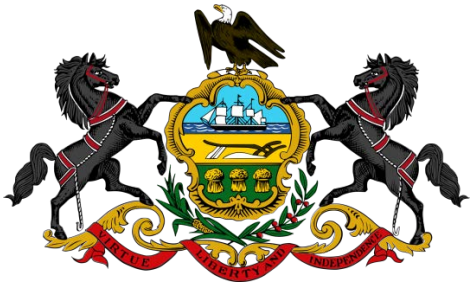
Environmental Hearing Board

Adjudications and Opinions



2014
VOLUME I

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chief Judge and Chairman

2014

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr.
Judge	Steven C. Beckman
Secretary	Vincent F. Gustitus, Jr.

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FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2014.

The Pennsylvania Environmental Hearing Board is a quasi-judicial agency of the Commonwealth of Pennsylvania charged with holding hearings and issuing adjudications on actions of the Pennsylvania Department of Environmental Protection that are appealed to the Board. *Environmental Hearing Board Act*, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §§ 7511 to 7516; and Act of December 3, 1970, P.L. 834, No. 275, which amended the *Administrative Code*, Act of April 9, 1929, P.L. 177.

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2014 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	**Issued: January 2, 2014**

OPINION AND ORDER
ON PETITION TO INTERVENE

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants a petition to intervene where the petitioner's interest in the appeal is substantial, direct and immediate, and the petitioner is therefore an interested party under Section 4 of the Environmental Hearing Board Act.

O P I N I O N

The Appellant, Patricia A. Wilson, filed an appeal before the Environmental Hearing Board (the "Board") challenging a decision by the Department of Environmental Protection (the "Department") to approve an Act 537 Official Plan Update (the "Plan") submitted by Newtown Township (the "Permittee"), dated October 2012, and revised November 2013. The Appellant listed thirty-three (33) detailed objections in her Notice of Appeal.

Before the Board is a Petition to Intervene (the "Petition") filed on behalf of Springton Pointe Estates Homeowners Association (the "Petitioner") pursuant to 25 Pa. Code § 1021.81. Newtown Township filed an Answer to the Petition. The Department did not, and the Board views the Department's silence as a lack of objection to, or perhaps a lack of interest in, the Petition.

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Section 4 of the Environmental Hearing Board Act provides that "[a]ny interested party may intervene in any matter pending before the board."[1] 35 P.S. § 7514(e). An "interested party" is a person or entity with an interest that is "more than a general interest in the proceedings . . . such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. In other words, "an intervenor must have standing." *Pileggi v. DEP*, 2010 EHB 433, 434 (quoting *Connors v. State Conservation Commission*, 1999 EHB 669, 670).

To that end, a person or entity seeking to intervene in a Board proceeding to challenge a Department action "must show a direct and substantial interest" and "must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.'" *Borough of Glendon v. Department of Environmental Protection*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992) (quoting *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975)); *see also Hostetter*, 2012 EHB at 387 ("An appropriate interested party is one where the petitioner's interest is 'substantial, direct and immediate.'"); *Ganzer Sand & Gravel, Inc. v. DER*, 1990 EHB 625, 626.

Under the Board's Rules, a petition to intervene must establish the following: (1) The reasons the petitioner seeks to intervene; (2) The basis for asserting that the identified interest is

[1] This language establishes a low burden for intervention in Board proceedings. *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166 ("[I]t does not take much to be able to intervene in Board proceedings." (quoting *TJS Mining v. DEP*, 2003 EHB 507, 508)); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606 ("The Board's governing statute and rules do not make it difficult to intervene in a pending matter.").

greater than that of the general public; (3) The manner in which that interest will be affected by the Board's adjudication; and (4) The specific issues upon which the petitioner will offer evidence or legal argument. 25 Pa. Code § 1021.81.

The Petition follows this prescribed format. First, the Petitioner states that it seeks to intervene because "the Plan would effect a substantial change in the handling of sewage for the Springton Pointe Estates community by"

> (i) eliminating an existing waste water [sic] treatment plant [("WWTP")] within the Springton Pointe Estates community;
>
> (ii) replacing the WWTP with a large pump station to collect and distribute sewage flow from both within and, in much great part, outside the community in the approximate amount of 336,000 gallons per day;
>
> (iii) subjecting the Springton Pointe Estates neighborhood to extensive construction activity including: the construction of gravity mains into Springton Pointe Estates, the removal of the existing wastewater treatment plant, and the installation of the new pump station, wet wells and control facilities.

Petition at 1. The Petitioner further states:

> [t]he new pump station will be set right beside the homes of two Springton Pointe Estates families who will also share a driveway with the pump station property. The new station is to be situated on property owned by the Petitioner. The Petitioner wishes to participate in the review of the plan as it impacts Association members, the Association community, and Association property.

Petition at 1-2.

Second, the Petitioner asserts that its interest is greater than that of the general public because

> land owned by the Petitioner is to be used and otherwise impacted by implementation of the Plan. Petitioner's land is the location projected for the installation of a large new pump station. Portions of land owned by Petitioner consisting of wetlands and floodplain are to be crossed and disturbed for the installation of piping and other facilities contemplated by the Plan. Additionally, under the Plan a large pipe associated with a proposed well will need to cross through a high berm (12 feet high) located on Petitioners property. The berm encloses a big retention pond on Petitioner's property.

Petition at 2.

Third, the Petitioner explains that the Board's disposition in this matter will impact the Petitioner's elevated interest and that if the Petitioner is denied intervention, its interests will not be adequately represented by the Appellant. Petition at 2, 3.

Lastly, the Petitioner states that it will offer evidence on all of the objections listed in the Appellant's Notice of Appeal.[2] Petition at 3. More specifically, the Petitioner states that it will offer further evidence on

> the appropriateness of the Plan as it directly impacts the Petitioner and its members including as to the use and disturbance of property within Springton Pointe Estates community as well as to activities outside the community which have consequences for the community (such as the choice of routing the sewage disposal piping to collect sewage outside of the community and to funnel it through the community and into a pumping station located within the community rather than routing it elsewhere).

Petition at 2-3. All of the facts averred in the Petition were verified by Raymond Lopez, President of the Springton Point Estates Homeowners Association, in compliance with 25 Pa. Code § 1021.81(f).

Newtown Township, in its Answer, raises two primary arguments in opposition to the Petition. Newtown Township first argues that a number of the issues listed in the Petition do not fit within any of the objections listed in the Appellant's Notice of Appeal. Indeed, the Board's Rules provide that an intervenor is limited to the issues remaining in the proceedings at the time intervention is granted, 25 Pa. Code § 1021.81(f), and the Board has discretion to limit the issues in an intervenor may pursue. *Monroe County Municipal Waste Management Authority v. DEP*, 2010 EHB 819, 824. Newtown Township's second argument, which logically flows from its

[2] The Petitioner states that it will offer "evidence and/or legal argument on the 30 objections listed" in the Appellant's Notice of Appeal, but, as noted above, the Notice of Appeal actually contains thirty-three (33) objections.

first, is that the Petitioner, while failing to cite any issues that fall within the objections in the Notice of Appeal, has failed to show how any of the existing objections in the Notice of Appeal, which are the only objections that can be argued in this appeal, can advance the Petitioner's interest, and, therefore, the Petitioner lacks standing to intervene.

The Board disagrees with Newtown Township and finds that the Petitioner has met its burden under Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514(e), to show that it is an interested party in this appeal. The Petitioner has more than a general interest in this appeal primarily because the Plan will be implemented, in part, within the Springton Pointe Estates community. In that sense, the Petitioner will either gain or lose by direct operation of the Board's ultimate determination. In other words, the Petitioner has standing to challenge the Plan. The Petitioner's interest in this appeal is substantial, direct and immediate.

The Board appreciates Newtown Township's concern that some of the issues raised by the Petitioner may not fit within certain, or any, of the objections currently listed in the Appellant's Notice of Appeal. The record before the Board, however, is not sufficiently developed for the Board to determine which, if any, of the issues raised by the Petitioner fit within certain, or any, of the objections listed in the Notice of Appeal. *See Ruddy v. DEP*, 2003 EHB 268, 270 (refusing to limit petitioner's participation in appeal at early point in proceedings where Board was presented with insufficient facts and legal arguments). Furthermore, the Appellant has the opportunity to amend the Notice of Appeal, and if the Appellant successfully amends the Notice of Appeal, some of the objections may change or be withdrawn, and perhaps some may even be added, if permitted by the Board. The Board has only decided to grant the Petitioner intervenor status, and Newtown Township is still able to challenge any future attempts

by the Petitioner to add objections that are not listed in the Appellant's Notice of Appeal. Newtown Township's concern is duly noted and preserved.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 2nd day of January, 2014, it is hereby ordered as follows:

1. The Petition to Intervene filed on behalf of Springton Pointe Estates Homeowners Association is **granted**.

2. Springton Pointe Estate Homeowners Association's participation in this appeal is limited to the objections listed in the Appellant's Notice of Appeal.

3. The caption is amended and shall appear on future filings as follows:

PATRICIA A. WILSON, Appellant and SPRINGTON POINTE ESTATES HOMEOWNERS ASSOCIATION, Intervenor	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: January 2, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOREEN DOUGHERTY	:	
	:	
v.	:	**EHB Docket No. 2013-220-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOUTHWESTERN ENERGY PRODUCTION COMPANY, Permittee	:	**Issued: January 3, 2014**

OPINION AND ORDER
DENYING PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's petition for supersedeas without a hearing pursuant to 25 Pa. Code § 1021.62(c) because the appellant failed to state grounds sufficient to support the granting of a supersedeas. The petition does not explain why the appellant believes the Department acted unlawfully or unreasonably in issuing a permit to drill and operate an unconventional gas well.

OPINION

On November 18, 2013, the Department of Environmental Protection (the "Department") issued a well permit to Southwestern Energy Production Company ("Southwestern"), which permitted the drilling of an unconventional gas well in Eaton Township, Wyoming County. Doreen Dougherty ("Dougherty"), a nearby resident acting *pro se*, filed this third-party appeal from the issuance of the permit. Dougherty included with her notice of appeal a one-paragraph petition for supersedeas, which reads in its entirety as follows:

> As per objections enumerated in the attached "OBJECTIONS TO THE DEPARTMENT'S ACTION", PA Code sections §1021.61 through §1021.70, and due to publicly stated plans by Southwestern Energy to commence gas well site development and the imminent danger presented to Ms. Doreen Dougherty, her property, and the surrounding environment, it is requested that a temporary supersedeas be granted by the Environmental Hearing Board to halt development pending resolution of the appeal hearing.

We interpreted Dougherty's filing as a petition for both a temporary supersedeas and a supersedeas and held a conference call with the parties to address the request for a temporary supersedeas. Dougherty was represented by counsel on the call. Counsel subsequently entered his appearance on behalf of Dougherty. After much discussion, we indicated that we did not believe that Dougherty's petition complied with our rules, but because Dougherty was now represented by counsel, we would allow her to amend her filings. Thereafter, Dougherty filed another notice of appeal and petition for supersedeas, which was identical to her original filing in every respect except that it now included a completed notice of appeal form and an affidavit from Dougherty, which we will discuss in more detail below. Dougherty did not add to or change her one-paragraph supersedeas petition in the second filing.

Both the Department and Southwestern argued on our conference call that Dougherty's petition was deficient on multiple grounds. Following the call, we issued an order taking Dougherty's petition for a temporary supersedeas under advisement and tentatively scheduling a hearing on the supersedeas petition for January 7, 2014. The Department has now filed a motion to deny Dougherty's petition. Southwestern has filed a "response" to the Department's motion, joining in the motion and adding that it is opposed to any continuation of the hearing.[1] The

[1] Southwestern has also sent us a letter complaining that Dougherty will not make herself available for deposition or hearing testimony either in person or via computer videoconference due to her chemical and electromagnetic sensitivity. Dougherty responded by letter indicating that she indeed will only testify via a landline telephone.

Department argues that Dougherty's petition should be denied without a hearing because she has not pled her case with any specific facts that would support a supersedeas. It says that, although Dougherty generally states that she suffers from toxic encephalopathy and other conditions, there is no connection made between the proposed drilling activities and Dougherty's health. It argues that she has not sufficiently correlated Southwestern's drilling activities to any potential harm she may suffer with any specificity or with sufficient affidavits. Instead, her affidavit merely generally describes her condition and states her fear of the drilling. The unsworn letter of a doctor attached to the petition describes generically certain drilling activities, but does not describe with any specificity how those activities will take place at this site or how they are different from other ongoing industrial activities in the area. The Department complains that, although Dougherty alleges that the well permit activities should not have been authorized, she has not cited any authority for the proposition that the granting of the permit violated the law.

Discussion

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Mellinger v. DEP*, EHB Docket No. 2012-163-M (Opinion and Order, June 5, 2013); *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Twp. v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Servs. v. DEP*, 1999 EHB 649, 651; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Neubert v. DEP*, 2005 EHB

598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Servs., supra; Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corp. v. DEP*, 1996 EHB 808, 810; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. If a petitioner fails to carry its burden on any one of the factors listed under 25 Pa. Code § 1021.63(a), the Board need not consider the remaining requirements for supersedeas relief. *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369.

Under the Board's Rules, the Board may deny a petition for supersedeas upon motion or *sua sponte* without hearing for lack of particularity in the facts pleaded, lack of particularity in the legal authority cited as the basis for the grant of the supersedeas, an inadequately explained failure to support the petition with affidavits, or a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(1)–(4); *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 372; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635; *Dickinson Twp. v. DEP*, 2002 EHB 267.

Given the fact that a supersedeas is an extraordinary measure that is not to be taken lightly, it is critical that a petition for supersedeas plead facts and law with particularity and be supported by affidavits setting forth facts upon which issuance of the supersedeas may depend. 25 Pa. Code § 1021.62(a). The pleadings and affidavits must be such that, if the petitioner were able to prove the allegations set forth in its pleadings and affidavits at a hearing, and the Department and/or permittee did not put on a case, it would be apparent from the filings that the

Board would be able, if it so chose, to issue a supersedeas. In other words, the petitioner's papers, on their face, must set forth what is essentially a *prima facie* case for the issuance of a supersedeas. *See Global Eco-Logical Servs. v. DEP*, 2000 EHB 829, 832; *A&M Composting v. DEP*, 1997 EHB 1093, 1098. A petition that together with its supporting documentation does not provide the Board with a basis for granting a supersedeas will be denied. *Mellinger, supra.*

Dougherty's petition for supersedeas is just such a petition. It is completely inadequate with respect to Dougherty's likelihood of success on the merits. In order to ultimately prevail in this appeal, Dougherty will need to prove by a preponderance of the evidence that the Department's issuance of a permit to Southwestern was unlawful, in the sense that the Department violated some statutory, regulatory, or adjudicatory law or Dougherty's constitutional rights, *Robinson Township v. Commonwealth of Pennsylvania*, No. 62 MAP 2012, 2013 Pa. LEXIS 3068 (Pa. Dec. 19, 2013), or that the Department's action was otherwise unreasonable or not supported by the facts. *See generally Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833.

The fundamental problem with Dougherty's petition is that it does not explain how the Department in her view has acted unlawfully or unreasonably. The petition is only supported by one affidavit, from Dougherty herself, which reads as follows:

> I, Doreen Dougherty, swear and affirm:
>
> 1. That I am the Appellant in the above-referenced matter.
> 2. That I am suffering from severe toxic encephalopathy, reactive airway disease, and other systemic and debilitating illness related to chronic toxic exposure.
> 3. That I also have very severe intolerance to electromagnetic and microwave exposure, such as electrical lines, and cellular towers.
> 4. That due to my condition, if highly hazardous gas-retrieval fracking operations occur close in proximity to my residence, it will cause serious risk of death.
> 5. That I have been properly diagnosed of these medical complications by Dr. Grace Ziem.

6. That Dr. Grace Ziem has been my treating physician for well over a decade.
7. That I truly feel my life will be threatened by any fracking operations that may occur near my house based on a letter written by Dr. Grace Ziem attached to this affidavit.

We cannot at this point credit or accept Ms. Dougherty's averment that "gas retrieval fracking operations" are "highly hazardous" or that such operations "will cause serious risk of death." There is no indication that Dougherty is qualified to make such averments. We can accept at this point Dougherty's averment that she has extreme sensitivity to chemicals and electromagnetism, but there is nothing in the affidavit to support a finding that there is a link between Southwestern's proposed operations and a credible risk to Dougherty as a result of those operations given her medical condition. And more to the point of our fundamental concern, the affidavit does not support a conclusion that the Department somehow acted unlawfully or unreasonably.

Dougherty's affidavit goes on to refer to a diagnosis performed and letter written by Dr. Grace Ziem. The letter is unsworn, and it obviously does not take on the form of sworn testimony simply because Dougherty references it in her affidavit. Furthermore, the letter contains multiple allegations regarding the dangers of fracking (e.g. "likelihood of eventual contamination of groundwater which would contaminate [Dougherty's] well (and that of others in the community.)" (emphasis in original)), but no explanation of the basis for her allegations or any indication that she is familiar with fracking or qualified to render expert opinions regarding fracking.[2] Again, the letter offers no clue on exactly why the Department erred in Dougherty's view.

Beyond the affidavit and the letter, the supersedeas petition itself is woefully inadequate. Even after we gave her an opportunity to expand the petition with the assistance of counsel in

[2] The letter also alleges that Southwestern is incompetent and negligent as demonstrated by an extensive and problematic compliance history.

accordance with our rules, it still contains only the one paragraph quoted above. That paragraph simply refers the reader to the objections set forth in the notice of appeal and says that Dougherty is in imminent danger as a result of Southwestern's plan to begin gas well development. We are not suggesting at this point that the objections in the notice of appeal do or do not have merit. We are simply saying that it is not enough for a grant of supersedeas to submit a one-paragraph reference to the contents of that notice of appeal.

Thus, Dougherty's petition and supporting papers provide us with no factual or legal support for the proposition that she ultimately must prove; namely, that the Department acted unlawfully or unreasonably by issuing a permit to Southwestern. Taking Ms. Dougherty's extreme sensitivity as a given for the moment, she does not tell us why the Department acted unlawfully or unreasonably in light of that sensitivity. She has not alleged that the Department had some particular or heightened duty or obligation with respect to her condition or that the Department failed to comply with or fulfill such a duty or obligation. In short, she has failed to state grounds sufficient for the granting of a supersedeas. This, in addition to the lack of particularity in the facts pleaded and the legal authority for a grant of a supersedeas, requires us to grant the Department's motion to deny the petition for supersedeas.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOREEN DOUGHERTY	:	
	:	
v.	:	**EHB Docket No. 2013-220-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOUTHWESTERN ENERGY PRODUCTION COMPANY, Permittee	:	

ORDER

AND NOW, this 3rd day of January, 2014, pursuant to 25 Pa. Code § 1021.62(c), it is hereby ordered that the Department's motion to deny the Appellant's petition for supersedeas is **granted**. The petition for a temporary supersedeas and a supersedeas are **denied**. The hearing previously scheduled to begin on January 7, 2014 is **cancelled**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 3, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN L. GUERIN	:	
	:	
v.	:	**EHB Docket No. 2013-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 10, 2014**
	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Judge

Synopsis

The Board denies an appellant's petition for supersedeas of an order of the Department of Environmental Protection that proposes to install a monitoring well on the appellant's property and conduct periodic sampling, because the appellant did not meet any of the criteria for the grant of supersedeas.

OPINION

This case involves a residential property owned by Stephen Guerin and his wife Denise Gardner-Guerin, located at 650 Jacksonville Road, Northampton Township, Pennsylvania, 18974, tax parcel 31-1-69 (hereinafter, "650 Jacksonville Road" or the "property").[1] (Appellant's Exhibit No. ("Ex.") A-1). The property is located in an area that was designated as a hazardous site by the Department of Environmental Protection (the "Department") due to contamination discovered in the groundwater underlying the area. (Ex. A-11). Near the property are several industrial parks that are the suspected source of contamination to the groundwater, although the

[1] Although the property at 650 Jacksonville Road is still owned by both Stephen Guerin and Denise Gardner-Guerin, the property is subject to divorce proceedings, which have been ongoing between Mr. Guerin and Ms. Gardner-Guerin since November 2006. Since the divorce proceedings were initiated, Mr. Guerin has lived at a different address, 7609 Filmore Street, Philadelphia, Pennsylvania, 19111.

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http://ehb.courtapps.com

specific source of the contamination has yet to be determined. (Commonwealth of Pennsylvania Department of Environmental Protection's Ex. C-1; A-11). The Department has referred to the general area of contamination surrounding the industrial parks as the Jacksonville TCE Site. (Ex. A-11).

According to the evidence presented at the supersedeas hearing, the groundwater contamination was first noted by the Bucks County Health Department in 1979 during an investigation of residential water wells in which it noted levels of Trichloroethylene (TCE)[2] that exceeded 5 micrograms/Liter (µg/L), the level identified as the primary drinking water standard by the Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f—300j-26, and the regulations promulgated under it.[3] 40 C.F.R. § 141.61(a). (Ex. A-11; Notes of Transcript ("T.") page 81). TCE is designated as a hazardous substance under the Hazardous Substances Control Act of 1988, 35 P.S. §§ 6020.101—6020.1305 (HSCA).[4] The record does not indicate whether any additional action was taken regarding this contamination until May 15, 2008, when an area resident complained to the Northampton Bucks County Municipal Authority, which then sampled the water well and detected a TCE level of 8.32 µg/L. (Ex. A-11). In May 2010, the same resident contacted the Department regarding suspected well contamination. (*Id.*). The Department had been unaware of the contamination in this area before this time. (T. 81).

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[2] The Department refers to TCE as trichloroethene, which is simply another name for the same substance. For TCE and for all following hazardous substances we will use the names of the substances as they are listed in the federal regulations.

[3] The Safe Drinking Water Act defines the safe levels of contaminants as the Maximum Contaminant Level (MCL). 42 U.S.C. § 300f(3).

[4] 35 P.S. § 6020.103 defines "hazardous substance" as including any substance designated pursuant to the Federal Superfund Act, which is also known as the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601—9675, the federal counterpart to HSCA. CERCLA defines certain substances as hazardous in Section 101(14). Additionally, Section 102 of CERCLA authorizes the Administrator of the EPA to adopt regulations designating additional hazardous substances. These hazardous substances can be found generally in the national primary drinking water regulations at 40 C.F.R. Part 141.

Shortly thereafter, in June 2010, the Department requested that the firm Science Applications International Corporation (SAIC) provide technical assistance with the investigation of the groundwater contamination at the Jacksonville TCE Site. (T. 48-49). SAIC prepared various reports concerning the investigative activities it conducted at the Jacksonville TCE Site—a Project Report and Supplemental Work Plan in April 2011 (Ex. A-6), a Project Report 2 in November 2012 (Ex. A-7), and a Supplemental Work Plan 2 in June 2013 (Ex. A-8). The reports detail SAIC's activities and findings in investigating the groundwater contamination in and around the Jacksonville TCE Site, along with recommendations for proceeding with investigation of the groundwater contamination.

To further its investigation, the Department sent a letter to the residents of the area, dated July 8, 2010, which informed the residents of the forthcoming groundwater sampling of their water wells. (Ex. A-3). This letter was sent to 650 Jacksonville Road. (*Id.*). The Department then conducted two rounds of sampling of residential water wells in Northampton Township, obtaining samples from 119 properties. (Ex. A-11). In addition to TCE, the Department also found the presence of the hazardous substances Tetrachloroethylene (PCE) and 1,1-Dichloroethylene (1,1-DCE), which have MCLs of 5 µg/L and 7 µg/L, respectively. 40 C.F.R. § 141.61(a). The results from the sampling ranged from non-detect to levels in excess of MCLs for TCE, PCE, and 1,1-DCE. Among the water wells sampled was Mr. Guerin's at 650 Jacksonville Road on May 10, 2011. On May 31, 2011, the Department sent a letter to 650 Jacksonville Road, addressed to Ms. Gardner-Guerin, informing her of the results of the water sampling at the property. (Ex. A-4). The results indicated that TCE was detected at a concentration of 29.2 µg/L and PCE was detected at a concentration of 31.8 µg/L—both well in excess of their MCLs of 5 µg/L. (*Id.*). The letter also stated that bottled water delivery to the

property had already commenced.

On October 28, 2011, following the two rounds of sampling, the Department released a Statement of Decision (Ex. A-11) in which it declared that it would take responsive action pursuant to Section 103 of HSCA and pay for the extension of municipal water lines to approximately 122 residential properties in the area, including 650 Jacksonville Road. The water line extension project was completed in the fall of 2012. Mr. Guerin testified that he was unaware of any of these developments—the groundwater contamination in the area, the sampling of his property's water well, the contamination of the property's water well, and the connection to municipal water—until his daughter informed him at the end of 2012 that there was municipal water and sewer at the property. (T. 26-27). The water well at the property was subsequently abandoned. (T. 33).

On March 18, 2013, the Department sent a letter to Mr. Guerin via e-mail, with his Filmore Street address in the heading, seeking permission to install a monitoring well at 650 Jacksonville Road and to periodically sample that well to determine the nature and extent of the groundwater contamination plume. (Ex. A-5). An in-person meeting occurred between Mr. Guerin and the Department. (T. 27). On May 28, 2013, the Department issued an order to Mr. Guerin and Ms. Gardener-Guerin, mailed to both 650 Jacksonville Road and Mr. Guerin's Filmore Street address. (Ex. A-2). Paragraph G of the order states that the Department intends to install one or more monitoring wells on the property for the purpose of fully defining the nature and extent of the contamination plume. Paragraph M, in conjunction with Paragraph 2, requires the owners of 650 Jacksonville Road to provide access and right of entry to the Department for the purposes of installing the monitoring well and conducting periodic sampling of that well.

On June 21, 2013, Mr. Guerin filed an appeal of that order with the Board. Mr. Guerin

filed a petition for supersedeas on November 5, 2013. A conference call was held among the parties on November 12, 2013 and a hearing on the supersedeas was scheduled for and conducted on December 3, 2013. The hearing lasted one day.

Discussion

A supersedeas is an extraordinary remedy that is only appropriate when there is a clear demonstration of requisite need. *Dougherty v. DEP*, EHB Docket No. 2013-220-L, slip op. at 3-4 (Opinion and Order, Jan. 3, 2014); *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362. The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511—7514, and our rules provide that the grant or denial of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Neubert v. DEP*, 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB 797, 802; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420; *see also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-809 (Pa. 1983).

In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB at 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. If a petitioner fails to carry its burden on any one of the factors listed under 25 Pa. Code § 1021.63(a), the Board need not consider the remaining requirements for supersedeas relief. *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB at 1369. The Environmental Hearing Board Act also provides a distinct

limitation that "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2); *see also* 25 Pa. Code § 1021.63 (same).

Irreparable Harm

Mr. Guerin raises essentially two general concerns regarding how he would suffer harm, through his property and his children. Mr. Guerin offered the belief that his property value will be negatively affected by the installation of a monitoring well on his property. (T. 34-36). The Department objected that Mr. Guerin was not qualified as an expert in real estate or property value and therefore was not qualified to offer such an opinion. (T. 34-35). The Board accepted Mr. Guerin's statement with the qualification that it understood that Mr. Guerin was not an expert in real estate or property valuation. Mr. Guerin did not offer any evidence or expert testimony substantiating or quantifying the alleged devaluation of his property due to the installation of a monitoring well. Further, there was no evidence presented that even if there were devaluation, that such devaluation would be permanent, resulting in irreparable harm.

Mr. Guerin also expressed concern about the safety of his teenage children, who reside at the property, particularly with respect to Department personnel coming on and off the property to sample the monitoring well. (T. 34). Certainly this is a legitimate concern. However, we received no specific testimony as to exactly how his children would be endangered by the installation of the monitoring well and the periodic sampling of that well by Department personnel. The Department offered testimony that the installation of the monitoring well would take two to three days, meaning that there would be potentially three days in which heavy machinery would be present on the Guerin property. (T. 137). This two to three-day period strikes us as the time when harm, if it were to occur, would be most likely, but it is within a

reasonably confined window. If Mr. Guerin's children can remain out of the way of the machinery during those few days, the likelihood of harm after the machinery has been removed is small.

In considering Mr. Guerin's concerns, we note that general assertions of irreparable harm without greater specificity are not enough to establish irreparable harm. *Mellinger v. DEP*, EHB Docket No. 2012-163-M, slip op. at 7 (Opinion and Order, June 5, 2013); *Stevens v. DEP*, 2005 EHB 619, 625. Without any further explanation as to how Mr. Guerin's property will be devalued and how his children's safety will be endangered, we cannot support a finding of irreparable harm. In short, Mr. Guerin has presented little more than mere speculation on whether he will suffer any irreparable harm, which is insufficient for a supersedeas. *PA Fish and Boat Comm'n v. DEP*, 2004 EHB 473, 478-79.

Likelihood of Success

In terms of likelihood of success on the merits, HSCA provides specific instructions for how the Board is to evaluate an order of the Department that is issued pursuant to HSCA. HSCA directs the Board to uphold such an order when "[t]he Department has a reasonable basis to believe that there may be a release or a threat of a release of a hazardous substance or contaminant" and "[t]he order or relief requested is reasonably related to determining the need for a response, to choosing or taking any response or to otherwise enforcing the provisions of [the Act]." 35 P.S. § 6020.503(f)(4)(i) and (ii). Essentially, so long as the Department proposes to act reasonably in responding to a release or threat of release of a hazardous substance, the order will be upheld.

For Mr. Guerin to ultimately prevail in this appeal, he will need to prove by a preponderance of the evidence that the Department in issuing the order acted unlawfully,

meaning it violated some statutory or regulatory provision, or that the Department's order was otherwise unreasonable or not supported by the facts. *Dougherty v. DEP*, slip op. at 5 (Opinion and Order, January 3, 2014); *Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833. Given the statutory structure of HSCA and the broad authority it grants to the Department to effect and enforce its provisions, Mr. Guerin's likelihood of success is low.

Much of Mr. Guerin's case in terms of likelihood of success centers on the contention that there are other, more suitable properties for the installation of a monitoring well in the area. To bolster this argument, Mr. Guerin pointed to the SAIC reports and noted that the monitoring well at 650 Jacksonville Road was first sited for a different property. Two maps from these reports, dated October 23, 2012 and May 1, 2013 (Ex. A-9 and A-10, respectively), show the sampling locations and general results of the sampling, as well as the existing and proposed monitoring wells. The May 1, 2013 map shows a proposed monitoring well at 650 Jacksonville Road, while the October 23, 2012 map shows no monitoring well at the property and instead has a proposed location approximately three properties southwest of 650 Jacksonville Road. (Ex. A-9, A-10). Mr. Guerin extensively questioned why this change was made. Additionally, Mr. Guerin identified a vacant lot adjacent to 650 Jacksonville Road that he argued would be more suitable for the installation of the monitoring well.

However, there is nothing in HSCA that mandates the Department choose the very best property for the location of a monitoring well. The location only needs to be reasonable. *See* 35 P.S. § 6020.503(f)(4)(ii). At the hearing, the Department presented credible evidence and testimony as to why the Guerin property was a reasonable location for the monitoring well. Richard L. Merhar, P.G., formerly of SAIC, either directly prepared, or reviewed the preparation of the SAIC reports. (T. 60-63). Mr. Merhar testified that the monitoring well location was

changed after visiting the area with Department staff and discussing the location with them. (T. 67-70). He testified that 650 Jacksonville Road was a better location for the monitoring well because it would be able to provide data for tracking the contamination plume if it were to move in an eastern direction. (T. 69). Bonnie McClennen, a supervisor in the Department's HSCA program who was involved with the Jacksonville TCE site since the Department became involved with it, testified that the monitoring well location was moved to 650 Jacksonville Road because that property had produced samples in exceedance of the MCLs for TCE and PCE and there was a clear path of access for a drilling rig to come on the property and drill the well. (T. 92-97). Mr. Merhar concurred with the considerations of access. (T. 159-60). Absent any compelling testimony to the contrary, these appear to be reasonable grounds for changing the location of the monitoring well. Mr. Guerin was the only person to testify in support of his petition and he provided us "with no technical basis for concluding that there was anything wrong with the dictates of the order." *Weaver v. DEP*, EHB Docket No. 2013-041-L, slip op. at 10 (Opinion and Order, August 29, 2013).

Furthermore, HSCA provides the Department broad authority to carry out is provisions through the issuance of orders. HSCA Section 503(a) provides the Department with authority for information gathering and access when it has a "reasonable basis to believe there may be a release or threat of release of a hazardous substance." 35 P.S. § 6020.503(a). In this instance, the Department has more than a reasonable basis for its belief because it has already documented the existence of the contamination plume by testing the residential water wells in the area and further, it has documented sampling results from 650 Jacksonville Road that show high levels of TCE and PCE contamination. (Ex. A-4). Section 503(c) provides the Department with the right to enter a site or other place or property when "a release of a hazardous substance or contaminant

has occurred on a nearby property, and entry is required to determine the extent of the release." 35 P.S. § 6020.503(c)(4). The situation contemplated by this statutory provision is precisely the one at issue in this case. The Department presented evidence that the release of TCE, PCE, and 1,1-DCE occurred from a property near the Guerin property at the industrial park. The Department's stated purpose in entering the Guerin property and installing the monitoring well is to determine the extent of the release and track its migration.

In addition to the authority given to the Department for right of entry, HSCA provides the Department with certain authorization to conduct inspections on sites and properties identified under Section 503(c). In conducting an inspection, the Department is permitted to conduct a number of activities, including "the sampling of solids, liquids and gases; excavations for soil sampling; drilling and maintenance of wells to monitor groundwater; and the installation and maintenance of other equipment to monitor the nature or extent of a release of a suspected hazardous substance or contaminant." 35 P.S. § 6020.503(d). Specifically included within this list is authorization for the drilling and maintenance of monitoring wells.

Finally, HSCA Section 503(e)(1) mandates that certain people allow the Department access and right of entry to their property for inspection "as may be reasonably necessary to determine the nature and extent of a release of a hazardous substance or contaminant." 35 P.S. § 6020.503(e)(1). Among those included are a "person who owns or occupies land on which there is a release or threat of a release of a hazardous substance or contaminant" and a "person who owns or occupies land which is near the site of a release or threatened release." 35 P.S. § 6020.503(e)(1)(i) and (ii). Mr. Guerin is covered under both of these categories since the Department detected elevated levels of hazardous substances when they sampled his residential water well and he owns or occupies land that is near the industrial park, the suspected source of

the release of the hazardous substance.

The Department is granted broad authority under HSCA and is well within its statutory authorization to install a monitoring well on the property. Because 650 Jacksonville Road is near the Jacksonville TCE Site and has had detections of hazardous substances, absent any contrary technical evidence why a monitoring well should not be installed on that property, Mr. Guerin's likelihood of success on the merits is low.

Injury to the Public or Other Parties

The stated purpose of the installation of the monitoring well on the Guerin property is to track and monitor the contamination plume emanating from the industrial park area. (Ex. A-2). Some of the lines of questioning by Mr. Guerin of Mr. Merhar and Ms. McClennen suggest the argument that because the Department connected municipal water lines to a number of the residents in the area of the Jacksonville TCE Site there is no longer any threat from the contamination plume. This view of the threat is too narrow. Experts for the Department testified that there is still a significant threat to the properties that have not been connected to the municipal water line. (T. 90-92, 153). As plainly stated by Mr. Merhar, groundwater moves. (T. 54). Simply because the threat of the contamination plume has been eliminated as to a number of residents in the area in terms of their drinking water does not mean that all aspects of the threat no longer exist.

Although the Department's initial responsive action was fortunately effective in removing the threat to many of the residents' drinking water, the Department cannot now remain idle while it knows that the contamination plume exists and has the potential to migrate. In fact, the Department is mandated by HSCA to take appropriate investigative action when there is a release of a hazardous substance. 35 P.S. § 6020.501(a). When the Department has reason to

believe that there has been a release of a hazardous substance, HSCA requires the Department to undertake "investigations, monitoring, surveys, testing and other similar activities necessary or appropriate to identify the existence and extent of the release or threat of release, the source and nature of the hazardous substances or contaminants and the extent of danger to the public health or welfare or the environment." 35 P.S. § 6020.501(d). The Department actually would be in violation of the law if it *did not* take action to continue to investigate the extent and source of the plume. The Department must have complete and up-to-date information to appropriately evaluate the scope of the contamination and the need for continued response or enforcement. *See Clever v. DEP*, 1999 EHB 870, 873.

If the Board were to grant Mr. Guerin's petition superseding the Department's order and preventing the installation of the monitoring well, the potential for injury to the public and other parties could actually increase. The Environmental Hearing Board Act specifically directs the Board to not issue a supersedeas "in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2). This is such a case. There is no dispute that pollution exists in the area in the form of hazardous substances in the groundwater. Granting a supersedeas in this case would be contrary to the provisions of the Environmental Hearing Board Act and to HSCA.[5]

For all of the above reasons we must deny the petition for supersedeas. Accordingly, we enter the following Order.

[5] Mr. Guerin presented other arguments at the hearing. Chief among these is whether he had proper notice from the Department of the activities occurring at 650 Jacksonville Road. Given that this consideration is not relevant to the grant or denial of a supersedeas, we will not consider it here and instead leave it to the case in chief.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN L. GUERIN	:	
	:	
v.	:	**EHB Docket No. 2013-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of January, 2014, it is hereby ordered that the appellant's petition for supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: January 10, 2014

c: **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson
9th Floor, RCSOB

For the Commonwealth of PA, DEP:
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Office of Chief Counsel – Southeast Region

For Appellant:
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613 West Avenue
Jenkintown, PA 19046

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM BRAWAND d/b/a BRAWAND OIL COMPANY	:	
v.	:	**EHB Docket No. 2013-006-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 22, 2014**

OPINION AND ORDER ON
MOTION TO COMPEL

By Steven C. Beckman, Judge

Synopsis

The Board denies the Department's motion to compel responses to discovery requests. Waiting almost six months after the close of discovery to file a motion to compel constitutes an undue delay. However, we will not reward a party's failure to follow the rules of discovery nor allow the party to "surprise" its adversary by waiting until its prehearing memorandum to disclose its witnesses and therefore require the party to file witness information.

OPINION

Before the Environmental Hearing Board is the Department's motion to compel responses to the Department's First Set of Interrogatories and Request for Production of Documents in the matter of William H. Brawand, doing business as Brawand Oil Company, EHB Docket No. 2013-006-B.

For context, this matter commenced with the filing of Brawand's Notice of Appeal on January 17, 2013. That same day, the Board issued Pre-Hearing Order No. 1, in which we ordered, among other things, that the parties complete discovery within six months—July 16, 2013. Pre-Hearing Order No. 1 also set a deadline for the filing of dispositive motions as August

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15, 2013, thirty days after the close of discovery. According to its motion, the Department served its First Set of Interrogatories and Request for Production of Documents on Brawand on June 6, 2013, a full twenty weeks after the appeal was initiated and with less than six weeks left in the discovery period. The July 16, 2013 deadline for discovery passed without any filings with the Board by either party. On August 15, 2013, the parties filed a joint request to extend the deadline for filing dispositive motions, which the Board then extended to October 18, 2013. In their joint request, the parties indicated that Brawand had not yet responded to the Department's discovery request, but "[a]s a result of [Brawand's] representation that a response is forthcoming and as a courtesy to [Brawand's] counsel, the Department has not yet filed a motion to compel answers to the discovery." Despite this representation that discovery responses were forthcoming, Brawand apparently never responded to the Department's discovery.

On October 18, 2013, the last day for filing dispositive motions, the Department filed for summary judgment arguing that Brawand had not produced any information or evidence to rebut the statutory presumption in Section 3218 of Act 13, pursuant to which the Department issued the order at appeal. The Board denied that motion, in part because of Brawand's statements in an affidavit attached to its response to the summary judgment motion that older oil and gas wells contributed to the pollution and that a Department official represented to Brawand that his company likely was not the cause of the pollution. *See William Brawand d/b/a Brawand Oil Co. v. DEP*, EHB Docket No. 2013-006-B, *slip op.* at 4, (Opinion issued December 30, 2013.). On January 6, 2014, after being denied summary judgment, the Department filed the subject motion to compel discovery responses from Brawand. The motion to compel was filed almost six months after the close of discovery in this matter.

Discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a).

> Therefore, the broad discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas are applicable to actions before the Board. Full disclosure of a party's case underlies our discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and pretrial proceedings. *Cappelli v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

Cecil Twp. Mun. Auth. v. DEP, 2010 EHB 551, 552–53. The Board will entertain motions to compel, even after the close of discovery, when (1) the motion is filed soon enough that it will not delay a hearing, and (2) where there is no undue delay in filing the motion. *Coalition of Religious and Civic Organizations v. DEP and Pfizer Pigments*, 1990 EHB 1376, 1379.

The parties' lack of effort in the discovery process has created the issue facing the Board in deciding this motion. The record appears to reflect that Brawand sought no discovery at all, which is difficult to understand given its assertion that "[a] representative of the Department indicated . . . that the water well at issue was likely not polluted by the conduct of Brawand Oil Company." (Aff. of William Brawand filed Nov. 15, 2013.) Furthermore, despite apparent representations to the contrary, Brawand failed to respond to the Department's discovery request, even when additional time was granted. We do not think that such behavior should be countenanced. As we have previously stated:

> Litigation is serious and time consuming business. When a party chooses to litigate there is a responsibility to come forward and participate. . . . The ostrich strategy of litigation should not be countenanced by any court since it undermines the foundations of the litigation process.

Morgan Brothers Builders, Inc. and Michael P. Morgan v. DEP, 2000 EHB 7, 10.

At the same time, the Department, as we noted, waited over four months to file its initial discovery request. The Department's argument that "a motion to compel [filed after the deadline for filing dispositive motions was extended] would likely not have been resolved in time for the Department to file a dispositive motion," falls flat in light of this lack of effort. Had the Department been diligent in serving what appear to be largely form interrogatories, any motion to compel could have been resolved long before the *original* deadlines for discovery and filing dispositive motions, to say nothing of the extended deadline for filing dispositive motions.

While the Department has stated that it will not seek to delay the hearing as a result of its motion to compel, we are nevertheless concerned with how late in the game the motion comes before us. It is incumbent on the Department to file a timely motion to compel with the Board when a discovery dispute arises. We think that a delay of almost six months after the close of discovery and subsequent to filing a motion for summary judgment is, frankly, undue. Furthermore, we do not find the Department's explanation for this delay a sufficient basis for granting the requested motion. "As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process." *Energy Resources v. DEP*, 2006 EHB 431, 434 (quoting *Petchulis v. DEP*, 2001 EHB 673, 678).

We must be clear, however, that the Board in no way sanctions Brawand's actions in this matter. Pennsylvania's Rules of Civil Procedure require that answers (and objections, if any) to interrogatories and to requests for production of documents be served within *thirty days*. *See* Pa.R.C.P. 4006(a)(2); 4009.12(a). Brawand's obligations to respond appropriately to discovery requests are independent of whether the Department served them in the first week following the initiation of the appeal or the twentieth. "As we have stated numerous times—the discovery

process is not a game. Parties are obligated to provide all discoverable information within thirty days." *McGinnis v. DEP and Eighty-Four Mining*, 2010 EHB 489, 495. Furthermore, the Board does not look approvingly upon the provision of discoverable information for the first time in a prehearing memorandum. *See, e.g., Environmental & Recycling Services v. DEP*, 2001 EHB 824. We will not allow Brawand, who, we note, files his prehearing memorandum only after the Department in this matter, to surprise the Department with fact witnesses, and potentially expert witnesses, mere weeks before the hearing. Accordingly, while we deny the Department's motion to compel on the grounds that it was filed after an undue delay, we will require Brawand to identify witnesses that he intends to call at the hearing in accordance with the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM BRAWAND d/b/a BRAWAND OIL COMPANY	:	
v.	:	**EHB Docket No. 2013-006-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of January, 2014, it is hereby **ORDERED** that

1. The Department's Motion to Compel is **DENIED**.
2. Brawand shall disclose any witnesses upon whom Brawand will rely at hearing in support of his alleged affirmative defenses.
    a. Brawand shall file on or before **February 5, 2014** a memorandum identifying any fact witnesses or expert witnesses.
    b. For any expert witnesses, the memorandum shall include a summary of each expert witness's opinion and the factual basis for such opinion.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 22, 2014

c: **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

For the Commonwealth of PA, DEP:
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Meadville, PA 16335

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY R. JAKE	:	
	:	
v.	:	**EHB Docket No. 2011-126-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KMP ASSOCIATES, INC.	:	**Issued: February 18, 2014**

ADJUDICATION

By Richard P. Mather, Judge

Synopsis

The Board dismisses a third-party appeal of the Department's issuance of a surface mining permit even though the permittee's application for the surface mining permit failed to strictly comply with 25 Pa. Code § 86.37(a). The permittee failed to list a current address for a county conservation district office as required by 25 Pa. Code § 86.15(c) and 25 Pa. Code § 86.31(a). Instead, the permittee's public notice of its application listed the prior address of the county conservation district, which had recently moved. Nevertheless, the permittee's failure to strictly adhere to the Department's regulatory notice requirements was harmless error, and the Appellant's due process rights were not infringed upon, because the appellant was aware of the county conservation district's current address, having visited that office only two months prior to the permittee's publication of the required public notice containing the old address.

FINDINGS OF FACT

1. The Appellant is Stanley R. Jake, who resides at 605 White Street, Saltsburg, Indiana County, Pennsylvania. (Notice of Appeal.)

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2. The Permittee is KMP Associates, Inc. ("KMP"), a Pennsylvania corporation with a mailing address of 3756 Rt. 981, Saltsburg, Pennsylvania. (Permittee's Exhibit ("Ex.") A; Stipulated Exs. 1 and 2.)

3. The Appellee is the Pennsylvania Department of Environmental Protection (the "Department"). (Notice of Appeal.)

4. Prior to January 27, 2010, the offices of the Indiana County Conservation District ("Conservation District") were located at 1432 Route 286 East, Indiana, Pennsylvania, during which time the Conservation District shared office space with the United States Department of Agriculture's Natural Resources Conservation Service ("USDA"). (Notes of Transcript ("N.T.") 49-50.)

5. On January 27, 2010, the Conservation District moved from 1432 Route 286 East, Indiana, Pennsylvania ("1432 Route 286 East" or "old address") to 625 Kolter Drive, Suite 8, Indiana, Pennsylvania ("625 Kolter Drive" or "new address"). (N.T. 49-50, 56; Permittee's Ex. B.)

6. For approximately two years following the Conservation District's relocation, employees at the USDA, the tenants remaining at the Conservation District's old address at 1432 Route 286 East, would inform visitors of the Conservation District's new address and created a map and written directions to the Conservation District's new address, which they provided to visitors if verbal instructions did not suffice. (N.T. 51, 60-61; Permittee's Ex. C.)

7. For approximately one year following the Conservation District's relocation, the Conservation District's telephone number at its old address provided an automated recording that announced the Conservation District's new address and new telephone number. (N.T. 52.)

8. Tammie Robinson, a secretary for the Conservation District and an employee of the Conservation District for twenty-nine years, testified that she was familiar with the Appellant and identified him for the record. (N.T. 48-49, 52-54.)

9. On July 13, 2010, the Appellant met with Ms. Robinson at the Conservation District's new address at 625 Kolter Drive and reviewed a KMP mining permit file. (N.T. 53-54, 56, 58, Permittee's Ex. D.)

10. Ms. Robinson's time log entitled "Indiana County Conservation District, Record of Activities" contains an entry on July 13, 2010 which indicates that she met with the Appellant in connection with a KMP mining permit and specifically states, "w/Stanley Jake on KMP mine permit." (N.T. 53-54, 56, 58; Permittee's Ex. D.)

11. Ms. Robinson did not recall which KMP mining permit file was reviewed by the Appellant on July 13, 2010. (N.T. 54.)

12. On or about August 27, 2010, KMP submitted an application to the Department for a surface mining permit to conduct surface mining and coal refuse reprocessing at a site in Young Township, Indiana County, Pennsylvania (the "Application"). (N.T. 36-37; Permittee's Ex. A.)

13. On September 17, 2010, KMP's consultant, Kent Sell of Minetech Engineers, Inc., sent by facsimile transmission a copy of a Public Notice of the Application to the *Indiana Gazette* and requested that the *Indiana Gazette* publish the Public Notice once per week for four consecutive weeks. (N.T. 16, 37-39; Stipulated Ex. 1.)

14. The Indiana Printing and Publishing Company verified that the *Indiana Gazette* published the Public Notice on September 21, 2010, September 28, 2010, October 5, 2010 and October 12, 2010. (N.T. 17, 40; Stipulated Ex. 4.)

15. The Public Notice contained the following statement:

> A copy of this application has been placed on file for public review at the office of the Indiana County Conservation District, *1432 Route 286 East, Indiana, Pa. 15701-1467*. Anyone wishing to submit comments or requests for an informal conference concerning this application should write to the above listed D.E.P. address within thirty (30) days of the fourth (final) publication of this notice . . . .

(N.T. 16-17; Stipulated Ex. 2) (emphasis added).

16. At the time the Appellant read the Public Notice containing the old address of the Conservation District, the Appellant knew that the Conservation District was located at a different address because he had previously reviewed a KMP mining permit file at the Conservation District's new address. (N.T. 54.)

17. On September 17, 2010, Mr. Sell mailed a copy of the Application to the Conservation District's old address, 1432 Route 286 East. (N.T. 17, 39-40; Stipulated Ex. 3.)

18. The United States Postal Service did not return the copy of the Application that Mr. Sell mailed to the Conservation District's old address, 1432 Route 286 East. (N.T. 43, 46-47.)

19. The Conservation District received a forwarded copy of the Application at its new address, 625 Kolter Drive. (N.T. 56-57.)

20. On November 10, 2010, the Appellant notified the Department's Bureau of District Mining Operations, located at 286 Industrial Park Road, Ebensburg, Pennsylvania, in writing, of his objections to the Application. (N.T. 21-22; Stipulated Ex. 6.)

21. One of the Appellant's objections raised in his November 10, 2010 letter was that the Public Notice contained the Conservation District's old address. (N.T. 64; Stipulated Ex. 6.)

22. Tim Kania is the Permits Chief of the Department's Cambria District Mining Office and is responsible for overseeing the technical aspects of mining permit application review. (N.T. 62-63.)

23. Mr. Kania first became aware of the Appellant's objection to the Application when Mr. Kania received the Appellant's November 10, 2010 letter objecting to the Application. (N.T. 63-64; Stipulated Ex. 6.)

24. Mr. Kania testified that as part of his permit review process he spoke with KMP's consultant, Mr. Sell, who explained to Mr. Kania that the Conservation District had moved. (N.T. 64-65.)

25. Mr. Kania considered the Appellant's objection as part of the Department's permit application review. (N.T. 65.)

26. Mr. Kania determined that the public had a reasonable opportunity to view the Application because the Application was available at the Conservation District's new address, 625 Kolter Drive, and the public was provided with sufficient notice of the address change. (N.T. 65.)

27. On July 22, 2011, the Department issued Surface Mining Permit No. 32100103 for the Big Blackie Mine in Young Township, Indiana County to KMP to surface mine 7.3 acres of the Pittsburgh Coal Seam. (Notice of Appeal.)

28. The Appellant received notice of the Department's permit decision on July 30, 2011 and filed an appeal on August 29, 2011. (Notice of Appeal.)

DISCUSSION

Background

On or about August 27, 2010, KMP Associates, Inc. ("KMP") submitted an application to the Department for a surface mining permit to conduct surface mining and coal refuse reprocessing at a site in Young Township, Indiana County, Pennsylvania (the "Application"). On September 17, 2010, KMP's consultant, Kent Sell of Minetech Engineers, Inc., sent by

facsimile transmission a copy of a Public Notice of the Application to the *Indiana Gazette* and requested that the *Indiana Gazette* publish the Public Notice once per week for four consecutive weeks. The Public Notice ran in the Indiana Gazette on September 21, 2010, September 28, 2010, October 5, 2010 and October 12, 2010. The Public Notice contained the following statement:

> A copy of this application has been placed on file for public review at the office of the Indiana County Conservation District, *1432 Route 286 East, Indiana, Pa. 15701-1467.* Anyone wishing to submit comments or requests for an informal conference concerning this application should write to the above listed D.E.P. address within thirty (30) days of the fourth (final) publication of this notice . . . .

(N.T. 16-17; Stipulated Ex. 2.)

On September 17, 2010, Mr. Sell also mailed a copy of the Application to the Indiana County Conservation District ("Conservation District") at 1432 Route 286 East, Indiana, Pennsylvania ("1432 Route 286 East" or "old address"). The Conservation District office is a public office approved by the Department in Indiana County where the public may review certain permit applications, and it is a different address than the Department's address where comments or requests for conferences are directed, which is located in Ebensberg, Cambria County, not in Indiana County. Unbeknownst to Mr. Sell at the time, the Conservation District had moved locations on January 27, 2010 from 1432 Route 286 East, to 625 Kolter Drive, Suite 8, Indiana, Pennsylvania ("625 Kolter Drive" or "new address").

Prior to January 27, 2010, the Conservation District shared its office space at 1432 Route 286 East with the United States Department of Agriculture's Natural Resources Conservation Service ("USDA"). (N.T. 49-50.) The remaining USDA employees and employees of the Conservation District made several attempts to inform the general public of the location change.

For example, for approximately two years following the Conservation District's relocation, USDA employees remaining at the Conservation District's old address, 1432 Route 286 East, would inform Conservation District visitors of the Conservation District's new address, 625 Kolter Drive. The USDA employees also created a map and written directions to the Conservation District's new address, which they provided to those visitors if verbal instructions did not suffice. In addition, for approximately one year following the Conservation District's relocation, the Conservation District's telephone number at its old address provided an automated recording that announced the Conservation District's new location and new telephone number.

Although KMP's consultant, Mr. Sell, mailed the Application to the Conservation District's old address, the United States Postal Service did not return a copy of the Application to Mr. Sell. Rather, the Conservation District received a forwarded copy of the Application at its new address.

The Appellant claimed he visited the Conservation District at the advertised address, i.e., the old address, 1432 Route 286 East, to review the Application, but he found that the Conservation District no longer occupied the offices at that location, and instead the office space was occupied by only the USDA. He also claims that he did not see any notice about the Conservation District's new address. On November 10, 2010, the Appellant, without reviewing the Application, sent a letter to the Department's Bureau of District Mining Operations, located at 286 Industrial Park Road, Ebensburg, Pennsylvania, objecting to the Application. One of the Appellant's objections raised in his November 10, 2010 letter was that the Public Notice listed the Conservation District's old address.

Tim Kania, the Permits Chief of the Department's Cambria District Mining Office who is responsible for overseeing the technical aspects of mining permit application review, considered the Appellant's objection as part of the Department's permit application review. Ultimately, Mr. Kania determined that the public had a reasonable opportunity to view the Application, notwithstanding the error in the Public Notice, because the Application was available at the Conservation District's new address and the public was provided with sufficient notice of the address change.

At the June 11, 2013 hearing before the Board, however, the Department presented compelling evidence indicating that the Appellant was actually aware of the Conservation District's new address for at least two months prior to the initial publication of the Public Notice. In fact, Tammie Robinson, a secretary for the Conservation District and an employee of the Conservation District for twenty-nine years, met with the Appellant on July 13, 2010 at the Conservation District's new address, 625 Kolter Drive, during which time the Appellant reviewed a KMP mining permit file.[1] In addition to Ms. Robinson's testimony recalling the meeting, the Department presented Ms. Robinson's time log entitled "Indiana County Conservation District, Record of Activities" which contains an entry on July 13, 2010 indicating that she met with the Appellant concerning a KMP mining permit file. (N.T. 53-54, 56, 58; Permittee's Ex. D.)

On August 29, 2012, the Appellant filed a Notice of Appeal with the Board challenging the Department's issuance of Surface Mining Permit No. 32100103 ("SMP 32100103") to KMP in connection with its site in Young Township, Indiana County, Pennsylvania. Shortly

[1] Ms. Robinson was unable to remember which permit file the Appellant reviewed on July 13, 2010, but she was certain it was a KMP mining permit file. (N.T. 54.) The identification of the particular KMP mining permit file is less important than the fact that the Appellant knew where the Conservation District office was and where he would have to go to review any KMP mining permit files.

thereafter, the Department filed a Motion to Dismiss, arguing that the Appellant's Notice of Appeal failed to set forth objections in numbered paragraphs pursuant to 25 Pa. Code § 1021.51(e) and that the Appellant's objections, to the extent that there were any in the Notice of Appeal, lacked sufficient specificity. The Board issued an Opinion and Order denying the Department's Motion to Dismiss, holding that the Notice of Appeal contained an attached August 24, 2011 letter from the Appellant to the Department containing a number of specific objections and that any potential defect in procedure found in the Appellant's Notice of Appeal did not affect the substantial rights of the Department, thus permitting the Board to disregard that defect under 25 Pa. Code § 1021.4. The Board also held that the Department could avail itself of the benefits of discovery, during which time the Department could ascertain more specific information related to the Appellant's objections.

On June 11, 2013, the Board presided over a hearing at the Board's Pittsburgh offices. The issues have been briefed, and this matter is now ripe for adjudication.[2] The sole issue presented before the Board is whether the Department's issuance of SMP 32100103 was lawful and reasonable despite KMP's failure to list in the Public Notice the current address for the Conservation District, the location where members of the public could copy and inspect the Application. The Appellant argues that KMP's failure to list the Conservation District's current address violated the Appellant's due process rights and, thus, precluded the Department from

[2] The Appellant, Mr. Jake, is proceeding *pro se*, or without legal counsel. Parties proceeding pro se are not exempt from following the Board's Rules of Practice and Procedure found at 25 Pa. Code §§ 1021.1-1021.201. The Appellant's Prehearing Memorandum did not adhere to the requirements of § 1021.104 and his Post-Hearing Brief did not follow the outline of § 1021.131. The Appellant's failure to conform his brief to the Board's Rules reduces the utility of his brief as an aid in the Board's preparation of its Adjudication. *DEP v. Colombo*, EHB Docket No. 2011-114-CP-C, slip op. at 9 n.1 (Adjudication issued Oct. 28, 2013) (citing *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2011-137-L, slip op. at 13 n.1 (Adjudication issued Oct. 11, 2013).

issuing SMP 32100103 to KMP.[3] KMP argues that the Appellant's due process rights were not violated because the Appellant had prior and actual notice of the Conservation District's new address. The Department argues that the Appellant lacks standing to bring this appeal because the Appellant was aware of the Conservation District's new address and therefore was not actually harmed by KMP's error. For the reasons set forth below, the Board agrees with KMP.

Burden of Proof and Standard of Review

The Appellant bears the burden of proof in this matter. Under the Board's rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action. 25 Pa. Code § 1021.122(c)(2); *see Gadinski v. DEP*, EHB Docket No. 2009-174-M, slip op. at 24 (Adjudication issued May 31, 2013). Specifically, the Appellant must prove by a preponderance of the evidence that the Department's issuance of SMP 32100103 was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. *See Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772.

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full

[3] Any and all objections listed in the Appellant's Notice of Appeal, other than the Appellant's objection related to notice, were not raised in the Appellant's Post-Hearing Brief, and as a result, pursuant to 25 Pa. Code § 1021.131(c), which states that "[a]n issue which is not argued in a Post-Hearing Brief may be waived," the Board deems those objections waived. Further, the Appellant argued in his Notice of Appeal that "[b]y depriving the public of its intrinsic rights we have been disenfranchised. Our constitutional rights are due a review also." (Notice of Appeal.) The Appellant later stated in his Prehearing Memorandum that the Department's "refusal to acknowledge" the issues raised in his November 10, 2010 letter "was a denial of our freedom of speech." *See* Appellant's Prehearing Memorandum at 2. To the extent that these two statements can be characterized as a First Amendment Free Speech challenge, the Appellant failed to raise this issue in his Post-Hearing Brief, and as a result, pursuant to 25 Pa. Code § 1021.131(c), the Board deems that objection waived.

> consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156.

Violation of Appellant's Due Process Rights

The first issue for the Board to consider is whether the Department's issuance of SMP 32100103 was lawful and reasonable despite KMP's failure to list a current address for the Conservation District where members of the public could copy and inspect the Application. The Appellant draws our attention to the relevant Departmental regulatory notice requirements.[4]

First and foremost, "[i]nformation set forth in the application shall be current . . . ." 25 Pa. Code § 86.15(c). In addition, at the time the applicant files the application with the Department, the applicant shall place "an advertisement in a local newspaper of general circulation in the locality of the proposed coal mining activities at least once a week for 4 consecutive weeks," and that advertisement must contain "[t]he location where a copy of the application is available for public inspection" and "[t]he name and address of the Department's appropriate district or regional office to which written comments, objections or requests for informal conferences on the application may be submitted." 25 Pa. Code § 86.31(a); *see also* 52 P.S. 1396.4(b). Further, "[n]o later than the first date of the newspaper advertisement . . . the applicant . . . shall file a complete copy of the application for the public to copy and inspect at a

[4] The Department has statutory authority to promulgate regulations regarding public notice of surface mining applications. *See* 52 P.S. 1396.4(b) ("The department shall prescribe such requirements regarding public notice and public hearings on permit applications and bond releases as it deems appropriate.").

public office approved by the Department in the county where the coal mining activities are to occur." 25 Pa. Code § 86.31(b); *see also* 52 P.S. 1396.4(b). Finally, 25 Pa. Code § 86.37(a) provides, in part:

> (a) A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply:
>
> > (1) The permit application is accurate and complete and that the requirements of the acts and this chapter have been complied with.

25 Pa. Code § 86.37(a).

The Appellant argues that the Public Notice's inclusion of the Conservation District's old address and the Department's subsequent approval of the Application resulted in the violation of the aforementioned provisions and denied the Appellant an opportunity to review the Application. The Appellant's Post-Hearing Brief fails to fully discuss the legal basis for his claims, and the other Parties and the Board are forced to flesh out his legal concerns. KMP characterizes the Appellant's objection as a due process argument, stating that the Appellant "claims that the mistaken address in the public notice denied him an opportunity to review the permit, voice his objections or be heard," which "is a 'due process' argument." Permittee's Post-Hearing Brief at 4. The Board agrees with KMP that the Appellant has raised a due process objection.[5]

The Board recognizes the long-standing and widely adopted principle that due process guarantees apply in administrative proceedings. *Robachele, Inc. v. DEP*, 2006 EHB 997, 1004

[5] The Department takes a completely different approach and raises concerns about the Appellant's standing for the first time in its Post-Hearing Brief. Department's Post-Hearing Brief at 7-8. For the reasons set forth elsewhere in this Opinion, the Board rejects this untimely and ill-advised attack on the Appellant's standing. *See infra* pp. 20-23.

("Robachele points out that it is entitled to due process of law in administrative proceedings. That is obviously true . . . ."); *see also S & F Builders, Inc.*, 1972 EHB 144, 151 (citing *Morgan v. United States*, 304 U.S. 1 (1938) and *S. Ry. Co. v. Virginia*, 290 U.S. 190 (1933)); *Ecological Prot. Soc'y, Inc.*, 1972 EHB 30, 39 (citing *Bridgewater Borough v. Pa. Pub. Util. Comm'n*, 124 A.2d 165, 173 (Pa. Super. 1956) and *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 100 A.2d 110, 114 (Pa. Super. 1953)).

Although it is unclear from the Appellant's Post-Hearing Brief whether his due process argument is grounded in the Fourteenth Amendment of the United States Constitution or Article I of the Pennsylvania Constitution, or both for that matter, as the Board has noted in the past, the "due process guarantees under the State Constitution are no greater than those afforded by the Federal Constitution."[6] *Pagnotti Enterprises, Inc. v. DER*, 1993 EHB 884, 903 n.6 (citing *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102, 120 and *Coades v. Commonwealth, Bd. of Probation and Parole*, 480 A.2d 1298, 1304-05 (Pa. Cmwlth. 1984)).

To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty or property. *Pa. Coal Mining Ass'n v. Ins. Dep't*, 370 A.2d 685, 692-93 (Pa. 1977) ("Notice should be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections."); *Manor at St. Luke Vill. v. Dep't of Pub. Welfare*, 72 A.3d 308, 314 (Pa. Cmwlth. 2013) ("The principles of due process require that parties be given notice the

[6] The Fourteenth Amendment of the United States Constitution states, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. Article I, Section 1 of the Pennsylvania Constitution states, in full: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. Article I, Section 9 of the Pennsylvania Constitution states, in part: "nor can he be deprived of his life, liberty or property, unless by the judgment of his peers of the law of the land." PA. CONST. art. I, § 9.

adjudicating body is considering specified information.") (quoting *Pa. Bankers Assoc. v. Pa. Dep't of Banking*, 981 A.2d 975, 995 (Pa. Cmwlth. 2009)); *Wilbar Realty Inc, et al. v. DER*, 1994 EHB 999, 1020-21 (citing *Martin v. DER*, 548 A.2d 675, 679 (Pa. Cmwlth. 1988)); *see also Ecological Prot. Soc'y, Inc.*, 1972 EHB 30, 39 (citing *Nat'l Auto. Serv. Corp. of Pa. v. Barfod*, 137 A. 601, 602 (Pa. 1927)).

An individual alleging a deprivation of procedural due process rights must demonstrate that actual harm or prejudice resulted therefrom. *State Dental Council and Examining Bd. v. Pollock*, 318 A.2d 910, 916 (Pa. 1974) ("[W]e cannot say that appellant was denied due process because he has alleged no harm that resulted therefrom."); *see also D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 721 (Pa. Cmwlth. 2010) ("Demonstrable prejudice is a key factor in assessing whether procedural due process was denied."); *Conlon v. Commonwealth State Bd. of Nurse Examiners*, 449 A.2d 108, 109 (Pa. Cmwlth. 1982) ("[T]o succeed in a contention that constitutional rights were violated here, the petitioner must demonstrate that some harm or prejudice to her interests resulted . . . .") (citing *Ullo v. State Bd. of Nurse Examiners*, 398 A.2d 764, 766 (Pa. Cmwlth. 1979)).

The Board has issued a number of decisions implicating due process concerns stemming from an alleged defective notice. *Clancy v. DEP*, EHB Docket No. 2011-110-R, slip op. at 27 (Adjudication issued Oct. 11, 2013); *Gadinski v. DEP*, EHB Docket No. 2009-174-M, slip op. at 30 (Adjudication issued May 31, 2013); *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 209 n.14; *Riddle v. DEP*, 2002 EHB 283, 317; *New Hanover Township v. DER*, 1991 EHB 1234, 1246-47. The Board has repeatedly upheld Department actions in the face of due process challenges where the appellant had actual notice of the proposed or final action, and thus, the Department's failure to strictly adhere to its regulatory notice requirements was deemed harmless

error. *Gadinski*, slip op. at 30 (holding that Department's admitted failure to provide appellant with timely notice of its decision to approve permit revision was harmless error because appellant through his own diligence learned of Department's permit decision and was not prevented from pursuing his appeal); *Paul Lynch Investments, Inc.*, 2012 EHB at 209 n.14 (finding that Department's misaddressed Notice of Violation ("NOV") was harmless error where prior owner of appellant's property was also sole officer of appellant, thereby implicating full knowledge to appellant of Department's issuance of NOV at the time it was issued); *Riddle*, 2002 EHB at 317 ("Since other landowners of Bond Release Area No. 1 received actual notice of the application for bond release, the failure to provide written notice was harmless error."). Thus, the Board has excused a defective notice that fails to meet regulatory requirements where the Board has found evidence of actual notice by other means. Under these circumstances, the defective notice is viewed as harmless error.

The Department undoubtedly failed to strictly follow 25 Pa. Code § 86.37(a), which prohibits the approval of a surface mining permit application unless "[t]he permit application is accurate and complete and . . . the requirements of the acts and [Chapter 86 of the Pennsylvania Code] have been complied with." 25 Pa. Code § 86.37(a). The Department approved the Application even though it was aware of KMP's failure to list the Conservation District's new current address in the Public Notice, which fell short of KMP's strict compliance with both 25 Pa. Code § 86.15(c), requiring information in an application to be current, and 25 Pa. Code § 86.31(a), requiring that advertisements of applications contain "[t]he location where a copy of the application is available for public inspection."[7]

[7] KMP did comply with 25 Pa. Code § 86.31(a), in part, to the extent that the Public Notice listed the current "name and address of the Department's appropriate district or regional office to which written comments, objections or requests for informal conferences on the application may be submitted." KMP may have failed to comply with 25 Pa. Code § 86.37(b), which requires applicants to file a complete copy

Nevertheless, under the facts of this appeal, the Department's failure to strictly adhere to its regulatory notice requirements was harmless error. The Appellant alleges that he was precluded from reviewing the Application, but what he failed to disclose when he presented his case-in-chief is that he had actually visited the Conservation District office at its new address to review an unnamed KMP mining permit file just two months prior to KMP's publication of the Public Notice in the *Indiana Gazette*. We cannot ignore the fact that the Appellant had actual knowledge of the Conservation District's correct address.

The Appellant asserts that he did not know that the Conservation District moved to 625 Kolter Drive. (N.T. 29.) The Board finds that this assertion is not credible, and the testimony of Ms. Robinson and the Permittee's Exhibit D establish that the Appellant was fully aware of the location of the Conservation District's new office at 625 Kolter Drive. The Appellant was in the Conservation District office at 625 Kolter Drive to review a KMP mining permit file on July 13, 2010, seven months after the Conservation District moved to its new office. When the Public Notice at issue was published in September and October of 2010 and listed the Conservation District's old address, the Appellant had actual knowledge that the Conservation District was located at its new address.

Because the Board finds that the Appellant had actual knowledge of the Conservation District's change of address to 625 Kolter Drive, the Appellant's true objection is simply that the Public Notice listed the Conservation District's old address rather than the new address. The other Parties acknowledge that the Public Notice contained the Conservation District's old

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of an application for public inspection at a public office approved by the Department in the county where the coal mining activities are to occur. Even though the Application was originally mailed to the Conservation District's old address, the fact that a copy of the Application was forwarded to the Conservation District's new address may have cured this potential deficiency. In any event, even if the Board were to find that KMP failed to comply with 25 Pa. Code § 86.37(b), in addition to 25 Pa. Code § 86.15(c) and 25 Pa. Code § 86.31(a), the Board is not any more likely to find that the Appellant's constitutional due process rights were violated.

address, but the Board finds that this was harmless error. The defective Public Notice is not a basis to overturn the Department's permit decision where the Appellant had actual notice of the Conservation District's new address and where the Conservation District took reasonable steps to alert the public that it had moved its offices and changed its address.

Ms. Tammie Robinson testified at the hearing before the Board. She has worked for the Conservation District for twenty-nine years. (N.T. 48.) She testified that the Conservation District changed its address on January 27 2010, and prior to the change of address the Conservation District shared space with the USDA. (N.T. 50.) She further testified that the Appellant was in the Conservation District's new office on July 13, 2010 to review a KMP mining permit file. (N.T. 54.) She testified regarding her Indiana County Conservation District Record of Activities, which covered the date of July 13, 2010. (N.T. 52, 54; Permittee's Ex. D.) Exhibit D, the Record of Activities, which was prepared shortly after the pay period ending July 23, 2010, contains a brief description of work performed by Ms. Robinson on July 13, 2010, including the following statement: "w/Jake Stanley on KMP mine permit." (Permittee's Ex. D.) At the hearing, Ms. Robinson testified she was familiar with Mr. Jake as a result of his visit to her office to review records. Based upon the testimony of Ms. Robinson and the evidence of her Record of Activities covering July 13, 2010, the Board finds that the Appellant, Mr. Jake, was aware that the Conservation District's office was located at 625 Kolter Drive when he reviewed the Public Notice published two months later in September and October of 2010.[8] The Board finds that the Appellant's testimony that he did not know that the Conservation District was located at 625 Kolter Drive is not credible.

[8] The Board does not know which KMP mining permit file he reviewed when he visited the Conservation District on July 13, 2010, but this detail does not impact the Board's decision.

In addition to the evidence that the Appellant had actual knowledge of the Conservation District's new address, there is also credible evidence that the Conservation District took numerous steps to inform the public of its change of location and new address. The Conservation District prepared a notice and posted it at the prior address to inform individuals that the Conservation District had moved its offices to a new address. (N.T. 50-52.) The Conservation District prepared a map with written directions to help individuals locate the new address. (Permittee's Ex. C.) The notices at the prior address and the map and directions for the new address were maintained and available for several years after the Conservation District moved. The Conservation District also changed its phone number when it moved in January, 2010, and it provided a recorded message notifying anyone who called the Conservation District that it had moved to a new address on Kolter Drive. The Board finds that these are reasonable steps to inform the public that the Conservation District moved its offices and changed its address.

The Appellant asserts that he went to the prior address listed on the Public Notice to review the permit application file and that he did not see any notices about a new address. (N.T. 18-19.) The Board does not find these assertions to be credible. The Appellant already knew the Conservation District office was located on Kolter Drive based upon his July 13, 2010 visit to review a KMP mining permit file, and his statements regarding his visit to the prior Conservation District address are inconsistent with Ms. Robinson's testimony regarding the efforts undertaken by the Conservation District to alert the public about its change of address. Ms. Robinson's testimony is credible, including her testimony that she was familiar with the Appellant.

The Appellant's testimony about such steps being "irrelevant" when the Public Notice was defective is telling. (N.T. 54.) The Appellant's "whole basis" for his appeal is that the

Public Notice contained an incorrect prior address for the Conservation District. (N.T. 18.) Without re-advertising the correct current address for the Conservation District, the Appellant asserts that the Department should not have issued SMP 32100103 to KMP. The Board disagrees. While it is unfortunate that the Public Notice contained the prior address of the Conservation District, this fact did not deprive the Appellant of his due process rights because he had prior knowledge of the Conservation District's new 625 Kolter Drive address and actual recent experience reviewing a KMP mining permit file at that address. The Appellant knew where he had to go to review KMP's Application described in the Public Notice, notwithstanding the incorrect prior address. The incorrect prior Conservation District address in the Public Notice was simply harmless error.

The testimony of Tim Kania, the Permits Chief of the Department's Cambria Mining Office, indicates that at the time the Permit was reviewed and approved, Mr. Kania was not aware of the Appellant's prior visit to the Conservation District's new address and, instead, indicates that Mr. Kania believed that the Appellant received adequate notice based solely on the fact that the Conservation District provided the public with sufficient notice of the address change. The Board reviews appeals *de novo*, meaning that it reviews the case anew and can consider evidence that was not considered by the Department when it made its decision. As a result, whether the Department knew and considered that the Appellant had actual knowledge of the Conservation District's new address is not necessarily relevant to the Board's analysis. Instead, the Board is permitted to consider the Appellant's awareness of the Conservation District's new address, which was a fact established at the hearing before the Board, in addition to the reasons underlying Mr. Kania's decision to approve the Permit. As explained above, the Board finds that the steps that the Conservation District undertook to inform the public of its

change of address were reasonable, even though the Appellant ultimately did not need this information.

Finally, although KMP points to evidence that the Appellant submitted and the Department received and considered the Appellant's comments on KMP's Application, we do not view this evidence as a de facto cure for an otherwise deficient notice. The Appellant's comments may have been more substantial and thorough if he had actually reviewed the Application. At the same time, we cannot ignore the fact that the Appellant's alleged failure to review the Application was apparently willful. He knew where to go to review KMP's Application in Indiana County at the Conservation District's new office, and yet he decided, apparently, not to go there to review these materials. Having recognized that the Public Notice contained an incorrect old address, the Appellant submitted comments at the correct Department office in Cambria County, and he assumed the technical defect in listing the Conservation District's old address would suffice to block the issuance of SMP 32100103 to KMP.

Based on the binding case law discussed above, the Appellant, who has alleged a deprivation of his procedural due process rights, has failed to demonstrate that he was actually harmed or prejudiced by the Public Notice's inclusion of the Conservation District's old address. Applying the Board's harmless error standard, we find that because the Appellant was aware of the Conservation District's new address, having visited just prior to publication of the Public Notice, the Department's failure to strictly adhere to its regulatory notice requirements was harmless error, and the Appellant, therefore, was not deprived of his procedural due process rights.

Department's Challenge to Appellant's Standing

The Department argues that this appeal should be dismissed because the Appellant lacks standing. The Department asserts that the Appellant was not adversely affected by the mistaken address because he was aware of the Conservation District's new address and therefore could have viewed the Application during the comment period. The Appellant also submitted, and the Department received and considered, objections to the Application, and the Department asserts that these facts support its view that the Appellant lacks standing. Department's Post-Hearing Brief at 7-8. The Department did not timely raise this argument, so the Board rejects the Department's argument for the reasons set forth below.

Unlike subject matter jurisdiction, which is not waivable and may be challenged at any point throughout a proceeding, standing is not a jurisdictional matter under Pennsylvania law and therefore may be waived.[9] *Beers v. Unemployment Comp. Bd. of Review*, 633 A.2d 1158, 1161 n.5 (Pa. 1993); *In re Nomination Petition of Paulmier*, 937 A.2d 364, 368 n.1 (Pa. 2007); *Erfer v. Commonwealth of Pa.,* 794 A.2d 325, 329, 352 (Pa. 2002); *Bullock v. Cnty. of Lycoming,* 859 A.2d 518, 523 (Pa. Cmwlth. 2004); *Mixon v. Commonwealth of Pa.,* 759 A. 2d 442, 452 (Pa. Cmwlth. 2000), *aff'd.* 783 A.2d 763 (Pa. 2001); *Hendryx v. DEP*, 2011 EHB 127, 129-30; *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 896 n.2; *Oley Township v. DEP*, 1996 EHB 1098, 1126-27.

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[9] Unlike standing under federal law, which is grounded in Article III of the United States Constitution, Pennsylvania courts are not bound by Article III, *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)), nor does the Pennsylvania Constitution contain any standing requirements, *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 896. In fact, the Pennsylvania Constitution states that the Pennsylvania Supreme Court "shall have such jurisdiction as shall be provided by law." PA. CONST. art. V, § 2; *see also* PA. CONST. art. V, § 4 (vesting Commonwealth Court with "jurisdiction as shall be provided by law"). The Pennsylvania Supreme Court has "repeatedly recognized that the fact that a party lacks standing does not by itself deprive [the Court] of jurisdiction over the action, as it necessarily would under Article III of the federal Constitution." *Borough of Roaring Spring*, 2004 EHB at 896 n.2 (quoting *Housing Auth. of the Cty. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 941 (Pa. 1999)).

The Board's subject matter jurisdiction and standing requirements differ in subtle yet significant ways. The Board's subject matter jurisdiction is described in Section 4 of the Environmental Hearing Board Act ("EHB Act"), which provides the Board with "the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). Section 4 of the EHB Act also states that ". . . no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board . . . ." 35 P.S. § 7514(c). The Board's Rules define "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). In other words, the Board has subject matter jurisdiction only over final Department actions adversely affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. *Lower Salford Township Authority v. DEP*, 2011 EHB 333, 339; *see also Sayreville Seaport Associates Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012).

In contrast to the Board's subject matter jurisdiction, which examines whether a Department action has adversely affected *any person*, standing before the Board is narrower in scope and examines whether a Department action has adversely affected *an individual appellant*. *Pa. Game Comm'n v. Dep't of Envtl. Res.*, 555 A.2d 812, 815 (Pa. 1989) ("The concept of 'standing,' in its accurate legal sense, is concerned only with the question of *who* is entitled to make a legal challenge to the matter involved."). To establish standing, individuals must show a "direct and substantial interest" in the subject matter of the litigation, as well as a "sufficiently close causal connection between the challenged action and the asserted injury to qualify the

interest as 'immediate' rather than 'remote.'" *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269, 286 (Pa. 1975); *DeFazio v. Civil Serv. Comm'n*, 756 A.2d 1103, 1105 (Pa. 2000). Although the Board's analysis of standing relies on the same phrase, "adversely affected," as does the Board's analysis of subject matter jurisdiction, the Board, following the lead of the Pennsylvania Supreme Court's nearly half century-long line of precedent, has consistently held that standing is not a jurisdictional issue and is waivable. *Hendryx*, 2011 EHB at 129-30; *Borough of Roaring Spring*, 2004 EHB at 896 n.2; *Oley Township*, 1996 EHB at 1126-27.

Here, the Department waited until its Post-Hearing Brief to challenge the Appellant's standing to bring this appeal. The Department failed to challenge standing in its Prehearing Memorandum, and as a result, the Department waived its ability to challenge the Appellant's standing. *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 677 (ruling that issues not raised in prehearing memorandum were waived); *Oley Township*, 1996 EHB at 1126 (holding that **standing is waived** where permittee failed to challenge **standing** either in dispositive motions or prehearing memorandum); *Blose v. DEP*, 2000 EHB 189, 191 n.2.[10]

[10] In *People United to Save Homes v. DEP*, 2000 EHB 1309, 1321, the Board permitted the Department to challenge standing, even though the Department had not raised the issue in a prior dispositive motion or prehearing memoranda, because the Department called a witness for the sole purpose of developing its standing challenge and the issue of standing had been fully briefed. Here, the Department also failed to challenge standing in a prior dispositive motion or in its prehearing memorandum. However, in this appeal, the Department provided no indication at the hearing that it intended to challenge standing, and it was not until the second to last document filed in this three-year long appeal that the Department decided to finally challenge standing. The issue of standing has not been fully briefed, and the Appellant was not put on any prior notice that the Department intended to challenge his standing to bring this appeal. The Department presented no evidence at the hearing to develop a standing challenge. We will not require appellants to defend standing challenges brought for the first time in a responsive Post-Hearing Brief where the opposing party provided no prior notice that it would raise such a challenge.

Conclusion

For the reasons set forth above, the Board finds that the Department's failure to strictly adhere to its regulatory notice requirements was harmless error because the Appellant had actual knowledge of the Conservation District's new address, and the Appellant, who failed to act on this knowledge, was not deprived of his procedural due process rights. As a result, the Appellant failed to meet his burden to prove by a preponderance of the evidence that the Department's issuance of SMP 32100103 was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. Accordingly, we dismiss the Appellant's appeal and make the following:

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has the power and duty to issue adjudications on decisions of the Department. 35 P.S. § 7514.

2. The Appellant bears the burden of proof in this matter pursuant to 25 Pa. Code § 1021.122(c)(2), and must prove by a preponderance of the evidence that the Department's issuance of Surface Mining Permit No. 32100103 to KMP Associates, Inc. was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

3. The Board reviews appeals *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156.

4. KMP Associates, Inc. failed to strictly comply with 25 Pa. Code § 86.15(c) and 25 Pa. Code § 86.31(a), and as a result, the Department, in issuing Surface Mining Permit No. 32100103 to KMP Associates, Inc., failed to strictly follow 25 Pa. Code § 86.37(a).

5. The Department's failure to strictly follow 25 Pa. Code § 86.37(a) was harmless error.

6. The Department's failure to strictly follow 25 Pa. Code § 86.37(a) did not deprive the Appellant of his due process rights.

7. The Department waived its ability to challenge the Appellant's standing to appeal the Department's issuance of Surface Mining Permit No. 32100103 to KMP Associates, Inc. where the Department raised the issue of standing for the first time in its Post-Hearing Brief.

8. The Appellant failed to meet his burden to prove by a preponderance of the evidence that the Department's issuance of Surface Mining Permit No. 32100103 to KMP Associates, Inc. was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY R. JAKE	:	
	:	
v.	:	**EHB Docket No. 2011-126-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KMP ASSOCIATES, INC.	:	

ORDER

AND NOW, this 18th day of February, 2014, it is hereby ordered that the above-captioned appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 18, 2014

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMETEK, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-223-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 24, 2014**

OPINION AND ORDER ON MOTION FOR LEAVE TO FILE APPEAL *NUNC PRO TUNC*

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

A motion for leave to file an appeal *nunc pro tunc* is denied where there is no showing of fraud, breakdown in the Board's operation or other non-negligent grounds for failing to file the appeal in a timely manner. Where the appellant serves a copy of the appeal on the Department of Environmental Protection's Office of Chief Counsel and program office within the 30 day appeal period, but due to oversight fails to file a copy of the appeal with the Environmental Hearing Board, the Board is deprived of jurisdiction to hear the appeal. The Department has no legal authority to extend the statutorily prescribed appeal period.

O P I N I O N

Before the Pennsylvania Environmental Hearing Board (Board) is a Motion for Leave to File Appeal *Nunc Pro Tunc* submitted by Ametek, Inc. (Ametek). The background of this matter is as follows: On October 11, 2013, the Pennsylvania Department of Environmental Protection (Department) issued an order to Ametek directing it to perform remediation work at the Sellersville Landfill in Bucks County, Pennsylvania (the site). Certified mail receipts indicate that Ametek's Vice President of Corporate Compliance and Auditing received the order on

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http://ehb.courtapps.com

October 16, 2013.[1] Prior to issuance of the order, the parties had been engaged in negotiations for transfer of the site to the Bucks County Redevelopment Authority. (Motion, para. 2; Response, para. 2)[2] According to Ametek, the parties have reached an agreement in principle. (Reply, para. 1)

Following issuance of the order, discussions took place between counsel for Ametek and the Department with respect to the filing of an appeal of the order with the Board. Although the exact nature of the discussions is disputed, there appears to have been some discussion regarding tolling the time period for pursuing an appeal before the Board. Counsel for Ametek contends that counsel for the Department offered to delay implementation of the order and further offered to prepare a "tolling agreement" to toll the time period for filing an appeal with the Board. (Motion, para. 3; Reply, para. 3) On November 5, 2013, counsel for Ametek contacted counsel for the Department to inquire about the status of the tolling agreement, and Department counsel responded by email with the following recommendations:[3]

> 1. Within the time period set forth in Board Rule 1021.52, Ametek should file a skeletal appeal to preserve the Board's jurisdiction.
>
> 2. The parties should enter into a stipulation including an agreement as to when the right to amend the appeal will expire (the tolling agreement).
>
> 3. The parties should file a joint motion for an alternative litigation schedule or more accurately for extension of the deadlines in Pre-Hearing Order No. 1. I can prepare this motion along with the stipulation.

---

[1] Ametek's attorney received it one day prior, on October 15, 2013.

[2] "Motion, para. __" refers to Ametek's Motion for Leave to File Appeal *Nunc Pro Tunc;* "Response, para. __" refers to the Department's Response to the Motion, and "Reply, para. __" refers to Ametek's Reply to the Department's Response.

[3] In her email Department counsel mistakenly states that she spoke with the Board's "chief law clerk." There is no such title at the Board. Department counsel spoke with one of the Board's Assistant Counsel in the central Harrisburg office.

(Ex. 1 to Ametek Motion, Ex. 2 to Department Response) The email further stated that the Department was agreeable to a "60 day period to toll the filing of an amended appeal." (*Id.*) This period of time was later extended to 90 days. (Ex. 2 to Motion)

On November 13, 2013, Ametek served a copy of its notice of appeal by Federal Express (FedEx) on the Department's Office of Chief Counsel and the program office that issued the order. However, Ametek failed to file the notice of appeal with the Board. (Motion, para. 6; Response, para. 6) On November 22, 2013, Department counsel contacted the Board to inquire why no docket number had been assigned to Ametek's appeal, and she was advised that no such appeal had been received by the Board.[4]

On December 6, 2013, counsel for Ametek emailed counsel for the Department to inquire whether she had prepared the tolling agreement. She was informed by Department counsel at that time that the appeal had not been filed with the Board. (Ex. 3 to Response)

On December 26, 2013, Ametek filed a letter with the Board requesting leave to file its appeal *nunc pro tunc*. The Board ordered Ametek to file its request by motion, which Ametek did on January 13, 2014. The Department filed a Response to the Motion on January 23, 2014. On January 28, 2014, Ametek sought leave to file a Reply to the Department's Response, which was granted on January 30, 2014.

In its Motion, Ametek apologizes for its error and states that the failure to file the appeal with the Board was an oversight. Ametek seeks leave to file its appeal *nunc pro tunc*. The basis for its request is its assertion that the Department is not prejudiced by the delay in filing the appeal since the Department had agreed to a 90 period for Ametek to amend its appeal and had no expectation that the litigation would be moving forward. Ametek further alleges that the

[4] Department counsel mistakenly states that she spoke with a "law clerk" at the Board. In fact, she spoke with a secretary in the Board's central Harrisburg office.

Department had consented to Ametek delaying the filing of the appeal pending the outcome of negotiations over the transfer of the site to the Bucks County Redevelopment Authority. In response, the Department denies agreeing to the tolling of the appeal period and argues that Ametek has failed to demonstrate a showing of good cause for allowing the appeal *nunc pro tunc*.

DISCUSSION

The Board's rules on "timeliness of appeal" state in relevant part as follows:

> **§ 1021.52. Timeliness of appeal.**
>
> (a) Except as specifically provided in § 1021.53 (relating to amendments to appeal or complaint), *jurisdiction of the Board will not attach* to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:
>
> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

25 Pa. Code § 1021.52(a)(1) (emphasis added). It is long established that "this limited right of appeal is jurisdictional in nature, and cannot be extended as a matter of grace." *Stoney Creek Technologies, LLC v. DEP*, 2007 EHB 624, 626 (citing *Rostoksy v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976), and *Ziccardi v. DEP*, 1997 EHB 1)).

The Board may permit n*unc pro tunc* appeals in limited circumstances as follows:

> **§ 1021.53a. Nunc pro tunc appeals.**
>
> The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

25 Pa. Code § 1021.53a.

Courts and the Board have generally construed "good cause" to mean "fraud or some breakdown in the court's operation" or "unique and compelling circumstances establish[ing] a non-negligent failure to appeal." *Stoney Creek, supra* at 627 (citing *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); and *Glantz v. DEP*, 2006 EHB 841, 842)).

The Department cites two cases in its Response in which a *nunc pro tunc* appeal was denied under circumstances similar to those in the present case. In *Mon View Mining Corp. v. DEP*, 2003 EHB 542, the appellant served a copy of its appeal on the Department but later discovered that the appeal was inadvertently not sent to the Board. The Board did not allow the appeal to proceed *nunc pro tunc*, holding:

> A long line of appellate and Board cases have upheld the thirty day appeal period as jurisdictional and have refused to recognize the serving of appeals with the Department rather than filing them with the Board. In *Rostosky v. Department of Environmental Resources*, appellant's counsel served his notice of appeal with the Department rather than the Board. The Commonwealth Court, in upholding the Board's dismissal of the appeal, set forth the hornbook law in this area. "The untimeliness of the filing deprives the Board of jurisdiction."

2003 EHB at 547-48 (quoting *Rostosky*, 364 A.2d at 763)

West Caln Township v. DER, 595 A.2d 702 (Pa. Cmwlth. 1991), involved a similar set of circumstances. In that case, the solicitor for the appellant township served a copy of the notice of appeal on the Department but, like the appellant here and in *Mon View*, did not file a copy with the Board. After discovering the error, the township filed a petition to appeal *nunc pro tunc,* arguing that an employee of the Board had led the township solicitor to believe that the filing of

the appeal should be done through the Department. The Board denied the petition, and the township appealed the matter to the Commonwealth Court, which affirmed the Board. The Court pointed out that even if a Board employee had verbally misinformed the appellant about where to file the appeal, the written instructions sent to the appellant contained the correct information.

Ametek cites the case of *Vietri v. Delaware Valley High School*, 63 A.3d 1281 (Pa. Super. 2013) in support of its argument that its appeal should be allowed to go forward because it will not prejudice the Department. Ametek asserts that *Vietri* stands for the proposition that courts have moved away from a hard line definition of what constitutes "good cause" and are willing to allow an appeal *nunc pro tunc* based on equitable factors. However, the circumstances in *Vietri* are very different from those of the present case and the cases cited above. First of all, in *Vietri* the appellant was seeking *appellate review* by the Pennsylvania Superior Court of a decision of the trial court. Here, although the action that starts a matter before the Environmental Hearing Board is called a notice of *appeal*, the Board does not provide appellate review. We function as a trial court. *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 580. Second, in *Vietri*, the appellant had initially filed a timely appeal which was quashed by the Superior Court on the mistaken belief that there was an outstanding post trial motion pending. The appellant filed a second appeal, which also was quashed by the Superior Court but "'without prejudice to appellant['s] right to seek *nunc pro tunc* relief in the trial court.'" *Vietri,* 63 A.3d at 1283. When the lower court denied the appellant's petition for appeal *nunc pro tunc*, the Superior Court overturned this ruling, stating that its own misleading order (quashing the first appeal) had put the appellant in this situation. In a footnote, the Court stated as follows:

> [W]e effectively put Appellant in a bind. In implying that he was barred from appealing during the pendency of what we treated as

> his post-trial motion, we all but directed him to seek a ruling below. In effect, he followed our instructions to the letter. Although we did not say that doing so would perfect his appeal, that was certainly one implication of our order. We do not believe it is fair for this order to deprive Appellant of his right to appeal.

Id. at 1287, n. 6 (citation omitted). The Court further stated,

> [O]ur order quashing Appellant's first appeal complicated the situation. We find it fair to characterize our misleading order as a breakdown in this Court that interfered with Appellant's right to appeal. Thus, the reasonable course for the trial court to have followed was to have restored Appellant's right to appeal *nunc pro tunc*, especially in light of our indication in our second quashal order that we believed such relief might be appropriate.

Id. at 1289. Thus, *Vietri* involved a breakdown in the court's operation, circumstances that are not present here. As the Court stated in *Vietri*, *nunc pro tunc* relief is "'intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain *extraordinary circumstances*.'" *Id.* at 1284 (quoting *Union Electric Corp. v. Board of Property Assessments, Appeals and Review,* 746 A.2d 581, 584 (Pa. 2000) (emphasis in original). No such extraordinary circumstances exist here. The failure to file the notice of appeal with the Board was merely an oversight, as counsel for Ametek concedes. While we sympathize with Ametek, there is no relief we can grant in the absence of extraordinary circumstances.

Counsel for Ametek does raise an allegation regarding a failure in communication by one of the Board's staff. However, the circumstances of the incident cited by Ametek do not rise to the level of a breakdown in the Board's operation. On November 22, 2013 – after serving the notice of appeal on the Department, and *after expiration of the appeal period* – Ametek's counsel contacted the Board to state that she was attempting to locate the copy of the appeal that she believed had been filed with the Board. She emailed Ms. Connie Hartlaub, a secretary in the Board's central Harrisburg office. Ms. Hartlaub informed Ametek's counsel that the Board did

not have a copy of the appeal. Ms. Hartlaub asked Ametek's counsel to provide her with the FedEx tracking number and said she "could try to investigate this matter further." (Ex. 4 to Motion). Although it was later determined that the FedEx tracking number pertained to the copy of the notice of appeal that Ametek had sent to the Department – not the Board – this information was not communicated to Ametek's counsel. (Motion, para. 10) Ametek's counsel states that, had Ms. Hartlaub communicated this information to her, she would have immediately requested leave to file her appeal *nunc pro tunc*, rather than waiting several weeks. However, Ms. Hartlaub's failure to follow up with a telephone call or an email to Ametek's counsel in no way affected the timeliness of Ametek's appeal. The initial email exchange between Ametek's counsel and Ms. Hartlaub took place on November 22, 2013, which was past the 30 day appeal period. Therefore, even if Ms. Hartlaub had responded to Ametek's counsel that day regarding the FedEx tracking number, it would have been too late to file the appeal on time. Moreover, it is not the responsibility of the Board's staff to track down misfiled appeals; the duty to file an appeal at the proper address lies with the appellant. The Board's notice of appeal form states the address where the appeal must be filed, and the Department's order also contained this information. In sum, there was no breakdown in the Board's operation leading to the failure to file a timely appeal.

Finally, although we agree with Ametek that the Department is not prejudiced by the late filing of the appeal since the Department had agreed to a tolling of the litigation schedule, the Department's prejudice or lack thereof is irrelevant to our inquiry. The Board is statutorily deprived of jurisdiction to hear a late-filed appeal without a showing of good cause, and as we have stated, good cause has not been demonstrated here. As the Commonwealth Court has held:

> "[A]ppellants contend that we should allow their appeals in the interest of justice. This argument assumes incorrectly that we have

> discretion in the matter. Failure to perfect an appeal within the time allowed by statute is a defect in the proceeding of which the appellate court must take notice, even on its own motion. We have no power to extend the time limit for filing an appeal." Consequently, the Township's argument is without merit.

West Caln Twp, supra at 706 (citing *Rostosky v. Department of Environmental Resources, supra* (quoting *City of Pittsburgh v. Pennsylvania Public Utility Commn.*, 284 A.2d 808, 811 (Pa. Cmwlth. 1971)).

Ametek asserts that there is an equitable basis for allowing the appeal based on the Department's alleged representations to Ametek that it was agreeable to extending the time for filing an appeal of its order. Even if the Department led Ametek to believe that the period for filing an appeal with the Board could be tolled, the Department has no legal authority to extend the deadline for filing an appeal with the Board. The appeal period is statutorily prescribed and is jurisdictional. The Department has no more authority to lengthen the appeal period than does the Board itself. Moreover, the duty was on Ametek to ensure that it was in compliance with the law and to file a timely appeal. As we held in *Rhodes v. DEP*, 2009 EHB 599, 615 "Even in those cases where a Department employee gives a clear but wrong legal opinion, responsibility for compliance with the law ordinarily rests with the regulated party." Moreover, even if Department counsel initially believed that the filing period could be tolled, she later corrected that position in her email to Ametek's counsel sent on November 5, 2013, ten days prior to the expiration of the appeal period. (Ex. 1 to Motion; Ex. 2 to Response)

Because good cause has not been demonstrated for allowing an appeal *nunc pro tunc*, we therefore must deny Ametek's motion and dismiss the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMETEK, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-223-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of February, 2013, it is hereby **ORDERED** that the appellant's motion to file its appeal *nunc pro tunc* is denied for failure to demonstrate good cause. The appeal is dismissed and this case is marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 24, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: March 3, 2014**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

In a third-party appeal from the Department's issuance of a permit for a construction and demolition waste landfill, the Board rejects most of the third party's objections but finds that the Department committed four errors. First, the Department improperly considered the permittee's potential profits to be a "limited benefit" as part of its environmental assessment. Removing potential profits from consideration as part of the environmental assessment does not change the final result of the balancing test and does not require a remand. Second, the Department improperly issued the permit to a fictitious name rather than a legal entity. This is a minor error but it must be corrected on remand. Third, the Department improperly deferred a determination of whether the potential for mine subsidence under portions of the site would endanger the environment or public safety. The Department must make this determination *before* the permit is issued. Finally, the Department improperly reviewed the landfill's nuisance minimization plan without requiring the permittee to obtain site-specific meteorological data as required by the regulations. This also requires a remand.

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FINDINGS OF FACT

Stipulated Facts

1. The Appellant, the Borough of St. Clair ("St. Clair" or the "Borough"), is a borough of the Commonwealth of Pennsylvania located in Schuylkill County. (Stipulation of the Parties Number ("Stip.") 1.)

2. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Solid Waste Management Act of 1980, 35 P.S. §§ 6018.101—6018.1003, the Municipal Waste Planning, Recycling and Waste Reduction Act of 1988, 53 P.S. §§ 4000.101—4000.1904 ("Act 101") and the rules and regulations promulgated under those statutes. (Stip. 2.)

3. The Permittee, Blythe Township, is a second-class township of the Commonwealth of Pennsylvania located in Schuylkill County. (Stip. 3.)

4. On February 26, 2004, Blythe Township (or the "Township") filed with the Department a Phase I and Phase II application for a waste management permit for a new construction and demolition waste landfill to be located in the Township, referred to as the Blythe Recycling and Demolition Site ("BRADS"). (Stip. 4.)

5. St. Clair took an active role in reviewing and commenting upon the permit application for the BRADS Landfill. (Stip. 5, 9, 14, 20.)

6. The Department engaged in an extensive and protracted review of the permit application over the course of several years that included the local municipal involvement process and other meetings, pre-denial letters to Blythe Township, and permit application revisions. (Stip. 6-8, 10-12, 15-20.)

7. On April 11, 2008, the Department issued a letter denying the permit application for the BRADS Landfill. (Stip. 21.)

8. Blythe Township appealed the April 11, 2008 denial. *Blythe Township v. DEP*, EHB Docket No. 2008-165-L. (Stip. 22.)

9. St. Clair intervened in that appeal. (Stip. 23.)

10. The Department entered into a settlement agreement with Blythe Township to resolve the appeal of the April 11, 2008 denial. St. Clair was not a party to the settlement agreement. (Stip. 24.)

11. In the settlement agreement, dated April 30, 2009, the Department agreed to complete its environmental assessment process "harms-benefits" review pursuant to 25 Pa. Code §§ 271.126 and 271.127 and issue a written decision on the environmental assessment review process within sixty days from the date of publication of the settlement agreement in the Pennsylvania Bulletin, but no later than July 30, 2009. (Stip. 25.)

12. On July 30, 2009, the Department denied the permit application, stating that "Blythe Township has not demonstrated that the benefits of the project to the public clearly outweigh the known and potential harms that will remain after the proposed mitigation..." (Stip. 27.)

13. In the harms-benefits review referenced in its July 30, 2009 denial letter, the Department considered "Potential Costs/Liability to Blythe Township" as a social/economic harm. (Stip. 28.)

14. Blythe Township appealed the July 30, 2009 denial. *Blythe Township v. DEP*, EHB Docket No. 2009-115-L. (Stip. 29.)

15. St. Clair intervened in that appeal. (Stip. 30.)

16. The Department issued a corrected denial letter dated November 19, 2009, which included "Potential Costs/Liability to Blythe Township" as a social/economic harm. (Stip. 31.)

17. Blythe Township appealed the November 19, 2009 denial. *Blythe Township v. DEP*, EHB Docket No. 2009-166-L. (Stip. 32.)

18. St. Clair intervened in that appeal. (Stip. 33.)

19. FKV, LLC ("FKV") also intervened in that appeal. (Stip. 35.)

20. On August 5, 2011, the Department issued a new letter, this time approving the environmental assessment (harms-benefits) review. (Stip. 38.)

21. The August 5, 2011 letter instructed Blythe Township to submit certain additional information for the technical review of the permit application. (Stip. 39.)

22. The Department's review continued, with St. Clair continuing to submit comments and Blythe Township continuing to submit additional information. (Stip. 40-44.)

23. On July 13, 2012, the Department issued Solid Waste Permit No. 101679 for the BRADS Landfill. (Stip. 45.) This is the permit that is the subject of this appeal.

24. The BRADS Landfill site is located on Burma Road. Burma Road is a state route that connects with Morea Road, which then connects to Pennsylvania Route 54 to the southeast of Mahanoy City. Route 54 connects with I-81 at the Mahanoy City interchange. Burma Road connects with Pennsylvania Route 61 in the Borough of St. Clair. (Stip. 48.)

25. The BRADS Landfill site is located in Blythe Township within two miles of the Borough of St. Clair. (Stip. 49.)

26. The landfill site is approximately 400 acres. (Stip. 50.)

27. The permitted area of the site is approximately 252 acres, of which approximately 110 acres is the permitted disposal area. (Stip. 51.)

28. The site is located in the Little Wolf Creek watershed. (Stip. 52.)

29. The Wolf Creek Reservoir is located in the Wolf Creek watershed. (Stip. 53.)

30. The Blythe Township Water Authority's Silver Creek Reservoir is located in the Silver Creek watershed approximately 6,600 feet (1.25 miles) from the disposal boundary. (Stip. 54, 58.)

31. Hancock Street in the Borough of St. Clair is a state road, S.R. 1006. (Stip. 55.)

32. Burma Road from St. Clair through East Norwegian Township and Blythe Township is a state road, S.R. 1006. (Stip. 56.)

33. A groundwater monitoring system, which will monitor upgradient and downgradient groundwater conditions, must be constructed at the BRADS site prior to the start of operations at the facility. (Stip. 57.)

34. The permit application, which becomes part of the permit, includes a nuisance minimization and control plan for the mitigation of potential harms from dust. (Stip. 59.)

35. On October 3, 2007, Blythe Township's application for plan approval was submitted to the Department's Air Quality Program for a landfill gas collection and control system. (Stip. 60.)

36. The Department consulted with the Pennsylvania Department of Transportation ("PennDOT") on traffic as it relates to the BRADS Landfill. (Stip. 61.)

37. The Township's Traffic Impact Study along with St. Clair's comments on the traffic study were submitted to and reviewed by PennDOT. (Stip. 62, 63.)

38. PennDOT reported back to the Department that it had no additional comments on the traffic impact study for the BRADS Landfill and it approved the study. (Stip. 64, 65.)

39. The Department's letter dated August 5, 2011 stated that the Department determined that Blythe Township proposed adequate mitigation measures to minimize traffic impacts to the extent possible; however, traffic-related harm remained for the purpose of the environmental assessment review of the BRADS project by the Department. (Stip. 66.)

40. The Department's letter dated August 5, 2011 stated that the Department considered the wetland impacts of the project when it evaluated the environmental assessment. (Stip. 67.)

41. The Department's letter dated August 5, 2011 stated that Blythe Township indicated that the existing wetlands in the mining disturbed areas at the site do not have any special ecological value that cannot be replaced by replacement wetlands elsewhere and that there was no harm with respect to wetlands impacts from the BRADS Landfill. (Stip. 68.)

42. The Department's letter dated August 5, 2011 stated that the Department determined that impacts to wetlands remained a harm and that was considered for the purpose of the environmental assessment review for the BRADS Landfill. (Stip. 70.)

43. Water Obstruction & Encroachment Permit No. E54-325 was issued to Blythe Township for the BRADS Landfill on June 18, 2013. (Stip. 71.)

44. The Department's August 5, 2011 letter requested that Blythe Township provide detailed engineering plans for the sewer leachate pipeline from the site to the outfall, the pump stations, and leachate storage and treatment facilities, pursuant to 25 Pa. Code §277.162. (Stip. 72.)

45. Form 25 of the permit application provides that a leachate treatment system will be installed within three years following detection of leachate in the collection or handling system. (Stip. 73.)

46. Blythe Township submitted additional information regarding its plan for leachate treatment to the Department in October 2011 and January 2012. (Stip. 74.)

47. The permit application identified the leachate treatment technology, the Batch PACT® System, as shown in drawings LM-7 and LM-8, submitted to the Department on October 24, 2011, and LF-11, submitted to the Department on January 25, 2012, but noted that the treatment technology was subject to change. (Stip. 75.)

48. The Department determined that the details provided by Blythe Township on the submitted drawings and documents regarding leachate were sufficient to fully satisfy the requirements of 25 Pa. Code § 277.162. (Stip. 76.)

49. On January 24, 2013, the Department issued NPDES Permit No. PA0065137 to Blythe Township for the discharge of wastewater from the BRADS Landfill. (Stip. 77.)

50. Waste approved for disposal at BRADS is limited to construction & demolition waste. Disposal of municipal waste, other than construction and demolition waste, and residual waste is prohibited at the BRADS Landfill under the current permit. (Stip. 78.)

Additional Findings of Fact

51. The Department's harms-benefits analysis weighed eight benefits (recycling drop-off center, reduced stormwater impact to mine pool, land cleanup, benefits to Blythe Township (host fee/profits), fees/services to surrounding municipalities, state tax, direct employment, and fossil repository) against five mitigated environmental harms (air quality impacts, quality of the environment, visual impacts, traffic, and wetlands), and determined that the benefits of the project clearly outweighed the known and potential environmental harms. (Notes of Transcript Page Number ("T.") 923-37; Appellant's Exhibit Number ("Ex. A-") 6.)

52. The Department interprets the environmental assessment regulation (25 Pa. Code § 271.127) to not require a financial viability determination, which is to say that an applicant for a landfill permit is not required to submit a business plan, profitability analysis, financing plan, or other financial information to prove to the Department that the project will make a profit. (T. 952, 973-74, 979-81, 988-89; Ex. A-20 at 23-25.)

53. The Department concedes that it does not have the expertise to conduct a meaningful review of a landfill developer's business plan. (T. 972-973.)

54. In performing the environmental assessment, the Department *did not* consider the potential harm that could result if the landfill cannot be financed or the landfill does not prove to be profitable or financially viable. (T. 980-81; Ex. A-6, A-20 at 22-33.)

55. In performing the environmental assessment, the Department *did* consider potential profits to Blythe Township to be a "limited benefit." (T. 928, 1011; Ex. A-6 at 6-7.)

56. The Department acknowledged that removing the consideration of both profits and losses from the harms-benefits balancing would not change the final result in this case. (T. 1009-10.)

57. The permit requires the Township to have financial assurances and insurance in place to ensure that liabilities are addressed and that the landfill closure and post-closure care can be accomplished in accordance with all regulatory requirements. (T. 1015; Ex. A-7 at 5, 31.)

58. The landfill has designated two approach routes that will be used by vehicles accessing the landfill: Approach Route 1, which runs from the Mahanoy City exit on Interstate 81, west on Pennsylvania Route 54, southwest on Morea Road, and southwest on Burma Road; and Approach Route 2, which begins at the intersection of Pennsylvania Route 61 and Hancock

Street in the Borough of St. Clair and runs east on Hancock Street until it becomes Burma Road upon exiting the Borough. (Ex. A-14a, A-14b, A-14c.)

59. Blythe Township's traffic study was based upon the traffic impacts that would occur if the landfill were operating at its maximum capacity of accepting 1,500 tons-per-day of waste every day. (T. 499-500.)

60. The landfill will control traffic through a Transportation Compliance Plan ("TCP"), which has been incorporated into the permit. The plan will be reevaluated quarterly, and will impose penalties on drivers who do not comply with the measures contained therein. (Blythe Township Exhibit Number ("Ex. B-") 59, A-7.)

61. Traffic mitigation measures include installing a deceleration lane and pavement markers near the landfill driveway to improve entry and departure, removing vegetation along Burma Road to increase sight distance, and retiming the traffic signal at the intersection of Route 61 and Hancock Street. (Ex. A-6; T. 729.)

62. Although the Department found there to be some residual harm regarding traffic, it also found that the harm has been adequately mitigated and traffic concerns do not require that the permit should be denied. (Ex. A-6 at 5.)

63. The landfill is about 2.5 miles from St. Clair, is distant from any homes, will only be partially visible at its height from small sections of the Borough, will be shielded along part of Burma Road, will have vegetative cover, and is part of a panoramic view that consists of unreclaimed mines and commercial and industrial activities. (T. 318-19, 494-98, 573, 932-34; Ex. A-1, vol. 5 at 31 and attach. 21, B-55.)

64. The landfill is not likely to impose an undue burden on St. Clair's emergency services. (T. 936, 938; Ex. A-6 at 3.)

65. The landfill is designed to have six cells. (T. 554, 957.)

66. The majority of the landfill site consists of an unreclaimed surface mine. (T. 831-34; Ex. A-1, vol. 2, Form 6.)

67. There is an acknowledged potential for mine subsidence underneath the landfill due to the existence of abandoned underground coal mines. (T. 514-18, 554-55, 833, 856-65, 869-70, 875-76.)

68. Mine subsidence poses a threat to the integrity of the landfill liner, which in turn poses a threat to the waters of the Commonwealth. (T. 505-07, 869.)

69. The Department failed to complete its analysis of the potential threat posed by mine subsidence occurring under the landfill before issuing the permit. (T. 864, 899; Ex. A-7.)

70. Among other things, further drilling is likely to be needed to fully assess the threat of subsidence. (T. 514-18, 860-63; Ex. A-1.)

71. Instead of completing its analysis of the potential threat posed by mine subsidence under the landfill before issuing the permit, the Department issued the permit with Permit Condition No. 34(h), which requires the Township to have a mine subsidence plan approved by the Department and successfully implemented prior to the construction of Cell 4. (T. 864, 899; Ex. A-7 at 37.)

72. The Department issued the permit to "Blythe Recycling and Demolition Site," which is not a legal entity. (Ex. A-7.)

73. Blythe Township is the true permittee. (Stip. 3; T. 1013; Ex. A-1, vol. 1, Form GIF, A-20.)

74. Blythe Township has entered into a development and management contract with FKV, LLC. (T. 656; Ex. A-11.)

75. Under the agreement between FKV and Blythe Township to develop the BRADS Landfill, FKV's role is to provide technical and financial expertise to Blythe Township and assist it in securing all necessary approvals. (T. 656-58; Ex. B-49.)

76. Groundwater contamination from the landfill is unlikely and would occur only in the event of a failure of the landfill's liner and leachate control systems brought on by uncontrolled mine subsidence. (T. 569, 846-50.)

77. The Little Wolf Creek watershed, where the landfill is located, and the Wolf Creek watershed, where the Wolf Creek Reservoir is located, are separate and distinct watersheds. (T. 841-42.)

78. The Department approved Blythe Township's nuisance minimization and control plan even though the plan was not based upon a determination of normal and adverse weather conditions based on site-specific meteorological data. Instead, Permit Condition No. 33 only requires Blythe Township to construct a weather station and collect weather data prior to the acceptance of waste at the facility. (T. 314-16; 324-25; Ex. A-1, A-7 at 27, 36.)

79. Fugitive dust and debris from the landfill, traveling either through the air or via surface water, does not pose a risk to the Wolf Creek and Silver Creek reservoirs. (T. 491-91, 837-45.)

80. St. Clair has refused Blythe Township's offer to pay it a per-ton fee. (T. 375-76, 443-45.)

DISCUSSION

The Department reviews applications for construction and demolition (C&D) waste landfills in two phases. 25 Pa. Code § 277.101. Phase I contains basic information about the project but it is generally thought of as the environmental assessment phase. This phase contains

the harms-benefits analysis. 25 Pa. Code §§ 277.111—277.122 (incorporating Chapter 271, Subchapter 13). The general idea is that Phase I allows the Department to assess whether the project is conceptually acceptable. If the project passes muster at that level, Phase II of the Department's review essentially involves engineering the project to ensure that it will comply with all applicable legal requirements and be environmentally protective and safe. 25 Pa. Code §§ 277.131—277.192. St. Clair attacks certain aspects of both phases of the Department's review.

Phase I: The Environmental Assessment

The Department's Phase I review includes the environmental assessment process, commonly referred to as the harms-benefits test, the substance of which is described at 25 Pa. Code § 271.127 as follows:

> (a) *Impacts.* Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility on the environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses, land use and municipal waste plans...
>
> (b) *Harms.* The environmental assessment shall describe the known and potential environmental harms of the proposed project. The applicant shall provide the Department with a written mitigation plan which explains how the applicant plans to mitigate each known or potential environmental harm identified and which describes any known and potential environmental harms not mitigated. The Department will review the assessment and mitigation plans to determine whether there are additional harms and whether all known and potential environmental harms will be mitigated. In conducting its review the Department will evaluate each mitigation measure and will collectively review mitigation measures to ensure that individually and collectively they adequately protect the environment and the public health, safety and welfare.

> (c) *Municipal waste landfills, construction/demolition waste landfills and resource recovery facilities.* If the application is for the proposed operation of a municipal waste landfill, construction/demolition waste landfill or resource recovery facility, the applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.

St. Clair argues that the Department's environmental assessment was unreasonable and contrary to law for two main reasons. First, it argues that the Department's reversal of its earlier permit denial was arbitrary as a matter of law. Second, it argues that the Department did not give sufficient weight to some of the social and economic harms of the project; namely, the potential financial impact of a failed project, the impact of the landfill on traffic, the impact on St. Clair's emergency services, the impact on St. Clair's hopes for economic development, and the visual impact of the landfill. St. Clair does not offer any additional mitigation measures for these alleged harms. It will only be satisfied if the landfill permit is denied.

Before turning to these arguments, we should note that there are several aspects of the Department's harms-benefits analysis that St. Clair has mentioned but not seriously pursued. For example, St. Clair makes passing reference in its brief to the impact of the landfill on wetlands at the site, the effect of the landfill on the amount of water flowing into the mine pool, the landfill's plan for dealing with leachate, and a recycling drop-off center at the landfill, but it does not develop any arguments regarding these points. It does not explain how or why the Department's assertedly flawed evaluation of these issues should lead to us to deny or remand the permit. St. Clair's passing references are insufficient to preserve its objections on these points. *See* 25 Pa.

Code § 1021.131(c); *Gadinski v. DEP*, EHB Docket No. 2009-174-M, slip op. at 28 n.7 (Adjudication, May 31, 2013); *Chippewa Hazardous Waste, Inc. v. DEP,* 2004 EHB 287, 290-91, *aff'd,* 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004).[1]

Department's Changed Position

The Department originally denied Blythe Township's permit. Thereafter, without the benefit of any significant new information, it changed its mind and issued the permit. St. Clair contends that the Department's about-face means that its second action was "arbitrary as a matter of law" or "presumptively arbitrary." (St. Clair Brief at 3, 9.) This contention has no merit. Granted, St. Clair is correct that the Department changed a permit denial into a permit issuance based on no significant new facts.[2] At the time of the initial permit denial the Department was concerned that Blythe Township would suffer economic harm if the landfill failed to turn a profit, and that concept was integrated into the harms-benefits analysis. (T. 970; Ex. A-20 at 21-27.) However, the Department later came to believe that "integrating viewpoints for commercial success and untold risks to Blythe Township attributable to financing the project into the requisite balancing of the harms and benefits" was not defensible. (DEP Brief at 19-20.)

St. Clair has expressed its suspicions regarding this explanation. It says that the only thing that really changed was that a new Secretary of the Department was appointed in the period between the initial permit denial and the subsequent permit issuance. St. Clair points out that the

[1] Blythe Township, for its part, briefly argues that the Department should have considered the indirect and induced economic benefits of the landfill. The Township invites us to consider those benefits, but only if we decide to perform our own harms-benefits analysis from scratch. We are not performing such an analysis.

[2] We do not credit the Department's claim that it changed its position based upon an affidavit from and discussions with the Pennsylvania Department of Community and Economic Development and other information it received during the discovery phase of the earlier EHB appeal. In fact, that claim is entirely inconsistent with the Department's primary contention that it should not be predicting the financial success of the landfill.

Department expressed *multiple* bases for the initial denial in addition to the financial viability issue, but those bases just seemed to fade away when the permit was issued.

Although we understand St. Clair's frustration, the problem with its argument is that it does not get us anywhere. It is illogical. There is no logical reason why we would presume that the Department's later decision is the incorrect decision. The earlier decision might just as well have been the incorrect one. In fact, we think it was. In any event, the Department is not only entitled to change its mind, it should never allow bureaucratic intransigence to stand in the way of good governance, even if that means admitting a mistake and correcting course. The Department's review of a permit application is collaborative and deliberative. Careful and thoughtful review will often involve internal disagreement and changes in position based upon ongoing reflection over time. Our responsibility as an independent reviewing agency is not to get into all of that, but rather to decide whether the Department's *final* action—the one being appealed—was lawful, reasonable, and supported by the facts. *Dougherty v. DEP*, EHB Docket No. 2013-220-L, slip op. at 5 (Opinion and Order, January 3, 2014); *O'Reilly v. DEP*, 2001 EHB 19, 32.

Furthermore, so long as the Department's final decision was lawful and reasonable, whether the change in position was politically motivated is irrelevant. A lawful and reasonable action that stands on its merits does not become any less so because it was politically motivated. The Department's motivation, political or otherwise, will rarely if ever play a significant part in our review. *See Primrose Creek Watershed Assoc. v. DEP*, EHB Docket No. 2011-135-L (consolidated with 2011-136-L), slip op. at 6 (Opinion and Order, March 20, 2013); *Perano v. DEP*, 2011 EHB 298, 316; *Starr v. DEP*, 2002 EHB 799, 810; *Milco v. DEP*, 2002 EHB 723, 726; *Westtown Sewer Co. v. DER*, 1992 EHB 979, 996.

Financial Viability

St. Clair next argues that the Department should have stuck with its original view that the permit should be denied because the landfill is going to fail. Had the Department conducted a financial analysis, it would have seen that Blythe will be unable to obtain financing to build the landfill, and even if it is able to obtain financing, the project will not yield an adequate return and it will ultimately fail in St. Clair's view. In contrast, Blythe Township has vigorously contended from day one that the Department has no business getting into the Township's business decision to build and operate a C&D landfill.

The Department now interprets its environmental assessment regulation at 25 Code § 271.127 to preclude it from considering the commercial or financial viability of a proposed landfill. (T. 943, 979-81; Ex. A-20 at 22-25.) It has come to believe that it has neither the authority nor the expertise to delve into a landfill's financing mechanisms and business plan to determine whether developing the landfill is a good business decision or whether it will provide a good return to its investors. As a result, the Department did not assess whether the BRADS Landfill will be profitable and a good investment as part of its harm-benefits test.

Given the Department's diametrically opposite interpretations of the same regulation, there is no call for us to defer to any one of its interpretations. *See Waste Mgmt. Disposal Servs. of Pa. v. DEP*, 2005 EHB 433, 460-62; *Brunner v. DEP*, 2004 EHB 684, 688, *rev'd on other grounds*, 869 A.2d 1172 (Pa. Cmwlth. 2005); *Envtl. & Recycling Servs., Inc. v. DEP*, 2002 EHB 461, 491; *see also Tri-State Transfer Co. v. DEP*, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999). Nevertheless, we find the Department's latest interpretation to be reasonable and consistent with the regulatory language for several reasons. The regulatory language on its face does not mandate or in our view contemplate a review of a landfill's business plan. The pertinent case

law does not suggest that a financial analysis is needed. *See, e.g., Eagle Environmental v. DEP*, 884 A.2d 867 (Pa. 2005); *Berks County v. DEP*, 894 A.2d 183 (Pa. Cmwlth. 2006). The Department by its own admission has neither the resources nor the expertise to engage in such a business analysis. (T. 972-73.) Such an analysis would take the Department far afield of its core mission of protecting the environment. Protecting investors from the consequences of their own bad decisions is not the Department's responsibility. The Department should not be seen as in any way endorsing any particular business venture based upon its profitability.

It is worth looking at the sorts of harms that are specifically addressed in the regulations regarding permit applications and landfill operations when considering what harms should be considered as part of the harms-benefits analysis. Those regulations require such things as an operations plan, access control plan, litter control plan, and a soil erosion and sedimentation control plan. 25 Pa. Code §§ 277.132, 277.135, 277.137, and 277.151. The regulations do *not* require an applicant to submit a business plan, a financing strategy, *pro formas*, a profitability analysis, or anything of that nature. There is nothing anywhere in the regulations that supports a notion that the Department should act as an investment analyst.

If St. Clair's fear that Blythe Township will not be able to obtain financing is realized, there will be no landfill and no harms or benefits. If St. Clair's even more speculative fear is realized and the landfill is financed but proves to be commercially unsuccessful, regulatory required financial assurances are in place to ensure that the landfill is properly closed and maintained post-closure. (T.1015.) *See* 25 Pa. Code §§ 271.331, 271.332, 271.341, 271.342. *See also* 25 Pa. Code §§ 271.371—271.379, 271.381—271.397 (insurance requirements).

We are left to wonder why *St. Clair* is so concerned about whether *Blythe Township* will suffer economic harms. Not a single elected representative of St. Clair testified at the hearing to

explain the basis for this concern about another municipality's financial affairs. St. Clair alleges without any credible support that a financial collapse of the landfill would hurt its own citizens, but it never explains how or why. Such a threat of harm is conjectural at best. In contrast, not a single citizen of Blythe Township came forward at any point during the permit review or appeal process in opposition to the project. (T. 919, 987-88.) St. Clair obviously has legitimate concerns regarding the other effects the landfill might have on its own citizens related to the environmental and public safety impacts of the project, and that is where the focus in a proceeding such as this should be. Instead, this case was dominated by business experts variously opining at length about construction costs, personnel expenses, *pro formas*, non-recourse municipal bonds, amortization schedules, and the like.

If the Department cannot and should not be passing judgment on the landfill's business plan, it follows that it has no way of knowing whether the landfill will generate any profits or any return to its investors. Without a full-scale analysis, the Department simply cannot know whether the landfill will be profitable or not. The Department needs to be all in or all out on the financial issue; it should not be making rough guesses about profits or losses.

In something of a retrenchment, St. Clair says in its reply brief that it is not contending that the Department should evaluate a detailed business plan for every proposed landfill. In its view, only cases in which the potential for harm is "obvious" require such an evaluation. We disagree. It is either appropriate for the Department to delve into landfills' business plans or it is not. The Department cannot know that the alleged harm is "obvious" unless it conducts a meaningful review. Similarly, the Department is wrong when it argues that it is obvious that a landfill will be successful because it costs a lot of money to apply for a landfill permit.

If the Department is not in a position to speculate on the landfill's financing or profitability, it necessarily is not in a position to speculate on the hypothetical consequences that would follow from a hypothetical loss. Therefore, it was entirely appropriate for the Department to reverse its earlier course in this case and conclude that such hypothetical impacts need not be included in the environmental assessment.

Having concluded that the potential *losses* from the landfill are not properly considered, the Department inexplicably went on to consider the equally speculative *profits* from the landfill to be a "limited benefit." (Ex. A-6.) Similarly, Blythe Township, having vehemently argued that the Department should not consider potential losses, argues that it was acceptable for the Department to consider potential profits. These positions make no sense to us. The Department cannot at once say that the potential losses from an unsuccessful project are not to be considered because the Department cannot analyze the project's business plan, and also say that the potential profits can be considered. If the Department cannot pass judgment on the project's financing, business plan, or projected revenues, it has no rational basis for speculating on profits *or* losses. The Department simply does not know whether there will be profits or losses, so it erred when it concluded that potential profits are a "limited benefit."

Thus, potential profits should be taken out of the equation as well as potential losses. The Department acknowledged that this change would not alter the final result of the balancing exercise. (T. 1009-10.) A remand for further consideration based on this change is not necessary. The financial benefits of the project have not and should not play a significant role in the final analysis. As Tracey McGurk, the Department's Facilities Supervisor, quite aptly testified,

> When we do a phase one environmental review, we look at the known and potential harms of the project and their mitigation

> measures and the benefits of the project, individually and collectively. Although the various staff is doing reviews of the different portions simultaneously, our main goal is to ensure that the harms are adequately mitigated.
>
> If we don't believe that they've been adequately mitigated, we're not likely to move forward with the balancing of the harms and benefits because that's the Department's main concern is that the harms are adequately mitigated to protect the public health, safety, and the environment.

(T. 922.)

Traffic

St. Clair complains that the Department failed to give due weight to the traffic impacts associated with the new landfill in the harms-benefits balancing. It criticizes both the methodology and the conclusions of Blythe Township's Traffic Impact Study, which was the primary source for the Department's conclusion that the harm caused by the increased truck traffic associated with the landfill either individually or in combination with other harms was not a reason to deny the landfill permit.

In assessing the effects of a proposed landfill on traffic as part of the environmental assessment review, the Department needs to consider whether the surrounding roadway infrastructure will support the operation. *Dauphin Meadows v. DEP*, 2003 EHB 163, 168-69; *Korgeski v. DEP*, 1991 EHB 935, 949. Throughout this evaluation process, "the Department's function is not to regulate the use of highways; it is to determine whether a proposed operation can be safely located at a particular site." *Dauphin Meadows*, 2003 EHB at 169. The Department does not stand in the shoes of the Pennsylvania Department of Transportation ("PennDOT"). Traffic issues only come into play in reviewing an application for a landfill permit because the Department considers increased traffic associated with a landfill to be one type of harm to be evaluated as part of the harms-benefits test. Certain mitigation measures,

such as adjusting waste volumes or operating hours, or implementing road improvements or access restrictions, may be appropriate to reduce any residual harm associated with increased traffic, but there are no specific standards in the waste regulations that must be met, and the Department's authority to effectively regulate traffic as part of the landfill permitting process is limited. *See id.*; *Empire Sanitary Landfill v. DEP*, 1992 EHB 848, 872-73.

In challenging the Department's conclusion regarding the harms-benefits balancing test, it is not sufficient to simply have a different opinion about how the balancing could have been done; rather, the appellant must show that the Department acted unreasonably or violated the law in deciding the result of the harms-benefits balance. *Exeter Citizens Action Comm., Inc. v. DEP*, 2005 EHB 306, 328. Additionally, it is important to note that 25 Pa. Code § 271.127(c) does not require that a landfill cause *no* harm. *Id.* at 330.

There are two designated approach routes to the BRADS Landfill that are evaluated in the traffic study. Approach Route 1 begins at the Mahanoy City exit on Interstate 81, continues west on Pennsylvania Route 54, then southwest on Morea Road, southwest on Burma Road, and ends at the landfill. Approach Route 2 begins at the intersection of Pennsylvania Route 61 and Hancock Street, runs east through the Borough of St. Clair along Hancock Street, which becomes Burma Road upon entering East Norwegian Township, continues northeast on Burma Road, and ends at the landfill. All traffic to and from the landfill must follow either Approach Route 1 or Approach Route 2. St. Clair is concerned with both routes. As with every other aspect of its presentation, St. Clair does little to propose any solutions or additional mitigation measures; rather, it argues that the landfill should not be permitted because the traffic impacts collectively make this site a poor location for a landfill.

Before turning to St. Clair's specific concerns regarding the approach routes, and in order to keep things in perspective, we start by noting that the number of trucks larger than a pickup truck traveling to or from the landfill that can be expected on a day that the landfill is operating at its maximum capacity is 110 trucks. (T. 499; Ex. B-58.) Only a very small percentage of these trucks will pass through the Borough of St. Clair itself due to the weight restriction on part of that route that precludes vehicles weighing more than ten tons. (T. 281-82, 344-49, 501, 720-21.) The landfill will obviously not operate at its maximum permitted capacity on most days. The traffic counts conducted by Robert Richardson, P.E., Blythe Township's well-qualified traffic engineer, showed that the average volume of traffic traveling through St. Clair was around 1,500 vehicles per day, 30 of which were vehicles larger than a pickup truck. (T. 710, 755.) Even in the unlikely worst case scenario, the number of truck trips that would be added to the existing trips in St. Clair is not enough to give us pause in terms of the traffic impact, and it is certainly not enough to warrant denial of the permit.

St. Clair complains that Blythe Township failed to add trucks hauling leachate away from the landfill to the total anticipated trips in its traffic study. St. Clair does not explain why this should make a difference. Mr. Richardson acknowledged that the traffic study did not account for these trips. (T. 740-41.) However, the six or seven loaded truck trips a week resulting from leachate transportation (*see* Ex. B-12, B-14 [2,000,000 gallons per year / 6,000 gallons per truck / 52 weeks].) are not significant enough to render the conclusions set forth in Blythe Township's traffic study fatally flawed. Further, as mentioned above, the traffic study accounts for traffic trips as if the landfill were operating at capacity. The leachate truck trips do not significantly affect the conclusions of the traffic study and do not warrant the denial of the permit.

St. Clair next contends that Blythe Township's traffic counts are inaccurate because they were conducted in November. Brian Baldwin, P.E., St. Clair's municipal engineer, argued that traffic counts in November would not account for the increase in traffic that occurs during the summer while Mountain Valley Golf Course and Locust Lake are being used for recreation and tourism. (T. 295-96, 327-28, 341.) Although St. Clair fails to fully develop its argument, it suggests that the increase in summer traffic would change the base assumptions in Blythe Township's traffic study. Consequently, so it seems, when accounting for greater summer traffic on Burma Road and adding the anticipated traffic from the landfill, there could be deficient levels of service on Burma Road.[3] However, St. Clair did not conduct its own traffic counts to contradict those provided by Richardson. (T. 327.) St. Clair provided nothing more than the unsupported testimony of Mr. Baldwin that there is more traffic along Burma Road during the summer. At the same time, Richardson competently rebutted St. Clair's claims. He credibly argued that seasonal variations in traffic patterns do not produce enough of a difference to significantly change the numbers in traffic counts. (T. 706-07.) He posited that few things short of the increase in summer traffic resulting from a large amusement park would cause such a dramatic seasonal increase of traffic to undermine the integrity of the counts in a traffic study. (*Id.*)

St. Clair also raises a concern over the traffic impacts from a potential residential development in the area of the Mountain Valley Golf Course. Again, although not fully developed, this concern seems to be that the traffic resulting from this development in combination with the existing traffic and the anticipated traffic from the landfill will overwhelm

[3] Level of service is a metric used by traffic engineers to determine whether a proposed activity will have an impact on the roads, causing delays or unsafe conditions. Levels of service are graded A through F, with A being the best and F the worst, characterized by significant delays and unsafe conditions. (*See* Richardson at T. 731-32; Ex. B-28 at 10-11.)

the roadways and cause deficient levels of service. This argument is without merit. Blythe Township should not have to plan for things that may or may not happen. Regardless, Richardson performed an additional analysis of the traffic associated with this potential development, accounting for 200 residential units. (Ex. B-30.) He determined that this development would not cause deficient levels of service, or require a traffic signal or any turn lanes at the intersection of Burma Road and SR 1011. (Ex. B-29.) He testified that even with this development levels of service would remain at level B or better. (T. 732-33.) Therefore, even if the development does come to fruition, Burma Road will not be negatively impacted in terms of traffic.

Thus, with all of the above stated, there will not be a dramatic increase in total truck traffic as a result of the landfill. Any impacts will be commensurately muted. It is also worth adding that the landfill is being sited in the heart of an area that has been heavily mined historically, with all the heavy truck traffic that is typically associated with mining. (T. 445-46, 465-66, 614-16.) The landfill trucks will not be a significant new impact to this area.

Turning to the designated approach routes themselves, although St. Clair's particular interest is with Approach Route 2, which runs directly through the Borough, it has raised some concerns with Approach Route 1 as well, even though that route is completely outside the Borough. St. Clair argues that the pavement on Burma Road is substandard, that the pavement will not be able to support the truck traffic that the landfill will bring, and that the truck traffic will cause accelerated pavement deterioration. However, Mr. Richardson testified that he was not aware of any reports that deemed the pavement substandard on Burma Road. (T. 766.) Likewise, St. Clair did not produce any reports from PennDOT, or any other evidence, indicating

the pavement is substandard.[4] Richardson went on to say that he did not believe that the truck traffic from the landfill would have any negative impact on the pavement structure beyond the regular wear and tear that normally occurs on roadways. (*Id.*) Further, upon reviewing Blythe Township's traffic study in conjunction with its application for a highway occupancy permit, PennDOT requested that Blythe Township provide the "existing and proposed pavement structure (materials and depths)" for Burma Road. (Ex. A-1, vol. 4, attach. 23.) Richardson's firm, Traffic Planning and Design, Inc., then supplied PennDOT with that information and PennDOT subsequently approved Blythe Township's traffic study and issued the highway occupancy permit. St. Clair produced nothing to suggest that PennDOT's review was flawed or that Mr. Richardson's opinion is incorrect.

St. Clair also expresses concern over the curving path of Burma Road along Approach Route 1. However, this concern has been adequately addressed. PennDOT expressed a similar concern about the curvature of Burma Road when it reviewed Blythe Township's traffic study. PennDOT sent a letter to Traffic Planning and Design in which it commented, "This section of SR 1006 [Burma Road] has many sharp horizontal curves. [PennDOT] will require an analysis of the existing curves southbound from I-81 to the proposed site to determine whether pavement widening is necessary to facilitate the safe movement of WB-62 tractor trailers." (Ex. A-1, vol. 4, attach. 23.) Traffic Planning and Design responded by stating that the road is appropriately marked by advisory speed limits, warnings of approaching curves, and guiderails, and that there is no evidence of opposing lane encroachment on southbound Burma Road or rutting along the shoulder. (*Id.*) PennDOT then approved the traffic study without further comment. St. Clair

[4] The applicable regulation at 25 Pa. Code § 271.127(g) encourages the Department to consult with other agencies with appropriate expertise, which in the case of traffic is PennDOT. The Department did so in this case. PennDOT was actively engaged in reviewing the landfill's traffic impacts, particularly in reviewing and providing comments on Blythe Township's traffic study. (Ex. A-1, vol. 4, attach. 23.)

produced nothing that credibly contravenes Richardson's response or PennDOT's analysis, or suggests either was inadequate.

St. Clair expressed a concern over the adequacy of the landfill's parking staging area, but the concern is unfounded. Mr. Baldwin testified about a lack of detail in the permit application on whether the staging area would be large enough to accommodate numerous tractor-trailer trucks and ensure that they would not back up onto Burma Road. (T. 408.) However, Richard Bodner, P.E., Blythe Township's highly qualified landfill engineer, credibly stated that the staging area is adequate, especially considering the relatively small size of the landfill operation. (T. 510-12.) The staging area will be wide enough to accommodate three tractor trailers side-by-side and it will be long enough for trucks to line up behind the first three trucks. (T. 511, 579.) Further, Mr. Bodner stated that it would be a rare occurrence that trucks would even need to queue before passing through the scales at the landfill. (T. 511.) In sum, there is nothing about Approach Route 1 or the staging area that gives us pause regarding the Department's decision to permit the BRADS landfill.

Not surprisingly, St. Clair's greater concern is with Approach Route 2. Approach Route 2 runs directly through the center of St. Clair on Hancock Street before it becomes Burma Road upon exiting the Borough. Residential properties, a number of churches, schools, and the St. Clair business district are within that immediate area. Although we sympathize with St. Clair's concerns, we do not agree that they provide a reasonable basis for overturning the Department's harms-benefits analysis or denying the landfill a permit.

St. Clair's first concern relates to the slope of Burma Road, particularly with respect to those vehicles that will be leaving the landfill and descending the slope into the Borough. However, there are no restrictions barring any vehicles from using Burma Road, and currently

trucks of all sizes, comparable to those that the landfill expects to receive, use the road. (T. 724.) Additionally, Mr. Richardson credibly concluded that there were no undue safety concerns arising from curvature, grades, lane width, or sight distances along Burma Road. (T. 750.)

St. Clair's second concern is that a portion of Hancock Street along Approach Route 2 is posted with a ten-ton weight restriction, which according to St. Clair, will impact the ability of trucks to use that route. St. Clair's fear is that trucks going in that direction will either violate the weight limit or used unapproved routes through the Borough. At the risk of stating the obvious, the landfill permit does not authorize any truck to violate the weight restriction. Just as truck drivers must stop at stop signs and obey speed limits, they must comply with weight restrictions. As Blythe Township stated in response to the Department in a revised application:

> To the extent there are other traffic restrictions on area roadways, whether those be St. Clair's 10-ton weight restriction on a portion of West Hancock Street, the traffic signal on Route 61 in Pottsville, or even the 65 mph speed limit on I-81 as it passes through the area, Blythe anticipates that these traffic rules will be enforced by the local and state police as jurisdiction applies.

(Ex. A-1, vol. 4 at 37.) Only vehicles weighing less than ten tons, loaded or unloaded, may use the weight-restricted section of Hancock Street, regardless of the existence of the permit. Since there are only two approved routes to the landfill, and the permit was issued with that understanding, any truck going to or from the landfill that cannot lawfully use Approach Route 2 will need to use Approach Route 1. (T. 281-82, 344-49, 501-02, 590, 593, 708, 720-21, 773; Ex. B-29.)

St. Clair complains that Blythe Township will not be able to effectively control the vehicles that patronize the landfill and the routes they use, which includes preventing trucks weighing more than ten tons from using Approach Route 2. It is true that there is only so much that a landfill can do to enforce its rules regarding approach routes. Nevertheless, the

Department reasonably found that Blythe Township has done just about all that can be done in this regard. Blythe Township prepared a Transportation Compliance Plan ("TCP") that outlines measures the Township will take to control the traffic traveling to and from the landfill. The permit requires implementation of the TCP at Permit Condition No. 34(f). (Ex. A-7; T. 349-50, 503.) The landfill will distribute the plan to the owners and operators of waste transportation vehicles that deliver waste to the facility and to all new customers upon their first visit. (Ex. B-59.) Based upon our review of the testimony and the permit application as a whole (which is incorporated into the permit itself (T. 996)), the landfill will ensure as part of its compliance plan that only vehicles capable of lawfully using Approach Route 2 will use that route. (T. 281-82, 344-49, 501-02, 590, 593, 708, 720-21, 773; Ex. A-1, B-29.)

Drivers who violate the TCP will be subject to penalties, such as being directed to wait in detention areas or even being banned from further use of the facility. (T. 502.) Citizens will be encouraged to contact the landfill to report any suspected violations. Importantly, the TCP will be re-evaluated quarterly to assess whether it is effectively mitigating the traffic harm. (Ex. B-59.) This regular interval for reassessment will allow the landfill to amend its plan to respond to any issues of noncompliance and any concerns raised by members of the surrounding communities affected by landfill traffic.

An important enforcement aspect in addition to the TCP is that the landfill will be staffed with a traffic compliance officer, who according to Mr. Bodner, will

> be out there seeing where the trucks are going, where they're coming from and are they doing what they're supposed to do in terms of such things as what route are they using.
>
> Are they arriving at the site earlier than they're supposed to? Are they parking off the exit ramp of Route 81 at 4:00 in the morning? Those are the kinds of things that the traffic compliance officer is keeping an eye on.

(T. 546-47.)

Finally, St, Clair contends that it will suffer harm because it will have to bear the costs associated with a traffic signal retiming at Hancock Street and Route 61 that is encompassed in Blythe Township's traffic study and highway occupancy permit. However, St. Clair presented no credible evidence that it would need to pay for the signal retiming. Former Borough Council member John Shandor stated that he believed the retiming would cost $40,000 and that PennDOT would require the Borough to make improvements to the curbs at that intersection in conjunction with the retiming. (T. 443.) Mr. Richardson testified that since the signal retiming is part of Blythe's highway occupancy permit issued by PennDOT, Blythe will bear the expense of the signal retiming if it has not been completed already. (T. 728, 769-70.) Further, Richardson stated that he has never experienced PennDOT imposing a requirement to improve curbs at an intersection during a signal retiming in his 24 years of experience in the field. (T. 728.)

St. Clair has produced very little evidence establishing that it will suffer tangible harm from traffic associated with the landfill, that the Department did not give due weight to the traffic impact in its harms-benefits analysis, or that the Department was unreasonable in granting the permit because of traffic concerns. A new landfill will always produce additional traffic and in the Department's view there will be some harm associated with that traffic. In this case Blythe Township has taken appropriate measures to ensure that this harm has been properly mitigated and controlled. St. Clair's traffic concerns do not themselves or in combination with any other harms warrant the denial of the permit.

Other Harms

St. Clair next argues that the Department failed in its environmental assessment to give due weight to the allegedly adverse visual impact of the landfill. St. Clair complains that the

landfill's profile will mar the landscape to such an extent that the permit should have been denied. Although Blythe Township's mitigation plan calls for trees to be planted along Burma Road to offer some screening for persons driving by the site, St. Clair complains that the screening vegetation will do little to hide the site, and in fact, is inconsistent with another facet of the permit (as well as the highway occupancy permit), which requires the landfill to clear vegetation to allow for proper sight distance on the road. As with its other arguments, nothing short of a permit denial will satisfy St. Clair.

The Department's view is that there will be some harm, but it is a limited harm that was given due weight in its balancing. It says that the landfill has some flexibility regarding roadside planting to reduce the visual impact without compromising highway safety. Blythe Township does not dispute the harm but says it is "negligible" and "inconsequential."

We find that the Department accorded proper weight to the visual impact of the landfill. Initially, it must be remembered that the site in its current condition is not a greenfield site. It is a heavily scarred, unreclaimed mine site. St. Clair says that, but for the landfill, the BRADS site might have been reclaimed by the Department's Bureau of Abandoned Mine Reclamation, but the Department correctly responds that it is not charged with comparing the landfill to what might have been.

Even when it is completed the landfill will not be visible from downtown St. Clair. (T. 498.) The landfill is largely shielded from view by an interceding ridgeline. The top of the fill will only be seen from a couple of relatively high points at the edges of the Borough. Although there will be limited screening along Burma Road, we do not view it as a major imposition if travelers on the road are forced to suffer a brief look at the landfill instead of the abandoned mine site that exists there now for a few seconds as they pass by. The landfill has reasonably been

afforded some flexibility in coordinating the need to maintain proper sight distances along the road with the desirability of providing some vegetative screening to minimize the visual impact of the landfill. (T. 727, 946.)

The only testimony cited by St. Clair regarding the visual impact of the landfill was that of John Shandor, a former Borough Council member. (T. 451-52.) The opinion of this one individual that the landfill will offend his personal aestheticism is insufficient to overcome the Department's finding that the visual impact of the landfill is a limited harm that neither individually nor in combination with other harms justifies denial of the permit.

Although St. Clair has somewhat in passing asserted that the landfill will result in a reduction of residential property values, it presented absolutely no evidence to support that contention. Instead, it makes the curious argument that Blythe Township must prove that there will *not* be a reduction in property values. Blythe Township has no such obligation. The burden of proof at all times rests with St. Clair. *Exeter Citizens Action Comm., Inc. v. DEP*, 2002 EHB at 327-28. In any event, we have not been presented with any testimony, expert or otherwise, that property values will go down in the vicinity of this landfill. In fact, there are no homes within one mile of the BRADS site and no occupied dwellings on Burma Road between the site and its connection with Morea Road south of Mahanoy City.

Next, Mr. Shandor testified that he is personally concerned that the landfill's presence approximately two miles away from the Borough will quell economic development that might otherwise have expanded eastward from the Borough toward the landfill. The Department did not consider this perceived threat to future eastward economic expansion as part of its review. St. Clair has failed to show that the Department should have done so. St. Clair presented no credible proof or expert opinion to support Shandor's personal, unsubstantiated fear. No

developer, for example, testified that it no longer intends to move forward with a particular project because of the landfill. There was no other evidence that any project that is currently planned and actively pursued has been scrapped in the area in question as a result of the permit issuance. Even Mr. Shandor is not aware of any actual expansion plans. (T. 455-56.)

St. Clair complains that its police and fire departments will be required to respond without compensation to emergencies associated with landfill operations. This complaint is difficult to accept given St. Clair's refusal to accept the offer of actual revenues made by the landfill. (T. 463.) In any event, St. Clair failed to show that it will not in fact be compensated for services that it may on rare occasions be required to provide. The cost of providing emergency services to a commercial facility is often billed to that facility. (T. 936; Ex. A-6.) In any event, most on-site problems are handled on site by landfill personnel without the need to involve local first-responders. (T. 938.) Although St. Clair listed police and fire officials as witnesses in its prehearing memorandum, it did not call any of them to testify. It offered no other proof of an undue impact on its first-responders as a result of the landfill being built.

In summary, we do not agree with St. Clair's objections to the Department's environmental assessment, with the exception that the Department should not have considered potential profits to be a "limited benefit." As discussed in detail below, however, errors in the Department's Phase II review will require further analysis. Following a completion of those analyses, the Department will need to confirm that there is no need to revise its Phase I conclusion.

Phase II: Technical Review

St. Clair also takes issue with certain aspects of the Department's technical review. Three of those objections are valid and require a remand.

Mine Subsidence

St. Clair argues that the permit fails to adequately address potential impacts from abandoned underground coal mines that underlie portions of the site. It cites 25 Pa. Code § 271.201, which provides:

> A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met:
>
> . . . .
>
> (6) When the potential for mine subsidence exists, subsidence will not endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and will not cause the proposed operation to endanger the environment or public health, safety or welfare.

Similarly, 25 Pa. Code § 277.120(a)(2) provides that, if the proposed permit area or adjacent area overlie existing workings of an underground mine, the applicant shall submit sufficient information to evaluate the potential for mine subsidence, including maps and plans showing previous mining operations underlying the proposed facility, and an investigation addressing the probability and potential impacts for future subsidence.

Apparently, whatever potential for subsidence exists under Cells 1, 2, and 3 of the six-cell landfill has been addressed to everyone's satisfaction. St. Clair's concern is related to Cell 4. The parties do not disagree that "the potential for mine subsidence exists" under Cell 4. The potential has been acknowledged by both Blythe Township and the Department. (T. 859-60, 869.) In fact, there is no dispute that a plan to address this potential subsidence needs to be submitted and approved. Subsidence is a serious concern because it poses a threat to the landfill's liner, which is what prevents the groundwater from being contaminated by leachate. (T. 869.)

The criticism raised by St. Clair is that the Department has approved the permit without first requiring Blythe Township to "affirmatively demonstrate" that subsidence under that portion of the landfill will not endanger or lessen the ability of the landfill to operate in a manner that is consistent with applicable legal requirements and will not cause the landfill to endanger the environment or public health, safety or welfare. St. Clair is correct. Rather than require Blythe Township to affirmatively demonstrate that no threat of harm exists from mine subsidence under Cell 4 *before* issuing the permit, the Department issued the permit with Permit Condition No. 34(h), which says: "Prior to Cell 4 construction the operator shall have a mine subsidence plan approved by the Department and successfully implemented to the Department's satisfaction." This is unacceptable. The Department cannot consistent with the dictates of 25 Pa. Code §§ 271.201 and 277.120 defer the important determination that mine subsidence will not endanger or lessen the landfill's ability to operate safely and in compliance with the law. The Department must make that determination *before* it issues the permit.

This case is reminiscent of *Jefferson County Commissioners v. DEP*, 2002 EHB 132, *aff'd*, 819 A.2d 604 (Pa. Cmwlth. 2003). In that case, the Department issued a landfill permit with a condition deferring submission of a bird hazard mitigation plan until some indeterminate time "prior to accepting waste at the landfill." *Jefferson Cnty. Comm'rs v. DEP*, 2002 EHB at 163. The Board held it was an error not to require approval of the plan *prior* to permit issuance, quoting our Adjudication in a related case, *Jefferson County Commissioners v. DEP*, 1996 EHB 997, 1002, that "the Department must determine whether or not a permit applicant can mitigate a potential nuisance *before* it issues the permit." (Emphasis in original). Similarly, we held in *New Hanover Township v. DEP*, 1996 EHB 668, that, although the Department has power under the Solid Waste Management Act to place conditions in a landfill permit, that power may not be

used to contravene statutory and regulatory requirements. Speculation on the Department's part in the *Jefferson County* case that the problem "could be successfully mitigated to an acceptable degree of harm to public safety" was held not to be an adequate substitute for compliance with the regulation. 2002 EHB at 188.

If the Department had a legitimate reason for deferring the regulatorily required subsidence plan review in this case, we were not told what the reason might be. The Department tells us that landfills are often built over old mine workings without any problems. That is, of course, true, but it misses the point. The Department has acknowledged the potential for a subsidence problem at this site and gone so far as to require that a plan be prepared and approved to address this acknowledged concern before the landfill extends to the potentially problematic area. What the Department fails to explain is why it decided to defer this important determination until after issuing the permit when 25 Pa. Code § 271.201 clearly says that the analysis must be performed or "[a] permit application will not be approved."

The Department may have been acting in conformance with a settlement agreement it reached with Blythe Township following the 2008 permit denial. Prior to that settlement, the Department in its 2008 denial cited the unknown subsidence potential of Cell 4 as a major reason for the permit denial:

> [T]he application made assumptions about the collapsed state of known mine passages under Cell 4, but did not verify the actual state of the collapse of these mine passages through direct borehole investigations. BRADS has indicated they will not verify the conditions of the mines through direct field investigations until after the permit is issued. The subsidence evaluation for Cell 4 has calculated that absent any mitigation measures, the deep-mined coal vein may have the potential to produce mine subsidence at levels that would impact the integrity of the design for Cell 4. BRADS has proposed to mitigate the subsidence effects by conducting flushing of the mine voids, based on the assumption that conditions in the mine passages match the assumptions made

> in the worst case scenario they used to calculate the amount of potential mine subsidence.
>
> Without investigations verifying actual field conditions of the mine voids in Cell 4, the Department cannot conclude that void flushing will be adequate to minimize the potential for mine subsidence. Absent a viable plan to lessen the potential for subsidence, the application fails to meet 25 PA Code §277.120 (Mineral deposits information). Title 25 PA Code §271.201 (Criteria for permit issuance or denial) prohibits the Department from issuing a permit when the potential for mine subsidence exists and could endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts, and Title 25 and could cause the proposed operation to endanger the environment or public health, safety or welfare. BRADS has not shown that Cell 4 area is suitable for permitting purposes.

(Ex. A-2 at 5.)

Following the 2008 permit denial, the settlement agreement provided:

> Blythe Township has submitted information to evaluate the potential for mine subsidence damage to the facility. Blythe Township has committed to perform any necessary mitigation to the underground mine conditions to reduce the potential for mine subsidence impact to the site prior to the construction of Cell 4, should a waste management permit be issued to Blythe Township.

(Ex. B-2, ¶ 6.)

This language only adds to the mystery. If the necessary information has been submitted, why does the permit still ask for a plan? Why defer review of that plan? In any event, the Department cannot agree to disregard a regulatory requirement in a settlement agreement. Blythe Township has done nothing more than "commit" to doing what it is required to do by law anyway. A "commitment to perform any necessary mitigation" is not a proper substitute for ensuring in the first place that mitigation is possible.

Blythe Township cites *Environmental & Recycling Services, Inc. v. DEP*, 2007 EHB 568, in support of its contention that sufficient information was submitted for the Department to evaluate the potential for mine subsidence damage. However, in that case, a plan was submitted

and fully evaluated and the parties disagreed about the implications of the findings. Here, in contrast, it is undisputed that additional investigation and analysis is required, so the parties are not yet at the point where there are any findings to be debated.

We are not in a position to assess in the first instance whether the potential for subsidence can be adequately ameliorated. Blythe Township's primary subsidence expert was not presented as a witness. The testimony of the Township's other witnesses on the issue was based largely on hearsay, some of which is not particularly credible. (T. 517, 567, 858, 870.) A proper review must be done in the first instance by the Department.

We cannot conclude that the Department's decision to defer resolution of this obligation constitutes harmless error. The permit as written allows the Department to at some indeterminate time in the future quietly act on the subsidence plan in a way that will not be readily subject to public notice and comment. No one other than the Department and the permittee is likely to know about it. This approach is inconsistent with the transparent review of permits that is mandated by applicable law. *See, e.g.*, 25 Pa. Code § 271.5.

Furthermore, there will be a significant disincentive to disapprove the landfill's subsidence plan months or years after the landfill has been in operation. This is why the regulation requires that the analysis be performed now, before the decision changes from a determination that the landfill may be built to a determination that an existing landfill's operations should be terminated, employees should be laid off, investors' expectations should be frustrated, and closure costs should be incurred. That is neither legal nor fair.

The Department's conclusions regarding the subsidence plan could have a ripple effect on other components of the application, especially and most obviously if it finds that adequate mitigation is not possible. Its findings may also affect its conclusions regarding the relative

harms and benefits of the project. On remand the Department should take these things into account.

Identity of the Permittee

St. Clair points out that the permit in this appeal was issued to "Blythe Recycling and Demolition Site (aka BRADS)," which is not a legally recognized "person." As such, it argues that issuing the permit to BRADS was a violation of 25 Pa. Code § 271.201, which provides:

> A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met:
>
> (1) For a disposal or processing permit, each of the entities that is the permit applicant, an owner of the facility or a part thereof, an operator of the facility, or a related party to one or more of the foregoing entities, is one of the following: a natural person; a partnership; a corporation; a municipality of this Commonwealth; a municipal authority or joint municipal authority established under the laws of the Commonwealth; an agency of the Commonwealth; the Commonwealth; an agency of the Federal Government; or the Federal Government.

St. Clair is correct. BRADS is not one of these approved entities, and, therefore, the permit was issued unlawfully. Blythe Township was the applicant and should have been named as the permittee. (T. 1013.) The Department erred by issuing the permit to BRADS. There must be no doubt about the identity of a landfill permittee, and that permittee must be a legal entity as described in the regulations. The error is harmless in the sense that the Department knew that Blythe Township was the proper permittee and evaluated the application with that in mind. (T. 1013; Ex. B-20.) Nevertheless, the error must be corrected on remand.

In a somewhat similar vein, St. Clair argues in a few short paragraphs that "the permit issuance unlawfully gives FKV, a private entity, authority to make management decisions concerning landfill operation, unreasonably limiting Blythe's authority, as permittee, to make such decisions." (St. Clair Brief at 41.) The permit issuance, however, does no such thing.

Blythe Township as the permittee must itself comply and ensure compliance by others with the terms and conditions of the permit and the applicable regulations, regardless of the terms of any contract between Blythe and FKV. 35 P.S. § 6018.610(4). Blythe Township cannot contract away those responsibilities. By the same token, the permit creates no rights, liabilities, or obligations on the part of FKV. The Township's contractual obligation to work with FKV does not override, and is not inconsistent with, its duty to comply with the law. St. Clair has not referred us to any legal authority that prevents Blythe Township from entering into an agreement with FKV to provide the technical and financial expertise necessary to design, permit, and operate the landfill. We would expect any municipality without its own in-house expertise in waste management to do the same.

Groundwater Contamination

St. Clair, exclusively through the testimony of its municipal engineer, Mr. Baldwin, raised the concern that the landfill will contaminate groundwater, and that such contamination could in turn lead to contamination of the Wolf Creek Reservoir, a public drinking water source located about one mile from the landfill site, and the Silver Creek Reservoir, located about a mile and a quarter from the site. Mr. Baldwin, although qualified to testify as an expert in some areas such as traffic issues, is only marginally qualified at best to testify regarding hydrology, hydrogeology, and water pollution issues. He admittedly conducted no meaningful investigation regarding water issues. His testimony on water issues was limited to the observation that the reservoirs are close to the landfill, that the reservoirs are fed by groundwater, and that there are springs at the landfill site. He offered no opinion that there is, in fact, a hydrogeological connection between the landfill site and the reservoirs.

Expert opinions regarding increased risk and the likelihood of something occurring are routinely admitted by the Board; however, they must do more than describe mere possibilities. *Blythe Twp. v. DEP*, 2011 EHB 433, 436 (citing *Merchant v. WCAB*, 758 A.2d 762 (Pa. Cmwlth. 2000)). Speaking more generally, we have held that appellants may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *Shuey v. DEP*, 2005 EHB 657, 711. Making unfounded accusations does nothing more than waste the time and resources of the parties and the Board. Mr. Baldwin's opinions at best describe mere possibilities, and they are not supported by credible scientific experience, training, investigation, or fact.

In contrast to Mr. Baldwin's unsupported suppositions, Robert Hershey, P.G., an eminently qualified hydrogeologist, credibly testified on behalf of the Township that there is no realistic opportunity for surface water or groundwater to move from the BRADS site to either the Wolf Creek Reservoir or Silver Creek Reservoir. (T. 839-50.)

Although there is no credible evidence of any threat to the reservoirs, contamination of any groundwater, even if it does not reach the reservoirs, is not acceptable and must be prevented. 25 Pa. Code § 277.161. The most likely way that contamination may occur, however, is if the landfill's state-of-the-art liner or leachate control systems fail. (T. 506, 565, 569, 587-88, 846.) Richard Bodner credibly testified that, assuming the aforementioned mine subsidence issue is properly addressed, such a failure is highly unlikely. (T. 569.) Furthermore, the permit requires Blythe to construct a fairly elaborate groundwater monitoring system, which will function to monitor upgradient and downgradient groundwater conditions. (Ex. A-7 at 22.) St. Clair has not given us any reason other than the unresolved subsidence issue to question Bodner's testimony or otherwise conclude that there is any credible threat of groundwater contamination.

Because the landfill is located near special-protection waters, St. Clair argues that the Department and Blythe Township bear the burden of proving that the project is *not* likely to degrade those waters. St. Clair relies on *Pine Creek Valley Watershed Assoc., Inc. v. DEP*, 2011, EHB 761, where we said:

> In an appeal such as this one, which involves application of antidegradation requirements to special protection waters, Pine Creek does not necessarily need to show that there *will* be environmental harm in order to meet its burden of proof. Rather, once a challenger such as Pine Creek shows that a project presents a significant and credible risk of harm, it is incumbent upon the Department and the project's proponents to show that the risk will not be realized and the special protection waters are not likely to be harmed. In other words, the burden of proof effectively shifts to the Department and the project's proponents to show that the functions and values of the special protection wetlands and the existing water quality of the special protection streams will be maintained and protected.

2011 EHB at 772-73. *Pine Creek* does not apply here because St. Clair, who bears the initial burden of proof, has fallen far short of showing in the first instance that the landfill presents a significant and credible risk of harm. Therefore, the burden never shifts.

Air Quality

St. Clair's first objection related to air quality is that the Department failed to require Blythe Township to provide site-specific meteorological data in connection with its odor control plans. St. Clair refers us to 25 Pa. Code § 277.136, which states that the permit application must contain a nuisance minimization and control plan that includes a "determination of normal and adverse weather conditions based on site-specific meteorological data. Prior to the installation of equipment and collection of meteorological data, a protocol for the installation and data collection shall be approved by the Department."

In response, although some data was included in the permit application that apparently was collected by some unidentified party three miles away from the site, neither Blythe Township nor the Department claim that "site-specific" data was produced. They do not seriously defend the use of the data obtained from this source three miles away. Instead, they point out that Permit Condition No. 33 requires that Blythe must construct a weather station and collect weather data *prior to acceptance of waste at the facility*. Although we were not presented with any credible evidence of material, insufficiently mitigated impacts from the landfill on air quality (*see* T. 490-91, 926, 929-30; Ex. A-1, A-3, A-6, A-7), the Department must comply with its own regulations. We are not in a position to simply overlook the clear regulatory requirement to produce site-specific information. We agree with St. Clair that this is another example of the Department unlawfully attempting to use a permit condition to contravene a regulatory requirement. *See Jefferson Cnty. Comm'rs*, 2002 EHB 132. In that case, and in this one, the regulation requires that "the Department must determine whether or not a permit application can mitigate a potential nuisance *before* it issues the permit." *Jefferson Cnty. Comm'rs*, 1996 EHB at 1002.

Again, we are left to wonder why the Department chose to disregard this regulatory requirement. The permit application was pending for years. The data could easily have been generated by now. Weather data relates to not only compliance, as hinted at by the Department, but whether the landfill can be permitted in the first place.[5] The Department will need to reevaluate the Township's nuisance and odor control plan on remand using the regulatorily required data. As with its evaluation of the subsidence issue, the Department will need to ensure

[5] The Department says that meteorological data is used "*not* to determine whether a site is suitable, rather to determine where potential impacts of a landfill might be." (DEP Brief at 31 (emphasis in original).) We do not see the difference between determining whether a site "is suitable" and determining "where the potential impacts of a landfill might be."

that its reevaluation of Blythe Township's nuisance minimization plan does not alter its conclusion regarding the relative harms and benefits of the project.

St. Clair next argues that the landfill will generate airborne dust and debris that "could" land in the Wolf Creek and Silver Creek reservoirs. St. Clair relied on Mr. Baldwin to support this objection. However, Baldwin has not credibly opined how dust and debris, if generated and if becoming airborne, will find its way to the reservoirs. He has not described how such dust and debris would adversely impact water quality in the reservoirs in a significant way even if it finds its way to a reservoir. He has not explained how such dust and debris could affect the drinking water derived from the reservoirs. He did not give any examples of why the landfill's plan for limiting dust and debris emissions from the site is inadequate in this regard. In short, this is another example of raising nothing more than a speculative possibility, which does not provide a basis for reversing the Department's action. *Shuey, supra.* In contrast, Blythe Township's experts credibly opined based upon existing data that dust and debris from the landfill poses no risk to the reservoirs. (T. 489-92, 570, 837-38, 843-45.)

CONCLUSIONS OF LAW

1. Issues not adequately preserved in the posthearing brief are waived. 25 Pa. Code § 1021.131(a). *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004).

2. The Board is charged with reviewing whether the action under appeal—the Department's final action—is lawful, reasonable, and supported by the facts. *Dougherty v. DEP*, EHB Docket No. 2013-220-L, slip op. at 5 (Opinion and Order, January 3, 2014); *O'Reilly v. DEP*, 2001 EHB 19, 32.

3. The Department's motivation in taking a certain action is rarely significant to the Board's review. *Primrose Creek Watershed Assoc. v. DEP*, EHB Docket No. 2011-135-L (consolidated with 2011-136-L), slip op. at 6 (Opinion and Order, March 20, 2013); *Perano v. DEP*, 2011 EHB 298, 316; *Starr v. DEP*, 2002 EHB 799, 810; *Milco v. DEP*, 2002 EHB 723, 726; *Westtown Sewer Co. v. DER*, 1992 EHB, 979, 996.

4. The Board does not give deference to the Department's interpretation when its interpretation has not been consistent or it has changed over time. *Waste Mgmt. Disposal Servs. of Pa. v. DEP*, 2005 EHB 433, 460-62; *Brunner v. DEP*, 2004 EHB 684, 688, *rev'd on other grounds*, 869 A.2d 1172 (Pa. Cmwlth. 2005); *Envtl. & Recycling Servs., Inc. v. DEP*, 2002 EHB 461, 491; *Tri-State Transfer Co. v. DEP*, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999).

5. The Borough of St. Clair, as a third-party appellant, bears the burden of proving by a preponderance of the evidence that the Department acted unlawfully or unreasonably or that its action is not supported by the facts as found by the Board. 25 Pa. Code § 1021.122(c)(2); *Gadinski v. DEP*, EHB Docket No. 2009-174-M, slip op. at 24 (Adjudication May 31, 2013).

6. Appellants may not satisfy their burden of proof by simply raising an issue and then speculating that all types of unforeseen calamities may occur. *Shuey v. DEP*, 2005 EHB 657, 711.

7. The Department may issue a permit for a construction and demolition landfill if the applicant satisfies the two phases of permit review prescribed by the regulations. 25 Pa. Code §§ 277.101 and 271.201.

8. Phase I includes an environmental assessment that requires the applicant to analyze the impacts of the project on the environment, public health and public safety, submit a mitigation plan for the known or potential environmental harms, and ultimately demonstrate that

the project's benefits to the public clearly outweigh the associated known and potential harms. 25 Pa. Code § 271.127.

9. Phase II requires that the project conform to the technical regulations specifying how the landfill is to be constructed. 25 Pa. Code §§ 271.201 and 277.131—277.192.

10. The Department's interpretation of the environmental assessment regulation (25 Pa. Code § 271.127) to not authorize a financial viability determination is lawful, consistent with the regulatory language, and reasonable.

11. Given its correct interpretation of 25 Pa. Code § 271.127(c), the Department acted lawfully and reasonably by not considering the potential financial consequences of a failed landfill.

12. Given its correct interpretation of 25 Pa. Code § 271.127(c), the Department erred by considering the potential profits of a successful landfill to be a "limited benefit."

13. The Department properly concluded that the harm associated with increased truck traffic was adequately mitigated. 25 Pa. Code § 271.127(b).

14. The Department's evaluation of the landfill's traffic impact was sufficient under 25 Pa. Code § 271.127 and no further evaluation of traffic issues needs to be undertaken.

15. Any adverse visual impact resulting from the construction and operation of the landfill has been sufficiently mitigated, and any residual harm was adequately factored into the Department's review of the environmental assessment. (T. 318-19, 494-98, 573, 932-34; Ex. A-1, A-6, A-7.)

16. The Department accorded proper weight to the landfill's visual impact under the harms-benefits test. 25 Pa. Code § 271.127(b).

17. The Department acted unlawfully by issuing the permit without first requiring the applicant to submit an acceptable mine subsidence plan. 25 Pa. Code §§ 271.201(b) and 277.120.

18. The Department violated 25 Pa. Code § 271.201 by issuing the permit to BRADS instead of the true permittee, Blythe Township.

19. The Department's violation of 25 Pa. Code § 271.201 was a harmless error in the sense that it knew that Blythe Township was the actual permittee and it evaluated the permit application on that basis. However, the error must be corrected on remand.

20. The Department acted unlawfully by issuing the permit without first requiring the applicant to submit a nuisance minimization and control plan based on site-specific meteorological data. 25 Pa. Code § 277.136(b)(3).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 3rd day of March, 2014, it is hereby ordered that Solid Waste Permit No. 101679 is remanded to the Department for further consideration consistent with this Adjudication. Specifically, the Department shall do the following:

1. Complete its review of the Permittee's mine subsidence mitigation plan;

2. Revise its review of the Permittee's nuisance minimization plan based upon site-specific meteorological data;

3. Reevaluate its environmental assessment to ensure that the other revised analyses called for in this Order do not change the Department's ultimate conclusion that the BRADS Landfill satisfies the harms-benefits test set forth in 25 Pa. Code § 271.127; and

4. Reissue the permit, if appropriate, to Blythe Township (as opposed to "BRADS").

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

Judge Richard P. Mather, Sr. recused himself and did not participate in this matter.

DATED: March 3, 2014

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-177-CP-M**
JUSTAN T. TURNBAUGH AND DAVID T. LITTLE	:	**Issued: March 11, 2014**

OPINION AND ORDER
ON MOTION FOR DEFAULT JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis:

The Board grants the Department's motion for default judgment because the Defendants failed to answer the Department's complaint for civil penalties, failed to respond to a notice of intent to seek default judgment or the motion for default judgment, and failed to otherwise demonstrate any interest in defending against the complaint. The Board assesses a civil penalty in the amount requested in the Department's complaint.

OPINION

On October 7, 2013, the Department of Environmental Protection (the "Department") filed a complaint for assessment of civil penalties against Justan T. Turnbaugh and David T. Little (the "Defendants") for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Dam Safety and Encroachments Act, 52 P.S. §§ 693.1 *et seq.*, and the regulations promulgated thereunder, that are alleged to have occurred on property located in Miller Township, Perry County. Each defendant received service of the complaint and a notice to defend on October 4, 2013. The Defendants did not file an answer or otherwise to the Department's complaint.

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http://ehb.courtapps.com

On January 31, 2014, the Department filed a motion for default judgment. That motion informed the Board that the Department sent each of the Defendants a notice of intent to seek default judgment on November 8, 2013, which each of the Defendants received on November 9, 2013. The Defendants failed to react to the Department's notice of intent, and they failed to respond to the motion for default judgment within thirty days pursuant to 25 Pa. Code §1021.94.

Our Rules provide that answers to complaints shall be filed with the Board within thirty days after the date of service of the complaint. 25 Pa. Code § 1021.74. Where a defendant fails to file an answer to a complaint, a plaintiff may file a motion for entry of default judgment with the Board pursuant to 25 Pa. Code § 1021.76a. *DEP v. Wolf*, 2010 EHB 611, 613. Since the adoption of 25 Pa. Code § 1021.76a in October, 2009, the Board has been explicitly authorized to "assess civil penalties in the amount of the plaintiff's claim" when the Board enters default judgment in a matter involving a complaint for civil penalties. *Wolf*, 2010 EHB at 614-15.

The record shows that, although the Department has filed and served its complaint, provided the Defendants with a notice to defend, provided the Defendants with notice that the Department intended to seek an entry of default judgment, and moved for default judgment, the Defendants have failed to file anything in this case. The Defendants have had numerous opportunities to defend against the complaint and to participate in proceedings before the Board but have chosen not to do so. Therefore, the Board grants the Department's motion and assesses civil penalties in the amount of the Department's claim as set forth in its complaint of $11,000.[1]

Accordingly, we enter the Order that follows.

---

[1] While the Board finds the amount requested in this case is reasonable, and therefore will grant the amount requested by the Department in full, it would be helpful to the Board, in cases where the Department is seeking a default judgment for "civil penalties in the amount of the plaintiff's claim" pursuant to 25 Pa. Code Sec 1021.76a(d), for the Department to provide information on how the requested penalty amount was determined by way of an affidavit or some other method.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-177-CP-M**
JUSTAN T. TURNBAUGH AND DAVID T. LITTLE	:	

ORDER

AND NOW, this 11th day of March, 2014, it is hereby ordered that the Department's motion for entry of default judgment is **granted**. The Board assesses a civil penalty against the Defendants in the amount of $11,000.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 11, 2014

c: **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson
9th Floor, RCSOB

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David T. Little
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-185-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE TOWNSHIP and GROVE CITY FACTORY SHOPS LP, Intervenors	:	**Issued: March 11, 2014**

OPINION AND ORDER ON
PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a petition to intervene filed by individuals who live, work, and/or recreate near the site of a proposed landfill.

O P I N I O N

Tri-County Landfill, Inc. ("Tri-County") filed this appeal from the Department of Environmental Protection's (the "Department's") denial of its application for a municipal waste landfill permit at a site in Pine and Liberty Townships, Mercer County. Ray Yourd, Diana Hardisky, Eric and Polly Lindh, Bill and Lisa Pritchard, Ann and Dave Dayton, and Doug Bashline (the "Petitioners"), who support the Department's decision to deny the permit, have filed a petition to intervene. Their petition, which is supported by verifications, alleges that they all live, work, and/or recreate in close proximity to the site of the proposed landfill, and that the landfill will likely have a detrimental impact upon their economic and environmental well-being. Tri-County opposes the petition. It contends that some of the individuals do not live close enough to the landfill site, or at least have not provided enough detail about how close they live

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to the landfill, or have not explained why owning a home or business close to the landfill is sufficient to establish standing. Tri-County denies that any of the Petitioners' property or businesses would be adversely affected by the operation of the landfill. It adds that the Petitioners' interests will be adequately served by the existing parties in the case.

Section 4 of the Environmental Hearing Board Act provides that "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). Because the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance, we have held that an intervenor must have standing. *Wilson v. DEP*, EHB Docket No. 2013-192-M (Jan. 2, 2014); *Pileggi v. DEP*, 2010 EHB 433, 434. A person has standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Robinson Twp. v. Cmwlth. of Pa.*, No. 63 MAP 2012 (Pa. Dec. 19, 2013); *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Wilson, supra*, slip op. at 2. A substantial interest is one that is greater than the abstract interest of all citizens in having others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). "Direct" and "immediate" mean that there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *Id.* In other words, the intervenor's interest must not be remote. *Id.* at 286; *Borough of Glendon v. Dep't of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992).

In order to assess whether the Petitioners have standing to intervene in this appeal, we need look no further than the Supreme Court's recent decision in *Robinson Township*. The Court in that case, among other things, addressed the standing of the Delaware Riverkeeper Network (the "Network"), a citizen's group, and Maya van Rossum the group's Executive Director, to challenge Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act, 58 Pa.C.S. §§

2301-3504. In support of its standing, the Network emphasized the deleterious effects of industrial activities close to its members' homes, including potential effects on their health and their ability to enjoy natural beauty, environmental resources, and recreational activities such as fishing, boating, swimming, and bird-watching. Citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 183 (2000), the Network alleged that its members used the affected area and that they were persons for whom the aesthetic and recreational values of that area would be lessened by the challenged activity. The Network said that environmental well-being, like economic well-being, is an important ingredient of the quality of life, and the fact that environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Based upon these allegations, the Court held that the Network and Maya van Rossum had standing. *Robinson Twp.*, slip op. at 22. The Court noted that the citizens had submitted affidavits to show that individual members of the Network were Pennsylvania residents and/or owners of property and business interests in areas that already host or were likely to host active natural gas operations related to the Marcellus Shale Formation. The affidavits asserted that the individuals were likely to suffer considerable harm with respect to the values of their existing homes and the enjoyment of their properties given the intrusion of industrial uses and the change in the character of their zoning districts effected by Act 13. The Court held that the individuals had a substantial and direct interest in the outcome of the litigation premised upon the serious risk of alteration to the physical nature of their respective political subdivisions and the components of their surrounding environment. *Id.* The Court's holding made it clear that "this interest is not remote." *Id.* at 17-18.

Similarly, the Petitioners in this case have verified that they all live, work, and/or recreate near the proposed landfill. They have averred that the landfill is likely to have a significant detrimental effect on their use and enjoyment of the environment and their quality of life. These interests are hardly remote.

Tri-County's opposition to the Petitioners' intervention has no merit. Initially, its answer in opposition to the petition to intervene is not verified as required by our rules. 25 Pa. Code § 1021.81(d). Even if Tri-County's answer had been verified, its opposition would not have been successful. Tri-County's primary complaint is that the Petitioners' allegations of a proximate interest are not sufficiently detailed. Our evaluation of a challenge to a person's standing varies depending upon when the challenge is presented. If the challenge is presented in an answer to the petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of law. *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3; *see also Pennsburg Housing Partnership, L.P. v. DEP*, 1999 EHB 1031, 1035; *cf. Robinson Twp.*, slip op. at 21-22 (review of standing in connection with preliminary objections). If standing is challenged in an appropriately timed motion for summary judgment, we look to whether there are genuine issues of fact regarding the issue. Standing may even be challenged following the evidentiary hearings if the issue has been properly raised and preserved, in which case we look to whether the appellant or intervenor has carried its burden of proving that it has standing by a preponderance of the evidence. *Greenfield Good Neighbors Grp., Inc. v. DEP*, 2003 EHB 555, 563; *Giordano v. DEP*, 2000 EHB 1184, 1187; *Ziviello v. DEP*, 2000 EHB 999, 1005.

At this stage, we accept as true all of the verified facts set forth in the petition. The petition is clearly sufficient. The Petitioners have verified in sufficient detail that they live, work, and/or recreate in the vicinity of the proposed landfill. They have averred that a landfill would have a deleterious impact on their use and enjoyment of the area in the vicinity of the landfill site as well as their economic and environmental well-being. Whether the landfill would in fact have such an impact is not the appropriate subject of inquiry at this point, so long as there is an objectively reasonable threat of adverse effects. *Giordano*, 2000 EHB 1154, 1156 (citing *Friends of the Earth, supra,* 528 U.S. 167, 180-84.) There is an objectively reasonable threat here. This is not the appropriate time to address Tri-County's claim that the landfill will not in fact have an adverse effects. *Ainjar Trust, supra*; *Pennsburg*, 1999 EHB at 1032 n.1.

Tri-County says that some of the petitioners do not actually live or work in the immediate vicinity of the landfill. Even if that were true, we have repeatedly held that it is the person's *use* of the area and whether the project threatens that use by, e.g., lessening the aesthetic and recreational value of the area that qualifies for purposes of standing. *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07; *Giordano*, 2000 EHB at 1186. The Petitioners have alleged such use here. Finally, the fact that other parties in the case are in a position to represent interests similar to the Petitioners' interests is not a reason to deny them status as intervenors. *See Pileggi, supra* (granting the intervention of a wife whose husband was already a party to the case and finding it irrelevant whether her interests would be adequately protected by her husband); *Ashton Investment Group, LLC v. DEP*, 2010 EHB 221 (granting the intervention of a township despite arguments that its interests in the case were coextensive with the Department's).

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-185-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE TOWNSHIP and GROVE CITY FACTORY SHOPS LP, Intervenors	:	

ORDER

AND NOW, this 11th day of March, 2014, it is hereby ordered that the Petitioners' motion for leave to intervene is **granted**. The caption shall be revised to read as follows:

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-185-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE TOWNSHIP, GROVE CITY FACTORY SHOPS LP, and RAY YOURD, et al., Intervenors	:	

ENVIRONMENTAL HEARING BOARD

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

DATED: March 11, 2014

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHANE M. WINNER	:	
	:	
v.	:	**EHB Docket No. 2013-120-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LIMESTONE TOWNSHIP SUPERVISORS, Permittee	:	**Issued: March 13, 2014**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board denies the Department's Motion to Dismiss. The letter outlining the Department's determination regarding the applicability of an exception to the requirement that a municipality revise its official sewage facilities plan for new land development under 25 Pa. Code Section 71.55 is an appealable final action over which the Board has jurisdiction. The Board cannot conclude, based on the filings before it, that an adjacent, down-gradient property owner lacks standing to challenge the determination that a subdivision proposal qualifies for an exception to the requirement that a municipality revise its official sewage facilities plan for new land development under 25 Pa. Code Section 71.55.

O P I N I O N

Background

Appellant Shane M. Winner filed a Notice of Appeal with the Environmental Hearing Board on August 13, 2013, objecting to the Department of Environmental Protection's July 16, 2013 approval of a Component 1 Sewage Facilities Planning Module ("July Letter"). A

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Component 1 module is filed with the Department for subdivisions seeking an exception from the requirement that a municipality revise its official sewage facilities plan to account for new subdivisions—in this case, for a proposed two-lot subdivision adjoining Winner's property in Limestone Township, Lycoming County. In the July Letter, which was addressed to the Township's supervisors, the Department states the lot in question is "a proposed new single family residential building lot with both a fully suitable, and reserved, primary and replacement onlot sewage disposal absorption area established on it." (Department's Mot. Dismiss, Ex. A.) The Department "determined that this proposal qualifies as an exception" to the requirement that Limestone Township revise its official plan, observing that the "sewage enforcement officer may now proceed to issue an onlot sewage disposal permit for the new building lot . . . when an acceptable application is presented." *Id.*

The gist of Winner's objection is that the site is unsuitable for an on-lot septic system based on the site's previous failures of septic testing. He also objects to the limited number of test areas excavated and to the fact that a Department official accompanied the Sewage Enforcement Officer's site investigation. On January 13, 2014, the Department filed the pending motion to dismiss. Appellant Winner filed an answer on February 12, 2014, and the Department filed a reply brief on February 26, 2014. The motion is now ripe for ruling.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party. A motion to dismiss will only be granted where there are no material issues of fact in dispute and the moving party is clearly entitled to judgment as a matter of law. *See, e.g., Teska v. DEP*, 2012 EHB 447. "As a matter of practice the Board . . . has permitted the motion to be determined on facts outside those stated in the notice of appeal when the Board's jurisdiction is

at issue. . . . Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving [] Motions to Dismiss." *Beaver v. DEP*, 2002 EHB 666, 671 n. 4.

Discussion

In its memorandum supporting its motion to dismiss, the Department argues that the letter is not an appealable action and, therefore, the Board lacks jurisdiction to hear the appeal. In the alternative, the Department argues that, even if the letter is appealable, Winner lacks standing to bring the appeal.

The Department's motion raises a difficult and recurring issue before the Board. As Judge Mather recently characterized the question:

> When does a Department letter or other similar communication cross a line to become an appealable action over which the Board has jurisdiction? The Board has the power and duty to hold hearings and issues adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). The EHB Act states that "no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board. . . ." 35 P.S. § 7514(c). The Board's rules define "action" as "an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). The Board only has jurisdiction to review final actions of the Department. *Kennedy v. DEP*, 2007 EHB 511, 512.

Teska, 2012 EHB at 453.

Some Department letters or communications are appealable, and some are not. The Board must therefore evaluate each letter on a case by case basis to determine if it is an appealable action. In order to determine whether a particular Department letter is appealable, the Board considers such factors as the specific wording of the communication, its purpose and intent, its practical impact, its apparent finality, its regulatory context and the relief, if any, the

board can provide. *Id.* at 454 (citing *David Dobbin v. DEP*, 2010 EHB 852; *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 376; *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24).

The Department argues that the July Letter is "nothing more than an interlocutory opinion," a "statement of its view of what the law requires," and that it is merely "advisory." (Department's Mem. 4–7.) Under 25 Pa. Code Section 71.51(a)(1), with limited exceptions, a municipality must revise its official sewage facilities plan when a new subdivision is proposed. The exception pertinent to the present appeal concerns a Component 1 Sewage Facilities Planning Module, which developers submit to the Department for evaluation of whether certain small-scale developments may commence without a revision in the official plan. The regulations underlying this component except a municipality from its duty to revise its official plan "when the *Department determines* that the proposal is for the use of individual onlot sewage systems serving detached single family dwelling units." 25 Pa. Code § 71.55(a) (emphasis added). For the Department to make that determination, the developer of the subdivision must include information about the site, its suitability for the use of onlot systems demonstrated through testing conducted by the sewage enforcement officer, and approval by the municipality of the plan as part of the application. *See* Instructions for Completing Component 1 Exception to the Requirement to Revise the Official Plan, DEP 3800-FM-WSFR0350, *available at* http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-9504; *see also* 25 Pa. Code §§ 71.55(a)(2), (4), (b). The Sewage Facilities Act provides for the Department to collect a fee from the applicant for its efforts reviewing the Component 1 module. 35 P.S. § 750.10(12)(v). These circumstances are clearly distinguishable from the provision of a "legal interpretation

disembodied from any Department action directly affecting a particular party." *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 341.

In addition to the regulatory context, the Board looks at the specific wording of the communication. Here, it is clear that the Department made a determination. The Department "determined that this proposal qualifies as an exception" to the requirement that Limestone Township revise its official sewage facilities plan. (Ex. A to the Department's Mot. to Dismiss.) This is what the regulations require the Department to do; if the Department fails to act within 30 days of a Component 1 request, "the exception . . . shall be deemed to be applicable," thus allowing the development to move forward without a revision to the municipality's official plan. Finally, there is no evidence that the Department will have any further involvement with the subdivision or its sewage. The Department argues that the fact that the sewage enforcement officer still needs to issue a permit for the new lot means that the July letter cannot constitute a final action. The salient point, however, is that the action being appealed *is the Department's determination.* Given its finding that the exception applies, the Department's role in the process is complete.

We also note that in previous cases, both the Board *and* the Department have addressed similar determinations to the one at issue in this case. In *Walker v. DEP*, EHB Docket No. 2005-274-K, the Department proposed a finding of fact in its Post-Hearing Memorandum that its letter "confirming a planning exemption" for a subdivision under 25 Pa. Code Section 71.51(b) was a final action. The Board adopted the Department's interpretation. *Walker v. DEP*, 2007 EHB 117, 121; *cf. Stern v. DEP*, 2001 EHB 628, 637–38 ("The Department's Motion to Dismiss for Lack of Jurisdiction contends that the only 'action' by the Department in this case was the March, 1999 granting of the exemption" under 25 Pa. Code § 71.51(b).) The language of

Section 71.51 is very similar to that of Section 71.55—under the provision, the Department makes a determination that certain conditions exist, entitling a municipality to permit a development without revising its official plan, as it would otherwise be obligated to do under the law.

The Department offers no reason why determination letters under Section 71.55 should be treated differently from those under Section 71.51. In fact, the Department and Appellant Winner failed to cite *Walker* and *Stern* entirely. Given the Board's and the Department's treatment of similar determination letters, the regulatory context, and, considering the standard of review—that is, viewing motions to dismiss in the light most favorable to the non-moving party—we find that the July Letter constitutes an appealable action.

Standing

The Department argues that "[i]n his Notice of Appeal, Appellant Winner makes no reference whatsoever to how the Department's [letter] adversely affects in any way his . . . interests." (Department's Mem. 9.) It continues: "As there is no discernible causal connection between the Department's July 16, 2013 letter and any interest of Winner, his Appeal must be dismissed for his lack of standing to file the Appeal *ab initio*." *Id.* The Board's rules and prior case law disagree. "There is no requirement in the Board's rules requiring an appellant to aver facts sufficient to show that it has standing in its notice of appeal." *Ziviello v. DEP*, 2000 EHB 999, 1003; *see also Cooley v. DEP*, 2004 EHB 554; 559; 25 Pa. Code § 1021.51 (relating to the commencement, form, and content of notices of appeal before the Board).

It is additionally important to note the current procedural posture of this matter. The Department proceeded to file its Motion to Dismiss relying exclusively on the alleged shortcomings in Winner's Notice of Appeal. The Department did not attach any discovery

responses from Appellant Winner regarding the issue of standing to its motion, and the Board has no indication whether the Department has conducted any discovery in the matter.

> A motion to dismiss made prior to any discovery even having been taken is obviously too early to dispositively determine the question of standing. . . . The proceedings are far too young procedurally to even discuss the parties' competing views of standing, let alone make any determinations about them.

Cooley, 2004 EHB at 559. The factual allegations are thus limited to those contained in the Notice of Appeal, the motion and responses, and any documents attached to those filings. Winner's property and water sources are alleged to be down-gradient and adjacent to the proposed site of the onlot septic system. (Appellant's Answer, Ex. 1) Viewing the factual allegations in a light most favorable to the non-moving party, we find that there are material factual disputes that preclude the Board from concluding that Winner lacks standing to appeal the Department's determination.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHANE M. WINNER	:	
	:	
v.	:	**EHB Docket No. 2013-120-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LIMESTONE TOWNSHIP SUPERVISORS, Permittee	:	

ORDER

AND NOW, this 13th day of March, 2014, it is ORDERED that the Department's Motion to Dismiss is **DENIED.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 13, 2014

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2011-158-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 14, 2014**

OPINION AND ORDER ON
MOTION IN LIMINE AND BURDEN OF PROOF

By: Michelle A. Coleman, Judge

Synopsis

The Board denies a motion in limine of the Department that seeks a sanction against the Appellant to preclude the testimony of an expert witness and to preclude certain evidence as either irrelevant or improperly withheld during discovery. The Board also finds that the Department properly bears the burden of proof in a case in which its letter to the Appellant is functionally the same as an order.

OPINION

On October 28, 2011, Bucks County Water and Sewer Authority (the "Authority") appealed to the Board a September 30, 2011 letter sent by the Department of Environmental Protection (the "Department") to the Authority in response to the Authority's submission of its 2010 Chapter 94 Annual Report for the Upper Dublin wastewater treatment facility in Montgomery County. These annual reports are required by 25 Pa. Code § 94.12 pursuant to the authority of the Pennsylvania Sewage Facilities Act of 1966, 35 P.S. §§ 750.1 – 750.20a ("Act 537"). The Department's letter advised the Authority that its Annual Report for the Upper

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Dublin facility was incomplete for a number of reasons. A checklist was appended to the letter identifying what the Authority needed to include in a resubmitted Annual Report.

The letter also stated that the Annual Report established that the Upper Dublin facility was organically overloaded, which then necessitates certain actions be taken by the sewerage facility pursuant to 25 Pa. Code § 94.21. Specifically, the letter states in pertinent part:

> Based on the data presented in Figure 14 of the report, the average influent daily organic load, expressed as lbs/day of BOD_5, exceeded the organic design capacity upon which the permit and the plant design are based. The average monthly organic loading exceeded the maximum monthly limit for seven months. This constitutes a(n) existing organic overload, and as such, it will be necessary for Authority, as the permittee, to comply with Section 94.21 of Chapter 94 as follows:
>
> 1. Prohibit new connections to the overloaded sewerage facilities except as approved by the permittee under the standards for granting exceptions contained in Sections 94.55-94.57...
> 2. Immediately begin work for the planning, design, financing, construction, and operation of the sewerage facilities that may be necessary to provide required capacities to meet anticipated demands for a reasonable time in the future...
> 3. Submit to the Regional Office, for the review and approval of the Department, a written Corrective Action Plan ("CAP") to be submitted within 90 days of the date of this letter, setting forth the actions to be taken to reduce the overload and to provide the needed additional capacity. The written CAP shall include, but not be limited to, limitations on and a program for control of new connections to the overloaded sewerage facilities and a schedule showing the dates each step toward compliance with paragraph 2 shall be completed.
>
> Please submit a CAP and Connection management Plan ("CMP") to the Department within 90 days of the date of this letter.

Through its Prehearing Order No. 1, the Board set deadlines for the completion of discovery and for the filing of dispositive motions at April 30, 2012 and May 29, 2012, respectively. The parties filed, and the Board granted, requests to extend these deadlines, first on April 17, then on August 17, and finally on December 20, 2012, thereby pushing the deadlines

back nearly a year to March 15, 2013 and April 15, 2013. After those deadlines passed, and no dispositive motions were filed by either party, the Board requested that a status report be filed on or before May 10, 2013. On May 10, the parties filed a joint status report stating that settlement did not appear imminent. The Board issued its Prehearing Order No. 2, establishing the schedule for filing prehearing memoranda and setting a hearing date for September 16, 2013. The parties filed prehearing memoranda in accordance with that schedule.

On August 28, 2013, the Department filed a motion in limine and in that motion also requested a determination of the burden of proof and proceeding in the case. The Authority responded on September 12, 2013. The following day the Board held its previously scheduled prehearing conference call among the parties. During the call, the parties stated that they were working on a settlement and requested that the Board stay proceedings. Following the call the Board issued an order granting a stay for 60 days, until November 12, canceling the scheduled hearing, and ordering the parties to file a status report on or before October 15, addressing the substantive issues in the case and the issues raised in the Department's motion in limine.

The parties' October 15 status report stated that there was a reasonable possibility of settlement, that they had initiated discussion on the motion in limine, and that they would have a conference call the following week to discuss the matters further. The parties requested that they be able to report the outcome of that discussion with the Board. On October 23, the parties reported that they had worked out a framework for settlement and requested that they be able to notify the Board of the outcome of continued negotiations on November 1. The Board then issued an order requiring a November 1 status report. The November 1 report stated that the parties had engaged in further negotiations and the matter was headed toward settlement. The

parties requested to be allowed to report to the Board on November 14. We issued an order extending the stay in the case until November 14 and requested a status report on that date.

The parties November 14 status report stated in part: "[T]he parties have reached an agreement in principle to settle the above-referenced appeal and are in the process of reducing that settlement to writing.... the parties commit to submitting a stipulation of settlement to the Board for the Board's approval by December 10, 2013..." The Board ordered that a stipulation of settlement be filed by December 10. No filing was made on that date. The Board contacted the parties and were informed that no settlement was reached and any chance of settlement now seemed unlikely. Accordingly, the case once again became ready to schedule for hearing, pending our ruling on the Department's motion in limine and request for determination of the burden of proof and proceeding.

Discussion

The Department's August 28, 2013 motion raises four evidentiary objections. One objection seeks to bar the testimony of the Authority's expert witness, while the other three seek to preclude the Authority from using certain evidence at trial. In addition, the motion asks that we find that the Authority bears the burden of proof and proceeding in this appeal.

Burden of Proof

Dealing first with the determination of the burden of proof and proceeding, the Department frames the issue in the case as "whether [the Authority] can...prove...that its 'annual' report was not representative of what the BOD5 loading actually was, and would actually have contained numbers within its influent limit had the sampling been conducted competently and accurately." The Department adds that it should not have to prove the negative of an issue. In support of its contention, the Department cites part of our rule governing the

burden of proof and proceeding, 25 Pa. Code § 1021.122(a), which provides that the burden "shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue." The Department ignores the rest of the rule. Importantly, subsections (b) and (c) of that rule delineate specific instances where either the Department or the appellant bears the burden of proof. Included among these is subsection (b)(4), which states that the Department bears the burden of proof in cases in which it issues an order. 25 Pa. Code § 1021.122(b)(4).

As the Authority points out, among the listed instances in the rule, the Department's letter most closely resembles an order. "A letter is the equivalent of a compliance order if it directs or requires the recipient to do something; it is prescriptive or imperative, not merely descriptive or advisory." *Teska v. DEP*, 2012 EHB 447, 453-54; *see also Beaver v. DEP*, 2002 EHB 666. The letter at issue here is unquestionably prescriptive. It does much more than merely "inform" the Authority, as the Department contends. Rather, it specifically directs the Authority to: (1) prohibit new connections to the Upper Dublin facility; (2) immediately begin work on planning, designing, financing, constructing, and operating a facility that may be necessary to meet anticipated demand; and (3) submit to the Department both a corrective action plan (CAP) and a connection management plan (CMP) within 90 days of the date of the letter. The Department's letter induces the Authority to take responsive action. Contrary to the Department's assertion, the affirmative of the issue is whether the Department correctly determined that the Authority's Upper Dublin facility was in organic overload status and that responsive action needed to be taken by the Authority.

In addition to citing part of 25 Pa. Code § 1021.122, the Department also cites *500 James Hance Court v. Pennsylvania Prevailing Wage Appeals Board*, 33 A.3d 555, 575-76 n.28 (Pa.

2011), but its utility for the Department's argument is overstated. In this case, the Pennsylvania Supreme Court did note subsection (a) of our burden of proof rule and its adoption of a general common law approach, but essentially that is all the Court did. The Board has determined that the Department's letter functions as an order and therefore the Department bears the burden of proof in this case. *See ELG Metals, Inc. v. DEP*, EHB Docket No. 2009-091-R, slip op. at 10 (Adjudication issued Oct. 22, 2013); *Kraft v. DEP*, 2011 EHB 50, 54. The Authority, of course, must bear the burden of proof for any affirmative defenses that it raises. *See Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3; *Firsch v. DEP*, 1994 EHB 1226, 1240.

Motion in Limine

The Department raises four evidentiary objections, arguing that the Authority should not be permitted to offer the testimony of a tardily identified expert witness, Dr. X. Sean Zhang, and that the Authority should not be permitted to use as evidence certain items that were either not previously disclosed or are irrelevant. The Department requests that we preclude this testimony and evidence as a discovery sanction.

Initially we note that under the Administrative Agency Law of 1945, 2 Pa.C.S. §§ 101 – 754, Commonwealth agencies are not bound by technical rules of evidence at agency hearings and they may receive all relevant and reasonably probative evidence. 2 Pa.C.S. § 505; *see also* 25 Pa. Code § 1021.123(a); *D'Alessandro v. Pa. State Police*, 937 A.2d 404, 412 (Pa. 2007). Discovery in Board proceedings is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Rule 4019 authorizes the imposition of sanctions for a party's failure to comply with discovery rules. Pa.R.C.P. No. 4019; *see also* 25 Pa. Code § 1021.161 (the Board's rule for imposing sanctions). Whether or not to impose sanctions is within the Board's discretion and must be appropriate given the magnitude of the violation.

Envtl. & Recycling Servs., Inc. v. DEP, 2001 EHB 824, 829. In making this assessment we consider (1) the prejudice caused to the opposing party and whether that prejudice can be cured, (2) the defaulting party's willfulness or bad faith, (3) the number of discovery violations, and (4) the potential importance of the precluded evidence. *Id.*; *Dirian v. DEP*, 2012 EHB 357, 358.

Ordinarily, discovery sanctions, especially the sanction of the preclusion of evidence, are not imposed unless a party defies an order compelling discovery. *Twp. of Paradise and Lake Swiftwater, Inc. v. DEP*, 2001 EHB 1005, 1007; *DEP v. Land Tech Eng'g, Inc.*, 2000 EHB 1133, 1140. However, we have also held that discovery sanctions may be appropriate absent a motion to compel as long as a sanction is reasonable given the severity of the violation. *DEP v. Colombo*, 2012 EHB 370, 371-72 (citing *Kochems v. DEP*, 1997 EHB 422, 424, *aff'd* 701 A.2d 281 (Pa. Cmwlth. 1997)); *DER v. Chapin & Chapin, Inc.*, 1992 EHB 751, 755.

The Department's first argument is that it has not had the opportunity to depose Dr. X. Sean Zhang, an expert apparently identified for the first time in the Authority's pre-hearing memorandum, and therefore his testimony at hearing should be precluded as a sanction for not complying with discovery. Dr. Zhang will purportedly testify in some relation to the Authority's sampling and operating logs, to which the Department also has objections.

We have previously held that "expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries." *Casey v. DEP*, 2012 EHB 461, 464 (citing *CMV Sewage Co., Inc. v. DEP*, 2010 EHB 725, 729). In *CMV Sewage*, we stated that the identification of expert witnesses for the first time in one's prehearing memorandum defeats the purpose of discovery to prevent surprise and unfairness and allow for a fair hearing on the merits. *CMV Sewage*, 2010 EHB at 729. We also said that despite the language of Pa.R.C.P. No. 4003.5(b) mandating that courts bar the testimony of tardily identified

expert witnesses absent extenuating circumstances, both courts and this Board have taken a less draconian approach. *Id.* at 730.

The Department argues that its notice of deposition called for the identification of any individuals with knowledge of sampling practices and results and that Dr. Zhang was never identified. The Department has not supplied the Board with any exhibits of its discovery requests to support this argument. The Authority contends that the Department did not send expert discovery requests that would have required the Authority to disclose any experts prior to the filing of its pre-hearing memorandum. We do not have enough information to determine whether the Department explicitly asked for the identification of experts, or if Dr. Zhang falls under the Department's umbrella request under its notice of deposition requesting the identification of all people involved with the Upper Dublin facility from January 1, 2006 to April 16, 2012. For instance, we do not know if the Department served interrogatories requesting the identification of the Authority's expert witnesses, or if it was merely bootstrapped to a notice of deposition. All that we received from the Department on this point was a convoluted footnote to its memorandum in support of its motion that purportedly represents the pertinent text of the notice of deposition and attempts to somehow convey what the Department did during discovery. Regardless, we think that any prejudice to the Department has been cured. Subsequent correspondence with the parties indicated that Dr. Zhang was offered for deposition on January 22, 2014. There has been ample time since the scheduled deposition to analyze and process the information obtained through the deposition. Accordingly, we will not bar Dr. Zhang's testimony as a sanction.

The Department next argues that the Authority should be precluded from using its 2012 Chapter 94 Annual Report as evidence as well as any reference to previously unproduced 2010

and 2011 sampling and operator logs. The Department alleges that despite its requests, the Authority's sampling and operator logs were not produced during discovery. The Department did not file with the Board a motion to compel the production of those documents. Instead, it wishes to preclude their admission through its motion in limine. Although the Authority states that it has since produced the logs, it does not explain why these logs were withheld, or why it took the filing of a motion in limine for the Authority to finally turn them over to the Department. The Authority argues that the Department has been aware of the contents of these logs by way of meetings between the Department and the Authority, but this is a poor substitute to actually producing the logs in a timely manner, as required by the rules governing discovery. Without actually having the logs, the Department has no way of verifying the accuracy of any description or characterization of their contents. The Department's professional staff cannot analyze the data contained in logs it does not have.

We do not take lightly a party's complete abdication of responsibility under Pa.R.C.P. No. 4009.12 (relating to answering a request for production of documents or things). However, we also take a cautious approach to excluding integral evidence as a sanction for a discovery violation when no motion to compel was filed and no Board orders were violated. *ERSI*, 2001 EHB at 830-31. Since the information in the logs and the 2012 Annual Report may be important to the outcome of the case, and since the documents have subsequently been produced, we decline to wholly preclude the use of the logs at trial as a sanction.

The Department next argues that the Authority should be precluded from introducing any evidence or testimony regarding $CBOD_5$ in reference to the regulatory requirements of Chapter 94, as such information is irrelevant. The Board's Rules provide that relevant and material evidence of reasonable probative value is admissible and that although the Board is not bound by

the technical rules of evidence, it generally applies the Pennsylvania Rules of Evidence. 25 Pa. Code § 1021.123(a). To be relevant, evidence must have a tendency to make a fact of consequence in the action more or less likely. Pa.R.E. 401. The Pennsylvania Supreme Court has added the gloss that relevant evidence "logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable[,] or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Jones*, 65 A.3d 318, 324 (Pa. 2013) (citing *Commonwealth v. Williams*, 896 A.2d 523, 539 (Pa. 2006)). Relevance is not an exacting standard. (*See* Pennsylvania Evidence Courtroom Manual Ch. 401 (2014 ed. Matthew Bender), "[T]his threshold standard of relevancy is exceptionally low.") As it is often stated, relevance simply refers to the ability of a piece of evidence to function as a proverbial brick in the wall of a fact of consequence.

The Board makes a determination on relevance "in the light of reason, experience, scientific principles, and other testimony offered in the appeal." *R.R. Action and Advisory Comm. v. DEP,* 2009 EHB 472, 474. Accordingly, given the breadth of the Board's review, what is relevant can be extensive. *Gadinski v. DEP*, 2011 EHB 68, 70. It is not now apparent whether evidence and testimony concerning $CBOD_5$ will be relevant at trial and make any fact of consequence to the appeal more or less likely. Accordingly, since its relevance is uncertain prior to trial, at this time we are unwilling to wholly preclude any evidence relating to $CBOD_5$. *See, e.g. Gadinski*, 2011 EHB at 70; *DEP v. Neville Chem. Co.*, 2005 EHB 181, 183. The Department may raise specific relevance objections to evidence involving $CBOD_5$ at trial.

Finally, the Department argues that the Authority should be precluded from calling Department employees to testify and question them using leading questions. The Department argues that employees of the Department do not have an adverse interest and therefore cannot be

questioned as if on cross-examination, per 42 Pa.C.S. § 5935. The Department also cites *Pittsburgh Miracle Mile v. Board of Property Assessment*, 294 A.2d 226 (Pa. Cmwlth. 1972), for a reason we cannot readily discern, as it struggles to bear any relevance on the issue. Regardless, the Authority is correct in its response to the Department in arguing that employees of the Department, as witnesses identified with an adverse party, are permitted to be questioned using leading questions under Pa.R.E. 611(c). This notion has long-standing support in the Board's case law. *See Smedley v. DEP*, 2000 EHB 97 (providing extensive discussion on the issue). Therefore, the Authority may call Department employees to testify at trial and ask them leading questions.

For all the reasons above, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2011-158-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of March, 2014, it is hereby ordered that the Department's motion in limine is **denied** and the Department shall bear the burden of proof in the case. It is further ordered that a hearing in this matter shall begin at **10:00 a.m.** on **Wednesday, May 14, 2014** at the Harrisburg offices of the Environmental Hearing Board, 400 Market Street, Second Floor, Hearing Room 1, Harrisburg, Pennsylvania. The parties shall also participate in a pre-hearing conference call at **10:00 a.m.** on **Thursday, May 8, 2014**. The dial-in number for the call is **(602) 333-2017** and the access code is **8981473**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: March 14, 2014

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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700 Lisburn Road
Camp Hill, PA 17011

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE CITY OF PHILADELPHIA	:	
	:	
v.	:	**EHB Docket No. 2013-074-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FMRA, INC., Permittee	:	**Issued: March 19, 2014**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an appellant's motion for summary judgment because there is no genuine issue of material fact that the appellant, as landowner and lessor, did not consent to the permittee's handling of municipal solid waste on the leased property, yet the Department issued a major modification to the permittee's solid waste management permit authorizing the handling of such waste.

OPINION

The City of Philadelphia filed this appeal from the Department of Environmental Protection's (the "Department's") approval of FMRA, Inc.'s application for a major modification of its solid waste management permit (Permit No. 101687), which authorized FMRA for the first time to handle municipal solid waste at its planned waste transfer facility instead of just dredge materials and construction and demolition (C&D) waste. The Department originally issued a permit to FMRA on February 17, 2007. The permit authorized FMRA to operate a C&D waste transfer facility located at the intersection of Hog Island and Fort Mifflin Road in the City of Philadelphia. The facility has never been built.

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In 2008, FMRA applied for a permit modification. The facility would remain exclusively a dredge material and a C&D waste facility, but the permitted area of the facility would expand onto land owned by the City. In support of its application, FMRA included a Contractual Consent of Landowner Form ("landowner consent form"), which was executed by the City. The City acknowledged on that form that FMRA had the right to enter upon and use the land for the purpose of conducting waste management activities. By executing the form, the City granted the Commonwealth a right of access to the site that is irrevocable for at least ten years. The form specifically provided that there was nothing that precluded the City from terminating FMRA's right to conduct waste management activities on the property (other than closure or environmental remediation activities). The Department accepted the form and issued the permit modification.

On November 30, 2012, FMRA applied for a major modification of its permit. FMRA sought to add municipal solid waste (MSW) as an additional waste stream to be managed at the yet-to-be-built facility. As part of its application, FMRA simply resubmitted the landowner consent form that had been executed previously by the City in 2008 when the facility was limited to C&D waste. When the City received word that FMRA had applied for a permit modification to allow the facility to also handle municipal waste, it advised the Department in formal comments submitted on February 8, 2013 that the lease and sublease for the property prohibited the management of any materials at the facility beyond dredge spoils and C&D waste. The City said that it "has not and will not grant authorization for the site to be used for waste materials other than C&D debris and dredge materials as authorized in the current lease."

On or about February 25, 2013, the City sent another letter to the Department reiterating that the sublease for its property pursuant to which FMRA had possession prohibited the

processing or management of MSW at the facility. The City added that its 2008 landowner consent form was not intended to expand FMRA's rights under the lease and sublease between FMRA's affiliate, Victory Recycling, LP, and the City. The City said that it never intended to consent to the use of the property for the handling of municipal solid waste.

The Department received the City's comments and correspondence and was well aware of the City's strong opposition to the use of the facility for handling MSW. Despite this, on May 15, 2013, the Department issued the permit modification authorizing the handling of MSW. It acknowledged the City's opposition but said that the City's opposition did not constitute a basis for the Department to deny a permit because the City had not revoked its 2008 landowner consent form. The City timely filed this appeal from the Department's approval of the permit modification.

After the permit modification was issued, on May 31, 2013, the City sent the Department and FMRA a letter "withdrawing" its consent of landowner, adding that "[w]ith this withdrawal, FMRA, Inc. does not have permission from the city to conduct any solid waste management activities on the aforesaid land." The Department sent a letter to FMRA dated June 19, 2013, citing the letter of May 31, 2013, and indicating that, based on the City's letter, the Department believed that FMRA would be unable to comply with certain conditions of the permit. In its letter the Department asked FMRA to submit a written plan and schedule addressing the problem. Counsel for FMRA responded to the Department's letter by letter dated June 28, 2013, in which he stated that he and his client were in discussions with the City regarding this matter and FMRA would not begin construction of the facility until the matter was resolved with the City.

By letter dated January 8, 2014, the City advised the Department that a withdrawal of the landowner consent form had been recorded with the City of Philadelphia Department of Records. By letter dated January 10, 2014, the Department advised FMRA that, in light of the City's January 8, 2014 letter, it did not appear likely that FMRA would be able to resolve the ongoing violations noted in the letter of June 19, 2013. The Department requested a written response indicating whether FMRA wished to voluntarily request termination of its permit "or otherwise provide a factual and legal basis for why FMRA believes DEP should not pursue resolution of this matter by initiating an action pursuant to Section 503(c) of the SWMA [Solid Waste Management Act], 35 P.S. Section 6018.503, or Section 602(a) of the SWMA, 35 P.S. Section 6018.602(a)." FMRA responded that it will under no circumstances voluntarily request termination of the permit and that it has "a number of options" for resolving its dispute with the landowner. It revealed that its lease has in fact been terminated, but that Victory Recycling has taken action against the City for wrongful termination.

The City has now filed a motion for summary judgment. It argues that the Department erred as a matter of law in issuing the major permit modification authorizing FMRA to handle MSW even though it knew that the City, as landowner, did not consent to such use of its property. The Department has filed its own motion for summary judgment arguing that it was entitled to rely on the landowner's executed consent form from 2008. Interestingly if not pointedly, FMRA has not submitted any responses to the summary judgment motions.

Discussion

The Board may grant summary judgment if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Berks County v. DEP*, 2012 EHB 23; *Yoskowitz v. DEP*, 2005 EHB 401; *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in light most favorable to the nonmoving party and resolves all doubts as to the existence of a genuine issue of material fact against the moving party. *Holbert v. DEP*, 2000 EHB 796.

There is no dispute that the City as landowner does not consent to the use of its property for the purpose approved in the modified permit. It has never consented. In fact, it strongly objects to that use. The City has been very clear about its position, and remains so to this day. The Department has not contended otherwise. It has not disputed the fact that the City does not consent to the use of the property for managing MSW. As previously noted, FMRA has not participated in the summary judgment motion practice in defense of its own permit, so FMRA is obviously not contending that the City consented. Thus, there is no genuine dispute that the landowner does not consent to the use of its property as authorized in the modified permit.

The issue before us is whether we should uphold the Department's issuance of the major modification even though there is no landowner consent. The answer seems obvious: the permit modification cannot stand. Indeed, there actually is no dispute that the permit modification cannot stand. Obviously, the City holds that view. FMRA has expressed no view. The only other party, the Department, is not arguing that the permit can or should remain in place now that the landowner has withdrawn its landowner consent form and recorded that withdrawal with the recorder of deeds. To the contrary, as discussed above, it has signaled that the permit is in serious jeopardy even if this Board does not act.

Although it does not claim that the modified permit should remain in place now, the Department nevertheless attempts to convince us that its decision to issue the major modification was justified at the time. We do not think that an historical analysis is necessary. We conduct a *de novo* review of the Department's action to determine whether it was a lawful and reasonable exercise of the Department's discretion that is supported by the evidence presented before the Board. *Jake v. DEP*, EHB Docket No. 2011-126-M (Adjudication, February 18, 2014); *O'Reilly v. DEP*, 2001 EHB 19. *De novo* review involves consideration of the case anew. The Board is substituted for the Department and redecides the case based solely on the record before us, rather than deferring in any way to the Department's findings. *Young v. DER*, 600 A.2d, 667, 668 (Pa. Cmwlth. 1991); *Jake, supra*, slip op. at 10-11 (quoting *Smedley v. DEP*, 2001 EHB 131, 156). In other words, the important question is not whether the Department's action was appropriate based upon the facts as they existed at the time. The operative question is whether the Department's action was appropriate knowing what we know now. *R. R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476-77. Considering everything that we know up until this point, it is undisputed that the permit is not supported by landowner consent. No such permit can remain extant.

However, even if it were necessary or appropriate to go back in time and analyze whether the Department erred based on the facts as they existed at the time it approved the permit modification, we would conclude that the Department's action was neither reasonable nor supported by the facts. The owner of the site told the Department in no uncertain terms that it did not consent to the use of its property for the purposes sought in the major modification. The landowner's opposition was expressed repeatedly and it was unequivocal. The Department was fully aware of the landowner's opposition. The Department was presented with the lease for the

property that clearly did not authorize the use of the property for the handling of MSW. The Department has never asserted that the landowner in fact consented to the major modification.

Yet, in a clear case of elevating form (or in this case, a form) over substance, the Department disregarded the landowner, blindly relied upon a form executed in connection with a substantially different version of the permit from five years earlier, and issued the major modification. The City executed the landowner consent form at a time when its property was to be used for handling dredge material and C&D waste. There was no discussion of using the site to handle MSW. That is a very significant change. Even if we assume that it would have been reasonable for the Department to simply rely on a form executed in that earlier context as proper support for a permit modification for a major change in operations had the landowner been silent, here the landowner made it abundantly clear that it did not consent to the expanded activity, either then or now. We need not decide whether the Department acted unlawfully by relying on an old form for a major modification. Even if we assume it was lawful, the Department clearly acted unreasonably and with apparently willful ignorance in disregarding the landowner's position.

The Department's position boils down to a claim that it was entitled to rely on the City's 2008 landowner consent form to the exclusion of everything else. To be more precise, it argues that it was entitled to rely exclusively on that form because the City did not "revoke" it. The Department's actions before the permit issuance and since have made it clear that, had the City "revoked" or "limited" or "withdrawn" the form, we would not be here. The Department would not have approved the major modification and, in fact, as previously mentioned, it has now indicated that the permit is in jeopardy because the City has now withdrawn the consent form and recorded the withdrawal with the recorder of deeds.

We do not agree that some sort of formal withdrawal or revocation of the consent form is as significant as the Department makes it out to be. Initially, we do not understand how the landowner can "revoke" an irrevocable consent for site access to the Commonwealth and FMRA for regulatory oversight and pollution abatement activities, as necessary. We also do not understand why the Department would push so hard for a withdrawal or revocation of the form. A withdrawal is not necessary to limit the use of the site for waste management activities because the landowner consent form on its face makes it clear that the landowner can withdraw its consent for the use of the site for such activities, and that is exactly what the landowner did here. Furthermore, pushing for a withdrawal, even if that is legal, is contrary to the Commonwealth's interests because it puts into question the Commonwealth's right of access for regulatory oversight and the permittee's right of access for pollution abatement activities, which rights are supposed to be irrevocable.

Even if the landowner's position had been equivocal, it would have been appropriate for the Department to err on the side of caution. What we have said in the context of mining is equally applicable here in the context of solid waste management: the Department should not issue a permit for either activity unless it is confident that the owner of the site where the activity is to take place has consented to the use of its property for that purpose. *Cf. Rausch Creek Land, LP v. DEP*, 2011-137-L (Adjudication, October 11, 2013) (and cases cited therein).

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE CITY OF PHILADELPHIA	:	
	:	
v.	:	**EHB Docket No. 2013-074-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FMRA, INC., Permittee	:	

ORDER

AND NOW, this 19th day of March, 2014, it is hereby ordered as follows:

1. The City of Philadelphia's motion for summary judgment is granted.

2. The Department's motion for summary judgment is denied.

3. The major modification of Solid Waste Management Permit No. 101687 is revoked. The permit as unmodified remains in force.

4. Jurisdiction is relinquished. The docket shall be marked closed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 19, 2014

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2013-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Permittee	:	**Issued: April 1, 2014**

OPINION AND ORDER ON MOTION TO DISMISS

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants a motion to dismiss filed by the Department of Environmental Protection where an appellant, after receiving an automated email generated by the Department's eNOTICE system and following a link included in the email to an eFACTS webpage maintained by the Department, subsequently submitted a Right-To-Know Law Record Request Form ("RTKL Request") which included language indicating that the appellant understood that a permit had been renewed. The Board finds that the appellant had actual notice of the Department's renewal of the permit on the date he viewed the webpage and filed the RTKL Request, and the appellant's notice of appeal, filed more than thirty days later, was untimely.

O P I N I O N

Background

The Appellant, Laurence Harvilchuck, filed an appeal before the Environmental Hearing Board (the "Board") challenging a decision by the Department of Environmental Protection (the "Department") to issue Renewal Permit Number 37-115-21061-00-00 to Facility Authorization

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http://ehb.courtapps.com

ID 995272 McNamara Well Pad, Sub-Facility ID 1089132 McNamara 39 11H Well ("Well") located in Silver Lake Township, Susquehanna County ("Renewal Permit").[1] The Renewal Permit authorizes WPX Energy Appalachia, LLC (the "Permittee") to drill and operate the Well.

Before the Board is a Motion to Dismiss (the "Motion") filed on behalf of the Department, arguing that the Appellant filed his Notice of Appeal after the thirty-day appeal period.[2] The Permittee joined in the Department's Motion. The Appellant filed a Response to the Motion, and the Department filed a Reply to the Appellant's Response. The Permittee did not join in the Department's Reply.

Before filing his November 6, 2013 Notice of Appeal objecting to the issuance of the Renewal Permit, the Appellant, on January 28, 2013, appealed the Department's issuance of the original permit for the Well. *See* EHB Docket No. 2013-015-M (consolidated at 2013-013-M). In that Notice of Appeal, under the heading, "On what date and how did you receive notice of the Department's action," the Appellant stated:

> Notice of the Department's Action was delivered electronically to Appellant from the Department's eFACTS database by the Department's eNOTICE service in an e-mail update mailed on January 1, 2013. Written notice of the Department's action was received by Appellant on January 25, 2013 in response to a written request, dated January 4, 2013, to the Department under the Right-To-Know Law (65 P.S. § 67.703) for a copy of the Well Permit.

See Notice of Appeal, EHB Docket No. 2013-015-M (consolidated at 2013-013-M). On October 11, 2013, the Board granted the Appellant's Revised Motion for Leave to Amend Consolidated Appeal 2013-013-M to add an objection that argued that the Department failed to adequately ascertain whether the original permit was issued to the proper entity, and in its memorandum of

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[1] The Renewal Permit was issued on September 25, 2013.

[2] According to the Department, the Appellant received actual notice of the Department's decision to issue the Renewal Permit on September 30, 2013 and the Appellant filed his appeal on November 6, 2013 which is more than thirty days after September 30, 2013.

law attached to his motion suggested that the original permit should have instead been issued to WPX Energy, Inc., the parent company of WPX Energy Appalachia, Inc. *Harvilchuck v. DEP*, EHB Docket No. 2013-013-M, slip op. at 3-4 (Amended Opinion and Order issued Oct. 11, 2013).

The Parties agree that on September 25, 2013 the Department issued the Renewal Permit for the Well. Brief of Appellee Department in Support of its Motion to Dismiss ("Department's Brief") at 1; Brief in Support of Appellant's Response to Department's Motion to Dismiss ("Appellant's Brief") at 1, Exhibit ("Ex.") L. Notice of the issuance of the Renewal Permit was not published in the *Pennsylvania Bulletin*. On September 27, 2013, the Appellant received an automated email generated by the Department's eNOTICE system, a notification system designed to provide information about Departmental activities and to encourage civic engagement in environmental issues. That email informed the Appellant, in pertinent part, as follows:

> The following Permit Applications have changed as of Friday, September 27, 2013.
>
> **Silver Lake Municipality:**
> Authorization # 995239 has been updated on 9/25/2013
> Subfacility ID=1117182 Name=MCNAMARA 36 5H eMapPA search
> Authorization # 995243 has been updated on 9/25/2013
> Subfacility ID=1117197 Name=MCNAMARA 36 7H eMapPA search
> Subfacility ID=1117198 Name=MCNAMARA 36 7H eMapPA search
> Authorization # 995245 has been updated on 9/25/2013
> Subfacility ID=1117203 Name=MCNAMARA 39 9H eMapPA search
> Authorization # 995272 has been updated on 9/25/2013
> Subfacility ID=1089132 Name=MCNAMARA 39 11H eMapPA search

Appellant's Response, Ex. B.

The Appellant claims that this email provided a link to the Department's eFACTS website, a site maintained by the Department designed to enhance public knowledge of Departmental activities and to encourage greater public involvement in environmental matters. Appellant's Brief at 2. The Appellant asserts that the eFACTS website, on September 27, 2013,

indicated that the application for the Renewal Permit had been filed with the Department. *Id.* The Appellant, on that same day, submitted a Right-To-Know Law Record Request Form ("RTKL Request") to the Department requesting "a copy of the 'Permit and Application to Drill and Operate an Unconventional Well,' and all attachments thereto" as well as "all departmental records, correspondence, minutes of meetings, and transcripts from phone calls that collectively constitute the Administrative Review" of DEP Facility Authorization ID 995272, including Sub-Facility 1089132.[3] Appellant's Brief, Ex. D. The Department responded to that RTKL Request on October 18, 2013, notifying the Appellant that it did not have the records requested and that it "is not required 'to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.'" Appellant's Brief, Ex. J.[4]

On September, 30, 2013, the Appellant received a second automated email generated by the Department's eNOTICE system, informing the Appellant, in pertinent part, as follows:

> The following Permit Applications have changed as of Monday, September 30, 2013.
>
> **Silver Lake Municipality:**
> Authorization # 994038 has been updated on 9/25/2013
> Authorization # 995272 has been updated on 9/25/2013
> Subfacility ID=1089132 Name=MCNAMARA 39 11H eMapPA search

Appellant's Brief, Ex. E. The Appellant claims that this email provided another link to the Department's eFACTS website. Appellant's Brief at 3, 4. That eFACTS webpage, a copy of which the Appellant attached as Exhibit C to his Response, contains the following information:

- Authorization ID: 995272
- Permit number: 115-21061

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[3] Pennsylvania's Right to Know Law, 65 P. S. §§ 67.101-67.3104, provides citizens the right of access to certain public records.

[4] Although an initial response to the September 27, 2013 RTKL Request was due on October 4, 2013, the Department notified the Appellant by letters of October 2, 2013 and October 3, 2013 that the Department required up to an additional thirty days to respond. Appellant's Brief, Exs. G, H.

- Site: MCNAMARA WELL PAD OG ESGP
- Client: WPX ENERGY APPALACHIA LLC
- Authorization type: Drill & Operate Well Permit
- Application type: Renewal
- Authorization is for: FACILITY
- Date received: 09/18/2013
- Status: Issued on 9/25/2013
- Sub-Facility ID: 1089132
- Sub-Facility Name: MCNAMARA 39 11H
- Description: Well
- Authorization status: Issued on 9/25/2013
- Completeness Review Start Date: 9/18/2013
- Completeness Review Completion Date: 9/23/2013
- Technical Review State Date: 9/23/2013
- Technical Review Completion Date: 9/25/2013
- Permit Review Notes from 9/23/2013: "The permit application package is complete, has been accepted, and is undergoing technical review."
- Permit Review Notes from 9/25/2013: "The technical review and decision review are complete and either the permit decision and/or permit issuance are forthcoming."

Appellant's Brief, Ex. C.[5]

The Appellant then submitted a RTKL Request, dated September 30, 2013, requesting a copy of the Renewal Permit. That RTKL Request stated, in pertinent part:

> I formally request and require a copy of the Renewed Well Permit pertaining to DEP Facility Authorization ID 995272 McNamara Well Pad, Sub-Facility ID 1089132 McNamara 36 [sic] 11H Well located in Silver Lake Township, Susquehanna County, that was issued on September 25, 2013 and the notice of issuance posted to the Department's eFACTS site on September 30, 2013. . . .

[5] The Appellant contradicts himself as to the date of Exhibit C, the printed eFACTS webpage. Initially, the Appellant claims that the September 27, 2013 eNOTICE email directed him to the eFACTS webpage included as Exhibit C. However, the Appellant makes three subsequent claims that the later September 30, 2013 eNOTICE email directed him to the eFACTS webpage included as Exhibit C. *Compare* Appellant's Brief at 2 (claiming September 27, 2013 eNOTICE email linked to Exhibit C) *with* Appellant's Brief at 3, 4 (claiming September 30, 2013 eNOTICE email linked to Exhibit C). The Department did not dispute any of these four statements in its Reply. The most practical explanation for this discrepancy is that the Appellant did not print out the eFACTS webpage until he began preparing his Response to the Motion. In any event, the Appellant's Response more strongly suggests that the information in Exhibit C reflects the information available on the Department's eFACTS webpage on September 30, 2013, not September 27, 2013.

Department's Motion, Ex. A. The Appellant's RTKL Request is evidence that the Appellant understood after reading the attached webpage that the Renewal Permit was issued on September 25, 2013. On October 24, 2013, the Department responded to the September 30, 2013 RTKL Request and provided the Appellant with a copy of the Renewal Permit. Appellant's Brief, Ex. L.[6]

The Appellant ultimately filed his appeal of the Renewal Permit on November 6, 2013. In his Notice of Appeal, under the heading, "On what date and how did you receive notice of the Department's action," the Appellant stated:

> Notice of the Department's Action was published by the Department's eNOTICE service in an e-mail update mailed on September 30, 2013. Written notice of the Department's action was received by Appellant on October 24, 2013 in response to a written request by Appellant, dated September 30, 2013, to the Department under the Right-To-Know Law (65 P.S. §67.703) for a copy of the Well Permit.

See Notice of Appeal, EHB Docket No. 2013-202-M. The Appellant asserts that the thirty-day appeal period began on October 24, 2014 when he received written notice of the Department's action and a copy of the Renewal Permit. The Appellant included functionally the same objection that he successfully had added to his appeal of the original permit, discussed above, arguing that the Department failed to adequately ascertain whether the original permit was issued to the proper entity.

On January 8, 2014, the Department filed a Motion to Dismiss, arguing that the Appellant received actual notice of the Department's action on September 30, 2013, the date on which the Appellant submitted a RTKL Request asking for a copy of the Renewal Permit, and therefore the Appellant's failure to file his appeal by October 30, 2013, thirty days after the Appellant

[6] Although an initial response to the September 30, 2013 RTKL Request was due on October 7, 2013, the Department notified the Appellant by letter of October 7, 2013 that the Department required up to an additional thirty days to respond. Appellant's Brief, Ex. K.

received actual notice, deprives the Board of jurisdiction over this appeal. The Appellant disagrees that he had actual notice on September 30, 2013 and maintains that he did not have actual notice of the Department's action until he received written notification of the action on October 24, 2013, when the Department provided him with a copy of the Renewal Permit.[7]

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. A motion to dismiss will be granted only where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law.[8] *Teska*, 2012 EHB at 452; *Tinicum Township v. DEP*, 1996 EHB 816, 822.

Actual Notice

Section 4 of the Environmental Hearing Board Act provides that "[n]o action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board." 35 P.S. § 7514(c). To that end, the Board's jurisdiction extends only to timely-filed appeals. 25 Pa. Code § 1021.52(a); *Hendryx v. DEP*, 2010 EHB 127, 131; *Rostokosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976) ("[T]he untimeliness of the filing deprives the Board of jurisdiction."). The Board's Rules provide several means to determine whether an appeal is "filed with the Board in a timely manner, . . . unless a different time is provided by statute." 25 Pa. Code § 1021.52(a).

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[7] The Appellant argues that the date on which he had actual notice of the final Department action is a disputed issue of material fact. *See* Appellant's Brief at 1, 5. To the contrary, that issue is a disputed conclusion of law.

[8] The Department's Motion is supported in large part on facts outside of those stated in the notice of appeal. As a matter of practice, the Board has decided motions to dismiss based on facts outside of those stated in the appeal when the Board's jurisdiction is in issue. *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 421, n. 7; *Hendryx*, 2011 EHB at 129-30. The issue before the Board, whether the Appellant's Notice of Appeal was timely filed, is a jurisdictional issue, and the Board, in deciding the Motion, may base its decision on facts outside of those stated in the appeal.

For a person to whom the Department action is directed or issued, an appellant shall file an appeal within thirty days after receiving written notice of the action. 25 Pa. Code § 1021.52(a)(1). For any other person aggrieved by a Department action, the appellant shall file the appeal within one of two situations. If notice of the Department action is published in the *Pennsylvania Bulletin*, then the appellant shall file an appeal within thirty days after the notice is published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i). If notice of the Department action is *not* published in the *Pennsylvania Bulletin*, then the appellant shall file an appeal within thirty days after receiving actual notice. 25 Pa. Code § 1021.52(a)(2)(ii). The Appellant in this appeal is not a person to whom the action was directed or issued, and notice of the Department action under appeal was not published in the *Pennsylvania Bulletin*. The appeal is therefore subject to the actual notice standard in 25 Pa. Code § 1021.52(a)(2)(ii).

An appellant may receive actual notice through a variety of means and need not necessarily receive a physical, written notification from the Department. *Bentley v. DER*, 1989 EHB 960, 965 n.2 (finding that appellant received actual notice of permit issuance while attending a public hearing); *Emerald Coal Resources, LP v. DEP*, 2008 EHB 312, 318 (suggesting that "a posted sign clearly indicating that an approval has been granted may be sufficient [to provide actual notice] if it is seen."); *id.* ("We are not suggesting that Emerald was required to see a copy of the actual letter before it needed to file an appeal."). In addition, the Board generally insists on precision in the context of providing notice of final Department actions. *Barra v. DEP*, 2004 EHB 276, 284; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Emerald Coal Resources, LP v. DEP*, 2008 EHB 312, 319 (finding that hand-written note sent by Department employee to appellant stating, "[t]he Department's information indicates that [the Well] is active. Please call Mr. Trout at [his phone number] to verify if

needed" was too informal and imprecise to provide actual notice to appellant). The facts of a particular appeal are very important when evaluating when a person received actual notice of a Department action thereby triggering a thirty-day appeal period.

In *Emerald Coal Resources*, we declined to conclude that an appellant had received actual notice of the Department's decision to issue a well permit, even after the appellant learned from a review of an online database managed by the Pennsylvania Department of Conservation and Natural Resources called the Internet Record Imaging System ("IRIS") that the application for the permit had been submitted to and processed by the Department, because IRIS did not provide any indication that the Department had taken any final appealable action. *Emerald Coal Resources, LP*, 2008 EHB at 316-20. The Board found that the appellant did not have actual notice of the Department's final action until receipt of a letter indicating a final decision was made. *Id.* at 320. Nevertheless, the Board stated that it would have been "faced with a different case if the Department clearly expressed on IRIS that a well had been registered and, for example, its document stamps said as much or it included the registration approval letters on IRIS." *Id.* at 320-21 n.2.

In 2009, the Board, in two opinions stemming from the same set of facts and issued on the same day by former Judge George J. Miller, announced a standard for determining whether an appellant received actual notice of a Department action. *Borough of West Chester v. DEP*, 2009 EHB 308; *Telford Borough Authority v. DEP*, 2009 EHB 333. That standard, the Board stated, is whether the notice "identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board." *Borough of West Chester*, 2009 EHB at 313; *Telford Borough Authority*, 2009 EHB at 338. In 2011, the Board, in an

opinion issued by Judge Richard P. Mather, Sr., applied the same standard in *Hendryx v. DEP*, 2011 EHB 127, 134. The standard of actual notice "does not depend on the sophistication of an appellant." *Emerald Coal Resources, LP v. DEP*, 2008 EHB 312, 318; *see also Borough of West Chester*, 2009 EHB at 313 ("The standard is not whether an experienced practitioner of the law should have known to file an appeal on behalf of a client."); *Telford Borough Authority*, 2009 EHB at 338; *Solebury Township v. DEP*, 2003 EHB 208, 215 ("[I]t is unreasonable to assume that members of the public are intimately acquainted with the minutiae of the Department's manner of administering its regulatory programs . . . ." (quoting *P.R.I.D.E. v. DER*, 1986 EHB 905, 907.")); *Hendryx*, 2011 EHB at 134.

In *Borough of West Chester* and *Telford Borough Authority*, the Department filed motions to dismiss arguing that the appellants failed to timely file their appeals of certain TMDLs because the appeals were filed more than thirty days after an individual, who later became the appellants' counsel, received an email notifying him that the TMDLs had been "established" by the United States Environmental Protection Agency. *Borough of West Chester*, 2009 EHB at 308-10; *Telford Borough Authority*, 2009 EHB 333-35. The Appellants argued that they had no reason to know that the Department was involved in the development of the TMDLs until the following month when the appellants received letters from the Department, less than thirty days after which the appellants filed their appeals. *Borough of West Chester*, 2009 EHB at 310; *Telford Borough Authority*, 2009 EHB at 335.

The Board held that the emails were insufficient to provide actual notice to an ordinary member of the public that the Department took an appealable action. *Borough of West Chester*, 2009 EHB at 311; *Telford Borough Authority*, 2009 EHB at 336. The Board "reject[ed] the notion that the voluminous website content that the e-mail directed the individuals to provided

adequate notice of an action of the Department." *Borough of West Chester*, 2009 EHB at 313; *Telford Borough Authority*, 2009 EHB at 338. "Just as the Board has not required members of the public to review voluminous permits in the face of an insufficient *Pennsylvania Bulletin* notice," the Board did "not find that the [appellants] should have discovered that [they were] aggrieved by an action of the Department by reviewing voluminous content on another agency's website." *Borough of West Chester*, 2009 EHB at 313-14; *Telford Borough Authority*, 2009 EHB at 338-39.

More recently, at issue in *Hendryx v. DEP* was an appeal of the Department's revision to a Water Management Plan authorizing East Resources, Inc. to withdraw water from a site on the Allegheny River for use at a number of its Marcellus Shale permitted natural gas well sites. *Hendryx v. DEP*, 2011 EHB 127, 128-29. The appellants received an email on July 27, 2010 from the board president of the Allegheny Defense Project, which included an attached copy of a letter from John Hanger, then the Secretary of the Department. *Id.* at 130. The attached letter briefly referred to a Water Management Plan authorizing East Resources, Inc. to withdraw water from the Allegheny River and included a footnote which contained a hyperlink to the Department's approval letter for the Water Management Plan. *Id.* The Department claimed that the email provided the appellants with actual notice on July 27, 2010, and therefore the appellants' September 16, 2010 appeal, which was filed fifty-one days later, was untimely. *Id.* at 130-31. The appellants, on the other hand, claimed they received actual notice on August 24, 2010 through information acquired in discovery in a related appeal of a well drilling permit. *Id.* at 131.

The Board held in *Hendryx* that the email was insufficient to provide actual notice to an ordinary member of the public that the Department took an appealable action. *Id.* at 133-34.

The Board found that an ordinary member of the public would not "be able to see that they would be affected by the issuance of a particular [Water Management Plan] without additional information from the Department or the Permittee." *Id.* at 134. Further, the Board reasoned that appellants do not "have a duty to investigate all materials that they receive from third parties to look for clues of actual notice of a Department action of interest to them." *Id.* at 133.

The Board applies the ordinary person standard in appeals where the Board lacks information indicating that an appellant had in fact understood the nature or significance of the communication or information that the appellant received, such as in *Emerald Coal Resources*, *Borough of West Chester*, *Telford Borough Authority* and *Hendryx*. In those cases, the Board lacked any further information, other than the Department's notification or communication, to indicate whether the appellants had actual notice of the action under appeal. Absent facts indicating that an appellant understood or appreciated the nature or significance of the received communication, the Board applies the ordinary person standard. We will, however, consider additional information regarding any actions taken by an appellant that indicate the appellant in fact had actual notice that the Department took an appealable action. The Board's review is not limited only to the application of the ordinary person standard.

Here, the Board does not have to rely solely on the ordinary person standard to determine that the Appellant had actual notice on September 30, 2013. The Board has been presented with information that the Appellant acted in a way that demonstrated that he received actual notice on September 30, 2013 that the Department had issued the Renewal Permit. After receiving the Department's automated eNOTICE email and following a link contained in that email to the Department's eFACTS webpage for the Well, the Appellant submitted a RTKL Request, dated

September 30, 2013, requesting a copy of the Renewal Permit. That RTKL Request stated, in pertinent part:

> I formally request and require a copy of the Renewed Well Permit pertaining to DEP Facility Authorization ID 995272 McNamara Well Pad, Sub-Facility ID 1089132 McNamara 36 [sic] 11H Well located in Silver Lake Township, Susquehanna County, that was issued on September 25, 2013 and the notice of issuance posted to the Department's eFACTS site on September 30, 2013. . . .

Department's Motion, Ex. A. The Department argues that the Appellant, by his own admission in his September 30, 2013 RTKL Request, "demonstrate[ed] his awareness" of "various details concerning the issuance of the Renewed Well Permit, including the date of issuance, the township and county where the well is located, and the well authorization and subfacility numbers . . . ." Department's Brief at 3; Department's Reply at 5-6. We agree. The Appellant, in his RTKL Request, expressed that he viewed the eFACTS webpage and that he understood on September 30, 2013 that the Renewal Permit had been issued.

The factual situation presented in this appeal differs significantly from the facts in *Emerald Coal Resources*, *Borough of West Chester*, *Telford Borough Authority* and *Hendryx*, where the appellants took no subsequent actions indicating whether they had actual notice of the Department action at issue. For example, in *Hendryx*, where the appellants received an email with an attached letter containing a link inside a footnote to the Department's approval letter for a particular Water Management Plan, the appellants never admitted to taking further action, such as following the link to the Department's approval letter. In this appeal, however, the Appellant admitted to following the link included in the eNOTICE email directing him to the eFACTS webpage, he admitted to viewing the webpage, and, in his September 30, 2013 RTKL Request, he admitted to understanding that a Department action was taken. Appellant's Brief at 3, 4; Department's Motion, Ex. A.

The Department also argues that "[b]ecause Appellant is already in litigation regarding the issuance of the original permit he clearly has a greater understanding of whether or not he would be affected by the renewal of a permit," particularly where the Appellant asserts in both appeals that the permit may have been issued to an improper entity. Department's Reply at 4; *see also* Department's Brief at 4. The Board agrees. The Appellant did not have actual notice simply because he acted after receiving the Department's electronic notification. Having acknowledged in his RTKL Request that the Renewal Permit was issued, the Board finds that because the Appellant had appealed the issuance of the original permit for the Well, particularly on grounds that the permit may have been issued to an improper entity, the Appellant had sufficient information to understand that he would be affected by the issuance of the Renewal Permit for the purposes of filing an appeal with the Board.

In response to the Department's argument that the Appellant's RTKL Request is evidence of actual notice, the Appellant argues that he needed to be served with a written copy of the Renewal Permit before he could be deemed to have received actual notice of the Department's issuance of the Renewal Permit. The Appellant states in his Response that:

> it is unreasonable for the Department to suggest in its Brief that this Appellant, both acting *pro se* and who is neither a practicing attorney nor otherwise endowed with specialist knowledge or expertise of how the Department arrives at its own Unconventional Oil and Gas Well Permitting decisions, could possibly have been aware of the actual contents of the Application . . . and any resulting grounds for appeal merely through the distribution of a terse automated e-mail message that is Exhibit E linked to an equally terse status page on the Department's public website (Exhibit C) and without being furnished a true copy of the Application and the resulting Permit . . . .

Appellant's Brief at 3. The Appellant claims that he requested a copy of the Renewal Permit "to determine whether or not grounds existed for a good faith appeal of the Department's

action . . . ," Appellant's Brief at 2, and that "it is implausible for the Department to expect" that the Appellant had actual notice based on the contents of the September 30, 2013 eNOTICE email and the eFACTS webpage without having received from the Department a copy of the Renewal Permit and after having reviewed the Renewal Permit "in detail." Appellant's Brief at 4-5. On that point, the Appellant is simply incorrect on the law. The Board has never held that an appellant must receive a written copy of a Department action before the Board would deem the appellant to have had actual notice of that action under 25 Pa. Code § 1021.52(a)(2)(ii).

Evaluating the Department's Motion to Dismiss in the light most favorable to the Appellant, the Board finds that no material issues of fact are in dispute and the Department is entitled to judgment as a matter of law. The Appellant had actual notice of the Department's issuance of the Renewal Permit because the Appellant's RTKL Request indicates that he was aware that the renewal permit was issued and because his pending appeal of the original permit for the Well indicates that he understood that the Department's issuance of the Renewal Permit would affect him for purposes of filing an appeal with the Board.

As a further word on the Department's eNOTICE and eFACTS systems, we believe that without the Appellant's assertions in his September 30, 2013 RTKL Request and the pending appeal of the original well permit, the ordinary person standard would not have been met here. The Appellant received two automated eNOTICE emails related to the Renewal Permit's application and issuance. The contents of those two emails have been provided above. *See supra* at pp. 3, 4. Neither of those two emails provides sufficient information for an ordinary person to understand that the Department took an appealable action. An appellant may receive actual notice through a variety of means, but the Board, however, generally insists on precision in the context of providing notice of final Department actions, and the two automated eNOTICE

emails are far from precise. Those emails provide only that certain permit applications have "changed." Appellant's Brief, Exs. B, E. Opening and viewing an email generated by the Department's eNOTICE system alone does not impute actual notice on an appellant.

The two automated eNOTICE emails contained links to a Department eFACTS webpage for the Well. The September 27, 2013 email included a link which directed the Appellant to the eFACTS webpage for the Well at a time when the webpage notified viewers only that an application for the Renewal Permit was filed, but not that the Renewal Permit had been issued.[9] Appellant's Brief at 2. Further, the Department did not argue in its Motion that the Appellant had actual notice on September 27, 2013. Accordingly, the Board finds, under the ordinary person standard, that the Appellant did not have actual notice that the Renewal Permit was issued upon viewing the eFACTS webpage on September 27, 2013.

The September 30, 2013 eNOTICE email, however, included a link which directed the Appellant to the eFACTS webpage for the Well at a time when additional information made the Appellant aware that the Renewal Permit had been issued. Nevertheless, the information provided on the eFACTS webpage, which is summarized above, would not have provided an ordinary person with actual notice that the Department took an appealable action. First, the webpage contains no geographical information, which is critical to providing actual notice. Second, the webpage does not indicate in a precise manner that the Renewal Permit was issued, but instead an ordinary person would have to piece together from the terms "authorization type," "application type," "status" and "authorization status" that the renewal had been issued, and even that is not entirely clear. Third, the webpage contains no contact information, unlike what is provided in notices in the *Pennsylvania Bulletin*. In short, while a sophisticated person diligently tracking this permit may have been aware by viewing the eFACTS webpage for the Well on

[9] The Appellant asserted this fact, *see* Appellant's Brief at 2, and the Department did not dispute it.

September 30, 2013 that the Renewal Permit had been issued, an ordinary person would not have had sufficient information and clarity to draw such a conclusion.

It is apparent that the Department developed these systems to provide more widespread dissemination of information to the public and to encourage greater civic engagement in environmental concerns. The Department should be commended for these efforts. The Department's efforts to improve public access to information about its activities presents the Board with new issues as the Board applies its Rules at 25 Pa. Code § 1021.52 governing the timeliness of appeals. The Board does not wish to see the Department's enhanced public participation systems used to limit an appellant's right to file a timely appeal and to limit the Board's jurisdiction.

While the Board has some sympathy for the Appellant's position in this appeal, under the facts of this appeal, the Appellant's appeal was not timely filed pursuant to 25 Pa. Code § 1021.52(a)(2)(ii). The Appellant had actual notice on September 30, 2013 of the Department's issuance of the Renewal Permit, and his appeal on November 6, 2013, filed more than thirty days later, was untimely.

Nunc Pro Tunc

The Appellant further requests that if the Board finds that his Notice of Appeal was filed untimely, then the Board permit the filing *nunc pro tunc* to prevent conflicts and overlaps amongst the Board's Rules, and because the Department provided the Appellant with a copy of Renewal Permit only six days before the thirty-day appeal period expired, which limited his ability to determine whether he had grounds to file an appeal. The Board rejects this Appellant's argument for a number of reasons.

The Board's thirty-day appeal period is "jurisdictional in nature, and cannot be extended as a matter of grace." *Ametek, Inc. v. DEP*, EHB Docket No. 2013-223-R, slip op. at 4 (Opinion and Order issued Feb. 24, 2014); *Stoney Creek Technologies, LLC v. DEP*, 2007 EHB 624, 626 (citing *Rostoksy v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976), and *Ziccardi v. DEP*, 1997 EHB 1)). The Board's Rules provide that "[t]he Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." 25 Pa. Code § 1021.53a. The Board and other Pennsylvania courts have generally defined "good cause" to include fraud, a breakdown in the court's operation, or unique and compelling circumstances establishing a non-negligent failure to file a timely appeal. *Ametek, Inc.*, slip op. at 5 (citing *Stoney Creek Technologies, LLC v. DEP*, 2007 EHB 624, 627; *Grimaud v. Department of Environmental Resources*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); and *Glantz v. DEP*, 2006 EHB 841, 842). Recently, the Pennsylvania Superior Court stated that *nunc pro tunc* relief is "intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain *extraordinary circumstances*." *Vietri v. Delaware Valley High School*, 63 A.3d 1281, 1284 (Pa. Super. 2013) (quoting *Union Electric Corp. v. Board of Property Assessments, Appeals and Review*, 746 A.2d 581, 584 (Pa. 2000) (emphasis in original)).

The Appellant does not argue that there has been fraud or a breakdown in the court's operation.[10] He seems, however, to argue that there are extraordinary circumstances or unique

[10] The Appellant did claim that the Department falsely denied that it possessed the application for the Renewal Permit requested in the Appellant's September 27, 2013 RTKL Request. Appellant's Brief at 2. The Appellant has not, however, indicated that he appealed the Department's response to that request to any venue, and, thus, the Department's response to that request is not at issue in this appeal.

and compelling circumstances establishing a non-negligent failure to file a timely appeal. We do not agree. The Board's Rule largely at issue in this appeal is 25 Pa. Code § 1021.52(a), which provides that any person aggrieved by an action of the Department shall file an appeal with the Board within thirty days after *actual notice* of the action if a notice of the action is not published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2)(ii). The Board has a separate Rule found at 25 Pa. Code § 1021.51(d), which states that if an appellant has received *written notification* of an action of the Department, then a copy of the action must be attached to the appeal. The former rule relates to when an appeal must be filed, which is jurisdictional, whereas the latter rule relates to what must be included in an appeal, which is not jurisdictional. The two rules impose separate requirements.[11] The written notification referred to in 25 Pa. Code § 1021.51(d) may in fact provide an appellant with actual notice under 25 Pa. Code § 1021.52(a), but then again, as evident in this appeal, it may not.

The Board does not view the Department's eNOTICE or eFACTS systems as written notification under 25 Pa. Code § 1021.51(d), so under the facts of this appeal the Appellant was not provided with written notification until October 24, 2013 when the Department responded by letter to the Appellant's September 30, 2013 RTKL Request. If the Appellant had filed his notice of appeal prior to October 24, 2013, he would not have been required to attach a copy of the action. If he had filed his notice of appeal from October 24, 2013 to October 30, 2013, then he would have been required to attach a copy of the action. The Appellant, however, filed his appeal untimely, on November 6, 2013, after the thirty-day appeal period ended.

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[11] The Appellant seems to have acknowledged this distinction in his Notice of Appeal, where he states that "Notice of the Department's Action was published by the Department's eNOTICE service in an e-mail update mailed on September 30, 2013," then states that "Written notice of the Department's action was received by Appellant on October 24, 2013 in response to a written request by Appellant, dated September 30, 2013, to the Department under the Right-To-Know Law (65 P.S. §67.703) for a copy of the Well Permit." *See* Notice of Appeal, EHB Docket No. 2013-202-M.

The Appellant's argument in support of his *nunc pro tunc* request, that his receipt of a copy of Renewal Permit only six days before the thirty-day appeal period expired limited his ability to determine whether he had grounds to file an appeal, is legally and practically invalid. First, as discussed earlier in this Opinion, the Board has never held that an appellant must receive a written copy of a Department action before the Board would deem the appellant to have had actual notice of that action. The Board also has rejected the argument that an appellant must be provided an opportunity to inspect technical documentation to form a basis for an appeal as a prerequisite to receiving actual notice under 25 Pa. Code § 1021.52. *Township of Robinson v. DEP*, 2007 EHB 139, 144.

Second, even if the Appellant felt that he could not have prepared a good faith notice of appeal by the filing deadline of October 30, 2013, the Board's Rules provide appellants with twenty days to amend their appeals as of right. 25 Pa. Code § 1021.53(a). The Board's general practice when an appellant fails to comply with 25 Pa. Code § 1021.51(d) and attach a copy of an action to an appeal is to issue an order requiring the appellant to perfect that appeal by providing the Board with a copy of the action. As a practical matter, appellants are actually given fifty days, from the time they receive actual notice, to attach a copy of the action to their appeal, assuming that they received written notification prior to filing their appeal. Rather than waiting until November 6, 2013, the Appellant had the option to file his appeal prior to the thirty-day deadline, then take up to twenty days to further inspect the Renewal Permit and amend his appeal as of right within those twenty days, which, if the Appellant filed his appeal on October 30, 2013, would have ended November 19, 2013. The Appellant showed that he could file a complete appeal within this timeframe because he did in fact file a complete appeal with detailed objections and an attached a copy of the action on November 6, 2013.

The Appellant has failed to show extraordinary circumstances or unique and compelling circumstances establishing a non-negligent failure to file a timely appeal and therefore has failed to demonstrate good cause for allowing his appeal *nunc pro tunc*.

Mootness

On January 13, 2014, the Permittee filed a Motion for Admission Pro Hac Vice of Lisa A. Decker, which the Board granted on January 15, 2014. On January 16, 2014, the Appellant filed a Motion to Rescind the Order Granting Pro Hac Vice Admission of Lisa A. Decker on Behalf of WPX Energy Appalachia, LLC ("Motion to Rescind"), setting forth a few tenuous objections to the Board's order granting Ms. Decker's motion for admission pro hac vice. The Board's determination that this appeal was filed untimely deprives the Board of jurisdiction to hear this appeal, and therefore the Appellant's Motion to Rescind is denied as moot.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2013-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 1st day of April, 2014, it is hereby ordered as follows:

1. The Department's Motion to Dismiss is **granted**.

2. The above-captioned appeal is **dismissed**, and the docket shall be marked closed and discontinued.

3. The Appellant's Motion to Rescind the Order Granting Pro Hac Vice Admission of Lisa A. Decker on Behalf of WPX Energy Appalachia, LLC is denied as **moot**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: April 1, 2014

c: **DEP, General Law Division:**
Attention: Priscilla Dawson
9th Floor, RCSOB

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Denver, CO 80202

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2013-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Permittee	:	

DISSENTING OPINION OF
CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND

I respectfully disagree with my colleagues in the majority. While I agree with the majority's position that the eNOTICE and eFACTS issued in this instance do not constitute notice of a Department action, I disagree with their conclusion that because the Appellant filed a Right to Know request based solely on those same eNOTICE and eFACTS documents that he had actual notice as a matter of law. How can the Board hold that these electronic documents do not constitute notice yet at the same time hold that the Appellant did in fact have proper notice because he acted after viewing those same documents?

The eNOTICE and eFACTS at issue in this appeal simply do not contain sufficient information from which a reasonable person could determine what action has been taken or whether he or she is adversely affected by it. My colleagues, in my humble opinion, confuse the generic term "notice" with that of the legal notice which is sufficient to start the clock running on the Board's 30 day appeal period. Our rules state that in a third-party appeal where no notice has been published in the Pennsylvania Bulletin, the appeal must be filed within 30 days of "actual notice" of the action. 25 Pa. Code § 1021.52(a)(2)(ii). The standard for what constitutes "actual notice" has long been established as requiring something more than a vague reference to a

Department action. Former Chief Judge Krancer enunciated the standard in *Solebury Township v. DEP*, 2003 EHB 208, 213, as follows:

> It is virtually black letter law that notice provided must be at least that which is reasonably calculated to inform interested parties of the action taken and provide the information necessary to provide an opportunity to present objections. . . .

(*citing Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Pennsylvania Coal Mining Assn. v. Insurance Dept.*, 370 A.2d 685 (Pa. 1977)).

Former Judge Miller further set forth the standard in *Borough of West Chester v. DEP*, 2009 EHB 308, 312, and *Telford Borough Authority v. DEP*, 2009 EHB 333, 337, by clarifying that "actual notice" is not some vague reference to an action, but notice that "identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board." As Judge Labuskes further held in *Emerald Coal Resources, LP v. DEP*, 2008 EHB, 312, 319, "If a party cannot determine from a document that the Department has taken action, then actual notice of the alleged action cannot be said to have occurred. Hints or vague references that a Department action may have occurred do not suffice."

The Commonwealth Court also enunciated the standard required for a notice required to pass constitutional muster in *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994):

> Constitutionally adequate notice of administrative action is notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Both my colleagues in the majority and Judge Beckman in his dissenting opinion conclude that because the Appellant had adequate information to submit a request under

Pennsylvania's Right to Know Law, 65 P.S. § 67.101 *et seq.*, he therefore must have had sufficient notice to file an appeal before the Board. I strongly disagree. Simply because Mr. Harvilchuck had basic information, such as the date the renewal permit was issued, does not somehow provide him with enough information to ascertain if he was adversely affected. In my opinion, this "belt and suspenders" approach adopted by the majority is an incorrect assumption to make and is likely to have a chilling effect on members of the public who wish to exercise their rights under the Right to Know Law because, clearly by doing so here, Mr. Harvilchuck has lost his appeal rights before the Board.

The question presented in this case is not whether the eNOTICE and eFACTS provided notice of some action that the Department had taken or was about to take, but whether those notices contained *sufficient* information to allow the Appellant to make a determination as to whether he was adversely affected. A review of the eNOTICE and eFACTS at issue here leads me to conclude that they contain nothing that would allow an ordinary member of the public to determine whether he was adversely affected or that would allow him to formulate the basis for any objection.

The electronic notice that Mr. Harvilchuck received on September 30, 2013 stated simply, "The following Permit Applications have *changed* as of Monday, September 30, 2013." (App. Response, Ex. B) (emphasis added). Under the heading "Silver Lake Municipality" two "authorization" numbers are listed, stating as follows:

> Authorization # 994038 has been updated on 9/25/2013
> Authorization # 995272 has been *updated* on 9/25/2013
> Subfacility ID=1089132=MCNAMARA 39 11H eMapPA search

(App. Brief, Ex. E) (emphasis added). The eNOTICE contains no reference to a permit being issued or the contents of such permit. The eNOTICE directs one to an eFACTS webpage that concludes with the following statement: "Permit Review Notes from 9/25/13: 'The technical

review and decision review are complete and either the permit decision and/or permit issuance are *forthcoming*.'" (App. Brief, Ex. C) (emphasis added). It is not entirely clear from this statement whether the permit has been issued or will be issued at some point in the future, much less put a person on notice as to whether he or she is adversely affected by it. Although the eFACTS page also states "Authorization status: Issued on 9/25/13," at the very least it is confusing. While the information contained on the webpage may be clear to a program person at the Department, I doubt it is clear to ordinary members of the public (this Judge included).

Moreover, neither the eNOTICE nor eFACTS set forth any of the details or conditions of the renewed permit. Without at least some basic information of what is in the renewed permit a member of the public has no way of knowing if his or her interests are affected.

As stated in *Borough of West Chester*:

> [T]he standard for the adequacy of the notice is whether it clearly identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board. The standard is not whether an experienced practitioner of the law should have known to file an appeal on behalf of a client.

2009 EHB at 313. Where questions of fact exist in the context of a motion to dismiss, they must be resolved against the moving party, in this case, the Department. *GEC Enterprises, Inc. v. DEP*, 2010 EHB 305, 307.

The majority points out that Mr. Harvilchuck appealed the original permit issuance, which presumably put him on notice as to the contents of the renewal permit. However, there is nothing in the eNOTICE or eFACTS that would indicate the terms of the renewal permit are identical to those of the original. Quite simply, the eNOTICE and eFACTS contain no information of substance regarding the permit renewal.

The Board's rules are quite clear that a notice of appeal must contain specific objections to the action being appealed. Section 1021.51(e) of the Board's rules states, "The appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department." 25 Pa. Code § 1021.51(e). The failure to file specific grounds for an appeal is a defect that goes to the jurisdiction of the Board. *People United to Save Homes v. Department of Environmental Protection,* 789 A.2d 319 (Pa. Cmwlth. 2001). Objections not raised in a notice of appeal are considered to be waived. *Thomas v. DEP*, 1998 EHB 93, 97.

As a result, the Appellant in this matter took the most prudent course of action - he made a timely request to see a copy of the permit before filing an appeal of it. One can only conclude that he did so in order to 1) be given notice of whether he was adversely affected by it and 2) formulate his objections to the permit. The majority's view that a person should be required to file an appeal of an action without being able to *see* the action is the antithesis of due process. Indeed, at the two most recent meetings of the Environmental Hearing Board Rules Committee, even the Department's representatives advocated that appellants should be required to obtain a copy of the action before filing their appeal. (Minutes of Environmental Hearing Board Rules Committee meetings of March 13, 2014 and January 9, 2014). In my view, the fact that Mr. Harvilchuck's due diligence is the basis for dismissal of his appeal violates basic due process.

On the very day that he received the eNOTICE and looked at the eFACTS webpage, Mr. Harvilchuck submitted an email request to the Department under Pennsylvania's Right to Know Law, *supra*, requesting a copy of the permit. Under the provisions of the Right to Know Law, an agency is required "to respond as promptly as possible under the circumstances existing at the time of the request," but in no event exceeding five days. 65 P.S. at § 67.901. Therefore, a response to Mr. Harvilchuck's request was due on or before October 7, 2013. The Right to

Know Law allows an agency to take an additional 30 days if certain circumstances are present, such as the need for redaction of a record, the record is stored in a remote location, a timely response cannot be accomplished due to staffing limitations, a legal review is necessary in order to determine if a record is subject to the Law, the requester did not comply with agency policies, the requester refuses to pay applicable fees, or the extent or nature of the request precludes a response within five days. *Id.* at § 67.902. Here, the Department stated that it required an additional 30 days to respond to Mr. Harvilchuck's request "for the reason(s) checked below." However, no reasons were checked. (App. Brief, Ex. K). The Department did not provide Mr. Harvilchuck with a copy of the permit until October 24, 2013, 24 days after he made the request. (App. Brief, Ex. L). Mr. Harvilchuck filed his appeal within 13 days after receipt of the permit. In my opinion, the 30 day appeal period began on the date Mr. Harvilchuck received a copy of the renewal permit because until that point, he did not have notice as to whether he was adversely affected by the action. In my opinion, Mr. Harvilchuck's appeal was timely.

In *Solebury Township v. DEP*, 2003 EHB 208, the Board found that a notice in the Pennsylvania Bulletin lacked the appropriate specificity to constitute notice for purposes of calculating the start of the appeal period. That case dealt with the Department's approval of a Section 401 certification under the Federal Water Pollution Act. The action consisted of a letter stating that the Department was approving the environmental assessment for the project and that approval of the environmental assessment included the Section 401 certification. However, the notice in the Pennsylvania Bulletin stated only that the Department had granted approval of the environmental assessment. The Board found that the Pennsylvania Bulletin notice was not reasonably calculated to provide notice of the Section 401 certification, even though the Department argued that they were one and the same. The Board concluded that the question of

the adequacy of the notice was a disputed question of fact or a mixed question of fact and law, or, at the very least, it was not clear that the Department was entitled to judgment as a matter of law.

As stated by former Chief Judge Krancer in *Solebury*, "We do not think it is unreasonable, on a motion to dismiss, to construe the published notice strictly against the party or parties seeking to rely on it. This is especially so where the Department is one of those parties seeking to rely on the notice and it is the party who controls the publication of the notice." 2003 EHB at 217.

While I do not think there is any question that Mr. Harvilchuck did not have actual notice of the Department's action simply based on his review of the eNOTICE and eFACTS at issue here, it is at best a disputed question of law and fact and, therefore, inappropriately addressed in the context of a motion to dismiss. As Judge Mather eloquently stated in *GEC Enterprises, supra*, a motion to dismiss may only be granted when the matter is free from doubt and the moving party is clearly entitled to judgment as a matter of law. 2010 EHB at 307. Those circumstances are not present here. *See also, Thomas, supra* at 98 ("The Board is reluctant to grant a Motion to Dismiss on any but the clearest of issues since it precludes an appellant from making his case.")

Even if my colleagues disagree with the view that the appeal period began on the date that Mr. Harvilchuck received a copy of the renewal permit, at the very least they should allow Mr. Harvilchuck to file his appeal *nunc pro tunc*. Mr. Harvilchuck made a timely request for a copy of the renewal permit. The Department could have provided Mr. Harvilchuck with a copy of the permit within the five day period provided for by the Right to Know Law. Instead, it chose to take the 30 day extension, but provided no reason for doing so. If it is the Department's

practice to take the 30 day extension on all or most Right to Know Law requests for a copy of an action by a member of the public, this presents a dilemma for the public who wish to file appeals before the Board: At worst, it prevents a person from being able to file a timely appeal and, at best, it requires a person to appeal without the knowledge of whether he or she is adversely affected by the action. In my opinion, this constitutes a breakdown in operations and presents good cause for allowing the appeal *nunc pro tunc*. 25 Pa. Code § 1021.53a ("The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*. . . ."); *Ametek, Inc. v. DEP*, EHB Docket No. 2013-223-R (Opinion and Order issued February 24, 2014) (Good cause may be demonstrated where there is fraud, breakdown in the court's operation, or other non-negligent failure to file a timely appeal).

The notice in this case was not legally sufficient to constitute actual notice. Therefore, I would deny the motion to dismiss and find that the appeal in this case was timely filed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: April 1, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2013-202-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Permittee	:	

DISSENTING OPINION OF
JUDGE STEVEN C. BECKMAN

Like my colleague, Chief Judge Renwand, I respectfully dissent from the decision of the majority in this case. However, because I do so on different grounds, I am compelled to write a separate dissent. Unlike Chief Judge Renwand, I agree with the majority's decision that the appellant's appeal in this matter was untimely because it was filed more than 30 days after he had actual notice of the Department's issuance of the Renewal Permit that is the subject of the appeal. I find the majority's reasoning supporting that decision persuasive and further agree that the e-mail eNotice and the information on the eFACTS webpage alone were not sufficiently clear by themselves to constitute actual notice, a position that I believe is consistent with the position of both the majority and Chief Judge Renwand. Where I differ from the majority is in my determination that the Board should grant Mr. Harvilchuck's request to proceed *nunc pro tunc*, and I reach that position for reasons different than those expressed by Chief Judge Renwand.

Mr. Harvilchuck requests that he be permitted to proceed *nunc pro tunc* "to prevent conflicts and overlaps amongst this Board's published mandate to include a copy of the Department's action in filing a Notice of Appeal with this Board as declared within Exhibit A, the 30 day window permitted to the Department to either affirmatively or passively respond to

requests for the provision of a written copy of the Department actions under 65 P.S. 67.902, and the 30 day window for timely filing of a Notice of Appeal pursuant to 25 Pa. Code 1021.52(a)(2)(ii)." The conflict alluded to by Mr. Harvilchuck was, in part, generated by the Notice of Appeal form and instructions promulgated by the Board, a copy of which is attached to his Brief as Exhibit A. The version of the form and the instructions reproduced at Exhibit A were the version that appeared on the Board's website in September 2013, during the time that Mr. Harvilchuck was filing his appeal.[12] The form can reasonably be read to require that all parties appealing a Department action must attach a copy of the action to their appeal. The form says exactly that, stating in bold red text: "NOTE: You must attach a copy of the action to this form." (Appellant's Ex. A, 1.) Earlier versions of the Board generated Notice of Appeal form dated February 2006, January 2010 and January 2012 all contain similar language stating that a copy of the action of the Department must be attached. The instructions included with the September 2013 Notice of Appeal form state the following: "Documents and Additional Information that Must be Submitted with a Notice of Appeal: 1. You must attach a copy of the action for which review is sought to the Notice of Appeal (for example, the letter, order, or permit which you received from the Department)." (Appellant's Ex. A, ii.) The forms and the instructions can reasonably be read to require that a copy of the permit must be attached to a

[12] I note that the actual form used by Mr. Harvilchuck to file his appeal is not the version of the form (revised September 2013) that he attached as Exhibit A to his Brief, which contains the misstatement about what must be attached to the Notice of Appeal. The form he did use does not contain the directive that a copy of the action must be attached. That certainly calls into question what Mr. Harvilchuck reviewed prior to filing his appeal and whether he was even aware of the alleged requirement to file a copy of the action with the Notice of Appeal. Prior to this appeal, Mr. Harvilchuck had filed five other appeals of well permits (currently consolidated at 2013-013-M) and I note that he attached a portion of the permit to each of these Notices of Appeal. In his Response to the Department's Motion to Dismiss and accompanying Brief, he sets forth the contention that he believed he was mandated to attach a copy of the action. Viewing all of this in the light most favorable to Mr. Harvilchuck, as we are obligated to do at this point in the proceeding, what Mr. Harvilchuck was aware of regarding the alleged mandate at the time of filing his Notice of Appeal appears to me to be a fact issue, further counseling against dismissing the appeal at this stage.

Notice of Appeal in order for it to be filed with the Board. As a matter of fact, I think many people would interpret the language in that fashion.

Unfortunately, the language on the form and in the instructions quoted above and cited by Mr. Harvilchuck does not accurately reflect the actual language of the Board's regulations. The Board's regulation addressing what must be included with the Notice of Appeal, as cited in the majority opinion, and found at 25 Pa. Code § 1021.51(d) states that *if* an appellant has received written notification of an action of the Department, *then* a copy of the action must be attached to the appeal. The Board has recognized this inconsistency and the language of the current version of the Notice of Appeal form tracks the regulatory language and states: "NOTE: If you received written notification of the action, you must attach a copy of the action to this form." I find that the inaccurate language in the Board's form, compounded with the regulatory requirement to file the appeal within 30 days of actual notice, as well as the amount of time it took for the Department to respond to Mr. Harvilchuck's Right to Know request created an unreasonably narrow window for the Appellant to timely file his Notice of Appeal.

It is important to note that Mr. Harvilchuck immediately requested a copy of the permit on receipt of actual notice and he acted promptly to file his Notice of Appeal once he received a copy of the permit. This reflects diligence on his part and, therefore, this is not a case where a party idly sat on his or her appeal rights for an extended period of time and then came to the Board seeking extraordinary relief. Viewing all of the facts in the light most favorable to the non-moving party, with a particular concern about the role that the Board's own form and instructions played in the potential for confusion, I conclude that Mr. Harvilchuck has demonstrated good cause for the Board to allow him to proceed *nunc pro tunc*. I believe that the facts of this case demonstrate, at minimum, compelling circumstances establishing a non-

negligent failure to file a timely appeal, and potentially rise to the level of a breakdown in Board operations. Therefore, I dissent from the decision of the majority which found that Mr. Harvilchuck failed to demonstrate good cause for allowing his appeal *nunc pro tunc*.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 1, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF GLENDON	:	
	:	
v.	:	**EHB Docket No. 2013-047-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and REHRIG PENN LOGISTICS (a/k/a REHRIG PACIFIC LOGISTICS), Intervenor	:	**Issued: April 4, 2014**

OPINION AND ORDER
ON JURISDICTION

By: Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal taken by one party from an email that the Department sent to a different party, which opined that the recipient of the email did not need to get a solid waste permit. The Board finds that the Department's email is not an appealable action over which the Board has jurisdiction.

OPINION

The Borough of Glendon (the "Borough") filed this appeal of an email sent from the Department of Environmental Protection (the "Department") to Rehrig Penn Logistics (a/k/a Rehrig Pacific Logistics) ("Rehrig"). Rehrig operated a facility located in the Borough in Northampton County where it ground up used wooden pallets into wood chips, added a resin to the wood chips, and then processed them into fiberboard. The plant is currently idled. This facility came to the Department's attention in August 2012, when the Department received a complaint from a resident of the Borough regarding dust allegedly coming from Rehrig's facility and settling in the resident's swimming pool. The Department investigated the matter and noted

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http://ehb.courtapps.com

no air quality violations at the time. At the conclusion of the investigation, the Department requested that Rehrig submit to the Department a Request for Determination ("RFD") regarding any potential air pollution resulting from the facility.

On January 21, 2013, Rehrig submitted to the Department a completed form titled "Request for Determination of Changes of Minor Significance and Exemption from Plan Approval/Operating Permit Under Pa Code §127.14 or §127.449." This RFD indicates that Rehrig sought exemption under 25 Pa. Code § 127.14 from the plan approval requirements for facilities that may be sources of air contamination. Essentially everything contained in the RFD related to air emissions resulting from the processes occurring at the Rehrig facility, and the controls that Rehrig had in place to check those emissions. Although the general process of converting pallets into fiberboard is detailed in the RFD, nothing contained in it specifically addressed whether that process constituted the handling of waste. On February 22, 2013, the Department responded to the RFD submitted by Rehrig and conveyed its decision that the sources of air contamination identified in the RFD were exempt from the plan approval process.

On March 26, 2013, the Department then sent an email to Rehrig's plant manager that addressed whether the Rehrig facility is subject to Pennsylvania's waste regulations. The email reads as follows:

> Mr. LaRoche,
>
> The Department has reviewed the RFD package you provided and find that Rehrig's use of pallets falls out of the definition of a waste and that a recycling permit is not needed from the Waste Management program. I have copied the appropriate section of the Residual Waste Regulations below for your reference.
>
> If you have any questions or require additional information, please let us know.
>
> Jeff Spaide, P.E. | Environmental Engineer Manager

Following Spaide's signature block is the regulatory definition of waste quoted from 25 Pa. Code

§ 287.1. The email was copied to a number of people, including a representative of the Borough. The Borough then appealed this email to the Board. On January 24, 2014, the Board ordered the parties to submit briefs on the issue of whether the Board has jurisdiction in this case.

The Board's jurisdiction is governed by the Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7516 ("EHB Act"). Section 4 of the EHB Act provides the Board with "the power and duty to hold hearings and issue adjudications...on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). Although "decision" is not defined in the EHB Act or the Board's Rules, "administrative agency laws generally refer to the term 'decision,' as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties." *Sayreville Seaport Assocs. Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012) (quoting *Dep't of Envtl. Res. v. New Enter. Stone & Lime Co., Inc.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976)). Section 4 of the Act states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board...." 35 P.S. § 7514(c). The Board's Rules define "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). In short, the Board has jurisdiction to review final Department actions adversely affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 339; *see also Chesapeake Appalachia, L.L.C. v. Dep't of Envtl. Prot.*, No. 1570 C.D. 2013 (Pa. Cmwlth. Apr. 3, 2014).

We find that the email at issue in this appeal is not an appealable action. The email does

nothing more than provide Rehrig with the Department's opinion on whether it needs a waste or recycling permit, even though the RFD submitted by Rehrig dealt solely with the question of whether an air permit or plan approval was needed. In a similar case, *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174, a developer sought governmental approval to demolish a building previously used as a shopping center to clear the way for the construction of a new building at the same site. *Id.* at 1175. After learning that the placement of fill material near a creek was required as part of the proposed project, the developer's consultant requested that the Department determine whether a Water Obstruction and Encroachment Permit was necessary for the activity pursuant to the Dam Safety and Encroachments Act. *Id.* The Department responded with a letter stating that its interpretation of the applicable law and regulations was that the project did not constitute a water obstruction and encroachment within the floodway of the creek, which obviated the need to obtain a permit. *Id.* at 1176-77. Leaseholders of the shopping center appealed the letter. The Board found that the letter was not an appealable action because it did not affect any personal or property rights, privileges, immunities, duties, or obligations of any person but, rather, simply provided the Department's legal interpretation and advised the developer that no permit was necessary for the proposed activity. *Id.* at 1182-83.

In *Gordon-Watson v. DEP*, 2005 EHB 812, the Department letter at issue was sent in response to the appellants' complaint that the Pennsylvania Department of Transportation ("PennDOT") was illegally dumping asphalt road millings on a property across the street from the appellants' home. *Id.* at 812-13. The letter stated the Department's view that the asphalt road millings met the regulatory definition of "used asphalt," which is included in the definition of "clean fill," and therefore no solid waste management permit was required for PennDOT's activities. *Id.* at 813. The Board ruled that the letter was not an appealable action because it did

not direct the appellants "to do anything, or to refrain from doing anything" and instead, merely provided the Department's interpretation of law. *Id.* at 816.

Most recently, in *Perkasie Borough Authority v. DEP*, 2008 EHB 483 the appellant, Perkasie Borough Authority ("Perkasie"), appealed a Department letter responding to a township's inquiry and advising the township that no permit was required for continued operation of its sewage diversion valve. Perkasie alleged it was harmed by the letter because the letter permitted the township, at the township's discretion, to divert sewage flows to the township's Highland Park treatment plant that Perkasie believed should go to the Pennridge Water Treatment Authority. *Id.* at 484. Relying on our prior decisions in *Associated Wholesalers* and *Gordon-Watson*, we dismissed Perkasie's appeal, finding that the Department letter directed no action from anyone, was merely an interpretation of law, and did not adversely affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of any person. *Id.* at 484-85. Consistent with *Associated Wholesalers*, *Gordon-Watson*, and *Perkasie*, the Department's email to Rehrig is not an appealable action. *See also Sayreville*, 60 A.3d at 872 (Department letters that "do not grant or deny a pending application or permit,...do not direct...any action or impose any obligations," and rather merely express the Department's interpretation of the law, are not appealable actions); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008) (a decision of the Department that "does not result in any action being taken against a party" is not appealable); *New Enter. Stone & Lime*, 359 A.2d 845 (holding the same).

The Borough has failed to explain how the email to Rehrig affects anyone's rights and liabilities. No one needs to do anything or refrain from doing anything as a result of the email. We doubt that the email would have been appealable even if it opined that Rehrig *did* need a

permit. Even Notices of Violation (NOVs), which include a finding that there has been a violation of the law, are generally not appealable. *Perano v. DEP*, 2011 EHB 750, 754; *Cnty. of Berks*, 2003 EHB 77; *Kephart Trucking Co. v. DER*, 1992 EHB 162; *see also Fiore v. Dep't of Envtl. Res.*, 510 A.2d 880 (Pa. Cmwlth. 1986); *Sunbeam Coal Corp. v. Dep't of Envtl. Res.*, 304 A.2d 169 (Pa. Cmwlth. 1973). Thus, even if the letter had said that Rehrig does need a permit, we doubt it would have been appealable.

In *Sayreville*, the Court held that letters saying that certain waste would under no circumstances be allowed to be disposed of in Pennsylvania were not appealable actions. The Court found that the letters were "best characterized as advisory opinions, expressing the Department's understanding of Pennsylvania law." 60 A.3d at 872. The *Sayreville* letters arguably had a much greater impact on their recipient than the email in this case has on anyone's right or liabilities, yet the Court held that the letters were not appealable.

The regulatory context of the Department's email is interesting in that it does not appear to have been prompted by any formal initiation of a process for determining whether Rehrig's use of pallets constituted a waste activity subject to regulation. Instead, the email seems to have arisen from Rehrig's RFD submission regarding air quality impacts and emission controls, which pertains to a separate regulatory scheme. In *Sayreville*, the Commonwealth Court noted that Sayreville had not "followed the formal regulatory process required to seek approval to beneficially use the soil and, therefore, the Department has not yet adversely affected Sayreville's personal or property rights, privileges, duties or obligations." *Sayreville* at 872. Here, the communication likewise occurred outside of a formal regulatory process. *See Perano v. DEP*, 2011 EHB 587, 593-94 ("Perano and the Department's exchange of correspondence in a situation where formal procedures must be followed does not provide a basis for this Board to

exercise jurisdiction and does not in any way substitute for a final appealable action of the Department." (footnote omitted)); *Perano v. DEP*, 2010 EHB 439, 445-45. This reinforces our conclusion that the email is not an appealable action.

Finally, this case can be distinguished from two lines of cases where we have assumed jurisdiction over Department communications. The first line of cases is where the Department has a statutory duty to investigate and make a determination whether an individual has been impacted by a certain activity. In *Love v. DEP*, 2010 EHB 523, 526-28, we held appealable denied water loss claims under the Bituminous Mine Subsidence and Land Conservation Act because that Act creates a detailed claims procedure that requires the Department to investigate and rule one way or the other. Similarly, in *Kiskadden v. DEP*, 2012 EHB 171, 176-78, we relied on *Love* in holding appealable the Department's determination under the Oil and Gas Act that the appellant's water well was not contaminated by oil and gas activities because the Oil and Gas Act also imposes a mandatory duty on the Department. This case must be distinguished from *Love* and *Kiskadden*, where the Department's finding that no water loss or water pollution has occurred is not merely an interpretation of the law, but a fulfillment of a mandatory statutory duty requiring the Department to investigate, analyze, and decide a claim, which clearly impacts an individual's property rights. We are empowered to review the propriety of those decisions. *Love*, 2010 EHB at 527; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

The second line of cases involves instances where the Department has formalized in a communication a decision to grant an individual a particular exemption or exception from regulatory requirements. One such case was recently before the Board in *Winner v. DEP*, EHB Docket No. 2013-120-B (Opinion and Order, March 13, 2014). In *Winner*, the Department

determined that a township would not need to revise its Act 537 Plan to account for a new subdivision because the proposal that had been submitted to the Department qualified for an exception. *Winner*, slip op. at 1-2. Drawing on similar factual situations in *Walker v. DEP*, 2007 EHB 117 and *Stern v. DEP*, 2001 EHB 628, we found that it was clear that the Department made a determination that certain conditions existed allowing for the township to qualify for an exception, as specified in the regulations, and therefore the township could move forward with developing the subdivision without revising its Act 537 Plan. *Winner* at 4-6. Additionally, we note that in these cases formal procedures were being followed to obtain a determination from the Department. These were not informal communications occurring wholly outside of the appropriate regulatory context like the case before us and in *Sayreville*.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF GLENDON	:	
	:	
v.	:	**EHB Docket No. 2013-047-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and REHRIG PENN LOGISTICS (a/k/a REHRIG PACIFIC LOGISTICS), Intervenor	:	

ORDER

AND NOW, this 4th day of April, 2014, it is hereby ordered that the appeal is **dismissed**.

The docket will be marked closed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 4, 2014

c: **DEP, General Law Division:**
Attention: Priscilla Dawson
9th floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2013-059-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	**Issued: April 4, 2014**

OPINION AND ORDER
ON MOTION IN LIMINE

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a permittee's motion in limine which seeks to exclude from evidence an appellant's expert report delivered to the permittee two months after the discovery deadline where a question remains as to whether the appellant was even obligated to produce to the expert report and where the Board has provided a cure for potential prejudice caused to the opposing parties by allowing them to list additional expert evidence in their prehearing memoranda and provide additional expert evidence at trial to respond to the appellant's expert report which may prove to have great importance to the appellant's case.

O P I N I O N

Rural Area Concerned Citizens (the "Appellant") filed an appeal before the Environmental Hearing Board (the "Board") challenging a decision by the Pennsylvania Department of Environmental Protection (the "Department") to issue a renewal of Small Noncoal (Industrial Minerals) Surface Mining Permit No. 26072802 (the "Permit") to Bullskin Stone & Lime, LLC ("Bullskin") allowing Bullskin to surface mine five acres of sandstone and shale at a site in Bullskin Township, Fayette County.

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http://ehb.courtapps.com

Before the Board is a Motion in Limine (the "Motion") filed by Bullskin seeking to exclude from evidence expert testimony related to an expert report of Eric McCleary. The Appellant filed a response opposing the Motion, and the Department filed a response concurring with the Motion and urging the Board to grant the Motion.

Bullskin served the Appellant with initial discovery requests on September 6, 2013. On October 10, 2013, in response to Interrogatory No. 9 of Bullskin's discovery requests, the Appellant answered in the affirmative that it intended to call Eric McCleary as an expert and use an expert report previously filed in *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2008-327-R, entitled "Electro-fishing Stream Survey of Latta Run and Mounts Creek" ("First McCleary Report").[1]

Discovery initially closed on November 12, 2013, but on December 2, 2014, the Board granted the Appellant's unopposed request to reopen discovery until December 12, 2013.

On February 19, 2014, the Appellant provided Bullskin and the Department with a second expert report prepared by Eric McCleary ("Second McCleary Report"), apparently after having just received the report from Mr. McCleary earlier that day. Shortly thereafter, Bullskin filed a Motion in Limine seeking to exclude evidence related to the Second McCleary Report, arguing that receipt of that expert report more than four months after the Appellant initially responded to Bullskin's discovery requests and more than two months after the close of discovery deprived Bullskin of the ability both to serve "additional discovery related to Mr. McCleary's proposed testimony" and to "retain experts or collect evidence to rebut his proposed

[1] In support of its Motion, Bullskin asserts that the Appellant provided a deficient response to Interrogatory No. 7 of the *Department's* discovery requests. The Board, however, will not accept alleged deficient responses to the Department's discovery requests as direct support for a permittee's motion in limine, particularly where the Department has not joined in that motion.

testimony."[2] The Department submitted a response and memorandum of law concurring with Bullskin's Motion and urging the Board to grant the Motion, but unfortunately these materials were unhelpful to the Board's resolution of the Motion.

The Board has previously held that "expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries." *Casey v. DEP*, 2012 EHB 461, 464 (citing *CMV Sewage Co., Inc. v. DEP*, 2010 EHB 725, 729). Rule 4019 of the Pennsylvania Rules of Civil Procedure authorizes the imposition of sanctions for a party's failure to comply with discovery rules. Pa.R.C.P. No. 4019; *see also* 25 Pa. Code § 1021.161. The Board considers the following factors when deciding whether to impose a discovery sanction: (1) the prejudice caused to the opposing party and whether that prejudice can be cured, (2) the defaulting party's willfulness or bad faith, (3) the number of discovery violations, and (4) the potential importance of the precluded evidence. *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824, 829; *Dirian v. DEP*, 2012 EHB 357, 358.

The facts underlying the present discovery dispute and Bullskin's Motion in Limine do not appear to be in dispute. During discovery, in response to one of Bullskin's interrogatories, the Appellant identified Eric McCleary as an expert witness and identified an expert report previously filed in an earlier appeal prepared by Mr. McCleary. In response to another interrogatory, the Appellant described the scope of Mr. McCleary's testimony, which extends beyond the scope of the identified expert report previously filed in an earlier appeal.

[2] Bullskin also claims that Mr. McCleary trespassed on Bullskin's property to prepare the Second McCleary Report. The Appellant denies these claims. Bullskin, however, has provided no legal basis for exclusion of the Second McCleary Report on the basis that its contents were derived during a trespass. Further, the Board lacks sufficient evidence to determine whether the purported trespass even took place, having been provided no more than an accusation by Bullskin based on tenuous circumstantial evidence.

After the close of the discovery period, the Appellant provided Bullskin and the Department with the Second McCleary Report. This Second McCleary Report expands the scope of Mr. McCleary's expert testimony beyond the scope of Mr. McCleary's initial expert report. The Second McCleary report was produced after the close of the prescribed discovery deadline, and this apparent violation of the discovery deadline presents the potential to prejudice the Department and Bullskin. The Board, however, believes there is a better means to address the potential for prejudice rather than granting Bullskins' Motion in Limine.

In addition, the Board's May 5, 2013 Prehearing Order No. 1, which incorporates 25 Pa. Code § 1021.101(a), states, "The service of an expert report together with a statement of qualifications may be substituted for an answer to expert interrogatories." In other words, party does not need to produce an expert report so long as it answers expert interrogatories. Bullskin has not shown that the Appellant has failed to adequately answer expert interrogatories. The Appellant described the scope of McCleary's testimony, which extends beyond the areas of expert testimony in his first expert report. If Bullskin believed that the Appellant's answers were deficient, it could have filed a motion to compel prior to the discovery deadline, but it did not.

The Appellant claims that the Second McCleary Report did not exist at the time the Appellant responded to Bullskin's discovery requests, and therefore it could not have been produced at that time. However, the Appellant also states that it contacted Mr. McCleary prior to Bullskin's service of its discovery requests, but that Mr. McCleary was unable to prepare his report until February 2014, which indicates that the Appellant was aware that the Second McCleary Report would exist at some point in the future, even though it did not exist at the time the Appellant responded to Bullskin's discovery requests. In addition, the Appellant claims that Bullskin and the Department were also aware of the forthcoming Second McCleary Report in

advance of its preparation and production, and neither Bullskin nor the Department has filed a reply denying that claim. If true, Bullskin, rather than waiting months after the discovery deadline for the Appellant to produce the Second McCleary Report, could have instead filed a motion to compel immediately at the close of discovery. The Board generally does not support the strategy used here.[3] *See Bucks County Water & Sewer Authority v. DEP*, EHB Docket No. 2011-158-C, slip op. at 7, 9 (Opinion and Order issued Mar. 14, 2014).

In support of the Motion, Bullskin cites *Maddock v. DEP*, 2001 EHB 834. In *Maddock*, the Board granted a motion to exclude an appellant's expert testimony when an expert had not been identified and expert report was not produced until eight months after the Board's discovery deadline, and only one month prior to a scheduled hearing. *Id.* at 835-36. As the Appellant correctly points out, however, any discovery violation before the Board today does not rise to the egregious violation found in *Maddock*. First, in *Maddock*, the actual expert had not been identified prior to the close of discovery, whereas in this appeal, the expert was identified in the Appellant's initial response to Bullskin's discovery requests. Second, the expert and export report in *Maddock* were not identified until eight months after the close of discovery, *after* a hearing was already scheduled, and only one month prior to that scheduled hearing, whereas in this appeal, the expert report was identified only two months after the discovery deadline and no hearing has yet been scheduled.

Rather than granting Bullskin's Motion in Limine, the Board believes there is a better way under these facts to address Bullskin's concerns. The Board will allow the Appellant to

---

[3] Discovery sanctions are generally not imposed unless a party defies an order compelling discovery. *Township of Paradise and Lake Swiftwater, Inc. v. DEP*, 2001 EHB 1005, 1007; *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133, 1140. The Board, however, has also found discovery sanctions to be appropriate absent a motion to compel if the sanction is reasonable in light of the severity of the violation. *DEP v. Colombo*, 2012 EHB 370, 371-72 (citing *Kochems v. DEP*, 1997 EHB 422, 424, aff'd 701 A.2d 281 (Pa. Cmwlth. 1997)); *DER v. Chapin & Chapin, Inc.*, 1992 EHB 751, 755.

introduce the expert report, but to accommodate Bullskin and the Department, we will allow them to identify additional expert evidence in their prehearing memoranda in response to the Second McCleary Report. That additional expert evidence may include an additional expert, expert report, or other expert evidence, but that additional expert evidence may only respond to the Second McCleary Report and may not address other issues.

The Department stated in responding to the Motion that exclusion of the Second McCleary Report would be a "strong" and "serious sanction." We agree with the Department's observation, but the Board disagrees with the Department's belief that we should impose such a serious sanction in this case. Such a strong sanction is simply not appropriate given the Board's ability to accommodate the interests of the opposing parties. We have provided a cure for potential prejudice caused to the opposing parties; the Appellant appeared not to have acted in bad faith, having produced the Second McCleary Report on the same day Mr. McCleary provided it to the Appellant; no other discovery violations have been alleged in this appeal; and the Second McCleary Report may prove to have great importance to the Appellant's case.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2013-059-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	

ORDER

AND NOW, this 4th day of April, 2014, upon consideration of Bullskin Stone & Lime, LLC's motion in limine and the responses thereto, it is hereby ordered as follows

1. Bullskin Stone & Lime, LLC's motion in limine is **denied**.

2. Bullskin Stone & Lime, LLC and the Department may include additional expert evidence, including an additional expert witness, expert report, or other expert evidence, in their prehearing memoranda in response to Eric McCleary's expert report which was provided by the Appellant on February 19, 2014.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: April 4, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD WEAN, JR.	:	
	:	
v.	:	**EHB Docket No. 2012-179-M**
	:	**(Consolidated with 2012-159-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 11, 2014**
	:	

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis:

The Board upholds the Department's issuance of an Explosives Compliance Order and issuance of an Order suspending the appellant's blaster's license. The appellant violated 25 Pa. Code § 211.152 when carbon monoxide gases generated by the appellant's blasting activities adversely affected the health and safety of several individuals working near the site of the blasting activity. The Department did not abuse its discretion in issuing the Explosives Compliance Order and the Suspension Order. In addition, 25 Pa. Code § 211.152, as applied by the Department in issuing the Explosives Compliance Order and the Suspension Order, is not unconstitutionally vague.

INTRODUCTION

Those who wish to conduct blasting activities in Pennsylvania must be licensed and must also comply with a number of other requirements. The performance standard found at 25 Pa. Code § 211.152 requires blasters to conduct their blasts "so that the gases generated by the blast do not affect the health or safety of individuals." The Department of Environmental Protection (the "Department") asserts that the Appellant, Edward Wean, Jr., violated this requirement, and, as a result, the Department imposed sanctions on the Appellant in the form of two orders. On

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August 1, 2012, the Appellant conducted a blast at the Northampton Community College New Campus building site in Pocono Township, Monroe County, Pennsylvania ("NCC Site"). The blast caused the release of carbon monoxide. Three individuals working at the site were exposed to the carbon monoxide and had to be hospitalized for carbon monoxide poisoning. After a review of the August 1, 2012 incident, the Department issued a compliance order and later issued a second order suspending the Appellant's Blaster's License No. BL-5788 for a period of 120 days.

On September 5, 2012, the Appellant filed a Notice of Appeal challenging the Department's issuance of the Explosives Compliance Order. That appeal was docketed at EHB Docket No. 2012-159-M. On October 26, 2012, the Appellant filed a Notice of Appeal challenging the Department's order suspending the Appellant's blaster's license. That appeal was docketed at EHB Docket No. 2012-179-M. On January 25, 2013, the Environmental Hearing Board ("Board") entered an order consolidating both appeals under EHB Docket No. 2012-179-M.

On November 6, 2012, the Appellant filed an Application for Temporary Supersedeas and a Petition for Supersedeas. On November 6, 2012, the Board denied the Appellant's Application for Temporary Supersedeas. In consideration of the Appellant's Petition for Supersedeas, the Appellant and the Department agreed to an expedited hearing schedule. The hearing was held in Harrisburg on January 29, 2013 and January 30, 2013.

FINDINGS OF FACT

Blasting Activity Permit

1. On June 11, 2012, Silver Valley Drilling & Blasting, Inc. ("Silver Valley") submitted a blasting activity permit ("BAP") application to the Department's Pottsville District Mining Office. (S.F. 1.)[1]

2. Silver Valley, through the BAP application, sought Department authorization to conduct blasting activities at the Northampton Community College New Campus building site located along Rt. 715 in Pocono Township, Monroe County, Pennsylvania ("NCC Site"). (S.F. 2.)

3. Edward Wean, Jr. is the president and sole officer of Silver Valley, a Pennsylvania corporation. (N.T. 286.)

4. Mr. Wean is licensed to conduct blasting activities in the Commonwealth of Pennsylvania pursuant to Blasting License No. BL-5788 issued by the Department. (S.F. 4.)

5. Mr. Wean has been licensed to blast in Pennsylvania for approximately twenty-five years. (N.T. 286.)

6. The general contractor on the NCC Site hired Muschlitz Excavating Inc. ("Muschlitz Excavating") to install a sanitary sewer line to serve the project, which required the excavation of a trench for the sewer line, the installation of the sewer line and appurtenant

[1] Stipulated Facts shall be referred to as "S.F." The numbered Stipulated Facts refer to the facts as set forth in the section of the Appellants' Pre-Hearing Memorandum entitled, "*Relevant facts upon which the parties agree.*" Later Stipulated Facts set forth in the section of the Appellants' Pre-Hearing Memorandum entitled, "*Facts remaining in dispute,*" which facts were later stipulated by the Department at the commencement of the hearing, shall be referred to as "L.S.F." Notes of Testimony from the hearing conducted on January 29 and 30, 2013 shall be referred to as "N.T." Commonwealth Exhibits shall be referred to with the designation "C" followed by the appropriate exhibit number. Appellant Exhibits shall be referred to with the designation "A" followed by the appropriate exhibit number.

manholes, the backfilling of the trench following installation and the regrading of the soil following backfilling. (L.S.F. 1, N.T. 6.)

7. Pursuant to its contract with the general contractor, Muschlitz Excavating hired Silver Valley to drill and blast bulk rock and trench rock. (L.S.F. 2, N.T. 6, A. 1.)

8. On June 18, 2012, an onsite review of the BAP application was conducted between the Department's blasting inspector, Ross Klock; representatives of Silver Valley, including Edward Wean, Jr. and Michael Chopek, a licensed blaster employed by Silver Valley; several consultants for the project; personnel from Muschlitz Excavating; and Pocono Township personnel. (N.T. 158, 188-189.)

9. During the on-site meeting, Mr. Klock discussed the need to ensure that gases were vented and did not impact nearby homes. (N.T. 159-160.)

10. Designing the blast to ensure venting of gases generated by a blast is a common measure used to protect individuals from noxious gases generated by blasting. (N.T. 153.)

11. During the on-site meeting, it was mentioned that because of the close proximity of some homes to the blast site, there was a need to ensure that precautionary measures were taken for carbon monoxide. (N.T. 159.)

12. Mr. Klock also noted on the Explosives Inspection Report, which memorialized the on-site meeting, that pursuant to 25 Pa. Code § 211.152, the operator and site excavator should take all necessary action to protect the public from noxious gases, including immediate excavation and trenching. (N.T. 160; C. 1.)

13. Mr. Klock chose not to require specific actions in the Explosives Inspection Report because he did not expect carbon monoxide to be an issue given that the blast was

conducted in Monroe County, which is not prone to carbon monoxide related problems. (N.T. 193-194.)

14. Although Monroe County is not particularly prone to carbon monoxide issues, carbon monoxide incidents have nevertheless occurred in Monroe County over the past ten years. (N.T. 194.)

15. On June 19, 2012, Mr. Klock reported to the Department that the BAP was technically acceptable and no changes were recommended. (L.S.F. 9, N.T. 6.)

16. On June 22, 2012, the Department issued BAP #45124002 to Silver Valley, authorizing blasting activities at the NCC Site. (S.F. 5; C. 2.)

17. Silver Valley was the permittee named on the BAP. (N.T. 160.)

18. Muschlitz Excavating was not named as a co-permittee on the BAP. (N.T. 160-161; C. 2.)

19. Mr. Wean recognized that Muschlitz Excavating was not a co-permittee on the BAP. (N.T. 342-343.)

20. Mr. Wean recognized that Muschlitz Excavating was not authorized to conduct blasting activities under the BAP. (N.T. 343.)

Carbon Monoxide

21. Carbon monoxide is odorless and colorless. (N.T. 203, 284, 329.)

22. Mr. Wean is aware that carbon monoxide is odorless and colorless. (N.T. 329.)

23. All blasts generate carbon monoxide. (N.T. 187, 242, 329.)

24. Mr. Wean is aware that gases generated by blasting include carbon monoxide. (N.T. 329.)

25. Gases generated by blasting can stay in the soil and in the subsurface of a blast area for months. (N.T. 245.)

26. The specific gravity of carbon monoxide is approximately 0.97 atm. At this specific gravity, carbon monoxide is slightly lighter than air. (N.T. 119, 126-127, 284.)

27. Carbon monoxide tends to dissipate into the atmosphere. (N.T. 284.)

28. Carbon monoxide tends to follow the path of least resistance. (N.T. 187-188, A. 17.)

29. Don Haney, a blasting consultant who provides considerable safety training for Pennsylvania blasters, and who was accepted as an expert for the Appellant by the Board in the area of blasting and the handling of explosives, sees carbon monoxide come up as an issue in blasting in approximately 1 out of every 100 cases, or 1% of the time. (N.T. 396-397.)

30. There is no way to predict, by reviewing a blast design, precisely how much carbon monoxide a blast may generate. (N.T. 187.)

31. Carbon monoxide poisoning resulting from blasting activities can adversely affect the health and safety of individuals. (A. 17.)

32. The National Institute of Occupational Safety and Health's ("NIOSH") time-weighted average for exposure to carbon monoxide is 35 parts per million ("ppm"). (N.T. 139.)

33. The Occupational Safety and Health Administration ("OSHA") permissible exposure limit for carbon monoxide is 50 ppm. (N.T. 139.)

34. NIOSH's and OSHA's carbon monoxide exposure values are set for typical workday exposure. (N.T. 139.)

35. At a carbon monoxide level of 130 ppm, the effects can be felt within 30 to 45 minutes. (N.T. 201.)

36. At a carbon monoxide level of 200 ppm, which is the ceiling level for carbon monoxide exposure and the point at which a person should leave the environment, the effects can be felt within 15 minutes. (N.T. 139-140, 201.)

37. Carbon monoxide concentrations of 1200 ppm are immediately dangerous to life. (N.T. 139.)

August 1, 2012 Blast and Attempt to Vent Gases

38. On July 26, July 31 and August 1, 2012, Silver Valley conducted a series of trench blasts at the NCC Site, designed to break rock in advance of Muschlitz Excavating's excavation of the sewer line trench. (L.S.F. 10-12, N.T. 6.)

39. Following blasting, Muschlitz Excavating's procedure was to excavate the sewer line trench to depth, install a protective trench box to prevent cave in, send Muschlitz Excavating workers into the trench box to manually install a portion of the sewer line, advance the workers and the trench box and backfill the trench to grade overtop of the installed sewer line. (L.S.F. 13, N.T. 6.)

40. Blasting on July 31, 2012 was in the immediate vicinity of the sewer line trench. (N.T. 135.)

41. The trench box and trench were oriented in an east-west direction. (N.T. 52; C. 14.)

42. Blasting on August 1, 2012 occurred to the west of the trench box and trench. (N.T. 52, 55, 135; C. 5; C. 14.)

43. Mr. Wean indicated that approximately 50 feet of unexcavated trench line remained from the blast conducted on July 31, 2012. (N.T. 167.)

44. The shot had forty holes between 3.5 and 4 inches in diameter with 6 to 18 foot depths. (S.F. 11.)

45. The blast was extremely deep for trench line work. (N.T. 180.)

46. The blast geology had multiple layers of different material in the shot. (S.F. 13.)

47. The upper portion of the blast holes were finer shale and dirt material, and the material became more coarse and harder with depth. (S.F. 14.)

48. On August 1, 2012, Mario Silva, a pipe layer employed by Muschlitz Excavating, began his work at the NCC Site at approximately 6:30 a.m. (N.T. 16-17.)

49. On August 1, 2012, Brian Dzedzy, a pipe foreman for Muschlitz Excavating, began his work at the NCC Site at approximately 6:30 a.m. (N.T. 41-42.)

50. Once Mr. Silva and Mr. Dzedzy began work, they were installing sewer pipe in a trench at a depth of approximately ten feet, using a twenty-four foot trench box that was eight feet tall and no more than forty-two inches wide. (N.T. 42, 62-63; C. 14.)

51. At the time of the accident and at the hearing, Mr. Silva testified that he was generally in good health other than that he takes medication for a thyroid issue. (N.T. 30-31.)

52. When Mr. Silva arrived for work on August 1, 2012, he felt well. (N.T. 18.)

53. Shortly after Mr. Silva began working in the trench on the morning of August 1, 2012, he began to feel sick and experienced shortness of breath and a racing heart. (N.T. 18.)

54. Mr. Silva had experienced similar symptoms when he was working in the trench on July 31, 2012 towards the end of the day. (N.T. 19.)

55. Mr. Silva felt better after he arrived home on the evening on July 31, 2012. (N.T. 19.)

56. Prior to the August 1, 2012 blast, Mr. Wean informed the Muschlitz Excavating workers of a safe evacuation distance. (N.T. 46.)

57. At approximately 10:00 a.m. on August 1, 2012, Mr. Wean, the blaster-in-charge of the August 1, 2012 blast, told Mr. Silva to move away from the trench to a safe distance. (N.T. 19, S.F. 7.)

58. Mr. Silva and Mr. Dzedzy went on break at approximately 10:00 a.m. (N.T. 45.)

59. While Mr. Silva and Mr. Dzedzy were on break, either Mr. Wean or Mr. Chopek informed Mr. Dzedzy that they were going to blast. (N.T. 45.)

60. The shot was fired on August 1, 2012 at 10:40 a.m. (S.F. 10.)

61. The August 1, 2012 blast was conducted at least 50 feet away from the excavated portion of the trench containing Muschlitz Excavating's trench box. (L.S.F. 17, N.T. 6.)

62. The August 1, 2012 blast produced between 6 and 8 feet of swell, i.e., material expanded above the original surface elevation of the blast. (L.S.F. 18, S.F. 8, N.T. 6, 302.)

63. The August 1, 2012 blast was designed to create enough swell to allow venting of gases. (S.F. 8.)

64. All records for the August 1, 2012 blast were complete, and the blast was loaded in compliance with the approved BAP. (S.F. 12, N.T. 184.)

65. The shot report indicated that at the time of the August 1, 2012 shot there was a breeze at the NCC Site out of the southwest at 1 to 5 miles per hour. (N.T. 165; C. 3.)

66. Mr. Wean testified that he had an express conversation with Mr. Muschlitz to have him dig the overburden off after Mr. Wean was done blasting to ensure that the effects of noxious gases would not impact the health and safety of individuals. (N.T. 343.)

67. After post-blast inspections were conducted, Muschlitz Excavating began excavating the muck pile at approximately 12:00 p.m. on August 1, 2012 and completed the process in 1.5 to 2 hours. (L.S.F. 19, N.T. 7.)

68. Muschlitz Excavating eventually scraped the swell back to the original surface elevation of the blast. (S.F. 15.)

69. The muck pile was being cleared after the blast on August 1, 2012 while Mr. Wean was on-site. (N.T. 324.)

70. At approximately 12:00 p.m. on August 1, 2012, Silver Valley personnel departed the NCC Site. (L.S.F. 22, N.T. 6.)

Injuries Caused by August 1, 2012 Blast

71. Silver Valley would normally decide when an evacuation period ended and workers could safely return to an area after a blast. (N.T. 87.)

72. Mr. Wean, or one of his workers, told the Muschlitz Excavating workers when it was safe to return to the work area after the August 1, 2012 blast. (N.T. 46.)

73. Mr. Dzedzy relied on Mr. Wean to tell him when the evacuation period ended and it was safe for the Muschlitz Excavating workers to return to work in the trench. (N.T. 67.)

74. Mr. Silva stayed away from the trench until Mr. Dzedzy told him to return to work. (N.T. 20-21, 40.)

75. Work resumed in the trench at approximately 11:00 a.m., roughly twenty minutes after the August 1, 2012 blast. (N.T. 46.)

76. Muschlitz Excavating workers advanced the trench approximately two or three times after work resumed. (N.T. 61-62.)

77. After Mr. Silva resumed work in the trench, he began to feel worse than he had felt earlier that morning. (N.T. 21-22.)

78. Later in the day, Mr. Dzedzy looked down into the trench box, noticed that Mr. Silva looked ill and climbed down the ladder into the trench box to check Mr. Silva. (N.T. 47.)

79. Mr. Silva began to be overcome by noxious gases at approximately 2:30 p.m. and soon thereafter passed out. (S.F. 18; N.T. 21-22.)

80. On August 1, 2012, Michael Keefer was employed by Muschlitz Excavating as a site superintendent for the NCC Site, overseeing grading and paving of parking lots and moving dirt to fill some of those parking lots. (N.T. 69, 71.)

81. Mr. Keefer had been a certified emergency medical technician ("EMT") from 1994 until January 1, 2013 and had previously responded to people who might be having a heart attack or a stroke as part of his work as an EMT. (N.T. 71, 74-75.)

82. Once Mr. Dzedzy was in the trench box attending to a collapsed Mr. Silva, Mr. Dzedzy used his cell phone to call Mr. Keefer to come over to the trench, knowing that Mr. Keefer had training as an EMT. (N.T. 47, 71-72.)

83. An inspector for Muschlitz Excavating at the NCC Site called 911. (N.T. 47.)

84. Emergency crews from the Pocono Township Volunteer Fire Company ("PTVFC") were called. (S.F. 19.)

85. When Mr. Keefer arrived to the trench area, he looked for hazards such as gas-operated machines, pumps and generators. (N.T. 72.)

86. Mr. Keefer did not see any immediate hazards that might have caused Mr. Silva's condition. (N.T. 72.)

87. Mr. Keefer did not see anything to make him believe it was not safe to enter the trench. (N.T. 74.)

88. Muschlitz Excavating operated three excavating machines at least 20 feet away from the trench box while Mr. Silva was in the trench box laying sewer pipe. (N.T. 33.)

89. Typically, while Mr. Silva was working in the trench box, one Muschlitz Excavating excavating machine would be digging in front of the trench box and two Muschlitz Excavating excavating machines would be backfilling behind the trench box. (N.T. 33.)

90. All the heavy excavating machinery operated by Muschlitz Excavating in the vicinity of the trench box was powered by internal combustion engines. (L.S.F. 26, N.T. 6.)

91. Although one of these machines could have been operating as much as 5 feet below ground level in a part of the trench, all of the heavy machinery operating in the vicinity had rear exhaust stacks that were 7 to 8 feet off the ground. As a result, the tops of the exhaust stacks were all above grade level. (N.T. 25, 44, 73.)

92. Mr. Keefer did not consider the heavy machinery operating in the vicinity of the trench to be a hazard because it was a standard operating procedure to have the equipment working with them and, in his experience, it had never caused an issue before. (N.T. 73.)

93. Before climbing into the trench, Mr. Keefer asked the excavator operator to go to the backside of the trench and make a ramp so the trench would be more accessible for rescue. (N.T. 73.)

94. After Mr. Keefer ruled out any known hazards, he believed Mr. Silva was suffering from a medical condition. (N.T. 72-73.)

95. Mr. Keefer then climbed into the trench box and began attending to Mr. Silva. (N.T. 48, 75.)

96. Mr. Keefer looked at Mr. Dzedzy, noticed that Mr. Dzedzy was getting "glassy eyed" and told him that he did not look right. (N.T. 48, 75.)

97. When Mr. Keefer asked if Mr. Dzedzy was alright, Mr. Dzedzy laid Mr. Silva down very gently, got up and walked out the back of the trench and passed out. (N.T. 48, 55, 75.)

98. After Mr. Dzedzy had walked away, Mr. Keefer began to feel ill and realized that something was wrong. (N.T. 75.)

99. Mr. Keefer supported Mr. Silva's head with some towels and loose stone and then exited the rear of the trench. (N.T. 75.)

100. After Mr. Keefer walked to the top of the trench, he passed out and drifted in and out of consciousness. (N.T. 76.)

101. Mr. Keefer had never experienced that feeling before. (N.T. 76.)

102. A firefighter responded to Mr. Keefer with a self-contained breathing apparatus with fresh compressed air. (N.T. 76.)

103. Mr. Silva did not know how he got out of the trench. (N.T. 27.)

104. Mr. Silva, hearing sirens, regained consciousness in an ambulance. (N.T. 29.)

105. Mr. Silva was transported to the Pocono Medical Center and then flown to the University of Pennsylvania Medical Center, where he was treated for carbon monoxide poisoning in a hyperbaric chamber. (N.T. 29.)

106. Mr. Silva spent a total of four hours, through three separate sessions, in treatment in the hyperbaric chamber. (N.T. 29.)

107. Mr. Dzedzy was transported to the University of Pennsylvania Medical Center, where he was treated for carbon monoxide poisoning in a hyperbaric chamber. (N.T. 48.)

108. Mr. Dzedzy was treated in three separate sessions in a hyperbaric chamber. (N.T. 48.)

109. While Mr. Dzedzy was undergoing treatment in a hyperbaric chamber, he was told that he had carbon monoxide poisoning. (N.T. 67.)

110. Mr. Keefer was transported to the Pocono Medical Center, where his blood was taken, then he was transported to the University of Pennsylvania Medical Center, where he was treated for carbon monoxide poisoning in a hyperbaric chamber. (N.T. 76-77.)

111. Mr. Keefer was told by medical personnel that he had carbon monoxide poisoning. (N.T. 77.)

112. A doctor at the University of Pennsylvania Medical Center reported to Mr. Keefer that carbon monoxide is a byproduct of blasting. (N.T.77-78.)

113. Overall, seven men who had been working in or near the trench were taken to a nearby hospital. (S.F. 20; N.T. 29, 48, 76.)

114. The incident at the NCC Site on August 1, 2012 was reported as a carbon monoxide incident to the Department's Pottsville District Mining Office. (S.F. 6.)

Fire Departments' Response

115. Michael Shay is the Chief of the PTVFC. (N.T. 89.)

116. Mr. Shay has been with the PTVFC since 1990 and has been its Chief for the past twelve years. (N.T. 89.)

117. Mr. Shay has had training in everything from the essentials of firefighting to vehicle rescue operations, hazardous materials operations, building construction and incident command and control classes. (N.T. 89-90.)

118. Mr. Shay was called to assist an ambulance crew in removing personnel from a trench at the NCC Site. (N.T. 90.)

119. Mr. Shay led the PTVFC, along with the neighboring Jackson Township Volunteer Fire Department ("JTVFD"), to the NCC Site. (N.T. 90.)

120. The original dispatch to the scene occurred at 2:20 p.m. on August 1, 2012. (N.T. 91.)

121. Mr. Shay responded to the incident at the NCC Site at approximately 2:40 p.m. on August 1, 2012. (N.T. 90, 91.)

122. When Mr. Shay arrived at the scene, the initial responders were not sure what was causing the problems at the NCC Site. (N.T. 91.)

123. Mr. Shay, while viewing the NCC Site at the time of his response, did not see any obvious sources of carbon monoxide. (N.T. 93.)

124. Mr. Shay directed one member of the PTVFC and one member of the JTVFD to use their carbon monoxide meters to obtain readings near the trench. (N.T. 91.)

125. The PTVFC meter is calibrated every other month and had last been calibrated sometime in July 2012. (N.T. 92.)

126. Although Mr. Shay could not say when the JTVFD meter was last calibrated, given that the PTVFC meter was timely calibrated and both the PTVFC and JTVFD meters indicated identical readings of 700 ppm at the edge of the trench, the JTVFD meter was properly calibrated. (N.T. 91-92, 101.)

127. The PTVFC and JTVFD personnel both took carbon monoxide readings at the edge of the trench, and personnel from both fire departments received readings of carbon monoxide concentrations of 700 ppm. (N.T. 91-92.)

128. Fire department personnel were receiving normal carbon monoxide readings near heavy machinery located roughly 100 feet away from the ditch. (N.T. 94.)

129. Mr. Shay stated that the heavy equipment at the NCC Site did not appear to be the source of the carbon monoxide because it was located in an open area. (N.T. 94.)

130. From Mr. Shay's experience in responding to other carbon monoxide incidents, he considered 700 ppm to be too high to have been produced by a vehicle. (N.T. 94.)

131. Mr. Shay has seen carbon monoxide readings of 300 ppm for cars left running in a garage. (N.T. 94.)

132. The highest carbon monoxide readings Mr. Shay had seen prior to the August 1, 2012 incident were in the range of 400 to 500 ppm, which were attributable to propane heaters inside of a home. (N.T. 95.)

133. Testing in homes in the vicinity of the NCC Site produced no traces of carbon monoxide. (N.T. 96, 119.)

134. While Mr. Shay was on-site, a representative of Silver Valley told Mr. Shay that the blasting could have produced the carbon monoxide. (N.T. 95.)

PA DEP Emergency Response Team

135. Shailesh Patel, a Professional Quality Engineer with the Department in Wilkes-Barre and a member of the Department's Emergency Response Team ("ERT"), responded to the incident at the NCC Site on behalf of the ERT at approximately 4:45 p.m. on August 1, 2012. (N.T. 104, 107.)

136. Jim Kunkle, an Environmental Cleanups Program Supervisor in the Department's Bethlehem Field Office, responded to the incident at the NCC Site on behalf of the ERT at approximately 4:50 p.m. on August 1, 2012. (N.T. 128-129, 132-133.)

137. Mr. Patel was previously involved with two carbon monoxide investigations associated with blasting prior to the August 1, 2012 incident. (N.T. 106-107.)

138. Mr. Patel and Mr. Kunkle were each equipped with Department issued-MSA Altair 4-gas meters. (N.T. 108, 120, 131.)

139. Mr. Patel and Mr. Kunkle were trained to use the MSA Altair 4-gas meters through a training session conducted by MSA. (N.T. 106, 131.)

140. Mr. Patel and Mr. Kunkle agreed to use Mr. Patel's meter and leave Mr. Kunkle's meter on as a backup. (N.T. 135.)

141. Patel had used his gas meter three previous times in the field. (N.T. 106.)

142. Although Mr. Patel's gas meter is calibrated on a monthly basis and was last calibrated exactly one month prior to the August 1, 2012 incident, the meter had not been used since the last calibration. (N.T. 122.)

143. Mr. Patel did not conduct a "bump test" on his gas meter on the day of the incident to ensure that the monitor was operating properly. (N.T. 121-122.)

144. The weather was clear with a light breeze during the ERT's monitoring. (N.T. 108-109.)

145. The ERT did not detect any carbon monoxide in the background reading taken at the NCC Site. (N.T. 109.)

146. The carbon monoxide readings taken by Mr. Patel at the top of the trench fluctuated between 5 and 180 ppm. (N.T. 111-112.)

147. The carbon monoxide readings approximately five feet above the trench fluctuated between 0 and 180 ppm. (N.T. 142.)

148. The highest carbon monoxide reading, 185 ppm, was detected halfway up the trench. (N.T. 112.)

149. The lowest carbon monoxide reading recorded inside the trench was 135 ppm. (N.T. 123.)

150. In the two manholes immediately down gradient from the trench, the carbon monoxide readings exceeded 1000 ppm. (N.T. 112-114.)

151. The carbon monoxide readings in the blast area ranged between 12 and 20 ppm in the voids under the stones in the blast area. (N.T. 114-115.)

152. No carbon monoxide was found in a stockpile located in the immediate vicinity of the blast area. (N.T. 116-117.)

153. Mr. Patel and Mr. Kunkle did not see any other potential sources of the carbon monoxide. (N.T. 117.)

154. Mr. Patel did not consider the heavy equipment to be the source of the carbon monoxide. (N.T. 119.)

155. The heavy equipment was not operating at the time Mr. Patel was conducting his investigation. (N.T. 119.)

156. Even had the heavy equipment been running at the time Mr. Patel visited the NCC Site on August 1, 2012, Mr. Patel would not have considered it to be the source of the carbon monoxide because the equipment had stacks 8 to 10 feet above the ground, and any carbon monoxide produced by the running engines would have dispersed to the atmosphere. (N.T. 119.)

157. No sewer gases could have been entering the NCC Site from the municipal sewer because the sewer lines that were being installed had not yet been connected to the municipal sewers, particularly the Pocono Township sewer line. (N.T. 51, 139.)

158. Mr. Patel and Mr. Kunkle nevertheless opened the Pocono Township manhole that the NCC Site sewer line would connect to and took carbon monoxide readings in the municipal sewer. (N.T. 139.)

159. The carbon monoxide reading in the Pocono Township manhole was zero. (N.T. 139.)

160. Mr. Patel and Mr. Kunkle completed all on-site testing by 6:15 p.m. on August 1, 2012. (L.S.F. 28, N.T. 6.)

Failure to Warn

161. Mr. Wean did not tell the people working in the trench at the NCC Site that carbon monoxide was generated by blasting. (N.T. 320.)

162. Mr. Wean assumed that Mr. Muschlitz told his workers about the dangers associated with the gases generated by blasting. (N.T. 338-339.)

163. Mr. Wean never saw Mr. Muschlitz or Muschlitz Excavating's safety manager discuss the byproducts of blasting with Mr. Silva, Mr. Dzedzy or Mr. Keefer. (N.T. 330.)

164. Mr. Wean did not know what training Muschlitz Excavating's employees had for working in confined spaces. (S.F. 32.)

165. Mr. Haney, the Appellant's expert, testified that blasting companies need to let the excavating contractor or anybody else working on the site know that there are inherent dangers associated with blasting. (N.T. 375.)

166. Mr. Haney is a blasting consultant and provides safety training for Pennsylvania blasters. (N.T. 365.)

167. For every project Mr. Haney works on, there is an on-site safety meeting where all areas of safety are discussed. (N.T. 375-376.)

168. Mr. Haney instructs his students to tell the excavating contractor that if its workers are going to be in and around a trench, they need to take precautions. (N.T. 380.)

169. Mr. Haney also tells his students that they need to let everyone that will come in contact with the blast area know that there are inherent risks. (N.T. 382.)

170. Mr. Haney testified that for smaller blasting projects, anytime the blaster sees people around the blast area, the blaster should warn them of the inherent dangers associated with blasting. (N.T. 387.)

171. Mr. Haney testified that as part of a blaster's due diligence, the blaster should make sure everyone in the surrounding area is safe. (N.T. 399-400.)

172. Mr. Haney testified that the potential for carbon monoxide to migrate into a trench should be communicated to the contractor before a blast. (N.T. 404.)

Failure to Utilize Carbon Monoxide Monitors

173. Because carbon monoxide is odorless and colorless, the only reasonable and reliable manner in which to determine whether carbon monoxide is present is through the use of a carbon monoxide detector. (N.T. 241, 284.)

174. Monitoring for noxious gases is a standard industry practice in blasting. (N.T. 153, 376-377.)

175. Monitoring for carbon monoxide requires very minimal effort. (N.T. 365, 366, 371, 396.)

176. Carbon monoxide monitors do not impede workers' ability to perform their jobs. (N.T. 51.)

177. The Appellant's expert, Mr. Haney, uses carbon monoxide monitors quite often to protect the public. (N.T. 374.)

178. Richard Lamkie, the Chief of the Explosives and Safety Section with the Bureau of Mining Programs, testified that using carbon monoxide monitors is a common measure used by the blasting industry. (N.T. 244-245.)

179. Mr. Wean did not have a carbon monoxide monitor on-site. (S.F. 29.)

180. Mr. Wean did not use any instrumentation to determine if carbon monoxide was present after the blast and did not test for carbon monoxide in the trench. (N.T. 320, S.F. 29.)

181. Mr. Wean did not direct Muschlitz Excavating to have its trench workers wear carbon monoxide monitors. (S.F. 27.)

182. Mr. Wean did not talk to anyone at the site to caution them to wear carbon monoxide monitors if they were reentering a confined space. (S.F. 30.)

183. Mr. Chopek did not use any instrumentation to monitor for carbon monoxide generated by the blast. (N.T. 359.)

184. Although Muschlitz Excavating had one functioning carbon monoxide monitor available for use by Muschlitz Excavating workers at the NCC Site on August 1, 2012, the monitor was not used in the trench on August 1, 2012. (N.T. 28, 36-37, 65-66.)

185. The carbon monoxide monitors that Muschlitz Excavating uses are approximately 3 inches by 5 inches with a thickness of 1 to 2 inches. (N.T. 50.)

186. Muschlitz Excavating was cited by OSHA for an issue associated with monitoring of the trench in connection with the August 1, 2012 blast. (N.T. 84.)

187. Muschlitz Excavating will now monitor trenches for carbon monoxide before entering a blasted area. (N.T. 78.)

188. Mr. Wean did not discuss the use of carbon monoxide monitors with Mr. Muschlitz prior to the August 1, 2012 blast. (N.T. 343.)

189. Neither Silver Valley nor Mr. Wean had to seek authorization from the Department before initiating the use of carbon monoxide monitors at the NCC Site. (N.T. 215.)

190. Mr. Silva had used carbon monoxide monitors in the past in manholes and confined spaces. (N.T. 28.)

191. Mr. Silva had previously been provided OSHA training from Muschlitz Excavating regarding confined spaces. (N.T. 35-36.)

192. Mr. Silva has had training on the dangers of carbon monoxide poisoning that informed him that he needed to be careful in confined spaces and if engines were running nearby. (N.T. 38-39.)

193. None of Mr. Silva's training discussed carbon monoxide associated with blasting. (N.T. 38-39.)

194. Mr. Silva was not told that carbon monoxide could be generated by blasting. (N.T. 28, 38-39.)

195. Mr. Silva was not told that carbon monoxide could stay in the soil for days after a blast occurred. (N.T. 28.)

196. Mr. Dzedzy typically monitors for carbon monoxide on the work site when men are entering manholes or when small engines are operating in the vicinity of the work area, which is consistent with training he previously received. (N.T. 49.)

197. Mr. Dzedzy was not monitoring for carbon monoxide on August 1, 2012 because it was an open trench area and he had never heard of anything like this incident before. (N.T. 49.)

198. Mr. Dzedzy was not told that carbon monoxide is generated by blasting. (N.T. 50.)

199. Mr. Dzedzy was not told that carbon monoxide could stay in the soil for days after a blast occurs. (N.T. 50.)

200. Mr. Dzedzy testified that he would have directed his workers to use a carbon monoxide monitor if Mr. Wean had told him that they should have been using the monitor. (N.T. 66-67.)

201. Prior to this incident, Mr. Keefer was not aware that carbon monoxide was generated by blasting. (N.T. 77.)

202. At the time of Mr. Wean's January 30, 2013 testimony before the Board, Mr. Wean still had not purchased any carbon monoxide monitors. (N.T. 338.)

Failure to Excavate Trench

203. One of the best ways to vent gases generated by blasting is immediate excavation of the blast site because it eliminates areas where gases could be trapped. (N.T. 242-243.)

204. Immediately excavating a trench to depth and trenching at a blast site are standard industry practices used by the blasting industry. (N.T. 153, 244-245, 376-377.)

205. Venting holes and interrupting the path along which gases may flow by excavating breaks are measures used for venting carbon monoxide that have been used in the blasting industry for over twenty-two years, although venting holes are used less often today than in the past. (N.T. 153, 217-218.)

206. In the Department's Explosives Inspection Report issued on June 18, 2012, the Appellant was advised that all necessary action should be taken to protect the public from noxious gases, including, but not limited to, immediate excavation and trenching. (N.T. 214; C. 1.)

207. No portion of the trench blast of August 1, 2012 was excavated to depth prior to the August 1, 2012 incident at issue. (S.F. 16, N.T. 214.)

208. Neither Silver Valley nor Mr. Wean had to seek authorization from the Department before excavating breaks to depth in the blast area after the August 1, 2012 blast. (N.T. 215-216.)

209. Mr. Wean did not direct anyone to excavate a break to the depth of the trench between the closest end of the August 1, 2012 blast and the workers. (S.F. 31.)

210. Immediate excavation of the blast area would have alleviated the effects of carbon monoxide. (N.T. 214.)

211. Interrupting the path of the carbon monoxide and using carbon monoxide monitors in the trench would have prevented harm caused to the Muschiltz Excavating workers on the August 1, 2012. (N.T. 186.)

PA DEP'S August 2, 2012 Inspection

212. Ross Klock, a Department blasting inspector who reviewed Silver Valley's BAP for the NCC Site, was accepted by the Board as an expert in blasting design and blasting safety. (N.T. 149, 155-156; C. 25.)

213. On August 1, 2012, after Mr. Klock became aware of the incident at the NCC Site, he called Mr. Chopek and told him that Silver Valley was to cease all activity at the NCC Site. (N.T. 162; S.F. 25.)

214. Mr. Klock conducted an investigation at the NCC Site beginning between 8:30 and 9:30 a.m. on August 2, 2012. (N.T. 163.)

215. Mr. Klock met with Mr. Wean, Mr. Chopek and Jack Muschlitz of Muschlitz Excavating. (N.T. 163, 166.)

216. Mr. Wean and Mr. Chopek gave Mr. Klock the shot report when he arrived at the NCC Site. (N.T. 163; C. 3.)

217. Mr. Wean described to Mr. Klock the different layers of geology at the site that Mr. Wean had encountered while drilling the holes for the shot. (N.T. 166.)

218. Mr. Wean agreed that to protect the workers from the noxious gases generated by blasting, any further blasting conducted would be accompanied by the use of carbon monoxide monitors and excavation of a break between future blasts and where people might be working. (N.T. 167.)

219. Mr. Muschlitz indicated during the August 2, 2012 meeting with Mr. Klock that Mr. Muschlitz could supply the carbon monoxide monitors and dig the breaks. (N.T. 167-168.)

220. Typically, the surface heave created by the August 1, 2012 blast would have been adequate to vent gases. (N.T. 209-210.)

221. During the August 2, 2012 meeting, Mr. Klock reviewed a still photograph of the August 1, 2012 blast, which was taken midway through the blast and portrayed the ground surface heaving upwards and some gases venting into the atmosphere. (N.T. 177, 178.)

222. From the photographic evidence, Mr. Klock believed that the shot had a good blast design with a good swell factor. (N.T. 178; C. 4.)

223. From the photographic evidence, Mr. Klock believed that the blast area was well-protected, and Mr. Klock did not see anything to suggest that the shot was uncontrolled. (N.T. 178-179; C. 4.)

224. During the August 2, 2012 meeting, Mr. Klock reviewed a cell phone recording of the August 1, 2012 blast. (N.T. 176-179.)

225. From the video and photographic evidence, it appeared to Mr. Klock that some of the blasting gases vented. (N.T. 178.)

226. At the end of the August 2, 2012 meeting, Mr. Klock reached the preliminary conclusion that the carbon monoxide that affected the Muschlitz Excavating workers on August 1, 2012 was caused by blasting, and Mr. Klock directed Silver Valley to submit a corrective action plan to the Department via email before Mr. Klock would allow blasting to resume. (L.S.F. 33, N.T. 6, 167.)

227. On August 2, 2012, Mr. Chopek submitted a corrective action plan on behalf of Silver Valley incorporating the measures discussed at the August 2, 2012 meeting. (N.T. 168; C. 18.)

228. The Department approved the corrective action plan on August 2, 2012 and lifted the cease order that had been verbally issued on August 1, 2012. (N.T. 170; C. 19.)

229. On September 5, 2012, Mr. Klock issued an Incident Investigation Report setting forth his observations and conclusions about the August 1, 2012 carbon monoxide incident. (C. 22.)

230. The Incident Investigation Report was based on the shot records, Mr. Kunkle's report of the August 1, 2012 incident, and information gathered by Mr. Klock through on-site interviews and through his August 2, 2012 investigation. (N.T. 175-176.)

231. Mr. Klock concluded that carbon monoxide gas generated from the trench blast failed to vent entirely. (C. 22, p. 45.)

232. In the Incident Investigation Report, Mr. Klock concluded that "the [carbon monoxide] incident was likely caused by scraping off the swell material from the blast, which

compacted the finer material near the surface and created a barrier through which the gas could no longer vent to the surface." (C. 22, p. 45; N.T. 185.)

233. Mr. Patel and Mr. Keefer testified that on August 1, 2012 they observed that the ground heave from August 1, 2012 had not been fully scraped away. (N.T. 83, 125.)

234. When Mr. Klock inspected the August 1, 2012 blast site on August 2, 2012, it was scraped off with no muck pile visible. (N.T. 163-164.)

235. Mr. Klock testified that "there was six feet of finer material even with the scrape. If it wasn't scraped off . . . the material on top was still extremely fine. It still would have prevented the gases from evacuating or venting through the top." (N.T. 184.)

236. Mr. Klock testified that the different layers of geology, with the finer material on top, trapped the gases, forcing them to travel laterally along the previously blasted trench area in the direction of where the men had been working, and eventually the gas vented at the point where the three Muschlitz Excavating employees were harmed in the trench box. (N.T. 180-181.)

237. The Department followed up its verbal cease order with a written Explosives Compliance Order. (N.T. 171-172; C. 20.)

238. Given that three workers had been injured and hospitalized, Department policy required the issuance of the Explosives Compliance Order. (N.T. 173-174.)

239. The Explosives Compliance Order stated that the Appellant "failed to vent all the noxious gases from the blast. Three men working in the same trench were overcome by noxious gases. This is in violation of 25 PA Code Ch.211.152. Operator failed to control noxious gases." (C. 20.)

240. The Explosives Compliance Order required the Appellant, as the operator and blaster-in-charge, to "submit a plan stating action that [was] to be taken to insure compliance with the Department's regulations and to insure the safety of individuals on and off site pertaining to noxious gases." (C. 20.)

241. Mr. Klock held the belief to a reasonable degree of scientific certainty that the August 1, 2012 blasting was the only source of the carbon monoxide. (N.T. 180-182.)

242. Mr. Klock did not believe that any carbon monoxide created by equipment operating in the area was the source of the carbon monoxide poisoning. (N.T. 181.)

243. No small engines were operating in the vicinity of the trench on August 1, 2012. (N.T. 27-28, 181.)

244. The heavy machinery in the vicinity of the trench had stacks 8 to 10 feet off the ground and they were downwind from the trench. (N.T. 181, 216-217; C. 14; C. 3.)

245. Mr. Klock believed that with the stacks on the heavy machinery all being roughly 8 feet tall and the wind blowing, gases from the heavy machinery did not migrate into the trench. (N.T. 181.)

Source of Carbon Monoxide Gas

246. The August 1, 2012 blast produced carbon monoxide gas. (N.T. 187, 242, 329.)

247. Carbon monoxide gas, which was produced from the August 1, 2012 blast, traveled from the blast site to the area where Muschlitz Excavating workers were excavating the trench on August 1, 2012. (N.T. 91-95, 111-119, 180-185.)

248. Carbon monoxide gas from the August 1, 2012 blast was present in the trench area where Mr. Silva was working after work was resumed at 11:00 a.m. on August 1, 2012, and the carbon monoxide gas from the blast was present when Mr. Silva began to be overcome by the

carbon monoxide gas at approximately 2:30 p.m. on August 1, 2012. (N.T. 91-95, 111-119, 180-185.)

249. Carbon monoxide gas from the August 1, 2012 blast was present in the trench area when Mr. Dzedzy noticed that Mr. Silva looked ill in the trench and climbed down into the trench to check on Mr. Silva. (N.T. 91-95, 111-119, 180-185.)

250. Carbon monoxide gas from the August 1, 2012 blast was present in the trench when Mr. Keefer entered the trench, noticed that Mr. Dzedzy looked glassy eyed, then exited the trench and passed out. (N.T. 91-95, 111-119, 180-185.)

251. Carbon monoxide gas from the August 1, 2012 blast was present in the trench at levels that caused the carbon monoxide poisoning of Mr. Silva, Mr. Dzedzy and Mr. Keefer. (N.T. 91-95, 111-119, 180-185.)

252. Carbon monoxide gas from the August 1, 2012 blast remained in the trench at noxious levels for hours after the time when Mr. Silva, Mr. Dzedzy and Mr. Keefer were overcome by carbon monoxide gas. (N.T. 91-95, 111-119, 180-185.)

253. The heavy equipment operating on August 1, 2012 near the trench where Mr. Silva, Mr. Dzedzy and Mr. Keefer were overcome by carbon monoxide gas was not the source of the carbon monoxide gas that poisoned the three individuals. (N.T. 25, 44, 73, 119.)

Department's Suspension of Appellant's Blaster's License

254. Richard Lamkie, the Chief of the Explosives and Safety Section with the Bureau of Mining Programs, has approximately thirty-seven years of experience working with explosives. (N.T. 232.)

255. Mr. Lamkie has been involved in approximately twelve carbon monoxide investigations since 2000. (N.T. 233.)

256. Mr. Lamkie was accepted by the Board as an expert in blasting; blasting investigations, particularly those involving carbon monoxide; and preventive measures used to insure individual health and safety. (N.T. 240-241.)

257. Mr. Lamkie was involved with Mr. Klock's investigation of the carbon monoxide poisoning incident that occurred at the NCC Site on August 1, 2012. (N.T. 245-246.)

258. Mr. Lamkie discussed the proposed corrective actions with Mr. Klock and felt that they were adequate. (N.T. 246-247.)

259. Mr. Lamkie concluded that "[t]here's no other possible source for the [carbon monoxide] than the blasting. And I don't think there is any way in God's world it could have come from anything else." (N.T. 281.)

260. Mr. Lamkie, as Chief of the Explosives and Safety Section, is responsible for deciding the length of a blaster's license suspension. (N.T. 252.)

261. Mr. Lamkie held a fact-finding meeting on September 18, 2012 to hear Mr. Wean's explanation of the August 1, 2012 blast and aftermath. (N.T. 247-249; C. 21.)

262. Silver Valley's representatives at the fact-finding meeting included Mr. Wean, Mr. Chopek and Mr. Wean's attorney, Geoffrey Worthington. The Department's representatives at the fact-finding meeting included Mr. Lamkie, Nels Taber, Robin Katzman Bowman, Ross Klock, Michael Menghini and Renee Bogdan. (N.T. 249-250.)

263. At the fact-finding meeting, Mr. Wean offered no explanation as to why there had been no monitoring for carbon monoxide. (N.T. 250.)

264. At the fact-finding meeting, Mr. Wean offered the explanation that he set off the blast, the ground humped and he saw smoke, leading him to conclude that the gases had vented from the blast. (N.T. 251.)

265. At the fact-finding meeting, there was also a discussion of how the area where the ground had humped up had been graded. (N.T. 251.)

266. Based on what Mr. Lamkie heard at the fact-finding meeting, he concluded that Mr. Wean violated 25 Pa. Code § 211.152. (N.T. 252-253.)

267. In Mr. Lamkie's experience, since 2000, rarely have individuals required medical attention following a blasting violation, and prior to the August 1, 2012 incident, the only incident of a person going into a hyperbaric chamber as a result of blasting since 2000, as far as Mr. Lamkie was aware, occurred in 2000. (N.T. 256.)

268. Mr. Lamkie felt that it was an aggravating factor that the workers had been working in close proximity to the blast area, that there was material from the previous blast between where the August 1, 2012 blast was conducted and where the workers were in the trench, and that the Muschlitz Excavating workers were evacuated from the trench area for only a short period of time. (N.T. 255.)

269. In the last flyrock case involving a minor injury, the blaster had been suspended for one year. (N.T. 256, 258.)

270. Mr. Lamkie initially considered a license suspension of at least six months. (N.T. 256.)

271. Mr. Lamkie did not feel a six month license suspension was warranted because Mr. Wean took some measures to vent the gases to the atmosphere, he did not have a history of violations on his record and he cooperated with Mr. Klock. (N.T. 254.)

272. Prior to August 1, 2012, Mr. Wean's Pennsylvania blaster's license had never been revoked or suspended. (N.T. 286-287.)

273. Appellant's expert, Mr. Haney, testified that Mr. Wean has a very good reputation, is very diligent and is a consummate professional. (N.T. 384, 393.)

274. On October 9, 2012, after considering the aggravating and mitigating factors, Mr. Lamkie, on behalf of the Department, issued a Suspension Order to Mr. Wean, suspending Mr. Wean's blaster's license for a period of 120 days because the blast, of which Mr. Wean was the blaster-in-charge, affected the health and safety of individuals, in violation of 25 Pa. Code § 211.152. (N.T. 253-256; C. 23.)

275. Since the August 1, 2012 incident, Mr. Wean has not changed any of his procedures. (N.T. 338.)

DISCUSSION

This is a consolidated appeal from the Department's actions to issue two compliance orders to the Appellant following the accident at NCC Site on August 1, 2012. The Department issued the first compliance order on August 8, 2012, concluding that the Appellant failed to vent all noxious gases from the blast on August 1, 2012 and that this failure resulted in injury to three individuals who were working in a nearby trench that was under construction.[2] Following a fact-finding meeting on September 18, 2012 the Department issued the second compliance order to the Appellant suspending his blaster's license for 120 days.

The Appellant objects to the Department's determination which underlies the issuance of the Explosives Compliance Order and the issuance of the Suspension Order, that the Appellant violated 25 Pa. Code § 211.152. The Appellant claims that the Department failed to meet its evidentiary burden and thus failed to establish a violation of 25 Pa. Code § 211.152.

[2] On the day of the August 1, 2012 blast after an on-site meeting the Department issued a verbal cease order to the Appellant to cease all blasting at the site until the Appellant submitted and the Department approved a corrective action plan that included measures discussed at the on-site meeting.

The Appellant also objects to the Department's interpretation of 25 Pa. Code § 211.152 and raises constitutional objections to 25 Pa. Code § 211.152 and the Department's application of that provision in issuing the Explosives Compliance Order and the Suspension Order.[3]

Burden of Proof and Standard of Review

The Department bears 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). Specifically, the Department must prove by a preponderance of the evidence that its issuance of the Explosives Compliance Order and issuance of the Suspension Order constituted a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. *See Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Company v. DEP*, 2010 EHB 456, 475; *see also* 25 Pa. Code §§ 1021.117(b), 1021.122(a). The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Clancy v. DEP*, 2013 EHB 554, 572.

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by [the Department]. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [Board], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the

[3] Nowhere does the Appellant challenge the length of the Suspension Order. The Appellant challenges only the Department's decision to issue the Suspension Order.

> case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156.

Regulation of Blasting Activities in Pennsylvania

There is no doubt that under Pennsylvania law blasting activity is considered an ultra-hazardous activity. *Federoff v. Harrison Construction Co.*, 66 A.2d 817, 818 (Pa. 1949) (citing Sections 519 and 520 of the Restatement of Torts). As a result, blasters have absolute liability for damages resulting from their blasting activities. *Lobazzo v. Adams Edemiller, Inc.*, 263 A.2d 432, 433 n.1 (Pa. 1970). Under tort law, Pennsylvania Courts have recognized for more than sixty years that a person who conducts blasting activity is strictly liable for any damages resulting from blasting activities even if the utmost care was exercised to prevent the harm. *Federoff*, 66 A.2d 817.

The General Assembly has established a comprehensive, dual review program to regulate blasting activity in Pennsylvania. First, a person who wants to conduct blasting activity must obtain a blaster's license. *See* 73 P.S. §§ 157 and 161; 25 Pa. Code Chapter 210. (To obtain a blaster's license, a person must comply with the eligibility requirements in 25 Pa. Code § 210.14 that include an age requirement, a one year experience requirement, an education requirement and a testing requirement. 25 Pa. Code § 201.14(a)(1)-(4). To retain a license, a licensed blaster must meet continuing education requirements. 25 Pa. Code § 201.17(d). The Department's licensing program recognizes the professional status of persons who are licensed to conduct blasting activity in Pennsylvania. Second, after a person is licensed to conduct blasting activities in Pennsylvania, the licensed blaster must obtain from the Department a blasting activity permit for a particular blasting activity. *See* 25 Pa. Code §§ 211.121 and 211.124.

The Department oversees the issuance of blaster's licenses. 73 P.S. § 165.[4] Pennsylvania law requires that "[t]he use of explosives for the purpose of blasting in the neighborhood of any public highway, stream of water, dwelling house, public building, school, church, commercial or institutional building or pipe line, shall be done in accordance with the provisions of the . . . rules and regulations promulgated by [the Department]." 73 P.S. § 166(a). The Department may issue orders necessary to implement the Department's blasting regulations including an order to suspend, modify or revoke a license or permit authorized by the blasting regulations. 25 Pa. Code § 211.103(a). The Department may suspend any blasting license "for due cause." 73 P.S. § 165. The Department may issue orders suspending, modifying or revoking a blaster's license for violations of the blaster's license regulations, Chapter 210, and Chapter 211 (relating to storage, handling and use of explosives in surface applications). 25 Pa. Code § 210.19. Before an order is issued, the Department will give the blaster an opportunity to informally meet with the Department to discuss the facts and issues that form the basis of the Department's determination to suspend, modify or revoke the license. 25 Pa. Code § 210.19.

Under the Department's regulations, the blaster-in-charge shall control and supervise blasting activity. 25 Pa. Code § 211.154(a). The blaster-in-charge is responsible for all effects of the blast. 25 Pa. Code § 211.154(a). Regulations further provide:

> A blast shall be conducted so that the gases generated by the blast do not affect the health and safety of individuals. Effects from gases may be prevented by taking measures such as venting the gases to the atmosphere, interrupting the path along which gases may flow, and evacuating people from areas that may contain gases.

[4] The statutes regulating explosives were originally administered by the Department of Labor and Industry. That authority was subsequently conveyed to the Department of Environmental Resources, 71 P.S. § 510-1(24), then to the Department of Environmental Protection. 71 P.S. § 1340.503(a).

25 Pa. Code § 211.152. The Department asserts that the Appellant violated 25 Pa. Code § 211.152 by conducting a blast which generated gases that affected the health and safety of individuals.

Background

On June 22, 2012, the Department issued Blasting Activity Permit #45124002 ("BAP") to Silver Valley Drilling & Blasting, Inc. ("Silver Valley"), authorizing blasting activities at the Northampton Community College New Campus building site located along Rt. 715 in Pocono Township, Monroe County, Pennsylvania ("NCC Site"). (S.F. 2, 5; C. 2.) Edward Wean, Jr., the president and sole officer of Silver Valley, is licensed to conduct blasting activities in the Commonwealth of Pennsylvania under Blasting License No. BL-5788 issued by the Department. (S.F. 4; N.T. 286.) Mr. Wean has been licensed to blast in Pennsylvania for approximately twenty-five years. (N.T. 286.)

The general contractor at the NCC Site had previously hired Muschlitz Excavating Inc. ("Muschlitz Excavating") to install a sanitary sewer line to serve the project, which required the excavation of a trench for the sewer line, the installation of the sewer line and appurtenant manholes, the backfilling of the trench following installation and the regrading of the soil following backfilling. (L.S.F. 1, N.T. 6.) Under its contract with the general contractor, Muschlitz Excavating hired Silver Valley to drill and blast bulk rock and trench rock. (L.S.F. 2, N.T. 6, A. 1.) Silver Valley, not Muschlitz Excavating, was the permittee named on the BAP. (N.T. 160-161; C. 2.) Under Pennsylvania blasting law and regulations, the Department does not regulate the excavating contractor.

On July 26, July 31 and August 1, 2012, Silver Valley conducted a series of trench blasts at the NCC Site, designed to break rock in advance of Muschlitz Excavating's excavation of the

sewer line trench. (L.S.F. 10-12, N.T. 6.) Following blasting, Muschlitz Excavating's procedure was to excavate the sewer line trench to depth, install a protective trench box to prevent cave in, send Muschlitz Excavating workers into the trench box to manually install a portion of the sewer line, advance the workers and the trench box and backfill the trench to grade overtop of the installed sewer line. (L.S.F. 13, N.T. 6.)

The trench box and trench were oriented in an east-west direction. (N.T. 52; C. 14.) Blasting on July 31, 2012 was in the immediate vicinity of the sewer line trench, (N.T. 135), whereas blasting on August 1, 2012 occurred to the west of the trench box and trench. (N.T. 52, 55, 135; C. 5; C. 14.) Approximately 50 feet of unexcavated trench line remained from the blast conducted on July 31, 2012. (N.T. 167.) The August 1, 2012 blast, which was extremely deep for trench line work, had forty holes between 3.5 and 4 inches in diameter with 6 to 18 foot depths. (N.T. 180; S.F. 11.) The upper portion of the blast geology was composed of finer shale and dirt material, and the material became coarse and harder with depth. (S.F. 13, 14.)

On August 1, 2012, Mario Silva, a pipe layer employed by Muschlitz Excavating, and Brian Dzedzy, a pipe foreman for Muschlitz Excavating, began their work at the NCC Site at approximately 6:30 a.m. (N.T. 16-17, 41-42.) Once Mr. Silva and Mr. Dzedzy began work, they were installing sewer pipe in a trench at a depth of approximately ten feet, using a twenty-four foot trench box that was eight feet tall and no more than forty-two inches wide. (N.T. 42, 62-63; C. 14.)

Mr. Wean, the blaster-in-charge with the authority to evacuate Muschlitz Excavating's workers from the blast area, (N.T. 87), informed the Muschlitz Excavating workers of a safe evacuation distance, (N.T. 46), and at approximately 10:00 a.m., Mr. Wean told Mr. Silva to

move away from the trench to a safe distance, at which point Mr. Silva and Mr. Dzedzy went on break. (N.T. 19, 45; S.F. 7.)

The August 1, 2012 blast, fired at 10:40 a.m. and loaded in compliance with the BAP, was conducted at least 50 feet away from the excavated portion of the trench containing Muschlitz Excavating's trench box. (N.T. 6, 184; L.S.F. 17; S.F. 10, 12.) The blast, designed to create enough swell, i.e., material expanded above the original surface elevation of the blast, to allow venting of gases, produced between 6 and 8 feet of swell. (L.S.F. 18, S.F. 8, N.T. 6, 302.)

After post-blast inspections were conducted, Muschlitz Excavating began excavating the muck pile at approximately 12:00 p.m. and completed the process in 1.5 to 2 hours. (L.S.F. 19, N.T. 7.) Muschlitz Excavating eventually scraped the swell back to the original surface elevation of the blast. (S.F. 15.)

Mr. Wean, or one of his workers, let the Muschlitz Excavating workers know when it was safe to return to the work area after the blast. (N.T. 46.) Work resumed in the trench at approximately 11:00 a.m., roughly twenty minutes after the August 1, 2012 blast. (N.T. 46.) After worked resumed, Muschlitz Excavating workers advanced the trench two or three times. (N.T. 61-62.)

When Mr. Silva arrived for work on August 1, 2012, he felt well. (N.T. 18.) Shortly after he began working in the trench on the morning of August 1, 2012, however, he began to feel sick and experienced shortness of breath and a racing heart. (N.T. 18.) After Mr. Silva resumed work in the trench at 11:00 a.m., he began to feel worse than he had felt earlier that morning. (N.T. 21-22.) Later in the day, Mr. Dzedzy looked down into the trench box, noticed that Mr. Silva looked ill and climbed down the ladder into the trench box to check him. (N.T.

47.) Mr. Silva began to be overcome by noxious gases at approximately 2:30 p.m. and soon thereafter passed out. (S.F. 18; N.T. 21-22.)

Once Mr. Dzedzy was in the trench box attending to a collapsed Mr. Silva, Mr. Dzedzy used his cell phone to call Michael Keefer, an employee of Muschlitz Excavating working as a site superintendent for the NCC Site, who was at the time working at a different area of the worksite, to come over to the trench, knowing that Mr. Keefer had training as an EMT. (N.T. 47, 69, 71-72.) Meanwhile, an inspector for Muschlitz Excavating at the NCC Site called 911, (N.T. 47), and emergency crews from the Pocono Township Volunteer Fire Company ("PTVFC") were called. (S.F. 19.) After Mr. Keefer arrived, he climbed into the trench box and began attending to Mr. Silva. (N.T. 48, 75.) Shortly thereafter, Mr. Keefer noticed that Mr. Dzedzy looked ill, and Mr. Dzedzy then laid Mr. Silva down very gently, got up and walked out the back of the trench and passed out. (N.T. 48, 55, 75.) After Mr. Dzedzy had walked away, Mr. Keefer began to feel ill, supported Mr. Silva's head with some towels and loose stone, exited the rear of the trench, then passed out and thereafter drifted in and out of consciousness. (N.T. 75, 76.)

A firefighter responded to Mr. Keefer with a self-contained breathing apparatus with fresh compressed air. (N.T. 76.) Mr. Silva did not know how he got out of the trench. (N.T. 27.) Mr. Silva, hearing sirens, regained consciousness in an ambulance. (N.T. 29.) Mr. Silva, Mr. Dzedzy and Mr. Keefer were transported to the Pocono Medical Center and then transported to the University of Pennsylvania Medical Center, where they were treated for carbon monoxide poisoning in hyperbaric chambers. (N.T. 29, 48, 76-77.) At least Mr. Dzedzy and Mr. Keefer were told by medical personnel that they had carbon monoxide poisoning. (N.T. 67, 77.) Further, a doctor at the University of Pennsylvania Medical Center informed Mr. Keefer of the doctor's understanding that carbon monoxide is a byproduct of blasting. (N.T. 77-78.) Overall,

seven men who had been working in or near the trench were taken to a nearby hospital. (S.F. 20; N.T. 29, 48, 76.) The incident at the NCC Site on August 1, 2012 was reported as a carbon monoxide incident to the Department's Pottsville District Mining Office. (S.F. 6.)

The record provides a number of various carbon monoxide concentrations that are considered dangerous under certain circumstances. The National Institute of Occupational Safety and Health's ("NIOSH") time-weighted average for exposure to carbon monoxide is 35 ppm. (N.T. 139.) The Occupational Safety and Health Administration ("OSHA") permissible exposure limit for carbon monoxide is 50 ppm. (N.T. 139.) NIOSH's and OSHA's carbon monoxide exposure values are set for typical workday exposure. (N.T. 139.) At a carbon monoxide level of 130 ppm, the effects can be felt within 30 to 45 minutes, and at a carbon monoxide level of 200 ppm, the ceiling level for carbon monoxide exposure and the point at which a person should leave the environment, the effects can be felt in 15 minutes. (N.T. 139-140, 201.) Carbon monoxide concentrations of 1200 ppm are immediately dangerous to life. (N.T. 139.)

Michael Shay, the Chief of the PTVFC, led the PTVFC and neighboring Jackson Township Volunteer Fire Department ("JTVFD") and responded to the NCC Site at approximately 2:40 p.m. on August 1, 2012. (N.T. 89-91.) Mr. Shay directed one member of the PTVFC and one member of the JTVFD to use their carbon monoxide meters to obtain readings near the trench. (N.T. 91.) The PTVFC and JTVFD personnel both took carbon monoxide readings at the edge of the trench, and personnel from both fire departments received readings of 700 parts per million ("ppm"). (N.T. 91-92.) While Mr. Shay was on-site, a representative of Silver Valley told Mr. Shay that the blasting could have produced the carbon monoxide. (N.T. 95.)

Shailesh Patel, a Professional Quality Engineer with the Department in Wilkes-Barre and a member of the Department's Emergency Response Team (the "ERT"), responded to the NCC Site on behalf of the ERT at approximately 4:45 p.m. on August 1, 2012. (N.T. 104, 107.) Jim Kunkle, an Environmental Cleanups Program Supervisor in the Department's Bethlehem Field Office, also responded to the NCC Site on behalf of the ERT at approximately 4:50 p.m. on August 1, 2012. (N.T. 128-129, 132-133.) Although Mr. Patel and Mr. Kunkle were each equipped with Department-issued MSA Altair 4-gas meters, they agreed to use Mr. Patel's meter and leave Mr. Kunkle's meter on as a backup. (N.T. 108, 120, 131, 135.)

The weather was clear with a light breeze during the ERT's monitoring. (N.T. 108-109.) The carbon monoxide readings taken by Mr. Patel at the top of the trench fluctuated between 5 and 180 ppm. (N.T. 111-112.) Carbon monoxide readings approximately five feet above the trench fluctuated between 0 and 180 ppm. (N.T. 142.) The highest carbon monoxide reading, 185 ppm, was detected halfway up the trench. (N.T. 112.) The lowest reading inside the trench was 135 ppm. (N.T. 123.) In the two manholes immediately down gradient from the trench, the carbon monoxide readings exceeded 1000 ppm. (N.T. 112-114.) No carbon monoxide was found in a stockpile of excavated material located in the immediate vicinity of the blast area, (N.T. 116-117), yet carbon monoxide readings in the blast area ranged between 12 and 20 ppm in the voids under the stones in the blast area, (N.T. 114-115), signaling that carbon monoxide remained in the unexcavated material at the location of the blast area.

On August 1, 2012, Ross Klock, a Department blasting inspector, after becoming aware of the incident at the NCC Site, called Michael Chopek, a licensed blaster employed by Silver Valley, and told him that Silver Valley was to cease all activity at the NCC Site. (N.T. 149, 162; S.F. 25.) Mr. Klock initiated an investigation at the NCC Site beginning between approximately

8:30 and 9:30 a.m. on August 2, 2012. (N.T. 163.) Mr. Klock met with Mr. Wean, Mr. Chopek and Jack Muschlitz of Muschlitz Excavating. (N.T. 163, 166.) Mr. Wean and Mr. Chopek gave Mr. Klock the shot report when he arrived at the NCC Site. (N.T. 163; C. 3.) Mr. Wean described to Mr. Klock the different layers of geology encountered at the site while drilling the holes for the shot. (N.T. 166.)

Mr. Klock reviewed a cell phone recording, as well as a still photograph of the August 1, 2012 blast, which was taken midway through the blast and portrayed the ground surface heaving upwards and some gases venting into the atmosphere. (N.T. 176-179.) After viewing that evidence, Mr. Klock believed that the shot had a good blast design with a good swell factor and that the blast area was well protected. (N.T. 178-179; C. 4.) While Mr. Klock testified that it appeared to him from viewing the video and photographic evidence that some of the blasting gases vented, (N.T. 178), Richard Lamkie, the Chief of the Explosives and Safety Section with the Bureau of Mining Programs, testified that based on the same video and photographic evidence, he did not see anything that made him feel that gases had or had not vented. Smoke and steam coming up from a blast hole does not indicate that gases are vented. (N.T. 231, 264; C. 24.)

At the conclusion of the on-site meeting, Mr. Klock reached a preliminary conclusion that the carbon monoxide that affected the Muschlitz Excavating workers on August 1, 2012 was caused by blasting, and Mr. Klock directed Silver Valley to submit a corrective action plan to the Department via email before Mr. Klock would allow blasting to resume. (L.S.F. 33, N.T. 6, 167.) Mr. Wean agreed that to protect the workers from the noxious gases generated by blasting, any further blasting conducted would be accompanied by the use of carbon monoxide monitors and excavation of a break between future blasts and where the men might be working. (N.T.

167.) On August 2, 2012, Mr. Chopek submitted a corrective action plan on behalf of Silver Valley incorporating the measures discussed at the on-site meeting. (N.T. 168; C. 18.) The Department approved the corrective action plan on August 2, 2012 and lifted the cease order that had been verbally issued on August 1, 2012. (N.T. 170; C. 19.)

On September 5, 2012, Mr. Klock issued an Incident Investigation Report setting forth his observations and conclusions regarding the August 1, 2012 carbon monoxide incident. (C. 22.) The Incident Investigation Report was based on the shot records, Mr. Kunkle's report of the August 1, 2012 incident, and information gathered by Mr. Klock through on-site interviews and through his August 2, 2012 investigation. (N.T. 175-176.)

The Department followed up its verbal cease order with a written Explosives Compliance Order. (N.T. 171-172; C. 20.) Given that three men had been injured and hospitalized, Department policy required the issuance of the Explosives Compliance Order. (N.T. 173-174.) The Explosives Compliance Order stated that the August 1, 2012 blast "failed to vent all the noxious gases from the blast," and that the "[o]perator failed to control noxious gases." (C. 20.) The Explosives Compliance Order required the operator to "submit a plan stating action that [was] to be taken to insure compliance with the Department's regulations and to insure the safety of individuals on and off site pertaining to noxious gases." (C. 20.)

While there is some disagreement over when Muschlitz Excavating completed scraping off the swell material generated by the August 1, 2012 blast, Mr. Klock testified that "there was six feet of finer material even with the scrape. If it wasn't scraped off . . . the material on top was still extremely fine. It still would have prevented the gases from evacuating or venting through the top." (N.T. 184.) Mr. Klock also testified that the different layers of geology, with the finer material on top, trapped the gases, forcing them to travel laterally along the previously

blasted trench area in the direction of where the men had been working, and eventually the gas finally vented at the point where the three injured Muschlitz Excavating employees were working in the trench box. (N.T. 180-181.) Mr. Klock testified that it was his belief to a reasonable degree of certainty that blasting was the only source of the carbon monoxide. (N.T. 180-182.)

In addition, Richard Lamkie was involved with Mr. Klock's investigation of the carbon monoxide poisoning incident that occurred at the NCC Site on August 1, 2012. Mr. Lamkie, as Chief of the Explosives and Safety Section with the Bureau of Mining Program, is responsible for deciding the length of a blaster's license suspension. (N.T. 252.) Mr. Lamkie held a fact-finding meeting on September 18, 2012 to hear Mr. Wean's explanation of the August 1, 2012 blast and itsaftermath. (N.T. 247-249; C. 21.) Silver Valley's representatives at the fact-finding meeting included Mr. Wean, Mr. Chopek and Mr. Wean's attorney, Geoffrey Worthington. The Department's representatives at the fact-finding meeting included Mr. Lamkie, Nels Taber, Robin Katzman Bowman, Ross Klock, Michael Menghini and Renee Bogdan. (N.T. 249-250.) Based on what Mr. Lamkie heard at the meeting, he concluded that Mr. Wean violated 25 Pa. Code § 211.152. (N.T. 252-253.)

In Mr. Lamkie's experience, since 2000, rarely have individuals required medical attention following a blasting violation, and prior to the August 1, 2012 incident, the only incident of a person going into a hyperbaric chamber as a result of blasting since 2000, as far as Mr. Lamkie was aware, occurred in 2000. (N.T. 256.) In addition, Mr. Lamkie felt that aggravating factors included: that the workers had been working in close proximity to the blast area, that there was material from the previous blast between where the August 1, 2012 blast was

conducted and where the workers were in the trench, and that the Muschlitz Excavating workers were evacuated from the trench area for only a short period of time. (N.T. 255.)

Mr. Lamkie initially considered a license suspension of at least six months. (N.T. 256.) In fact, in the last flyrock case involving only a minor injury, the blaster had been suspended for one year. (N.T. 256, 258.) However, he did not feel a six month license suspension was warranted because Mr. Wean did take some measures to vent the gases to the atmosphere, he did not have a history of violations on his record and he cooperated with Mr. Klock's investigation. (N.T. 254.) Prior to August 1, 2012, Mr. Wean's Pennsylvania blaster's license had never been revoked or suspended. (N.T. 286-287.) Appellant's expert, Mr. Haney, testified that Mr. Wean has a very good reputation, is very diligent and is a consummate professional. (N.T. 384, 393.)

After considering the aggravating and mitigating factors, Mr. Lamkie, on behalf of the Department, issued a Suspension Order to Mr. Wean, suspending Mr. Wean's blaster's license for a period of 120 days because the blast, of which Mr. Wean was the blaster-in-charge, affected the health and safety of individuals, in violation of 25 Pa. Code § 211.152. (N.T. 253-256; C. 23.) Since the August 1, 2012 incident, Mr. Wean has not changed any of his blasting procedures. (N.T. 338.)

Appeal of Department Orders

The Department issued two orders to the Appellant following an incident at NCC Site on August 1, 2012 in which three employees of Muschlitz Excavating, who were excavating a trench for a new sewer line, were overcome by carbon monoxide. The three employees were rushed to a hospital by ambulance and required treatment in a hyperbaric chamber to treat their carbon monoxide poisoning. The Department issued the first order on August 2, 2012, which identified violations of 25 Pa. Code § 211.52 and directed the Appellant to submit a corrective

action plan to the Department for the Department's approval before the Appellant could resume blasting at the NCC Site. The Department issued the second order on October 9, 2012, which suspended the Appellant's blaster's license for a period of 120 days. The Appellant filed timely appeals of the two orders, and those appeals were later consolidated. The Appellant raises both factual and legal objections to the Department's actions.

The Appellant makes two arguments in his Posthearing Brief in support of his appeal. First, the Appellant asserts that the Department failed to meet it evidentiary burden to establish a violation of 25 Pa. Code § 211.152. In support of this argument, the Appellant asserts that the Department has not established by a preponderance of the evidence that the carbon monoxide gas that poisoned the three individuals who were hospitalized was generated by the Appellant's August 1, 2012 blast. Second, the Appellant asserts that the application of Section 211.152 to the Appellant in this case was unconstitutional and that Section 211.152 has an "unconstitutional vagueness".

Violation of 25 Pa. Code § 211.152

The Department's two orders under appeal were based upon the Department conclusion that the Appellant violated 25 Pa. Code § 211.152 on August 1, 2012 when carbon monoxide gas from a blasting activity at the NCC Site injured at least three individuals who were hospitalized as a result of the incident. The first order required Appellant to submit a corrective action plan to the Department. The second suspended Appellant's blaster's license for a period of 120 days. Both orders are based on the same alleged violation of Section 211.152, and the Appellant asserts that the Department failed to support the issuances of the two orders because it failed to meet its evidentiary burden to establish a violation of Section 211.152.

The Appellant advances a number of arguments in an attempt to undermine the Department's finding that the Appellant violated 25 Pa. Code § 211.152. First, the Appellant argues that the Department failed to adequately consider exhaust and potential exhaust leaks from heavy machinery located within the vicinity of the August 1, 2012 blast as an alternate source of the carbon monoxide that affected the health and safety of the Muschlitz Excavating employees. In support of that contention, the Appellant offered an expert, Mr. Haney, who testified that the machines should have been turned on and tested after the blast. (N.T. 378-379.)

On August 1, 2012, Muschlitz Excavating operated three excavating machines at least 20 feet away from the trench box while Mr. Silva was in the trench box laying sewer pipe. (N.T. 33.) One excavating machine would dig in front of the trench box and two excavating machines would backfill behind the trench box. (N.T. 33.) All the heavy excavating machinery operated by Muschlitz Excavating in the vicinity of the trench box were powered by internal combustion engines. (L.S.F. 26, N.T. 6.)

The Appellant draws attention to the fact that Mr. Klock did not know how long the excavating machines may have been running near the trench on the day of the incident, that he did not know if the excavating machines were running properly and that he was not aware of any tests conducted on the exhaust from the excavating machines. (N.T. 198-199.) The Appellant also points out that Mr. Patel did not test the heavy machinery because it was not operating at the time he was conducting his investigation. Appellant's Posthearing Brief at 21.

Exhaust from the heavy machinery, however, did not produce the harm to the Muschlitz Excavating employees on August 1, 2012. Although one of these machines could have been operating as much as 5 feet below ground level in a part of the trench, all of the heavy machinery

operating in the vicinity had rear exhaust stacks that were 7 to 8 feet off the ground. As a result, the tops of the exhaust stacks were all above ground level. (N.T. 25, 44, 73.)

The Appellant points out that Mr. Klock testified that carbon monoxide is heavier than air. The Board, however, sides with Mr. Patel and Mr. Lamkie who both testified that carbon monoxide is lighter than air,[5] which means that carbon monoxide tends to rise and dissipate into the atmosphere. (N.T. 119, 127-127, 284.) As a result, carbon monoxide from the stacks, which were above ground level, would have tended to dissipate into the atmosphere, particularly given the breeze documented at the time of the August 1, 2012 blast. Mr. Klock and Mr. Patel arrived at this same conclusion. Exhaust from the heavy machinery would not have settled down into the trenches as the Appellant suggests. The Board finds the testimony of Mr. Klock and Mr. Patel more credible on the issue of the exhaust from the heavy machinery. As a result, the Board finds that the carbon monoxide in the trench was generated from the Appellant's blasting activity.

Others who observed the NCC Site around the time of the blast also dismissed the heavy machinery as a potential source of the carbon monoxide. When Mr. Keefer arrived to the trench area on August 1, 2012 to provide assistance to Mr. Silva, Mr. Keefer looked for hazards such as gas-operated machines, pumps and generators, but he did not see any hazards that might have been the cause of Mr. Silva's condition. (N.T. 72.) He also did not see anything that made him believe it was not safe to enter the trench. (N.T. 74.) Mr. Keefer did not consider the heavy machinery operating in the vicinity of the trench to be a hazard because it was a standard operating procedure to have the equipment working with them and, in his experience, it had never caused an issue before. (N.T. 73.)

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[5] More specifically, Mr. Patel testified that the specific gravity of carbon monoxide is approximately 0.97. (N.T. 126-127.)

In addition, Mr. Shay believed that the heavy equipment at the NCC Site did not appear to be the source of the carbon monoxide because it was located in an open area. (N.T. 94.) Also, while Mr. Shay was on-site, a representative of Silver Valley told Mr. Shay that the blasting could have produced the carbon monoxide. (N.T. 95.)

Fire department personnel were receiving normal carbon monoxide readings near heavy machinery located roughly 100 feet away from the ditch. (N.T. 94.) From Mr. Shay's experience in responding to other carbon monoxide incidents, he considered the 700 ppm carbon monoxide readings received from the edge of the trench to be too high to have been produced by a vehicle. (N.T. 94.) For cars left running in a garage, for example, Mr. Shay had seen carbon monoxide readings of 300 ppm. (N.T. 94.) The highest carbon monoxide readings Mr. Shay had seen prior to the August 1, 2012 incident were in the range of 400 to 500 ppm, which were attributable to propane heaters. (N.T. 95.)

Further, the Emergency Response Team did not detect any carbon monoxide in the background reading taken at the NCC Site. (N.T. 109.) Mr. Patel and Mr. Kunkle did not see any other potential sources of the carbon monoxide other than the blast. (N.T. 117.) No small engines were operating in the vicinity of the trench on August 1, 2012. (N.T. 27-28, 181.) Furthermore, no sewer gases could have been entering the NCC Site from the municipal sewer because the sewer lines that were being installed had not yet been connected to the municipal sewers, particularly to the Pocono Township sewer line. (N.T. 51, 139.) Mr. Patel and Mr. Kunkle nevertheless opened the Pocono Township manhole that the NCC Site sewer line would ultimately connect to and found that the carbon monoxide reading in the manhole was zero. (N.T. 139.)

Second, the Appellant also attempts to discount Mr. Klock's Explosives Compliance Order and Mr. Lamkie's Suspension Order because neither of the two men were at the site, nor did either of the two men personally take readings at the NCC Site. Appellant's Posthearing Brief at 18-19. Further, Mr. Patel and Mr. Kunkle arrived more than two hours after Mr. Silva was affected and could not indicate precisely how much carbon monoxide, if any, was present in the trench at the time of Mr. Silva's exposure. (N.T. 107, 200.) The logical conclusion of the Appellant's argument is that unless the Department employee who issues an order is present at a blasting site at the precise time of an injury, the order cannot stand. The Appellant therefore seems to suggest that a Department inspector be present at every blast conducted in the Commonwealth. This suggestion is no more than a self-serving argument that is economically and administratively impracticable. The Board, rather, appreciates the thorough monitoring conducted by Mr. Patel and by the PTVFC and JTVFC, as discussed at length above. The Appellant's arguments also fail because, while Mr. Patel's readings were taken at least two hours after Mr. Silva was overcome by carbon monoxide, the PTVFD's readings, which indicated carbon monoxide levels of 700 ppm in the trench, were taken very shortly after Mr. Silva's exposure.

Third, the Appellant draws attention to the confusion over when Muschlitz Excavating finished scraping the swell from the blast area. The facts indicate that the Appellant had an express conversation with Mr. Muschlitz to have him dig the overburden off after the Appellant completed blasting to make sure the effects of noxious gases would not impact the health and safety of individuals. (N.T. 343.) The parties stipulated that after post-blast inspections were conducted, Muschlitz Excavating began excavating the muck pile at approximately 12:00 p.m. on August 1, 2012 and completed the process in 1.5 to 2 hours. (L.S.F. 19, N.T. 7.) The parties

also stipulated that Muschlitz Excavating scraped the swell back to the original surface elevation of the blast. (S.F. 15.)

The Appellant points out that Mr. Patel and Mr. Keefer testified that on August 1, 2012 that they observed that the ground heave from August 1, 2012 had not been fully scraped away. (N.T. 83, 125.) When Mr. Klock inspected the August 1, 2012 blast site on August 2, 2012, it was scraped off with no muck pile visible. (N.T. 163-164.) This appears to have led Mr. Klock to conclude in the Incident Investigation Report that "the [carbon monoxide] incident was likely caused by scraping off the swell material from the blast, which compacted the finer material near the surface and created a barrier through which the gas could no longer vent to the surface." (C. 22, p. 45; N.T. 185.)

Nevertheless, at the hearing before the Board, the Department's re-analysis through testimony does not disturb its finding that the August 1, 2012 blast caused the release of carbon monoxide which affected the Muschlitz Excavating workers. Mr. Klock testified that "there was six feet of finer material even with the scrape. If it wasn't scraped off . . . the material on top was still extremely fine. It still would have prevented the gases from evacuating or venting through the top." (N.T. 184.) Mr. Klock testified that the different layers of geology, with the finer material on top, trapped the gases, forcing them to travel laterally along the previously blasted trench area in the direction of where the men had been working, and eventually the gas vented at the point where the three Muschlitz Excavating employees were harmed in the trench box. (N.T. 180-181.) As a result, Mr. Klock's impression of the timing of the scrape results in no more than harmless error. The Board reviews appeals *de novo*, meaning that the Board, as the reviewing body, "is substituted for the prior decision maker, [the Department], and redecides the

case" and, further, "makes its own factual findings, findings based solely on the evidence of record in the case before it." *Smedley v. DEP*, 2001 EHB 131, 156.

Fourth, the Appellant impliedly argues that Mr. Patel's meter and the JTVFD meter were improperly calibrated. The Appellant argues that the Appellant failed to show that the JTVFD meter was properly calibrated. Although Mr. Shay could not say when the JTVFD meter was last calibrated, given that the PTVFC meter was timely calibrated and the PTVFC and JTVFD meters both provided identical readings of 700 ppm at the edge of the trench, the JTVFD meter was properly calibrated. (N.T. 91-92, 101.) The Appellant also states that Mr. Patel's meter was due for calibration and that he did not perform a "bump test" to ensure that the meter was working properly. (N.T. 121-122.) The Board finds that Mr. Patel's meter was properly calibrated. Although Mr. Patel's gas meter is calibrated on a monthly basis and was last calibrated exactly one month prior to the August 1, 2012 incident, the meter had not been used since its last calibration. (N.T. 122.)

Fifth, the Appellant attempts to focus to the timing of Mr. Silva's symptoms in an effort to draw attention away from the August 1, 2012 blast as the source of the harm to the Muschlitz Excavating workers. In particular, the Appellant states that Mr. Silva experienced similar symptoms on July 31, 2012 and on August 1, 2012 prior to the August 1, 2012 blast to imply that those symptoms were caused by the heavy machinery located near the trench. (N.T. 18-19.) The Appellant, however, fails to distract attention away from the August 1, 2012 blast as the source of Mr. Silva's trip to the hospital. Silver Valley conducted a blast on July 31, 2012 that could have caused those symptoms. Carbon monoxide can remain in the soil for up to months, which could explain Mr. Silva's symptoms prior to the August 1, 2012 blast. Also, even if the blast on July 31, 2012 did not cause Mr. Silva's symptoms, and even if Mr. Silva's symptoms were not

caused by a release of carbon monoxide from the August 1, 2012 blast, the Appellant still fails to explain the unlikely coincidence that six others also became ill, two of which experienced precisely the same symptoms as Mr. Silva in precisely the same location as Mr. Silva and required precisely the same treatment as Mr. Silva.

Rather than follow the Board's case law on the preponderance standard, cited above, the Appellant cites Third Circuit case law, stating that "Pennsylvania law demands that the [preponderance] burden of proof be met with more than conjecture, it requires that the inferences drawn from the facts and circumstances upon which plaintiff relies be established by a preponderance in favor of the basic proposition to the exclusion of any equally well supported belief in any inconsistent theory." *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 851 (3d Cir. Pa. 1967). The Appellant did not, however, cite the remainder of the Third Circuit's preponderance standard. The Third Circuit continued by stating that "the proofs need not be convincing to the point of absolute certainty . . . and may be sustained though the trier of fact has not been persuaded beyond a reasonable doubt. *Id.*

The Appellant then argues that the Department failed to meet its evidentiary burden because "[t]he evidence produced at hearing has established at least one well supported and inconsistent theory as to the source of the Carbon Monoxide that apparently affected the MEI workers," that purported theory being that the carbon monoxide that affected the health and safety of individuals was produced by three excavating machines with internal combustion engines operating "in close proximity to" the trench box while Mr. Silva was in the trench box laying sewer pipe. Appellant's Posthearing Brief at 17-18.

The Appellant fails to align his assertion with the language from the case law cited. *Vlases* requires the party carrying the burden to exclude "any *equally* well supported belief in

any inconsistent theory." *Id.* (emphasis added). The Appellant claims only that his theory is a well supported belief in a consistent theory, not an *equally* well supported belief. As the Board laid out above, the Appellant's theory, that the excavating machinery was the source of the carbon monoxide that affected the health and safety of the Muschlitz Excavating workers, is not well supported, and it certainly is not well supported to the point of being equal to the overwhelming weight of evidence in favor of the theory that the August 1, 2012 blast was the source of the carbon monoxide that affected the health and safety of the Muschlitz Excavating workers.

In consideration of the overwhelming weight of evidence indicating that the August 1, 2012 blast caused the release of carbon monoxide, a noxious gas, which affected the health and safety of the Muschlitz Excavating workers, in violation of 25 Pa. Code § 211.152, the Board finds that the Department met its evidentiary burden and thus established by a preponderance of the evidence that the Appellant violated 25 Pa. Code § 211.152. The Department did not abuse its discretion in issuing the Explosives Compliance Order and Suspension Order based on the Appellant's violation of 25 Pa. Code § 211.152. The Board finds no merit in the Appellant's offered alternate theory that exhaust from the heavy machinery located near the trench caused three men to be treated in hyperbaric chambers for carbon monoxide poisoning.

Constitutional Objections to Department's Application of 25 Pa. Code § 211.152

The Appellant raises constitutional challenges to the Department's application of 25 Pa. Code § 211.152 in issuing the Suspension Order.[6] First, the Appellant claims that the regulation as applied by the Department is not sufficiently specific to give fair notice to persons of ordinary intelligence as to what conduct will render them in full compliance with the regulation. Second,

[6] All of the Appellant's objections challenge only the act of issuing the Suspension Order. None of the objections challenge the length of the Suspension Order.

the Appellant claims that the regulation as applied by the Department is vague as to the duration of the precautionary measures that should be taken by a blaster, and the regulation's use of the phrase "A blast shall be conducted" is vague as to the duration of time that will be considered part of the "conduct" of the blast for which the blaster will be held responsible. Third, the Appellant claims that in support of the Department's suspension of the Appellant's blaster's license, the Department imposes standards of conduct upon the Appellant that are neither contained in Section 211.152 nor incorporated into the Explosives Compliance Order and therefore not properly adopted or announced in advance.

The Appellant also implicitly argues at various times throughout his brief that 25 Pa. Code § 211.152 is unconstitutionally vague on its face. To succeed on this challenge, the Appellant "must demonstrate that the regulation is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982). As a result, if the Board finds that the Department's application of 25 Pa. Code § 211.152 in this case was constitutional, then the Board cannot find that Section 211.152 is unconstitutional on its face.

In the face of vagueness challenges, regulations are treated the same as statutes. *Tri-County Indus. v. Dep't. of Env't. Prot.*, 818 A.2d 574, 583 (Pa. Commw. 2003). A vagueness challenge to a statute or regulation is essentially a due process challenge under the Fifth Amendment. *Eagle Environmental II, L.P. v. DEP*, 2002 EHB 335, 356-57 (citing *Village of Hoffman Estates*, 455 U.S. at 497; *Commonwealth v. Stenhach*, 514 A.2d 114, 124 (Pa. Super. 1986).

The Supreme Court has held that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S.

104, 108-09 (1972). The Board has previously explained that "[v]ague regulations deny due process in two ways: 'they do not give fair notice to people of ordinary intelligence that their contemplated activity may be unlawful, and they do not set reasonably clear guidelines for law enforcement officials and courts, thus inviting arbitrary and discriminatory enforcement.'" *Eagle Environmental II, L.P.*, 2002 EHB at 357 (*quoting Park Home v. City of Williamsport*, 545 Pa. 94, 101 (1996).

When reviewing a vagueness challenge to a regulation, the Board will consider both the essential fairness of the law and the impracticability of drafting legislation with greater specificity. *Eagle Environmental II, L.P.*, 2002 EHB at 357 (citing *Fabio v. Civil Service Commission*, 414 A.2d 82, 84-85 (Pa. 1980)). In addition, the standards used for evaluating vagueness should not be mechanically applied. *Eagle Environmental II, L.P.*, 2002 EHB at 357. As the U.S. Supreme Court has explained, "[t]he degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment." *Village of Hoffman Estates*, 455 U.S. at 498 (footnotes omitted).

As we previously noted, blasting is regulated as an ultra-hazardous activity. *See* N.T. 271, 402; *see also Federoff v. Harrison Construction Co.*, 66 A.2d 817, 818 (Pa. 1949). Blasting activity, therefore, is highly regulated by the Department and is subject to a dual review system. The first review occurs when the Department issues a blaster's license under 73 P.S. § 165. The second review occurs when the Department issues a blasting activity permit consistent with the requirements of 25 Pa. Code § 211.124 which permits the licensed blaster to conduct blasting activities in a particular instance. In the act of blasting, blasters are held to a broad standard of conduct. "A blast shall be conducted so that the gases generated by the blast do not affect the

health and safety of individuals." 25 Pa. Code § 211.152. Borrowing from the U.S. Supreme Court's reasoning in *Village of Hoffman Estates*, the degree of vagueness that the Constitution tolerates of 25 Pa. Code § 211.152 depends in part on the highly dangerous nature of blasting.

The Appellant argues that the regulation as applied by the Department is not sufficiently specific to inform licensed blasters, such as the Appellant, what conduct on their part will render them in full compliance with the regulation and thereby avoid penalty. The Appellant also argues that the Department's application of the regulation fails to provide fair notice to persons of ordinary intelligence that their contemplated conduct might be unlawful. The Board disagrees.

Here, the Appellant confuses Section 211.152 for a design standard rather than the performance standard that it is. A design standard establishes a specific means, perhaps additional design standards or other mandatory requirements, to achieve an anticipated level of performance. A regulated entity has no flexibility or discretion to stray from the prescribed design standards. A performance standard, on the other hand, establishes an acceptable level of performance, but then allows a regulated entity flexibility in selecting means to achieve that acceptable level of performance. Whereas compliance with a design standard is measured simply by determining whether the mandatory design standards were followed regardless of whether the anticipated level of performance was achieved, compliance with a performance standard is measured by determining whether the mandatory performance standard is achieved.

Section 211.152 is a performance standard, and the level of mandatory performance it establishes is that gases generated by a blast shall not affect the health and safety of individuals. The regulation provides a few examples of measures that may be used but it does not provide an exhaustive list of design standard-like requirements. Section 211.152 imposes a broad but

succinct and straightforward performance standard on professional licensed blasters: a professional licensed blaster is required to conduct all blasting activities in such a manner that noxious gases from the highly regulated blasting activities do not adversely affect the health and safety of individuals. If noxious gases from the highly regulated blasting activities adversely affect individuals, then the professional licensed blaster responsible for the blasting activity has violated the straightforward performance standard in Section 211.152.

Section 211.152 provides a person of ordinary intelligence with a reasonable opportunity to recognize what is prohibited, i.e., the gases generated by a blast cannot affect the health and safety of individuals. That standard provides fair warning to the blasting industry of what is expected.

The Appellant also claims that the regulation as applied by the Department does not set reasonably straightforward guidelines for Departmental enforcement officials or courts, thus inviting arbitrary and discriminatory enforcement. The Board disagrees. The regulation does impose a straightforward performance standard, and it allows licensed blasters flexibility in selecting the appropriate means to achieve this standard.

The Appellant claims that the regulation is vague as to the duration of the precautionary measures that should be taken by a blaster and that the regulation's use of the phrase "A blast shall be conducted" is vague as to the duration of time that will be considered part of the "conduct" of the blast for which the blaster will be held responsible. As such, the Appellant argues, blasters cannot reasonably discern from the regulation the extent of the precautionary measures they must take to avoid liability nor can they reasonably discern from the regulation the time at which the blaster may safely depart the blast site or relinquish control of the blast site to other parties.

Again, the Appellant confuses performance standards with design standards. The Appellant desires a design standard to limit the duration of his liability. Such a limitation of liability is not appropriate in the context of the regulation of an ultra-hazardous blasting activity that can affect the health and safety of individuals. Under Section 211.152, a licensed professional blaster must protect the public from noxious gases produced by that licensed professional's blasting activity at all times. The fact that a licensed professional blaster is responsible for noxious gases from a regulated blasting activity at all times does not render Section 211.152 vague. It is not vague. Section 211.152 imposes a broad but straightforward performance standard on licensed professional blasters.

Given the highly dangerous nature of blasting, the regulation imposes liability on blasters for as long as noxious gases from a blast are capable of affecting the health and safety of individuals. Evidence presented at the hearing before the Board shows that gases generated by blasting can stay in the soil and in the subsurface of a blast area for up to months. (N.T. 245.) The fear that the Appellants will leave the worksite only to find out that months later noxious gases were released from the ground and harmed individuals, however, is unfounded. First, neither party provided evidence of any documented case of a delayed release of noxious gas after blasting. Noxious gases are generated when the blasting activity occurs. Second, licensed blasters have a number of tools at their disposal, such as excavating and monitoring, to ensure that noxious gases are released immediately into the atmosphere. The Board rejects the Appellant's void for vagueness argument and finds that Section 211.152 is not unconstitutionally vague.

During an on-site review of Silver Valley's BAP application, it was also mentioned that there was a need to ensure that precautionary measures were taken for carbon monoxide. (N.T.

159.) Mr. Klock also noted on the Explosives Inspection Report, which memorialized the on-site meeting, that under 25 Pa. Code § 211.152, the operator and site excavator should take all necessary action to protect the public from noxious gases, including immediate excavation and trenching. (N.T. 160; C. 1.)

One of the best ways to vent gases generated by blasting is immediate excavation of the blast site because doing so would reduce or eliminate areas where gases could be trapped. (N.T. 242-243.) In fact, immediately excavating a trench to depth and trenching at a blast site are standard industry practices that have been used in the blasting industry for over twenty-two years. (N.T. 153, 217-218, 244-245, 376-377.) Even though immediate excavation of the blast area would have alleviated concerns with regard to the impacts from noxious gases, no portion of the trench blast of August 1, 2012 was excavated to depth prior to the August 1, 2012 blast. (S.F. 16, N.T. 214.) The Appellant did not direct anyone to excavate a break to the depth of the trench between the closest end of the blast and the workers after the August 1, 2012 blast. (S.F. 31.) Instead, a break should have been dug between the blast conducted on July 31, 2012 and the blast conducted on August 1, 2012. (N.T. 206.)

The Appellant counters that digging a break in a blasted trench line is not 100 percent effective to prevent carbon monoxide exposure. (N.T. 207-208, 260-262); Appellant's Posthearing Brief at 29-30. The Appellant's attack on excavation is off target, however, because excavation is only one of the many protective tools available to blasters. Another available tool is monitoring for noxious gases.

The only reasonable and reliable manner to determine whether carbon monoxide is present is through the use of a carbon monoxide detector. (N.T. 241, 284.) In fact, monitoring for noxious gases is a standard industry practice in blasting. (N.T. 153, 244-245, 376-377.)

Monitoring for carbon monoxide requires very minimal effort, (N.T. 365, 366, 371, 396), and carbon monoxide monitors do not impede workers' ability to perform their jobs. (N.T. 51.) Even the Appellant's expert, Mr. Haney, uses carbon monoxide monitors quite often to protect the public. (N.T. 374.) Mr. Haney also testified that the blaster-in-charge makes the ultimate decision of what sort of carbon monoxide controls should be in place based the upon the blaster's best professional judgment, and if there is to be monitoring for carbon monoxide, the blaster-in-charge is responsible to make sure the monitors are in place. (N.T. 390, 392.)

Nevertheless, the Appellant did not have a carbon monoxide monitor on-site, (S.F. 29), and did not use any instrumentation to determine if carbon monoxide was present after the blast and did not test for carbon monoxide in the trench. (N.T. 320, S.F. 29.) Even further, the Appellant did not direct Muschlitz Excavating to have its trench workers wear carbon monoxide monitors, (S.F. 27), and did not talk to anyone at the site to caution them to wear carbon monoxide monitors if they were reentering a confined space. (S.F. 30.)

Prior to the August 1, 2012 blast, Mr. Silva and Mr. Dzedzy were not told that carbon monoxide is generated by blasting and that carbon monoxide could stay in the soil for days after a blast occurred.[7] (N.T. 28, 38-39, 50.) Prior to the August 1, 2012 blast, Mr. Keefer was also not aware that carbon monoxide was generated by blasting. (N.T. 77.) Mr. Dzedzy was not monitoring for carbon monoxide on August 1, 2012 because it was an open trench area and he had never heard of anything like this incident before. (N.T. 49.) Mr. Dzedzy testified that he

[7] The Appellant claims that Mr. Silva should have known of the dangers associated with carbon monoxide produced by blasting because Mr. Silva had used carbon monoxide monitors in the past in manholes and confined spaces, (N.T. 28), had previously been provided OSHA training from Muschlitz Excavating regarding confined spaces, (N.T. 35-36), and he had training on the dangers of carbon monoxide poisoning that informed him that he needed to be careful in confined spaces if engines were running. (N.T. 38-39.) Nevertheless, none of Mr. Silva's training discussed carbon monoxide associated with blasting. (N.T. 38-39.)

would have directed his workers to use a carbon monoxide monitor if the Appellant had told him that the workers should have been using this. (N.T. 66-67.)

The Appellant attempts to shift the blame off of himself for failing to monitor for carbon monoxide. While it is true that Mr. Klock had the authority to require carbon monoxide monitoring in his Explosives Inspection Report but chose not to require it because he did not expect carbon monoxide to be an issue given that the blast was conducted in Monroe County, which is not prone to carbon monoxide problems associated with blasting, (N.T. 193-194), the licensed blaster is still responsible to use his or her professional judgment in determining whether the use of monitors should be used to avoid a violation of Section 211.152. The Appellant also blames Muschlitz Excavating for failing to monitor for carbon monoxide. He claims that he made Muschlitz Excavating workers aware of the dangers of carbon monoxide produced by blasting. However, no evidence exists to support the Appellant's assertion that Muschlitz Excavating workers were aware of the danger. The Appellant discussed the dangers of carbon monoxide from blasting with Mr. Muschlitz and then merely assumed that Mr. Muschlitz told his workers about those dangers. (N.T. 338-339.)

The Appellant also points to the fact that although Muschlitz Excavating had one functioning carbon monoxide monitor available for use by Muschlitz Excavating workers at the NCC Site on August 1, 2012, the monitor was not used in the trench on August 1, 2012. (N.T. 28, 36-37, 65-66.) After the August 1, 2012 blast and resulting injuries, Muschlitz Excavating was cited by OSHA for an issue associated with monitoring of the trench in connection with the August 1, 2012 blast. (N.T. 84.) Mr. Dzedzy typically monitors for carbon monoxide on the work site when men are entering manholes or when small engines are operating in the vicinity of the work area, which is consistent with the training he previously received. (N.T. 49.) Although

Muschlitz Excavating is subject to a federal monitoring standard, 29 C.F.R. § 1926.651(g)(i), the Appellant is also subject to a state standard that may require monitoring. 25 Pa. Code § 211.152. The fact that two parties responsible to monitor for carbon monoxide in the same area does not allow one party to escape that responsibility.

The Appellant argues that Muschlitz Excavating workers may have advanced the trench two or three times after work resumed, (N.T. 61-62), and as a result, the void in which the Muschlitz Excavating employees were exposed to carbon monoxide did not exist immediately after the August 1, 2012 blast was conducted. This argument is misleading because the workers were advancing the trench *towards* where the blast occurred, indicating an even higher likelihood that carbon monoxide released by the August 1, 2012 blast harmed the workers.

In short, interrupting the path of the carbon monoxide and using carbon monoxide monitors in the trench would have prevented the August 1, 2012 incident from occurring. (N.T. 186.) The Appellant could have went even further. The Appellant's expert, Mr. Haney, a blasting consultant and provides safety training for Pennsylvania blasters, testified that blasting companies need to inform the excavating contractor or anybody else working on the site that there are inherent dangers associated with blasting. (N.T. 365, 375.) For every project Mr. Haney works on, there is an on-site safety meeting where all areas of safety are discussed. (N.T. 375-376.) Mr. Haney instructs his students to tell the excavating contractor that if its workers are going to be in and around a trench, they need to take precautions. (N.T. 380.) Mr. Haney also tells his students that they need to let everyone that will come in contact with the blast area know that there are inherent risks. (N.T. 382.) Mr. Haney believes that for smaller blasting projects, any time the blaster sees people around the blast area, the blaster should warn them of the inherent dangers associated with blasting. (N.T. 387.) Mr. Haney believes that as part of a

blaster's due diligence, the blaster should ensure that everyone in the surrounding area is safe. (N.T. 399-400.) Mr. Haney believes that the potential for carbon monoxide to migrate into a trench should be communicated to the contractor before a blast. (N.T. 404.)

The Appellant argues that "[w]hether or not a license is suspended appears to depend on whether the blaster took acceptable precautionary measures" and, specifically, that the Appellant should have, but did not, monitor or ensure that Muschlitz Excavating workers monitored the air in the trench box. Appellant's Posthearing Brief at 27. The record, however, indicates that the Appellant's assertion is simply unfounded. Mr. Lamkie testified that the Department's procedure, as a threshold matter, is to consider the suspension of a blaster's license if the license holder violated Section 211.152. After the Department determines that a violation occurred, it applies its discretion in weighing aggravating and mitigating measures to determine the need for and the length of a suspension. As such, the Suspension Order was based on the Department's finding that the Appellant violated 25 Pa. Code § 211.152.

The Appellant, seeking to shift blame from himself, also argues that Mr. Klock's Explosives Inspection Report never distinguished the responsibilities of Silver Valley as "operator" and Muschlitz Excavating as "site excavator." Appellant's Posthearing Brief at 32. Mr. Klock had noted on the Explosives Inspection Report, which memorialized the on-site meeting, that the operator and site excavator should take all necessary action to protect the public from noxious gases as per 25 Pa. Code § 211.152 including immediate excavation and trenching. (N.T. 160; C. 1.) The Department, however, only has authority to regulate the blasting activity of the licensed blaster. Silver Valley, not Muschlitz Excavating, was the permittee named on the BAP. (N.T. 160-161; C. 2.) The Appellant understood that Muschlitz Excavating was not a co-

permittee on the BAP and was not authorized to conduct blasting activities under the BAP. (N.T. 342-343.)

The manner in which the Department has applied 25 Pa. Code § 211.152 as a basis for suspension of the Appellant's blaster's license is upheld as constitutional. Section 211.152, as applied by the Department, provides regulated entities with sufficient notice. As a result, the Board also finds that the provision is not unconstitutionally vague on its face. The Department's issuance of the Suspension Order was a reasonable and appropriate exercise of the Department's discretion.

Conclusion

The Board upholds the Department's issuance of the two orders and finds that the Department sustained its burden to establish that the Appellant violated 25 Pa. Code § 211.152 when carbon monoxide from the Appellant's blasting activities adversely affected the health and safety of several individuals. The violation and the serious adverse effects to the three individuals overcome by carbon monoxide support the 120 day blaster's license suspension.

CONCLUSIONS OF LAW

1. The noxious gases generated by the August 1, 2012 blast at the NCC Site affected the health and safety of individuals.

2. A blaster-in-charge is responsible for all effects of a blast. 25 Pa. Code § 211.154(a).

3. As blaster-in-charge of the August 1, 2012 blast at the NCC Site, Mr. Wean was responsible for all effects of the blast.

4. Mr. Wean failed to adequately control the effects of the gases generated by the August 1, 2012 blast at the NCC Site.

5. Mr. Wean violated Section 211.152 when he did not take adequate measures to ensure that the effects of the gases did not adversely impact the health and safety of individuals. 25 Pa. Code § 211.152.

6. The 120 day suspension of Mr. Wean's blasting license is appropriate, particularly given the seriousness of the injuries to the individuals affected by the gases generated by the August 1, 2012 blast at the NCC Site.

7. The Department did not commit an abuse of discretion when it suspended Mr. Wean's blasting license for 120 days.

8. The Department did not act arbitrarily, capriciously, or contrary to law when it suspended Mr. Wean's blasting license for 120 days.

9. 25 Pa. Code § 211.152 is found to be constitutional light of a void for vagueness challenge.

10. The Department's application of 25 Pa. Code § 211.152 as a basis for issuing a compliance order against Appellant is constitutional and said order is hereby UPHELD.

11. The Department's application of 25 Pa. Code § 211.152 as a basis for suspending Appellant's blaster's license is constitutional and said suspension is hereby UPHELD.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD WEAN, JR.	:	
	:	
v.	:	**EHB Docket No. 2012-179-M**
	:	**(Consolidated with 2012-159-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of April, 2014, it is hereby **ORDERED** that Edward Wean, Jr.'s appeal is **dismissed**. The Board upholds the Department's order suspending Appellant, Edward Wean, Jr.'s, Blaster's License for a period of 120 days, and the Department's issuance of an Explosives Compliance Order.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 11, 2014

c: **DEP, General Law Division**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CELIA RAJKOVICH	:	
	:	
v.	:	**EHB Docket No. 2014-013-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 21, 2014**

OPINION AND ORDER
ON DISMISSING APPEAL AS UNTIMELY

By Steven C. Beckman, Judge

Synopsis:

This appeal of an email by the Department notifying Appellant that she was not exempt from the certification requirements of 25 Pa. Code Chapter 240 is dismissed as untimely. The Appellant filed her appeal almost five months after receiving the Department's email, and therefore the Board lacks jurisdiction.

O P I N I O N

This appeal commenced with the docketing of a letter faxed to the Environmental Hearing Board by Appellant Celia Rajkovich on February 12, 2014. In that letter, Ms. Rajkovich sought review of an email from September 2013 from the Department of Environmental Protection that denied her an exemption from certification requirements promulgated under the Radon Certification Act, Act of July 9, 1987, P.L. 238, 63 P.S. §§ 2001–2014 and the Radiation Protection Act, Act of July 10, 1984, P.L. 688, No. 147, 35 P.S. §§ 7110.101–7110.703. However, her letter lacked certain required information and the Board issued an order on February 18, 2014 requiring Ms. Rajkovich to perfect her appeal. In response to the order to perfect, Ms. Rajkovich filed a Notice of Appeal form containing appeal information with the

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Board on March 17, 2014. On that form, Ms. Rajkovich listed the date on which she received notice of the Department action as September 19, 2013. Given the length of time between the date on which she received notice of the Department's action (September 19, 2013) and the date on which the original letter to the Board was received (February 12, 2014), the Board ordered Ms. Rajkovich to show why the appeal should not be dismissed as untimely. The timeline in this matter, outlined below, comes from the information and documents submitted by the Appellant on March 26, 2014 in response to that order.

On July 27, 2013, Appellant Rajkovich emailed the Section Chief of the Department's Radon Certification Section to inquire whether "someone that lives in [Pennsylvania] and operates a [National Radon Safety Board] approved activated carbon charcoal canister [laboratory] in their house . . . would be required to be a PA certified lab" if none of the homes being tested were located in Pennsylvania. Three days later, on July 30, 2013, the Section Chief responded that such a person "would be required to be a PA-DEP certified laboratory, because they are performing radon laboratory analysis in Pennsylvania." On August 7, 2013, Ms. Rajkovich emailed the Department to request an exemption from the certification requirements. When the Department apparently failed to respond, Ms. Rajkovich followed up on August 21, and again on September 18. On September 19, 2013, the Department's Radon Program Manager responded to Ms. Rajkovich by email stating that the Department was going to follow its "legal counsel's interpretation that the regs require certification" for the situation described by Ms. Rajkovich. The email continued: "Thus, we would *not exempt* you from the certification requirements as outlined in Chapter 240." (emphasis in original). While it is not entirely clear from the documents submitted by Ms. Rajkovich, it appears that this correspondence denying her exemption request is the action from which she is appealing. She acknowledged the

Department's denial of her exemption request in an email she sent on September 19, 2013, stating the decision was "terribly disappointing." The Department further clarified its denial through an email to Ms. Rajkovich on September 20, 2013, stating that "if we open the door to you then we have to open it for anyone else who may request the same exemption." That email appears to be the last correspondence between Ms. Rajkovich and the Department on the subject of her exemption request.

According to Ms. Rajkovich, she expected to receive a written response, but upon contacting the Department thirty days after receiving the email, was told that none would be forthcoming. Ms. Rajkovich states that, in November 2013, she contacted her state representative, as well as an attorney, to assist her. She also states that, on November 16, 2013, she mailed a letter to the Board which was eventually received by separate fax on February 12, 2014.[1] In both that letter and in her response to the Board's Order of March 18, 2014, Ms. Rajkovich objects to being required to go through the Department's certification process to run her lab. Briefly stated, Ms. Rajkovich disagrees with the Department's denial of her certification exemption request for two reasons. She argues, first, that she intends to do no business with customers in Pennsylvania, and, second, her lab will be certified by (and subject to the oversight of) two national proficiency groups, and will be licensed as required in the states where her customers will be located.

The Board's rule on the timeliness of appeals states, in part, that "jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and filed with the Board in a timely manner." 25 Pa. Code § 1021.52(a); *Rostokosky v.*

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[1] The Board has no record of receiving the letter allegedly mailed in November. The letter faxed to the Board on February 12, 2014, however, is dated November 16, 2013.

DER, 364 A.2d 761 (Pa. Cmwlth. 1976) ("[T]he untimeliness of the filing deprives the Board of jurisdiction"). An appeal must be filed with the Board within 30 days after the person to whom the action of the Department is directed has received written notice of the action. 25 Pa. Code § 1021.52(a)(1). The Board has the authority to *sua sponte* raise questions going to the basis for its jurisdiction over a case. *Delta Mining, Inc. v. DER*, 1986 EHB 383, 386.

Assuming, without deciding, that the Department's denial of the exemption request was a final action, we believe that the Department's emails of September 19 and 20 constitute written notice of the Department's action and were sufficient to give actual notice to Ms. Rajkovich that the Department was unwilling to grant her request for exemption, thus starting the 30-day clock for filing an appeal with the Board. Given that Ms. Rajkovich filed her letter 145 days after receiving written notice of the Department's action, the appeal is clearly untimely.[2] *See Piccolomini v. DEP*, 2011 EHB 803, 804; *Pedler v. DEP*, 2004 EHB 852, 854; *Burnside Township v. DEP*, 2002 EHB 700, 703 (stating that an appeal filed even one day late will be dismissed).

Accordingly, we enter the following Order.

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[2] Even if the Board had received Ms. Rajkovich's letter dated November 16, 2013 on or shortly after that date, this Board would still lack jurisdiction over her appeal. The letter would have been received approximately three weeks after the 30-day deadline had passed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CELIA RAJKOVICH	:	
	:	
v.	:	**EHB Docket No. 2014-013-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of April, 2014, IT IS ORDERED that the appeal of Celia Rajkovich is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 21, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STACEY HANEY, JOHN VOYLES AND BETH VOYLES	:	
v.	:	
	:	**EHB Docket No. 2013-112-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; RANGE RESOURCES – APPALACHIA, LLC, Permittee and RONALD and SHARON YEAGER, Intervenors	:	**Issued: April 25, 2014**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER AND FOR EXPEDITED CONSIDERATION

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board denies the Motion for Protective Order filed by Appellants seeking to preclude their depositions from being taken because they were previously deposed in a related tort case filed in the court of common pleas. The Board finds that the issues and remedies, although related, are not identical, and the Permittee is therefore entitled to depose Appellants in the Board action.

Background

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion for Protective Order and for Expedited Consideration Thereof (Motion for Protective Order). Appellants seek a Protective Order to prevent their depositions from being taken. The Motion for Protective Order was electronically filed late in the afternoon of Monday, April 21, 2014. On the morning of April 22, 2014, the Board granted Appellants' request for expedited

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consideration of their Motion by directing the other parties to file their Responses by two p.m. on Thursday, April 24, 2014.[1]

The Pennsylvania Department of Environmental Protection takes no position on the Motion for Protective Order, while the Intervenors, Ronald and Sharon Yeager, support the position of the Permittee. The Permittee filed a comprehensive Response and supporting Brief in opposing the Motion for Protective Order on the afternoon of Thursday, April 24, 2014. The issue is now ripe for decision.

On July 26, 2013, the Appellants, Stacey Haney, and John and Beth Voyles, filed a Notice of Appeal with the Pennsylvania Environmental Hearing Board objecting to the Department's issuance of two well drilling permits to Range Resources Appalachia LLC (Range Resources). The Permit Numbers are 37-125-24315-01-01 and 37-125-24314-01-02 and cover the Yeager Unit 2H and the Yeager Unit 1H. The permits authorize Range Resources to drill and operate the wells.

The Notice of Appeal consists of 85 paragraphs and indicates that Appellants "live and/or own property in Amwell Township, Washington County, Pennsylvania down-gradient from the Yeager Site owned and operated by Range Resources...." (Appellants' Notice of Appeal, Paragraph 1). The Appellants content that "1) Range's activities at the Yeager Site have resulted in the contamination of the surrounding groundwater as a result of numerous leaks, spills, and releases; 2) Range has systematically violated and/or demonstrated non-compliance with the law with regard to its activities at the Yeager Site; and 3) Range's permit applications are technically

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[1] Counsel requested expedited consideration of their Motion for Protective Order because the depositions they are seeking to preclude are scheduled to commence on Monday, April 28, 2014. However, since the Notices of Deposition were served on March 25, 2014 a more timely Motion for Protective Order would have obviated the need for expedited consideration.

incomplete as Range failed to disclose that the Yeager Site is built in a recharge area for groundwater as well as a hydrogen sulfide area." (Notice of Appeal, Paragraph 10).

The Notice of Appeal is very fact specific and lists many alleged violations of the Pennsylvania Oil and Gas Act, Clean Streams Law, and Solid Waste Management Act. *See* Notice of Appeal, Paragraph 45 and Exhibit 100. It also sets forth alleged problems with the Yeager Impoundment and the primary and secondary liners as required by Pennsylvania Oil and Gas regulations. *See* Notice of Appeal, Paragraphs 63-70. Appellants contend that these numerous factual and legal issues should result in the revocation of the permits issued by the Pennsylvania Department of Environmental Protection.

Appellants seek a Protective Order preventing their depositions from being taken in this Board case because they have already been deposed, some for multiple days, in a related action Appellants brought as Plaintiffs in the Court of Common Pleas of Washington County, Pennsylvania. After reviewing the exhibits to the Motion and Responses, that action is filed at docket number 2012-3534. The case has been assigned to the Washington County President Judge, the Honorable Debbie O'Dell-Seneca. It is a tort action brought against Range Resources and thirteen other defendants. The defendants do not include the Pennsylvania Department of Environmental Protection.

Discussion

Appellants contend that to allow their depositions to be taken in this action before the Pennsylvania Environmental Hearing Board would subject them to "unreasonable annoyance, embarrassment, oppression, burden or expense" in express violation of Pennsylvania Rule of Civil Procedure 4011. They claim that this would amount to Range "getting a second bite at the apple." They make this contention on the basis that they have already been subject to extensive

questioning by counsel for Range Resources and other defense counsel (although not counsel for the Pennsylvania Department of Environmental Protection) in the Washington County litigation involving the same general subject matter as this action before the Pennsylvania Environmental Hearing Board.

All parties would seem to agree, based on their filings, that the discovery in the related Washington County case has been robust. According to Appellants' Counsel, their clients have produced to Range Resources over 40,000 pages of documents in discovery. Many of these documents are the medical records of the Appellants. Nevertheless, as pointed out by Counsel for Range Resources, the Notice of Appeal before the Pennsylvania Environmental Hearing Board comprises 45 pages of allegations consisting of 85 paragraphs objecting to the permits the Pennsylvania Department of Environmental Protection issued to Range Resources allowing them to conduct horizontal drilling at the Yeager site. Range Resources also seems to be especially interested in learning the particulars of a conference held between the Department and the Appellants prior to the Department's issuance of the permits under Appeal.

As correctly stated by Appellants, the purpose of discovery before both the Pennsylvania Environmental Hearing Board and the Washington County Court of Common Pleas is to discover facts and information "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The discovery requests should seek information "reasonably calculated to lead to the discovery of admissible evidence." (Paragraph 4 of Appellants' Motion for Protective Order, *quoting* Pennsylvania Rule of Civil Procedure 4003.1(b)). "As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is

related to the contentions raised in the appeal." *Solebury Township v. Department of Environmental Protection,* 2007 EHB 325, 327.

To quote Judge Labuskes "the Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Township v. Department of Environmental Protection*, 2009 EHB 202, 205. In accordance with Pennsylvania Rule of Civil Procedure 4012 the Board is certainly empowered to issue a protective order to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

The question then is whether a party who has already been deposed in a tort action in a common pleas court may also be deposed in a proceeding before the Board in what is clearly a related action. We think under the facts of this case as set forth succinctly by both Counsel for Appellants and Permittee that the depositions may proceed as scheduled. We do not find that to allow such depositions will either result in any unreasonable annoyance, embarrassment, oppression, burden or expense and does not amount to a "second bite of the apple." We reach this decision on the basis that although the actions may be related there are also substantial differences in the cases including the remedies requested. There are also issues which are relevant to the Board action which likely have little or no relevance to the tort matter in the Washington County Court of Common Pleas.

We, therefore, believe that Range Resources is entitled to depose the Appellants in this action pursuant to the Pennsylvania Rules of Civil Procedure and the Board's Rules of Practice and Procedure. We will issue an appropriate Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STACEY HANEY, JOHN VOYLES AND BETH VOYLES	:	
v.	:	
	:	**EHB Docket No. 2013-112-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; RANGE RESOURCES – APPALACHIA, LLC, Permittee and RONALD and SHARON YEAGER, Intervenors	:	

ORDER

AND NOW, this 25th day of April, 2014, after review of the Appellants' Motion for Protective Order filed on April 21, 2014 and the Response and supporting Brief filed by Range Resources on the afternoon of April 24, 2014, it is ordered as follows:

1) The Motion for Protective Order is **denied.**

The depositions of the Appellants noticed by Range Resources may proceed as scheduled.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: April 25, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT OF PENNSYLVANIA, INC., ET AL.	:	
v.	:	**EHB Docket No. 2013-033-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Permittee	:	**Issued: May 5, 2014**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies two motions for summary judgment filed by the appellants, who are disappointed bidders that were not selected by a county as designated disposal facilities in a revision to the county's Act 101 plan. Act 101 does not preempt a county's ability to request voluntary assistance with its recycling program as part of an RFP, so long as the request is truly voluntary. It is not clear as a matter of undisputed fact that the county's request was anything other than voluntary. It is also not clear as a matter of undisputed fact that the county's designation process discriminated against out-of-state competitors or was anything other than fair, open, and competitive.

O P I N I O N

The Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.100 *et seq.* ("Act 101") requires all counties, including Clearfield County ("Clearfield"), to adopt and periodically revise a solid waste management plan and submit it to the Department of Environmental Protection (the "Department") for approval. 53 P.S. §§ 4000.303 and 4000.501 –

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.505. In order to secure Department approval, the plan must provide for county-wide solid waste management and must ensure at least ten years of available disposal capacity. Plans frequently ensure capacity by among other things designating waste disposal facilities that will receive the municipal solid waste that is generated within the county over the next ten years. *See generally Pa. Waste Indus. Ass'n v. Monroe Cnty. Mun. Waste Mgmt. Auth.*, 80 A.3d 546 (Pa. Cmwlth. 2013).

In 2010, Clearfield embarked on a process to revise its Act 101 plan. Clearfield was facing a deficit in funding its recycling and waste reduction programs. In order to address the problem, Clearfield commissioned a sustainability study. The alternatives in the completed study included negotiating voluntary contributions, seeking sponsorships or in-kind services, implementing user fees, or simply using county funds to make up the deficit in recycling funding.

Clearfield formed a Solid Waste Advisory Committee ("SWAC") to assist it in reviewing the study and revising its solid waste plan. Meetings of the SWAC were advertised in the local paper and were open to the public. The ten solid waste members of the SWAC included representatives from all classes of municipalities within the county, citizen organizations, industry, the private solid waste industry, the private recycling or scrap material processing industry, and the county recycling coordinator. Clearfield's SWAC met several times between September 2009 and April 2012.

Clearfield then issued a request for proposals ("RFP") for "Integrated Municipal Solid Waste Management Services." The RFP sought proposals that would "provide tangible financial and/or programmatic support to Clearfield County's integrated waste management programs." The RFP stated that proposals "shall include qualification and quantification of how the

proposals shall address the funding shortfall and/or tangibly augment Clearfield County's programs during the contract period." The RFP stated that responses to this need "might include provision of services purchased by the county in the past or revenue sharing or a mixture of these approaches. Facilities responding are encouraged to develop and propose innovative, cost effective alternatives for meeting this need. Facilities may wish to partner with other providers in making a proposal." The RFP's reference to "tangible financial and/or programmatic support" meant money or services, while "quantification" meant the dollar value of the cash contribution or services that the proposer would provide. Clearfield advertised its RFP nationally in *Waste & Recycling News*, and sent the RFP to the Department to publish in the *Pennsylvania Bulletin.* Eight facilities, all located within Pennsylvania, responded to the RFP.

Clearfield first evaluated the RFP responses with regard to three mandatory criteria: all proposal forms had to be returned, each facility had to have a current permit and the facility could accept waste as of January 21, 2012, and each facility could guarantee a disposal capacity of at least 50 percent of the county's anticipated municipal solid waste for ten years. All eight responders, including the Appellants,[1] met the three mandatory evaluation criteria.

The County then evaluated each of responses using point rated evaluation criteria. These were: (1) reserving capacity beyond the 50 percent minimum (10 points); (2) the cost per ton for disposal (40 points); (3) "environmental soundness," i.e., how the proposal addressed recycling and waste reduction program sustainability, including the goal of recycling 35 percent of the municipal solid waste stream (30 points); and (4) compliance history and background for the previous five years (20 points). The maximum number of points any responder could receive was 100 points.

[1] The Appellants are Waste Management of Pennsylvania, Evergreen Landfill, Laurel Highlands Landfill, Shade Landfill, and Waste Management Disposal Services of Pennsylvania.

Clearfield reviewed the RFP responses, determined points for each responder, and ranked them. Veolia Greentree Landfill ("Veolia") offered the lowest disposal cost, the strongest compliance record, a 100 percent capacity assurance, and substantial assistance with the County's recycling program. Clearfield initially planned to flow control all waste to Veolia. Through the public participation process, haulers raised concerns about all of the waste being taken to Veolia. As a result, Clearfield designated another disposal facility, the Wayne Township Landfill. The Wayne Township Landfill had the second highest score of the eight landfills that responded to the RFP.

The County submitted the plan revision to the Department. The Department approved the plan revision on January 28, 2013. This appeal by the disappointed bidders followed.

The disappointed bidders have filed two motions for summary judgment. In the first motion the Appellants seek to have Clearfield's Act 101 plan overturned because they say the County has in effect charged a fee for recycling, which is not allowed. The second motion says the plan must be thrown out because the process leading up to the plan was less than fair, open, and competitive. The motions are vigorously opposed by the Department and Clearfield. We deny both motions.

Before turning to the substance of the Appellant's motions, we observe that the Appellants throughout their motions attack Clearfield's Act 101 plan directly. Although this is convenient shorthand, to be precise, this Board's role is limited to reviewing *the Department's approval* of the plan. *See Montgomery Cnty. v. DER*, 1991 EHB 1874, 1881; *Montgomery Cnty. v. DER*, 1991 EHB 906, 912. As with any other appeal from an action of the Department, we assess whether *the Department* acted reasonably and in accordance with the law in approving the county's plan. *Dirian v. DEP*, 2013 EHB 224, 231. The Department's role in turn is not to

second-guess the county's choices. *Cf. Northampton Twp. v. DEP*, 2008 EHB 563, 566-67 (Department's oversight role in reviewing municipality's 537 plan does not extend to making planning choices in lieu of the municipality). Rather, the Department must approve any county plan that demonstrates to the satisfaction of the Department that:

> (1) The plan is complete and accurate and consistent with [Act 101] and regulations promulgated hereunder.
>
> (2) The plan provides for the maximum feasible development and implementation of recycling programs.
>
> (3) The plan provides for the processing and disposal of municipal waste in a manner that is consistent with the requirements of the Solid Waste Management Act and the regulations promulgated pursuant thereto.
>
> (4) The plan provides for the processing and disposal of municipal waste for at least ten years.
>
> (5) If the plan proposes that municipal waste generated within the county's boundaries be required, by means other than contracts, to be processed or disposed at a designated facility under section 303(e), the plan explains the basis for doing so.
>
> (6) If the plan proposes that the county own or operate a municipal waste processing or disposal facility, the plan explains the basis for doing so.

53 P.S. § 4000.505(b).[2]

Preemption

The Appellants argue in their first motion for summary judgment that Act 101 preempts a county from *requesting* payments to help cover recycling programs or free recycling services from landfills when it asks landfills if they want to be included as designated facilities in an Act 101 plan. The County, of course, disagrees, as does the Department. In fact, as illustrated by its

[2] Subclauses 505(b)(5) and (6) are not relevant in this appeal.

defense of Clearfield's plan in this appeal, the Department has never interpreted Act 101 to preclude even *mandatory* county recycling fees, let alone *voluntary* requests for assistance.

The Appellants rely on the Commonwealth Court's preemption analysis in *Pennsylvania Independent Waste Haulers Association v. County of Northumberland*, 885 A.2d 1106 (Pa. Cmwlth. 2005). The Court in that case held that unauthorized local fees that cover recycling are preempted by Act 101. 885 A.2d at 1110-11. The Court reasoned as follows:

> Act 101 provides a comprehensive recycling plan that provides a specified funding source and does not provide any authority to raise revenue by other means. If counties are permitted to add to the existing regulations the inconsistent rules would preclude coexistence with the existing regulations. The trial court found that an "examination of Act 101 reveals a plan for recycling programs set out with such detail that the Court cannot help but find 'an intention on the part of the legislature that it should not be supplemented by municipal bodies.'" We agree with this determination and, thus, conclude that the trial court did not abuse its discretion or make an error of law in reaching its conclusion.
>
> As municipal powers are preempted by Act 101 with respect to recycling programs, Appellants may only impose the administrative fee if it is expressly authorized by the Act. Act 101 provides no such authority. Accordingly, the order of the trial court is affirmed as to this issue.

Id. (internal citation omitted). The Court in *IESI PA Bethlehem Landfill Corporation v. County of Lehigh*, 887 A.2d 1289 (Pa. Cmwlth. 2005) relied on *County of Northumberland* to strike down another mandatory recycling fee.

The Appellants' argument is premised on their belief that *County of Northumberland* and *County of Lehigh* should be expanded to preclude *requests* for voluntary payments or services as part of the designation process like the request in Clearfield's RFP. The Appellants admit that

neither case dealt with a request for voluntary payment or services. Those cases instead involved non-negotiable, mandatory fees unilaterally imposed by counties. Thus, in order to rule in Appellants' favor we would need to conclude that *County of Northumberland* and *County of Lehigh* should be read broadly to preclude *requests* for payment in an RFP.

The Appellants refer us to some of the broader language in *County of Northumberland*, such as "Act 101 provides a comprehensive recycling plan that provides a specific funding source and does not provide any authority to raise revenue by other means." However, the Court quite recently in *Monroe County*, *supra*, said that *County of Lehigh* and *County of Northumberland* "are limited to unauthorized recycling fees." 80 A.3d 546, 559. The Court in *Monroe County* repeatedly speaks of "limiting" its earlier holdings. It says that the Court "never held that Act 101 preempts other municipal charges that are otherwise authorized by statute, and we decline to do so now." *Id.* It holds that the express preemption language of Act 101 does not contemplate field preemption; only inconsistency is contemplated. It notes that an express purpose of Act 101 is to "[e]stablish and maintain a cooperative State and local program of planning and technical and *financial assistance* for comprehensive municipal waste management." 80 A.3d at 560 (citing 53 P.S. § 4000.102(b)(1)(emphasis by the Court)). It said "[t]his language anticipates some local financial assistance." *Id.* The Court went on to reject the trade association's challenge to the county's $7 per ton administrative fee. Although *Monroe County* did not deal with requests for recycling assistance, there is certainly nothing in the Court's most recent word on the subject in either tone or substance that encourages us to expand the holding in *County of Northumberland* to include requests for voluntary assistance.

County of Northumberland dealt with a "fee" unilaterally "imposed" by the County. A fee is like a tax. It is unilaterally "imposed" by a governmental unit. The county comes up with

an amount, everyone affected pays it, and it is not negotiable. There is a fundamental difference between a fee or tax imposed by a governmental unit and a request for voluntary assistance. Where a fee or tax is imposed, the statutory authority should be clear. The Court struck down the imposition of fees because they were not expressly authorized in Act 101. 885 A.2d at 1111. In other words, if the Legislature had wanted to authorize counties to impose fees or taxes, it would have said so in the statute.

Such express authority is not as critical when a request for voluntary assistance is involved. It is not as important that we search Act 101 for language expressly authorizing requests for assistance. The fact that Act 101 nowhere expressly states that counties may request assistance does not appear to us to be fatal to Clearfield's innovative approach. In fact, Act 101 expressly requires counties to provide for the "maximum feasible development and implementation of recycling programs." 53 P.S. § 4000.505(b)(2). This is exactly what Clearfield has done. As noted by the Court in *Monroe County*, Act 101 "anticipates some local financial assistance." 80 A.3d at 560. Putting these two concepts together, Act 101 anticipates that counties will rely on some local financial assistance to achieve the maximum feasible implementation of recycling programs. We should not be quick to hamstring the county so long as its efforts to comply with Act 101 stop short of imposing new taxes or fees.

The Court in *County of Northumberland* appeared to be concerned with the mischief that would arise "if counties are permitted to add to the existing regulations." 885 A.2d at 1110. Clearfield's approach would not result in any new rules or regulations.

Counties have been put between a rock and a hard place when it comes to recycling. Although they are supposed to reduce waste going into landfills by implementing recycling programs, the funding scheme contemplated by the Act, when mass recycling was a relatively

new idea and the economics of recycling were not fully understood, has proven to be inadequate. Therefore, the Legislature has provided counties with an affirmative defense for not implementing recycling if they cannot afford it, 53 P.S. § 4000.1712, and requires the Department to develop a statewide plan to solve this widespread funding dilemma, 53 P.S. § 4000.1513. The Appellants have latched onto these provisions as further support for their position. They argue that counties should be made to suffer as much as possible so the Department does a better job of developing the relief plan called for in Section 1513. In the alternative, they point out that Clearfield could simply drop its program because it is clearly underfunded. These arguments are not particularly convincing. If the Department had a good plan for relieving counties from the funding problem, we expect it would have been developed by now. As for dropping the program altogether, it must be remembered that Act 101 was enacted in response to a perceived scarcity of landfill capacity. One of the best ways to preserve capacity is to divert waste that would otherwise take up space in landfills and recycle it. *See* 53 P.S. § 4000.102(a)(8) and (13). Adopting the Appellants' position would obviously result in less recycling and defeat one of Act 101's primary goals. We are not anxious to join in such defeatist approach.

Commonwealth Court instructs that:

> [p]ertinent questions in determining the preemption issues are: (1) Does the ordinance conflict with the state law, either because of conflicting policies or operation effect, that is, does the ordinance forbid what the legislature has permitted? (2) Was the state law intended expressly or impliedly to be exclusive in the field? (3) Does the subject matter reflect a need for uniformity? (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation? (5) Does the ordinance stand as an obstacle to the

> accomplishment and execution of the full purposes and objectives of the legislature[?]

County of Northumberland, 885 A.2d at 1109 (quoting *Duff v. Twp. of Northampton*, 532 A.2d 500, 505 (Pa. Cmwlth. 1987), *aff'd*, 550 A.2d 1319 (Pa. 1988).

Taking these factors in reverse order, Clearfield's request for recycling assistance as a component of a long-term plan does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature in enacting Act 101. To the contrary, planning can be burdensome, unpopular, and, as this appeal shows, controversial and expensive. Clearfield's process shows that counties can still benefit from planning, and its approach has managed to stave off an ignominious end to recycling in the county. There is nothing about what Clearfield has done here that strikes us as inconsistent with the fundamental purposes of Act 101.

Act 101 is not so pervasive or comprehensive that it precludes coexistence of requests for voluntary assistance. To the contrary, as previously mentioned, Act 101 requires counties to plan for the "maximum feasible development and implementation of recycling programs."

As to uniformity, Act 101 actually seems to encourage a variety of approaches. By placing primary responsibility for waste planning at the county level rather than at the state level, the Legislature was authorizing, and perhaps even encouraging, a lack of uniformity, thereby conducing the benefits that flow from a sort of intrastate system analogous to federalism. There is no reason that every county needs to handle recycling in the same way. There is nothing in Act 101 that precludes the coexistence of different recycling programs. No one approach was intended by Act 101 to be exclusive, and Act 101 nowhere prohibits or necessarily precludes Clearfield's approach. Accordingly, we conclude that Clearfield's request for voluntary help with its recycling program is not automatically as a matter of law preempted by Act 101.

The Appellants go on to argue, however, that Clearfield's RFP was in effect a mandatory fee; that is, Clearfield's characterization of the fee as "voluntary" is basically a sham. The Appellants argue that "fees and services can *never* be voluntary when a County considers the provision of such fees and services as a factor in designating landfills...." In other words, if a county selects facilities based in part on whether they agree to provide recycling services, the county has as a matter of law imposed an illegal mandatory fee under the Appellants' theory. This is much too broad of a statement for us to adopt as a matter of law. Determining whether something that appears to be voluntary is in fact mandatory is a factual inquiry. There is no dispute that Clearfield considered the provision of recycling payments and services as a significant factor in designating landfills. Clearfield created a rubric that evaluated potential facilities based upon reserving capacity (10 points), disposal cost (40 points), compliance history (20 points), and "environmental soundness," which included in part recycling assistance (30 points). Breathing life into its recycling program appears to have been the *raison d'etre* for the RFP, so if a bidder did not help with such resuscitation, it is not a stretch to imagine its bid would not fare well.

On the other hand, Clearfield did not specify in the RFP or (based on the existing record) anywhere else that a proposal would not be accepted if recycling help was not offered. A facility was not disqualified if it decided not to provide support. Wayne Township is providing entirely different recycling assistance, which hardly supports the Appellants' theory that the County was in effect imposing a mandatory fee. Clearfield says that any bidder could have been successful even if it scored zero points for "environmental soundness" if it presented more attractive proposals in other areas. For example, tipping price was the most important criterion. Veolia offered a not-to-exceed price of $35 or $39 per ton depending upon where in the county the

waste was generated. Most of the Appellants offered a price of $59.50 per ton. This case would be closer if the successful bidders had demanded a higher price and nevertheless ended up being selected.

In short, the existing record does not support a finding based upon undisputed facts that Clearfield's actions amounted to the unilateral imposition of a recycling fee. There is no undisputed evidence to suggest that the successful bidders did anything other than voluntarily make what ultimately appears to have been a good business decision to offer an attractive package to the county that included a low price and some voluntary recycling assistance. The record at this point hardly supports a characterization of this negotiated deal as the unilateral imposition of a mandatory recycling fee. Accordingly, the Appellants' first motion for summary judgment must be denied.

Designation Process

The Appellants' second motion for summary judgment contends that Clearfield's planning process was not fair, open, and competitive. The contention is based on the Commerce Clause of the U.S. Constitution, as well as general government procurement principles. Although Act 101 does not specifically charge the Department with reviewing the constitutionality of county plans, it appears that it does so. The Department and, of course, Clearfield, respond that Clearfield's process was fair, open, and competitive.

The Commerce Clause provides that "the Congress shall have Power...to regulate Commerce...among the several states." U.S. Const. art. I, § 8, cl. 3. "Although the Clause speaks in terms of powers bestowed upon Congress, the [Supreme] Court has long recognized that it also limits the power of the States to erect barriers against interstate trade." *Harvey & Harvey v. Cnty. of Chester*, 68 F.3d 788, 796 (3d Cir. 1995) (quoting *Lewis v. B.T. Inv.*

Managers, Inc., 100 S. Ct. 2009, 2015 (1980)). "That is, the Commerce Clause has a negative or dormant aspect which limits state authority to regulate areas where 'Congress has not affirmatively acted to either authorize or forbid the challenged state activity.'" *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cnty.*, 48 F.3d 701, 710 (3d Cir. 1995) (quoting *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir. 1987)).

The tension created by overlaying the Commerce Clause with solid waste management arises from the fact that the Supreme Court has some holdings that view solid waste just like any other item in commerce, *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), but numerous statutes and ordinances such as Act 101 say that trash is not like widgets and there is a role for government in controlling how and where it travels in commerce. (*See, e.g.*, 53 P.S. § 4000.102(a) ("Improper municipal waste practices create public health hazards, environmental pollution and economic loss....It is necessary to give counties the primary responsibility to plan for the processing and disposal of municipal waste generated within their boundaries....Authorizing counties to control the flow of municipal waste is necessary...")) Complying with the strictures of these solid waste management laws necessarily restricts commerce. After all, that's the idea. But when government units such as Clearfield attempt to fulfill the obligations imposed by the solid waste management laws upon them by restricting commerce, they can easily bump up against the restrictions imposed by Commerce Clause jurisprudence. That has resulted in costly litigation as counties have been forced to defend cases such as this appeal. *See generally United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007) (Justices' Opinions vary on continuing merits of subjecting flow control ordinances to the scrutiny of the courts; majority distinguish *Carbone* with respect to public facilities).

The Third Circuit has attempted to resolve this tension between the Commerce Clause's prohibition against restricting commerce and Act 101's encouragement of such restrictions by holding that governmental units may restrict commerce in waste to a certain extent so long as the *process* used to set up the restriction does not discriminate against interstate commerce. *Harvey & Harvey, supra,* 68 F.3d 788, 801.[3] The process must not be designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* at 797; *see also New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1807 (1988).

The burden of proving discrimination against interstate commerce rests with the party challenging the governmental action, in this case, the Appellants. *Hughes v. Okla.*, 99 S. Ct. 1727, 1736 (1979); *J. Filberto Sanitation v. N.J. Dep't of Envtl. Prot.*, 857 F.2d 913, 919 (3d Cir. 1988). Determining whether there has been discrimination is an intensely factual inquiry that requires us to draw upon notions of reasonableness and consider evidence regarding the designation process such as bid solicitation, selection criteria and evaluation of bidders used in the designation process, the duration of the designation, and the likelihood of an amendment to the plan that would allow alternative sites. *Harvey & Harvey*, 68 F.3d at 801, 803. We need to decide whether the various aspects of the designation process are as neutral to out-of-state interests in practice as they appear to be on their face. *Id.* at 803. A process that is fair, open, and competitive in the sense that it allows in-state and out-of-state entities to compete on a level playing field is likely to pass constitutional muster. *Id.*

There was nothing overtly discriminatory about Clearfield's planning process. Clearfield did not, for example, give any kind of bonus or preference to a facility simply because it is

[3] Note that *Harvey & Harvey* has been qualified with respect to "clearly public facilities," *Lebanon Farms Disposal v. County of Lebanon*, 538 F.3d 241, 249 (3d Cir. 2008), based on *United Haulers*. Given the split opinions in *United Haulers*, it is clear that the final chapter has not yet been written on the constitutionality of flow control.

located in Pennsylvania. Rather, the Appellants charge that the planning process *in effect* discriminated against potential out-of-state waste management facilities as compared to in-state facilities.

The problem with the Appellants' charge of discrimination against interstate commerce is that they cite to very little in the record that would suggest there was any bias in purpose or effect against out-of-state competitors as compared to in-state facilities. Interestingly (albeit not dispositively), the Appellants are all in Pennsylvania. They have not referred us to any out-of-state competitors who were actually harmed or affected. They rely very heavily if not exclusively on *Harvey & Harvey*, but that case involved waste planning in two border counties of the Commonwealth—Mercer and Chester. Out-of-state competitors were interested in participating and available as a practical matter in both of those counties. With the exception of the appropriately named Centre County, one would be hard-pressed to find a county in Pennsylvania more distant from any neighboring state than Clearfield County. Out-of-state facilities are obviously at a significant disadvantage in competing for Clearfield's waste, but that is a function of geography, not Clearfield's designation process.

The Appellants say that Clearfield's request for assistance with recycling exacerbated the hypothetical out-of-state facilities' disadvantage. In other words, Clearfield is not allowed to request (or in the Appellants view, demand) recycling help because that necessarily and unfairly discriminates against out-of-state facilities. Again, geography logically seems more at work here. In any event, the record at this point certainly does not support the Appellants' conclusion. Clearfield points out that facilities had the option of offering lower tipping fees or giving a cash payment to compensate for their limited ability to provide recycling. It is not uncommon for distant facilities to offer lower tipping fees or make other accommodations to attract customers

and account for the inconvenience. The issue is obviously not ripe for decision on summary judgment.

The Appellants go on to criticize Clearfield's planning process more generally. They essentially take the language and reasoning of *Harvey & Harvey* and use it to attack Clearfield's favoritism with respect to the successful bidder *vis-à-vis* other *in-state* facilities. We are not entirely sure this is an appropriate application of *Harvey & Harvey*, but the analytical distinction is not particularly significant because Act 101 itself provides that county plans must explain the reason for selecting designated facilities and, as previously mentioned, "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities..." 53 P.S. § 4000.502(f)(2).

The Appellants would have both the Department and this Board scrutinize Clearfield's planning process in great detail to ensure that it was fair, open, and competitive. They have a lengthy list of complaints with the planning process, which they say explain why they were not chosen. However, we see the fact that they refer us to several cases regarding government procurement in support of their argument as a red flag. The Appellants' criticisms of Clearfield's bidding process in both tone and substance would seem to be more at home in government contracting litigation pursued by disappointed bidders. *See, e.g. Stapleton v. Berks Cnty.*, 593 A.2d 1323 (Pa. Cmwlth. 1991) (challenge to county's bidding process under Act 101 brought before Court of Common Pleas). We are very hesitant to impose upon the Department an obligation to be expert in government procurement when reviewing Act 101 plans. The Act and regulations require the Department to ensure that there are "reasonable assurances" in the plan that the county used a fair process, 53 P.S. § 4000.502; 25 Pa. Code § 272.227(a)(2), but that is as far as its duty should go.

Did Clearfield's plan include reasonable assurances that its planning process was fair, open, and competitive? In their attempt to show that it did not, the Appellants point to the fact that the successful bidder, Veolia, had an ongoing relationship with Clearfield that predated the RFP. Because Veolia was already providing recycling services to Clearfield, the Appellants say Veolia was better positioned to continue that service. Because of its existing connection, and participation by a Veolia representative on Clearfield's Solid Waste Advisory Committee, Veolia had insider information not easily available to the other bidders, according to the Appellants. They allege that the idea to seek recycling services originated with Veolia. Only Veolia understood what the County was getting at when it vaguely requested proposals that included help with integrated waste management programs. They complain that this supposedly cozy relationship gave Veolia a competitive advantage that not only resulted in Veolia being the successful bidder, but it so tainted the planning process that the entire plan must be thrown out. Finally, the Appellants complain that the subjectivity inherent in Clearfield process for ranking proposals allowed it to favor Veolia.[4]

The fact that Veolia had an historical relationship with Clearfield means that it is no surprise to us that it would work the hardest to keep that business. This is not a case where Veolia presented a less attractive proposal but mysteriously got the designation anyway. To the contrary, Veolia presented the best bid. As previously mentioned, Veolia offered the lowest disposal cost by far: $39 versus $59. It had the lowest escalation fee: two percent versus Waste Management's five percent. Clearfield calculated that using Veolia would save $16.9 million over using Waste Management over the life of the contract. Veolia is closer, sometimes much closer, than the disappointed bidders' facilities to Clearfield, resulting in substantially lower fuel

[4] Wayne Township Landfill was also ultimately successful in being included in Clearfield's plan, but the Appellants' complaints primarily relate to Veolia.

and labor costs, lower greenhouse emissions, and less garbage trucks on the roads. Veolia had the strongest compliance record, and it is the only facility that promised 100 percent capacity assurance. It also offered an attractive package regarding recycling help, which is what offends the Appellants, but Veolia would have scored the highest even if the recycling component was removed from the ranking. Having reviewed Clearfield's plan, we think Clearfield arguably would have been hard-pressed to justify the selection of any bidders other than Veolia and Wayne Township.

Clearfield and the Department point to numerous facts that would support a finding that Clearfield's plan included reasonable and accurate assurances that its planning process was fair, open, and competitive. It commissioned a sustainability study. It used a planning committee. Clearfield made no secret of the fact that it was seeking recycling help. Indeed, the Appellants concede that they did not offer help because they thought it would be "improper," not because they did not understand the request. There are numerous facts that would support findings that the process was fully transparent, the RFP was sufficiently detailed, the ranking process was fair, and Veolia had no improper advantage.

Although the Appellants complain that Clearfield's ranking process was too subjective, it would be disingenuous to suggest that any ranking process that goes beyond dollars and cents and assigns points based on various criteria can be performed without the application of some discretionary judgment. Whether any subjectivity inherent in the exercise was used as a cover for improper favoritism is at best a disputed issue of fact. The existing record relied upon by the Appellants would not support such a finding.

The Appellants say Clearfield had an "economic motive" for favoring Veolia because Veolia agreed to help fund recycling. The Appellants draw this phrase from *Harvey & Harvey*,

but the economic interest that drew the Court's attention in that case and in *C&A Carbone, supra*, referred to the governmental unit's interest in the designated facilities themselves. Clearly, Clearfield has an interest in negotiating the best deal possible on behalf of its citizens, but there is nothing sinister about that. Clearfield has no financial interest in Veolia.

The Appellants complain that they have now lost their chance for ten years because there is "no real possibility" that Clearfield will add alternative sites over the excessively long ten year contracts with Veolia and Wayne Township. Whether this is true is an issue of fact about which the parties have widely divergent opinions based upon disputed evidence and the inferences that may be drawn therefrom. However, even if the Appellants' allegation is true, ten years does not seem particularly offensive given that Act 101 specifically requires a ten-year plan. 53 P.S. § 4000.502. Like several of the Appellants' other complaints, this complaint seems more directed at Act 101 than Clearfield's effort to comply with that statute. Once again, it seems that Clearfield is being criticized for merely doing what Act 101 wants it to do. Furthermore, the duration of the plan's designations has limited significance as an independent factor. Rather, if the original designations are suspect, a marginal designation may escape invalidation if it is either short lived or readily open to amendment. *See Harvey & Harvey*, 68 F.3d at 806, 809. Clearfield's designations do not appear to be suspect based on the existing record.

In Board proceedings, granting summary judgment is most appropriate where there are a limited set of material facts that are truly undisputed and the appeal presents a clear legal question. *AKF Dev. Corp. v. DEP*, 2009 EHB 251, 253; *Berthothy v. DEP*, 2007 EHB 254, 255. This is clearly not such a case. The Appellants' criticisms of Clearfield's process are not based upon a limited set of undisputed facts; quite the contrary. Therefore, its second motion for summary judgment must also be denied.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT OF PENNSYLVANIA, INC., ET AL.	:	
v.	:	**EHB Docket No. 2013-033-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Permittee	:	

ORDER

AND NOW, this 5th day of May, 2014, it is hereby ordered that the Appellants' motions for summary judgment are **denied**. The Board will schedule a hearing on the merits in due course.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: May 5, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT OF PENNSYLVANIA, INC., ET AL.	:	
v.	:	**EHB Docket No. 2013-033-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Permittee	:	

DISSENTING AND CONCURRING OPINION OF JUDGE BECKMAN IN WHICH CHIEF JUDGE RENWAND JOINS

By Steven C. Beckman, Judge

In 2010, Clearfield County ("Clearfield") faced a significant deficit in funding its recycling programs. In order to address that deficit, and as part of its efforts to revise its Act 101 plan, Clearfield issued a request for proposals for waste management services ("RFP"). The RFP requested that a facility responding to the RFP include how its proposal would address the funding shortfall and/or tangibly augment Clearfield's recycling programs. Specifically, the facilities were requested to state the dollar value of the cash or services that the proposer would provide to Clearfield. The amount of the cash or services offered was a significant factor in the ranking of the proposals by Clearfield. The only facilities included in Clearfield's Act 101 plan were the two facilities who specifically offered cash and/or services to Clearfield for its recycling programs. The Department approved the Act 101 plan submitted by Clearfield. The Appellants in this appeal are facilities that submitted proposals but were not selected for inclusion in Clearfield's Act 101 plan.

The Appellants have filed two requests for summary judgment: one claiming that Act 101 preempts Clearfield from seeking assistance for its recycling program in the manner selected,

and the second claiming that Clearfield's process was not fair, open, and competitive. The majority denies both requests for summary judgment. With all due respect, we believe that Act 101 preempts the mechanism relied on by Clearfield to fund its recycling program. Accordingly, we dissent. The state scheme for recycling set out in Act 101, including its provisions relating to the funding of recycling programs, is so comprehensive that it precludes the coexistence of the alternative funding scheme at issue in this case. We believe that this position is the appropriate reading of the Commonwealth Court's prior decisions addressing the issue of funding of recycling programs.

The Commonwealth Court cases addressed factual situations where the source of recycling funding in dispute involved specific fees charged by the government entity. In each case, the Court found that these mandatory fees are preempted by Act 101. The majority asserts that these Commonwealth Court cases are limited to those situations where the fees in question are non-negotiable, mandatory fees unilaterally imposed by counties. Thus, according to the majority, to the extent Clearfield's scheme can be characterized as a request for voluntary payment or services, those cases do not control. We disagree with the majority in that we find that the language and reasoning used in those cases is such that we conclude that the Commonwealth Court would find that the funding scheme at issue here, even if it was found to be voluntary, is preempted by Act 101.

In *County of Northumberland*, the Court discusses at length the provisions in Act 101 that deal with recycling and recycling fees, noting that there are three full chapters devoted to the development and implementation of a recycling plan. *Pa. Indep. Waste Haulers Ass'n v. Cnty. of Northumberland et al.*, 885 A.2d 1106, 1109–10 (Pa. Cmwth. Ct. 2005). The Court cites favorably to the extensive trial court opinion discussing the financial aspects of Act 101. 885

A.2d at 1110. The trial court, after describing the various sources of revenue for recycling programs expressly provided for in the Act, notes that the Legislature addressed the issue of potential insufficient funds through two specific provisions of Act 101. *Id.* The first, found at Section 1712 of Act 101, provides an affirmative defense to the requirement that a municipality implement a recycling program if the reasonable and necessary costs of operating the program exceed the income from the sale or use of collected materials, grant money received and avoided costs of processing or disposal. The second, found at Section 1513 and added to Act 101 in 2002, requires the Department to develop a plan to assist municipalities in making recycling programs financially self-sufficient and lists several specific items to be included in that plan. The trial court opinion cited by the Commonwealth Court concludes with the statement that "[T]he implication is, of course, that no funds other than those provided for by the Act are contemplated." 885 A.2d at 1110. The Commonwealth Court summarizes its own conclusion by stating that "Act 101 provides a comprehensive recycling plan that provides a specified funding source and does not provide any authority to raise revenue by other means." *Id.* The Court further states that the only fees that may be imposed by the municipality are those that are expressly authorized by the Act. 885 A.2d at 1111. In *County of Lehigh*, the Court relies on its reasoning in *County of Northumberland* to find that an administrative fee for the purpose of funding a recycling program was similarly preempted by Act 101. *IESI PA Bethlehem Landfill Corp. et al. v. Cnty. of Lehigh*, 887 A.2d 1289, 1292 (Pa. Cmwth. Ct. 2005).

Two recent opinions from the Commonwealth Court in 2013 further expand on the understanding of Act 101's preemption of funding for recycling programs. In *City of Reading*, the Court again reviews in detail the extensive provisions in Act 101 addressing recycling and the mechanisms available for funding the programs. *City of Reading v. Iezzi*, 78 A.3d 1257,

1264–66 (Pa. Cmwth. Ct. 2013). After completing this review, the Court concluded that the recycling fee was "inconsistent with the comprehensive statewide recycling funding provisions in Act 101 and related statutes." 78 A.3d at 1268. Perhaps more telling for this case, the Court continued:

> Additionally, we conclude the . . . recycling fee is inconsistent with a purpose of Act 101. The . . . service fee covers 'all costs associated with the recycling program.' However, one purpose of Act 101 is to '[e]ncourage the development of waste reduction and recycling . . . through planning, grant and other incentives.' . . . Simply, a service fee which covers all costs of recycling does not encourage waste reduction and marketing of recyclables, nor does it use planning, grants or other incentives to attain increased efficiency.

Id. If you substitute the type of funding scheme that is alleged in Clearfield, a request for voluntary fees or services, in place of "service fee" in the above discussion, it appears to us that the Commonwealth Court would likely conclude that Clearfield's approach is also inconsistent with the purposes of Act 101.[5]

In *Monroe County*, the Commonwealth Court again notes that recycling is "given extensive, special treatment in Act 101 and "the recycling funding scheme is the subject of express Legislative findings and purposes." *Pa. Waste Indus. Ass'n v. Monroe Cnty Mun. Waste Mgmt. Auth.*, 80 A.3d 546, 559 (Pa. Cmwth. Ct. 2013). The Court also stated that it "agree[d] that the funding system for recycling must be uniform in order to attain the required efficiency." 80 A.3d at 560. Ultimately the Court found the fee in question in *Monroe County* is not preempted, because the trial court found that the fee in question *did not include recycling fees.* However, the clear implication from the *City of Reading* opinion and the *Monroe County* opinion

[5] The decision in *City of Reading* is void for technical reasons due to a bankruptcy court decision, *see In re Iezzi*, 504 B.R. 777 (Bankr. E.D. Pa. 2014), but there is no reason to think that the reasoning outlined in the published opinion would not be followed in a future case involving Act 101 preemption.

is that the funding of recycling programs continues to be a special situation and subject to a strict preemption analysis. *See* 80 A.3d at 561.

The majority extensively discusses the *Monroe County* opinion. They acknowledge that the *Monroe County* case "did not deal with requests for recycling assistance" but concludes that "there is nothing in the Court's most recent word on the subject in either tone or substance that encourages us to expand the holding in *County of Northumberland* to include requests for voluntary assistance." Slip Op. at 7. We think that ignores or diminishes the statements from the *Monroe County* opinion discussed above. Further, the majority cites to the discussion of express versus field preemption in the *Monroe County* opinion as support for its position. It is clear, however, that the Court's discussion on the issue of field preemption is aimed at the claim by the appellant that *all local fees*, not just recycling fees, are preempted and thus, does not lend any support to the majority's position in this case.

The majority also relies on the statement by the Court that its earlier decisions regarding preemption in *Northumberland* and *Lehigh* are "limited to unauthorized recycling fees." Slip Op. at 7. We think that this is an accurate summation of the holdings in those cases; express authority in Act 101 is central to government efforts to fund recycling programs. However, that raises the question: *where* is the express authority in Act 101 for the recycling funding scheme used by Clearfield? The answer is that it simply does not exist. The majority acknowledges this, but attempts to minimize the import by stating: "Such express authority is not as critical when a request for voluntary assistance is involved." Slip Op. at 8. To support its position that express authority is not critical, the majority relies on a general statement of legislative intent that counties should provide for "maximum feasible development and implementation" of recycling programs, an admittedly worthy goal, combined with a statement that Act 101 "anticipates some

local financial assistance" from the *Monroe County* opinion—a case that all acknowledge does not involve recycling fees. You cannot have it both ways, as the majority attempts to do in its sweeping decision in this case. The fact that the continuation of the recycling efforts by Clearfield is universally recognized as a positive for the environment does not mean that the majority can ignore clear guidance from the Commonwealth Court on this issue.

In the end, we find that the most appropriate reading of the Commonwealth Court precedent is that the sources available to counties for funding recycling programs are limited to those sources expressly set forth in Act 101. The mechanism selected by Clearfield and approved by the Department are not among those express sources set forth in the Act 101. Therefore, we would conclude that the funding approach in this case is preempted by Act 101. Thus, the Department should not have approved the Act 101 plan submitted by Clearfield, and summary judgment should have been granted to the Appellants on that issue.

The majority opinion also denies the second summary judgment requested by the Appellants regarding the designation process. We agree with the majority's decision to deny the summary judgment on that issue because we agree that this is clearly not a case where there are a limited set of material facts that are truly undisputed and where the appeal presents a clear legal question. We would have preferred that the majority stop with that determination and not have extensively analyzed the factual arguments set forth by the parties, particularly the Appellants. This gives the appearance that the issue remains open not in fact, but only in name. We hope that

is not the case and look forward to reviewing all of the facts that will be further developed at hearing before deciding whether the process in this matter was fair, open, and competitive.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

Dated: May 5, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 7, 2014**

OPINION AND ORDER ON WARRENTLESS SEARCH

By: Michelle A. Coleman, Judge

Synopsis

The Board admits photographic evidence tendered by the Department at hearing because it finds that a warrantless search of the property was not conducted and that the exclusionary rule does not apply to this civil, administrative proceeding.

OPINION

This opinion originates out of issues that have continually arisen during the hearing on the merits in this case, issues that have prompted countless objections and extended soliloquy from both parties to such an extent that proceedings have been excessively prolonged. The hearing began on April 14, 2014. The Department of Environmental Protection (the "Department") initiated its case in chief and used a number of photographs during the examination of its first witness, Lisa Dziuban of the Bucks County Conservation District. Mr. Becker objected to a number of the photographs, arguing that they were taken on his property without his consent and without a warrant, in violation of the Fourth Amendment to the United States Constitution. As such, he argued, they constituted fruits of an unlawful search and should be precluded from being admitted into evidence.

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After the conclusion of the first day of the hearing, the case was scheduled to resume on April 22, 2014. In the interim, Mr. Becker submitted a letter to the Board dated April 18, 2014, stating that upon further consideration of the photographs offered by the Department at the first day of the hearing, he now realized that all of the photographs were taken on his property and therefore objected to all of them on the grounds that they were fruits of warrantless searches. During the second day of trial the issue continually arose, with a considerable amount of time spent at the onset of the day with argument between counsel for the Department and Mr. Becker on the issue. The Department argued that the searches fell under the open fields exception to Fourth Amendment searches. The issue then repeatedly arose during the examination of the Department's second witness, Frank DeFrancesco of the Department. At the close of the second day of hearing we ordered the parties to submit briefs on the issues of warrantless search and the open fields doctrine on or before May 2, 2014. It was further ordered that the parties would reconvene on May 8, 2014 for a third day of hearing.

In its brief, the Department argues that the searches conducted by the Department and the Bucks County Conservation District were done pursuant to the authority given to the Department to conduct inspections under the Clean Streams Law and Dam Safety and Encroachments Act. *See* 35 P.S. §§ 691.5 and 691.305; 32 P.S. § 693.16.[1] The Department argues that these provisions impose an obligation on the Department to investigate violations of the two laws.

[1] Importantly, the Department notes that the Dam Safety and Encroachments Act does not require consent for an inspection of property and only requires a warrant when a property owner refuses to allow inspection: "The owner, operator or other person in charge of such property, facility, operation or activity, upon presentation of proper identification and purpose for inspection by the agents or employees of the department, shall give such agents and employees free and unrestricted entry and access, and upon refusal to grant such entry or access, the agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection." 32 P.S. § 693.16(b). In this case there was no refusal from Mr. Becker.

The Department then argues that earth movement and construction is a heavily regulated industry that is excepted from the protections of the Fourth Amendment. We reject this argument. The Department analogizes Mr. Becker's alleged earth disturbance activities with the waste disposal industry as it was discussed in *Department of Environmental Resources v. Blosenski*, 566 A.2d 845 (Pa. 1989), which found that the Fourth Amendment warrant requirement did not apply to the waste disposal industry because those in the industry should reasonably anticipate unannounced inspections. The Department argues that the same can be said for the construction and earth moving industries. We are unwilling to make that leap in the circumstances stated here. We think that earth disturbance is somewhat different from what courts have found to be heavily regulated industries. *See e.g. New York v. Burger*, 107 S. Ct. 2636 (1987) (automobile junk yard); *Donovan v. Dewey*, 101 S. Ct. 2534 (1981) (mining); *U.S. v. Biswell*, 92 S. Ct. 1593 (1972) (gun dealers); *Colonnade Catering Corp. v. U.S.*, 90 S. Ct. 774 (1970) (liquor industry and related retailers). None of these industries are the kinds of things that an individual could easily conduct in one's own backyard, as not infrequently happens with Dam Safety and Encroachments Act cases involving work within a floodplain or along the banks of a waterway. Although the construction of new buildings and other large-scale developments may be closer to being heavily regulated, in this case we do not find that the Department's inspection of the subject property falls under the heavily-regulated industry exception.

Additionally, the Department argues that the investigations conducted under the authority of the Clean Streams Law and Dam Safety and Encroachments Act were done on property that falls under the open fields exception to the Fourth Amendment. The open fields exception provides that there is no expectation of privacy that extends to the area beyond the immediately surrounding property of a home. *See Oliver v. U.S.*, 104 S. Ct. 1735, 1742 n.11 (1984) ("It is

clear, however, that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech.")

In Mr. Becker's brief, he argues that the open fields doctrine does not apply and that the issue turns on whether the inspections occurred within the curtilage of his property. He contends that his property is essentially too small to have any open field exception apply and that all of his property is within the curtilage. The Department did not address curtilage in its brief.

Mr. Becker cites all of the major cases on open fields and curtilage, including *Hester v. United States*, 44 S. Ct. 445 (1924), *Katz v. United States*, 88 S. Ct. 507 (1967), *Oliver, supra*, 104 S. Ct. 1735 (1984), and *United States v. Dunn*, 107 S. Ct. 1134 (1987). *Dunn* outlines a test with four factors used to determine whether an area falls within the curtilage of a home: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." 107 S. Ct. 1134, 1139. Most recently, the U.S. Supreme Court addressed the issue in *Florida v. Jardines*, 133 S. Ct. 1409 (2013). There, the Court stated, "We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" 133 S. Ct. 1409, 1414 (quoting *Oliver, supra*, 104 S. Ct. at 1742). The Court in *Jardines* then held that one's front porch is unquestionably within the curtilage of the home.

In this case, under the factors in *Dunn*, the question of whether the land surrounding the structure on the subject property falls within the curtilage of the home is a close one. Undoubtedly, the area subject to the Department's inspection, and the area Mr. Becker claims is

his curtilage, is within close proximity to the dwelling structure. Although we do not have any evidence so far as to how the area was put to use by Mr. Becker, we can imagine that it was used as any backyard would be used for leisurely activity. Additionally, Mr. Becker's driveway extends behind the dwelling structure so it is not hard to imagine that the area was used for storing one's automobile. The other two factors, however, weigh against Mr. Becker. There is no enclosure that surrounds the area. There is no fence or any other structure that marks off the area of the property. Additionally, from the testimony heard so far, there were no steps taken by Mr. Becker to protect the area from observation by passers-by. Mr. DeFrancesco testified that he observed no signs that would indicate that the owner would want to keep people off of the property. (Notes of Transcript at 264.)

In weighing the four factors we conclude that the searches conducted by the Department and the Bucks County Conservation District were done outside of the curtilage of the home on the subject property and therefore Mr. Becker did not enjoy a reasonable expectation of privacy in the area. Accordingly, the searches were not unlawful.

Furthermore, even if we did find that the photographs were taken in violation of the Fourth Amendment, the exclusionary rule does not compel us to keep them out of evidence. The U.S. Supreme Court has consistently held that the exclusionary rule is not itself a constitutional right of the Fourth Amendment, but rather a judicially-created doctrine that has been held to be applicable only when the deterrence benefits outweigh the substantial social costs. In *Pennsylvania Board of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2019 (1998), the U.S. Supreme Court noted that their holdings have repeatedly emphasized that "the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution."

Additionally, there is a substantial amount of case law that holds that the exclusionary rule is generally only applicable in criminal cases, not civil proceedings. In *Scott, supra*, the U.S. Supreme Court addressed whether the exclusionary rule applied to parole revocation proceedings. Reviewing prior cases where the Court held that the exclusionary did not apply to civil tax proceedings or civil deportation proceedings, the Court once again declined to "extend the operation of the exclusionary rule beyond the criminal trial context." 118 S. Ct. at 2020.

The Pennsylvania Supreme Court has also interpreted the exclusionary rule to only apply to criminal trials. In *Kerr v. Pennsylvania State Board of Dentistry*, 960 A.2d 427 (Pa. 2008), the Pennsylvania Supreme Court addressed the issue for the first time. The Pennsylvania Supreme Court recognized the longstanding consistency in the U.S. Supreme Court to not extend the exclusionary rule beyond criminal trials. 960 A.2d 427, 433. The Pennsylvania Supreme Court looked to the balancing test outlined by the U.S. Supreme Court in *United States v. Janis*, 96 S. Ct. 3021 (1976), to determine whether the deterrence benefit outweighed the social cost. The Court in *Kerr* held, "Because applying the federal exclusionary rule in criminal trials already serves to deter unlawful evidence-gathering by police, the marginal deterrent value of applying the rule to civil proceedings is minimal. Accordingly, we decline to apply the rule in the civil context as Appellant requests." 960 A.2d at 434 (internal citation omitted).

The Court in *Kerr* also points us to numerous instances where the Commonwealth Court has held that the exclusionary rule does not apply in civil cases. *See Kyte v. Pa. Bd. of Probation & Parole*, 680 A.2d 14 (Pa. Cmwlth. 1996) (parole revocation hearing); *Sertik v. School District of Pittsburgh*, 584 A.2d 390 (Pa. Cmwlth. 1990) (school board termination hearing); *Pa. Social Services Union v. Pa. Bd. of Probation & Parole*, 508 A.2d 360 (Pa. Cmwlth. 1986) (labor arbitration); *DeShields v. Chester Upland School District*, 505 A.2d 1080 (Pa. Cmwlth. 1986)

(school board termination hearing); *Kleschick v. Civil Service Commission of Philadelphia*, 365 A.2d 700 (Pa. Cmwlth. 1976) (claim for back pay).

Although Mr. Becker argues that the prospective criminal provisions of the Clean Streams Law renders this proceeding "a full-on criminal proceeding in the guise of an administrative hearing[,]" that is not the case. Mr. Becker initiated this proceeding by filing an appeal with us. The Board is not empowered to render a judgment that involves the imposition of jail time. All the Board is empowered to do in this case is to say whether or not the Department's order was reasonable, lawful, and supported by the facts. *See Dirian v. DEP*, 2013 EHB 224, 231 ("In an appeal from an order, the Department bears the burden of proving that its order was lawful, reasonable, and supported by the facts.") Any potential criminal proceeding that would arise out of one's non-payment of a civil penalty would be conducted in a different forum.

All of the case law is consistent with how this Board has interpreted claims of warrantless searches and arguments for the application of the exclusionary rule. In *Goetz v. DEP*, 2000 EHB 840, 874-76, a proceeding under the Noncoal Surface Mining Act, we analyzed *Scott* and the cases cited therein and concluded, "[T]he exclusionary rule would not preclude us from considering the evidence obtained as a result of the Department's inspections—even assuming the investigations were unlawful because they were done without a warrant." 2000 EHB at 876. Furthermore, in undertaking the balancing test outlined in *Janis*, and consistent with our prior holding in *Goetz*, we conclude that "the deterrent effect of the exclusionary rule in this setting would be minimal because the use of the exclusionary rule in criminal trials already deters illegal searches regarding alleged violations" of the Clean Streams Law and Dam Safety and Encroachments Act. *Id.*

Accordingly, even if we did find that the Department and the Bucks County Conservation District conducted a warrantless search of the subject property, there still would be no basis for the exclusion of the photographs taken during that search of the property. Because we have resolved the issue, we need not address the parties' arguments regarding whether the issue was waived by not being raised in Mr. Becker's prehearing memorandum. In closing, we note that Mr. Becker never raised an analogous warrantless search claim under Article 1 Section 8 of the Pennsylvania Constitution. Therefore, our discussion is limited to the Federal Constitution, although we are not certain that we would reach a different conclusion.

We issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of May, 2014, it is hereby ordered that the evidentiary objection seeking to preclude admission of the Department's photographs taken on the subject property is **overruled**. The photographs are admitted into evidence.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 7, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-187-CP-C**
ALLEGHENY ENTERPRISES, INC.	:	**Issued: May 13, 2014**

OPINION AND ORDER ON
MOTION TO COMPEL

By: Michelle A. Coleman, Judge

Synopsis

The Board grants a motion to compel where the Department seeks certain financial documents of a defendant to help determine the deterrence aspect of a civil penalty amount under the Clean Streams Law.

OPINION

The Department of Environmental Protection (the "Department") filed a complaint with the Board against Allegheny Enterprises, Inc. on October 22, 2013. Essentially, the complaint alleges that Allegheny Enterprises conducted earth disturbance activities without an erosion and sediment control permit and without implementing applicable erosion and sediment control best management practices, in violation of the Clean Streams Law of 1937, 35 P.S. §§ 691.1 – 691.1001. The Department noted these alleged violations during an inspection of Allegheny Enterprises' Butler well pad on September 26, 2011. Allegheny Enterprises filed an answer to the Department's complaint on November 15, 2013.

On March 18, 2014, the Department filed a motion to compel. The Department's motion complied with our Rules in that it contained a certification that the Department attempted to

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resolve the discovery dispute in good faith and it contained exhibits documenting the discovery requests and responses giving rise to the dispute. 25 Pa. Code § 1021.93(b). Under our Rules, Allegheny Enterprises had 15 days to file a response to the Department's motion, meaning a response was due on April 2, 2014. 25 Pa. Code § 1021.93(c). No such response was filed on that date. A full two weeks after the due date, on April 16, 2014, Allegheny Enterprises filed a response opposing the Department's motion to compel.[1]

The subject of the dispute involves the Department's request for certain financial documents of Allegheny Enterprises. The Department served on the defendant a request for production of financial documents dated December 26, 2013, which requested (1) Allegheny Enterprises' federal tax returns with all schedules and attachments filed in 2011, 2012, and 2013 and (2) all financial statements prepared for those years. Allegheny Enterprises was given 30 days to respond to the discovery request (as is provided in Pa.R.C.P. No. 4009.12), but the parties agreed to an extension of time. Allegheny Enterprises responded on February 24, 2014 with objections to the Department's request for financial documents as well as objections to other discovery requests. In its discovery response, Allegheny Enterprises makes the same objection to both categories of financial documents the Department requests, arguing that the documents "are not relevant and/or material to the subject matter involved in the pending action

[1] Counsel for Allegheny Enterprises acknowledges the tardiness of his response in a footnote to his brief, essentially stating that he was too busy with other cases to make a timely filing. He then states that because the applicable Board rule at 25 Pa. Code § 1021.91(f) deems a failure to respond as an admission of all properly pleaded facts contained in the motion and his client does not contest the facts in the Department's motion, "Allegheny's failure to respond in a timely fashion has no effect on the substantive issue before the Court." We disagree with counsel's trivialization of his tardy response.

Such cavalier disregard for our Rules wastes our time and resources. We cannot divine whether or not a party will respond to a filing. We cannot continually reach out to counsel to remind them of filing deadlines or to determine whether or not they will file a response at all. Counsel for Allegheny Enterprises, apparently knowing that his response would be late, could have taken such proactive measures as requesting an extension of time to file a response, but he did not. Prior to receipt of counsel's response, an Opinion and Order had been prepared in this matter, however, we received counsel's tardy response prior to issuance. We expended extra effort to address counsel's concerns.

and are not reasonably calculated to lead to the discovery of admissible evidence..." (DEP Mot. to Compel, Ex. B.)

Discussion

Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure and the Board's Rules at 25 Pa. Code § 1021.102. Pennsylvania Rule 4003.1(a) provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Pa.R.C.P. No. 4003.1(a). Subsection (b) of that Rule adds, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Pa.R.C.P. No. 4003.1(b). Generally, this Board favors and encourages broad discovery. *PA Waste, LLC v. DEP*, 2009 EHB 317, 318; *Raven Crest Homeowners Ass 'n v. DEP*, 2005 EHB 803, 806. In overseeing the discovery process we have wide discretion to determine whether discovery is being conducted appropriately and we may limit discovery where required. *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

In its late response to the motion to compel, Allegheny Enterprises argues that the Department's request for tax returns invades a privilege, is overly broad, and requests irrelevant information. It incorporates the same arguments regarding the other financial documents. Allegheny Enterprises cites two federal cases in support of its argument. First, it cites *DeMasi v. Weiss*, 669 F.2d 114 (3d Cir. 1982) for the notion that public policy favors the non-disclosure of tax returns. To reach this conclusion, the Court in *DeMasi* looks to 26 U.S.C.S. § 6103, a portion of the Internal Revenue Code stating that a tax return shall be confidential as to a taxpayer and the federal government. Second, Allegheny Enterprises cites *Jackson v. Unisys, Inc.*, 2009 U.S. Dist. LEXIS 121716 (E.D. Pa. Jan. 4, 2010) for a test to apply in deciding

whether to order tax returns discoverable, which balances the privacy right recognized in *DeMasi* with the compelling public policy favoring liberal discovery.

However, the test articulated in *Jackson* is not universally accepted across the Commonwealth. Indeed, the three district courts have at times taken different approaches. This generally is reflective of the splits in courts throughout the United States, suggesting that this issue is far from settled. We find it necessary to review the competing viewpoints regarding tax returns and discovery.

One of the earliest discussions of the issue appears in *St. Regis Paper Company v. United States*, 82 S. Ct. 289 (1961), where the U.S. Supreme Court held that the Federal Trade Commission could require a corporation to submit reports the corporation made to the Census Bureau. Drawing a parallel between reports produced for the Census Bureau and tax returns filed with the IRS, the Supreme Court noted in dicta that the privilege regarding tax returns is not absolute and only exists between the tax return filer and the government agency; it does not extend to outside parties. 82 S. Ct. 289, 295-96 The Supreme Court concluded that tax returns are therefore subject to discovery. *Id.* However, federal jurisprudence across the country has limited the broad statement in *St. Regis Paper* and gradually developed the concept of a qualified privilege that may protect tax returns from being discoverable in certain circumstances.

Three tests have developed on the issue of the discoverability of tax returns. The tests have emerged from the cases of *Kingsley v. Delaware, Lackawanna & Western Railroad*, 20 F.R.D. 156 (S.D.N.Y. 1957), *Cooper v. Hallgarten & Co.*, 34 F.R.D. 482 (S.D.N.Y. 1964), and *Eastern Auto Distributors v. Peugeot Motors of America, Inc.*, 96 F.R.D. 147, 148 (E.D. Va. 1982). Not one of these tests has gained universal acceptance and Federal District Courts in Pennsylvania have variously employed all three.

The *Kingsley* Court held tax returns discoverable if they were put at issue in the case by the litigant, thereby waiving any claim to privilege. 20 F.R.D. 156, 158. In analyzing 26 U.S.C.S. § 6103 in conjunction with 26 U.S.C.S. § 7213 (relating to penal provisions for state and federal employees who divulge confidential tax information), the Court determined that an absolute privilege of one's tax returns is not conferred by the statutes or regulations. *Id.* The Court reasoned, "The purpose of the statute is to prevent the disclosure of confidential information to those who do not have a legitimate interest in it." *Id.* The *Kingsley* Court therefore suggests that if a party does not put her tax returns at issue in the case, then the party seeking those documents must have a legitimate interest in obtaining them. This approach has been employed in the Middle District of Pennsylvania in *Jacobson v. Cmty. Med. Health Ctr.*, 1992 U.S. Dist. LEXIS 20017, at *6–7 (M.D. Pa. Jul. 22, 1992).

The *Cooper* Court struck a balance between the longstanding principle favoring broad discovery and the public policy of confidentiality of tax returns, holding that "the production of tax returns should not be ordered unless it clearly appears they are relevant to the subject matter of the action or to the issues raised thereunder, and further, that there is a compelling need therefor because the information contained therein is not otherwise readily obtainable." 34 F.R.D. 482, 484. This two-part test requires that (1) the tax returns be relevant to the proceeding and (2) that they not be readily obtainable by other means. This test was applied in the Western District of Pennsylvania in *Lefkowitz v. Duquesne Light Co.*, 1988 U.S. Dist. LEXIS 17251, at *5–6 (W.D. Pa. Jun. 14, 1988). However, it is unclear on which party the burden rests in meeting the second part of the test.

The third test originated in *Eastern Auto Distributors*. In that case the Court held that there is a general qualified privilege against the discovery of tax returns, but that it may be

overcome in "appropriate circumstances." 96 F.R.D. 147, 148. The test arising from *Eastern Auto* is a burden-shifting framework: if the party seeking production of the documents shows that they are relevant to the case, the burden shifts to the party opposing production to articulate other sources by which the information can be obtained and is readily available. *Id.* at 149. This approach has been employed in the Eastern District of Pennsylvania in *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 80 (E.D. Pa. 1994). Notably, *Fort Washington* cited *DeMasi* and found that the confidential nature of a tax return must be balanced against the public policy favoring liberal discovery. The *Fort Washington* test was used in *Haas v. Kohl's Department Store, Inc.*, 2009 U.S. Dist. LEXIS 57816, at *2 (E.D. Pa. Jul. 7, 2009), however, the *Hass* Court inverted the second half of the framework and held that the burden is on the party seeking the documents to demonstrate their *unavailability* by other means. Although the *Jackson* Court used the same test as in *Fort Washington* and *Eastern Auto*, Allegheny Enterprises in the final paragraph of its brief construes it to shift the entire burden on the Department, as in the heightened standard in *Hass*.

All of this discussion goes to show that the law on this issue is far from settled. While the federal cases are instructive on the discoverability of tax returns, none of them are binding on this tribunal. Accordingly, we decline to adopt any specific test at this point, although we have considered the individual merits of each in reaching our decision.

Allegheny Enterprises' tax returns are not directly at issue in this case, nor did Allegheny Enterprises place them at issue in the case. *See e.g. Paul Lynch Investments, Inc. v. DEP*, 2011 EHB 8, 10 and *Goetz v. DEP*, 1998 EHB 955, 968 n.9 (cases involving claims of inability to prepay civil penalties under the Air Pollution Control Act and the Noncoal Surface Mining Act, respectively, where tax returns and other financial documents are used as evidence to make a

determination on the claim). However, we do think that an analysis of relevance is a threshold consideration that must be undertaken in any determination of whether to compel the production of documents. Here, the tax returns and other financial documents are undoubtedly relevant to a proceeding under the Clean Streams Law where the Department seeks to impose a penalty with a deterrent effect or determine any cost-savings to the violator.

As we recently stated, relevance is not an exacting standard. *Bucks Cnty. Water and Sewer Auth. v. DEP*, EHB Docket No. 2011-158-C, slip op. at 10 (Opinion and Order issued Mar. 14, 2014). The relevance standard is even lower when applied to discovery matters. *See* Pa.R.C.P. No. 4003.1. As the Department notes in its motion, in a complaint for civil penalties, the Department suggests to the Board a penalty amount, but that amount is purely advisory; the Board makes an independent determination of the appropriate penalty amount. *DEP v. Colombo*, 2013 EHB 635, 649; *DEP v. Leeward Constr.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003); *Westinghouse Elec. Corp. v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998). In evaluating the factors that go into a civil penalty calculation under the Clean Streams Law, we have long considered deterrence to be important. *Pines at West Penn, LLC v. DEP*, 2010 EHB 412, 423, *aff'd*, 24 A.3d 1065 (Pa. Cmwlth. 2011); *DER v. Jefferson Twp.*, 1978 EHB 134, 140; *see also DEP v. Pecora*, 2008 EHB 146, 159 ("We have often stated that deterrence is a major factor in determining an appropriate civil penalty."); *DEP v. Angino*, 2007 EHB 175, 209 (deterrence appropriate where defendant has extensive plans for property); *DEP v. Hostetler*, 2006 EHB 359, 365 (Board assessing civil penalty to deter defendant from acting in the same manner in the future); *DEP v. Breslin*, 2006 EHB 130 (deterrence appropriate in light of defendant's checkered compliance history).

We have previously found financial documents relevant to determining whether a civil

penalty amount will deter a party from committing future violations, or if it will deter a similarly situated class of would-be violators. The financial documents provide us with an image of the size and scale of an entity and allow us to evaluate whether a penalty will create a sufficient financial disincentive to deter that entity from taking a similar unlawful course of action in the future. In *Westinghouse Electric Corporation v. DEP*, 1996 EHB 1144, *rev'd on other grounds,* 705 A.2d 1349 (Pa. Cmwlth. 1998), the Department did not provide the Board with any financial information regarding the Westinghouse corporation and we could not determine whether the penalty we assessed had the prospect of deterring future violations. We underscored the importance of having this information, stating,

> In order for a civil penalty to have a deterrent effect, it must be in an amount that awakens the attention of management to bring about needed changes in operations and attitudes. In other words, it has to hit the violator in the pocketbook to the point where it hurts. The size of the violator is important.

Id. at 1289.[2]

In *DER v. Lawrence Coal Company*, 1988 EHB 561,[3] we evaluated a civil penalty absent evidence relating to deterrence or the cost of restoration, despite finding that deterrence was warranted by the circumstances of the case. Specifically, we said:

> The problem posed by the present case is the total absence of evidence on which to base a meaningful decision that will serve as a deterrent to Lawrence and to others. There is no evidence of Lawrence's net worth; no evidence of the amount of money Lawrence saved by not implementing control measures earlier than it did; no evidence of the cost of injury to Buck Run or the cost of restoring it; no evidence of any kind to suggest an amount of civil penalty that would deter Lawrence from similar actions in the

[2] Although we eventually re-evaluated our civil penalty calculation in *Westinghouse* on remand from the Commonwealth Court of Pennsylvania, we still found deterrence to be an important factor in reaching that calculation. *Westinghouse Elec. Corp. v. DEP*, 1999 EHB 98, 109, n.8, 118-19, *aff'd*, 745 A.2d 1277, 1280 (Pa. Cmwlth. 2000) ("[T]he Board's penalty calculation on remand was not improperly based upon implementing a policy of deterrence without a factual foundation.").

[3] Affirmed by Commonwealth Court in an unreported opinion dated July 12, 1989 (No. 1891 C.D. 1988).

> future. Absent such evidence, we are left only with a very generalized approach to deterrence whereby something more than a "nominal" amount is assessed.

1988 EHB at 598. As evidenced by the above two cases, the deterrence aspect may often seem like an afterthought in a penalty calculation and we are left guessing at what will be an appropriate deterrent to violators.[4]

We have also held that a motion to compel financial documents is appropriate when the Department seeks these documents to determine whether a defendant realized a profit from its failure to comply with the Clean Streams Law. *See DEP v. Quaker Homes, Inc.*, 2009 EHB 284 (entering judgment against Quaker Homes as a sanction for failing to comply with a prior order of the Board requiring the production of tax returns to determine in part whether Quaker Homes realized a profit from its violations of the Clean Streams Law); *see also Blosenski v. DER*, 1989 EHB 1067, 1069 ("The financial records of the violator, therefore, are appropriate objects for DER discovery purposes."); *cf. Nashotka v. DER*, 1989 EHB 1132, 1137 (Proceeding under the Solid Waste Management Act: "In order to carry the burden of showing that the amounts of the civil penalties are justified, DER must have access to this material.").

Here, in a similar situation, the Department seeks financial documents to determine whether a civil penalty is sufficient to deter similar violations from happening in the future and to provide appropriate information to the Board so that we can make an independent determination of the penalty amount. As stated above, deterrence is important not only to the specific violator involved in the particular case, but also to a general class of violators that may take a similar course of action in the future. *DEP v. Weiszer*, 2011 EHB 358, 392 ("The general deterrence to others to avoid similar violations in the future is as important as the specific

[4] We note solely for relevant comparison that the Pennsylvania sentencing guidelines on economic sanctions contain provisions mandating that a court shall consider the offender's hourly wage in determining an appropriate fine. *See* 204 Pa. Code § 303.14(a).

deterrence to the Defendant in light of the nature, extent and duration of the numerous violations which we previously established."). Additionally, as in other cases, the requested financial records may be appropriate to determine whether Allegheny Enterprises profited from a violation of the law. Therefore, there is no question as to the relevance of the requested financial documents and tax records.

Having determined that the information is relevant, we will now address whether it can be obtained by other means that are allegedly less intrusive to Allegheny Enterprises. First, we note that the Department did not demonstrate that this information is either available or unavailable through other means. For its part, Allegheny Enterprises argues that the information is readily obtainable elsewhere.

In fact, Allegheny Enterprises contends that the number of ways that the Department could obtain the information it seeks other than by the production of tax returns and financial records are "practically limitless." However, we have a difficult time imagining how comparable information can be obtained from a privately-held company. For instance, there are no public filings with the Securities and Exchange Commission like there are with publicly traded companies. Arguably, any request for documents such as cash flow reports and balance sheets that show specific assets and liabilities is more intrusive than what is reflected on a company's tax return. Further, obtaining this sort of information through a series of interrogatories or through the deposition of a financial officer is not efficient and would likely prompt objections similar to those that Allegheny Enterprises has already made.

Despite these "practically limitless" possibilities, Allegheny Enterprises proposes only one alternative. It suggests that the Department could obtain sufficient information for the deterrence aspect of a civil penalty by inquiring about the amount of revenue Allegheny

Enterprises received from the Butler well pad. We are unpersuaded by the assertion that the deterrent effect of a penalty needs to be limited in scope to the specific operation or activity bringing about the alleged violation. Allegheny Enterprises cites no case law directly on point for this contention. The profits derived from an individual operation are not necessarily correlative to whether a company will be deterred from committing a similar violation in the future. A single operation that makes a small amount of profit for a large company can still result in a great deal of environmental harm. Simply because a particular well pad only makes x dollars in profit does not mean that it cannot be held liable for a penalty greater than x dollars. Allegheny Enterprises' suggested approach is unnecessarily restrictive and an inadequate substitute for the more comprehensive earnings information that would be revealed in the documents requested by the Department.

Furthermore, in the *Jackson* case cited by Allegheny Enterprises, the Court reasoned that inquiry into the tax returns of an individual was too intrusive for the stated purpose of determining whether the individual properly mitigated his damages under state and federal disability statutes. However, the Court still ordered the production of the individual's W-2 documents to provide the other party with a reasonable picture of the individual's earnings. Allegheny Enterprises has offered no comparable alternative akin to what the Court ordered in *Jackson*. It has not suggested a document a privately-held company could provide that is analogous to an individual's W-2 form.

While we are sensitive to the privacy expectation inherent in one's tax return, we are also cognizant of the policy favoring liberal discovery.[5] Although we are not adopting any one of the

[5] Notably, Allegheny Enterprises did not file a motion for a protective order under Pennsylvania Rule 4012 to request that the documents be precluded from production or that they only be produced under seal, although we are not saying here whether such a motion would be granted or not. Further, Allegheny Enterprises could request that the documents be provided to the Board for in camera review.

tests outline above, in considering the merits of all of them and employing our discretion, we order the tax documents and financial documents to be produced. We note that none of the cases outlining the tests for the discoverability of tax returns involve the Pennsylvania Rules of Civil Procedure, and importantly, none of them involve the Clean Streams Law.

Ultimately, deterrence is simply another element in the spectrum of factors that the Board weighs and considers in reaching an appropriate penalty. In instances where we find deterrence to be necessary and appropriate given the nature of the violation, the ability to make a proper determination of the deterrent effect on the violator is aided by access to pertinent financial records.

Therefore, we find that the requested documents are appropriately discoverable in this proceeding under the Clean Streams Law and must be provided to the Department during discovery.[6]

Accordingly, we issue the order that follows.

[6] The Board has the authority to compel a party to respond to discovery requests. *Mann Realty, Inc. v. DEP*, 2013 EHB 730, 731; *DER v. U.S. Steel Co.*, 1977 EHB 323.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-187-CP-C**
ALLEGHENY ENTERPRISES, INC.	:	

ORDER

AND NOW, this 13th day of May, 2014, it is hereby ordered that the Department's motion to compel is **granted**. Allegheny Enterprises, Inc. shall provide the Department with the documents requested in its request for production of financial documents on or before the close of discovery. It is further ordered that the discovery and dispositive motion deadlines are hereby extended to **Monday, June 2, 2014** and **Monday, June 30, 2014**, respectively.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 13, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BROCKWAY BOROUGH MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2013-080-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLATIRONS DEVELOPMENT, LLC, Permittee	:	**Issued: May 15, 2014**

OPINION AND ORDER ON
JOINT MOTION TO STRIKE

By: Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a joint motion to strike filed by the Department and the permittee. The Board strikes from the appellant's prehearing memorandum legal issues involving property rights and trespass because they are not relevant to the appeal.

O P I N I O N

Brockway Borough Municipal Authority ("Brockway Authority" or the "Authority") is appealing the Department of Environmental Protection's (the "Department's") issuance of well permit no. 37065-26926-00-00 to Flatirons Development, LLC ("Flatirons") for the development of an unconventional gas well that will be hydraulically fractured in Snyder Township, Jefferson County. The permit contemplates that Flatirons will utilize the surface property of Brockway Authority to drill a well that will produce gas from adjacent property. The hearing on the merits in this case is scheduled to begin on May 20, 2014. On March 20, 2014, Brockway Authority filed its prehearing memorandum, which contained a statement of 14 legal issues in dispute. On April 21, 2014, Flatirons and the Department filed a joint motion to strike portions of Brockway

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Authority's statement of legal issues from its prehearing memorandum. Brockway Authority responded to the joint motion on May 1, 2014.

The motion asks us to strike certain legal issues over which Flatirons and the Department contend the Board lacks jurisdiction, thereby precluding Brockway Authority from arguing them at the hearing. Specifically, Flatirons and the Department argue that paragraphs 1, 5, 6, and 7 of Brockway Authority's prehearing memorandum involve property rights, contract issues, trespass, and nuisance claims that are not jurisdictionally proper before the Board.[1] The paragraphs are as follows:

> 1. Whether or not the ownership rights of gas drillers allow the gas drillers to use the property that is not the subject of the gas drillers' ownership rights for the exploitation of the property that is the subject of said rights. *Belden & Blake Corporation vs. Commonwealth of Pennsylvania*, 600 Pa. 559; 969 A.2d 528 (2009).
>
> . . . .
>
> 5. Whether or not the Flatirons project will cause an undue burden and substantial added costs for the monitoring of contaminants under the requirements of 25 Pa. Code, §109.301 that controls the Authority's duty to monitor certain contaminants and to meet the requirements established in the National Primary Drinking Water Regulations.
>
> 6. Whether or not the proposed use of the Authority's property to exploit gas reserves under the property of other surface owners constitutes a trespass.
>
> 7. Whether or not the proposed use of the Authority's property constitutes a public nuisance.

(Brockway Authority Prehearing Memo at 5, 6).

Flatirons and the Department argue that paragraphs 1 and 6 ask the Board to decide

[1] The motion argues that paragraphs 8 through 11, involving issues related to Article 1 § 27 of the Pennsylvania Constitution, should also be stricken because these issues were not raised in Brockway Authority's notice of appeal. Brockway Authority in its response to the motion has agreed to remove those paragraphs from its prehearing memorandum.

property law issues that are beyond our jurisdiction. Flatirons and the Department also contend that any use of the surface property of Brockway Authority is governed by a Surface Use and Damage Agreement and Easement executed between Flatirons and the Authority. In its response to the joint motion to strike, Brockway Authority frames the issue not as whether Flatirons has the right to enter Brockway Authority's property, but whether the Department considered that Flatirons would be utilizing the surface of the Authority's property to drill for gas from the subsurface of adjacent property. The Authority asserts that "the issue before the Board is not a property issue, but more the DEP assessing the impacts that will occur on the Authority's watershed and the importance of protecting public drinking water supplies." Brockway Authority never explains how protecting public water supplies implicates property rights as outlined in paragraph 1, or why we should be considering property rights in assessing the potential impact on a public water supply. There is a significant gap in the logical inference of its argument that fails to connect the relevant property rights to the integrity of the water supply. Whether drilling will endanger the water supply has no apparent connection that we can see with property rights. Assessing whether Flatirons' drilling operations pose a significant risk to Brockway Authority's water supply is a process that occurs independently of any assessment of property rights. Therefore, any inquiry into property rights as has been framed by Brockway Authority in its prehearing memorandum and response to the motion to strike is irrelevant and beyond our consideration in this case.

Paragraph 6, involving the issue of trespass, is likewise irrelevant to the case. It is clearly a common law property issue. Even in its response to the motion to strike, Brockway Authority never explains how the claim of trespass relates to the issue of the integrity of the water supply. For the same reasons as stated in regard to paragraph 1, we find the issue raised in paragraph 6 to

be irrelevant. Brockway Authority has provided us with no compelling reason why we should think otherwise.

Brockway Authority cites *Belden & Blake Corp. v. Department of Conservation and Natural Resources*, 969 A.2d 528 (Pa. 2009), but never explains why that case has any bearing on the one before us, or how that case should convince us that we need to be considering property rights in evaluating whether the Department acted reasonably and in accordance with the law in issuing the well permit to Flatirons. We cannot glean from these bald assertions why or how we are to consider property rights in terms of their potential impact on Brockway Authority and its water supply. Accordingly, the motion to strike is granted with respect to paragraphs 1 and 6 because they raise issues that are irrelevant to this proceeding.

Flatirons and the Department next argue that Paragraph 5 addresses a contract claim and the Board's jurisdiction does not extend to reviewing private agreements. We disagree that this is necessarily a pure issue of contract. Brockway Authority and/or its customers may have rights under the law irrespective of the contract between the Authority and Flatirons. Simply because a contract exists between the parties does not mean that Brockway Authority has forfeited all of its rights under the law. At this time we are unwilling to strike this issue and preclude as a matter of law all argument relating to the issue at hearing. To the extent that the activity of Flatirons has the potential to impact either the quality or quantity of water supplies, we will permit this issue to be heard at the hearing. *See* 58 Pa.C.S. §§ 3211(m) and 3218 (relating to the Department's duty to evaluate a well permit in terms of its potential impact on water supplies and the statutory mandates for corrective action for restoring or replacing an affected water supply). The motion to strike is denied with respect to paragraph 5.

Paragraph 7 plainly states a common law public nuisance claim. Although Flatirons and

the Department are correct in arguing that the Board is not the proper forum for litigating common law nuisance claims, we interpret Brockway Authority's stated legal issue to be nothing more than a reference to Section 3252 of the Pennsylvania Oil and Gas Act of 2012, which reads:

> A violation of section 3217 (relating to protection of fresh groundwater and casing requirements), 3218 (relating to protection of water supplies), 3219 (relating to use of safety devices) or 3220 (relating to plugging requirements), or a regulation, order, term or condition of a permit relating to any of those sections constitutes a public nuisance.

58 Pa.C.S. § 3252. Similar language is contained in a bevy of environmental statutes in Pennsylvania. Since this is our understanding of Brockway Authority's legal issue, we do not feel the need to strike the paragraph from its prehearing memorandum. The motion to strike paragraph 7 is denied.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BROCKWAY BOROUGH MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2013-080-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLATIRONS DEVELOPMENT, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of May, 2014, it is hereby ordered that Flatirons Development and the Department's joint motion to strike is **granted in part and denied in part**. Paragraphs 1 and 6 of Brockway Borough Municipal Authority's statement of legal issues in its prehearing memorandum are **stricken**. The motion is otherwise denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 15, 2014

c: **DEP, General Law Division**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK M. STEPHENSON	:	
	:	
v.	:	**EHB Docket No. 2013-211-R**
	:	**(Consolidated with 2010-034-R**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: May 16, 2014**
PROTECTION and MARY COLLIER and	:	
RONALD COLLIER, Husband and Wife,	:	
Intervenors	:	

OPINION AND ORDER ON
INTERVENORS' MOTION TO OVERRULE AND/OR STRIKE
APPELLANT'S OBJECTIONS AND/OR ANSWERS TO INTERVENORS'
SECOND SET OF INTERROGATORIES AND DOCUMENT REQUESTS
SERVED ON APPELLANT MARK M. STEPHENSON

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where Counsel has conducted extensive discovery over a period of years in multiple cases, all related, the Pennsylvania Environmental Hearing Board denies a Discovery Motion. The information requested has already been addressed by the Appellant in earlier discovery including depositions, answers to interrogatories, and in the production of documents.

Factual and Procedural Background

Presently before the Pennsylvania Environmental Hearing Board is the Intervenors' Motion to Overrule and/or Strike Appellant's Objections and/or Answers to Interrogatories and Document Requests (Intervenors' Discovery Motion). Appellant opposes Intervenors' Discovery Motion. This litigation, encompassing several appeals since 2008, has been protracted and hard fought. Mark Stephenson, the Appellant in the latest Appeal, drilled a gas well in Westmoreland County approximately 292 feet from Mr. and Mrs. Collier's (the

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Intervenors) water supply. The Colliers claimed Appellant's drilling adversely impacted their water supply and on August 17, 2006, requested the Pennsylvania Department of Environmental Protection (Department) to investigate.

On August 12, 2008, the Department ordered Stephenson to provide the Department with a written plan and schedule to restore and replace the Collier Water Supply. Stephenson filed an Appeal with the Pennsylvania Environmental Hearing Board which was docketed at No. 2008-083-R. The Colliers intervened in that case. The Colliers also filed a lawsuit in the Court of Common Pleas of Indiana County in 2008 at Docket No. 11480 against Mr. Stephenson.

Extensive discovery was taken by the parties and on February 26, 2010, the Department and Stephenson entered into a Consent Order and Agreement. The Consent Order and Agreement was appealed by the Colliers before the Pennsylvania Environmental Hearing Board at Docket No. 2010-034-R. According to the Colliers, after some discovery and after the Board ruled on several Motions for Partial Summary Judgment, the Department retested the Colliers' Water Supply. On October 25, 2013, the Department entered an Order stating that the earlier treatment system proposed by Stephenson was no longer favored and directed Stephenson to submit a new plan to restore or replace the Collier Water Supply. Stephenson filed a timely Notice of Appeal to that Order and it was docketed at No. 2013-211-R. The Board granted the Colliers' Petition to Intervene and consolidated the latest Appeal with the Appeal docketed at 2010-034-R.

According to Stephenson, the parties have taken the depositions of eight Department employees, three employees from a laboratory that performed the pre-drilling sample, and the depositions of the Intervenor, her ex-husband, and the Appellant and his two sons. These deposition transcripts have been attached as exhibits to Appellant's Brief in Opposition to the

Intervenors' Discovery Motion. Moreover, extensive written discovery has been conducted.

Discussion

The Pennsylvania Environmental Hearing Board was established to hear appeals from final actions of the Pennsylvania Department of Environmental Protection. 35 P.S. §§ 7511-7516. The Board's Rules of Practice and Procedure govern discovery and specifically adopt the broad discovery provisions afforded by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102. *See also Cecil Twp. Mun. Auth. V. DEP*, 2010 EHB 551, 552. It is the duty and responsibility of the Board to oversee discovery and pretrial proceedings. *Id.* at 552-53; *Capelli v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

We commend counsel for the diligent and detailed effort they have shown in providing the Board with the parameters of this discovery dispute. In the course of our deliberations, we have reviewed hundreds of pages of deposition transcripts in addition to all of the disputed discovery answers, objections, and responses.

We first address and decide the Intervenors' request for oral argument. We have found oral argument helpful in ensuring that we are cognizant of all the nuances of the parties' positions. Many times Counsel's answers to our questions are valuable in leading us to the correct decision. However, in this case, we believe Counsel have adequately set forth their respective positions and oral argument is not necessary for us to decide this discovery dispute and rule on the pending Motion.

We have carefully reviewed the Intervenors' Discovery Motion together with the Appellant's Response and the supporting briefs. Although the Intervenors' Discovery Motion involves multiple discovery requests, they are all similar. In response to a specific Interrogatory or Request for Production of Documents, Appellant's Answers or Responses are similar to the

one set forth in his Answer to Interrogatory No. 1. Interrogatory No. 1 asked Appellant to describe in detail what investigation, if any, he conducted "at the time the McCormick #7 gas well was drilled in July 2006 that showed there was no evidence that the drilling of the Gas Well caused any pollution as stated in Paragraph 9 of Stephenson's Appeal." Appellant's Answer is as follows:

> Mr. Stephenson incorporates by reference his General Objections above. Mr. Stephenson objects to Interrogatory No. 1 on the grounds that it is a duplication of previous discovery conducted by the Intervenors, including the depositions of Mr. Stephenson and Department personnel. Mr. Stephenson has already provided the Intervenors with the requested information, therefor, this Interrogatory is burdensome and onerous.

Discovery, like all human endeavors, is not a perfect process. One of its primary purposes is to allow the parties to adequately prepare for hearing by fully exploring their opponents' positions. Counsel have done so in this case. In fact, it is rare in most cases, in any forum, to conduct such extensive discovery as has taken place in this dispute over several years in multiple appeals before this Board and in litigation before the Court of Common Pleas of Indiana County. And although all cases before the Board are important, especially to the parties in the case, we also need to balance the issues in the case and their complexity when deciding whether more discovery is needed or required.

Frankly, we do not see the issues in this case as either unique or unduly complicated. We believe that Counsel in this case have fully explored the factual bases of their respective positions. Appellant has been asked every question either in deposition or through written discovery and has provided answers or permissible responses. In some cases, we agree that he is being asked to prove a negative and he responded in a satisfactory manner.

This is true even though Appellant does not specifically set forth where the information is

provided in earlier Discovery. Our review of the voluminous discovery materials convinces us that the burdens in locating this information would be the same on the Intervenors as on the Appellant. Counsel for the Intervenors conducted very extensive and exhaustive depositions where these issues were explored in great detail. We assume Counsel is very familiar with his earlier examination and discovery. After our review, we believe Appellant has fully and adequately answered all of the questions raised by the Intervenors in the discovery conducted since 2008 in the various cases. No further answers or responses are thus required or necessary.

While we certainly understand Intervenors' Counsel's concern that he not be ambushed at trial, we do not believe any new information requested in Discovery will be raised at the hearing by Appellants. We are well aware of Appellant's Counsel's statement that "Appellant has previously produced every document in his possession related to this case." Appellant's Brief, Page 5, filed on April 24, 2014.

We ascertain no prejudice to the Intervenors. Therefore, we will issue an Order denying Intervenors' Discovery Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK M. STEPHENSON	:	
	:	
v.	:	**EHB Docket No. 2013-211-R**
	:	**(Consolidated with 2010-034-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARY COLLIER and RONALD COLLIER, Husband and Wife, Intervenors	:	

ORDER

AND NOW, this 16th day of May, 2014, following review of the Intervenors' Motion to Overrule and/or Strike Appellant's Objections and/or Answers to Interrogatories and Document Requests and the Response of the Appellant, together with the supporting Briefs, it is ordered as follows:

1) The Intervenors' request for oral argument on its Discovery Motion is **denied.**

2) The Intervenors' Discovery Motion is **denied**.

3) This case shall proceed to hearing according to the prehearing schedule as earlier set forth.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: May 16, 2014

c: **DEP, General Law Division**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2011-105-CP-C**
FRANCIS SCHULTZ, JR., AND DAVID FRIEND, d/b/a SHORTY AND DAVE'S USED TRUCK PARTS	:	**Issued: May 29, 2014**

OPINION AND ORDER ON
ORAL MOTION FOR SANCTIONS

By: Michelle A. Coleman, Judge

Synopsis

The Board denies the Department's oral motion for sanctions for the defendants' failure to sign or verify answers to the Department's request for admissions. The motion is denied because the Department never filed a motion to compel discovery.

O P I N I O N

On July 21, 2011, the Department of Environmental Protection (the "Department") filed a complaint for assessment of civil penalty issued to Francis Schultz, Jr. and David Friend, d/b/a Shorty and Dave's Used Truck Parts. The facts stated herein are germane to the oral motion for sanctions. Additional facts are stated in previously issued Opinions and Orders. *See DEP v. Shultz*, 2012 EHB 381; *DEP v. Shultz*, 2012 EHB 436.

Prehearing Order No. 2-CP was issued on August 19, 2011 and called for the completion of discovery by February 16, 2012 and the filing of dispositive motions by March 19, 2012. The Department filed three unopposed requests for extensions of the deadlines to complete discovery

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and file dispositive motions. The first request was filed on January 25, 2012, the second request on March 15, 2012, and the third on May 3, 2012. In each request the Department stated that "the parties have reached an agreement in principle" and settlement documents were being prepared. On January 27, 2012, March 15, 2012, and May 8, 2012, the Board granted the requests for extensions, effectively extending the deadlines to May 30, 2012 for discovery and June 29, 2012 for filing dispositive motions.

On June 29, 2012, the Department filed a Motion for Summary Judgment claiming that the defendants had failed to serve a timely answer to the Department's Request for Admissions and failed to verify answers and/or sign objections. Therefore, according to the Department, pursuant to Pennsylvania Rules of Civil Procedure 4006(a)(1) and 4014(b), all such matters are deemed admitted. (DEP Mot. for Summ. J. at 1-2.) In their response, the defendants stated that they had been served the Request for Admissions on April 13, 2012. The parties at that time were negotiating a settlement. Nevertheless, depositions of both defendants took place on May 29, 2012. At the close of depositions, counsel for the Department informed counsel for the defendants that the answers to admissions were late. The defendants' counsel hand delivered the answers on or before May 31, 2012. (Defs.' Answer to Mot. for Summ. J. at 4; *see also* Exhibit F attached to Answer.)

The Board denied the Motion for Summary Judgment in an Order issued August 7, 2012, stating that a misunderstanding between the parties does not warrant the sanctions requested. We then issued Prehearing Order No. 3-CP scheduling a hearing in this matter for October 15, 2012.

The Department filed its Prehearing Memorandum on September 17, 2012. It then filed a Motion in Limine on September 28, 2012, stating,

> The Department requests that the Environmental Hearing Board ("Board") issue an Order stating that each of the facts to which an admission is requested in the written Request for Admissions served by the Department on Defendants in April 2012 are admitted. The Department further requests that the Board's Order preclude the introduction and admission by Defendants of evidence related to the matters established as a result of those admissions, as the introduction and admittance of such evidence would result in the needless presentation of cumulative evidence, would be a waste of time, and would result in undue delay.

The defendants' Answer to the Motion in Limine cites the Board's Order of August 7, 2012 and the defendants' belief that the matter of admissions had previously been decided.

The Board issued an Opinion and Order on October 22, 2012, stating that no motion to compel had been filed and there was no request for the Board to determine the sufficiency of the answers or to determine that the answers did not comply with the requirement of Pa.R.C.P. No. 4014(c). *DEP v. Shultz*, 2012 EHB 381, 384. We denied the Motion in Limine.

After numerous postponements, the matter was set for a hearing on the merits on February 4, 2014. In his opening statement, counsel for the Department reiterated that the admissions were late and unverified. (Notes of Transcript page ("T.") 4-5.) He then requested sanctions. (T. 8.) Counsel for the defendants again responded that no motion to compel was filed (T. 18), however all other discovery was conducted. (T. 9-10.) Although we believe we have already fully addressed this issue, we do so again for the sake of abundant clarity.

Discussion

In its Memorandum of Law in Support of Motion for Summary Judgment, the Department cites *Heasley v. DER*, 1991 EHB 473 and *Kerry Coal Company v. DER*, 1991 EHB 73, among other cases. These specific cases state that the answers to requests for admissions must be provided as required pursuant to Pa.R.C.P. No. 4014. However, neither *Heasley* nor *Kerry Coal* are based on facts similar to the instant case. In *Heasley*, the Department's request

for admissions was served four days prior to the end of the discovery period and the appellants believed that they did not have to comply with late discovery. 1991 EHB at 475. The appellants filed no answers at that time and did not request an extension of time to file an answer. *Id.* Similarly in *Kerry Coal*, the appellants believed that when fewer than 30 days remained in the discovery period, no answers needed to be filed, so no answer was filed and no request for extension was filed. 1991 EHB at 75. In the matter currently before the Board, three requests for extensions were filed by the Department stating that there was an agreement in principle and possibility of settlement. Nevertheless, both sides continued to move forward on the case. On May 30, 2012, during depositions of the defendants, the Department informed the defendants that their answers to admissions were late. Counsel for the defendants then hand delivered the requested answers on May 31, 2012. (Defs.' Answer to Mot. for Summ. J. at 3-4.)

The Board took notice that extended discovery closed on May 30, 2012, that the defendants reported for depositions prior to the close of discovery and when reminded of the outstanding answers to the request for admissions the defendants produced these answers within 24 hours of the verbal request, and we denied the motion for summary judgment. The defendants' actions here are the opposite of those in *Kerry Coal*.

In *Kerry Coal*, Judge Ehmann writes:

> Kerry's only defense to its failure to file a timely Answer or to seek clarification on this point is its alleged absolute trust in the idea that if less than thirty days of the discovery period remained after DER served its Request for Admissions, Kerry could ignore the DER's Request entirely. Kerry offers us no cases in support of this contention or rational argument as to how it acquired a right to treat the Request as if it had never been made. We have had this issue come before us, however, in *Academy of Model Aeronautics v. DER*, EHB Docket No. 89-365-MR (Opinion issued January 12, 1990). There, Board member Robert D. Myers found discovery commenced within the discovery period was timely and had to be answered even if the thirty day period for filing answers ran

> beyond the end of the discovery period because "the answering party typically requests and is granted an extension of time." *Aeronautics*, *supra*, at page 3. We do not wish our adoption of that rationale in this case to be read as an endorsement of the concept that parties should routinely wait to file discovery until the end of the period of time we authorized for discovery when we issued Pre-Hearing Order No. 1. The reverse is true. Discovery should be commenced as close to the beginning of the discovery period as possible. However, where the thirty-day period for filing Answers to Requests For Admissions (as prescribed in the Rules of Civil Procedures) ends at a date beyond the end of the authorized discovery time period, we wish it to be clear that, that event's occurrence does not relieve the answering party of any obligation to file its sworn Answer or authorize such a party to sit on its Answers for nearly two months before making any attempt to provide them.

1991 EHB at 78-79.

In the matter currently before the Board, we do not find *Kerry Coal* compelling in that neither the facts of the case nor the actions of the defendants are similar. In this case, the defendants made efforts to comply with the Department's request even though they reasonably believed they had a settlement of the matter. The defendants' actions are also dissimilar to those in *Heasley* where Judge Mack cites both *Kerry Coal* and *Academy of Model Aeronautics* on the subject of failure to respond to a Department request and reaches a similar decision to that of Judge Ehmann. *Heasley*, 1991 EHB at 475.

In the instant case, on September 28, 2012, the Department filed a Motion in Limine citing the same facts that it cited in its motion for summary judgment and requesting that

> this Honorable Board grant this Motion and issue an Order stating that, as a result of their failure to serve responses to the Request for Admissions that comply with Pa. R.C.P. 4014, each of the matters of which admissions are requested in the Department's Request for Admissions, including, but not limited to, those matters set forth in Paragraph E of the Department's Motion, are hereby deemed admitted by Defendants…The Department further requests that the Board's Order preclude the introduction and admission by Defendants at Hearing of evidence related to the matters set forth

in Paragraph E of the Department's Motion.

(DEP Mot. in Limine at 5.)

In its Memorandum of Law in support of its Motion in Limine, the Department explains the legal standard required in a motion in limine and states that the defendants have admitted the information in the requested admissions. To support this statement the Department relies on *M & M Stone Company v. DEP*, 2009 EHB 213, and argues that

> Motions in *limine*, as authorized under the Board's Rules, allow a party to "obtain a ruling on evidentiary issues" in advance of a hearing. 25 Pa. Code § 1021.121. The Board has recognized that such a motion "is a proper and even encouraged vehicle for addressing evidentiary matters in advance of a hearing." *M&M Stone Co. v. DEP*, 2009 EHB 213, 220; citing *Angela Cres Trust v. DEP*, 2007 EHB 595, 596 and *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237.
>
> Pursuant to 25 Pa. Code § 1021.121 and Pa. R. Ev. 403, in response to a Motion in *Limine*, the Board may exclude the needless presentation of cumulative evidence that would result in undue delay and is, therefore, a waste of time. *M&M Stone Co. v. DEP*, 2009 EHB 213, 219. Defendants have admitted all of those matters of which admissions are requested in the Request for Admissions, including those specifically set forth in the Motion. Additional evidence at Hearing related to the facts thus admitted would be cumulative, would result in undue delay, and would be a waste of time. Therefore, such evidence is a proper subject for a Motion in *Limine*.

(DEP Mem. of Law at 4.)

The section of the *M & M Stone* Opinion from which these quotes were extracted concerns M & M Stone's attempt to relitigate already decided issues. Relitigation of issues is not the defendants' problem in the instant case. To the contrary, the issues under review in this Motion in Limine were the subject of a Department motion for summary judgment, which was denied. What counsel is requesting in the Motion in Limine is that the decision rendered previously be rescinded. This is not proper use of a motion in limine. Here is the entire sentence

from which the "waste of time" quote was taken:

> Going back over evidence regarding rehabilitation is not only beside the point of this appeal, which relates only to the discharge that would have resulted from a defunct rehabilitation project, it would confuse the issues, cause undue delay, waste time and expense, and needlessly present cumulative evidence, exactly the sort of evidence that we can and hereby do exclude under 25 Pa. Code § 1021.123 and Pa.R.Ev. 403.

M & M Stone, 2009 EHB at 219.

Moreover, on the next page Judge Labuskes continues to describe the proper use of a motion in limine in this full quote of what the Department cited above:

> Although a motion in limine should not be used as a motion for summary judgment in disguise, it is a proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *Dauphin Meadows v. DEP*, 2002 EHB 235.

Id. at 220. The facts and holdings of *M & M Stone* simply do not support the Department in the instant case. In fact, they are exactly the opposite.

The Department cites Pa.R.C.P. No. 4014 to support its belief that the admissions in the defendants' answer are admitted. Pa.R.C.P. No. 4014(b) concerns timeliness of service of the answer as the Department states in its motion. However, that Rule also contains the qualifications for determining the sufficiency of the admissions. In Subsection (c), the proper procedure for determining whether the admissions are sufficient is stated: "The party who has requested the admission may move to determine the sufficiency of the answer or objection." Pa.R.C.P. No. 4014(c). The Department has not requested that this Board determine the sufficiency of the specific answers as required by Pa.R.C.P. No. 4014.

This Board has been loath to impose harsh sanctions without such justifications as failure to follow Board Orders or failure to prosecute or defend a matter before this Board. *See Bucks*

Cnty. Water and Sewer Auth. v. DEP, EHB Docket No. 2011-158-C, slip op. at 7 (Opinion and Order issued Mar. 14, 2014) (citing *Twp. of Paradise and Lake Swiftwater, Inc. v. DEP*, 2001 EHB 1005, 1007; *DEP v. Land Tech Eng'g, Inc.*, 2000 EHB 1133, 1140). What the Department is asking the Board to do is to force the defendants to concede the primary issue in the case without benefit of a hearing. This is a harsh sanction for what was originally described as a "misunderstanding between parties." (*See* Order Den. Mot. for Summ. J., Aug. 7, 2012.) The Department has sworn deposition testimony from the defendants and has not argued that the defendants' answers are insufficient in any way other than that the answers were not signed or verified. (*See* Defs.' Resp. to Mot. for Summ. J.)

This case arrived on the Board's docket in July 2011. It has had countless extensions and postponements since that date. Counsel now has indicated to the Board that they are prepared to proceed to hearing on this matter. Consequently, a date will be set for witness testimony only, and we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2011-105-CP-C**
FRANCIS SCHULTZ, JR., AND DAVID FRIEND, d/b/a SHORTY AND DAVE'S USED TRUCK PARTS	:	

ORDER

AND NOW, this 29th day of May, 2014, it is hereby ordered that the Department's Oral Motion for Sanctions is **denied**. A hearing is scheduled for **10:00 a.m.** on **Tuesday, July 15, 2014** at the Norristown offices of the Environmental Hearing Board, Fourth Floor, 2 East Main Street, Norristown, Pennsylvania.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 29, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al., Appellants and SPRINGTON POINTE ESTATES HOMEOWNERS ASSOCIATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-192-M (Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	**Issued: June 6, 2014**

OPINION AND ORDER ON MOTION TO COMPEL

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants an unopposed motion to compel answers to a permittee's discovery requests where the appellants have failed to respond to those discovery requests within thirty days as required by the Pennsylvania Rules of Civil Procedure.

O P I N I O N

Before the Board is a Motion to Compel Appellants' Response to Discovery Requests ("Motion to Compel") filed by Newtown Township (the "Permittee"). The Motion to Compel is directed at only some of the Appellants, namely, Marc DeRita, Therese DeRita, Joseph Graham, Victoria Graham, Craig Toerien, and Lara Toerien (collectively, the "DeRita Appellants"). The DeRita Appellants have appealed a decision by the Department of Environmental Protection (the "Department") to approve an Act 537 Official Plan Update (the "Plan") submitted by Newtown Township, dated October 2012, and revised November 2013. Their appeal, which was originally docketed at 2013-200-M, has been consolidated at 2013-192-M.

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Newtown Township filed its Motion to Compel on April 15, 2014. The DeRita Appellants did not response to the Motion by the April 30, 2014 deadline. On May 7, 2014, the Board held a conference call with the parties to discuss the status of the discovery dispute. During that call, the parties jointly requested that the Board hold the Motion in abeyance while the parties engaged in settlement discussions.

On May 22, 2014, Newtown Township notified the Board by letter that after discussing the possibility of settlement with the DeRita Appellants, settlement was not imminent, and as a result, Newtown Township requested that the Board now consider the Motion to Compel. On May 22, 2014, in response to Newtown Township's request, the Board ordered the DeRita Appellants to respond to Newtown Township's Motion to Compel by no later than June 5, 2014. The DeRita Appellants did not respond to the Motion to Compel by that deadline. As a result, the Board deems the DeRita Appellants' failure to respond to the Motion to be an admission of all properly-pleaded facts contained in the Motion. 25 Pa. Code § 1021.91(f); *Barton v. DEP*, 2012 EHB 441, 442.

The Motion to Compel states that on January 24, 2014 Newtown Township served on the DeRita Appellants a first set of interrogatories and first request for production of documents. In proceedings before the Board, answers to interrogatories and requests for production of documents must be served within thirty days after service. Pa.R.C.P. Nos. 4006(a)(2) and 4009.12(a).[1] Thus, the DeRita Appellants' answers were due February 24, 2014. Newtown Township did not receive the DeRita Appellants' responses by that deadline. Newtown Township, by letter dated March 26, 2014, requested that the DeRita Appellants respond to the discovery requests within ten days, ending April 7, 2014, but the DeRita Appellants again did not

[1] Under the Board's Rules, discovery proceedings must conform to the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a).

respond. Newtown Township still has not received responses to its discovery requests from the DeRita Appellants. Newtown Township subsequently filed its Motion to Compel under 25 Pa. Code § 1021.93.

The Board has the authority to compel a party to respond to discovery requests. Pa. R.C.P. 4019(a)(1)(i), (vii), and (viii); 25 Pa. Code 1021.93(c); *Mann Realty, Inc. v. DEP*, 2013 EHB 730, 731; *DER v. U.S. Steel Co.*, 1977 EHB 323. In consideration of Newtown Township's Motion to Compel and in light of the DeRita Appellants' failure to respond to the Motion to Compel, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al., Appellants and SPRINGTON POINTE ESTATES HOMEOWNERS ASSOCIATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	**(Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 6th day of June, 2014, it is hereby ordered that Newtown Township's Motion to Compel Appellants' Response to Discovery Requests is **granted**, and the Appellants Marc DeRita, Therese DeRita, Joseph Graham, Victoria Graham, Craig Toerien, and Lara Toerien shall answer Newtown Township's first set of interrogatories and first request for production of documents by **June 16, 2014**.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: June 6, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: June 10, 2014**

OPINION AND ORDER ON
MOTION FOR CONTEMPT AND FOR SANCTIONS
IN THE FORM OF AN ADVERSE INFERENCE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where the criteria for an adverse inference have not been met, the Board denies the Appellant's request to preclude the Department and Permittee from arguing that the Permittee's drilling operation did not result in contamination to the Appellant's water supply. However, because the Permittee is the party in the best position to produce information regarding the chemical make-up of products used at its site and, further, because the Permittee is in noncompliance with a Board Order to produce this information, the Appellant is granted a rebuttable presumption that contaminants found in his water supply may have been used at the Permittee's site and/or in the Permittee's operation.

OPINION

Before the Pennsylvania Environmental Hearing Board (Board) is a Motion for Contempt and for Sanctions in the Form of an Adverse Inference and Supplemental Brief, filed by the appellant in this matter, Loren Kiskadden. Mr. Kiskadden served discovery on the permittee in

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this matter, Range Resources – Appalachia, LLC (Range), for the purpose of obtaining information regarding the chemical composition of products used by Range in its gas well operations at the Yeager site in Washington County, Pennsylvania. It is Mr. Kiskadden's contention that Range's activities have resulted in pollution to his water supply. The Pennsylvania Department of Environmental Protection (Department) conducted an investigation into the matter and issued a letter to Mr. Kiskadden stating that the Department "could not make the determination. . .that the problems in [the Appellant's] water well are caused by gas well related activities, particularly those at the Yeager well site operated by [Range]." (Notice of Appeal) This appeal ensued.

Procedural Background

The relevant procedural history of this matter is as follows: On August 24, 2012, Appellant served Range with a Request for Production of Documents, which included a request for a listing of all chemicals used by Range at the Yeager Site. Range responded to the request by producing, among other information, Material Safety Data Sheets for products used at the Yeager site. On December 3, 2012, Appellant filed a Motion to Compel, contending that Range's response had failed to include proprietary information. For example, the Material Safety Data Sheet for certain products listed some ingredients but failed to disclose others on the grounds that the information was "proprietary."

The Board held oral argument on the Appellant's Motion to Compel on December 20, 2012, at which time counsel for Range indicated that Range was attempting to obtain the requested information from its suppliers. As a result, the Board postponed ruling on the Appellant's Motion. On March 25, 2013, Range provided the Appellant with a list of the manufacturers they had contacted and from whom they were still unable to obtain proprietary

information regarding the make-up of their products. Therefore, on March 28, 2013, the Appellant renewed his earlier Motion to Compel, seeking the Board to order Range to produce the requested information. The Appellant filed an additional Motion to Compel Discovery against Range on April 9, 2013, again seeking, among other things, information regarding the proprietary chemicals used at the Yeager site.

On July 19, 2013, the Board entered the following order (the July 19, 2013 Order):

> On or before **August 20, 2013,** Permittee [Range] shall provide Appellant with a list identifying any and all proprietary chemicals comprising each and every product identified by Permittee as used at the Yeager Site. In addition, Permittee will provide Appellant with a list of all chemicals for each Material Safety Data Sheet of the products Permittee earlier identified as used at the Yeager Site that lacked full information regarding all of the chemicals and components of those particular products.

Kiskadden v. DEP and Range Resources – Appalachia, LLC, EHB Docket No. 2011-149-R (Order issued July 19, 2013), para. 9.

On September 17, 2013, the Appellant filed a Motion for Contempt and for Sanctions in the Form of an Adverse Inference, alleging that Range had failed to comply with the Board's July 19, 2013 Order. The Appellant requested that the Board impose a sanction on Range in the form of an adverse inference which would preclude both Range and the Department "from arguing that the chemicals and components of the products that [Range] used at the Yeager site did not contaminate Appellant's water" and declare that the Department's "determination that the products and chemicals used by Range at the Yeager Site did not impact Appellant's water is null and void." (Appellant's Motion for Contempt and for Sanctions, Proposed Order) Range responded on October 2, 2013, stating that it had used its best efforts to secure the product information from the manufacturers but a number of manufacturers continued to refuse to provide the information on the grounds it was proprietary. Therefore, Range offered another

method for obtaining the information, which involved "reverse engineering" the products that had been used at the Yeager site in an effort to determine their chemical make-up.

Range's response stated as follows:

> Range has retained the services of the R.J. Lee Group ("R.J. Lee"), an internationally recognized forensic chemistry laboratory. The Occupational Safety and Health Act requires suppliers of products to prepare a Material Safety Data Sheet ("MSDS") that lists each carcinogenic substance in the product above 0.1% concentration and each toxic substance above 1.0% concentration. Suppliers are permitted under the law to not identify proprietary additives. For those products purchased by Range that were used in the natural gas wells for drilling or completions, Range will identify through MSDS analysis or through forensic chemistry each carcinogenic substance in the product above 0.1% concentration and each toxic substance above 1.0% concentration.

(Range's Response, p. 3)

The results of the R.J. Lee testing were provided to the Appellant on April 30, 2014. On May 7, 2014, the Board held an in-person status conference with counsel, at which time the Board offered the Appellant an opportunity to supplement his September 17, 2013 Motion for Contempt and for Sanctions in the Form of an Adverse Inference and Range and the Department an opportunity to file supplemental responses.

In his supplemental brief, filed on May 28, 2014, the Appellant renews his request for an adverse inference on the grounds that the R.J. Lee report fails to provide the information ordered by the Board's July 19, 2013 Order. The Appellant argues that the failure to comply is twofold: First, the Appellant argues that the R.J. Lee report fails to produce all of the information requested by the Appellant and, second, that the instructions given to R.J. Lee by Range were not in compliance with the Board's Order. Range and the Department filed supplemental responses on June 4, 2014 addressing the Appellant's arguments.

Discussion

Upon reviewing the R.J. Lee report, we agree with the Appellant that the report appears to cover a more limited scope than what was set forth in the Board's July 19, 2013 Order. Our order directed Range to provide the Appellant with a list identifying "*any and all* proprietary chemicals comprising each and every product identified by [Range] at the Yeager site." (emphasis added) In contrast, R.J. Lee "*developed specific criteria* to select products for laboratory analysis." (Range's Reply to Appellant's Supplemental Brief, page 6; emphasis added). Specifically, the R.J. Lee report states that its summary and scope, in relevant part, was to identify:

> a. any hazardous or toxic constituents (under OSHA regulations) that exceed 1.0% by weight, and
>
> b. any carcinogenic constituents (under OSHA regulations) that exceed 0.1% by weight
>
> in products where 1) constituent identification is listed as proprietary, trade secret or confidential and 2) the constituent is identified as hazardous or no hazard rating is listed and it is not specifically listed as nonhazardous.

(R.J. Lee Group Report, page 3 – Exhibit 2 to Appellant's Supplemental Brief)

The Board's order did not limit disclosure of chemicals to those above a 0.1% concentration for carcinogenic substances or above a 1.0% concentration for toxic substances. Nor has Range provided an explanation for doing so. Thus, it appears, on this basis alone, the R.J. Lee report is not responsive to the Board's July 19, 2013 Order.

Based on the limited criteria set forth above, R.J. Lee selected seven products to be analyzed for chemical composition. According to Range, of the more than 100 products that were identified as being potentially used at the Yeager site, only these seven products "potentially contained a hazardous constituent that was also identified as proprietary by the

manufacturer." (Range's Reply to Appellant's Supplemental Brief, page 7; emphasis in original). According to Range's Reply, three of the products were potentially used for metal working or gear lubrication; three were potentially used during drilling of the natural gas well; and one was potentially used as a corrosion inhibitor, but, according to Range, none of the seven products were used as hydraulic fracturing additives.[1]

Ultimately, however, R.J. Lee was able to analyze only one of the seven products it identified as being potentially hazardous. The other six products are either no longer manufactured or have been relabeled. For two of the products that are no longer available, R.J. Lee analyzed what it deemed to be a "comparable product" but not the original.

The Appellant argues that Range should have preserved the evidence when it was under Range's control. In other words, the Appellant contends that Range should have retained a portion of all products used at the site and that it should have obtained information about their chemical make-up when the products were in its possession. It is the Appellant's contention that Range had a duty at the time it was using the products to be aware of the chemical composition of each product, and Range's failure to preserve the products amounts to spoliation of evidence. While we disagree that spoliation has occurred, since Range has not engaged in the destruction or withholding of evidence, we do agree that it, as the party that used the products in question, bears some responsibility for producing information regarding the chemical composition of the products. We have determined after extensive argument and briefing that the Appellant has a right to such information through discovery, and the party in the best position to obtain this information is Range, the purchaser and user of the products.

[1] This statement is made on page 7 of Range's Reply to Appellant's Supplemental Brief, but does not cite to an affidavit or any exhibit in support of the statement.

Range argues that the product information is equally accessible to the Appellant and that the Appellant should be seeking this information directly from the manufacturers. We think it disingenuous of Range to suggest that the Appellant has just as much access to this information as does Range. As the purchaser of the products, Range is certainly in a much better position to obtain this information from the manufacturers or suppliers, particularly if it continues to be a customer. Range exercises control over which manufacturers and suppliers it uses to purchase the chemicals and products used at its operation and has much better access to information about the products than does the Appellant.

Because Range has failed to produce the information directed by the Board's July 19, 2013 Order, the Appellant asks the Board for an adverse inference that would prevent Range and the Department from arguing that the Yeager site was not the source of any chemicals found in the Kiskadden water supply. In effect, the Appellant seeks an adverse inference that Range's operation at the Yeager site is the source of any contamination found in the Appellant's water supply. We are not willing to go that far. The decision as to whether to grant an adverse inference is within the sound discretion of the trial court. *Magette v. Goodman*, 771 A.2d 775, 779 (Pa. Super. 2001), *citing Clark v. Philadelphia College of Osteopathic Medicine*, 693 A.2d 202, 204 (Pa. Super. 1997). The general rule is that where evidence that would properly be part of a case is within the control of the party in whose interest it would be to produce it, and without satisfactory explanation the party fails to produce it, an adverse inference may be drawn that the evidence would be unfavorable to him. *Id.*

Here, the evidence in question – the chemical make-up of the products used at the Yeager site – is not within Range's possession, and Range's explanation for not producing the information is that it has been unsuccessful in obtaining this information from the

manufacturers.[2] Although it is our belief that Range could have engaged in much more extensive negotiations with its suppliers and manufacturers of the products to obtain the product information, the criteria necessary for an adverse inference are not met here. This is particularly problematic where the inference requested by the Appellant essentially decides the case in the Appellant's favor.

However, we do find that a more limited sanction is appropriate for Range's non-compliance with the July 19, 2013 Order. Our order directed Range to provide the Appellant with a list of all proprietary chemicals comprising products used at the site, and it has not done so. We understand that Range's failure to comply is due to the fact that it has been unable to obtain this information from its suppliers and the manufacturers of the products. The question, then, is who must bear the burden for this lack of information. Range purchased the products, exercised control over their usage and was in the best position to provide information regarding their chemical make-up and, as such, it must bear responsibility for the lack of information about those products. We have already ruled that Range is responsible for providing this information. The only question that remains is how to address the failure to do so.[3]

---

[2] We believe that Range put forth a minimum of effort into this endeavor. A company with the status and size of Range could have exercised much more influence with its suppliers to obtain information about the chemical composition of products it uses at its operation.

[3] We find it particularly troubling that neither Range nor the Department of Environmental Protection is fully aware of the chemical composition of products being used during gas drilling and hydraulic fracturing operations. In an April 30, 2014 letter to attorneys for the Appellant, counsel for Range stated the following:

> [I]n July 2010, Range was one of the first companies to announce that it would voluntarily disclose Marcellus Shale hydraulic fracturing additives to provide regulators, landowners, and citizens of Pennsylvania an accounting of the constituents used at its natural gas well sites. As promised, one month later, Range posted for the public its first voluntary Marcellus Shale hydraulic fracturing disclosure forms.

For the reasons set forth in this Opinion, we grant the Appellant a rebuttable presumption that contaminants present in the Appellant's water supply may have been used by Range at the Yeager site and/or in Range's operations. This presumption may be rebutted by Range or the Department. The burden of proving causation, i.e., that any such contaminants traveled from Range's operation to the Appellant's water supply, still lies with the Appellant.

(Exhibit 2, Part 1 to Appellant's Supplemental Brief) Yet, based on Range's discovery responses in this matter, it clearly is not disclosing *all* constituents used at its natural gas well sites since, by its own admission, it does not have this information.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 10th day of June 2014, it is ordered that the Appellant's Motion for Contempt and for Sanctions is **denied in part and granted in part.** The Appellant is granted a rebuttable presumption that contaminants present in the Appellant's water supply may have been used at the Yeager site and/or in Range's operations. The Appellant still has the burden of proving a hydrogeologic connection.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: June 10, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	**Issued: June 11, 2014**

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses a third-party appeal of the Department's issuance of a noncoal surface mining permit where the third-party appellant has failed to prove that the permit's air pollution control plan, if implemented, will not adequately control dust migration, and where a wetland on the site is not an exceptional value wetland because it is not located in or along the floodplain of the reach of a wild trout stream or in or along the floodplain of a stream tributary to the reach of a wild trout stream.

FINDINGS OF FACT

Parties

1. The Appellee is the Department of Environmental Protection (the "Department"), which is the administrative agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §§ 3301-3326; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §§ 4001-4015; The Clean Streams Law, Act of June 22, 1937,

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P.L. 1987 as amended, 35 P.S. §§ 691.1-691.1001; 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 under those laws.

2. The Permittee is Bullskin Stone and Lime, LLC ("Bullskin"), a Pennsylvania limited liability company with a business address of 117 Marcia Street, Latrobe, PA 15650. (Department's Exhibit ("Ex.") 1.)

3. The Appellant is Rural Area Concerned Citizens ("RACC"), a citizens group formed in 1991 and composed of approximately 150 individual members who share an interest in the local environment around their community, including the desire for clean air and water. RACC holds monthly meetings but has no formal process for becoming a member and requires only that a prospective member express an interest in their community. The officers of RACC are Lee Welker, President; Brian Konieczny, Vice President; Betty Stoffer, Treasurer; and the Acting Secretary is Mr. Welker's wife, Sharon. (Notes of Transcript ("N.T.") 96-97, 99, 120.)

4. Carter Booher, Brian Konieczny, Betty Stoffer, Sharon Wilson and Frank Heron are members of RACC who live near the Bullskin Mine site at issue in this appeal. (N.T. 98-99.)

Bullskin Mine

5. On April 22, 2009, Bullskin submitted a permit application to the Department proposing to conduct noncoal surface mining and surface activity connected with underground noncoal mining of limestone located on property adjacent to SR 982 and along Chestnut Ridge in Bullskin Township, Fayette County, Pennsylvania ("Bullskin Permit Application"). (N.T. 144-146; Board Ex. 1, Module 1.)

6. Scott Bradley was the Department's licensed professional geologist initially assigned to review the Bullskin Permit Application. (N.T. 160-161.)

7. Michael Gardner, a licensed professional geologist for the Department, assumed responsibility for overseeing the Bullskin mining operation after Mr. Bradley retired in late 2012. Mr. Gardner became familiar with the Bullskin Permit Application by reviewing the application and related documents, discussing the conclusions with Mr. Bradley and visiting the Bullskin mining site several times. (N.T. 160-162.)

8. On March 9, 2012, the Department issued Noncoal Surface Mining Permit No. 26092001 (the "Permit") to Bullskin for the Bullskin 1 Mine ("Bullskin Mine"). (N.T. 145; Department Ex. 1.)

9. On March 9, 2012, to accompany the surface mining permit, the Department issued National Pollution Discharge Elimination System ("NPDES") Permit No. PA 0251658 to Bullskin for discharges from a mine drainage treatment facility (Outfall 002) and erosion and sedimentation control facilities (Outfall Nos. 001, 003, 004 and 005). (N.T. 167-168, 247; Department Ex. 2.)

10. The Permit authorizes a total permit area of 307.8 acres for an underground limestone mine adjacent to SR 982 and along Chestnut Ridge in Bullskin Township, Fayette County, Pennsylvania. Within the 307.8 acre permitted area, the Permit authorizes 57.1 acres of surface facilities, such as roads, a scale house, erosion and sedimentation controls, a treatment pond, and a stone processing area, as well as underground limestone reserves. Access to the limestone reserves will be accomplished through an open pit. The Permit authorizes Bullskin to mine the Loyalhanna Limestone formation using the room and pillar method of mining. (N.T. 162-165; Department Ex. 1; Board Ex. 1, Modules 9 and 10.)

11. Limestone removed from the underground reserves will be crushed using on-site equipment which will be located within the pit. Stone will then move by conveyor belt to the processing yard where it will be loaded into trucks. (N.T. 146-147.)

12. Bullskin anticipates that it will complete construction of the open pit by the end of 2013. (N.T. 148.)

Air Pollution Control Plan

13. Bernard Robb is a mining engineer employed by the Department and assigned to the Greensburg District Mining Office. (N.T. 237.)

14. Mr. Robb holds, and since 1992 has maintained, a professional engineer's license, and he holds that license in good standing. (N.T. 238-239.)

15. Mr. Robb is responsible for the review of permit applications for coal and noncoal surface mines, in particular the Operations Map (Module 9); Operational Information (Module 10); Erosion and Sedimentation Controls (Module 12); Impoundments/Treatment Facilities (Module 13); Streams and Wetlands (Module 14); Noncoal Underground Mines (Module 15); and the Air Pollution Control Plan (Module 17). Mr. Robb has reviewed several hundred permit applications for surface coal and noncoal mines. (N.T. 238, 241-242; Board Ex. 1.)

16. Mr. Robb was accepted by the Board as an expert in surface mine engineering. (N.T. 244.)

17. Mr. Robb visited the Bullskin Mine site approximately six times while the Bullskin Permit Application was under review and approximately six times since the Permit was issued. (N.T. 245.)

18. Module 17 of the Permit is an Air Pollution and Noise Control Plan which, in part, identifies dust control measures that Bullskin must employ at the Bullskin Mine. (N.T. 222, 248; Board Ex. 1, Module 17.2.)

19. Module 17.2 is an Air Pollution Control Plan. The portions of the Air Pollution Control Plan relevant to this appeal appear as follows:

a) Access roads, haul roads and adjoining portions of the public road

12/2009 [The haulroad will [sic] paved from SR-982 up to the processing yard.] The access roads and haulroads will be controlled by the periodic application of water and/or crushed non-toxic stone. Water, if utilized, will be applied by spraying or a similar technique.

b) Truck traffic (including fugitive particulate material from truck loads).

Commercial trucks will be covered by tarpaulins when hauling.

(N.T. 222, 250: Board Ex. 1, Module 17.2.)

20. Module 17 provides that air pollution control measures for processing facilities will be established in a separate Air Quality Permit issued by the Department's Air Quality Program. Processing facilities at the Bullskin Mine site will consist of facilities that crush and process the stone, such as crushers, screens, conveyor systems, and material and handling systems that convert raw product into a final product. As part of the Air Quality Permit for the processing facilities, Bullskin is expected to be required to propose a truck wheel wash at the processing area to remove mud and dirt from truck tires before they enter the paved section of the haul road and exit the site onto SR 982. Module 17 does not require the use of a truck wheel wash. At the time of the hearing, Bullskin had not yet installed a truck wheel wash on the site and did not anticipate installing one until construction of the scale house was completed. (N.T. 148, 249-250; Board Ex. 1, Module 17.2(g).)

21. In April 2012, Bullskin began construction of the haul road, which provides access to the Bullskin Mine site from SR 982. Bullskin initially constructed the road with excavated shale rock, i.e., gravel. (N.T. 147.)

22. Bullskin placed "millings" on top of the haul road in the spring of 2013. Millings are bits of crushed, recycled asphalt. At the time of the hearing, the haul road had not yet been completely paved, but it was expected to be paved sometime in the fall of 2013. (N.T. 147-148, 246.)

23. As of July 16, 2013, approximately 30 to 50 feet of the haul road had been paved, beginning from the entrance at SR 982. (N.T. 32-33, 246.)

24. The dust control measures outlined in Module 17 are the types of dust control measures typically used to effectively control dust at mine sites. (N.T. 250.)

25. The Department expected that watering the haul road would be Bullskin's primary dust control method. (N.T. 250.)

26. Watering the haul road, when implemented, effectively controlled dust at the Bullskin Mine site. (N.T. 37, 63.)

27. Bullskin's water truck requires one hour to fill. (N.T. 233; Department's Ex. 7.)

28. The Department expected that paving the haul road would be an effective dust control measure. (N.T. 250.)

29. Module 17 does not indicate the number of trucks permitted to travel on the Bullskin Mine site, nor does it provide any details about when or how often the identified air pollution control methods are to be implemented. (Board Ex. 1, Module 17.2.)

Dust Migration

30. Carter Booher lives at 1042 Pleasant Valley Road, which borders the Bullskin Mine site. Mr. Booher has lived at that address since 2000. (N.T. 11-12.)

31. Mr. Booher's home is located more than 100 feet away from the Bullskin property line. (N.T. 23; Board Ex. 1, Module 9, Operations Map.)

32. Mr. Booher is aware of the location of the boundary between his residence and the Bullskin Mine site. (N.T. 16.)

33. Mr. Booher's residence has a 1000-foot dirt driveway which is located off of a 1000-foot dirt road that is connected to SR 982. Mr. Booher does not apply water to his driveway or to the dirt road leading to the driveway. Mr. Booher testified that he has never experienced dust created from his driveway. (N.T. 18, 19, 52-53.)

34. Between Mr. Booher's residence and the Bullskin Mine site lie approximately thirty feet of trees that completely obstruct the view from Mr. Booher's home to Bullskin's haul road. (N.T. 48-49.)

35. Bullskin's haul road steadily inclines towards the processing plant and reaches an elevation of approximately 50 feet above Mr. Booher's residence. (N.T. 19.)

36. Mr. Booher produced three photographs that he took which each depict dust trailing from a truck driving on the haul road. (N.T. 15-21; Appellant's Exs. 3-5.)

37. Mr. Booher testified that he has seen dust originate from trucks on the haul road on the Bullskin Mine site, enter the air, and cross the boundary onto his property. (N.T. 12, 15-16, 37-38, 48.)

38. Mr. Booher testified that he has seen some dust produced by Bullskin's haul road enter his property since the haul road was partially covered with millings and paved. (N.T. 31-32, 42.)

39. Mr. Booher produced a photograph that he took during the summer of 2012 which depicts dust and dirt at the bottom of his swimming pool. (N.T. 21-22; Appellant's Ex. 11.)

40. Mr. Booher testified that prior to the Department's issuance of the permit, he had not experienced dust in his swimming pool. (N.T. 22.)

41. Mr. Booher is in the business of selling used cars and maintains a number of vehicles on his property. (N.T. 25.)

42. Mr. Booher produced photographs that he took during the spring or summer of 2012 which depict dust on vehicles located on his property. (N.T. 23-31; Appellant's Exs. 12-14.)

43. Mr. Booher testified that he has witnessed trucks leaving the Bullskin Mine site and dragging dust onto SR 982. (N.T. 33.)

44. RACC's President, Leroy Welker testified that on one occasion shortly after the Department issued the Permit to Bullskin he observed trucks on a section of the haul road producing dust which crossed the property line. (N.T. 103-105, 112, 117.)

45. RACC's Vice President, Brian Konieczny, operates a farm located northwest of the Bullskin Mine. (N.T. 122-123; Board Ex. 1, Module 9, Operations Map, Property No. 3.)

46. Mr. Konieczny testified that in June of 2012, while positioned from roughly 800 to 1000 yards away, he observed dust at the upper portion of the Bullskin Mine site cross the permit boundary and travel towards Green Lick Hollow, which is located north of the Permit boundary. (N.T. 122-125, 136, 143; Board Ex. 1, Module 9, Operations Map.)

47. Mr. Konieczny testified that on a dry and dusty day in 2012, while he was driving on SR 982 past the Bullskin Mine site, he observed dust produced from the Bullskin Mine site cross the Permit boundary. (N.T. 126, 143.)

Dust Complaints

48. Glenn Krallman is a surface mine conservation inspector in the Greensburg District Mining Office and has held that position for nine years. He is assigned to the Bullskin Mine site. (N.T. 182-184.)

49. Mr. Krallman conducted a site inspection as part of a field review for the Bullskin Mine after Bullskin initially submitted its application. The purpose of the field review was to verify that the maps and other information contained in the permit application were accurate. (N.T. 184, 202, 203.)

50. Since the Permit was issued, Mr. Krallman has been at the site at least a dozen times for either mandatory six-month inspections, random inspections or in response to complaints. Mr. Krallman does not notify Bullskin in advance of inspections. (N.T. 185.)

51. Carter Booher contacted Mr. Krallman by telephone in May of 2012 to complain about dust on his property. Mr. Krallman met with Mr. Booher at his home in response to his phone call. Mr. Booher showed Mr. Krallman what Mr. Booher claimed was dust on one of his cars and in his swimming pool. Mr. Krallman, however, could not determine whether that dust originated from the Bullskin Mine site, particularly because the Bullskin Mine site was not producing dust at the time of Mr. Krallman's visit. (N.T. 191-193, 198.)

52. On August 23, 2012, Mr. Booher filed a complaint with the Greensburg District Mining Office, asserting that excessive dust was blowing from the Bullskin Mine site onto his property. Mr. Krallman met Mr. Booher at a church near the corner of SR 982 and Eutsey Road

within one hour of Mr. Booher's phone call. Mr. Krallman observed Bullskin watering the haul road. He observed that some trucks on the haul road were producing a small amount of dust, but it was not leaving the Bullskin Permit boundary. The Greensburg District Mining Office responded to Mr. Booher by letter dated September 19, 2012, stating that no violations were found. (N.T. 193-195, 198; Department's Ex. 6.)

53. On January 22, 2013, Mr. Booher filed a complaint with the Greensburg District Mining Office, asserting that dust from the Bullskin Mine site was blowing onto his property. The Greensburg District Mining Office responded to Mr. Booher by letter dated February 14, 2013, stating that after an investigation by Mr. Krallman, no violations were found. (Department's Ex. 6.)

54. Timothy Kuntz has been employed with the Department for twenty-nine years, initially as a geologist in the mining and reclamation program, then for twenty-two years as an air quality inspector, and for the past two and a half years he has supervised four air quality specialists in his position as an air quality district supervisor for the Department. (N.T. 221.)

55. Mr. Booher emailed pictures to Mr. Kuntz which Mr. Booher claimed showed dust being produced by equipment at the Bullskin Mine site, but Mr. Kuntz determined that the pictures failed to show dust leaving the Bullskin Permit boundary. (N.T. 228.)

56. On May 30, 2012, Mr. Booher filed a complaint with the Department, asserting that dust from the Bullskin Mine was creating health concerns. Mr. Kuntz assigned the investigation of the complaint to Fred Walter, an air quality specialist with the Department. Mr. Kuntz supervises Mr. Walter. (N.T. 223; Department's Ex. 7.)

57. Mr. Walter spoke with Mr. Booher and visited the Bullskin Mine site on June 7, 2012. He also met with Dave Herrholtz, co-owner of Bullskin. Mr. Walter noted that Bullskin's

water truck requires one hour to fill. Mr. Walter suggested to Bullskin that it "get a second tanker onsite and have a dedicated driver to water the haulroad to curtail the dust and resolve the issue with Mr. Booher." (N.T. 39, 224; Department's Ex. 7.)

58. At the time of Mr. Walter's investigation of Mr. Booher's dust complaint on June 7, 2012, Bullskin was in its early phases of constructing the haul road from SR 982. (N.T. 224.)

59. After speaking to Mr. Walter about his June 7, 2012 investigation, Mr. Kuntz believed, in part because Bullskin's water truck required one hour to fill, that Bullskin had "a poor dust control system." (N.T. 232-234; Department's Ex. 7.)

60. On January 23, 2013, Mr. Booher filed a complaint with the Department, asserting that dust created by trucks traveling up and down the haul road was blowing onto his property. Mr. Krallman responded to this complaint. He observed that Bullskin was watering the haul road, and he did not observe any dust coming from trucks on the Bullskin Mine site that day. (N.T. 195-196; Department's Ex. 7.)

61. On April 16, 2013, Mr. Booher filed a complaint with the Department, asserting that he had pictures showing dust being produced from the haul road. Mr. Kuntz reviewed the pictures and determined that they did not show dust leaving the Permit boundary. The Department responded to Mr. Booher by letter dated April 29, 2013, stating that no violations were found. (N.T. 227, 229, 234-235; Department's Ex. 7.)

Dust Fall Jar

62. On January 29, 2013, in response to Mr. Booher's January 23, 2013 dust complaint, Mr. Kuntz installed a receptacle, called a "dust fall jar," at the Bullskin Mine site to test for total settleable particulate matter generated by mining activities conducted at the Bullskin Mine site. (N.T. 225-226, 228-229; Department's Ex. 7.)

63. The dust fall jar was installed approximately 150 feet away from the haul road and was held three feet off the ground by a post. (N.T. 41-42.)

64. Mr. Kuntz changed the dust fall jar every thirty days from the period beginning January 29, 2013 through July 16, 2013. (N.T. 228-229.)

65. During the period from January 29, 2013 to July 16, 2013, the dust fall jar at the Bullskin Mine site had been changed five times. As of July 16, 2013, four test results were available, and one test result was pending. All four available test results showed no violations of the ambient air quality standard for settleable particulate matter. (N.T. 228-229.)

Hydrology of Bullskin Mine

66. In the 1980s, a company by the name of Solomon and Teslovich operated a surface coal mine in a portion of the area which is now covered by the Bullskin Permit. (N.T. 253-254, 266.)

67. In the 1990s, after Solomon and Teslovich abandoned the site, the Department declared the bonds for the permit forfeited, and the Department reclaimed the site. (N.T. 254.)

68. A sedimentation pond that was part of the Solomon and Teslovich operation was not removed during reclamation. Over time, it has filled with sediment, and wetland plants have appeared. It has all three characteristics of a wetland, i.e., the hydrology, the soils, and the vegetation. It is located to the southeast of the processing yard and to the north of an unnamed tributary referred to as unnamed tributary C-1 ("UNT C-1"). (N.T. 69, 75, 252, 254-255; Department's Ex. 5D.)

69. The Department directed Bullskin to identify the old sedimentation pond as a wetland on its permit maps, and Bullskin identified it as Wetland 1 (the "Wetland"). (N.T. 253, 255; Board Ex. 1, Module 9, Operations Map.)

70. Water flows into the Wetland from a seep associated with past Solomon and Teslovich surface coal mine operations. (N.T. 205, 255-257; Department Ex. 5A, 5C.)

71. Water also enters the Wetland from the Bullskin mining site. A sediment trap along the upper portion of the haul road discharges into the Wetland, and a diversion ditch was installed to divert water into the Wetland during large storm events. (N.T. 270.)

72. As surface water flows through the Wetland, the flow of that water slows down and oxidized material settles out into the Wetland. (N.T. 272.)

73. Mr. Robb did not calculate or determine the amount of water entering the watershed that surrounds the Wetland. When asked how he determined whether sufficient water was entering the Wetland so that the chemical characteristics of the water leaving the Wetland were not affected, Mr. Robb testified that his determination did not have to be that precise and that he only needed to ensure that some water was flowing into and out of the Wetland so that the Wetland did not dry up. (N.T. 270-271, 275-276.)

74. The Wetland's original limestone emergency spillway remains in place at the southern edge of the Wetland. The purpose of the emergency spillway is to allow excess water to flow out of the Wetland in periods of very high flow to prevent structural failure of the Wetland's embankment. Water flows intermittently from the spillway, depending on rainfall and various other conditions. (N.T. 253, 263.)

75. The top of the Wetland's embankment is eighty-five feet away from UNT C-1 and is at least ten feet higher in elevation than UNT C-1. (N.T. 260-261; Department Ex. 5F; Board Ex. 1, Module 9, Operations Map.)

76. Overflow water leaves the Wetland and flows downhill through a channel which is hydrologically connected to UNT C-1. (N.T. 76-78, 259-263.)

77. During the times Mr. Robb visited the Bullskin Mine site, he saw at most a foot of water in UNT-C1. (N.T. 261-262).

78. UNT C-1 is a stream tributary to a "reach," i.e., the stretch or segment, of Mounts Creek that is classified as a wild trout stream. (N.T. 22, 79, 92, 204; Board Ex. 1, Module 6, Environmental Resources Map; Board Ex. 1, Module 9, Operations Map.)

79. Mounts Creek is a stream located approximately 500 feet away from and outside of the southern permit boundary of the Bullskin Mine. (N.T. 165-166, 172; Board Ex. 1, Module 9, Operations Map.)

80. The Wetland is located approximately 1500 feet north of the reach of Mounts Creek that is designated as a wild trout stream. (Board Ex. 1, Module 9, Operations Map.)

81. Mounts Creek flows from its headwaters, which are to the south-southeast of the Bullskin Mine, towards the west and into the Youghiogheny River. (N.T. 165-166.)

82. The primary sources of water for Mounts Creek are surface water, shallow groundwater and intermediate groundwater that lies above the Loyalhanna Limestone formation. (N.T. 170-173.)

83. The Loyalhanna Limestone formation is approximately 200 feet below the ground surface. Limestone will not be removed from the portion of the formation that lies underneath Mounts Creek. (N.T. 170, 172.)

84. Michael Gardner is employed by the Department as a licensed professional geologist and holds that license in good standing. He is assigned to the Greensburg District Mining Office. (N.T. 152-154.)

85. Mr. Gardner is responsible for the review of permit applications for coal and noncoal surface mines. He has reviewed more than 200 mining permit applications. (N.T. 155.)

86. Mr. Gardner was accepted by the Environmental Hearing Board (the "Board") as an expert in the area of hydrogeology. (N.T. 159-160.)

87. Mr. Gardner testified that based on the erosion and sedimentation controls contained in Bullskin's NPDES permit, mining activities on the Bullskin Mine site would not adversely impact nearby surface water or groundwater. (N.T. 174-175.)

Mounts Creek Wild Trout Stream Designation

88. On March 5, 2011, the Pennsylvania Fish and Boat Commission (the "Fish and Boat Commission") published a notice in the *Pennsylvania Bulletin* proposing to add a segment of Mounts Creek to the list of wild trout streams in Pennsylvania. (N.T. 66-68; Appellant's Ex. 31; 41 Pa. Bull. 1294, 1295 (Mar. 5, 2011).)

89. On June 11, 2011, the Fish and Boat Commission published a notice in the *Pennsylvania Bulletin* approving the addition of a segment of Mounts Creek to the list of wild trout streams. (Department's Ex. 4; 41 Pa. Bull. 3063 (June 11, 2011).)

90. The segment, or "reach," of Mounts Creek that is designated as a wild trout stream extends from the headwaters of the stream to Township Road 819, also known as Eutsey Road. A trout hatchery is maintained in the segment of Mounts Creek that is designated as a wild trout stream. (N.T. 78-79, 105-108, 170; 41 Pa. Bull. 1294, 1295.)

91. As part of the Department's standard permit application review process, the Department notified the Fish and Boat Commission that the Department received a permit application for the Bullskin Mine. The Department provided the Fish and Boat Commission with an opportunity to review the Bullskin Permit Application and provide comments. Although the Fish and Boat Commission provided the Department with written comments related to

wetlands, the Fish and Boat Commission did not advise the Department that Mounts Creek had been added to the list of wild trout streams. (N.T. 169-170.)

92. Bullskin's mine drainage treatment facility, Outfall 002, discharges into UNT C-1. (N.T. 167-168.)

93. At the time the Department calculated the NPDES permit effluent limits for Outfall 002, the Department was not aware that the Fish and Boat Commission had added Mounts Creek to the list of wild trout streams and therefore the designated use for Mounts Creek at the time was "warm water fishery." (N.T. 168, 181.)

94. After the Permit was issued, the Department became aware that the Fish and Boat Commission had added a segment of Mounts Creek above Eutsey Road to the list of wild trout streams, and the Department subsequently revised the designated use for Mounts Creek from "warm water fishery" to "cold water fishery." (N.T. 168-169.)

95. After Michael Gardner learned that a portion of Mounts Creek had been added to the list of wild trout streams, and after the Department changed the designated use for that segment of Mounts Creek from warm water fishery to cold water fishery, Mr. Gardner reviewed the NPDES permit and recalculated the NPDES effluent limits, taking into account the change in designated use. The change in the designated use did not change the calculated effluent limits for Outfall 002. (N.T. 169, 180-181.)

Wetland

96. After reviewing the topographic maps and learning that the drainage area for UNT C-1 was sixty acres, Mr. Robb determined that calculating the floodplain for UNT C-1 was not necessary. (N.T. 262.)

97. A 100-foot stream barrier is intended to protect a stream from the effects of mining. The Wetland is not within the 100-foot stream barrier of Mounts Creek. The 100-foot stream barrier does not necessarily encompass the same area that would be inundated by a 100-year flood or storm event. (N.T. 252).

98. Mr. Robb did not examine any cross-sections of the Wetland or UNT-C1 and did not perform any detailed analysis to determine whether the Wetland was within the floodplain of UNT C-1. (NT. 262).

99. Eric McCleary is an environmental consultant with over twenty-four years of experience. He has been involved in many wetland delineations, stream evaluations, environmental assessments, environmental impact statements, fisheries management and stream evaluations, and has been heavily involved in the biological aspects of acid mine drainage treatment. (N.T. 64-66)

100. Mr. McCleary was accepted by the Board as an expert in wetland evaluation. (N.T. 70.)

101. The Appellant, RACC, contracted with Mr. McCleary to evaluate the Wetland that was associated with Mounts Creek and any unnamed tributary that could be connected to Mounts Creek. (N.T. 72.)

102. Mr. McCleary reviewed the Permit and reviewed maps and modules associated with the Permit. (N.T. 72.)

103. Mr. McCleary visited the Bullskin Mine site on November 15, 2012 to determine whether the Wetland was an exceptional value wetland and to determine whether the Wetland was "within the reach or in the floodplains of any stream associated with Mounts Creek." (N.T. 73.)

104. Mr. McCleary studied the Wetland, but he did not take soil samples or any other measurements during his visit to the Bullskin Mine site on November 15, 2012, nor did he observe UNT C-1 during his visit. He did not calculate or measure the floodplain for UNT C-1, and he did not determine whether the Wetland would be inundated in a 100-year flood for UNT C-1. (N.T. 75, 76, 78, 81, 89-90, 93.)

105. Mr. Robb determined that the Wetland is not within the floodplain of UNT C-1 because of the distance from UNT C-1, the height of the embankment and the small size of the drainage area to UNT C-1. (N.T. 264.)

106. The Wetland is not located in or along the floodplain of the reach of Mounts Creek that is designated as a wild trout stream. (N.T. 84-85, 92.)

107. The Wetland is not located in or along the floodplain of UNT C-1, which is a stream tributary to the reach of a wild trout stream. (N.T. 258-262, 264; Department's Exs. 5E, 5F.)

Appeal

108. On April 10, 2012, RACC filed a Notice of Appeal with the Environmental Hearing Board, objecting to the Department's issuance of the Bullskin Mine Permit. (Notice of Appeal, EHB Docket No. 2012-072-M.)

109. The Honorable Richard P. Mather, Sr. presided over a hearing on the merits on July 15, 2013 and July 16, 2013 in the Board's Pittsburgh courtroom.

110. Judge Mather conducted a site view of the Bullskin Mine on the morning of July 17, 2013.

DISCUSSION

Background

On March 9, 2012, the Department issued Noncoal Surface Mining Permit No. 26092001 (the "Permit") to Bullskin for the Bullskin 1 Mine ("Bullskin Mine"). Simultaneously, the Department also issued National Pollution Discharge Elimination System ("NPDES") Permit No. PA 0251658 to Bullskin for discharges from a mine drainage treatment facility (Outfall 002) and erosion and sedimentation control facilities (Outfall Nos. 001, 003, 004 and 005).

The Permit authorizes a total permit area of 307.8 acres for an underground limestone mine adjacent to SR 982 and along Chestnut Ridge in Bullskin Township, Fayette County, Pennsylvania. The limestone at issue is the Loyalhanna Limestone formation. Within the 307.8 acre permitted area, the Permit authorizes 57.1 acres of surface facilities, such as roads, a scale house, erosion and sedimentation controls, a treatment pond, and a stone processing area, as well as underground limestone reserves. Access to the limestone reserves will be accomplished through an open pit. As of July 15, 2013, Bullskin anticipated completing construction of the open pit by the end of 2013.

On April 10, 2012, Rural Area Concerned Citizens ("RACC") filed a Notice of Appeal with the Environmental Hearing Board, objecting to the Department's issuance of the Bullskin Mine Permit. RACC is a citizens group formed in 1991 and is composed of approximately 150 individual members who share an interest in the local environment around their community, including the desire for clean air and water. At least five RACC members live near the Bullskin Mine.

The Honorable Richard P. Mather, Sr. presided over a hearing on the merits on July 15, 2013 and July 16, 2013 in the Board's Pittsburgh courtroom. Judge Mather conducted a site

view of the Bullskin Mine on the morning of July 17, 2013. The issues have been briefed, and this matter is now ripe for adjudication.

Burden of Proof and Standard of Review

The Appellant bears the burden of proof in this matter. Under the Board's rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action. 25 Pa. Code § 1021.122(c)(2); *see Gadinski v. DEP*, 2013 EHB 246, 269. Specifically, the Appellant must prove by a preponderance of the evidence that the Department's issuance of Noncoal Surface Mining Permit No. 32100103 to Bullskin was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. *See Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772.

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156.

The Appellant raises two main issues in its Posthearing Brief. First, the Appellant argues that the Permit's Air Pollution Control Plan inadequately controls dust migration. Second, the

Appellant argues that the Department failed to adequately account for the presence of an exceptional value wetland located within the Permit area.[1] Appellant's Posthearing Brief at 1-2. The Department and Bullskin deny these allegations. The Board will address each issue separately in turn. For the reasons set forth below, the Board agrees with the Department and Bullskin.

Adequacy of Air Pollution Control Plan

The Appellant argues that Bullskin's Air Pollution Control Plan (the "Plan") does not adequately control dust at the site and therefore violates the prohibition against fugitive emissions and has created a public nuisance in violation of 25 Pa. Code §§ 123.1 and 123.2. Appellant's Posthearing Brief at 2, 9, 13.

Before examining the Appellant's objections, it is useful to outline the Department's regulatory program. There are several aspects of the Department's air quality protection regulatory program that govern noncoal mining. First, the Department requires that an applicant submit an Air Pollution Control Plan to the Department for review and approval as part of an application for a noncoal surface mining permit. An applicant is required to complete Module 17 of the noncoal surface mining permit application which contains an applicant's Air Pollution and Noise Control Plan.

Second, the Department's air quality regulations contain performance standard requirements which a person may not violate at any time regardless of compliance with the approved Air Pollution and Noise Control Plan. *See* 25 Pa. Code §§ 123.1 and 123.2. In particular, Section 123.2 provides:

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[1] All other objections listed in the Appellant's Notice of Appeal that were not raised in the Appellant's Posthearing Brief are deemed waived under 25 Pa. Code § 1021.131(c), which states that "[a]n issue which is not argued in a posthearing brief may be waived." *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 n.3 (Opinion and Order issued Feb. 18, 2014).

> A person may not permit fugitive particulate matter to be emitted into the outdoor atmosphere from a source specified in § 123.1(a)(1)-(9) (relating to prohibition of certain fugitive emissions) if the emissions are visible at the point the emissions pass outside the person's property.

25 Pa. Code § 123.2. It is well established that a quarry is a source subject to Section 123.2, and the owner of a quarry has an active duty to prevent particulate matter from visibly escaping into the atmosphere from the owner's property onto another's property, including the responsibility to provide an adequate system to suppress fugitive dust emissions so that visible dust emissions do not pass outside the quarry owner's property. *See e.g., Eureka Stone Quarry Inc. v. Commonwealth*, 544 A.2d 1125 (Pa. Cmwlth. 1988).

Third, the Environmental Quality Board has established a state ambient air quality standard for total settleable particulate matter, and the Department implements and enforces that standard. *See* 25 Pa. Code § 131.3. The Commonwealth's standard for total settleable particulate matter includes standards for ambient concentrations over a 1-year average and a 30-day average timeframe. The Department often uses dust fall jars to monitor for violations of the 30-day standard of 1.5 $mg/cm^2/mo$.

All three aspects of the Department's air quality program governing noncoal mining permitting and operations were raised at the hearing. This is not surprising because the three distinct aspects are interrelated. The Department's review and approval of an applicant's Air Pollution Control Plan is intended to prevent violations of various air quality requirements, including the requirement under Section 123.2 that no visible fugitive particulate matter leave one's property, as well as the total settleable particulate matter ambient air quality standard in Section 131.3. The three requirements governing particulate matter emissions, i.e., permitting, the prohibition on visible fugitive emissions, and the settleable particulate matter ambient air

quality standard, are related in that they all regulate particulate matter emissions, but they are also distinct in that a quarry operator may have an adequate and approved Air Pollution Control Plan but may still violate either Section 123.2, Section 131.3, or both. Compliance with one of the regulatory requirements does not ensure compliance with the other because one measures compliance instantaneously while the other standard is a 30-day average. The permitting standard is the primary concern in this appeal of the Department's permitting decision to approve Bullskin's noncoal surface mining permit, including its Plan, although the Appellant also argues that evidence of violations of the visible dust standard support the claim that the Plan is inadequate.

The Department also regulates the air quality of noncoal minerals processing plants. While a processing facility is planned for this operation, as of the date of the hearing the air permits for the related processing facility have not yet been issued. (N.T. 248-249; Board Ex. 1, Module 17.1.)

The Appellant provided testimony and photographic evidence at the hearing that the Appellant asserts demonstrate "that there have been, and continue to be fugitive dust emissions that cross the property boundary line." Appellant's Posthearing Brief at 3. The Appellant has not identified specific deficiencies with the approved Plan, but it asserts that its evidence of fugitive dust emissions crossing the property boundary in violation of Section 123.2 is evidence that the approved Plan is deficient and should not have been approved as part of the Permit.[2]

[2] It is useful to note that the standard in Section 123.2 regarding fugitive particulate matter, i.e., dust, is tied to visible emissions that pass outside a person's *property*. 25 Pa. Code § 123.2. A property boundary is not always at the permit boundary, and, in situations like Bullskin's Permit under appeal, the permit boundary is located within the property boundary. They do not share precisely the same boundary line. The property boundary, and not the permit boundary, is the proper place to determine compliance with Section 123.2.

Bullskin claims that the Appellant actually takes issue with Bullskin's noncompliance with the Plan and the Department's purported lack of enforcement, but that the Appellant has not actually challenged the Plan itself. Bullskin's Posthearing Brief at 5. According to Bullskin, the Appellant's "entire case on this subject," i.e., entire argument in opposition to the Plan, is based on the visual observations of three individuals who saw dust leave the site numerous times. Bullskin's Posthearing Brief at 5. Bullskin asserts that this testimony, even if true, is insufficient to establish that the Plan is inadequate and should not have been issued.

The Department makes similar arguments to contest the Appellant's assertion that the Plan is inadequate and should not have been approved. In addition, the Department provided testimony on the adequacy of the approved Plan.

The Department agrees with Bullskin that the Appellant has failed to identify any material deficiencies in Bullskin's Air Pollution Control Plan that would support the Appellant's claim that the Department abused its discretion in approving that Plan. Department's Posthearing Brief at 25. Further, the Department challenges the factual and legal basis of the Appellant's complaint and observation-based objections to the Department's approval of the Plan. From a legal perspective, the Department asserts that even if visible fugitive emissions crossed the property boundary, as alleged by the Appellant's witnesses, these observations do not establish that the Plan is inadequate and should not have been approved. From a factual perspective, the Department questioned the observations of the Appellant's three fact witnesses and provided rebuttal testimony indicating that Department staff did not observe violations of Section 123.2 when they were on-site to investigate complaints of Section 123.2 or violations of Section 131.3 when they reviewed the monitoring data from the dust fall jars. Finally, the Department questioned the timing of observations by the Appellant's witnesses who testified

about conditions during preliminary construction of the haul road and not about normal operations on the haul road after it was constructed.

Module 17.2 of the Permit contains an Air Pollution Control Plan that identifies dust control measures that Bullskin must employ at the Bullskin Mine, particularly for access roads, haul roads, the adjoining portion of the public road and truck traffic. The portions of the Plan relevant to this appeal state as follows:[3]

a) Access roads, haul roads and adjoining portions of the public road

12/2009 [The haulroad will [sic] paved from SR-982 up to the processing yard.] The access roads and haulroads will be controlled by the periodic application of water and/or crushed non-toxic stone. Water, if utilized, will be applied by spraying or a similar technique.

b) Truck traffic (including fugitive particulate material from truck loads).

Commercial trucks will be covered by tarpaulins when hauling.

In summary, Bullskin was required to pave the haul road from SR 982 to the processing area and was required to control dust from access roads and the haul road by periodically applying either water, crushed non-toxic stone, or both. Bullskin was also required to cover trucks with tarps while hauling materials within the Permit area. The testimony at the hearing establishes that dust control measures outlined in Module 17.2 are the types of dust control measures typically used to effectively control dust at mine sites.[4]

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[3] The Plan also contains additional requirements to control fugitive emissions related to Bullskin's drilling operation, overburden removal and mineral extraction, stockpiles, and loading and unloading areas. (Board Ex. 1, Module 17.2(c) through (h).)

[4] Air pollution control measures for Bullskin's processing facilities are expected to be established in a separate Air Quality Permit issued by the Department's Air Quality Program. (N.T. 248-249.) As part of that Air Quality Permit, Bullskin is expected to propose to have a truck wheel wash at the processing area to remove mud and dirt from truck tires before entering the paved section of the haul road and exiting the site onto SR 982. However, Module 17.2 of the Permit does not require the immediate use of a truck wheel wash, and as of July 16, 2013, Bullskin had not yet installed a truck wheel wash on the site and did not anticipate installing one until construction of the scale house was completed. The Department incorrectly asserts that "[a]ccording to the Plan, Bullskin . . . will require truck tires be washed prior to leaving the site." Department's Posthearing Brief at 25. On the contrary, the Plan does not require a

Several Department witnesses testified about whether the Plan's measures adequately controlled dust at the site. Bernard Robb, a mining engineer for the Department, who reviewed the Plan, testified that the dust control measures were the types of measures typically used to adequately control dust on at a mine site, and he provided his expert opinion that the measures in the approved Plan were reasonable and adequate to control dust on the Bullskin Mine site. (N.T. 250-251.) Glen Krallman, a surface mine inspector for the Department responsible for overseeing the Bullskin Mine site, and Timothy Kuntz, an air quality district supervisor for the Department, testified that the measures in Bullskin's Plan were typical and effective. (N.T. 196-198, 222.) The Board finds that this testimony is credible to support the conclusion that the approved Plan contained adequate measures to effectively control dust from the Bullskin Mine site. It is important to note that the Appellant did not offer any expert testimony to contest Mr. Robb's expert opinion that the dust control measures in the approved Plan are the types of measures typically used at mine sites to adequately control dust.

The Board agrees with the Department and Bullskin that the Appellant has not met its burden to demonstrate that the Department's approval of Bullskin's Plan, as part of its noncoal surface mining permit, was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. Without an expert witness to identify deficiencies in the approved Plan, the Appellant asserts that the testimony of its three witnesses and the photographs, which describe or identify dust associated with construction and use of the haul road, are sufficient to establish that the Department should not have approved the Plan. The Board disagrees with the Appellant and finds that there is not sufficient evidence about

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truck wheel wash, and the Department does not expect Bullskin to even propose the use of one until it applies for an Air Quality Permit for its processing facilities.

conditions at the site to demonstrate that the Plan is deficient and should not have been approved by the Department.

The Appellant provided evidence in support of its assertion that dust crossed the Permit boundary in violation of Section 123.2. Carter Booher, whose residence borders Bullskin's property, complained to the Department on a number of occasions that dust created within the Bullskin Permit area crossed the Permit boundary and fell to rest on his property. The Appellant produced a number of photographs taken by Mr. Booher, some that showed dust being produced by vehicles operating on the Bullskin haul road and others that showed dust on some of Mr. Booher's vehicles and in his swimming pool. (N.T. 15-31; Appellant's Exs. 3-5, 11, 12-14.) These photographs, as the Appellant admits, do not show dust crossing the Permit boundary and therefore do not depict violations of 25 Pa. Code § 123.2. Appellant's Posthearing Brief at 13. The photographs show only where dust was generated and where dust was deposited, and the testimony offered by the Appellant does not support causation.[5]

Three members of RACC, including Mr. Booher, testified that they witnessed dust cross the Permit boundary, but each time Department inspectors responded to one of Mr. Booher's complaints, the inspectors witnessed no dust crossing the Permit boundary.[6] In fact, in response to one of Mr. Booher's complaints, the Department installed a dust fall jar to test for total settleable particulate matter generated by activities conducted at the Bullskin Mine site. The dust fall jar was installed 150 feet away from the haul road and rested on a three-foot high post. The

[5] Two facts undermine Mr. Booher's testimony. First, Mr. Booher has a 1000-foot dirt driveway which is located off a 1000-foot dirt road. Mr. Booher does not water his driveway. There is no way for the Board to determine whether the driveway caused the dust depicted in Mr. Booher's photographs. Second, between Mr. Booher's residence and the Bullskin Mine site lies a tree line approximately thirty feet wide that completely obstruct the view from Mr. Booher's home to Bullskin's haul road. Mr. Booher could not observe Bullskin's haul road from his home.

[6] RACC's president, Leroy Welker, and RACC's vice president, Brian Konieczny, also testified that they witnessed dust cross the Permit boundary. Both viewed the dust from great distances with only partial views of the Bullskin Mine site.

dust fall jar was changed and monitored every thirty days after it was installed. All four results taken from the jar showed no violations of the ambient air quality standard for settleable particulate matter. *See* 25 Pa. Code § 131.3. The Appellant did not dispute those results. Nevertheless, test results from a dust fall jar showing that no violation occurred do not conclusively indicate that no violations of 25 Pa. Code § 123.2 have occurred. *See supra* pp. 21-23. As previously explained, the Section 123.2's prohibition on fugitive dust emissions is measured instantaneously, while the state ambient air quality standard is measured over a 30-day period. A person may comply with one standard while violating the other.

The only evidence offered by the Appellant in support of its opposition to the Plan consists of the testimony of three witnesses describing visible dust emissions crossing Bullskin's property line and photographs that the Appellant purports shows visible dust emissions crossing Bullskin's property line in violation of Section 123.2. Neither the testimony nor the photographs establish to the Board's satisfaction that Bullskin violated Section 123.2 on the dates alleged by the Appellant. The photographs do not establish that visible dust emissions from Bullskin's site development operations crossed Bullskin's property line. In addition, the Board does not find the observations of the Appellant's three witnesses to be credible on the issue of fugitive dust emissions crossing Bullskin's property line. The observations were either too far away or were blocked by vegetation or other obstructions to be of real value in establishing that visible dust emissions from Bullskin's operations crossed Bullskin's property line, which is not clearly marked on the site or easy to identify in the photographs entered into evidence. It is important to note that the Department did not observe violations of Section 123.2 when it responded to Mr. Booher's complaints.

The Department argues that even if the Appellant's witnesses are correct that dust crossed the Permit boundary during the spring and summer of 2012, at that time, Bullskin was in the early stages of site development and only beginning to build the haul road and the Plan was not yet fully implemented. Department's Posthearing Brief at 26. The Board agrees with the Department that the timing of the Appellant's complaints weaken the Appellant's challenge of the adequacy of the Plan. The Appellant's complaints, which occurred during the initial site development phase of operations, have limited relevance to the claim that the plan to control dust during actual operations is somehow deficient.

On the issue of overall compliance with the performance standard in Section 123.2, the testimony offered by the Appellant has some limited value because Section 123.2 does not provide a grace period or an exemption period for compliance during the initial development or construction phase. Mine operators must at all times ensure that dust does not cross their permit boundary, even during the initial construction or development phase. Even if the Board accepted the Appellant's claims that dust crossed Bullskin's property line during site development, this evidence would not establish that the Plan is inadequate.

The Appellant claims that these violations resulted from Bullskin's failure to adequately implement the Plan's dust control measures, particularly because of Bullskin's failure to adequately water and pave the haul road. When the Department issued the Permit, it expected that watering the haul road would be Bullskin's primary dust control method. Nevertheless, Department personnel observed that Bullskin's water truck required one hour to fill, which the Appellant, and even the Department, considered to be inadequate. When Bullskin did water the haul road, however, it effectively controlled dust at the site.

The Appellant also claims that Bullskin has failed to comply with the Plan's requirement to pave the haul road and apply crushed non-toxic stone. When Bullskin initially constructed the haul road in April 2012, Bullskin constructed the road with excavated shale rock, i.e., gravel. The haul road consisted only of gravel for approximately one year until the spring of 2013 when Bullskin placed "millings," i.e., bits of crushed recycled asphalt, on top of the haul road. The millings served as crushed non-toxic stone to control dust migration. Several months later, at the time of the Board's hearing on July 16, 2013, Bullskin had paved only 30 to 50 feet of the haul road and did not anticipate completing construction of the road until the fall of 2013, approximately a year and half after Bullskin began construction of the haul road.

The Appellant also argues that the adequacy of the Plan cannot be assessed until it is rendered effective, and that because Bullskin has violated Section 123.2 and failed to fully and timely implement the Plan's dust control measures, the Plan has therefore been rendered ineffective and should be remanded to the Department. Appellant's Posthearing Brief at 13. Our scope of review, however, is limited to our review of the Department's approval of the Plan as part of the Permit and does not include the Department's enforcement of the terms of the Plan. While we may look to a permittee's implementation of permit conditions as evidence of how a permittee would interpret those conditions, we will not overturn a permit solely because a permittee has failed to fully comply with a few of the permit's provisions.[7] In that sense, the Appellant confuses a permit appeal with an enforcement action.[8] The Appellant has argued only that Bullskin's failure to fully implement its dust control measures has led to a few violations of Section 123.2. The Appellant, however, has not argued that the provisions of the Plan, if

[7] Bullskin is largely correct that the few possible violations of the Plan are not necessarily sufficient to show that the Department erred in approving the Plan. Bullskin's Posthearing Brief at 12.

[8] In fact, Mr. Booher testified on behalf of the Appellant that he does not understand the difference between a permitting matter and an enforcement matter. (N.T. 55.)

adequately implemented, would still fail to control dust migration. When a permittee is failing to implement measures contained in its permit, the Department may bring an enforcement action against the permittee. As we have repeatedly held, however, the Board has no authority to order or direct the Department to take enforcement action. *Dobbin v. DEP*, 2010 EHB 852, 860. Here, our scope of review is narrower than the Appellant would have us take. We are restricted to reviewing the adequacy of the Plan approved as part of the Permit by the Department.

Although the Appellant claims that Bullskin inadequately implemented the Plan, the Appellant has failed to take a position on whether the Plan, if fully implemented, would have adequately controlled dust migration. The Appellant has also failed to point out any methods that the Department could have required to bolster the Plan. In short, the Appellant has failed to meet its burden to show that the Plan, if implemented, would be inadequate. The Appellant has not proven by a preponderance of the evidence that the Department's decision to approve the Air Pollution Control Plan was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

Exceptional Value Wetland

Under the Department's Chapter 105 regulations, exceptional value wetlands are subject to more rigorous permitting review and standards than other wetlands. *See* 25 Pa. Code § 105.18a(a) and (b). The Department evaluated a wetland on the site as an "other wetland" under subsection (b), and not as an "exceptional value wetland" under subsection (a). The Appellant asserts that the wetland is an exceptional value wetland because it meets the definition of exceptional value wetland in 25 Pa. Code § 105.17(1)(iii),[9] and therefore the Department erred

[9] Section 105.17(1)(iii) provides, in relevant part: (1) *Exceptional value wetlands.* This category of wetland deserves special protection. Exceptional value wetlands are wetlands that exhibit one or more of the following characteristics: . . . (iii) Wetlands that are located in or along the floodplain of the reach of a wild trout stream or waters listed as exceptional value under Chapter 93 (relating to water quality

by issuing the Permit without first issuing a written finding that Bullskin met the requirements at 25 Pa. Code §§ 105.18a(a)(1)-(7).

The Appellant also makes several additional arguments about adequate protection of the wetland under the Department's wetlands regulations. The Appellant asserts that the Department failed to sufficiently study the effects that Bullskin's mining activities would have on the wetland. The Appellant also claims that the Department erred by issuing the Permit without the awareness that Mounts Creek had been reclassified as a wild trout stream. The Board will address each of the Appellant's wetland-related concerns.

Before examining the merits of Appellant's claims, it is useful to describe the factual background of the wetland. In the 1980s, a company by the name of Solomon and Teslovich operated a surface coal mine in a portion of the area which is now covered by the Permit. In the 1990s, after Solomon and Teslovich abandoned the site, the Department declared the bonds for the permit forfeited, and the Department reclaimed the site. A sedimentation pond that was part of the Solomon and Teslovich operation was not removed during reclamation, and over time, the pond has filled with sediment and has sprouted wetland plants. The unreclaimed sedimentation pond has all three characteristics associated with a wetland, i.e., the hydrology, the soils, and the vegetation. The Department directed Bullskin to identify the old abandoned sedimentation pond as a wetland on its permit maps, and Bullskin identified it as Wetland 1 (the "Wetland"). The Wetland is located to the southeast of the processing yard and to the north of an unnamed tributary referred to as unnamed tributary C-1 ("UNT C-1").

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standards) and the floodplain of streams tributary thereto, or wetlands within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271-1287) or designated as wild or scenic under the Pennsylvania Scenic rivers Act (32 P.S. §§ 820.21-820.29).

Water flows into the Wetland from at least three locations: from a seep associated with past Solomon and Teslovich surface coal mine operations, from a sediment trap along the upper portion of the haul road, and from a diversion ditch that was installed to divert water into the Wetland during large storm events. The Wetland serves a valuable purpose by filtering incoming water. As surface water flows through the Wetland, oxidized material settles out into the Wetland, and the quality of the outgoing water is improved.

The Wetland has a limestone emergency spillway at its southern edge, and water flows intermittently from the spillway, depending on rainfall and other conditions. Overflow water from the Wetland discharges over the emergency spillway and flows downhill across the surface of the ground to a tributary referred to as unnamed tributary C1 ("UNT C-1"). The top of the Wetland's embankment is eighty-five feet away from UNT C-1 and is at least ten feet higher in elevation than UNT C-1. Bullskin's mine drainage treatment facility, Outfall 002, also discharges into UNT C-1.

UNT C-1 is a stream tributary to a stream named Mounts Creek and flows into Mounts Creek at a reach of Mounts Creek that was designated by the Pennsylvania Fish and Boat Commission (the "Fish and Boat Commission") as a wild trout stream.[10] Mounts Creek is located several hundred feet away from and outside of the southern permit boundary of the Bullskin Mine. Mounts Creek flows from its headwaters, which are to the south-southeast of the Bullskin Mine, towards the west and eventually into the Youghiogheny River.

The Appellant argues that, by operation of law, the designation of a segment of Mounts Creek as a wild trout stream changed the legal status of the Wetland to an exceptional value

[10] On June 11, 2011, the Fish and Boat Commission published a notice in the *Pennsylvania Bulletin* approving the addition of a segment of Mounts Creek to the list of wild trout streams. 41 Pa. Bull. 3063 (June 11, 2011). The segment of Mounts Creek that is designated as a wild trout stream, where a trout hatchery is maintained, extends from the headwaters of the stream to Township Road 819, also known as Eutsey Road. 41 Pa. Bull. 1294, 1295 (Mar. 5, 2011).

wetland under Section 105.17(1)(iii). Section 105.17(1)(iii) defines an exceptional value wetland, in part, as follows: "Wetlands that are located in or along the floodplain of the reach of a wild trout stream . . . and the floodplain of streams tributary thereto." 25 Pa. Code § 105.17(1)(iii). In other words, an exceptional value wetland is a wetland that is located either a) in or along the floodplain of the reach of a wild trout stream, or b) in or along the floodplain of streams tributary to the reach of a wild trout stream. The Board disagrees that the Wetland is an exceptional value wetland under either option.

The Wetland in question is not located in or along the floodplain of the reach of a wild trout stream. The term "floodplain" is defined as "[t]he lands adjoining a river or stream that have been or may be expected to be inundated by flood waters in a 100-year frequency flood." 25 Pa. Code § 105.1. For purposes of Section 105.17(1)(iii), the term "reach" refers to a defined stretch or segment of a stream. The "reach of a wild trout stream" is the segment of a stream that is classified as a wild trout stream, from its most upstream point to its furthest downstream point.

The Wetland, however, is not in the floodplain of the reach of Mounts Creek that is designated as a wild trout stream, nor is it in the floodplain of UNT C-1, which is a stream tributary to the reach of a wild trout stream. The Wetland lies a distance from the reach of Mounts Creek that is designated as a wild trout stream. According to Bullskin's permit maps, the Wetland is located approximately 1500 feet north of the reach of the wild trout stream. Furthermore, no party presented evidence in support of the proposition that the Wetland was in the floodplain of the reach of a wild trout stream. As such, the Board finds that the Wetland is not in the floodplain of the reach of Mounts Creek that is designated as a wild trout stream.

Even if UNT C-1 is viewed, in the alternative, as a headwaters of Mount Creek and thus is covered by the wild trout stream designation directly, this change in status of UNT C-1 to a

wild trout stream designation would not change the Board's view that the Wetland in question is not an exceptional value wetland. The Wetland is not located in or along the floodplain of either the reach of the wild trout stream or any stream tributary thereto, as set forth below.

The Appellant argues, however, that the Wetland is in the floodplain of UNT C-1, which is a stream tributary to the reach of a wild trout stream. Bullskin and the Department strongly oppose that conclusion. Neither the Appellant's nor the Department's experts calculated the floodplain of UNT C-1. The Department's expert, Bernard Robb, after reviewing the topographic maps and learning that the drainage area for UNT C-1 was sixty acres, felt that it was not necessary to conduct a formal calculation of the floodplain of UNT C-1 because he believed that Wetland was so clearly not in the floodplain of UNT C-1.

The Appellant's expert, Mr. McCleary, admitted that he did not know where the floodplain of UNT C-1 actually was but stated that for small tributaries like UNT C-1 typically the bed and bank of the stream constitutes the floodplain, and he expected that to be true of UNT C-1. In complete contradiction to these statements, however, Mr. McCleary provided his expert opinion that the Wetland is in the floodplain of UNT C-1. UNT C-1 is located ten feet downhill and eight-five feet away from the Wetland, which is a far cry from the bed and bank of UNT C-1. (N.T. 260-261; Department Ex. 5F; Board Ex. 1, Module 9, Operations Map.) The Board does not find Mr. MrCleary's testimony credible on this issue, and we find that the Wetland is not within the floodplain of UNT C-1.

The Department's regulations support the Board conclusion. Section 105.17(1)(iii) uses the term "Floodplain" which is defined as follows:

> *Floodplain*–The lands adjoining a river or stream that have been or may be expected to be inundated by flood waters in a 100-year frequency flood.

25 Pa. Code § 105.1. A floodplain and the channel of the watercourse constitute the "Floodway" which is defined as follows:

> *Floodway*–The channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood. Unless otherwise specified, the boundary of the floodway is as indicated on maps and flood insurance studies provided by FEMA. In an area where no FEMA maps or studies have defined the boundary of the 100-year frequency floodway, it is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream.

Id. Under the definition of floodway, the floodplain (floodway minus stream channel) extends from the stream to 50 feet from the top of the bank of the stream, absent evidence to the contrary. As explained above, there is no evidence to the contrary, so because the Wetland is eighty-five feet away from UNT C-1, the Board assumes that the Wetland is approximately 35 feet from the floodplain of UNT-C1. (N.T. 260-261; Department Ex. 5F; Board Ex. 1, Module 9, Operations Map.)

The Appellant also argues that the Wetland is "along" the floodplain of UNT C-1. The term "along" is defined under Chapter 105 as "[t]ouching or contiguous; to be in contact with; to abut upon." 25 Pa. Code § 105.1. The Appellant argues that the Wetland is "in contact with" UNT C-1 by way of the surface flow that runs from the Wetland to UNT C-1 from time to time. (N.T. 92-93.) The Appellant claims that the term "along" should be interpreted broadly to include the intermittent surface flow that connects the Wetland to UNT C-1. The Appellant has provided no evidence about the intermittency of this connection and whether it would be a strong enough to constitute "contact" with UNT C-1. On cross-examination, the Appellant's expert, Mr. McCleary, admitted that he never followed the surface flow of water from the Wetland to UNT-C1. (N.T. 93.) The Wetland is not in contact with UNT C-1's floodplain simply because

the two are connected by an intermittent surface flow. They are in contact with one another only if part of the Wetland touches part of the floodplain. The Appellant did not argue that the Wetland's surface flow leading to UNT C-1 is part of the Wetland, nor did the Appellant argue that the surface flow is a separate stream tributary to UNT C-1, or to Mounts Creek for that matter. We lack sufficient evidence to make that determination.

The Board finds that the Appellant has failed to prove that the Wetland is along the floodplain of UNT-C1. As such, the Board finds that the Appellant has failed to prove that the Wetland is in or along the floodplain of a stream tributary to the reach of Mounts Creek that is designated as a wild trout stream.

Analysis of Wetland

The Appellant also argues in the alternative that the Department "did not use scientific or mathematic calculations or studies to determine the effects" on the Wetland and other nearby surface water or groundwater. Appellant's Posthearing Brief at 21. In fact, the Department's expert, Mr. Robb, who studied the Wetland leading up to the Department's approval of the Permit, did not calculate or determine the amount of water entering the watershed that surrounds the Wetland. When asked how he determined whether sufficient water was entering the Wetland so that the chemical characteristics of the water leaving the Wetland were not affected, Mr. Robb testified that his determination did not have to be that precise and that he only needed to ensure that some water was flowing into and out of the Wetland so that the Wetland did not dry up.

The primary sources of water for Mounts Creek are surface water, shallow groundwater and intermediate groundwater that lies above the Loyalhanna Limestone formation. The Loyalhanna Limestone formation is approximately 200 feet below the ground surface.

Limestone will not be removed from the portion of the formation that lies underneath Mounts Creek.

Michael Gardner, who was accepted by the Board as an expert in the area of hydrogeology, is a licensed professional geologist employed by the Department. Mr. Gardner is responsible for the review of permit applications for coal and noncoal surface mines and has reviewed more than 200 mining permit applications. Mr. Gardner testified that based on the erosion and sedimentation controls contained in Bullskin's National Pollution Discharge Elimination System ("NPDES") permit, mining activities on the Bullskin Mine site would not adversely impact nearby surface water or groundwater. The Appellant provided no evidence that Bullskin's mining activities would harm the Wetland or other nearby surface water or groundwater. The Board finds Mr. Gardner's testimony credible about protection of the Wetland. The Appellant has provided no legal support for its claim that mining will adversely affect the Wetland. Further, the Appellant has provided no evidence to support a theory that if the Department more rigorously studied the Wetland that those studies would have caused the Department to make a different permit decision. As a result, the Board finds no merit in this objection.

Accounting for Wild Trout Stream Designation

Finally, the Appellant argues that the Department "did not use due diligence to determine the type of stream that Mounts Creek was prior to issuing this Permit." Appellant's Posthearing Brief at 21. The Board reviews appeals *de novo* and fully considers a case anew. We are not bound by prior determinations made by the Department. "Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it." *Smedley v. DEP*, 2001 EHB 131,

156. For the Department to have committed a material error, the Fish and Boat Commission's redesignation of Mounts Creek as a wild trout stream would have to have caused the Department to make a different permit decision or to issue a permit with different permit conditions.

The Fish and Boat Commission maintains a list of streams, known as wild trout streams, which are streams that support naturally reproducing populations of trout. 58 Pa. Code § 57.11. On June 11, 2011, the Fish and Boat Commission published a notice in the *Pennsylvania Bulletin* approving the addition of a segment of Mounts Creek to the list of wild trout streams in Pennsylvania. 41 Pa. Bull. 3063 (June 11, 2011). The segment of Mounts Creek that is designated as a wild trout stream, which supports a trout hatchery, extends from the headwaters of the stream to Township Road 819, also known as Eutsey Road. 41 Pa. Bull. 1294, 1295 (Mar. 5, 2011).

As part of the Department's standard permit application review process, the Department notified the Fish and Boat Commission that the Department received a permit application for the Bullskin Mine, and the Department provided the Fish and Boat Commission with an opportunity to review the Bullskin Permit Application and provide comments. Although the Fish and Boat Commission provided the Department with written comments related to wetlands, the Fish and Boat Commission did not advise the Department that Mounts Creek had been added to the list of wild trout streams.

The Department points out that the only parts of the Permit that may be affected by the addition of Mounts Creek to the list of wild trout streams are the effluent limits for the NPDES permit. At the time the Department calculated the NPDES permit effluent limits for Outfall 002, the Department was not aware that the Fish and Boat Commission had added Mounts Creek to the list of wild trout streams and therefore the designated use for Mounts Creek at the time was

"warm water fishery."[11] After the Permit was issued, the Department became aware that the Fish and Boat Commission had added a segment of Mounts Creek above Eutsey Road to the list of wild trout streams, and the Department subsequently revised the designated use for Mounts Creek from "warm water fishery" to "cold water fishery."

After the Permit was issued, Michael Gardner discovered that a portion of Mounts Creek had been added to the list of wild trout streams and that the Department had changed the designated use for that reach of Mounts Creek from warm water fishery to cold water fishery. At that point, Mr. Gardner reviewed the NPDES permit and recalculated the NPDES effluent limits, taking into account the change in designated use. Mr. Gardner found that the change in the designated use did not change the calculated effluent limits for Outfall 002. The Appellant has not disputed Mr. Gardner's conclusion, nor has it offered any evidence to support a finding that the designation of Mounts Creek as a wild trout stream would have caused the Department to make a different permit decision or to issue a permit with different permit conditions. The Board, reviewing this appeal *de novo*, may consider the Department's subsequent determination. As the Department correctly points out, the Department's failure to account for the redesignation of Mounts Creek was not a material error, and the Appellant has not carried its burden of proof to show otherwise.

Conclusion

For the reasons set forth above, the Board finds that the Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department's issuance of Noncoal Surface Mining Permit No. 26092001 to Bullskin Stone and Lime, LLC was not a lawful and

[11] The regulations in place at the time Bullskin's NPDES effluent limits were calculated identified the designated uses to be protected in Mounts Creek as warm water fishery. 25 Pa. Code §§ 93.3 (Table 2) and 93.9v (Drainage List v).

reasonable exercise of the Department's discretion supported by the evidence presented. Accordingly, we dismiss the Appellant's appeal and make the following:

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has the power and duty to issue adjudications on decisions of the Department. 35 P.S. § 7514.

2. The Appellant bears the burden of proof in this matter pursuant to 25 Pa. Code § 1021.122(c)(2), and must prove by a preponderance of the evidence that the Department's issuance of Noncoal Surface Mining Permit No. 26092001 to Bullskin Stone and Lime, LLC was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

3. The Board reviews appeals *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156.

4. The Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department's approval of Bullskin's Air Pollution Control Plan was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

5. The Appellant failed to meet its burden to prove by a preponderance of the evidence that the wetland at issue in this appeal was an exceptional value wetland.

6. The Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department failed to adequately study the effects of mining activities on the wetland at issue in this appeal, and that any such failure leads to a conclusion that the Department's issuance of Noncoal Surface Mining Permit No. 26092001 to Bullskin Stone and Lime, LLC was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

7. The Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department's failure to account for Mount Creek's addition to the list of wild trout streams leads to a conclusion that the Department's issuance of Noncoal Surface Mining Permit No. 26092001 to Bullskin Stone and Lime, LLC was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

8. The Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department's issuance of Noncoal Surface Mining Permit No. 26092001 to Bullskin Stone and Lime, LLC was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	

ORDER

AND NOW, this 11th day of June, 2014, it is hereby ordered that the above-captioned appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 11, 2014

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al., Appellants and SPRINGTON POINTE ESTATES HOMEOWNERS ASSOCIATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-192-M (Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	**Issued: June 18, 2014**

OPINION AND ORDER
ON MOTION TO COMPEL

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants an unopposed motion to compel answers to the Department's discovery requests where the appellants have failed to provide answers to those discovery requests within thirty days as required by the Pennsylvania Rules of Civil Procedure.

O P I N I O N

Before the Board is a Motion to Compel Response to the Department's First Set of Interrogatories and Request for Production of Documents to Marc and Therese Derita, Craig and Lara Toerien, and Joseph and Victoria Graham ("Motion to Compel"), filed by the Pennsylvania Department of Environmental (the "Department"). The Motion to Compel is directed at only some of the Appellants in this consolidated appeal, namely, Marc DeRita, Therese DeRita, Joseph Graham, Victoria Graham, Craig Toerien, and Lara Toerien (collectively, the "DeRita Appellants"). The DeRita Appellants have appealed a decision by the Department of Environmental Protection (the "Department") to approve an Act 537 Official Plan Update

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submitted by Newtown Township, dated October 2012, and revised November 2013. Their appeal, which was originally docketed at 2013-200-M, has been consolidated at 2013-192-M.

The Department filed its Motion to Compel on June 2, 2014, the day on which the discovery period ended in this matter. A response to the Department's Motion to Compel was due fifteen (15) days later, on June 17, 2014. 25 Pa. Code § 1021.93(c). The DeRita Appellants did not respond to the Motion to Compel by that deadline. As a result, the Board deems the DeRita Appellants' failure to respond to the Motion to be an admission of all properly-pleaded facts contained in the Motion. 25 Pa. Code § 1021.91(f); *Barton v. DEP*, 2012 EHB 441, 442.

The Motion to Compel states that on April 2, 2014, the Department served on the DeRita Appellants a first set of interrogatories and first request for production of documents. In proceedings before the Board, answers to interrogatories and requests for production of documents must be served within thirty days after service. Pa.R.C.P. Nos. 4006(a)(2) and 4009.12(a).[1] Thus, the DeRita Appellants' answers were due on May 2, 2014. The Department did not receive the DeRita Appellants' answers by that deadline. The Department still has not received answers to its discovery requests from the DeRita Appellants. The Department subsequently filed its Motion to Compel under 25 Pa. Code § 1021.93.

The Board has the authority to compel a party to provide answers to discovery requests. Pa. R.C.P. 4019(a)(1)(i), (vii), and (viii); 25 Pa. Code 1021.93(c); *Mann Realty, Inc. v. DEP*, 2013 EHB 730, 731; *DER v. U.S. Steel Co.*, 1977 EHB 323. In consideration of the Department's Motion to Compel and in light of the DeRita Appellants' failure to respond to the Motion to Compel, we issue the following order.

[1] Under the Board's Rules, discovery proceedings must conform to the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al., Appellants and SPRINGTON POINTE ESTATES HOMEOWNERS ASSOCIATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-192-M (Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 18th day of June, 2014, it is hereby ordered that the Department's Motion to Compel Response to the Department's First Set of Interrogatories and Request for Production of Documents to Marc and Therese Derita, Craig and Lara Toerien, and Joseph and Victoria Graham is **granted**, and the Appellants Marc DeRita, Therese DeRita, Joseph Graham, Victoria Graham, Craig Toerien, and Lara Toerien shall provide answers to the Department's first set of interrogatories and first request for production of documents by **June 30, 2014**.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: June 18, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN CASEY	:	
	:	
v.	:	**EHB Docket No. 2012-070-C**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSY SUPPLY, INC., Permittee, and DORRANCE TOWNSHIP, Intervenor	:	**Issued: June 20, 2014**

OPINION AND ORDER ON
MOTIONS FOR DISMISSAL AND SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board grants in part and denies in part a permittee's Motion for Summary Judgment where the appellant, bearing the burden of proof in this case, has not produced sufficient evidence of facts essential to his cause of action under Pennsylvania Rule of Civil Procedure 1035.2(2) for four of his six objections and/or has abandoned his objections contrary to 25 Pa. Code § 1021.94a(k). For the remaining issues, it is not clear as a matter of undisputed fact that the quarry's expansion will not have an adverse impact on special protection waterways and wetlands. Having ruled on the motion for summary judgment, it is unnecessary to reach the Department's Motion to Dismiss.

OPINION

This matter began with Appellant Kevin Casey filing an appeal of the Department of Environmental Protection's (the "Department's") March 12, 2012 issuance of Noncoal Surface Mining Permit No. 40090302 (hereinafter the "2012 permit") to Permittee Pennsy Supply, Inc. ("Pennsy Supply") for Small Mountain Quarry III, located in Dorrance Township, Luzerne

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County. The permit also incorporates NPDES Permit No. PA0224782. The 2012 permit was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act of 1984, 52 P.S. §§ 3301 – 3326. The appeal was filed on April 10, 2012 and perfected on May 2, 2012. The 2012 permit encompassed and replaced Noncoal Surface Mining Permits 40870301 and 40010301 and added an additional 184.0 acres to the permit area.

Mr. Casey's Notice of Appeal listed six objections to the issuance of the permit: (1) there will be adverse impacts to Balliet Creek, to Big Wapwallopen Creek and some of its unnamed tributaries ("UNT"s), and to adjacent exceptional value ("EV") wetlands; (2) there will be adverse impacts to adjacent property owners' quiet enjoyment of their property and to their private water wells due to blasting and the disturbance of the water table; (3) a report prepared for Dorrance Township by hydrogeologist Robert Hershey, P.G. that criticized the data from Pennsy Supply's test wells undermines the assertion that the mining operation will not have adverse impacts on the above-named waterways and wetlands; (4) Pennsy Supply does not own all of the mineral rights within the permitted area; (5) the mining operation will create adverse impacts and hazardous conditions on Small Mountain Road in Dorrance Township; and (6) the Dorrance Township Supervisors have not approved a conditional use permit for the expansion of the mining operation. All of these objections are in support of Casey's contention that in issuing the permit the Department acted unreasonably or contrary to the law.

On September 26, 2012, the Board issued an order in response to Dorrance Township's petition to intervene in the case, declaring Dorrance Township an interested party and admitting it as a party to the case. On December 19, 2012, the Board issued an opinion and order granting Pennsy Supply's motion in limine seeking to preclude Casey from using Robert Hershey as his expert witness and from using an expert report prepared by Hershey for Dorrance Township

during its zoning hearings. We reasoned that the Board cannot compel Hershey to testify on behalf of Casey when Hershey refuses to do so and that any use of Hershey's expert report constitutes inadmissible hearsay because the Department was not a party to the zoning proceedings for which the report was drafted. *Casey v. DEP*, 2012 EHB 461, 463-64. We also precluded Casey from introducing any and all expert testimony at hearing because he failed to designate any expert witnesses in his responses to discovery. 2012 EHB at 464-65.

On May 9, 2013, the Department filed a motion to dismiss. The Department argues that because Mr. Casey has been precluded from introducing expert testimony, he cannot make out a prima facie case as to his six objections, as required by the party bearing the burden of proof, and therefore dismissal is appropriate. The motion was supported by exhibits, including the 2012 permit and the January 10, 2013 decision of the Dorrance Township Board of Supervisors, which granted conditional use approval for the quarry's expansion.

Pennsy Supply filed a motion for summary judgment on May 10, 2013. This motion was also supported by a number of exhibits, including the permit, excerpted modules from the permit application, and excerpts of depositions. Pennsy Supply argues that summary judgment is appropriate under Pennsylvania Rule of Civil Procedure 1035.2(2), which provides for summary judgment upon motion when the party bearing the burden of proof has failed to produce any evidence in support of facts essential to the cause of action. Pennsy Supply asserts that Casey has not produced any evidence essential to his appeal and, further, that he cannot meet his burden of proof since he has been precluded from introducing expert testimony. On May 30, 2013, Pennsy Supply sent a letter to the Board concurring in the Department's motion to dismiss.

Mr. Casey responded to both the motion to dismiss and the motion for summary

judgment on June 11, 2013. His responses to the two motions are nearly identical and contain essentially the same arguments. Casey argues that there is sufficient evidence within the Department's permit file to support his contention that the Department erred in issuing the permit to Pennsy Supply. Specifically, he contends that Pennsy Supply acknowledges in its application that it will have an adverse impact on special protection waterways and wetlands, which he argues is prohibited under the antidegradation regulations found in Chapter 93 of Pennsylvania Code Title 25. Notably, in Casey's briefs submitted in opposition to the motion to dismiss and motion for summary judgment, he only discusses two of the six issues raised in his Notice of Appeal, all of which are addressed in the two pending dispositive motions. Nowhere in his briefs does he make an argument with regard to adverse impacts to adjacent property owners, Pennsy Supply's ownership of mineral rights, impacts to Small Mountain Road, or the conditional use permit. The Department filed a reply brief on June 24, 2014, arguing that Casey cannot rely on Robert Hershey's work and that dismissal is still appropriate. Pennsy Supply filed a reply brief on June 25, 2013, highlighting Casey's lack of response to four of the issues and reiterating the request for summary judgment. Intervenor Dorrance Township did not submit any filings regarding the two motions.

Discussion

We will first address Pennsy Supply's motion for summary judgment. As a third-party appealing the Department's issuance of a permit, Casey has the burden of proof. 25 Pa. Code § 1021.122(c)(2).[1] The Board may grant summary judgment if the record shows that there is no

[1] Casey argues that Pennsy Supply "refuses to recognize [its burden] to show that no degradation of Balliet Run or the associated exceptional value wetlands will occur." However, he confuses the placement of the burden. The Department determines during the permit application process if a permittee has demonstrated that no degradation will occur from the project and then the Department accordingly denies or issues a permit. If the permit is issued, it is then incumbent upon the third-party appellant to show that the Department erred in that determination. Regarding the antidegradation requirements, the burden only

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Berks Cnty. v. DEP*, 2012 EHB 23; *Yoskowitz v. DEP*, 2005 EHB 401; *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in light most favorable to the nonmoving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *City of Phila. v. DEP*, EHB Docket No. 2013-047-L, slip op. at 5 (Opinion and Order issued Mar. 19, 2014); *Holbert v. DEP*, 2000 EHB 796.

The Pennsylvania Rules of Civil Procedure provide that summary judgment is appropriate in circumstances where the party carrying the burden of proof has failed to produce "evidence of facts essential to the cause of action" after the close of discovery. Pa.R.C.P. No. 1035.2(2). Rule 1035.2(2) is met when a showing is made that the party with the burden of proof "has failed to produce either any evidence to support his allegations or not enough evidence to have made out a prima facie case." *Goetz v. DEP*, 2003 EHB 16, 19; *Eagleshire v. DEP*, 1998 EHB 610, 615; *see also Kleinberg v. SEPTA*, 765 A.2d 405, 408 (Pa. Cmwlth. 2000) ("[W]here a motion for summary judgment has been made and properly supported, parties seeking to avoid imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.").

Rule 1035.3(a) further provides that "the adverse party may not rest upon the mere allegations or denials of the pleadings" but must respond and identify either (1) "one or more issues of fact arising from evidence in the record controverting the evidence cited in support of

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shifts when a challenger shows that the project "presents a significant and credible risk of harm" to the water quality of streams or the functions and values of wetlands. *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 772-73; *see also Crum Creek Neighbors v. DEP*, 2009 EHB 548, 567 and 569-70; *Lehigh Twp. v. DEP*, 1098, 1112; *CRY v. Dep't of Envtl. Res.*, 639 A.2d 1265, 1269 (Pa. Cmwlth. 1994); *Marcon v. Dep't of Envtl. Res.*, 462 A.2d 969, 971 (Pa. Cmwlth. 1983).

the motion..." or (2) "evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.C.P. No. 1035.3. "[T]he opposing party must do more than allege unsupported allegations. Bald allegations are insufficient to create an element necessary for a prima facie case. Neither can bald, conclusory allegations create genuine issues of material fact." *Golaschevsky v. Dep't of Envtl. Res.*, 683 A.2d 1299, 1302 (Pa. Cmwlth. 1996), *aff'd*, 720 A.2d 757 (Pa. 1998) (internal citations omitted).

Further, our Rules provide that a response in opposition to a motion for summary judgment must set forth specific facts establishing a genuine issue of material fact and must be supported by affidavits from witnesses or other admissible evidence in the record. 25 Pa. Code § 1021.94a. In short, an appellant "must identify evidence in the record which indicates that he can prove that the Department made some error by approving the Permit, or which contradicts the statements made by the Department's witnesses with other evidence that would be admissible at a hearing." *Jackson v. DEP*, 2005 EHB 496, 498-99 (internal citations omitted); s*ee also Matusinski v. DEP*, 2008 EHB 489, 495 ("[M]erely making statements of denial in a response to a properly supported motion for summary judgment is insufficient to demonstrate the existence of a material fact in dispute."); *Pekar v. DEP*, 2007 EHB 291, 298 ("Mr. Pekar may not rely merely on assertions in the notice of appeal or conclusory statements in his correspondence, but must show that he is able to produce admissible evidence in support of his objections."); *Gera v. DEP*, 2006 EHB 635, 647 (granting summary judgment where an appellant failed to support his claims with relevant, admissible evidence).

Regarding four out of the six issues raised in his Notice of Appeal, Mr. Casey has not produced any record evidence to rebut the motion for summary judgment, nor has he produced any record evidence to establish any facts essential to his appeal. For those issues, the motion

for summary judgment is granted. For the remaining two issues, the motion is denied. We will discuss each issue below. In doing so, we note that our *de novo* review allows us to consider the permit issuance anew and we are not constrained by what the Department considered in reviewing the permit application. *City of Phila. v. DEP*, *supra*, slip op. at 6; *O'Reilly v. DEP*, 2001 EHB 19; *Young v. Dep't of Envtl. Res.*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991).

Objection 1—Adverse Impacts to Waterways and Wetlands

Mr. Casey's primary claim is that Pennsy Supply's Small Mountain Quarry III will adversely impact Balliet Run, Big Wapwallopen Creek and some of its unnamed tributaries, and adjacent exceptional value wetlands in the area. Although Casey seems to view the potential impacts to streams and wetlands as one issue, we believe that they are two distinct issues that are treated somewhat differently under the law. Special protection waters and special protection wetlands are addressed in different chapters of the Pennsylvania Code, Chapter 93 and Chapter 105 of Title 25, respectively. Balliet Run is a high quality Class A wild trout stream that warrants special protection under Chapter 93. Additionally, according to the parties, given the proximity of wetlands to Balliet Run, these wetlands are qualified as exceptional value under 25 Pa. Code § 105.17(1)(iii), because the wetlands fall within the floodplain of a wild trout stream.

Impacts to Waterways

We will first discuss potential impacts to Balliet Run and Big Wapwallopen Creek and its unnamed tributaries. As a high quality waterway, Balliet Run is afforded special protection under the law. The antidegradation requirements of Chapter 93 provide that "the water quality of High Quality Waters shall be maintained and protected," except when a satisfactory social or economic justification is provided pursuant to 25 Pa. Code § 93.4c(b)(1)(iii). 25 Pa. Code § 93.4a(c).

There are a number of aspects of this project as it relates to Balliet Run that raise questions and do not warrant granting summary judgment. Essentially, there seems to be some inconsistency in the 2012 permit and application documents as to whether Balliet Run will receive a discharge and whether the Department considered that Balliet Run is projected to suffer a loss in flow. The NPDES permit that forms Part A of the 2012 permit states that there will be a discharge to an unnamed tributary to Big Wapwallopen Creek and then explicitly states that there shall be no discharge to Balliet Run. In addition, Special Condition 5 under Part B of the permit states, "There shall be no point-source discharge of water from the area authorized by this SMP to Balliet Run." We take these to mean that there will in fact be no discharge to Balliet Run.

However, there are areas of the permit application that acknowledge impacts to Balliet Run and make us question the assertions in the NPDES permit and Special Condition 5. Module 8 of the permit application, concerning hydrology, lists Balliet Run as a stream receiving drainage from the Quarry. It is unclear how this reconciles with the no discharge provision of the NPDES permit. Additionally, the Groundwater Flow Model attached to Module 8 states that under average conditions, quarry pit dewatering is projected to cause a 10% reduction of flow in Balliet Run. The Hydrogeologic Evaluation also attached to Module 8 states that the predicted inflow rate to the new quarry pit is projected to be 107 gallons per minute (gpm), 80 gpm of which are projected to come from a reduction of flow in Balliet Run. Among other things, it is unclear whether Pennsy Supply or the Department evaluated the effect of a potential reduction in the assimilative capacity of Balliet Run due to this flow reduction and how that might impact its water quality in terms of the water quality criteria outlined in 25 Pa. Code § 93.4b.

In addition, Module 14, pertaining to streams and wetlands, contains information regarding a drainage swale that will carry discharge from the reclaimed mining pit to Balliet

Run. We do not find in the documents before us to what extent the Department considered the proposed reclamation plan's effects on Balliet Run or when the proposed reclamation plan is projected to go into effect. Without further explanation, we cannot conclude as a matter of undisputed fact that the unpermitted drainage to Balliet Run, coupled with a projected flow reduction, will not result in degradation to the waterway.

The Department has imposed special conditions on the permit that purport to guard against potential pollution to Balliet Run. In Part B of the 2012 permit, Special Condition 12 states,

> If, during the course of mining, the permittee pollutes or in any manner degrades the water quality in Balliet Run or the unnamed tributary to Big Wapwallopen Creek, then mining shall cease until the pollution caused by the permittee has been abated. Mining shall resume only when the Surface Mine Conservation Inspector and the Pottsville District Office are satisfied that the permittee has successfully and permanently abated the source of pollution.

Although this special condition can be seen as providing assurance, we are unsure why it is necessary if there will be no discharge to Balliet Run in the first place. This condition seems to suggest the possibility of a failure in the Quarry's design or an oversight in operations that could lead to pollution to Balliet Run.

Special Condition 20 requires Pennsy Supply to consult with the Department before conducting any mining or support activities other than monitoring within the Balliet Run watershed so that the Department can assess whether the controls and procedures are adequate to prevent runoff from reaching Balliet Run and the associated wetlands. Although this is another condition that provides some assurance to the concerns of potential degradation of Balliet Run, it seems to contemplate future work that will impact Balliet Run. It is unclear why the Department would delay consideration of future impacts to Balliet Run when permitting an expansion of 184

acres. While we are not saying that there is anything necessarily wrong with these conditions, or the permit as it applies to Balliet Run, the apparent inconsistency does not give us cause to grant summary judgment for Pennsy Supply without further explanation.

Mr. Casey also has objections regarding discharges to Big Wapwallopen Creek and appurtenant UNTs. Although nothing strikes us as obviously wrong with the permit application materials regarding Big Wapwallopen Creek, we do not believe it is appropriate to isolate Big Wapwallopen Creek and its UNTs from consideration while evaluating whether the regulatory requirements were satisfied regarding Balliet Run. The NPDES permit and the discharges and runoff from the Quarry must be evaluated in terms of the system of water bodies that stand to be affected by the proposed activity. Therefore, any potential effect to Big Wapwallopen Creek or its UNTs will also be considered during the hearing on the merits.

Impacts to Wetlands

In addition to the alleged impacts to Balliet Run, Casey argues that the permit application demonstrates that the quarry operation will have an indirect impact on exceptional value wetlands and that any direct or indirect impact on EV areas is a per se violation of the Clean Streams Law of 1937, 35 P.S. §§ 691.1 – 691.1001. Casey heavily relies on *Oley Township v. DEP*, 1997 EHB 1098, to make his argument, but we do not necessarily find that case to be persuasive in the present situation.[2] Casey picks out isolated statements from *Oley Township* that are broad axioms about what constitutes pollution under the Clean Streams Law. (E.g. "Thus any physical or biological alteration of the wetlands or other water resources as a result of the proposed project would constitute pollution under Section 611, and thereby violate the Clean Streams Law." 1997 EHB at 1118.) We are not disputing the legitimacy of the statements in

[2] We feel compelled to note that the vast majority of Casey's argument on this point consists of the near verbatim re-appropriation of language taken from comments submitted to the Department by PennFuture regarding the permit in 2009. (*See* Exhibit D to Casey's response to summary judgment.)

Oley Township, simply their relevance to the instant case.

Casey construes these statements in absolutist terms to mean that there can never be a discharge to a water of the Commonwealth that is not in violation of the Clean Streams Law. This is not true. The entire permitting regime contemplates discharges to waters of the Commonwealth. Permits exist to provide a limited allowance of an otherwise unlawful activity. The Clean Streams Law is premised upon a scheme where those seeking to discharge into waters of the Commonwealth apply to the Department for permits and the Department undertakes a review of the application to determine whether or not the proposed activity would have an adverse effect on those waters. *See* 35 P.S. § 691.402. That evaluation either serves as the basis for a permit denial, or it provides a foundation for the establishment of permit conditions and effluent limitations so as to preserve the overall quality of the waters of the Commonwealth. Any allegation that the Clean Streams Law wholly bars any discharge is inconsistent with the activities that the law contemplates.

With that being said, the statutory and regulatory scheme is still designed to preserve the water quality of special protection waters and the functions and values of special protection wetlands. The question remains whether in the instant case Pennsy Supply complied with the applicable regulations regarding special protection wetlands and whether the Department conducted a proper review.

Pennsylvania Code Title 25, Chapter 105 governs the assessment of effects to wetlands. Specifically, 25 Pa. Code § 105.18a(a) applies to permitting activities in EV wetlands:

> [T]he Department will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise affecting an exceptional value wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a written finding that the following requirements are met…

The requirements include that (1) the dam, water obstruction, or encroachment will not have an adverse impact on the wetland in accordance with Sections 105.14(b) and 105.15; (2) that the project is water-dependent; (3) that there is no practicable alternative to the proposed project that would have a less adverse effect on the environment or other wetlands; (4) that the project will not cause or contribute to a violation of a water quality standard; (5) that the project will not pollute surface or groundwater or interfere with their uses; and (6) that the cumulative effect of the project will not impair the Commonwealth's EV wetlands. 25 Pa. Code § 105.18a(a). Pennsy Supply's permit application identifies all of the relevant requirements of Sections 105.18a(a) and 105.14(b) and rephrases them in a way purporting to satisfy all of the requirements.

However, there are portions of the permit application that we find unclear in terms of if these requirements are fully satisfied. Mr. Casey focuses on aspects of Module 14 that he argues acknowledge *indirect* impacts to wetlands. Module 14.4(d)(2) of the application states that pursuant to the hydrology study conducted by Pennsy Supply, the proposed expansion of the Quarry is not anticipated to have any *direct* impacts on wetlands. The module then discusses the different segments of wetlands in the area and focuses on "several fingers" of the wetland complex "that extend north, cutting upslope into the project site." After discussing the hydrologic characteristics of the wetland fingers, Pennsy Supply concludes that the fingers will not be directly impacted by the proposed expansion, "but due to their location on the topography there could be some indirect impacts to the supporting hydrology." The application module then goes into detail about proposed swales and infiltration beds that will purportedly mimic the existing variable hydrologic regime and mitigate any indirect impacts to the finger wetlands due to a predicted loss of acres to the wetlands' drainage area.

Module 8 contains a hydrogeologic study that evaluates the effects of a pump test on the hydrogeologic area associated with the proposed quarry expansion. The study notes an indirect impact to a portion of the wetlands that would involve the removal of part of the wetland recharge area. However, the study concludes that this indirect impact can be reduced or even eliminated through BMPs such as infiltration trenches. Finally, Special Conditions 22 and 23 of the 2012 permit authorize limited activity within 100 feet of the jurisdictional boundary of EV wetlands.

In reviewing these sections of the permit application, there are specific regulatory requirements that give us pause. Section 105.14(b) requires the Department to consider a number of factors in reviewing a permit application to determine whether the project will have an impact on wetlands. Important for our purposes is the requirement that states,

> Secondary impacts associated with but not the direct result of the construction or substantial modification of the dam or reservoir, water obstruction or encroachment in the area of the project and in areas adjacent thereto and future impacts associated with dams, water obstructions or encroachments, the construction of which would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose.

25 Pa. Code § 105.14(b)(12). The next requirement states, "For dams, water obstructions or encroachments in, along, across or projecting into a wetland, as defined in § 105.1 (relating to definitions), the Department will also consider the impact on the wetlands values and functions in making a determination of adverse impact." 25 Pa. Code § 105.14(13). The word "along" is defined in Chapter 105 as "[t]ouching or contiguous; to be in contact with; to abut upon." 25 Pa. Code § 105.1.

In considering these regulations, we do not have enough evidence one way or the other to determine whether or not the activities affecting the supporting hydrology of the EV wetlands

and the limited activities allowed within 100 feet of the wetlands are in compliance with the regulations, or if the loss of wetland recharge areas will affect the EV wetlands in violation of 25 Pa. Code § 105.18a(a). It is unclear whether the Department fully evaluated the secondary impacts and future impacts that the Quarry will have on the wetlands, during operation and during reclamation. It is also unclear whether Pennsy Supply's proposed activities fall under the definition of "along" and, if so, whether the Department appropriately evaluated the impacts in that context. We simply do not have enough evidence to decide this issue without proceeding to a hearing on the merits.

Casey argues that the Department must make its own independent determination that the quarry operations will not degrade any EV wetlands. Although Casey does not point to any regulatory or statutory requirement mandating that the Department make an independent analysis, the Department is required under 25 Pa. Code § 105.18a(a) to issue a written finding that the proposed activity will not have an adverse impact to EV wetlands and that the project satisfies the other requirements of the subsection. The parties do not direct us to where these findings are memorialized, or if they were made for this permit. This is an important regulatory requirement that the Department must comply with. *See Forwardstown Area Concerned Citizens Coalition v. DEP*, 1995 EHB 731 (granting summary judgment on the issue of the Department's failure to make a written finding under 25 Pa. Code § 86.37 that a mining permit revision satisfied all of the regulatory requirements). It is for this additional reason that we cannot grant summary judgment.

Finally, Casey contends that the permit application contains hydroflow hydrographs prepared by Pennsy Supply that "show substantial impacts upon exceptional value wetlands feeding Balliet's Run and substantial reduction in the drainage areas feeding these wetlands as a

result of Pennsy's permitted mining activities." Although Casey attaches some of these hydrographs as Exhibit C to his response to Pennsy Supply's motion, without an expert he has no way of being able to interpret and explain these hydrographs, particularly how they demonstrate the likely degradation of EV wetlands. Although the point Casey wishes to make with the hydrographs is not self-evident, he can presumably use these hydrographs during the examination of witnesses.

Without his own experts, Mr. Casey cannot offer an opinion as to whether the proposed mitigation measures are insufficient or inadequate to guard against any adverse impact to the EV wetlands. He cannot pick apart Pennsy Supply's detailed proposal of swales and infiltration beds and claim that they will not work or that better options exist. He cannot contest the underlying hydrologic study that grounds all of Pennsy Supply's assertions regarding the wetlands and the proposed mitigation measures. However, Casey can question witnesses involved in the permit application and its review to test whether all of the regulatory requirements were satisfied. In this respect, Casey does not need to disprove any of the conclusions in the permit application regarding the hydrology, or dispute the data upon which Pennsy Supply's study relies, but rather confirm that the Department conducted the analysis that it was required to conduct under the regulations and that the permit application and the permit itself satisfy those requirements under the law.

Objection 3—Robert Hershey Report

Mr. Casey's objection based on Robert Hershey's expert report ties into his argument about impacts to special protection waters and wetlands. Our prior Opinion and Order on Pennsy Supply's motion in limine has precluded Casey from using this report that Hershey had prepared for the Dorrance Township supervisors. Specifically, we said, "Hershey has been retained by

Dorrance Township to do work for them and he has stated that he is unable to testify as Casey's expert. The Board cannot compel Hershey to testify as an expert for Casey." *Casey*, 2012 EHB at 463. We also cited *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979, 982 (Pa. Cmwlth. 1992), for the proposition that "It is equally clear under Pennsylvania law that a court has no power to compel expert testimony because a private litigant has no right to compel a citizen to give up the product of his brain anymore than he has a right to compel the giving up [of] material things." *Casey* at 463-64; *Weiss v. DEP*, 1997 EHB 39, 40. We also found that any use of Hershey's report was inadmissible hearsay under Pa.R.E. 801(c). *Casey* at 464.

Casey repeatedly cites to the Hershey report in his responsive filings and attaches as exhibits numerous letters from Hershey to the solicitor of Dorrance Township. Although we have precluded Casey's use of the Hershey Report at trial, it is conceivable, although unlikely, that another party could introduce the report into evidence at trial. In that circumstance, Casey could raise his concerns. With that caveat, and our understanding that this objection is simply a subpart of his greater argument on impacts to waters and wetlands, we will not grant summary judgment on this issue.

Objections 2, 4, 5, and 6

The remainder of Casey's objections appear to have been abandoned because Casey did not address them in his responsive filings to the dispositive motions. The only other issue that Casey addresses even in passing is the issue of whether Pennsy Supply has the requisite zoning approval to proceed with the quarry expansion. In regard to this issue, the Department points out in its motion to dismiss that Casey's objection regarding the conditional use permit is moot because the Dorrance Township Board of Supervisors granted Penny Supply conditional use approval on January 10, 2013. Casey responds in his answer to Pennsy Supply's statement of

undisputed material facts that this approval has been appealed by Casey to the Luzerne County Court of Common Pleas. Casey does not argue this point any further in his briefs. As we have stated before, it is not the Department's role to be a statewide zoning hearing board, nor is it the function of this Board. *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 601; *New Hanover Twp. v. DEP*, 2011 EHB 645, 662-64; *Lyons v. DEP*, 2011 EHB 169, 193. Accordingly, there is no need for us to consider this argument any further.

In choosing not to address the other issues, Casey failed to abide by our Rules at 25 Pa. Code § 1021.94a(k), providing that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing." The Rule then authorizes the Board to grant summary judgment against an adverse party who does not properly respond in accordance with the rule. *See generally Evans v. Thomas Jefferson Univ.*, 81 A.3d 1062, 1069 (Pa. Cmwlth. 2013) ("Failure to comply with applicable rules for responding to a summary judgment motion can constitute a basis for concluding that there is no genuine dispute of material fact and for granting summary judgment against the non-compliant party.") In lieu of a proper response addressing this issue, what we are left with are the mere allegations contained in Casey's Notice of Appeal.

We are under no obligation to assume the role as Casey's advocate and argue issues that he has failed to argue himself. As the Pennsylvania Superior Court has recognized, in the absence of a complete and adequate response to a motion for summary judgment, a trial court is not under a duty to scour the record for every conceivable ground on which to deny summary judgment. *See Harber Phila. Ctr. City Office v. LPCI*, 764 A.2d 1100, 1105 (Pa. Super. 2000); *see also id.* ("Because, under Rule 1035.3, the non-moving party must respond to a motion for

summary judgment, he or she bears the same responsibility as in any proceeding, to raise all defenses or grounds for relief at the first opportunity. A party who fails to raise such defenses or grounds for relief may not assert that the trial court erred in failing to address them.")

Although some of his objections did not necessarily require expert opinions, we find that Casey still has provided no evidence necessary to support his remaining four objections. An appellant's failure to respond to a motion for summary judgment citing evidence of record indicating that the appellant might be able to meet the burden of proof at a hearing on the merits is fatal under our Rules and the Pennsylvania Rules of Civil Procedure. *Pekar*, 2007 EHB at 297; *see also Matusinski*, 2008 EHB at 495; *Gera*, 2006 EHB at 647; *Jackson*, 2005 EHB at 498-99; *Goetz*, 2003 EHB at 19; *Eagleshire*, 1998 EHB at 615. Mr. Casey's failure to address four out of the six issues subject to the dispositive motions leaves us with little by which to evaluate his opposition to the motions. Therefore, summary judgment is granted pursuant to Pa.R.C.P. No. 1035.2(2) for the issues of whether Casey's neighbors will suffer adverse impacts, whether Pennsy Supply owns all of the mineral rights in the permitted area, whether there will be adverse impacts to Small Mountain Road, and whether Pennsy Supply has a valid conditional use approval from Dorrance Township.

For the issues related to impacts on waterways and wetlands, Casey has pointed out enough items in the permit application to give us pause and not conclude as a matter of undisputed fact that Pennsy Supply's Small Mountain Quarry III will not have any adverse impact to special protection waters and wetlands. We will consider these issues at the hearing on the merits.

Having resolved the matter under Pennsy Supply's motion for summary judgment, we need not reach the Department's motion to dismiss, although much of our discussion is also

applicable to that motion since the Department makes many similar arguments.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN CASEY	:	
	:	
v.	:	**EHB Docket No. 2012-070-C**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSY SUPPLY, INC., Permittee, and DORRANCE TOWNSHIP, Intervenor	:	

ORDER

AND NOW, this 20th day of June, 2014, it is hereby ordered that Pennsy Supply Inc.'s Motion for Summary Judgment is **granted in part and denied in part**. The issues to be addressed at hearing are whether the Small Mountain Quarry III will have an adverse impact on waters and wetlands. The Board will contact the parties to schedule a conference call.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 20, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GERTRUDE MCPHERSON AND CHARLES MCPHERSON	:	
v.	:	**EHB Docket No. 2014-060-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and XTO ENERGY, INC., Permittee	:	**Issued: June 27, 2014**

OPINION AND ORDER ON
MOTION FOR EXPEDITED HEARING

By Steven C. Beckman, Judge

Synopsis

The Board denies a motion for an expedited hearing where the motion did not conform with the Board's Rules and the Board had already shortened the pre-hearing schedule in the matter.

O P I N I O N

Pending before the Pennsylvania Environmental Hearing Board is Permittee XTO Energy's Motion for an Expedited Hearing. For the reasons that follow, the Board denies XTO's motion.

Background

On or about May 7, 2014, Gertrude and Charles McPherson (the "McPhersons") initiated their *pro se* appeal of the Department of Environmental Protection's issuance of permits to XTO Energy for the planned Bergbigler A Unit wells in Butler County. On May 8, the Board issued Pre-Hearing Order No. 1 Scheduling Discovery and Filing of Dispositive Motions. On June 2, XTO filed the pending motion. On June 11, Counsel for the McPhersons filed a Notice of

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http://ehb.courtapps.com

Appearance in this matter. On June 12, the Board issued an order extending the deadline for responding to XTO's motion one week. On June 19, the McPhersons filed a response and memorandum of law opposing XTO's motion. Finally, the Department filed a letter stating that it does not oppose XTO's motion.

XTO has Failed to Show that Further Expedition of the Hearing in this Matter is Justified

The content of motions for expedited hearings before the Board is covered at 25 Pa. Code Section 1021.96b. The Rule requires that the motion state facts justifying the request *with particularity* supported by affidavits or an explanation of why affidavits were not attached. 25 Pa. Code § 1021.96b(a). The Rule also requires a memorandum of law and a certification that "the moving party has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure an agreement on expediting the proceeding." 25 Pa. Code § 1021.96b(b), (c).

XTO failed to include a memorandum of law and a certification that it had conferred, or attempted to confer, with the McPhersons and the Department in its request. XTO also did not provide any affidavits in support of its request and does not explain its failure to include the required affidavits. In addition to the motion's failure to conform to the Board's Rules, the motion lacks sufficient detail for the Board to find that the burden to XTO outweighs the effect of an expedited hearing on the McPhersons if the motion were granted. For instance, XTO states that its lease obligations require it to "construct the Bergbigler Pad and drill the [wells] within a limited amount of time" or XTO will face termination of leases. XTO Mt. ¶ 3. Without more detail, it is difficult for the Board to determine the exact nature of the alleged impact to XTO, as weighed against that to the McPhersons. As the Board has stated previously:

> In deciding whether or not to grant an expedited hearing, the Board will balance the interests of the parties while considering the

> practical benefits and difficulties of expedited proceeding. Balancing interests is, by its nature, unique to the facts and exigencies of each case and thus must proceed on a case by case basis.

Perano v. DEP, 2010 EHB 91, 94 (citations omitted). "[T]he burden is upon the party requesting such proceedings to show that expedition is appropriate when the request is opposed by the other party." *Id.* at 96. Where the moving party has failed to follow the Board's Rules regarding motions for expedited hearings and largely failed to justify its motion, the Board will not grant the motion.

The Board has *Sua Sponte* Abbreviated the Pre-Hearing Schedule in this Matter

Finally, we note that the Board routinely issues an order setting the pre-hearing discovery and dispositive motion schedule. *See* 25 Pa. Code § 1021.101. In this matter, based on a review of the Notice of Appeal and prior to any request for an expedited hearing, the Board issued a pre-hearing schedule that set discovery and dispositive motion deadlines 60 days earlier than the timeframes frequently granted by the Board. *See* Pre-Hearing Order No. 1, May 8, 2014. We see no reason to further expedite the proceedings at this time. Nevertheless, the Board expects that the parties will cooperate to move this matter forward without undue delay.

We order as follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GERTRUDE MCPHERSON AND CHARLES MCPHERSON	:	
	:	
v.	:	**EHB Docket No. 2014-060-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and XTO ENERGY, INC., Permittee	:	

ORDER

AND NOW, this 27th day of June, 2014, XTO Energy's Motion for an Expedited Hearing is **DENIED**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 27, 2014

c: **DEP, General Law Division:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSTITUTION DRIVE PARTNERS, L.P.	:	
	:	
v.	:	**EHB Docket No. 2014-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 17, 2014**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board finds that a Department letter informing the appellant that the Department is terminating a covenant not to sue and considering whether to subsequently take enforcement action is not an appealable action under the terms of the Consent Order and Agreement entered into by the parties.

OPINION

In 2005, appellant Constitution Drive Partners, L.P. (CDP) purchased property known as the Bishop Tube HSCA[1] site in East Whiteland Township, Chester County, which had at one time been operated as a precious metals processing and stainless steel fabricating facility. The former operations on the site resulted in soil contamination and groundwater contamination that has migrated offsite. On March 17, 2005, CDP entered into a Prospective Purchaser Consent

[1] Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.101 et seq.

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Order and Agreement (the COA)[2] with the Department of Environmental Protection (Department) in which CDP agreed to undertake certain performance measures at the site in exchange for protection from liability. The COA consists of the original agreement and two amendments.

Of particular note are paragraphs 6, 7 and 23 of the COA. Paragraph 6 sets forth CDP's duty of non-interference:

> **6. Non-Interference:** Developer shall not interfere with or impair any response actions taken by the Department, or any other person or entity under the auspices of the Department with regard to the Existing Contamination or any other contamination identified at the Site....

(Exhibit B to Department's Motion)

Paragraph 7 sets forth the Department's covenant not to sue:

> **7. Department's Covenant Not to Sue:** Subject to the Reservation of Rights provided in Paragraph 8 below, the Department covenants not to sue or take any administrative or judicial action against Developer for response costs, response actions, civil penalties, natural resource damages, or injunctive relief, including encumbering the Property (through lien or otherwise), arising from or relating to the release and/or threatened release of hazardous substances defined as Existing Contamination at the Site. These covenants extend only to Developer, except as they may be transferable as stated below and may terminate at the Department's sole discretion upon Developer's failure to meet any of the requirements of the CO&A. These covenants shall take effect upon the effective date of this CO&A.

(*Id.*)

Finally, Paragraph 23 sets forth the parties' agreement as to when a decision under the COA becomes appealable:

> **23. Decisions Under Consent Order:** Any decision that the Department makes under the provisions of this CO&A shall not be

[2] The COA is also sometimes referred to in the parties' filings as "CO&A" or as the Prospective Purchaser Agreement or PPA.

> deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department enforces this CO&A or pursues equitable, administrative, civil or criminal action based on the belief that Developer has failed to comply with any material provision of this CO&A. At no time, however, may the parties challenge the content or validity of this CO&A or challenge the Findings agreed to in this CO&A.

(*Id.*)

In 2011, an independent contractor retained by CDP damaged piping and protective covering on a soil vapor extraction and air sparging system (the SVE/AS system) while conducting salvage operations at the site. According to CDP, the Department agreed that repairs to the system could be delayed until such time as the Department intended to operate the system or CDP intended to commence site redevelopment activities. (CDP Response to Motion, page 3)

On January 28, 2014, the Department issued the letter that is the subject of this appeal (the January 28, 2014 letter). The letter references the damage that occurred in 2011 and states that "this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the [COA] and its two Amendments." (Exhibit 1 to Department's Motion) The letter states that CDP's failure to repair the protective covering of the SVE/AS system constitutes a violation of the COA and its amendments. The letter also contains the following paragraph:

> This is to advise you that DEP now considers the CDP's violation of the PPA [COA] to void the Covenant Not To Sue set forth in Paragraph 7, which states: "These covenants . . . may terminate at the sole discretion of the Department upon [CDP's] failure to meet any of the requirements of the CO&A." Please be advised that this determination is not intended as an appealable action, and DEP will consider whether to exercise its enforcement options related to this determination as matters progress at the site. Immediate demolition of the buildings as CDP has repeatedly proffered will directly impact DEP's consideration of such enforcement options...

(*Id.*)

CDP appealed the letter to the Environmental Hearing Board (Board) on February 27, 2014. The Department has moved to dismiss the appeal on the grounds that the letter is not an appealable action. CDP filed a response to the motion on June 6, 2014, and the Department filed a reply on June 23, 2014.

We evaluate a motion to dismiss in the light most favorable to the non-moving party. *Harvilchuck* v. DEP, EHB Docket No. 2013-202-M (Opinion and Order issued April 1, 2014), *slip op.* at 7; *Teska v. DEP*, 2012 EHB 447, 452. A motion to dismiss may be granted where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *Id.*

Discussion

The Department contends that the January 28, 2014 letter is not appealable under the terms of Paragraph 23 which states that any decision made under the COA is not final or appealable until such time as the COA is enforced or the Department pursues action against CDP. The January 28, 2014 letter specifically states that the Department "will consider whether to exercise its enforcement options. . .as matters progress at the site." The Department argues that the purpose and intent of the letter was simply to notify CDP of the Department's determinations relating to Paragraph 6 of the COA (impairment of response actions) and Paragraph 7 (covenant not to sue) and not to initiate any enforcement action..

In support of its argument, the Department directs the Board to our decision in *Chesapeake Appalachia, LLC v. DEP*, which was recently affirmed by the Commonwealth Court. See, *Chesapeake Appalachia, LLC v. DEP,* 2013 EHB 447, *aff'd,* No. 1570 C.D. 2013 (Pa. Cmwlth. April 3, 2014). Like the present case, the appellant in *Chesapeake* had entered into a COA that contained language similar to that of Paragraph 23:

> **Decisions Under Consent Order and Agreement.** Except for Paragraph 16.c., above [relating to transfers of interest in gas wells], any decision which the Department makes under the provision of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101. Any objection which Chesapeake may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

2013 EHB at 455 (quoting Paragraph 24 of the Consent Order and Agreement). The Department letter at issue in that case involved an evaluation of a corrective action plan submitted by the appellant in connection with the remediation of gas wells and directed the appellant to begin work on certain gas wells and to assess others. The Board found that the letter was not an appealable action because it did not create any new rights or obligations beyond those set forth under the COA. Additionally, the Board pointed to the language of the COA that preserved any appeals until such time as the Department enforced the COA:

> If we were to hold that the Department's letter is appealable, we would have effectively rendered Paragraph 24 meaningless. The letter undeniably expresses a "decision under the COA." By consent, such decisions were not supposed to be appealed. If this letter can be appealed, we are effectively nullifying the agreement. . . . A holding that the letter is appealable by Chesapeake is the same as a holding that the Board will not recognize the terms of a COA even though that COA, by definition, was not appealed and cannot now be appealed. We will have disregarded the parties' bargain, which normally would not be done even in an enforcement or contract action absent fraud, accident, or mistake.

Id. at 465-66 (*citing Com. v. U.S. Steel,* 325 A.2d 324, 328 (Pa. Cmwlth. 1974); *Global Eco-Logical Services v. DEP*, 2001 EHB 99, 102).

CDP argues that the Department's reliance on *Chesapeake* is misplaced because *Chesapeake* involved a letter requiring corrective action, and not the termination of a covenant not to sue. Similarly in *Consol Pennsylvania Coal Co. v. DEP and Citizens Coal Council*, 2013

EHB 683, *appeal docketed*, No. 2257 CD 2013 (Pa. Cmwlth. Jan. 27, 2014), which relied heavily on the *Chesapeake* decision, the Board found that two letters requiring corrective action under a COA were not appealable actions under the terms of the COA. In the present case, CDP argues that, whereas the letter in *Chesapeake* was nothing more than a request with which the appellant could choose to comply or ignore, the voiding of a covenant not to sue carries significant consequences, including interfering with CDP's ability to attract investors or to secure financing or local land approvals for the redevelopment project. In CDP's opinion, the voiding of the covenant is itself the penalty, and forestalling the right to challenge it until some unspecified time in the future violates CDP's right to due process. The question before us then is whether the Department's letter which announced the termination of the covenant not to sue is an appealable action under the terms of the COA.

In determining whether a letter or other communication by the Department is an appealable action, the Board looks at whether the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." *Chesapeake, supra* at 461; *Felix Dam Pres. Ass'n. v. DEP*, 2000 EHB 409, 421-22 (citing 25 Pa. Code § 1021.2). Department "decisions" are appealable when they are "determination[s] which can be classified as quasi-judicial in nature and which affect rights or duties." *Sayreville Seaport Assocs. Acquisition Co., LLC v. DEP*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012) (citing *DER v. New Enterprise Stone and Lime Co., Inc.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976)).

CDP argues that it is adversely affected by the January 28, 2014 letter because the Department's letter voiding the covenant not to sue may have significant, far reaching circumstances, such as exposing CDP to claims by third parties and affecting its ability to attract investors or obtain land use approvals. However, these concerns are purely speculative, and the

Department's letter places no new obligations, duties or liabilities on CDP. Moreover, one can make an argument that *any* decision by the Department under the COA can have a significant or far reaching effect. That is the reason that parties enter into an agreement of this type, in order to avoid piecemeal litigation each and every time the Department makes a decision or issues a letter related to the project in question.

We see no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 375 ("We have consistently held that an NOV containing a listing of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action."), citing, *inter alia*, *Beaver v. DEP*, 2002 EHB 666, 674; *Lower Providence Twp. Mun. Auth. v. DEP*, 1996 EHB 1139, 1140-41; *The Oxford Corp. v. DER*, 1993 EHB 332, 333-34. A notice of violation merely serves to notify the recipient that the Department considers it to be in violation of some statutory provision or regulation, sets forth actions that the recipient must take in order to come into compliance, and may mention the possibility of future enforcement action. Similarly, the January 28, 2014 letter does not require anything of CDP. It simply notifies CDP that the Department considers it to be in violation of Paragraph 6 of the COA and states that the Department will *consider* future enforcement action.

In addition, Paragraph 7 contains the covenant not to sue in which the Department agrees, subject to the Reservation of Rights in Paragraph 8, "not to sue or take any administrative or judicial action against Developer ..." The provision further provides that the "covenant . . . may terminate at the Department's sole discretion upon Developer's failure to meet the requirements of the CO&A." The termination is contingent upon the Developer's violation of the COA and it is subject to the sole discretion of the Department according to the COA that CDP executed with

the Department. At this point, the Department has announced in a letter that it has terminated the covenant not to sue as a result of an alleged violation of the COA and that it now believes it is entitled to sue CDP in the future, although no action to sue has begun. The Department's announcement of the termination of the covenant not to sue is therefore quite similar to the Department's announcement of violations in a notice of violations. The termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the COA. CDP can challenge the termination and the underlying violations in the future when the Department decides to sue CDP.

Even if we accept CDP's argument that the Department's termination of the covenant not to sue has adversely affected its rights, privileges, immunities, duties, liabilities or obligations, Paragraph 23 of the COA, which CDP negotiated with the Department, deprives CDP of the opportunity to appeal it now. Paragraph 23 clearly states that *any* decision the Department makes under the COA shall not be treated as a final action of the Department and shall not be appealable to the Board until the COA is enforced. If the parties had wished to treat the voiding of the covenant not to sue differently than other decisions made under the COA, they very easily could have excluded it from the coverage of Paragraph 23. For example, in *Chesapeake,* the parties included an exception in the COA that would have allowed the appellant to appeal certain types of decisions. The language stated, "*Except for Paragraph 16.c., above [relating to transfers of interests in gas wells]*, any decision which the Department makes under the provisions of the Consent Order and Agreement . . . is intended to be neither a final action . . . nor an adjudication . . ." (emphasis added). In the present case, the parties could just have easily included similar language in Paragraph 23.[3] They did not do so, and the Board is loath to read

[3] For example, the language of Paragraph 23 could have been drafted as follows: "*Except for Paragraph 7 [relating to the Department's Covenant Not to Sue]*, any decision that the Department makes under the

language into the COA that the parties did not include. As we held in *Chesapeake*, the parties "should honor their agreement, and so should we." 2013 EHB at 464.

CDP argues that the Department should not have sole discretion to terminate the covenant not to sue without some meaningful opportunity for challenge or review of that decision. But isn't that precisely what CDP has agreed to? Paragraph 7 gives the Department the right to unilaterally void the covenant not to sue, and Paragraph 23 prohibits CDP from challenging this decision until such time as the COA is enforced. CDP argues that if the Department is allowed to terminate a covenant not to sue without any opportunity for the other party to challenge the decision, it will significantly undermine the Department's credibility in negotiating with redevelopers in the future. CDP may be correct; the Department's actions in this case may very well have a negative effect on its negotiations with future redevelopers wishing to avoid a similar fate as CDP. However, the Department assumes that risk, and it is not up to the Board to protect the Department, in any future negotiations with other parties, from any potential consequences of its actions in this matter involving CDP.

Finally, CDP disputes the Department's finding that it has exacerbated the existing contamination on the property and has interfered with the Department's response actions at the site. CDP asserts that the Department knew of its plans and appeared to be in agreement with them. While this may be a legitimate argument if and when the Department enforces the COA, it is premature at this stage of the proceeding.

Because we conclude that the Department's January 28, 2014 letter is not appealable, we will enter an order granting the Department's motion to dismiss.

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provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board . . ."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSTITUTION DRIVE PARTNERS, L.P.	:	
	:	
v.	:	**EHB Docket No. 2014-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of July, 2014, it is hereby **ORDERED** that the Department of Environmental Protection's Motion to Dismiss is **granted** and this appeal is marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: July 17 , 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSTITUTION DRIVE PARTNERS, L.P.	:	
	:	
v.	:	**EHB Docket No. 2014-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF
JUDGE BECKMAN

By Steven C. Beckman, Judge

The posture of this case is a pending motion to dismiss by the Department. The Majority identifies the standard for evaluating a motion to dismiss; that is, the Board evaluates the motion in the light most favorable to the non-moving party and will grant the motion only where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *See* Majority Op. at 4. An important corollary of that standard is that *all reasonable inferences must be drawn in favor of the nonmoving party. See Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. When reasonable inferences favorable to Constitution Drive Partners, L.P. ("CDP") are properly drawn in this case, the inevitable conclusion is that the Department's motion must be denied at this stage of the litigation.

In my opinion, the issue presented by the Motion to Dismiss raises two questions. The first is whether the Department's January 28, 2014 letter ("Letter") constitutes an appealable action. The second question is, if the Letter is appealable, what is the impact of Paragraph 23 of the Prospective Purchaser Consent Order and Agreement ("COA")?

In the Letter, the Department noted its finding that a contractor for CDP destroyed a liquid boot that capped the Soil Vapor Extraction/Air Sparging ("SVE/AS") system and stated

that "[n]eedless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the PPA." The Department requested that CDP repair the damaged boot but that effort was apparently delayed while CDP considered demolishing buildings at the site. The Department concludes this section of the Letter by stating that "nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments." Had the letter stopped there, I would agree with the Majority that there was "no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable." Majority Op. at 7. The Letter, however, goes further. In the next paragraph, it advises CDP that, as a result of the alleged violations, the Department has determined that the Covenant Not to Sue ("Covenant") found in Paragraph 7 of the COA is void. It is this determination memorialized in the Letter that is the main subject of CDP's appeal.

As the Majority states in its opinion, in evaluating whether a letter from the Department is an appealable action, the Board looks at whether the action outlined in the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." Majority Op. at 6 (citing *Chesapeake Appalachia v. DEP*, 2013 EHB 447, 461). In applying this standard, the Majority dismisses CDP's concerns about the impact of the voiding of the Covenant as "purely speculative" and finds that the Letter places no new obligation, duties or liabilities on CDP. They assert that the Letter is akin to a notice of violation in that it simply notifies CDP of the alleged violations and that the Department will consider future enforcement. Specifically addressing the termination of the Covenant, the Majority states that "the termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the CO&A." Majority Op. at 8.

Dismissing CDP's concerns as speculative and treating the Department's decision to void the Covenant as a simple notification ignores the reality of the agreement between the parties set forth in the COA and the real impact of that decision. At the time the COA was executed, CDP represented that it had not caused or contributed to, and was not responsible for any of the identified contamination on the site and the Department agreed that it was not aware of any information contrary to CDP's representation. Despite having no legal responsibility for the contamination issues at the site, CDP agreed, pursuant to the COA, to be legally bound to conduct certain work to address the contamination at the site. In return for its willingness to take on this work, CDP received the Covenant along with the contribution protection found in Paragraph 9 of the COA.

The Covenant (along with the contribution protection) was the major benefit of the bargain for CDP in entering the COA in the first place. Even the Majority recognizes this fact when it states that CDP entered into a COA with the Department "in which CDP agreed to undertake certain performance measures at the site *in exchange for protection from liability*" Majority Op. at 2 (emphasis added). This protection from liability is the key to allowing development of these types of brownfield sites and plays a significant role in the ability of developers like CDP to obtain the financing necessary to bring these sites back in to productive use. The Department's decision to void the Covenant directly eliminates the central benefit that it provided to CDP under the COA. The Board must draw inferences in favor of CDP, and in doing so, it cannot so readily dismiss CDP's alleged injuries as speculative, or find that this action by the Department was analogous to a mere notification of violation. In my opinion, the Department's decision set forth in the Letter to void the Covenant clearly *enforces* the terms of the COA, and affects the "personal or property rights, privileges, immunities, duties, liabilities or

obligations" of CDP. As such, under our prior rulings, the Letter is a final action of the Department that is subject to appeal to the Board.

The conclusion that the voiding of the Covenant is a final action subject to Board jurisdiction is supported by a review of another provision of the COA. The Majority states that the Department's action simply "alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations," but fails to note that the Department did *not* need to void the Covenant in order to put CDP on notice of the alleged violations and allow for future enforcement. Under the terms of the COA, the Department already has the authority to bring a future enforcement action for any alleged violations. Under the Reservation of Rights found at paragraph 8 of the COA, CDP and the Department agreed that the Covenant Not to Sue "*shall not apply* to the following claims by the Department against Developer for: (1) Failure to meet the requirements of this CO&A" (emphasis added). In light of that reservation, the decision to void the Covenant is clearly more than a notification of alleged violations of the COA and the potential for future enforcement related to those violations. If it is only intended as a notice of violation, why void the Covenant in the first place and not just rely on the reservation of rights provided in Paragraph 8?

It certainly would have been less problematic to have relied on the clear authority under the reservation of rights. It is not difficult to surmise, particularly when viewing the matter in the light most favorable to CDP—as we are required to do—that the Department knew the value of the Covenant to CDP and that voiding it would have a significant impact on CDP even without any further enforcement. It is reasonable to further draw the inference that the Department chose this course of action; that is, *enforcing* a distinct provision of the COA, to pressure CDP to complete the work requested by the Department. Under the terms of the COA, the Department

had a clear right to unilaterally terminate the Covenant upon its determination that CDP failed to meet certain requirements of the COA as a result of the alleged violations. I am not questioning the Department's strategic decision to void the Covenant; however, the decision to do so should not be shielded from Board review simply by a claim that the Department's action was only advisory.

Because I find that the voiding of the Covenant as set forth in the Department's Letter is an appealable action, it is necessary to consider the second question posed by the issue in this case, that is, what is the impact of Paragraph 23 of the COA on CDP's current appeal? The relevant part of Paragraph 23 provides that "[A]ny decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department *enforces this CO&A or pursues equitable, administrative, civil, or criminal action* . . . ." (emphasis added). The Department's voiding of the Covenant is clearly a decision of the Department within the meaning of this paragraph and none of the parties appear to seriously dispute that fact. Further, I agree with the Majority that the parties could have drafted the language of this provision to specifically exclude the decision to terminate the Covenant, but the fact that they did not do so here is not determinative in my opinion.

The issue, as I see it, is whether any of the triggering actions by the Department that would lift the prohibition on an appeal have taken place. In other words, has the Department enforced the COA or otherwise pursued equitable, administrative, civil or criminal action? Given that the Majority finds the Letter to be analogous to a notice of violation, the inference they draw is that no enforcement action has taken place. This view is consistent with a narrow interpretation of what constitutes enforcement under Paragraph 23. The Majority apparently

reads "enforcement" in that paragraph to simply mean the type of enforcement typical of the Department, that is, pursuing administrative or civil action against a party.

While I do not disagree that that reading is plausible, it essentially discards one clause from the Paragraph and ignores the use of the conjunction "or" in the key phrase. From the actual wording of the clause agreed to by the parties, it is just as plausible to draw the inference that the parties intended to distinguish between "enforc[ing] this CO&A" and "pursu(ing) equitable, administrative, civil or criminal action." Under this reading, enforcing the COA would not involve the Department's typical enforcement action as the Majority finds, but rather incorporates the Department's exercise of its contractual right to void the Covenant. Given that the Board must evaluate this Motion in the light most favorable to CDP, this approach to the meaning of Paragraph 23 should be taken where there is nothing in the record to indicate that another interpretation was intended by the parties. In the end, both questions raised by the issue in this Motion to Dismiss are close calls. Our standard of review, however, should lead the Board to resolve close questions in favor of the non-moving party where reasonable inferences support that result. Therefore, because I conclude that doing so in this case requires that the Motion be denied, I dissent from the Majority's decision to grant the Department's Motion.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 17, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY SCHOOL	:	
	:	
v.	:	**EHB Docket No. 2011-136-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	**Issued: July 31, 2014**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board rescinds a depth correction of a noncoal surface mine's permit where the mine's dewatering operations are causing the unabated formation of sinkholes on a boarding school campus, presenting a serious threat to the health, safety, and welfare of the children and adults who live on and use the campus.

FINDINGS OF FACT

I. Background

A. The parties

1. Solebury School (or, the "School"), the Appellant, is a private day and boarding school located at 6832 Phillips Mill Road, New Hope, Pennsylvania 18938. (Stipulation of the Parties Number ("Stip.") 1.)

2. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Act"), 52 P.S. §§ 3301 – 3326, Section 1917-A of the

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Administrative Code of 1929, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated under those statutes. (Stip. 2.)

3. New Hope Crushed Stone & Lime Company ("New Hope"), the Permittee, is a Pennsylvania corporation with its principal place of business located at 6970 Phillips Mill Road, New Hope, Pennsylvania, 18938. (Stip. 3.)

4. Solebury School has approximately 225 day and boarding students in grades 7 through 12. (Notes of Transcript page ("T.") 77.)

5. Approximately 40 percent of Solebury School's upper school students board on campus during the school year. (T. 77, 130.)

6. There are 50 faculty, staff, and their dependents who live on campus. (T. 77.)

7. The School operates a 6-week summer day camp program on its campus serving approximately 125 children per week, ages 4 through 12. (T. 78.)

8. Solebury School is comprised of approximately 90 acres. (T. 78.)

9. Solebury School has numerous sports teams, including soccer, cross country, golf, track and field, lacrosse, and baseball, which use the campus and its grounds for training, practice, and competitive activities. (T. 80.)

10. The School has operated on the present campus since the late 1920s. (T. 77.) Some of the buildings on the campus date back to the 1700s. (T. 81.)

11. Solebury School allows its students to freely roam the entire 90-acre campus with only limited restrictions. (T. 83-85, 159, 223.)

12. The School's campus includes boys' and girls' dormitories, faculty housing, classroom and athletic facilities, and the other features that one would expect to find on a school campus. (T. 80-81, 143-45; Solebury School Exhibit ("S. Ex.") 248.)

13. Adjacent and directly to the east of the School is New Hope's noncoal surface mine quarry. (Stip. 4; S. Ex. 267; New Hope Crushed Stone Exhibit ("N.H. Ex.") 203.)

14. The area around the School and New Hope's quarry is relatively rural with a mix of agricultural and residential use. (T. 83, 156-157; N.H. Ex. 32.)

15. New Hope's property is 215.75 acres. The quarry extracts limestone and dolomite for aggregate use in mainly the road and construction industries. (Stip. 5.)

16. Surface mining is conducted on approximately 141 acres. (Stip. 8.)

17. Mining has taken place at the quarry property since at least 1829. (T. 1174; N.H. Ex. 186.)

18. Mining operations at the quarry up until the 1960s were limited to the removal of rocks from outcrops and surface exposures. These operations did not require dewatering. (S. Ex. 247; N.H. Ex. 186.)

19. The first mining to depth that required the quarry to be dewatered occurred in the late 1960s. (S. Ex. 247.)

20. The Department issued New Hope its first mining permit on March 2, 1976. (Stip. 9.)

21. New Hope operates the quarry pursuant to Noncoal Surface Mining Permit No. 7974SM3C12. (Stip. 7.)

22. Although the original permit approves mining to an elevation of two-hundred feet below sea level (-200 feet MSL (mean sea level)), separate Department permit revisions in the form of "depth corrections" have since been required to mine progressively closer to that level. (T. 1947-48; N.H. Ex. 1, 177.)

23. On January 15, 1995, the Department authorized New Hope to mine to a depth of -35 feet MSL. (N.H. Ex. 177; SMP7974SM3C3.)

24. On March 6, 2006, the Department issued a depth correction authorizing New Hope mine to a depth of -100 feet MSL. (N.H. Ex. 177; SMP7974SM3C7).

25. On December 21, 2007, the Department issued a depth correction authorizing New Hope to mine to a depth of -120 feet MSL. (Stip. 10; N.H. Ex. 177; SMP7974SM3C9.)

26. On July 29, 2011, the Department issued a depth correction authorizing New Hope mine to a depth of -170 feet MSL. (Stip. 7, 26; N.H. Ex. 177; SMP7974SM3C12.) It is this depth correction that is the subject of this appeal.

B. The setting

27. The School and the quarry are located in and above carbonate rocks, such as limestone and dolomite, which have a relatively high degree of solubility. This type of geologic area is referred to as a karst area. (T. 333-37, 349-53, 1371-72, 1859, 1943; S. Ex. 245, 247, 292, 323; N.H. Ex. 176, 214.)

28. Karst is a terrain that is characterized by greater than average soluble rock, thereby resulting in the formation of closed depressions, collapse sinkholes, caves, and conduits that allow the turbulent flow of groundwater. (T. 478; S. Ex. 245.)

29. Carbonate rock dissolves over geologic time. As a result, voids or open spaces form in the rock, often where there are preexisting fractures. Although this is how caves can form, most voids are much smaller than caves. (T. 331-37, 387, 450, 1278-79, 1426-28, 1883; S. Ex. 245.)

30. The voids tend to fill up over geologic time with unconsolidated residual or transported rock material known as regolith. (S. Ex. 245.)

31. If the water table drops below the regolith, there is an immediate drying effect that can cause a loss of cohesion. (N.H. Ex. 176.)

32. Regolith-filled voids can remain stable over geologic periods of time, or events may occur which cause the regolith to migrate away. (T. 333-40, 345, 416-17; S. Ex. 245.)

33. Regolith can wash away below the surface for a while without there being any observable effect at the surface, but at some point the surface may collapse. (T. 333-40, 345, 416-17, 1277-79, 1415.) When this unsupported arch of overburden suddenly falls in, it forms a collapse sinkhole. (T. 323-31, 506-08; S. Ex. 245, 319.)

34. Voids, fractures, bedding planes, and the like, whether filled with regolith or not, are preferential pathways for groundwater flow in karst terrain. (T. 335, 339-40; S. Ex. 245, 247.)

35. In karst, these preferential pathways can develop into conduits that allow groundwater to flow relatively rapidly and in relatively large, concentrated amounts. (T. 432; S. Ex. 245.)

36. Mapping these preferential conduits can be particularly difficult because wells, including monitoring wells, can be hit or miss at best, which limits the conclusions that can be reliably and unqualifiedly reached from tracking water levels in wells in such areas. (T. 711-12; S. Ex. 247.)

C. Primrose Creek

37. Primrose Creek originates in the hills to the west of the School and flows eastward across the School's campus toward the quarry. (Stip. 18; S. Ex. 329.)

38. Primrose Creek's use is designated as Trout Stocking and Migratory Fishes pursuant to 25 Pa. Code § 93.9, Drainage List E. 32. (Stip. 15.)

39. Both Solebury School and the quarry are located within the Primrose Creek Basin. (Stip. 16, 17.)

40. From 1976 to 1995, New Hope's mine consisted of two separate quarry pits, called the North Pit and the South Pit. Primrose Creek flowed on a narrow strip of land that separated the North Pit from the South Pit. (Stip. 11; S. Ex. 247; N.H. Ex. 27-29; Department Exhibit ("DEP Ex.") 121, 182, 183.)

41. Sometime in the early 1990s, a "swallet" opened in the stream channel of Primrose Creek approximately 200 feet west of the quarry's North Pit highwall. (Stip. 12; DEP Ex. 5.)

42. A swallet is a sinkhole in a stream that redirects stream flow down the hole and underground. (S. Ex. 245.)

43. Since the swallet hole opened in the stream channel, Primrose Creek flows into the swallet. (Stip. 12; S. Ex. 80, 245.)

44. The swallet captures the entire flow of the stream in all but the most severe storms and from there water travels underground. (T. 819-20; S. Ex. 80, 245, 246; DEP Ex. 5.)

45. In 1993, the Department issued a permit revision allowing New Hope to mine through the Primrose Creek stream channel that had separated the two pits. New Hope subsequently mined through the channel, eliminated the stream where the pits are now located, and connected the North and South Pits. (T. 1049; S. Ex. 245, 246; N.H. Ex. 177; DEP Ex. 182, 183.)

46. The stream no longer exists in this area, so there is now an upstream reach and a noncontinuous downstream reach that begins with the quarry's pump discharge and terminates at the Delaware River. (T. 915-16; S. Ex. 245, 246; DEP Ex. 120, 174-77.)

II. Sinkhole Formation at the School and Within the Basin

47. In 1989, three collapse sinkholes opened on the Solebury School campus—two in the southwest portion of campus and one in the northeast portion of campus. (T. 165, 258; S. Ex. 70, 267.)

48. The first collapse sinkhole appeared to the east of a pond on campus and measured approximately 3-4 feet across and 2 feet deep. (T. 165; S. Ex. 70.)

49. The second collapse sinkhole appeared to the east of the learning skills classrooms and was larger, measuring approximately 15-20 feet across and 6-8 feet deep. (T. 166-67; S. Ex. 70.)

50. The third collapse sinkhole, which appeared in the area of the baseball field, was the largest of the three, measuring approximately 40-50 feet across and 10 feet deep. (T. 168-69.)

51. This third collapse sinkhole occurred while school was in session and caused significant alarm because it swallowed up several bushes and small trees and created a funnel, or swirling suction, as water ran into it and down the throat of the collapse. (T. 168-69, 259-60.)

52. Solebury School repaired each of the collapse sinkholes that appeared in 1989. (T. 166-67.)

53. In July 1990, a private well on the School's campus that serviced the Girls' Dorm went dry at a depth of over 200 feet below ground surface (bgs). (T. 252-53; S. Ex. 101.)

54. Drillers hit voids when they attempted to deepen the well and, therefore, the well was abandoned. (T. 252-53; S. Ex. 101.)

55. In November 1991, the School drilled a new well to a depth of 225 feet bgs to service the Girls' Dorm and faculty housing. (T. 255; S. Ex. 101.)

56. In 1992, another collapse sinkhole opened in the northeast portion of the campus near the School's wastewater treatment plant. (T. 175-76; S. Ex. 71, 267.)

57. The 1992 collapse sinkhole measured 50-60 feet across by 12 feet wide and 7 feet deep. (T. 175; S. Ex. 71.)

58. Solebury School remediated the 1992 collapse sinkhole. (T. 176.)

59. In September 1992, the School needed to lower the pump in a well serving its faculty house from 113 feet to 132 feet bgs. (T. 253-55; S. Ex. 101.)

60. In 1994, two collapse sinkholes opened on the School's campus—one in the southwest portion of campus and the other in the northeast portion. (T. 176; S. Ex. 72, 267.)

61. The first collapse sinkhole appeared in the area between the classroom buildings and the wastewater treatment plant. (T. 176.)

62. The collapse sinkhole measured almost a quarter of an acre in size. (T. 176, 262; S. Ex. 72.)

63. The land in the area gave way and collapsed within a period of a couple of hours. (T. 261-62.)

64. The second collapse sinkhole appeared in the area south of the baseball field. (T. 176.)

65. This collapse sinkhole measured 30-40 feet across. (T. 176.)

66. Trees as large as 20 feet fell into the sinkhole. (T. 176.)

67. Solebury School repaired both of these collapse sinkholes. (T. 178-79.)

68. Given their size, it took at least 5-6 weeks and a couple hundred trucks filled with soil to remediate the sinkholes that appeared in 1994. (T. 179.)

69. In February 1995, the well servicing the faculty houses on the Solebury School campus went dry at an approximate depth of 138 feet bgs and was abandoned. (T. 253-55; S. Ex. 101.)

70. In 1996, another two collapse sinkholes opened at the School in the southeast and northwest portions of the campus. (T. 180; S. Ex. 73, 267.)

71. The first collapse sinkhole was approximately 4-5 feet wide by 2 feet deep and appeared in the woods along the path where the cross-country team ran. (T. 180.)

72. The second collapse sinkhole was approximately 4-5 feet wide by 2 feet deep and appeared on the east bank of School Lane. (T. 180.)

73. Solebury School repaired both collapse sinkholes that opened in 1996. (T. 181.)

74. In October 1997, the School drilled a new well to service the Boys' Dorm to a depth of 616 feet bgs. (T. 255; S. Ex. 101.)

75. In 2004, another collapse sinkhole opened in the northwest portion of the Solebury School campus. (T. 181; S. Ex. 267.)

76. This collapse sinkhole appeared between classroom buildings and measured 4-5 feet across and 2 feet deep. (T. 181.)

77. Solebury School repaired the 2004 collapse sinkhole. (T. 182; S. Ex. 267.)

78. In 2005, a collapse sinkhole developed on the Magill property located at the corner of School Lane and Phillips Mill Road. (S. Ex. 267.)

79. In 2006, another collapse sinkhole opened in the northeast section of the Solebury School campus. (T. 182.)

80. This sinkhole opened near the G7 classrooms and the maintenance buildings and measured 6-7 feet wide and 4-5 feet deep. (T. 182.)

81. Solebury School repaired the collapse sinkhole that appeared in 2006. (T. 182.)

82. In October 2006, the School drilled a new well to service the campus at a depth of 400 feet bgs. (T. 255-56; S. Ex. 101.)

83. When the well was drilled, voids in the subsurface were encountered between 225 and 250 feet bgs. (T. 255-56; S. Ex. 101.)

84. In or about March 2008, a collapse sinkhole was reported on the quarry property, west of the North Pit. (N.H. Ex. 58, 106.)

85. In or about February 2009, a collapse sinkhole was reported on the Borthwick property across from the North Pit on Phillips Mill Road. (N.H. Ex. 69.)

86. In the same year, four collapse sinkholes opened on the Solebury School campus. (T. 87; S. Ex. 74, 75, 267.)

87. The first sinkhole opened west of the administration building, at the base of a bridge frequented by female boarding students traversing between their dormitory and the dining hall and near picnic tables where summer campers gathered for snacks. (T. 87-88, 227; S. Ex. 267.)

88. The sinkhole measured 15 feet deep and 3-5 feet across. (T. 88.)

89. School officials initially repaired the collapse sinkhole themselves, but the repair did not hold and the collapse reopened within a few days. (T. 264-65.)

90. The second sinkhole was located adjacent to the faculty housing area where children play. (T. 87; S. Ex. 74, 267.)

91. The sinkhole measured 15 feet deep and 3-5 feet across. (T. 88.)

92. The third sinkhole was located to the east of the soccer fields. (T. 87; S. Ex. 74, 267.)

93. That collapse sinkhole was 30-50 feet across with a number of cracks and fissures. (T. 88.)

94. A worker at the School fell into the collapse sinkhole as the land gave way under him. (T. 266.)

95. The fourth sinkhole appeared near the girls' softball field, at the edge of the School's property where it borders on School Lane. (T. 87; S. Ex. 74, 267.)

96. While on the surface the collapse sinkhole was difficult to see as most of it was under the road, when it was excavated during repairs it was shown to be a large void in the regolith. (T. 88.)

97. Solebury School initially attempted to repair the first 2009 sinkhole itself, but the repair did not hold, so the School then engaged expert professionals to remediate each of the collapse sinkholes that opened in 2009. (T. 92, 264-65.)

98. In particular, Solebury School took the additional step of grouting areas where sinkholes appeared in proximity to campus buildings and high traffic areas. (T. 94-95.)

99. In total, the remediation effort for the collapse sinkholes that opened on the School's campus in 2009 required multiple days of consistently running triaxle truckloads of fill to the campus. (T. 267; S. Ex. 60.)

100. In or about April 2010, a collapse sinkhole opened on the property of Misty Hill Farms, which is located across from the School on Phillips Mill Road. (S. Ex. 267.)

101. In or about April 2010, three collapse sinkholes opened on the property of Patricia Knight, which is also located across from the School on Phillips Mill Road. (S. Ex. 76, 267.)

102. In the same year, six collapse sinkholes opened on the Solebury School campus. (T. 108; S. Ex. 267.)

103. A cluster of sinkholes opened near the faculty houses and where the School's golf team practiced. (T. 109.)

104. Another cluster of sinkholes opened near the School's Learning Skills Building. (T. 109.)

105. The sinkholes near the Learning Skills Building were approximately 20 feet wide by 25 feet deep and took a great deal of effort to remediate. (T. 109.)

106. Solebury School engaged expert professionals to remediate each of the sinkholes that opened in 2010. (T. 112-13.)

107. In 2011, nine collapse sinkholes opened on the Solebury School campus:

a. Four of the sinkholes were in the southwest, another four were in the southeast, and another in the northeast of campus.

b. A cluster of sinkholes appeared near the faculty housing where children play.

c. Another cluster of sinkholes appeared near the boys' and girls' soccer field.

d. Two sinkholes opened north and east of the Learning Skills Building in an area that students frequently use to walk to the main athletic center on campus.

e. One sinkhole appeared in the middle of the campus.

(T. 111; S. Ex. 136, 267.)

108. New Hope and its consultants remediated the collapse sinkholes that opened on campus in 2011, with oversight from Solebury School's expert consultants. (T. 112-13.)

109. In 2011, other collapse sinkholes formed throughout the basin including, but not limited to:

a. Two on the property of Patricia Knight.

b. Three on the Busik property.

c. One near the property line of the Busik and Knight properties.

d. One on the Borthwick property.

e. One on the Mehok property.

f. One north of PECO road between the mining office water sampling locations NH-1 and NH-2.

(S. Ex. 77, 78, 79, 267; N.H. Ex. 84, 85, 175; DEP Ex. 9, 61.)

110. The largest of these sinkholes was on the Busik property and measured approximately 150 feet long, 75 feet wide, and 15-20 feet deep. (T. 425-26; N.H. Ex. 175; DEP Ex. 61.)

111. In 2013, one collapse sinkhole opened in the southeast corner of the Magill property just west of School Lane across from the School's headmaster's house. (T. 111; S. Ex. 267.)

112. In sum, at least 29 sinkholes have formed on the School's campus since 1989. (S. Ex. 267.)

113. Ten sinkholes formed in the first 17 years since 1989 and 19 have formed in the three years before this appeal was filed. (Finding of Fact ("FOF") 47-112.)

114. Additionally, at least another 12 sinkholes have formed off of the School's campus, but in the same immediate area within the Primrose Creek Basin. (S. Ex. 267.)

115. There is no credible, nonhearsay evidence that any sinkholes opened up on or near the School's campus before 1989. (T. 158-65, 170, 203-04, 214-15, 222-27, 427, 522-25, 537, 579-80, 757, 1288-89, 1602-07, 1615, 1874-75, 1903; S. Ex. 173, 245; N.H. Ex. 96, 181, 212, 214.)

116. Michael Kutney, P.G., the Department's hydrogeologist and lead permit reviewer, was taken aback when he first learned how many sinkholes were occurring at Solebury School. It was obvious to him that there was a serious problem. (T. 2118-19, 2206.)

117. The collapse sinkholes on the Solebury School campus tend to appear suddenly and without warning, with the land quickly giving way. (T. 89, 109, 111-12, 165-68, 258; S. Ex. 245, 247.)

118. The sinkholes have a tendency to continue to grow and expand after they initially open. (T. 89, 168, 178.)

119. The sinkholes have typically occurred when Solebury School has been in session. (T. 166, 168, 175.)

120. The development of collapse sinkholes at Solebury School is a hazardous condition that is creating a significant and ongoing risk to the health and safety of Solebury School, its students, faculty, visitors, buildings, and campus grounds. (T. 87-95, 108-11, 117-26, 171-72, 266, 426-29, 432; S. Ex. 25, 26, 31, 245, 247.)

121. The sinkholes occur near housing, play areas, sport areas, and other areas where children frequent. (T. 89, 109, 111, 120-21, 170, 180-81, 233; S. Ex. 10-12, 14, 18, 20, 58-61, 267.)

122. All sinkholes can result in property damage or personal injury or death, but the collapse sinkholes at the School are particularly dangerous because, as their name would imply, they open up suddenly and without warning. (T. 89, 109, 111-12, 165-68, 170, 181-82, 258, 261-62, 329, 331, 428, 432, 475-76, 500, 506, 587; S. Ex. 245, 247.)

123. Although some of the sinkholes have been large, small holes can also be dangerous, such as one that opened up near Phillips Mill Road, which was measured at 15 feet

deep and just wide enough to fit a person. A person who fell 15 feet into that hole would have a risk of injury and great difficulty getting out of the mud-walled slot. (T. 428-29.)

124. The development of sinkholes on the Solebury School property has impacted the School's ability to engage in any long-term planning, obtain grants and other funding, and develop its campus. (T. 86, 121-25, 146, 230, 234, 242; S. Ex. 28.)

125. After initially rerouting the cross-country running course in the mid-1990s, since 2010 Solebury School has ceased hosting cross-country meets due to sinkhole development. Cross-country meets since 2010 have been held away from the Solebury campus. (T. 120, 181.)

126. In the same year, the School's golf team was no longer permitted to practice on campus after a series of sinkholes developed in the area of their practice driving range. (T. 109, 120.)

127. Athletic coaches are required to avoid certain sections of the campus during practices and team runs. (T. 232-33; S. Ex. 36.)

128. Solebury School staff must constantly attempt to look for signs of sinkhole development in an effort to minimize the peril to its students, faculty, and campus visitors. (T. 117-20; S. Ex. 25, 26, 31-34.)

129. In addition to sports activities, the School has had to cancel other traditional events due to the appearance and concern of sinkhole development. (T. 121.)

III. New Hope's Application for a Depth Correction

130. New Hope submitted its application for a depth correction to advance to -170 feet MSL to the Department on October 20, 2008. (Stip. 25; N.H. Ex. 180.)

131. As part of New Hope's application for a depth correction, New Hope submitted to the Department a number of technical reports and supplemental materials. (N.H. Ex. 131, 178, 179, 180, 181, 195.)

132. Solebury School actively opposed the issuance of the depth correction. (T. 100-02, 323-24; S. Ex. 149, 158, 194.)

133. On February 6, 2011, Solebury School provided the Department with a report titled *Cause and Prognosis for Collapse Sinkholes at Solebury School, Bucks County, Pennsylvania*, prepared by its geology expert, Ira Sasowsky, Ph.D. (T. 323; S. Ex. 173, 174.)

134. Dr. Sasowsky concluded that the frequency, location, and type of sinkholes being experienced by Solebury School were unusual, that the quarry's dewatering activities were the underlying cause of collapse sinkhole formation at the School, and that deepening the quarry pit would promote continued sinkholes at the School. (S. Ex. 173.)

135. In response to the Department's request that the School provide potential engineering solutions to the appearance of collapse sinkholes on its campus, on March 7, 2011, Solebury School provided the Department with a copy of a March 2, 2011 letter report prepared by Michael Byle, P.E., a licensed professional engineer, detailing his evaluation of sinkhole mitigation options for the School. (T. 114-15; S. Ex. 175, 177.)

136. The Department dismissed Byle's proposed engineering solutions, arguing that they would be too expensive and/or would not work. (T. 115, 570.) There is no record evidence that any other possible remedies for preventing sinkholes from forming were ever proposed by New Hope or considered by the Department.

137. The Department did not apply any geotechnical engineering analysis to Byle's proposed solutions, and there is no record evidence that it would have had the expertise to do so. (T. 2303.)

138. An insufficient investigation has been done to date of possible measures to prevent the formation of sinkholes. (T. 571, 676.)

139. On May 9, 2011, Dr. Sasowsky received a call from Michael Kutney of the Department, informing him that: (1) New Hope was examining geologic features known as dikes within the quarry, (2) New Hope would be submitting to the Department a report detailing its findings within the week, and (3) the School would be provided one week to respond to New Hope's report. (S. Ex. 178.)

140. On May 12, 2011, New Hope provided the Department with a letter report titled *Requested Quarry Dike and Karst Feature Information*, prepared by Louis Vittorio, P.G., principal hydrogeologist at EarthRes Group, Inc. ("ERG"), the quarry's consultant. (S. Ex. 225.)

141. On May 12, 2011, Kutney provided Sasowsky with a copy of New Hope's *Requested Quarry Dike and Karst Feature Information* and instructed him that Solebury School would have until the close of business on May 20, 2011 to respond. (S. Ex. 181.)

142. On May 13, 2011, Kutney provided Sasowsky with a revised Sinkhole Minimization and Mitigation Plan ("SMMP") and told him that Solebury School had until the close of business on May 20, 2011 to provide comments. (T. 368; S. Ex. 181.)

143. Solebury School requested an extension from the May 20, 2011 deadline to provide substantive comments to the reports. (S. Ex. 181.)

144. The Department denied the School's request for a one-week extension, despite the fact that New Hope's application had been under consideration for more than 30 months. (T. 367-70; S. Ex. 181.)

145. On May 20, 2011, Sasowsky and Byle provided responses to ERG's reports. (S. Ex. 184.)

146. On May 24, 2011, New Hope Stone provided the Department with a new, revised SMMP. (N.H. Ex. 131.)

147. On June 2, 2011, Kutney provided Sasowsky with a copy of the May 24, 2011 revised SMMP and stated that the School had until the close of business on June 10, 2011 to provide comments. (T. 573-75; S. Ex. 187.)

148. The School requested an extension of this one week deadline, but the Department refused. (T. 574-75.)

149. On June 10, 2011, Byle provided the Department with the School's response to the May 24, 2011 revised SMMP. (S. Ex. 187.)

150. On June 10, 2011, Byle provided the Department with a letter report entitled *Engineering Evaluation of Potential Mitigation Measures*. (S. Ex. 188.)

151. From March 2010 to June 2011, Solebury School was assured by representatives of the Department that the protection and safety of the School was of paramount importance and that no decision would be made regarding the issuance of a new mining permit for New Hope until the Department had completed a process for investigating and protecting the School's campus. (S. Ex. 151, 190.)

152. The Department told Solebury School that the only way it would consider not approving the depth correction would be if the School could demonstrate to the Department's

satisfaction that New Hope's new mining (as distinct from the existing mining) would cause the School's sinkhole problem to get worse than it is now, as opposed to requiring New Hope to affirmatively demonstrate that mining could be reasonably accomplished under the law. (T. 114; S. Ex. 154.)

153. The Department told the School that it needed to develop a plan to address the sinkhole problem. (T. 114; S. Ex. 176.)

154. Although the School disagreed that the appropriate standard was whether additional mining would in and of itself make a bad situation worse, it nevertheless had its consultants attempt to answer that question. (T. 321.)

155. The Department limited its review of New Hope's application to an assessment of whether the parties who opposed the permit had proven to the Department's satisfaction that the 50-foot depth differential in and of itself would increase the frequency or severity of collapse sinkhole activity at the School. (T. 114, 2125, 2205-07; S. Ex. 154, 176.)

156. Kutney, the lead permit reviewer, was directed to apply this standard of review by his supervisors. (T. 2207.)

157. The Department limited its review to the marginal impact of adding 50 feet of depth to the quarry, as opposed to the continuing impact of the ongoing dewatering of the quarry. (T. 2171-74, 2178, 2205-07, 2411-12; S. Ex. 154, 176.)

158. The Department required the parties opposed to the depth correction to affirmatively demonstrate that New Hope's application should be denied. (T. 2205-07; S. Ex. 154.)

159. The Department issued the depth correction on July 29, 2011. This appeal followed. (Stip. 26, 27.)

160. Although New Hope has an NPDES permit authorizing its discharges into Primrose Creek, its permit was not up for renewal at the time of the depth correction, and the Department did not renew New Hope's NPDES permit in connection with the depth correction. (T. 2379-86, 2394-96; N.H. Ex. 1; DEP Ex. 190, 191.)

161. While its depth correction application was under review, New Hope continued mining, and mined deeper than its permitted depth of -120 MSL. (S. Ex. 141, 142.)

162. New Hope's unpermitted mining may have started as early as 2008 and included an area of approximately 100,000 square feet, amounting to approximately 50,000 cubic yards of stone. (T. 669-72; S. Ex. 142, 247, 278.)

163. The unpermitted mining was brought to the Department's attention by Solebury School. (S. Ex. 142.)

164. New Hope paid a civil penalty of $8,850 for its violation. (S. Ex. 146, 147, 196; N.H. Ex. 136.)

IV. Primrose Creek Impairment Listing

165. While the Department was reviewing New Hope's application for a depth correction, the Department was also involved in studying Primrose Creek to assess whether it was impaired. (S. Ex. 109, 110.)

166. Alan Everett, a water pollution biologist from the Department's Southeast Regional Office, concluded that the quarry's pumping and discharge resulted in flow reductions (baseflow diminution) in Primrose Creek upstream from the quarry and channel sedimentation downstream from the quarry. (T. 825; S. Ex. 109.)

167. Everett recommended that Primrose Creek be listed on Pennsylvania's Integrated List (303(d) list) as impaired for aquatic life uses. (T. 825; S. Ex. 109.)

168. Everett further recommended that the Source/Cause listings include "surface mining/baseflow diminution (flow alterations)" for Primrose Creek upstream from the quarry and "surface mining/sedimentation and hydromodification/other habitat alterations (Phillips Mill Dam)" for Primrose Creek downstream from the quarry. (S. Ex. 109.)

169. In February 2011, Kutney, of the Department's Pottsville District Mining Office, reached out to Rodney Kime, Environmental Program Manager for the Department, to request that the source of Primrose Creek's impairment be changed because the Pottsville District Mining Office did not believe that the quarry was the cause, or at least the sole cause, of the impairments to Primrose Creek. (T. 830, 1678-82, 2003-07.)

170. Kutney strongly advocated in support of the view that the quarry was not solely responsible for the stream impairments. (T. 1681, 1688-89; S. Ex. 116, 118, 267.)

171. Kime decided to accept Kutney's opinion instead of Everett's opinion regarding the source of the stream impairment, which was contrary to the directive of former Department Secretary John Hanger, who had previously directed that Primrose Creek be listed as impaired consistent with Everett's recommendations. (T. 1681-89; S. Ex. 115.)

172. The amended 2010 Integrated Report lists Primrose Creek in "Category 4c Waterbodies, Pollution not Requiring a TMDL" for aquatic life impairments upstream of the quarry, and adds "land development" to "surface mining" as a cause of the flow alterations impairment. (S. Ex. 119, 120.)

173. The amended 2010 Integrated Report lists Primrose Creek in "Category 5 Waterbodies, Pollutants Requiring a TMDL" for aquatic life impairment downstream of the quarry, and removes "surface mining" as the cause of the siltation impairment and replaces it with "source unknown." (S. Ex. 119, 120.)

V. The Quarry is Causing the Sinkholes

A. The quarry has lowered the groundwater levels below the School

174. Quarry dewatering is accomplished by pumping out the water that accumulates at the bottom of the pit. (T. 338-39, 1035; S. Ex. 247.)

175. Without dewatering the quarry would fill up with water, making mining impossible. (Stip. 19; T. 339, 1035.)

176. New Hope pumps approximately two to three million gallons per day (gpd) out of the quarry, although discharges can reach as high as twelve million gpd. (T. 1035-37; S. Ex. 265; N.H. Ex. 142, 176, 202.)

177. As authorized by NPDES Permit No. 0595853, the water is pumped out of settling ponds (or sumps) to Primrose Creek downstream and east of the quarry. (Stip. 20, 21.)

178. The water that New Hope is pumping comes from precipitation falling on the quarry, but also consists of groundwater coming from west of the quarry, which includes the area of the School. (T. 589-90, 1037-38; S. Ex. 247; N.H. Ex. 179, 180.)

179. It is clear that quarrying activities have led to a disturbance of the hydrologic balance of at least the Primrose Creek Basin. (T. 2184.)

180. The land surface at the School and the elevation of Primrose Creek is approximately 120 feet above mean sea level (+120 MSL). (T. 349, 409, 1177-79; S. Ex. 323, 329; N.H. Ex. 203.)

181. Prior to New Hope's mining, historic groundwater elevations beneath the School and quarry were close to ground surface at approximately +110 feet MSL (or 10-30 feet bgs). (T. 332-38, 376, 405-10, 493, 892-94, 1626-28, 1635-36; S. Ex. 86, 245, 247, 292.)

182. The Furlong Fault, which is immediately to the east of the quarry pit (on the far side from the School), is an effective groundwater barrier, which means that almost all of the groundwater that is entering the pit is coming from the other directions, including from the west in the direction of the School. (T. 337; S. Ex. 245; N.H. Ex. 97, 181; DEP Ex. 197.)

183. The Furlong Fault, forming the eastern boundary of the Primrose Creek Basin, is a major structure in the Newark Basin with a total vertical displacement of up to two kilometers. (T. 1230-31; N.H. Ex. 97, 181.)

184. Prior to mining, the Furlong Fault acted as a groundwater flow barrier, such that it created a water table close to the surface in the Primrose Creek Basin. (T. 335, 337, 349, 376-77, 437, 698, 1092; S. Ex. 245; N.H. Ex. 181; DEP Ex. 197.)

185. The Fault currently plays a limited role because during mining the quarry intercepts the groundwater before it reaches the Fault. (T. 337-38, 341.)

186. The Fault will continue to act as a barrier after mining terminates, which will allow groundwater levels to its west, where the School and the quarry are located, to return to their shallow, premining levels. (T. 376-77, 437, 1221; S. Ex. 245; N.H. Ex. 181; DEP Ex. 197.)

187. Over the life of the permitted quarry, groundwater levels as measured in nearby wells have been characterized by repeated periods of significant decline followed by periods of relative stability, followed by decline, etc. There have never been any sustained periods of groundwater levels trending up; the long-term trend has always been downward. (T. 455-58, 497, 1945, 2175-85, 2191, 2325-26; S. Ex. 247, 265, 328; N.H. Ex. 209.)

188. If the periods of decline seen in water well levels had been explained by drought, they would have rebounded, but that has not occurred here. (T. 2185-87.)

189. The parties in the case refer to the area where the quarry's pumping is lowering groundwater levels as the quarry's "zone of influence" ("ZOI"). (T. 590-91, 1070, 1091-92, 1945; S. Ex. 90, 206, 245, 247, 329; N.H. Ex. 176; DEP Ex. 197.)

190. Solebury School is within the quarry's zone of influence. (S. Ex. 90, 206, 247 329; DEP Ex. 124.)

191. Groundwater in the area travels from west to east, from areas west of the School, through the School property, through the quarry property, toward the Delaware River. (T. 682, 1372-73.)

192. To date, groundwater levels have dropped approximately 100 feet under Solebury School as a result of quarry dewatering. The groundwater table, which was about +110 MSL before quarrying, is now between +20 and 0 feet MSL. (T. 328, 405-11, 447, 458, 493, 1070, 1945, 2011; S. Ex. 90, 206, 245, 329; N.H. Ex. 137; DEP Ex. 131.)

193. Neither the Department nor New Hope dispute that quarry dewatering has substantially lowered groundwater levels beneath the School. (T. 1200, 1318-19, 1323, 1337, 1390, 1452, 1635, 1823-24, 1831; N.H. 176; DEP Ex. 131.)

194. The quarry's dewatering of the Primrose Creek Basin has been unusual compared to other limestone quarries due to its magnitude and rapidity. (T. 458.)

195. Quarry pumping is outpacing precipitation in the Primrose Creek Basin. (T. 601-04, 613, 1589-90; S. Ex. 247, 265, 299, 324.)

196. The parties differentiate between two species of groundwater: shallow groundwater, which is groundwater primarily supplied by precipitation falling within the topographic Primrose Creek Basin; and "regional groundwater," which is groundwater that

originates from a larger area that includes areas outside of the topographically defined Primrose Creek Basin. (T. 1038-39, 2011-12, 2014; N.H. Ex. 176, 178, 179.)

197. There is no distinct separation between the two zones of groundwater. (T. 1458-59.)

198. Because the Delaware River is at about 50-60 feet MSL, any water at or below that level is likely to include some regional flow. (T. 411, 1369; S. Ex. 245, 329.)

199. The quarry is essentially draining all of the in-basin groundwater out of the basin and has done so since the early 1990s. (T. 536, 1108, 1118, 1132, 1375, 1484, 1563, 2011-14, 2175, 2184, 2294-97, 2325-25, 2355.)

200. A large portion of the groundwater inflow into the quarry manifests at a waterfall that emerges from the western highwall at about 0 feet MSL. Little is known about the source of the waterfall, but it appears that the waterfall is related to a prolific conduit that focuses the submerged flow of the former Primrose Creek, as well as the groundwater inflow from both above and to a certain extent below 0 feet MSL. (T. 680-85, 688-90, 1409-12; DEP Ex. 56, 57.)

201. The water levels that now exist at and near the School reflect a regional groundwater component. (T. 1090, 1480, 2019, 2034, 2085, 2116, 2293.)

202. Quarry dewatering will continue to drain essentially all of the in-basin water, but it will also draw down more regional groundwater. (T. 1477, 2085, 2116, 2186-89.)

203. As a result, it is likely that continued dewatering associated with New Hope's mining will further depress groundwater levels below the School. (T. 338, 613, 641-47, 708-09, 1562, 2186-89; S. Ex. 245, 247.)

204. Unless the quarry intercepts a major karstic feature like the one it may have hit in the early 1990s, the effect is likely to be muted, but the water table under the School is

nevertheless likely to be lowered further as New Hope mines lower. (T. 328, 338, 604, 638-39, 684-88, 690-92, 694-96; S. Ex. 245, 247.)

205. There is no disagreement that groundwater levels below the School will remain at least as depressed as they are now so long as New Hope continues mining.

206. The Department only evaluated the effect that the quarry has had on groundwater levels in the Primrose Creek Basin since 2005. (T. 2171-72, 2189, 2293; DEP 136, 137, 197.)

207. By 2005, the quarry had already had a profound impact on groundwater levels, essentially having already dewatered the basin of its in-basin groundwater component down to the 20 feet MSL level. (T. 1945-46, 2175, 2181-84, 2325-26; S. Ex. 128.)

208. The Department was aware of the water level suppression, but only evaluated data from 2005 onward. (T. 2181-82, 2353, 2355, 2409.)

B. The quarry dewatering, which is causing the lowered groundwater table, is the cause of the hazardous sinkhole problem at the School.

209. Several factors play a role in the timing of collapse sinkhole development. The factors include the presence of carbonate bedrock, surface water flow, flooding, and precipitation. (T. 319-22, 342-45, 466-67; S. Ex. 177, 194, 245, 247; N.H. Ex. 176; DEP Ex. 196, 197.)

210. Dewatering of quarries in limestone areas such as the Primrose Creek Basin, which lowers the surrounding groundwater table, is a known and generally accepted cause of sinkholes. (T. 319; S. Ex. 245.)

211. Both the Department's and New Hope's credible experts acknowledge that the quarry dewatering at least contributes to the formation of sinkholes on and near the School's campus. (T. 1276-77, 1286, 1319-20, 1337, 1598-99, 1639-42, 2052-53, 2120-23, 2215; N.H. Ex. 176; DEP Ex. 197.)

212. In fact, New Hope's dewatering of the quarry is the overriding cause of sinkholes forming on and near the Solebury School's campus. (T. 328, 335-336, 342-345, 411, 430-431, 498-99, 509-12, 578, 582, 587, 591, 604, 613, 701, 782-83, 1277, 1349, 1616-17, 1891; S. Ex. 104, 173, 245, 247, 267.)

213. Quarry dewatering is also the major cause of the swallet that intercepts Primrose Creek, which eliminates essentially all surface flow downstream of the swallet and upstream of the quarry. (T. 536, 846, 889, 979-80; S. Ex. 245, 246.)

214. By lowering groundwater levels and changing groundwater gradients, as well as exposing groundwater conduits to an open mine pit, the quarry has created an unstable situation that allows the regolith that formerly filled voids in the limestone to settle or travel downward. As the effects of this settling have reached the surface, it has caused sinkholes to open. (T. 337-41, 498, 1599-1600, 1872-73, 2052-53; S. Ex. 167, 245, 292.)

215. Regolith being washed through voids that empty into the quarry would not necessarily be visible in discharges. (T. 710, 1414.)

216. The suspended solids measured in the quarry's NPDES discharge would be more than enough to account for the loss of regolith on the School's campus. (T. 710; S. Ex. 247.)

217. The large difference in water levels between the School and the quarry over a very short distance creates a steep hydraulic gradient that drives the formation of sinkholes. (T. 336, 433, 494-96, 532, 587; S. Ex. 245, 247.) There is a 160-foot water level drop over a very short distance. (T. 1108; S. Ex. 329.)

218. Continued mining will increase the hydraulic gradient between the School and the pit, which will increase the head differential and energy giving rise to the movement of regolith

and the resultant formation of collapse sinkholes at the School. (T. 328, 338, 587, 591, 604; S. Ex. 245, 247.)

219. Floods may trigger a sinkhole, but flooding associated with heavy precipitation events is not the cause of collapse sinkhole formation at the School because, among other things, portions of the Solebury School campus have experienced natural flooding throughout human memory, but that flooding did not result in the development of collapse sinkholes until after quarry dewatering began. (T. 160-62, 182-83, 225, 1286, 1891, 2200, 2218-19, 2222; S. Ex. 245, 247.)

220. Solebury School's development activities have not caused or significantly contributed toward the development of sinkholes on and near the campus. (T. 169-174, 199, 233-34, 272-75, 418-23, 431, 508-12, 582-87, 1608-09, 1619-22, 1890, 2216; S. Ex. 167, 245, 247, 288.)

221. Development in the surrounding area has not caused the collapse sinkholes on and near Solebury School. (T. 157, 221-22; S. Ex. 245, 247.)

222. So long as quarry dewatering continues, sinkholes will continue to propagate on and near the Solebury School campus. (T. 328, 335-38, 345, 412, 431, 440, 475-76, 532, 587, 604, 613, 615, 639, 782-83, 1338 1349; S. Ex. 245, 247.) No expert from any party opined that the hazardous situation that currently exists will dissipate during mining.

223. Continued mining will perpetuate the unstable hazardous conditions at the School. (T. 328, 338, 439, 694, 730-31; S. Ex. 245, 247.)

224. Even if the hydrologic regime in the basin could be characterized as in temporary equilibrium or very slow decline, sinkholes will continue unabated at the School. (T. 475-76, 703, 782-83; S. Ex. 245, 247.)

225. Returning the groundwater under the School to its premining levels, and without the dramatic head differential, will likely, in time, stem the formation of sinkholes. (T. 148-149, 154-55, 432-33, 496, 531-32, 587, 604, 615, 676-80, 1640-42; S. Ex. 175, 245, 247.)

226. After mining, it is anticipated that the pit will infill with water within 5 to 7 years, and the cone of depression caused by pit dewatering will dissipate, returning the water table approximately to pre-mining conditions. (T. 2312-14; N.H. Ex. 180; DEP Ex. 161.)

227. Closing the quarry would allow the water table to return to its premining levels near the surface and, therefore, sinkholes would abate. (T. 376-77, 676-80, 1640-42, 2312-14; S. Ex. 175.)

228. There may be engineering solutions for returning the water table to premining levels, such as a man-made groundwater cut-off or grouting, but those options have not been fully explored by the Department or New Hope and the Department believes they may be cost-prohibitive and/or ineffective. (T. 569-70, 677-79, 746; S. Ex. 175, 247.)

229. We credit the expert opinions of Sasowsky and Byle that the dewatering of the quarry is directly resulting and will continue to result in the hazardous formation of collapse sinkholes on and near the School's campus. (T. 328, 342, 411, 430-31, 457-58, 475-76, 507-08, 578, 587, 590-91, 615-16, 766-67, 782-83; S. Ex. 245, 247.)

VI. Natural Conditions Are Not Protecting and Will Not Protect the School

A. Shale layer

230. The Department issued the depth correction to New Hope based in part on the belief that a thin shale layer underlying the School's campus will help isolate the School from the effects of continued and deeper mining, premised on the theory that the shale will help maintain existing groundwater levels. (T. 378, 1110, 1822; N.H. Ex. 176; DEP Ex. 127, 128, 196, 197.)

231. If the shale layer were an effective protective measure, sinkholes would not be propagating the way they are at the School. (T. 648-52; S. Ex. 323, 330.)

232. There has been no credible evaluation of the extent, nature, continuity, or location of the shale layer and there is no credible evidence that it acts as a groundwater barrier that will insulate the School from the effects of New Hope's mining. (T. 378-80, 648-52, 766-67, 1822, 2063-68, 2236.)

233. The shale layer is thin where exposed to view, weathered, highly fractured, and may pinch out altogether. (T. 378, 1386-89; N.H. Ex. 178; DEP Ex. 46, 47, 48, 127, 128, 196, 197.)

234. The shale layer probably does not exist beneath portions of the School. (T. 2067.)

235. The limited available credible evidence suggests that the shale is not acting as a groundwater flow barrier, even where it does exist. (T. 378-80, 648-52.)

B. Dike 1

236. The Department issued the depth correction based upon its belief that a natural geologic feature known as Dike 1 would help prevent the frequency and severity of sinkholes from increasing at the School. (T. 362-63, 1054-55, 2051-53; DEP Ex. 197.)

237. Therefore, the Department added Special Condition 22 to the depth correction, which provides as follows:

> Future mining through the westernmost diabase dike (Dike 1, shown on Figure 1 Dike Location Map, dated June 9, 2011) below an elevation of -50' MSL is not authorized until the Permittee submits the results of a hydrogeologic investigation or predictive model detailing the potential hydrologic effects of removing the dike. The westernmost dike shall be field marked with durable paint and maintained so that it is visible and can be readily avoided by site personnel and contractors.

(N.H. Ex. 1.)

238. Dike 1 is a diabase dike, which is generally accepted as a semi-impermeable igneous intrusion into surrounding rock that can vary in size and thickness. (T. 361-64; DEP Ex. 197.)

239. Dike 1 runs through the quarry on the western side and strikes north 15 degrees east. (N.H. Ex. 176; 205.)

240. Dike 1 is obviously not preventing the formation of sinkholes at the School. (T. 413; S. Ex. 267; FOF 47-129.)

241. There is little data regarding the specific geologic characteristics of Dike 1 and an insufficient scientific basis for concluding at this time that it is in fact an effective hydrogeological barrier. (T. 372-74, 432, 572-73, 640-41, 718, 765, 1451, 1531-32, 1553-60, 1568-70, 1904, 2034-35, 2044-51, 2240-41; S. Ex. 138, 188, 206, 225, 247; DEP Ex. 106; N.H. Ex. 97, 179, 195.)

242. The limited evidence that does exist suggests that Dike 1 is not acting as an effective barrier to groundwater flow such that it will be or is in any way protective of the School. (T. 374, 412-14, 432, 438, 478-80, 641-647, 718, 1044-46, 1053-58, 1479-84, 1499-1500, 1506-08, 1551-53, 1558, 2029-36, 2051-52, 2239; S. Ex. 236, 247, 327, 328, 329.)

243. The permit itself recognizes the lack of information regarding the dike because it only prohibits mining through Dike 1 until New Hope submits the results of "a hydrogeologic investigation or predictive model detailing the potential hydrologic effects of removing the dike." (N.H. Ex. 1.)

244. Dike 1 has already been mined through from the surface down to as low as approximately -40 MSL, which is 40 to 60 feet below the current water table under the School. (T. 374-75, 1046, 1108, 1384, 1574; S. Ex. 323, 329; N.H. Ex. 176.)

245. Based upon the assumption that Dike 1 is a protective hydrogeologic barrier, the Department has restricted New Hope from "mining through" the dike below -50 MSL. (T. 2034-36; N.H. Ex. 1.)

246. The dike can be mined through where it exists above -50 MSL. (T. 374-75, 654-58, 1384-85, 1572-74, 2253-54; N.H. Ex. 205; DEP Ex. 161.)

247. The permit does not provide a buffer zone around Dike 1 to protect the dike from damage due to quarry blasting operations. (T. 414, 475-76, 653-54, 1366-67, 1571, 2250-51, 2339; S. Ex. 196, 247; N.H. Ex. 1.)

248. New Hope has indicated that it will voluntarily observe a buffer zone, but that is not a permit requirement and is not enforceable. (T. 1345-46, 1366-67, 2251; N.H. Ex. 91.)

C. Rock becoming tighter at depth

249. The Department issued the depth correction based upon the premise that the rock that New Hope is mining at depth is tighter than the rock previously mined closer to the surface. (T. 2031-32, 2061-62; N.H. Ex. 176; DEP Ex. 197.)

250. In fact, in the Department's view the rock is so tight that there are not likely to be *any* significant karst features at depth. If they are encountered, that "changes the game" according to the Department. (T. 2061-62.)

251. It is unlikely that there are *no* significant karst conduits at depth. (T. 338, 382-83, 440, 441, 458, 661-63, 691, 694, 711-12, 732, 740, 781; S. Ex. 245, 247, 326.)

252. There appear to be two geologic units of carbonate rock in the vicinity of the School and the quarry, which the parties refer to as "Unit A" and "Unit B." (T. 359-60, 1029.) The lower (deeper) rock in the quarry is referred to by the parties as Unit A. Unit A is what is being characterized as tighter. (N.H. Ex. 176; DEP Ex. 129, 130, 131, 197.)

253. While there is much less weathering and fewer known karstic features in Unit A than the higher, more weathered rock (Unit B), there are still voids and other likely water-bearing zones in the deeper rock. (T. 256, 382-88, 437-41, 523, 617-38, 691-94, 711, 726, 729, 738, 1226-27, 1461, 1490-98, 1524-28, 1861-64, 1539-40, 1581-85, 2018-19, 2243-47; S. Ex. 92, 95, 206, 208, 247, 275, 276, 323, 326; N.H. Ex. 179, 181; DEP Ex. 53.)

254. The tighter geologic strata at depth have been mined by New Hope for years, yet mining the strata is not preventing sinkholes and water losses now, so there is no reason to believe the strata will do so in the future. (T. 647, 705; S. Ex. 245, 247; FOF 47-129.)

255. Although mining deeper typically intercepts fewer water-bearing zones, those that are intercepted tend to produce more water. (T. 382-83.)

256. As New Hope mines deeper, and then wider at depth, it will intercept more water-bearing zones. (T. 388, 691-95; S. Ex. 245, 247.)

257. The interception of more water-bearing zones at depth has and will continue to lower the water table under the School. (T. 415-17, 637-38, 2061-62, 2177-78; S. Ex. 245, 247.)

258. No expert could testify with any confidence where Unit A and Unit B divide or where, if anywhere, they are under the School, but it is clear that Unit A is very close to the surface and/or exclusive of Unit B on portions of the campus. (T. 700, 702, 1077, 1109, 1520 (MW 11 in Unit A), 1912-14, 2064-68, 2103 (MW 11 in Unit A), 2232, 2236, 2304 (MW 11 in Unit A); N.H. Ex. 206; DEP Ex. 48, 176, 196 (Fig. 4, 5).)

259. Numerous sinkholes caused by New Hope's mining have formed in areas underlain by Unit A only, which indicates that Unit A does not provide protection to the School from quarry dewatering. (T. 705.)

VII. Other Provisions in the Permit Will Not Protect the School

A. Special Condition 21

260. In an effort to protect the School, the Department added Special Condition 21 to the permit, which provides as follows:

> To safeguard against unexpected significant and sustained new inflows of water or sediment laden water the Permittee shall report to PADEP if during pre-blast drilling, or during the expansion of the pit area either laterally or vertically the permittee encounters: (a) mud seams or voids coupled with the down hole loss of compressed air and/or a significant increase or decrease in return water during any drilling, and/or (b) sustained high yield artesian conditions. If a or b are encountered no blasting or additional mining in the area in question may occur until the Department is notified and concludes, following an evaluation of the hydrogeologic conditions, that further mining shall not adversely impact the prevailing hydrogeologic balance in the basin.

(N.H. Ex. 1.)

261. The original language for this permit condition was written by New Hope's consultant, Mr. Vittorio. (T. 1227-28, 2254-55, 2314-16; N.H. Ex. 195.)

262. This permit condition does not address the general lowering of the water table, is likely to only address a water loss due to conduit flow after it has already occurred, and is not likely to do much good because conduits once intercepted are difficult to control. (T. 414-17, 484-85, 565, 617, 659, 660, 764.)

263. Prolific voids or mud seams do not always react quickly or show any immediate effect from being intercepted. (T. 416, 484-89, 617, 660.)

264. All of the inflow near the bottom of the pits is to some extent artesian, so "sustained high yield artesian conditions" may already be occurring. (T. 1228-29, 2256.)

265. "Artesian" is somewhat variably defined but is not defined in the permit. (N.H. Ex. 1; *see* T. 1227-29, 1495-97.)

266. It is unclear how a "sustained high yield artesian condition" will be distinguishable from other flow into the quarry, particularly because the phrase is not defined in the permit. (T. 659-60, 667-68, 1229; N.H. Ex. 1.)

267. New Hope interprets Condition 21 to be limited to sudden gushing water of at least 100 to 200 gallons per minute that lasts at least an hour, which is between 144,000 and 288,000 gpd. (T. 1576-78.)

268. By way of perspective, it only takes 6,000 gpd of pumping discharge, less than 0.1% of the average daily quarry discharge, to potentially lower the groundwater within the mapped zone of influence by six inches per year. (S. Ex. 247 at 22.)

B. Sinkhole Minimization and Mitigation Plan

269. The Department has required New Hope to develop and implement a Sinkhole Minimization and Mitigation Plan. (N.H. Ex. 131, 137, 138; DEP Ex. 197.)

270. New Hope must also describe new sinkholes occurring within the basin in its quarterly monitoring reports. (T. 1237; N.H. Ex. 69-91.)

271. The SMMP requires that New Hope close sinkholes using proper techniques within the "ZOI/sinkhole-prone areas." The use of proper techniques may help reduce the risk of the sinkhole in question reopening and may reduce the likelihood of other sinkholes (or another opening of the same underlying hole) opening up in very close proximity to the initial sinkhole, but the plan is misnamed because it does not prevent new sinkholes from forming in the first place. (T. 417-18, 432, 574, 668-89, 1240-41, 1250-52, 1346, 1642-43, 1850, 2257-58; S. Ex. 183, 187, 196, 247; N. H. Ex. 131, 137, 138; DEP Ex. 150, 197.)

C. Monitoring well network

272. The Department premised the issuance of the depth correction on the assumption that New Hope's requirement to monitor groundwater levels in monitoring wells located throughout the quarry's zone of influence and report the results quarterly to the Department will help protect the School. (T. 1975, 2055, 2075-79, 2101, 2115, 2140-42; DEP Ex. 197.)

273. Groundwater monitoring does not itself prevent sinkholes from forming in the first place and it cannot predict where and when they will form. (T. 389, 462, 705-06.)

274. Groundwater monitoring has not been protective of the School to date. (FOF 47-129.)

275. The monitoring program is not an effective preventative measure because it only reveals a problem after it has already occurred, and the effects can be subtle. (T. 705-06.)

276. The quarry does not presently monitor any water wells on the property of Solebury School. (T. 116-117, 191, 257, 400-02, 594-95, 1399-1400; S. Ex. 329.)

277. Whether a change in water levels is actually observed and understood depends in part on the review of New Hope's groundwater contours as created by its groundwater modeling. (T. 2223-24, 2229, 2237-38, 2331.)

278. New Hope views the modeling results as a secondary tool to help back up actual data points. (T. 1535.)

279. The groundwater modeling that the Department and New Hope rely upon is entitled to limited weight because (a) the model has predicted wild, unnatural flow contours that are unlikely to reflect real-world conditions; (b) it is not clear the extent to which the model fully accounts for karst conditions; (c) the data relied upon is in some respects over-inclusive and in

other respects insufficient. (T. 388-405, 453, 460, 600-601, 606-13, 1103-06, 1394-1402, 1488, 1519-22, 1532-37, 1593-1403, 1427; S. Ex. 245, 247, 268, 287, 329.)

280. We credit the expert opinions of Sasowsky and Byle that the purportedly protective natural features and permit conditions have not and will not protect the School from the hazardous formation of sinkholes on the School's campus. (T. 328, 413-15, 418, 475-76, 479-80, 484-86, 574, 646-47, 652, 653-54, 659, 660, 668, 669, 705-06, 764, 765-67; S. Ex. 245, 247.)

VIII. Primrose Creek Upstream Flow Impairment

281. Primrose Creek was historically a perennial stream that received its baseflow from the shallow water table and ran across the Solebury School campus and where the quarry is currently located. (T. 158, 162, 203-04, 222, 405-06, 978, 1636; S. Ex. 84, 85, 245, 247.)

282. Today, Primrose Creek is a losing intermittent or ephemeral stream with extended periods of little or no flow in its reach upstream (west) of the quarry and upstream of the swallet. (T. 105-06, 226, 890, 977-79, 1447; S. Ex. 245, 247.)

283. The stream only flows between the swallet and the quarry during large storm events. (T. 889.)

284. The lowered groundwater levels caused by quarry dewatering are the dominant cause of the flow impairment of the stream. (T. 826-27, 890-898, 1200, 2006-07; S. Ex. 84, 109, 117, 119, 245, 246, 247, 292, 302; N.H. Ex. 176.)

285. Little additional impairment can be expected while New Hope continues mining because the water table has already dropped from 10 to 100 feet bgs, which means there is no shallow baseflow left in the carbonate formation. (T. 405-06, 890-91, 978, 992; S. Ex. 109, 119.)

DISCUSSION

Solebury School is challenging the July 29, 2011 depth correction issued by the Department to New Hope Crushed Stone's noncoal surface mining permit 7974SM3C12, which authorizes New Hope to mine to a depth of -170 feet MSL at its quarry in Solebury Township, Bucks County—an additional 50 feet deeper than its previous depth correction. The permit that was originally issued in 1976 authorized New Hope to mine to a final depth of -200 feet MSL, but the permit has been changed over time so that New Hope must now apply for a permit amendment, known as a depth correction, for periodic intervals of additional mining down to the -200 level. Although the School complains of damage to the hydrologic balance, including impacts to the stream on its campus, its overarching concern is that New Hope's mine is causing numerous collapse sinkholes to form on its campus, which presents a significant risk of harm to the School's students and faculty.

In third-party appeals of Department actions the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, or that its decision is not supported by the facts. *Gadinski v. DEP*, 2013 EHB 246, 269. In this appeal, Solebury School must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law in issuing the depth correction to New Hope. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *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).

The purpose of the Noncoal Act includes protecting land, decreasing soil erosion, preventing pollution of rivers and streams, generally improving the use and enjoyment of the

lands, and most importantly here, preventing and eliminating hazards to health and safety. 52 P.S. § 3302; *see Tinicum Twp. v. Del. Valley Concrete*, 812 A.2d 758, 760 n.4 (Pa. Cmwlth. 2002) ("The Non-Coal Act was passed to address the negative affects [sic] of surface mining by improving conservation of the land, protecting the health and safety of citizens and wildlife, and limiting pollution."). No permit may be issued unless the applicant affirmatively demonstrates that:

> (1) The permit application is accurate and complete and that all requirements of this act and the regulations promulgated hereunder have been complied with.
> (2) The operation and reclamation plan contained in the application can be accomplished as required by this act and regulations.
> (3) The operation will not cause pollution to the waters of this Commonwealth.

52 P.S. § 3308. The applicable regulations provide that a permit, permit renewal, or revised permit application may not be approved unless the applicant affirmatively demonstrates and the Department finds in writing that, among other things,

> (1) The permit application is accurate and complete and that the requirements of the act, the environmental acts and this chapter have been complied with.
> (2) The applicant has demonstrated that the noncoal mining activities can be reasonably accomplished as required by the act and this chapter under the operation and reclamation plan contained in the application.
> (3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

25 Pa. Code § 77.126(a). Among other requirements of Chapter 77, the applicant must show that it will ensure the protection of the quality and quantity of surface water and groundwater, both within the permit area and adjacent areas, as well as the rights of present users of surface water and groundwater. 25 Pa. Code § 77.457(a); *Plumstead Township v. DER,* 1995 EHB 741, 776-

77; *see also* 25 Pa. Code § 77.521 (mining to be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas).[1]

This case at its core is about health, safety, and public welfare. The Department clearly has the legal authority to deny a permit amendment such as New Hope's depth correction if continued mining is causing an unavoidable and serious hazard to health and safety. 52 P.S. §§ 3302 (purposes of Noncoal Act), 3308 (permit requirements), 3311 (authority to require the abatement of nuisances, which include conditions that create a risk of subsidence, cave-in, or other hazards to health or safety); 71 P.S. § 510-17(3) (authority includes abatement of conditions detrimental to public health); 25 Pa. Code §§ 77.126 (permitting requirements); 77.130(1) (permits are to prevent adverse impacts to public health and safety), 77.243 (bond amounts sufficient to cover measures that may be necessary to prevent adverse impact on public health, safety, or welfare), 77.294 (penalties are to consider impact to public health and safety and damage to property), 77.352 (inspections for adverse impacts to public health, safety, and welfare), 77.401 (waiver of permit application requirements if not needed to evaluate impacts on public health and safety). The Department's duty to ensure that mining can be "reasonably accomplished" requires it to ensure that the mining can be performed without an undue risk to health, safety, and welfare. Pointedly, no party in this case has argued otherwise. In fact, there is actually no dispute in this case that New Hope's continued mining is at the very least contributing to an intolerable and dangerous sinkhole problem at the School. The question, then, is whether the Department acted unlawfully or unreasonably by enabling this serious hazard to health, safety, and welfare to continue unabated. We conclude that the Department's approval of

[1] Hydrologic balance is defined as "[t]he relationship between the quality and quantity of water inflow to, water outflow from and water storage in a hydrologic unit, such as a drainage basin, aquifer, soil zone, lake or reservoir. The term includes the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa. Code § 77.1.

continued mining was in accord with neither the law nor reason, and therefore, we rescind its approval of the depth correction, effective immediately.

The School presented a compelling case that it is suffering from an alarming collapse sinkhole problem on its campus. To their credit, neither the Department nor New Hope disputed this point, nor could they. The School has now been the site of 29 sinkholes, and that does not include the 12 known sinkholes that have formed on nearby properties. (FOF 112, 114.) The sinkholes appear suddenly and without warning. At least one person has already fallen into one. Some holes are small, but others have been as large as a quarter of an acre. One hole was narrow and deep enough to potentially cause entrapment. It would seem that it is only a matter of time before someone gets hurt.

Aside from the danger to adults and children, the School is being deprived of the quiet use and enjoyment of its property. The School must operate under the constant threat that at some unknown time and location, the ground will collapse underfoot. There is no dispute that this will occur again and again so long as New Hope keeps mining. The School has lost grant money, foregone construction projects, and cancelled—sometimes permanently—school activities.

Although not a safety issue *per se*, it bears mentioning that by dropping the water table 100 feet, quarry dewatering has robbed Primrose Creek of most of its baseflow. A stream that undoubtedly once beautified and added to the character of the campus is now usually a dry ditch. And that is before the stream channel is intercepted by one of the most problematic of all the sinkholes caused by the quarry: the swallet.

The Department Applied the Incorrect Standard for Reviewing New Hope's Application

The Department was fully aware of the School's precarious situation. Indeed, the Department's lead permit reviewer was taken aback when he first learned of the School's sinkhole problem. (T. 2118-19, 2206.) Yet, for reasons we find difficult to understand, the Department decided that New Hope's ability to continue mining must take precedence. Toward that end, the Department fashioned and applied an unlawful and unreasonable standard for reviewing the depth correction application. The Department decided that the depth correction would be approved unless the School proved to the Department's satisfaction that the additional 50 feet of mining authorized by the depth correction, and only that narrow band of mining, would "increase the frequency and severity" of collapse sinkhole formation on the School's campus. Every aspect of this standard of permit application review is wrong.

First, the Department placed the burden of proof, if you will, on the wrong party. Although the School bears the burden of proof at this stage of the proceedings in this appeal, the law states that no permit may be issued or revised unless the *applicant affirmatively demonstrates* that mining can be performed safely. 52 P.S. § 3308(a); 25 Pa. Code § 77.126. In order to comply with the Noncoal Act and the regulations, it is the applicant that must show that hazards will be prevented or eliminated. Here, New Hope did not do that. There are known, continuing, unsafe conditions and New Hope was not required to show how those unsafe conditions could be rectified.

Secondly, there is no legally or scientifically justifiable reason to limit the permit review to only that portion of the harm that is being caused by New Hope's latest 50 feet of mining. The Department repeatedly tells us that only a depth correction is involved in this case. The original permit authorized mining to a depth of -200 MSL, and the Noncoal Act and regulations

do not mandate permit renewals. *See* 25 Pa. Code § 77.128 (permit terms). The Department does not explain why any of that matters. This particular permit by its own terms must be revised, regardless of whether Noncoal Act would ordinarily require it. No party has challenged that aspect of the permit, and events have shown that it was a good idea. The Department has required New Hope to periodically revise its permit through depth corrections to give the Department an opportunity to ensure that the mine *as a whole* was not unduly disturbing the hydrologic balance of the basin. (DEP Ex. 150, Conditions 18-20.)

Since the permit must be revised, regulations must be met based upon existing information. *Angela Cres Trust v. DEP*, 2009 EHB 342; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Tinicum Township v. DEP*, 2002 EHB 822. When considering an application for a permit revision, the question is not whether the limited subject of the revision can be safely accomplished. The question is whether the project as a whole, as revised, can be safely accomplished. 25 Pa. Code §§ 77.141 and 77.126. In this case, even without the revision the mining is causing a safety hazard.

In *Solebury Township v. DEP*, 2004 EHB 95, Solebury Township challenged the Department's decision to renew New Hope's NPDES permit for the same quarry that is the subject of this appeal. The permit renewal made no material changes to the terms of the permit. Among other things, the Department never considered whether the quarry's pumping limit of four million gpd was appropriate because the Department said it "was not going to tell them how to operate their operation." 2004 EHB at 119. We rejected New Hope and the Department's argument that the Township was barred from challenging the permit renewal because no changes had been made. We ultimately held that the Department failed to fully consider the impact to the hydrologic balance caused by the quarry's discharge *going forward.* It never occurred to the

parties or us in that case that the Department's review of the effect of continued mining would be artificially limited to anything other than the effect of the discharge from the *entire mine* on the hydrologic balance, rather than some smaller increment related to recent mining, and that is what New Hope eventually did.

Following the hydrogeologic study mandated by us in the 2004 Adjudication, the Department renewed New Hope's NPDES permit again in 2006 and the Township appealed again. Among other things, the Township attempted to challenge the Department's decision in 1995 that authorized New Hope to eliminate the portion of Primrose Creek between its two pits. We dismissed that challenge, stating that our review was of the permit renewal going forward, not of a separate Department action from eleven years earlier. *Solebury Twp. v. DEP*, 2007 EHB 713, 722-73. The Department refers us to this holding but we find it to be inapposite. The stretch of the creek that was eliminated by the quarry was long gone when the Township raised its concern in 2006. In contrast, the sinkholes in this appeal continue to propagate at an alarming rate. The School in this case is not challenging some prior Department action authorizing sinkholes, and it is not arguing that any *past* permit decision was improper because it resulted in sinkholes. The School has not sought remediation of past environmental damage, as the Township did in its 2006 appeal. Rather, the School is pursuing exactly the sort of challenge we found to be appropriate in both prior cases, namely, whether the Department's action is lawful and reasonable in light of the effect of the quarry dewatering *going forward.* The School argues that the depth correction, because it authorizes years of additional mining, will result in more collapse sinkholes going forward. Nowhere in the 2007 decision did we hold or suggest that restricting the Department's review to only one small part of the mine had any legal or scientific merit.

The Department cites *Inquiring Voices Unlimited v. DER*, 1990 EHB 798, in further support of its position that it only needs to look at the band of mining 50 feet at the bottom of an already large pit, but that case can be easily distinguished from the current situation. In *Inquiring Voices*, and the *Del-AWARE Unlimited v. DER* cases cited therein (1986 EHB 919 and 1988 EHB 1097), the appellants appealed various extensions of permits and construction deadlines. However, the appellants used those appeals to directly challenge the issuance of the original permit, openly arguing that the original issuance was contrary to law. In this case, the School is not arguing that the issuance of the 1976 permit was contrary to law. Instead, it is arguing that the factual situation in which the permit operates has changed significantly, and therefore, the effect of the continued operation of the permit needs to be reevaluated as a whole. The harms that the School is challenging did not exist and were not anticipated when the original permit was issued in 1976. The harm the School is now suffering from is ongoing and the result of a cumulative impact of the quarry on the immediately adjacent area.

As we stated in *Tinicum Township v. DEP*, 2002 EHB 822, 835, while an application for a permit renewal does not require the Department to reexamine whether the initial permit issuance was proper, "[i]t does, however, require the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information. Similarly, our review focuses upon the *continuation,* not the historical initiation, of the activity in question." (emphasis in original).

In *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135-36, we further explained our decision in *Tinicum Township* and adopted the same analysis:

> [E]ven in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative

> issue was not whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.

See also Angela Cres Trust v. DEP, 2009 EHB 342, 359. Here, the issue is not whether it was appropriate to issue New Hope's 1976 permit, but rather, in the context of a depth correction, whether it is appropriate to let the permitted activity continue in light of the current information that shows that mining is causing hazardous conditions at Solebury School. "The doctrine of administrative finality was never intended to insulate a permit from any changes or review of those changes for all of time." 2004 EHB at 133.

Aside from being legally incorrect, we doubt there is any scientific basis for evaluating the effect of only one small band of mining in a deep pit. The Department never explains the scientific justification for or validity of its artificially circumscribed review. It also never explained the basis for what determines the size of the increments of the depth corrections. Of course, the smaller the increment, the less likely it would be to pin any particular harm to that increment, but again, we fail to see how this artificially narrowed approach comports with either law or reality. A death by a thousand cuts is still a death. There is no logical, legal, or scientific justification for ignoring the first 999 cuts and limiting the review to the effect of the latest cut.

The third and arguably most serious defect in the Department's review of the depth correction application was its requirement that New Hope's permit amendment could only be denied if New Hope's mining would increase "the frequency and severity of sinkhole formation." We fundamentally disagree that the odds of someone getting hurt must increase before the Department does something about it. If the current level of risk is unacceptable—and it clearly is—the Department has an obligation not to perpetuate and enable it. The Department

says the situation must get worse, but the School has convinced us that, in terms of risk, it cannot get much worse than it already is.

Not only is the Department asking the wrong question, the question is ill defined, at best. For instance, what does it mean to increase the frequency or severity of collapse sinkhole formation at the School? Despite two weeks of testimony, not a single witness answered that question. With regard to "severity," the Department never defined whether the sinkholes needed to get larger or deeper. Many of the sinkholes have been quite large and deep, more than capable of causing harm to human life or damage to property. The swallet in Primrose Creek has completely swallowed up the stream. The Department never elucidated at what point it would be satisfied that the situation was sufficiently severe. Would an injury need to occur or a building collapse? With respect to frequency, Solebury School has averaged two to three sinkholes a year since 1989 and it suffered 19 sinkholes from 2009 through 2011. Must sinkholes be shown to appear once a month to satisfy the Department? The Department clung to its ill-conceived standard as if the sinkhole problem at the School were not already severe.

We seriously doubt that the Department's manufactured standard could even be met. The Department created an *ignis fatuus* that the School had no hope of satisfying. Predicting where, when, and how serious future collapse sinkhole occurrences will be is usually impossible. (*See* T. 475-76; S. Ex. 245.) Their unpredictability is precisely why they are so dangerous. If even one sinkhole cannot be predicted with accuracy, how can scientists working on behalf of the School be expected to predict the precise extent to which sinkhole formation at the School will increase "in frequency or severity"? We cannot imagine any scientist credibly opining, for example, that collapse sinkholes will now be deeper or they will now occur once a month instead of once every couple of months. The Department's standard asks the impossible and the Department then

criticizes the School's experts for not being able to predict the exact extent to which sinkhole occurrences will "get worse."

New Hope's Mining Is Causing a Serious Risk to Health, Safety, and Welfare and the Depth Correction Should Have Been Denied

Implicit in everything the Department has said and done in this matter is the notion that "what's done is done": quarrying has been going on for decades; the quarry may be nearing the end of its life anyway; the School never complained before and it should bear up and allow the mining to be completed. The School quite properly responds that what's done is far from done, and enough is enough. We agree with the School.

The Department should have evaluated New Hope's application to assess whether continued mining will unavoidably perpetuate a health and safety hazard. Had it done so, it would have found that mining will perpetuate the hazard, and as a result, the depth correction should not have been issued.

Despite a hearing on the merits lasting ten days, there was a remarkable lack of disagreement among the credible experts regarding many of the key facts in this case. As previously mentioned, there was no disagreement that the School is enduring a severe sinkhole problem, and that the problem presents a significant risk to the health, safety, and welfare of the children and adults who live, work, and go to school on its campus. Perhaps somewhat surprisingly, none of the credible experts disagree that New Hope's mining is at least a contributing factor that is causing the hazard.[2] While we think that alone is enough to justify

[2] William Kochanov, P.G. of the Department of Conservation and Natural Resources was brought in by the Department of Environmental Protection to testify in support of the permit issuance. Kochanov is well-regarded in Pennsylvania as an expert on karst geology. Although we find him to be qualified to testify as an expert, the opinions he rendered in this case were often at odds with that of every other expert in the case. For example, although every other expert acknowledged some connection between the quarry and the sinkholes, Kochanov's basic position is that more study is needed. (T. 1855-58; DEP Ex. 196.) However, despite claiming that the current evidence is inconclusive, he still somehow was able to

rescission of the depth correction, in the interest of a complete record we credit the expert opinions of the School's expert witnesses, Ira Sasowsky, Ph.D. and Michael Byle, P.E., that New Hope's mining is the *only* significant cause of the collapse sinkholes. In other words, but for the quarry, the sinkholes would not be forming.

The weight that we lend to an expert's opinion depends on a variety of factors, including the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data. *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 780 (citing *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)). We also look to the opinion itself to assess whether it is coherent, cohesive, objective, persuasive, and grounded in the relevant facts of the case. *Pine Creek*, 2011 EHB at 780.

An important aspect to any expert analysis of the Primrose Creek Basin is the underlying issue of karst geology. The existence of karst geology is an extremely important factor that pervasively influences any scientific study undertaken and expert opinion rendered regarding such an area. In this respect, the School's experts, Dr. Ira Sasowsky, P.G. and Michael Byle, P.E., must be viewed with an elevated credibility given their career specializations in the field of karst geology.

Dr. Sasowsky has devoted his career to studying karst geology. He is a well-recognized expert in karst geology, both nationally and internationally. He has conducted field studies in karst regions in more than 25 states, South America, the Caribbean, and Europe. He has edited textbooks on the subject and published numerous peer-reviewed articles and abstracts on karst.

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opine, employing the Department's standard, that quarrying 50 feet deeper will not exacerbate the sinkhole problem. Furthermore, if more study is needed to assess whether the School's serious sinkhole problem is being caused by the quarry, why is the Department allowing quarrying to continue pending the results of that study? By and large, we do not credit Kochanov's opinions in this case.

(S. Ex. 245.) Above all other experts in this case, Sasowsky is eminently qualified on the subject of karst geology and we accept his opinions as highly credible.

Mr. Byle has specialized in geotechnical engineering. He has more than thirty years of experience in karst geology issues, more than fifteen of which are specific to the karst geology of Pennsylvania. (S. Ex. 247.) Byle has conducted analyses, developed technical reports, and proposed engineering designs for karst regions across the United States. His specialized and expansive experience makes him a compelling expert for opining on geologic issues that form a key part of engineering solutions to challenges associated with karst geology.

At the hearing, the Department raised objections to Byle's testimony, arguing that he was conducting the unlicensed practice of geology. (T. 794-96.) The Department has reiterated similar objections in its post-hearing brief. The Department's objections to Byle's testimony and work in this case are essentially directed at the field of geotechnical engineering itself, due to either a fundamental misunderstanding of the study and practice of geotechnical engineering, or a misguided grievance with its existence as a discipline. We do not agree with the Department that in order to engage in the study and practice of geotechnical engineering that one must, as a necessary precursor, be both a licensed professional engineer and a licensed professional geologist. The Department has pointed us to no such requirement. An expert understanding of geology is a necessary component of geotechnical engineering. The standard for expert testimony in Pennsylvania is that the expert must possess knowledge beyond that of a layperson, the knowledge must assist the trier of fact in understanding evidence or an issue of fact, and the expert's methodology must be generally accepted in the field. Pa.R.E. 702; *Fisher v. DEP*, 2010 EHB 46, 47-48; *Rhodes v. DEP*, 2009 EHB 237, 238-39. Byle certainly qualifies under that standard and we find his opinions to be credible.

Louis Vittorio, Jr., P.G. has spent his career focusing on hydrogeology. His firm, EarthRes Group (ERG), has had New Hope as a client since 2002. (T. 1015-16.) He has the most direct experience working in the Primrose Creek Basin and in the quarry. (T. 1231.) Vittorio has also worked on numerous projects involving karst geology. (N.H. Ex. 176.) Although Vittorio is well-qualified, on balance, to the extent they disagreed, we find the opinions of Sasowsky and Byle more credible.

Michael Kutney, P.G. was the Department's lead permit reviewer for the New Hope depth correction. Mr. Kutney was a very sincere and credible witness and we found him to be a qualified geologist. However, although Kutney is generally familiar with karst geology and collapse sinkhole formation, he acknowledged that he has limited expertise in the field of karst geology and sinkhole formation. (T. 2169, 2206, 2301.) He testified that he involved Kochanov to assist him in assessing the karst geology of the region. (T. 2122.) Although Kutney also testified that he formed his own opinion regarding the effect of the quarry on sinkholes, his close work with Kochanov over the course of a year and a half indicates that Kutney's opinions were heavily influenced by Kochanov, whose opinions in this case we do not credit. (T. 2122-26, 2301.)

In short, the School assembled a top-notch team of experts for evaluating the karst geology of the Primrose Creek Basin and the hydrogeologic connection between the quarry's dewatering and the sinkhole development on the School's campus, the key issues in the case. Although Sasowsky, Byle, Jennifer Wollenberg, Ph.D., Kutney, and Vittorio were all qualified, sincere, and credible, Sasowsky and Byle's specialized knowledge uniquely qualifies them to opine on karst geology and the development of collapse sinkholes within the basin, which is the crux of this case. We weigh their opinions accordingly.

The evidence is overwhelming that New Hope's mining is the predominant cause of the sinkhole problem at Solebury School. The quarry pumps an average of between two and three million gallons of water per day out of its pits. Before New Hope's dewatering, the groundwater table underneath the School was about ten feet below the surface. It is now about 100 feet below the surface as a result of the quarry dewatering. The quarry is essentially draining all of the in-basin groundwater from the basin, and it is now pulling groundwater originating from outside of the basin as well. Since the basin itself has nothing left to give, future effects will be muted, but groundwater levels will continue to go down. No expert testified that groundwater levels will return to natural levels so long as dewatering continues. No expert testified that groundwater levels will go up, or that sinkholes will stop forming.

The drop in groundwater caused by the quarry is what is in turn causing the sinkholes. The absence of water causes an immediate destabilizing effect as a result of a loss of cohesion, but the bigger problem is that the quarry opening, including the opening of high conductivity groundwater pathways, coupled with lower groundwater in general and a more extreme hydraulic gradient, induces regolith that formerly filled voids in the soluble karstic rocks to wash away. If this happens from the bottom up as it does under the School, the unconsolidated materials at the surface hold for a while with nothing but air beneath them. Then suddenly, the arch collapses and the School is left with a collapse sinkhole. This process will continue unabated until the quarry stops pumping. A lot of damage has already been done, but when the quarry stops pumping, the pit will fill up and the sinkholes will eventually stop.

The Department and New Hope spent a good deal of effort attempting to deflect attention away from the quarry's obvious role in causing the collapse sinkhole problem within the Primrose Creek Basin. The Department and New Hope assert that rain and flooding as well as

Solebury School's campus development have contributed to sinkhole formation. The Department and New Hope also tell us, unhelpfully, that sinkholes form from a combination of water and karst geology. This is like telling us that you cannot have a broken bone without a bone. This is, of course, true, but something more than the presence of water and karst is needed to explain why the School is suffering from so many sinkholes. The karst geology has existed for millions of years. The School did not start to experience rain and floods for the first time in 1989. Yet there is no evidence of sinkholes forming on the School's campus until 1989.

The Department and New Hope's effort to saddle the School with part of the blame is entirely unconvincing. First, in terms of the School's development, the School constructed a number of buildings between 1948 and 1968 without any sinkholes forming. (S. Ex. 288.) Between 1978 and 1997 the School engaged in no campus development, yet saw eight sinkholes form from 1989 through 1997. (*Id.*) In addition, the development that the School has engaged in from 1998 to the present has been done in a cautious and responsible manner, seeking out geotechnical consultants to ensure that development and post-construction drainage pathways would be done in ways that would not exacerbate the sinkhole problem. (S. Ex. 42-56.) The School has taken all reasonable precautions to ensure that it did nothing to contribute to sinkhole formation. Furthermore, collapse sinkholes have formed both on and off the School's campus, in areas of long-existing buildings and in forested areas, such as the swallet in Primrose Creek. Sasowsky and Byle credibly opined that the School's development has not contributed in any meaningful way to sinkhole formation.

Putting aside its lack of technical merit, the Noncoal Act was not intended to elevate the right to mine above the right of the mine's neighbors to the quiet enjoyment of their property. As discussed above, the Act expresses the opposite intent. Through no fault of its own, Solebury

School is now constrained in the lawful use of its property as an educational institution for children. There is no support in the law for the Department's decision to allow this situation to go forward.

The Department impressed upon us the fact that the quarry and the School are located in a sinkhole-prone area. The Department did not explain the legal relevance of this fact. If the Department is suggesting that New Hope is somehow more entitled to cause a hazardous condition because the area is prone to sinkholes, we completely disagree.

The Department and New Hope point to a number of natural and permit conditions that they believe will protect the School. The School's response is that none of these conditions are working now, so they are largely irrelevant. We agree. The conditions will not eliminate or even reduce the existing, ongoing hazard to health and safety. The Department and New Hope argue that the conditions will prevent the situation from getting worse, but as previously mentioned, that is an entirely inappropriate question and, in any event, in terms of risk to health and safety the situation cannot get any worse. Nevertheless, we will touch on a few examples of how the School has convinced us that the Department's allegedly protective measures will not provide any comfort.

The Department and New Hope point to geologic features such as a shale layer underneath the School, a diabase dike east of the School, and tighter bedrock at depth beneath the School as natural features working in concert to restrict groundwater flow, thereby protecting the School from the effects of mining. At the risk of belaboring the point, the simple fact of the matter is that these features have done nothing to prevent collapse sinkholes from forming at an alarming rate at the School to date. There is no basis for the claim that the natural features will do anything in the future to quell the ongoing sinkhole problem. The conditions giving rise to

the sinkholes are already in place and an unacceptable number of sinkholes have formed while all of these alleged hydrogeologic barriers have been in place. There has been no evidence to suggest that there is anything in place now that will stop this ongoing problem.

As a technical matter, no expert could tell us exactly where the shale layer and tighter bedrock are located, if at all, under the School. There is photographic evidence of visible portions of the shale layer presenting itself in the bed of Primrose Creek, suggesting that the shale layer is very near the surface at some points. No comprehensive studies have been undertaken of the shale layer and no party could exactly pinpoint the defined extent of the shale layer. New Hope acknowledged that the shale layer pinches out and the Department testified that it comes and goes at points. We have a very difficult time accepting concrete assertions that the shale layer is an effective hydrogeologic barrier when no one even knows its westward extent toward the School and if it is a continuous, unbroken stratum.

Likewise, there has been no comprehensive study of Dike 1. For instance, Dike 1, even if it is functioning as a hydrogeologic barrier, has done nothing to stem the formation of collapse sinkholes thus far. Even now, it is undisputed that water is still finding a way around the dike and making it into the quarry, meaning the dike is still allowing the quarry to dewater the area under the School.

More than any other natural feature, the Department and New Hope rely heavily on the concept that the rock the quarry is mining becomes tighter with depth, meaning in their view that it is unlikely that karst conduits will be encountered. At the hearing, when the other natural geologic features were exposed as having a speculative effect as hydrogeologic barriers, the Department and New Hope continually fell back on the rock becoming tighter at depth. They lean on this premise to assert that there will be no further lowering of the groundwater table

beneath the School and then contend that consequently the quarry does not present a harm to the School. Not only are the Department and New Hope incorrect in this contention, but it also misses the point. New Hope has been mining this tighter rock for years and yet collapse sinkholes continue to develop on the School's campus. Furthermore, there is significant evidence of voids in the deeper rock based on well logs and blasting logs. Statistically, some of these voids are likely to be water-bearing zones. Still further, many sinkholes have formed in areas of the campus where it appears that there is nothing but the tighter formation, which runs directly counter to the assertion that the tighter strata are protective of the School.

In addition to the natural features doing nothing now or in the future to prevent sinkholes, there is nothing contained within the permit that is adequately protective of the School. The Department points to the Sinkhole Minimization and Mitigation Plan that it required New Hope to prepare and implement as a protective measure. The essence of this plan is that New Hope must now repair sinkholes *after* they form within the quarry's zone of influence. The plan is misleadingly named because it does nothing to prevent the formation of collapse sinkholes in the first place. Mr. Kutney acknowledges this in his expert report. (DEP Ex. 197 at 3.) Even Mr. Vittorio admitted that the Plan does nothing to prevent the occurrence of future sinkholes; it only sets forth measures to prevent existing sinkholes from reopening after they have been repaired. (T. 1642-43.) This plan is not protective of the School.[3]

Under Special Condition #21, New Hope is required to report to the Department when it encounters mud seams or voids coupled with down hole loss or decrease in return water, or when it encounters "sustained high yield artesian conditions" while conducting pre-blast drilling or any mining of the quarry. Drilling is then to cease until the Department can conduct an investigation

[3] *Cf. Solebury Twp. v. DEP*, 2004 EHB at 120-21 (the fact that New Hope was required to restore or replace water supplies after the fact does not excuse an unreasonable impact upon the hydrologic balance in the first place).

and determine whether further mining will adversely affect the hydrologic balance. This permit condition, which was essentially written by New Hope's consultant, is, perhaps not surprisingly, not particularly protective. First, the permit lacks definitions that would provide adequate meaning to the terms "sustained high yield artesian conditions." There is no guidance provided to New Hope on what constitutes sustained high yield artesian conditions or how to recognize such conditions that would require reporting to the Department.

Once one of these seams is encountered, stopping or controlling the inflow of water may be difficult. In addition, there was testimony that an encountered mud seam may at first seem insignificant, but may soon develop into a more serious condition with seeping water becoming an in-rush of water with accompanied sediment flushing. (T. 415-17, 484-85, 565, 617, 660.) Further, it seems that corrective action may only be required if the sustained high yield artesian conditions are coupled with the likewise undefined "major unanticipated change in the predicted groundwater inflow into the pit" from Special Condition 19.

The Department also refers us to New Hope's quarterly monitoring obligation. It says that if significant changes in the hydrogeology of the basin manifest, the data from the monitoring well network will give it an opportunity in the future to react. Once again, monitoring is already underway, but it has obviously done nothing to eliminate the ongoing sinkhole problem at the School. Like the Sinkhole Minimization and Mitigation Plan, groundwater monitoring does nothing to prevent sinkholes from forming in the first place. The Department has not explained what measures it might or might not take if it detects something in the groundwater monitoring results. A sudden collapse of groundwater levels is not necessarily a precursor or a prerequisite to sinkhole formation. It is unclear how another dewatering event like the one experienced in the early 1990s would impact sinkhole formation within the basin and

how long it would take for that impact to materialize. No program has yet been designed that can predict sinkhole formation. New Hope's monitoring well network contains no wells at the School. In short, New Hope's monitoring network provides no protection against the ongoing formation of sinkholes and no demonstrated value in stopping them from continuing into the future.

In order to detect abrupt changes in the groundwater, the Department relies in part upon New Hope's groundwater computer modeling, which has an integral reliance upon the monitoring well network. Interestingly, the Department in *M & M Stone Co. v. DEP*, 2008 EHB 24, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008), attacked the conclusions reached as a result of computer-generated groundwater modeling using the same model because the model was premised upon the inaccurate assumption that the fractured bedrock in the study area reacted to pumping more like a uniform porous media than a system controlled by irregular and variable fractures. 2008 EHB at 47. We agreed with the Department's criticism of M & M Stone's experts for basing conclusions on modeling that treated the study area as if it were a veritable sandbox in which water flows in a uniform pattern between all points. 2008 EHB at 61.

In this case, Dr. Sasowsky challenged Mr. Vittorio's conclusions for similar reasons. Karst favors irregular preferential groundwater flow at least as much as and likely more than other geologic settings. Sasowsky credibly opined that Vittorio's modeling was not designed to adequately account for that. (T. 389-97; S. Ex. 245.) Vittorio's defense on that point is not very specific or satisfying. (T. 1420-27, 1452, 1485-88.) The primary response seems to be that the groundwater levels generated by the model "contoured fairly well." (*See, e.g.,* T. 1427.) Sasowsky vigorously disagreed. He pointed to wildly crenellated contour lines, lines not supported by adequate data, lines that depict "crazy flow paths," and contour lines extending

through known hydrogeologic barriers. (T. 398-405, 452-55; S. Ex. 329.) We find Sasowsky's characterization far more credible. The bizarre results of the quarry's modeling should have been seen as a red flag suggesting that the model was not showing a real picture of what groundwater is actually doing at this particular site. This is not at all surprising in any karst system, let alone the Primrose Creek Basin, which has known conduit flow. The reliance on a model that does not account for the karst geology of the basin is a significant flaw that undermines many of the assertions put forth by New Hope regarding its ability to detect and react to a change in groundwater levels that will conduce sinkhole formation.

The School's overarching concern is with the collapse sinkholes on its campus. However, the School has also argued that the depth correction should have been denied because New Hope's mining has and will continue to cause an unreasonable disturbance of the hydrologic balance and impairment of the stream, and its mining is causing excessive sedimentation in the reach of the Primrose Creek located below and downstream of the quarry.

Although the School has raised some legitimate points on these issues, particularly regarding the way the Department reviewed the effects of the mine on the hydrologic balance,[4] the safety hazard caused by the quarry compels us to rescind the depth correction, so we will forbear at this time from offering an opinion regarding the Department's analysis of the

[4] For example, the Department evaluated the effect of New Hope's mining on the hydrologic balance using 2005 as a baseline. (T. 2171-74, 2178, 2411-12; S. Ex. 176.) The Department ordinarily uses natural conditions that existed before mining as the baseline. (T. 2198-99.) In this case, by 2005, New Hope's mining had already had a profound impact on the hydrologic balance, so it is difficult to understand the decision to start the analysis in 2005, according to the School. The School says that the mining by 2005 had already permanently eliminated part of the stream, converted other parts of the stream from perennial to ephemeral, lowered the water table by 100 feet, required replacement of numerous wells, and so the School questions why all of these effects were ignored by the Department in its analysis.

hydrologic balance and sedimentation issues.[5] Likewise, it is not necessary at this time for us to decide whether the quarry's undisputed flow impairment of the upstream reach of Primrose Creek would independently justify a rescission of its depth correction.

Objection to Exhibits

The Department contests some of the exhibits used by the School at the hearing that were not previously produced during the discovery period itself or simultaneously with the School's pre-hearing memorandum. The exhibits at issue are Solebury School Exhibits 323–330. All eight of these exhibits were admitted at the hearing over the Department's objections. The Department continues to maintain that it was unfairly prejudiced by the School's failure to produce them earlier during the course of the appeal. The School responds that the exhibits are merely demonstrative evidence that produce no new information and merely visually depict data contained in other exhibits that were previously available to all parties during the case.

The Department fails to explain exactly how it has been prejudiced. In fact, we view the objections as bordering on the frivolous. The exhibits at issue are multicolored diagrams illustrating the geologic formations in the area including and surrounding the Primrose Creek Basin, as well as graphs illustrating water levels in monitoring wells, the water bearing zones in geologic strata, and quarry pumping as a fraction of precipitation.

The critical consideration in evaluating the admissibility of demonstrative evidence runs to one of the core tenets of evidence, namely, weighing the probative value of relevant evidence against the risk of unfair prejudice to other parties. Pa.R.E. 403; *Commonwealth v. Serge*, 896 A.2d 1170, 1177 (Pa. 2006). Demonstrative evidence has long been held as admissible as long as it accurately depicts what it purports to represent and is helpful in understanding the

[5] Because we do not reach the sedimentation issue, there is no need to address New Hope's challenge of the School's standing to address that issue.

underlying facts. *Serge*, 896 A.2d at 1177 (Pa. 2006); *see also Nyce v. Muffley*, 119 A.2d 530, 532 (Pa. 1956). While we agree that exhibits such as the School's should have been provided to the other parties, in the case before us we do not find that the opposing parties suffered unfair prejudice in not having them earlier. The key point is that the exhibits do not contain any new data. In fact, they are all comprised of data generated either by the Department or New Hope. We do not see how the parties can claim unfair prejudice regarding exhibits that do nothing more than convey their own data. The exhibits themselves do not make any broad or specific conclusions; they merely show what has been discussed and studied exhaustively in this case. In a case that includes more than 700 exhibits and voluminous amounts of data, much of which is duplicative, the challenged exhibits have been slightly helpful, but they certainly have not played any key role. The Department has made no attempt to explain how these exhibits could possibly have materially impacted the resolution of this appeal.

Some of the information shown by these exhibits is extremely basic, such as the geologic formations that have been studied extensively by all parties. There is nothing controversial in them; there is nothing that is not already contained in other exhibits. In fact, Solebury School Exhibit 323 contains nothing that is drastically different from figures E-006 and D-006A from New Hope's consultant's Hydrogeologic Investigation Report. (T. 1371-72; N.H. Ex. 178.) The parties in this case were all represented by extremely able counsel who conducted many months of discovery and exchanged thousands of pages of complex documents. It was abundantly clear that each party was fully apprised of the other parties' cases. This was not a case of trial by ambush, very much the contrary.

To the extent the Department complains that some of the exhibits do not accurately represent what they purport to depict, such as an alleged manipulation of the scale on the *x* axis,

we very often deal with complex charts and graphs at the Board. We can understand and interpret differences in scale. We do not feel that we have been misled in any way. Accordingly, the objections to the demonstrative exhibits are overruled.

Conclusion

Our fundamental issue with the depth correction is that it allows a condition to persist that endangers the health and safety of others. New Hope does not get to continue creating a safety risk by estoppel. New Hope's right to mine while causing a clear safety risk is not grandfathered. There is nothing in the law to support such a notion, quite the contrary. *See Bonzer v. DER*, 1981 EHB 34, 39 ("No one can gain a prescriptive right against the public to continue a nuisance on his property."); *Clearview Land Dev. v. Commonwealth*, 327 A.2d 202, 205 (Pa. Cmwlth. 1974) (no prescriptive right to continue a condition that is declared by statute to constitute a public nuisance); *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 884 n.13 (Pa. 1974) (one cannot obtain a prescriptive right to maintain a public nuisance); *cf. Mystic Brooke Dev., L.P. v. DEP*, 2009 EHB 146, 151 (no prescriptive right to contaminate a water supply); *William J. McIntire Coal Co. v. DER*, 1986 EHB 712, 729 (no prescriptive or property right to pollute a stream).

We understand that there has already been a substantial amount of mining below -120 feet MSL both illegally before the depth correction was issued and legally after it was issued. Our Adjudication is not intended to have any retroactive effect with respect to that mining. It is also not intended to prohibit any mining that may be performed in accordance with the permit above -120 feet MSL. Although it will take quite a while for the unsafe condition to abate, movement toward that goal should commence immediately. New Hope may be able to pursue options such as the engineering solutions proposed by Mr. Byle to eliminate the quarry's effect

on the groundwater table beneath the School and help ensure that sinkhole development will abate, and nothing in this Adjudication is intended to discourage New Hope from pursuing such options. (T. 677-80.) Interestingly, New Hope (as opposed to the Department) has not argued that such alternatives do not exist. The Department claimed that Byle's proposals would be too expensive to implement and may not work, despite acknowledging that it did not bring any specific geotechnical engineering experience to bear on the issue. (T. 2302-03.) In the meantime, given the clear and present danger being caused by mining, we find it necessary to rescind the depth correction effective immediately.

CONCLUSIONS OF LAW

1. The Board reviews actions of the Department *de novo* and considers the case anew. *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2002 EHB 19; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

2. In third-party appeals of Department actions, the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2)

3. The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, or that its decision is not supported by the facts. *Gadinski v. DEP*, 2013 EHB 246, 269.

4. The Department acted unlawfully, unreasonably, and abused its discretion by approving New Hope's depth correction even though New Hope's continued mining pursuant to the depth correction is causing and perpetuating a hazardous condition on its neighbor's property that endangers the public health, safety, and welfare. 52 P.S. §§ 3302, 3308, 3311; 71 P.S. § 510-17(3); 25 Pa. Code §§ 77.126, 77.130(1), 77.521.

5. The Department erred by imposing a standard of review that the frequency or severity of sinkhole occurrences must increase for the depth correction to be denied.

6. The Department erred by requiring the School to demonstrate that New Hope's mining could not be reasonably accomplished rather than requiring New Hope to demonstrate that mining could be reasonably accomplished. 52 P.S. § 3308(a); 25 Pa. Code § 77.126.

7. The Department erred by limiting its review of the permit to the isolated portion of the 50 foot depth correction from -120 feet MSL to -170 feet MSL. The Department should have considered the effect of mining from the surface to -170 feet MSL. *Solebury Twp. v. DEP*, 2004 EHB 95; *Solebury Twp. v. DEP*, 2007 EHB 713; *Angela Cres Trust v. DEP*, 2009 EHB 342; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Tinicum Twp. v. DEP*, 2002 EHB 822.

8. Solebury School proved by a preponderance of the evidence that the Department erred in granting the depth correction and allowing New Hope to create hazards to health and safety. 52 P.S. § 3302; 25 Pa. Code § 77.130; 25 Pa. Code § 1021.122(c)(2).

9. Solebury School failed to prove that the quarry demonstrated a lack of ability or intention to comply with the law as indicated by past or continuing violations, except to the extent the quarry is causing a hazardous condition on its neighbor's property. *See* 52 P.S. § 3308(b)(1); 25 Pa. Code § 77.126(a)(6).

10. The Department's failure to comply with the requirement in 25 Pa. Code § 77.126(a) that it make several written findings before issuing the permit (T. 2142-45, 2150-51, 2396-99) constitutes a harmless error.

11. New Hope failed to affirmatively demonstrate that its mining activities could be reasonably accomplished under the Noncoal Act and the regulations promulgated thereunder. 77 Pa. Code § 77.126.

12. The quarry is creating a public nuisance. 52 P.S. § 3311(b).

13. The Department has a duty to abate and remove public nuisances. 52 P.S. § 3311(b); 71 P.S. § 510-17(3).

14. The issues raised by Solebury School in this appeal are not barred by administrative finality. *Angela Cres Trust v. DEP*, 2009 EHB 342; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Tinicum Twp. v. DEP*, 2002 EHB 822.

15. The Department erred in approving a depth correction that does not protect the quantity of surface and groundwater within the permit area and within adjacent areas. 25 Pa. Code § 77.457; *Plumstead Twp. v. DER,* 1995 EHB 741, 776-77.

16. Solebury School's demonstrative exhibits were not unfairly prejudicial to the Department or New Hope and were properly admitted. Pa.R.E. 403; *Commonwealth v. Serge*, 896 A.2d 1170, 1177 (Pa. 2006).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY SCHOOL	:	
	:	
v.	:	**EHB Docket No. 2011-136-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 31st day of July, 2014, it is hereby ordered that the July 29, 2011 depth correction to Surface Mining Permit 7974SM3C12 authorizing New Hope Crushed Stone & Lime Company to mine to a depth of 170 feet below mean sea level at the New Hope Crushed Stone quarry is **rescinded**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 31, 2014

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