



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

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EHB Docket No. 2022-068-BP

Issued: October 2, 2024

ADJUDICATION

By Paul J. Bruder, Jr., Judge

Synopsis

The Board dismisses an appeal of a Department administrative order directing Appellant to cease earth disturbance activities, implement Best Management Practices, submit a written Erosion and Sedimentation control plan, and apply for an NPDES permit. The Department met its burden of proof demonstrating that the order that it issued to Pileggi was lawful, reasonable and supported by the facts.

BACKGROUND

Appellant Salvatore Pileggi (“Mr. Pileggi”) has appealed an administrative order issued to him by the Department of Environmental Protection (“Department”) on August 11, 2022 following several inspections conducted by the Lackawanna County Conservation District (the “Conservation District” or “District”) in 2021 and 2022 of property owned by Mr. Pileggi in Newtown Township, Lackawanna County. The order alleges that Mr. Pileggi conducted earth disturbance activities in excess of one acre, and pursuant to a common plan of development or sale on his property, without first obtaining an NPDES permit, without implementing appropriate best management practices (“BMPs”) or stabilizing the site, and without developing an erosion and

sedimentation (“E&S”) control plan. The order requires Mr. Pileggi to cease any earth disturbance activity, implement appropriate BMPs, and submit an E&S control plan and an NPDES permit application to the Conservation District.

Mr. Pileggi argues that the order was improperly issued because any earth disturbance activities he performed fall within the regulatory definition of “road maintenance activities” and thus are exempt from NPDES permitting requirements. He contends that the Department, which bears the burden of proof in this appeal, has not produced sufficient evidence to show otherwise. Additionally, Mr. Pileggi argues that his earth disturbance activities were not taken pursuant to a common plan of development or sale and, such activities having since ceased, are all in the past and therefore there is no “proposed” earth disturbance within the meaning of the regulations requiring an NPDES permit or an E&S plan. Finally, Mr. Pileggi contends that the Department has not sufficiently controverted his assertion that he did use BMPs while engaging in the earth disturbance.

On September 15, 2022, the Appellant appealed the Order to the Pennsylvania Environmental Hearing Board (“Board”). On July 28, 2023, Appellant filed a Motion for Summary Judgement, which was denied by Order of then-presiding Judge Labuskes on September 28, 2023. On February 21 and 22, 2024, the Board held a hearing in this appeal in Harrisburg. The parties have filed their Post-Hearing Briefs, and the Board is now in the position to resolve this appeal.

FINDINGS OF FACT

1. The Department of Environmental Protection (“Department”) is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1- 691.1001 (“The Clean Streams Law”); Section 1917-A

of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (“Administrative Code”); and the rules and regulations promulgated thereunder, including the Department’s Chapter 102 Regulations governing Erosion and Sediment Control at 25 Pa. Code §§ 102.1 – 102.51.

2. The Appellant, Salvatore Pileggi is an adult individual who resides at 9156 Valley View Drive, Clarks Summit, PA 18411. He has lived at this location for over 30 years. (Hearing Transcript (“T.”) at page 348; Department Exhibit (“DEP Ex.”) 25.)

3. Mr. Pileggi owns approximately 60 acres spanning between Forest Acre Drive and Valley View Drive in Newton Township, Lackawanna County. (the “Property”). (T.288.)

4. Mr. Pileggi bought the Property in 1999 from K.W.F. Inc. (T. 488; DEP Ex. 25.)

5. Prior to Mr. Pileggi purchasing the property, the previous owner, K.W.F., Inc., developed plans to subdivide the Property in the 1970s, which included a 10-lot subdivision referred to as the Wooded Lane Subdivision (the “Subdivision”) (T. 488; DEP Ex. 30, p. DEP-400).

6. Mr. Pileggi is the owner of lots 3-10 in the Wooded Lane Subdivision located on the Property in Newton Township, Clarks Summit, PA. (Joint Stipulation).

7. Wooded Lane begins at its intersection with Forest Acres Drive, a PennDOT highway, and extends into the Property. (Appellant’s Statement of Undisputed Facts, Summary Judgment pleadings.)

8. Wooded Lane runs northeast to southwest through the Pileggi Property, coming off of Forest Acres Drive up to Valley View Drive and Mr. Pileggi’s residence. (T. 354; 361; 398-399; App. Ex. 16).

9. Bonnie Circle runs east and west and is perpendicular to Wooded Lane

approximately 350-400 feet from the Wooded Lane entrance from Forest Acres Drive. (DEP Ex. 18(a)).

10. Brian Mackowski serves as the Department's Waterways and Wetlands Program Chief of Compliance. (T. 217)

11. Mr. Mackowski routinely makes road maintenance determinations in his work on behalf of the Department. (T. 219-220)

12. When making road maintenance and construction determinations, Mr. Mackowski evaluates the road's characteristics prior to changes and whether parties are maintaining the road's original grade and cross-section. (T. 264)

13. Jerry Stiles is a life-long resident of Clarks Summit, PA in Lackawanna County. (T. 21)

14. Mr. Stiles has worked for the Lackawanna County Conservation District for approximately 30 years and currently serves as the District Manager there. (T. 19, 21)

15. Mr. Stiles first inspected Mr. Pileggi's Property on April 19, 2021, after having received complaints from the public. (T. 22-24, 26; Inspection Report No. 1.)

16. A significant but indeterminate amount of earth disturbance work had been performed on the Property as of the April 19, 2021 inspection. (T. 25-26, 32-33)

17. At the time of the April 2021 inspection Mr. Stiles had not definitively determined that an NPDES permit was required, so he requested further information from Mr. Pileggi regarding the estimated earth disturbance over the life of the project in order to make that determination. (T. 37-38.)

18. Mr. Pileggi responded that the project would include approximately 1,000 linear feet of trenching for utilities not exceeding two feet in width, approximating 2,000 linear feet, in

addition to work to widen the shoulder of an existing road cross-section. (T. 43; DEP Ex. 4.)

19. Mr. Pileggi further estimated that the entire project would not exceed 12,800 square feet of earth disturbance. (T. 41-45; DEP Ex. 4.)

20. Mr. Stiles did not agree with these estimates, based on the work proposed and already completed on the roadways, as well as the planned utility trenching, all of which indicated to Mr. Stiles that there were plans underway for a residential subdivision. (T. 41-45.)

21. In 2019, Mr. Pileggi cut and sprayed the field west of Wooded Lane to carve out Bonnie Circle. (T. 413)

22. The conditions on the Property on April 19, 2021 differed from the Property's prior appearance. (T. 28-30, 47, 150; DEP Ex. 18(a), pages DEP 137(a), and 138(a))

23. About 600 linear feet of Wooded Lane, which had previously been a "farm lane" on the Property, had been graded and covered with a stone aggregate as of April 19, 2021. (T. 28)

24. About 250 linear feet of roadway, which had formerly been a grass field perpendicular to the 600-linear-foot stretch of roadway, had been mowed and graded but had not been covered with stone aggregate as of April 19, 2021; it was bare earth. (T. 29-30; T. 128-129)

25. In 2021, Mr. Pileggi put down modified and gravel on Wooded Lane and Bonnie Circle. The modified and gravel was hauled to the site by the truckload and spread by Mr. Pileggi. (T. 419-420)

26. The total amount of graded roadway on the Property exceeded 5,000 square feet and did not show evidence of the E&S plan and BMPs required for that amount of roadway as of April 19, 2021. (T. 30, 55-57)

27. After the April 19, 2021 inspection, Mr. Pileggi received four more inspection reports, a Compliance Notice, a Notice of Violation, and an Administrative Order. (T. 66, 76, 89,

99, 105, 118, 123.)

28. Mr. Mackowski accompanied Mr. Stiles for the fifth inspection on December 6, 2022. (T. 119-121.)

29. The fifth inspection report notes 1.48 acres of earth disturbance at the Property. (T. 120, 242.)

30. Mr. Mackowski calculated the 1.48-acre figure using Google Earth in conjunction with his and Mr. Stiles' visual inspections on the ground. (T. 119-120, 226-227, 229-232.)

31. When making a road maintenance determination, Mr. Mackowski looks at the original condition of the area in question and whether an individual is maintaining the original grade and cross-section. (T. 264.)

32. "Road maintenance" does not include expanding upon what was already there, such as making shoulders, making ditches, making channels, or laying back the embankment to cut or fill it on one side or the other. (T. 264.)

33. Mr. Pileggi testified that he did the road work at issue to repair flood damage to the Property and his neighbor's property following a severe rainstorm, and that he did so in conjunction with his regular activities to maintain the road. (T. 384-385, 482.)

34. Mr. Pileggi widened the shoulder of an existing road cross-section on the Property. (T. 43)

35. Wooded Lane has existed since before the original subdivision plans were drawn up in the 1970s and had been an unimproved "farm lane" consisting of two dirt tracks on either side of a grassy strip, just wide enough for one vehicle, until Mr. Pileggi's work to expand the road cross-section. (T. 60, 150, 212)

36. As of September 16, 2019, Bonnie Circle had been created on the ground, as

evidenced by the road being mowed into the shape of a cul-de-sac. (DEP Ex. 18(a) page 138(a))

37. As of April 19, 2021, Bonnie Circle had been graded and improved with stone aggregate. (T. 151)

38. Mr. Pileggi conducted over one acre of earth disturbance, which primarily involved work on Wooded Lane and Bonnie Circle and adjacent support areas. (T. 56-57, 227, 229, 265-266; DEP Ex. 18(a), page DEP 139(a))

39. During the fifth inspection December 6, 2022, there were survey markers for several lots in the Subdivision and at least one real estate sign indicating the lots were for sale. (T. 231-232)

40. Online listings advertised Lot 5 of the Subdivision for sale. (T. 249-250)

41. Online records showed an easement agreement between Mr. Pileggi and PPL Electric Utilities that extended over Bonnie Circle from an existing pole on Wooded Lane. (T. 246-248, 475)

42. At the time of the hearing, Lot 5 was still available for sale. (T. 367, 459)

43. Mr. Pileggi submitted a private request for sewage on the Property over a decade ago. (T. 209)

44. Mr. Pileggi also submitted a sewage planning module to the Department in 2002. (T. 287, 365)

45. The Department denied both the private request for sewage planning, and his sewage planning module submission, between the years 2002 and 2015. (T. 287, 365-366)

46. Mr. Pileggi testified that he only listed Lot 5 for sale because a potential buyer approached him seeking to purchase it. (T. 368-369)

47. Newton Township informed the buyer that building permits would not be issued

for the lot, so the buyer decided not to proceed. (T. 368-369)

48. After learning that permits would not be issued for Lot 5, Mr. Pileggi has not proposed to build on the Property, applied for other permits, or listed other lots for sale. (T. 287-288, 366-367, 370)

DISCUSSION

The Department's Order to the Appellant alleges that he violated various regulatory requirements of Chapter 102 of the Department's regulations when he performed earth disturbance work on his property in violation of the Clean Streams Law, Act of June 22, 1937 P. L. 1987 as amended, 35 P S §§ 691.1 – 691. 1001 and the Department's Chapter 102 Regulations governing Erosion and Sediment Control, 25 Pa. Code §§ 102.1 – 102.51 ("Chapter 102 Regulations").

Specifically, the Department's Order alleges that the Appellant:

1. Violated Section 402 of the Clean Streams Law and Chapter 102.5(a) by conducting earth disturbance of more than one acre without an NPDES permit, or conducting earth disturbance on a portion of a larger common plan of development over one acre without an NPDES permit;
2. Violated Section 402 of the Clean Streams Law and Chapter 102.4 for failing to implement proper Best Management Practices ("BMPs");
3. Violated Section 402 of the Clean Streams Law and Chapter 102.4(b)(2) by failing to develop and implement an Erosion and Sedimentation ("E&S") control plan for earth disturbance of 5,000 acres or more; and
4. Violated Section 402 of the Clean Streams Law and Chapter 102.22(b) for failing

to temporarily stabilize the site.¹

To correct the listed violations, the Department directed the Appellant to:

1. Immediately cease earth disturbance activities until the required permits and plans are approved by the County Conservation District;
2. Within seven days, implement BMPs in accordance with the Department's regulations and the Erosion and Sediment Pollution Control Manual, Commonwealth of Pennsylvania, Department of Environmental Protection No. 363-2134-008 (April 2000) as amended and updated.
3. Within thirty days, submit an adequate E&S control plan that complies with Section 102.4(b)(5)(i)-(xv) of the Department's regulations, 23 Pa. Code § 102.4(b)(5)(i)-(xv); and
4. Within one hundred twenty days, submit an adequate NPDES permit application as per Section 102.5 of the Department's regulations, 25 Pa. Code § 102.5.

Burden of Proof and Standard of Review

In matters before the Board, the burden of proof rests with the party asserting the affirmative of the issue, and the party with the burden of proof is required to have presented a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(a)-(b). The Department has the burden of proof in this matter. Under the Board's rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Corsnitz v. DEP*, 2018 EHB 174; *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3. Here, the Department issued an order and must show

¹ It appears that the Department later dropped this alleged violation after subsequent inspections. Inspection Report Nos. 4 and 5 (DEP Exhibits 16 and 18) do not note this as a current violation.

by a preponderance of the evidence that its actions were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32. The Board can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

The Department has the burden of proof when it issues orders. In this case, the burden it held was: 1. to establish that the Appellant disturbed more than one acre of earth in his activities on his property; 2. that any earth disturbance less than an acre was pursuant to a common plan of development greater than one acre, requiring an NPDES permit; and 3. that he disturbed more than 5,000 square feet, requiring an E&S Control Plan and proper BMPs.

Purpose of NPDES Permitting, E&S Planning and BMPs

The Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.101 (“Clean Streams Law”) empowers the Department to regulate activities that may cause pollution to waters of the Commonwealth:

Whenever the department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the department may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the department

pursuant to this section shall give the persons a reasonable period of time to apply for and obtain any permits required by such rules and regulations.

35 P.S. § 691.402(a).² The Clean Streams Law also states that the prevention and elimination of water pollution is directly related to the economic future of the Commonwealth. 35 P.S. § 691.4. Pollution under the Clean Streams Law includes sediment pollution. See *Leeward Construction v. Department of Environmental Protection*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003) (“Sediment laden runoff is defined as pollution in Section 1 of The Clean Streams Law....”).

To allow the Department to address and prevent sediment pollution, the Erosion and Sediment Control regulations in 25 Pa. Code Chapter 102 have been promulgated under the Clean Streams Law. The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 600. Accelerated erosion is defined as “[t]he removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone.” 25 Pa. Code § 102.1.

As the Board held in *O’Rielly v. DEP*:

The pollutant of primary concern for construction projects is sediment. 25 Pa. Code § 102.2. On a large project, hundreds or even millions of cubic yards of earthen materials are disturbed. When they are disturbed, they are exposed to the elements. When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless

² Mr. Pileggi argues that the statute does not grant the Department authority to issue orders to individuals requiring those individuals to apply for an NPDES permit, and instead may only enact such a requirement via rules and regulations and further argues that the phrase “the department may issue an order to a person or municipality regulating a particular activity” does not extend to the issuing of an order to apply for a permit. We disagree. The Department, by and through approval from the Environmental Quality Board, has and will continue to promulgate rules and regulations requiring that activities that create a danger of pollution only be conducted pursuant to a permit. Examples of these rules and regulations can indeed be found among those that Mr. Pileggi has fun afoul of with his particular earth disturbance activities that led to this appeal. Because Mr. Pileggi’s particular activities fall under the kind that are – by regulation – required to be permitted, the Department may also, pursuant to those regulations and authorized by the statute, issue orders requiring that those engaged in such activities apply for the required permits.

precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a deleterious effect on Pennsylvania’s streams.

In order to control the discharge of sediment while earthen materials are exposed during construction projects, federal law requires that runoff from construction activity be treated as a point source requiring an NPDES permit. 40 C.F.R. § 122.26; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. *See also* 35 P.S. § 691.402 (Department may require permits for activities that create a danger of water pollution). The permits are designed almost exclusively to control the discharge of sediment because that is what has been proven to be the potential pollutant at construction sites. *See* 25 Pa. Code Chapter 102 (program is designed to minimize the potential for accelerated erosion and sedimentation).

2001 EHB 19, 33.

In *DEP v. Steven R. Simmons*, we said “Chapter 102 requires a person to install erosion and sedimentation (“E&S”) BMP controls ‘to minimize the potential for accelerated erosion and sedimentation.’ 25 Pa. Code § 1024(b)(1), *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589. BMPs are essentially aimed at keeping the soil on the Site and preventing sedimentation runoff pollution. *Blue Mountain Preservation Association*, 2006 EHB at 600.” 2010 EHB 262, 277.

Suffice it to say then that erosion and sedimentation control from construction activities is of paramount importance to the Department, and the Board has recognized on more than one occasion the significance of, and importance to, the Department with respect to these regulations.

Road Maintenance Exemption

Mr. Pileggi claims that his activities do not require NPDES permitting or E&S planning because his activities are exempt as “road maintenance” activities, and repairs due to flood damage, and because he is not “proposing” to do any further work.

An NPDES permit is required by anyone proposing an earth disturbance:

b) **Other than** agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or **road maintenance activities**, a person proposing an

earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a) (emphasis added).

The regulatory definition of “road maintenance activities” states that such activities must occur within the existing road cross-section and enumerates the specific activities that fall under the exception:

- (i) Earth disturbance activities within the existing road cross-section or railroad right-of-way including the following:
 - (A) Shaping or restabilizing unpaved roads.
 - (B) Shoulder grading.
 - (C) Slope stabilization.
 - (D) Cutting of existing cut slopes.
 - (E) Inlet and endwall cleaning.
 - (F) Reshaping and cleaning drainage ditches and swales.
 - (G) Pipe cleaning.
 - (H) Pipe replacement.
 - (I) Support activities incidental to resurfacing activities such as minor vertical adjustments to meet grade of resurfaced area.
 - (J) Ballast cleaning.
 - (K) Laying additional ballast.
 - (L) Replacing ballast, ties and rails.
 - (M) Other similar activities.
- (ii) The existing road cross-section consists of the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features.

25 Pa. Code § 102.1.

Department witness Brian Mackowski, Chief of Compliance for the Waterways and Wetlands Program, testified that when making a road maintenance determination, he looks at the original condition of the area in question and whether an individual is maintaining the original grade and cross-section. “If something was never actually constructed, then that’s not

maintenance. That is construction.” Mr. Mackowski further testified that “road maintenance” does not include expanding upon what was already there, such as making shoulders, making ditches, making channels, or laying back the embankment to cut or fill it on one side or the other.

In the course of his first inspection of the Pileggi Property on April 19, 2021, following the receipt of complaints, Department witness Jerry Stiles, District Manager of the Lackawanna County Conservation District, observed that there was earth disturbance work performed “somewhere in the area or neighborhood [of] an acre.”³ Mr. Stiles, who is familiar with the area from both his life-long residency therein as well as his thirty-year career with the Conservation District and with confirmation from historical Google Earth images, noted that the conditions he observed during this inspection differed from the prior appearance of the site. He also observed approximately 600 linear feet of roadway (Wooded Lane) that appeared to have been recently graded and covered with a stone aggregate. Additionally, Mr. Stiles documented about 250 linear feet of roadway (Bonnie Circle) perpendicular to the 600 linear feet of roadway that also appeared to have been recently graded, though no stone aggregate had been installed as of that time. In his inspection report, Mr. Stiles noted that those two sections of roadway together exceeded 5,000 square feet, thus requiring erosion and sediment control practices, including development of an E&S plan and the implementation of BMPs, of which Mr. Stiles observed no evidence. (T. 29-30, 55-57, 79.)

At the time of the April 2021 inspection, Mr. Stiles had not definitively determined that an NPDES permit was required, so he requested further information from Mr. Pileggi regarding the estimated earth disturbance over the life of the project in order to make that determination. Mr.

³ At this point in time, Mr. Stiles had not conclusively determined how much actual disturbance had already occurred or would be generated during the life of the project. (T. 32-33.)

Pileggi responded that the project would include approximately 1,000 linear feet of trenching for utilities not exceeding two feet in width, approximating 2,000 linear feet, in addition to work to widen the shoulder of an existing road cross-section. Mr. Pileggi further opined that the entire project would not exceed 12,800 square feet of earth disturbance, an estimation that Mr. Stiles did not agree with based on the work proposed and already completed on the roadways, as well as the planned utility trenching, all of which reasonably indicated to Mr. Stiles that there were plans underway for a residential subdivision.

Four more inspections followed the original April 19, 2021 inspection, and Mr. Pileggi was also issued a Compliance Notice, a Notice of Violation, and the Administrative Order at issue here. Mr. Mackowski accompanied Mr. Stiles on the fifth and final inspection on December 6, 2022. Inspection Report No. 5 from the December 6, 2022 inspection describes the amount of earth disturbance at the site as 1.48 acres, which Mr. Mackowski arrived at using Google Earth⁴, a tool he uses almost daily in his work for the Department, coupled with his and Mr. Stiles' observations.

Mr. Pileggi testified that the work that is the subject of the Department's order was done to repair flood damage to his property and a neighbor's property following a large rainstorm, in combination with the typical maintenance he does regularly to maintain the various roads on his property. While we find Mr. Pileggi's testimony with respect to the flood damage and repairs

⁴ At the hearing, Mr. Pileggi objected to the use of Google Earth to determine the size of the area of disturbance, arguing that the use of Google Earth constituted hearsay. The Presiding Judge heard the testimony over that objection. We now overrule that objection. In *Commonwealth v. Wallace*, the Pennsylvania Supreme Court addressed the question of whether machine generated GPS data records constitute hearsay in this jurisdiction and held that such records do not. 289 A.3d 894, 908 (Pa. 2023) ("In conclusion, we hold that GPS data does not constitute hearsay under the plain language of Rule 801 because it does not constitute a statement as defined therein. We leave for another day whether, and under what circumstances, such evidence may be challenged on reliability, authentication, or other grounds."). Google Earth is a program that determines the size of an area based on plotted GPS coordinates. Mr. Mackowski testified that he inputs the GPS coordinates and that Google Earth provides an area size. He testified credibly that Google Earth is 98% accurate based on his experience using the program. T. 340-341.

along Wooded Lane and his neighbor's property and typical farm maintenance to be credible, that does not change the fact that if that the road work does not fit within the definition of road maintenance, for purposes of an exception to the NPDES permitting requirements, then he must submit a permit application.

It seems that some of the conflict in this appeal arises from the differences between common parlance and regulatory language and the ways in which they are used and applied to the issues in this appeal. While we credit Mr. Pileggi's testimony that he routinely maintains the roads on his property, and we agree that that maintenance might often fall under the regulatory definition of road maintenance, under the circumstances at play when this particular round of maintenance was conducted – including any repairs necessitated by flood damage – the Department has submitted credible evidence that the work done to maintain the roads and clean up after the flooding exceeded the regulatory definition of road maintenance because it went beyond the original cross-section of the roads. Indeed, by his own email to Mr. Stiles, Mr. Pileggi admits that part of the work done included widening the shoulder of an existing road cross-section. While grading the shoulder of an existing road-cross section does fall within the definition of road maintenance, expanding the shoulder does not. 25 Pa. Code § 102.1(i)(B).

Likewise, while in common parlance the term "road construction" could reasonably be understood to mean the construction of new roads, in this context "road construction" simply means work done to and upon existing roads that falls out of the definition of "road maintenance," such as allowing the work to extend outside of the existing cross-section of the road at issue; it is not necessary that a new road be constructed from scratch for the term "road construction" to apply to an activity. Thus, because Wooded Lane has existed at least since the original subdivision plans were drawn up in the 1970s, and there has always been something of a "farm lane" there, the work

done by Mr. Pileggi in response to the flood damage, or for any other reason, falls out of the definition of road maintenance since that work expanded the cross-section of the road.

Regardless of whether Mr. Pileggi was simply being a good neighbor by cleaning up after a flood, the fact remains that earth disturbance activities totaling more than one acre require an NPDES permit, E&S planning and BMPs, unless some exception is met. The reason the work became necessary is immaterial; rather, the material issue is whether the extent of the earth disturbance activities was sufficient to require an NPDES permit and E&S controls to protect waters of the Commonwealth from potential adverse impacts caused by the earth disturbance activities. We find that the work done by Mr. Pileggi – in response to flood damage or otherwise – falls outside of the definition of road maintenance, thus requiring an NPDES permit and E&S controls.

Appellant also claims that the regulations at issue do not apply in this instance, because he is not “proposing” any further earth moving activity. 25 Pa. Code § 102.5(a) states:

a) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

Similarly, 25 Pa. Code § 102.4(b)(2) provides:

(b) For earth disturbance activities other than agricultural plowing or tilling or animal heavy use areas, the following erosion and sediment control requirements apply: ...

(2) A person proposing earth disturbance activities shall develop and implement a written E&S Plan under this chapter if one or more of the following criteria apply:
(i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more. (ii) The person proposing the earth

disturbance activities is required to develop an E&S Plan under this chapter or under other Department regulations.

As Mr. Pileggi points out, the regulation at issue here is addressed to anyone “proposing” earth disturbance activities rather than those who have already undertaken and completed a project involving earth disturbance activities. Mr. Pileggi argues vehemently that there is no work being proposed, and thus the regulation cannot apply to him or the work already undertaken and completed. *See* Appellant’s Post-Hearing Brief, page 40. He supports this position by pointing to the inclusion of only the word “proposing,” where elsewhere the regulations describe what a person “conducting or proposing to conduct” earth disturbance shall do. *Id.* at page 41.

The Department, of course, argues that Mr. Pileggi is proposing earth disturbance activities based on the factual circumstances which it used to come to the determination that the work already performed by Mr. Pileggi was done pursuant to a common plan for development or sale, which, of course, Mr. Pileggi denies.

Thus, one simple way to answer the question of whether Mr. Pileggi is *proposing* earth disturbance activity is by asking another question: is the work that Mr. Pileggi undertook pursuant to a common plan for development or sale? If the answer to that question is yes, then we can conclude that he is indeed “proposing” earth disturbance activity within the meaning of the regulation, because further work will be performed at some future time to complete the subdivision. We answer that question *infra*.

It would also be reasonable to say that the regulations at issue presume that one will apply for the required permits and plan approvals for the work being proposed, and not that one will perform earthmoving activities in violation of the regulations by doing regulated work without proper approvals. In other words, all such work is “proposed” because the permits and approvals are required to be obtained before the work is done.

Mr. Pileggi’s argument, if accepted, would give credence to the idea that one can violate a regulation and then ask for forgiveness rather than first seeking permission, yielding an absurd result that this Board does not accept. Therefore, even if Mr. Pileggi is not proposing further work at this time, the regulatory requirements remain applicable to the earthmoving activities already undertaken.

Common Plan of Development or Sale

There is no definition for a common plan of development or sale in Pennsylvania⁵, but the term is defined in Appendix A of the Environmental Protection Agency’s General Permit for Discharges from Construction Activities as:

A contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one common plan. The “common plan” of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot.

EPA’s General Permit for Discharges from Construction Activities, effective February 17, 2022, Appendix A – Definitions.

⁵ At least one other jurisdiction, Connecticut, utilizes a four-factor test to help determine if a grantor has the intent to develop a common plan of development:

“(1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor.”

DaSilva v. Barone, 849 A.2d 902, 907 (Conn. App. Ct. 2004). There are also three factors considered that, if present, indicate there is no common plan of development:

“(1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots.”

Id.; Powell, Real Property (1999) § 60.03 [7], p. 60-31.

According to the Department of Environmental Protection's (DEP's) regulations:

[A] person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity[.]

25 Pa. Code § 102.5.

Essentially, Section 102.5 states that if a person is found to have a common plan of development, then an NPDES permit is required for any earth disturbances that is greater than one acre.

In determining whether a particular project should be considered a common plan of development or sale, the Department and Conservation District employees making such a determination will often consult a guidance document entitled *Common Plan of Development or Sale National Pollutant Discharge Elimination System (NPDES) Permits for Stormwater Associated with Construction Activities Frequently Asked Questions (FAQ)* ("Guidance Document" or "Common Plan FAQ") in addition to the applicable regulations. (T. 146-147, 209, 236.)⁶

The Department argues that several different activities performed on Mr. Pileggi's property indicate that he was intending on carrying out a common plan of development, whether in the near future or at some time in the more distant future. Mr. Pileggi conducted over one acre of earth disturbance, which primarily involved work done on Wooded Lane and Bonnie Circle. Mr.

⁶ This Board has held on many occasions that Department guidance documents do not have the weight of properly promulgated regulations, and the Board is under no duty to follow them. *PQ Corp. v DEP*, 2016 EHB 826, 837; *Winner v. DEP*, 2014 EHB 1023, 1035. *United Refining Co. v. DEP*, 2006 EHB 846. Department witnesses also testified that these guidance documents are not binding on the Department in the same manner as regulations; rather, they are merely for guidance in interpreting statutes or regulations. (T. 344-345)

Mackowski observed survey markers for several different lots in the Wooded Lane Subdivision, as well as at least one real estate sign that indicated lots were for sale. It is undisputed that plans for the Wooded Lane Subdivision came into existence in 1977, long before Mr. Pileggi bought the property it resided on. No evidence was presented that Mr. Pileggi sought to undo the recorded subdivision plans to eliminate the existence of the subdivision. Mr. Mackowski carried out further research into Mr. Pileggi's property and found records of online listings of Lot 5 for sale, as well as an easement agreement between Mr. Pileggi and PPL Electric Utilities. This easement was from an existing pole on Wooded Lane that extended over to Bonnie Circle. At the time of the hearing, Lot 5 was still for sale.

Considering 25 Pa. Code §102.5 and the Common Plan of Development FAQ document, it does seem reasonable to conclude, based on the observations of Mr. Stiles and Mr. Mackowski, that plans were being set in motion to begin building a subdivision, and thus an NPDES permit would be needed at the times of Conservation District and Department observation.

Mr. Pileggi offered many answers in response to the observations of the Department. He noted that any work on Wooded Lane and Bonnie Circle was not done to start building the Wooded Lane Subdivision, but instead as flood repair work. He testified that on those prior occasions when he has taken steps to begin construction of the Wooded Lane Subdivision, he has correctly reached out to the DEP for various approvals, i.e. he submitted a private request for sewage on the property over a decade ago, as well as a sewage planning module to the Department in 2002; both were denied, and he claims that the Property was not touched beyond his regular maintenance of his land.

Mr. Pileggi further testified that Lot 5 was listed for sale not at his sole request, but because a potential buyer approached him regarding purchasing it. However, Newton Township informed

the buyer that building permits would not be issued for the lot, so the buyer backed out. Since Mr. Pileggi learned that permits would not be issued for Lot 5, he has not proposed building anything else on the property, he has not applied for any other permits, and he has not listed any other lots for sale.

While many of these things may be accurate and even done in good faith, we concur with the Department that these earth disturbance actions by Mr. Pileggi indicate that Mr. Pileggi must have an NPDES permit for earth moving activities done in accordance with a common plan of development.

The verbal testimony and documentary evidence notwithstanding, perhaps the most compelling evidence are the aerial photographs and Google Earth images produced by the Department. The Department submitted a series of exhibits which tend to show a timeline of activities. Sometimes a picture really is worth a thousand words, and that is certainly the case here.

The Department's trial Exhibit 18(a) consists of three (3) separate images labeled DEP 137(a), DEP 138(a), and DEP139(a). DEP 137(a) is dated September 30, 2017. It is an aerial Google Earth image that shows the area in question on the Property in a generally undisturbed state. Wooded Lane is nearly impossible to make out due to extensive tree cover, and there is no indication that Bonnie Circle even exists; the area is just a grassy field.

By contrast, DEP 138(a) is a Google Earth image of the same area taken two years later, on September 16, 2019. Wooded Lane appears to still be a two-lane dirt farm track with tree cover. However, in the field to the west of Wooded Lane, an area had been mowed into the shape of a typical residential cul-de-sac. Not only that, but there appear to be additional side roads that had been mowed through the field, which would indicate additional roads intended to be laid out for a

subdivision. DEP 139(a) is a Google Earth image of the same area taken another three years later, on May 9, 2022. That image clearly shows that Wooded Lane had been widened and improved with stone aggregate, many trees removed, and Bonnie Circle had also been similarly improved. There are additional support areas that show earth disturbance and compacted soils in and around Wooded Lane and Bonnie Circle.⁷

These images clearly show that in 2017, Wooded Lane was barely identifiable, and Bonnie Circle did not exist, except maybe on paper, the proverbial twinkle in a mother's eye. By 2019, the evidence shows that the field in which Bonnie Circle existed on paper had been mowed into the shape of a typical residential cul-de-sac, and not long after that, it had been improved with stone aggregate. There would simply be no logical, reasonable explanation for this action, and Mr. Pileggi did not offer one, other than it was done with the intent to construct a subdivision on the Property. Mr. Pileggi's explanation that it was done to repair flood damage, and that the aggregate was put down on Wooded Lane by a prior owner (which would have had to have been prior to his taking ownership in 1999), is simply not credible.

The Department contends that Mr. Pileggi failed to implement BMPs, failed to develop and implement an E&S Control plan, and failed to obtain an individual NPDES permit and/or a NPDES Permit for Stormwater Discharges Associated with Construction Activities. There is no doubt that Mr. Pileggi was required to obtain the aforementioned materials in regard to the road construction, and that a NPDES permit was needed in connection with a common plan of development or sale.

We therefore agree with the Department that Mr. Pileggi should have obtained an NPDES

⁷ Department trial exhibit 23(a) is a wider shot from 2022, which also shows the construction of Wooded Lane and Bonnie Circle and other disturbed areas.

permit for earth disturbance of over one acre for earth disturbance work was part of a common plan of development. While we question the logic behind the Department's order requiring him to apply for a permit for this particular work, we do not disturb the remedies in the order. There may be policy reasons that we are unaware of, or perhaps post-construction stormwater management issues that would be part of the permit. Mr. Pileggi is also obligated by law to comply with Department regulation 25 Pa. Code §102.5 if he eventually intends on further developing the Wooded Lane Subdivision.

For the reasons set forth herein, we affirm the Department's order and dismiss the appeal in its entirety.

CONCLUSIONS OF LAW

1. Environmental Hearing Board has jurisdiction over this matter. 32 P.S. §§693.24; 35 P.S. §7514.

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

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

4. The Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Corsnitz v. DEP*, 2018 EHB 174; *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3.

5. The Department must show by a preponderance of the evidence that its actions

were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

6. The Pennsylvania Clean Streams Law empowers the Department to regulate activities that may cause pollution to waters of the Commonwealth. Act of June 22, 1937, P.L. 1987, as amended, 35 P S §§691.1-691.101.1.

7. The Clean Streams Law states that the prevention and elimination of water pollution is directly related to the economic future of the Commonwealth. 35 P.S. §691.4.

8. Pollution under the Clean Streams Law includes sediment pollution. See *Leeward Construction v. Department of Environmental Protection*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003).

9. 25 Pa. Code Chapter 102 was promulgated under the Clean Streams Law.

10. The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 600.

11. Accelerated erosion is defined as “[t]he removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone.” 25 Pa. Code §102.1.

12. Chapter 102 requires erosion and sedimentation (“E&S”) Best Management Practices (“BMP”) controls ‘to minimize the potential for accelerated erosion and sedimentation.’ 25 Pa. Code §1024(b)(1); *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589.

13. BMPs are aimed at keeping the soil on the Site and preventing sedimentation runoff pollution. *Blue Mountain Preservation Association*, 2006 EHB at 600. 2010 EHB 262, 277.

14. GPS data does not constitute hearsay under the plain language of Rule of Evidence 801. *Commonwealth v. Wallace*, 289 A.3d 894, 908 (Pa. 2023).

15. Grading the shoulder of an existing road-cross section falls within the definition of road maintenance but expanding the shoulder does not. 25 Pa. Code §102.1(i)(B).

16. If a person is found to have a common plan of development, then an NPDES permit is required for any earth disturbances that is greater than one acre. 25 Pa. Code §102.5.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2022-068-BP

ORDER

AND NOW, this 2nd day of October, 2024, it is **ordered** that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark

SARAH L. CLARK
Judge

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

s/ Paul J. Bruder Jr.

PAUL J. BRUDER, JR.
Judge

DATED: October 3, 2024

c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)



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