Road and PPL Road. Field 14 slopes to the south and is bordered on its southern edge by a vegetated buffer area. At an unidentified date prior to August 20, 2020, Mr. High conducted clearing and excavation work in the vicinity of Field 14 including the excavation of a channel in Area 2 located along the southern edge of Field 14 in the vegetated buffer area. The Department received a complaint about the work conducted by Mr. High and on August 20, 2020, Mr. George Grose, a Department Senior Civil Engineer made an initial inspection of the High Farm. He testified that during his initial inspection he noted, among other observations, that a channel had been trenched in Area 2 in what Mr. Grose identified as wetlands. The Department mailed a copy of the August 20, 2020 Inspection Report to Mr. High and recommended that no additional work be done until a further evaluation of the site could be conducted.

A follow-up inspection was attended by Mr. High, Mr. Grose, and a Department biologist, Jared Jacobini, on September 23, 2020. Mr. Jacobini confirmed that there were wetlands present in Area 2 and that some of the work completed by Mr. High constituted encroachment into wetlands. The Department and Mr. High discussed a potential plan for restoring the impacted area to the satisfaction of the Department and the Department requested in its September 23, 2020 inspection report that the restoration work be completed in 60 days. Mr. High did not undertake

the requested restoration work in the time frame set forth in the Department's September 23rd Report.

On April 20, 2021, the Department issued the Compliance Order to Mr. High that is the subject of his appeal to the Board. The Department argues that its Compliance Order was a legal and reasonable action of the Department. In order to prevail, the Department must show by a preponderance of evidence that the violations on which its Compliance Order rests took place and that the restoration requirements it ordered are legal, reasonable and appropriate under the circumstances of this case. The Compliance Order alleges that the work conducted by Mr. High resulted in two violations that are identified by checked boxes listed on page two of the Compliance Order form. The first checked box lists the violation as "[t]he construction, operation, maintenance, modification, enlargement or abandonment of an encroachment or water obstruction activity without first obtaining a permit or other required authorization in violation of 25 Pa. Code § 105.11(a) and the Dam Safety and Encroachment Act 32 P.S. §§ 693.6 and 693.18." The second marked violation on the Compliance Order is the "[f]ailure to implement Erosion and Sediment Control Plans and/or construction not in accordance with approved plans, maps, profiles, and specifications in violation of 25 Pa. Code § 105.13, 105.46 and 105.44 and the Dam Safety and Encroachment Act 32 P.S. §§ 693.6 and 693.18."

After identifying these two violations, the Compliance Order ordered Mr. High to "[r]estore the excavated ditch through the wetland … by May 31, 2021" and to "[d]evelop and implement an erosion and sediment control (e&s) plan or conservation plan in accordance with Chapter 102.4(a) … by May 31, 2021." Mr. High did not comply with the Compliance Order in the time frame identified within it. In fact, the parties stipulated at the start of the hearing that Mr. High had not performed the remedial action required in the Compliance Order as of the date of the

hearing. A final basic fact in this case on which all parties agree is that Mr. High did not have a permit or authorization to conduct the work he completed in the vegetated buffer area. Mr. High asserts that he was not required to have a permit for the work and, therefore, there were no violations on which the Department could rely in issuing its Compliance Order.

The key issue in this case is whether the Department is correct that Mr. High's excavation activities in Area 2 required a permit or authorization from the Department. Under questioning at the hearing, the principal Department witness, Mr. Grose, acknowledged that the violation for failure to implement an Erosion and Sediment Control plan was secondary and a plan would only be required if a permit was required. In order to determine whether a permit was required, we start with the Dam Safety and Encroachment Act ("DSEA"). The DSEA states that "[n]o person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department." 32 P.S. § 693.6(a). The Department argues that Mr. High's activities constituted the construction, modification and enlargement of an encroachment that required a permit from the Department. An encroachment is 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." 32 P.S. § 693.3. A watercourse is defined as "[a]ny channel of conveyance of water having a defined bed and banks, whether natural or artificial with perennial or intermittent flow." *Id*. A body of water is defined as "[a]ny natural or artificial lake, pond, reservoir, swamp, marsh or wetland." *Id*. Based on these definitions, the Department asserts that a permit was required because Mr. High's excavation of a channel in Area 2 "created an encroachment that changed the cross-section of the wetlands." (Department's Post-Hearing Brief at 18). The Department further argues that Mr. High's actions

in Area 2 also included excavation of a portion of a watercourse which it identified as an unnamed tributary to the west branch of the Chillisquaque Creek. (*Id*., at 21).

We are satisfied that the evidence the Department presented at the hearing demonstrates that the excavation conducted by Mr. High encroached on wetlands located in Area 2 of the High Farm. Mr. Grose testified that during his initial inspection, he identified what he believed to be wetlands in Area 2 based on his years of experience. (T. at 53-54). However, because Mr. Grose did not consider himself to be a wetlands expert, he brought in another Department staff person. On September 23, 2020, Mr. Grose returned to the High Farm with Mr. Jacobini, a Department regional biologist, so that Mr. Jacobini could determine the absence or presence of wetlands. Mr. Jacobini was admitted by the Board as an expert in wetlands identification. (T. at 223, 226). Mr. Jacobini noted the presence of wetlands in Area 2 during his site inspection and stated that he observed excavations in the wetlands. (T. at 227, 238). According to the September 2020 Report, the wetlands boundary line extended between 20-30 feet from the top of the ditch on the right side and to the existing tree/shrub line on the left side of the ditch in Area 2. (Ex. D-2). For reasons that were never made clear to the Board during the hearing, Mr. Jacobini returned to the High Farm to conduct a more detailed wetlands determination on May 6, 2022, more than a year after the issuance of the Compliance Order. Based on his more detailed examination of Area 2 on May 6, 2022, Mr. Jacobini concluded that the area in question met all three parameters for a wetland because it had hydric soil, hydrology and hydrophytic plants. (T. at 233; Exs. D-4, D-14). Mr. Jacobini testified that he observed encroachment into the wetlands located in Area 2 during his May 6, 2022 inspection and that the encroachment was in the same area that he inspected on September 23, 2020.

Mr. High presented testimony from Mr. Baines who was admitted as an expert in the review of historic property uses and the application of guidance, policies, regulations, and law related to environmental property use, including forest environments. (T. at 360). Mr. Baines was not admitted as an expert in wetlands delineation, although he testified that he had been involved in around 100 properties that contained wetlands in his environmental career. (T. at 361). Mr. Baines' only testimony involving the issue of wetlands in Area 2 was in relation to his review of the National Wetland Inventory for the area of the High Farm. (T. 386; Ex. A-13). Mr. Baines stated that there were no wetlands shown on the National Wetlands Inventory in Area 2. However, we find this evidence less convincing than the direct observations of wetlands in Area 2 by the Department's staff. Overall, we conclude that the Department has demonstrated by a preponderance of the evidence that there are wetlands present in Area 2 of the High Farm.

We are less convinced regarding the Department's argument that there was a watercourse located in Area 2 prior to the excavation by Mr. High. Mr. Grose and Mr. Jacobini both testified that they had not directly observed the condition of Area 2 prior to Mr. High's excavation. (T. at 113, 259). Mr. Grose testified that there were definable bed and banks above and below the wetlands area but never clearly testified about a watercourse in Area 2. He was asked about unnamed tributaries and clearly identified an unnamed tributary emanating from the pond north of PPL Farm Road and running through Area 3 but gave unclear testimony regarding the presence of an unnamed tributary in Area 2. He stated "[t]he definable bed and bank above and the area two starting at one and two is also an unnamed tributary." (T. at 135). The follow-up question after this statement was, "[a]nd just so it's clear, what is your position of what the Department is regulating in section two, area two?" Mr. Grose answered "[t]hat would be the wetland area, the actual wetland area." (T. at 135).

Mr. Baines testified that he looked at both FEMA Flood Maps and the eMap Pennsylvania system showing the High Farm, and neither showed evidence of a watercourse in Area 2. (T. at 384; Exs. A-14, A-16). In contrast, the watercourse in Area 3 is identified on the eMap exhibit although not on the FEMA flood maps. On cross-examination by the Department, Mr. Baines was asked whether all unnamed tributaries in the area of High Farm would be depicted on the eMap exhibit and in response he stated that "[t]o the best of DEP's ability to put them on here, yes." (T. at 407).

Based on the testimony presented at the hearing, we find that the Department has not shown by a preponderance of the evidence that a watercourse with definable bed and banks existed in Area 2 prior to the excavation work done by Mr. High. While the lack of an identified floodway or unnamed tributary on the exhibits testified to by Mr. Baines is not definitive, it is suggestive of the absence of a watercourse in Area 2. The existence of watercourses with definable bed and banks in Areas 1 and 3 is reasonable based on the testimony which shows that those areas have sufficient slope to allow the downcutting of a stream channel. In contrast, Area 2 is relatively flat and consists of low-lying wetlands which inhibits the free flow of water. Thus, the absence of enough flow to create a watercourse with definable bed and banks fits the known conditions testified to by both the Department and Mr. Baines.

Mr. High offers two arguments as to why he was not required to have a permit prior to excavating a channel through Area 2. One argument is that the area in question qualifies as prior converted cropland and, therefore, is not a regulated wetland that would require a permit in order to conduct an activity resulting in an encroachment. The second argument is that Mr. High's activity in Area 2 qualified for a permit waiver as the maintenance of a field drainage system or

for plowing, cultivating, seeding or harvesting for crop production. The Department argues that neither of the two permit exemptions relied on by Mr. High apply to the facts of this case.

We will first turn our attention to the parties' arguments regarding whether the prior converted cropland exemption applies to Mr. High's activities. The Department sets forth its policy regarding prior converted cropland in a statement found at 25 Pa. Code § 105.452 which provides as follows:

> (c) Naturally occurring events may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now ''normal circumstances'' of the particular area. The Department recognizes ''prior converted cropland,'' as defined in the National Food Security Act Manual (180-V-NFSAM, Third Edition, March 1994), as ''normal circumstances'' as the term is used in the definition of wetlands in § 105.1 (relating to definitions). These prior converted croplands are not regulated as wetlands under the Commonwealth's Wetland Protection Program contained in this chapter. Prior converted cropland is defined in the National Food Security Act Manual, as 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.
>
> (1) Abandonment is the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:
>
> (i) Wetland criteria are met.
>
> (ii) The area has not been enrolled in a conservation set-aside program.
>
> (iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.
>
> (2) Prior converted cropland may also be considered abandoned if the landowner provides written intent to abandon the area and wetland criteria are met.

25 Pa. Code § 105.452(c).

As we understand this section, land that satisfies these requirements is classified as prior converted cropland and is not regulated as wetlands by the Department. Therefore, no encroachment permit would be required.

Mr. High and the Department spent a great deal of time at the hearing putting forth testimony regarding the requirements for land to be considered prior converted cropland and facts concerning past farming and crop-related activities on the High Farm. However, much of the testimony missed a key fact in this case. The Compliance Order focuses on the status of Area 2 and the activities that took place within Area 2. The testimony regarding prior converted cropland focused almost exclusively on the status and activities that took place within Field 14 which is adjacent to Area 2. Whatever activities took place in Field 14, and whether those activities afford Field 14 prior converted cropland status, have no bearing on the status of Area 2. Even if Field 14 is prior converted cropland, nothing in the testimony or our reading of 25 Pa. Code § 105.452 suggests that the status of Field 14 can somehow stand in for and transfer its prior converted cropland status to Area 2 merely because it is adjoining it[2].

When we narrow our focus to the status of Area 2, it clearly does not satisfy the requirements to be classified as prior converted cropland. The Department's definition of prior converted cropland provides that the wetlands in question must have been "drained, dredged, filled, leveled or otherwise manipulated […] before December 23, 1985 […] 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, 1985." 25 Pa. Code § 105.452(c). The only evidence we have regarding the conditions of Area 2 prior to

[2] Because it is not necessary for our decision, the Board takes no position on the issue of whether Field 14 of the High Farm would qualify as prior converted cropland.

December 23, 1985, comes from the testimony of Mr. Baines and a series of aerial photos he presented. The oldest aerial photo dates from 1938 and the later are photos dated from 1959, 1969, 1977 and 1981. In his testimony regarding these photos, Mr. Baines pointed out that the area, now known as Field 14, remained in agricultural use. Notably, he did not make the same statement with regards to Area 2. (T. at 364-370). Regarding Area 2, he testified that he believed that throughout the timespan the aerial photos were taken, Area 2 contained drainage ditches although, on cross-examination, he acknowledged it is difficult to distinguish ditches from small streams in aerial photos. (T. at 406). Each of the aerial photos in this time sequence show a distinct boundary between Field 14 and Area 2, and nothing in the photos suggests that Area 2 was a former wetland that was drained, dredged, filled, leveled or otherwise manipulated prior to 1985 in order to allow production of an agricultural commodity. While we don't have any photos that show what took place between 1981 and 1985, the next aerial photo presented by Mr. Baines is from 1993. The 1993 photo is of poor quality, but Mr. Baines' testimony is that it essentially shows no real change from the earlier photos. (T. at 370). In sum, we have no evidence that Area 2 was converted from a wetland to produce an agricultural commodity prior to 1985 or that it was planted or used to produce an agricultural commodity even once prior to December 23, 1985, and, therefore, it fails to satisfy the definition of prior converted cropland.

Furthermore, in order to satisfy the definition of prior converted cropland, the relevant cropland must not have been abandoned as that term is defined. Abandonment is defined as:

> […] the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:
>
> (i) Wetland criteria are met.
>
> (ii) The area has not been enrolled in a conservation set-aside program.

> (iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

25 Pa Code § 105.452(c)(1).

Even if Area 2 at some point satisfied the criteria for prior converted cropland,[3] we find that the evidence shows that it was abandoned and, therefore, would not be considered prior converted cropland at the time the Compliance Order was issued. Aerial photos from 2005, 2010 and 2015 do not appear to us to show cropping, forage production or management[4] in Area 2. (Ex. A-1). Mr. High has owned the High Farm since November 2017. He testified that he has never planted crops for production or tilled the land in Area 2. (T. at 339). Prior to Mr. High's ownership, the High Farm was leased from PP & L and its successor organization, Talen Energy, by Mr. Lynn Appelman. According to the testimony, Mr. Appelman enrolled the property in the Pheasants Forever Program from 2009 through 2016 and it was used to grow warm season grasses to support use of the area by pheasants. (T. at 149-50). However, none of the evidence regarding Mr. Appelman's activities were specific to Area 2, but more generally discussed the High Farm. The aerial photos during the time the High Farm was part of the Pheasants Forever Program (2010 and 2015) do not show any cropping or forage production in Area 2. Finally, Mr. Grose testified that he saw no evidence that Area 2 had been cropped or was being used for forage production at the time of his initial inspection in August 2020. (T. at 20; Ex. D-21). Even if Area 2 ever satisfied the definition of prior converted cropland, overall, the evidence supports a finding that Area 2 would have also met the definition for abandonment by the time the Compliance Order was issued.

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[3] As we discussed, we have no evidence that Area 2 was converted from wetland prior to December 23, 1985, but the aerial photos do contain time gaps, including a gap from 1981 to 1993, so we cannot say with certainty what transpired in Area 2 prior to December 23, 1985.

[4] Management is a broad term and can apply to a wide range of activities. In the context of prior converted cropland and abandonment, we understand that term to mean management to support production of an agricultural commodity.

Mr. High cannot prevail on the idea that Area 2 was prior converted cropland to successfully show that he did not need a permit for his excavation activity in that area.

We next turn our attention to the issue of whether Mr. High's activity in Area 2 qualified for a permit waiver. The DSEA at 32 P.S. § 693.7 allows the establishment of regulations that waive the permit requirement. The permit waiver regulation that was established pursuant to the DSEA is found at 25 Pa. Code § 105.12. It provides that the requirements for a permit are waived for certain structures and activities regardless of when commenced. Among the listed activities that qualify for a permit waiver are maintenance of a field drainage system and plowing, cultivating, seeding or harvesting for crop production[5]. The specific permit waiver provisions are as follows:

> (7) Maintenance of field drainage systems that were constructed and continue to be used for crop production. Crop production includes:
> (i) Plowing, cultivating, seeding, grazing or harvesting.
> (ii) Crop rotation.
> (iii) Government set aside programs.
> (8) Plowing, cultivating, seeding or harvesting for crop production.

25 Pa. Code § 105.12(7) and (8).

Mr. High asserts that his actions in Area 2 qualify for both waivers. It is clear that Mr. High does not qualify for the waiver for plowing, cultivating, seeding or harvesting for crop production. There is no evidence that Mr. High was engaged in any of these listed activities in Area 2 when he conducted the activities therein for which the Department concluded he was required to have a permit. As we set forth in our above discussion of prior converted cropland,

[5] The permit waiver regulation provides that "if the Department upon complaint or investigation finds that a structure or activity which is eligible for a waiver, has a significant effect upon safety or the protection of life, health, property or the environment, the Department may require the owner of the structure to apply for and obtain a permit under this chapter." 25 Pa. Code § 105.12. The testimony on whether the Department was relying on this provision to assert the permit requirement in its Compliance Order was not entirely clear, but we are ultimately satisfied that the Department did not rely on this provision.

there is no evidence that Area 2 has ever been used directly for crop production. Furthermore, Mr. High testified that he never planted any crops or tilled the land in Area 2. (T. at 339).

It is a closer question as to whether Mr. High's actions in Area 2 qualify for a waiver as maintenance of his field drainage system. He argues that they do and, therefore, the requirement for a permit was waived and the Department had no basis for its Compliance Order. The Department sets forth several arguments in its Post-Hearing Brief why the permit waiver for maintenance of a field drainage system does not apply to Mr. High's activities. Among its arguments, the Department asserts that there is no field drainage system in Area 2 and further, because there is no crop production in Area 2, it fails to satisfy the regulatory requisite that requires the continued use for crop production. None of the parties cited to Board cases or Pennsylvania state court cases interpreting the permit waiver that covers maintenance of a field drainage system and we did not find any in our research. As such, this appears to be a question of first impression for the Board. Ultimately, we hold that under the specific facts of this case, Mr. High's activities in Area 2 do not qualify for the field drainage system maintenance waiver for the reasons we discuss below.

There is no question that field drainage systems exist at the High Farm. Mr. High testified that the systems were installed prior to his ownership of the High Farm and that all but one of the fields at the High Farm have field drainage systems. (T. at 297). As described by Mr. High, the system consists of tiles and drainpipes that intercept the water and move it away from the fields. (T. at 299-301). Mr. High's expert, Mr. Baines, testified that he observed drainage tiles, outlets for conduits and associated ditches at the High Farm. (T. at 387-88). Curiously, the Department inspector, Mr. Gross testified that he was not aware that Field 14 had a farm drainage system until the Board and the parties conducted a site visit to the High Farm the day before the hearing in this

case. (T. at 37, 40). The Department conceded at the hearing that there was a field drainage system in that area. (T. at 394).

The issue we must decide then becomes whether the field drainage systems found at the High Farm, including the ones located upgradient in Field 14 and in the field east of Field 14, continue into Area 2, which is the area at issue in the Compliance Order. The Department argues that it does not. Mr. High's Exhibit A-12 is a map showing identified drain lines and the outlets of the subsurface part of the farm drainage system in the fields around Area 2. (T. at 326; Ex. A-12). It identifies five outlet points: three into Area 1 that are located upstream from Area 2, and two into the unnamed tributary located in Area 3. The outlet points in Area 1 appear to be associated with a drainage system in a field east of Field 14. The two outlets in Area 3 appear to be receiving water from the drainage system in Field 14. Significantly, for our purposes, the map shows no drainage lines or outlet points from the farm drainage system directly in Area 2. (Ex. A-12). Mr. High testified that there were no outlet points directly into Area 2. (T. at 326). The below ground portion of a field drainage system, including the outlet points, is not present within Area 2 and it is clear that the activities Mr. High conducted in Area 2 did not include direct maintenance of this part of his field drainage system and does not qualify for the waiver on that basis.

However, that is not the end of our analysis. Mr. Baines presented evidence concerning the general nature of field drainage systems relying in part on a portion of the National Engineering Handbook maintained by the USDA and the Natural Resources Conservation Service. (T. at 389). He noted that a properly designed and functioning field drainage system often includes aboveground ditches and channels that convey both surface water and the discharge from outlet drains away from the farm fields. Area 2 receives water from the field drainage system as it moves

downstream from the discharge in Area 1. If that water was conveyed through Area 2 via a pre-existing ditch or channel, arguably, we could hold that such a ditch or channel was part of the High Farm drainage system and that Mr. High was entitled to maintain it without the need to obtain a permit from the Department. Unfortunately, the evidence regarding the presence of a pre-existing ditch or channel in Area 2 is inconclusive. Neither of the Department inspectors observed Area 2 prior to Mr. High excavating the channel that is shown in Department's Exhibit D-21 and are therefore unable to provide testimony about the pre-existing conditions in Area 2. Based on his review of the aerial photos, Mr. Baines concluded that a conveyance ditch in Area 2, that he identified as the southern ditch, was present over time. (T. at 364-372; Ex. A-1). We find that Mr. Baines was not convincing on this point. During his testimony, it was often unclear exactly what feature on the aerial photos he was referring to as the conveyance ditch in Area 2. Our observation of the aerial photos in question do not support his conclusion. In most of the aerial photos, including all of the more recent ones (2005, 2010, 2015 and 2019), we observe no clear linear features within Area 2 that support Mr. Baines' conclusion that there was a pre-existing ditch or channel that was part of the farm drainage system.[6]

Mr. High, who was in the best position to testify as to the presence of a pre-existing conveyance ditch or channel in Area 2, did not provide clear and consistent testimony and evidence on that point. Mr. High presented no physical evidence such as photos or maps showing the presence of a drainage channel through Area 2 prior to him excavating one. He was neither asked, nor does he directly say that there was a pre-existing ditch in Area 2 that he considered part of his existing field drainage system. There are only two instances in his testimony where he appears to

[6] While scale may be an issue for the ability to observe a small feature such as a ditch, we note that many of the aerial photos clearly show the small tributary/channel that exists in Area 3.

be describing a pre-existing ditch in Area 2. In the first instance, he is asked why he had to do maintenance work in stretch two. The transcript reads as follows:

> A. So, first of all, this maintenance work is done all over the farm every year at some point. But in this particular stretch, I had to do maintenance work to keep the ditch at a sufficient depth to channel the water away from the field.
>
> Q. Were you getting variations in the depth before you did the maintenance work?
>
> A. Yeah. The variations are always changing there. I mean, as we saw when we were out there, I hope everyone saw, drain two is currently under water. Drain one on this diagram is almost under water. And it's a continual maintenance thing. It's - - it constantly needs mowed and it needs serviced.

(T. at 327).

This is as close as Mr. High comes to testifying about a pre-existing channel in Area 2 but, even in this testimony, he appears to be discussing Area 2 along with Area 3 when he mentions drain one and drain two, both of which are located in Area 3. As is evident from the testimony and the aerial photos, there is a clear pre-existing stream channel/ditch in Area 3 and the testimony does not seem to draw a clear distinction. The second instance of testimony regarding a pre-existing channel is limited as follows:

> Q. When you performed your maintenance on the site, did you follow the existing ditch path?
>
> A. Yes.

(T. at 335).

Again, this testimony is unclear whether Mr. High is referring to the ditch in Area 2 or another part of the High Farm site such as Area 3.

We do not find his testimony on the presence of a pre-existing channel in Area 2 as part of his field drainage system to be sufficiently clear to support a permit waiver. In light of the lack

of any physical evidence, like photos and maps, along with our conclusion that the available aerial photos do not show evidence of a pre-existing channel in recent years (including one just a couple of years prior to his ownership and one during his ownership), we are not convinced that Mr. High has demonstrated that there was a channel that should be considered as part of his field drainage system in Area 2. Therefore, Mr. High's failure to obtain a permit to cover his actions in Area 2 cannot be excused by the field drainage maintenance waiver.

Furthermore, even if we concluded that there was a pre-existing channel 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. We are not convinced that the full scope of Mr. High's actions within Area 2 would be covered under the maintenance waiver. The Department was very clear that at least some portion of the channel excavated by Mr. High cut through existing wetlands. Encroaching on and excavating in wetlands is a highly regulated activity. The maintenance waiver arguably would allow Mr. High 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 channel. In this case, it appears that at least some portion of the newly excavated channel cut by Mr. High encroached on wetlands adjacent to any pre-existing channel. Further, it is evident from the photographs that Mr. High placed the excavated material into wetlands areas adjacent to the new channel. Those actions would not qualify for the maintenance waiver in our opinion.[7]

[7] Because this appears to be a case of first impression where the Board has been called upon to review the field drainage system maintenance waiver, we want to be clear that we are deciding this case on the specific facts presented by this matter. Nothing we have decided is intended to create an onerous permit requirement for the thousands of Pennsylvania farmers who are routinely required to maintain their field drainage systems. The application of the waiver is clearly fact dependent to the unique circumstances of each farm and farmer.

Finally, we turn our attention to the issue of whether the resolution ordered by the Department in its Compliance Order was lawful and reasonable. The facts of this case support the Compliance Order and the Department clearly has the necessary legal authority to require that the violations identified in this case be corrected. However, we must also consider whether the Compliance Order represents a reasonable exercise of the Department's discretion. The Department carries the burden to prove that all the elements of its order are reasonable, including the ordered remedial measures. *Schaffer v. DEP*, 2006 EHB 1013, 1025; *Strubinger v. DEP*, 2003 EHB 247, 252-53.

We find that the proposed resolution of the violations was a reasonable approach at the time the Compliance Order was issued. The Department testified that a deeper channel had the potential to allow excess water to flow out of the wetlands and into the channel where it would be conveyed downstream. The Department requested that Mr. High restore the excavated channel through the wetland to a depth of no more than 10 inches below the pre-existing ground elevations and stabilize the disturbed area with a wetland seed mix and straw mulch. The Department explained that a channel of this depth would allow it to continue to convey some water flow through Area 2 without adversely affecting the water saturation levels necessary to maintain the wetlands. The Department offered a reasonable resolution of the matter that it concluded would still provide some benefit to Mr. High while ensuring the continued viability of the adjacent wetlands.

However, the passage of time since the excavation took place and the testimony concerning the current conditions in Area 2 raise a question about whether the proposed remediation work required by the Compliance Order is still necessary and appropriate. Mr. High's excavation in Area 2 occurred prior to August 20, 2020, the Compliance Order was issued in April of 2021, and

the hearing in this matter before this Board was held in May of 2023. There has been a considerable amount of time between the original excavation and the issuance of the Order to evaluate any negative impacts the channel has had on the wetland in Area 2 and whether the remedial measures remain reasonable in light of new facts that have occurred since the Order's issuance. We review appeals *de novo*, and as such, we can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). Therefore, the Board can consider evidence of the impacts to the wetland since the Department issued its Order.

In May 2022, when the Department conducted an evaluation of the wetlands in Area 2 more than a year after the issuance of the Compliance Order, Mr. Jacobini determined that Area 2 remained a wetland because hydrophytic vegetation, hydric soil, and hydrology, the three essential factors evaluated to identify a wetland, remained present. The photos taken by Mr. Jacobini during his May 2022 inspection (Exs. D-5 through D-8) show that the wetland is intact and that it is in the process of revegetation. We also look to the testimony of Mr. Grose concerning the current state of Area 2. When asked on cross-examination whether the current status of the ditch was acceptable, Mr. Grose answered that it was acceptable. (T. at 39). On redirect, the Department followed up on the question of acceptability with Mr. Grose. He replied as follows:

> [I]t was two years, eight months. It was almost three years in the past. Mother nature, mother nature heals herself very well. She can adapt and overcome and that happens on a regular basis. I see that every day, you know, for these types of activities and so that's why. She has healed herself and established the swale that we were trying to promote and have in there.

(T. at 131).

In light of the evidence presented at the hearing, we find that requiring Mr. High to restore the channel to a depth of 10 inches at this point as called for in the Compliance Order is no longer reasonable and appropriate. It is not difficult to conclude that allowing more excavation or filling involving the channel in Area 2 would be a net negative for what appears to be a situation that has now been stabilized, with the wetlands of concern intact and functioning properly.

In summary, we find that the Department has shown that its Compliance Order was legal and reasonable when issued. Mr. High's action involving excavation of a channel in a wetland in Area 2 encroached in that body of water by undertaking an activity that changed the course, current, or cross-section of that wetland. Under Section 693.6 of the DSEA, such an activity requires a permit from the Department, and Mr. High did not have one nor did he have the required Erosion and Sedimentation Control Plan. We further find that the situation has stabilized, and the restoration called for in the Compliance Order is no longer necessary or appropriate. We conclude that the best course at this point is for all parties to take no further actions regarding the Compliance Order and Area 2. If Mr. High desires to undertake any future activities in Area 2, he should discuss them with the Conservation District and/or the Department to determine what, if any, requirements apply and if any permits are necessary.

Therefore, we issue the following Order:

CONCLUSIONS OF LAW

1. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

2. The Department may issue such orders as are necessary to aid in the enforcement of the provisions of the Dam Safety and Encroachments Act. 32 P.S. § 693.20.

3. In an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion.

4. The Department must prove that all aspects of its order are reasonable, including the remedial action being ordered. *Strubinger v. DEP,* 2003 EHB 247, 252-53.

5. Area 2 of the High Farm contains wetlands. 25 Pa. Code § 105.1.

6. The wetlands on the High Farm constitute a body of water. 25 Pa. Code § 105.1.

7. Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), provides that, "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [D]epartment."

8. 25 Pa. Code § 105.11(a), provides that, "A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department."

9. The excavation that Mr. High conducted in the wetlands constitutes an encroachment. 32 P.S. § 693.3.

10. Mr. High's excavation of a ditch in the wetlands without having first obtained a permit from the Department constituted a violation of the law. 32 P.S. §§ 693.6(a), 693.18, and; 25 Pa. Code § 105.11(a).

11. The Department has satisfied its burden of proving that Mr. High acted unlawfully but has failed to satisfy its burden of proving that the restoration of the excavated ditch required by the Compliance Order is reasonable.

12. Mr. High bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

13. Mr. High has failed to prove that Area 2 contains the prerequisites to qualify for status as Prior Converted Cropland.

14. Mr. High has failed to prove that his excavation activities constituted maintenance of a field drainage system. Therefore, he is not exempt from permitting requirements.

15. Mr. High did not meet his burden of proof on the affirmative defenses he raised.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of January, 2024, it is hereby ORDERED that Mr. High's appeal of the Department's Compliance Order is **denied in part** and **granted in part**. The appeal is granted as to the restoration required in the Compliance Order. The Department's Compliance Order is revised to delete the requirements that Mr. High (1) restore the excavated ditch through the wetland to the pre-existing ground elevation less 10 inches with a material of ML or CL classification to match existing conditions, stabilize the disturbed area with a wetland seed mix and straw mulch and; (2) develop and implement an erosion and sediment control plan or conservation plan in accordance with Chapter 102.4(a). The appeal is denied in all other parts.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr.
PAUL J. BRUDER, JR.
Judge

DATED: January 5, 2024

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