



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD



<b>NEW HOPE CRUSHED STONE</b>	:	
<b>&amp; LIME COMPANY</b>	:	
	:	
v.	:	<b>EHB Docket No. 2016-028-L</b>
	:	
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:	
<b>PROTECTION, SOLEBURY SCHOOL and</b>	:	<b>Issued: September 7, 2017</b>
<b>SOLEBURY TOWNSHIP, Intervenors</b>	:	

**ADJUDICATION**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board dismisses a stone quarry’s appeal of a Department letter amending the stone quarry’s reclamation plan. The Department’s modifications to hasten reclamation efforts in order to expeditiously abate the propagation of sinkholes in the area caused by the quarry are reasonable and in accordance with the law.

**FINDINGS OF FACT**

1. The Department of Environmental Protection (the “Department”) is the agency entrusted with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 3301 – 3326, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Stipulation of the Parties No. (“Stip.”) 7.)

2. New Hope Crushed Stone & Lime Company (“New Hope”) is a Pennsylvania corporation that owns and operates a limestone quarry with its principal place of business located at 6970 Phillips Mill Road, New Hope, Solebury Township, Pennsylvania 18938. (Stip. 1, 2.)

3. New Hope's quarry in Solebury Township is operated as a noncoal surface mine pursuant to Permit No. 7974SM3. (Stip. 9.)

4. Intervenor Solebury Township (the "Township") has offices located at 3092 Sugas Road, Solebury Township, Pennsylvania 18963. (Stip. 6.)

5. Intervenor Solebury School (the "School") is a co-educational college preparatory day and boarding school located on approximately 90 acres in Bucks County, Pennsylvania, which serves approximately 230 day and boarding students in grades 7 through 12. (Stip. 4, 5.)

6. The Board previously issued an Adjudication on July 31, 2014, rescinding a depth correction the Department had issued to New Hope, which would have allowed it to mine 50 feet deeper to a level of 170 feet below mean sea level (-170 MSL), and determining that the quarry's mining and dewatering of the water table was creating a public nuisance by causing numerous sinkholes to open up on the School's campus and on other surrounding properties. *Solebury School v. DEP*, 2014 EHB 482. (Stip. 10, 23; Department Exhibit No. ("DEP Ex.") 1.)

7. New Hope filed an appeal of the Board's Adjudication before the Commonwealth Court, but discontinued the appeal before any decision was rendered. (Stip. 11.)

8. Following the 2014 Adjudication, the Department requested that New Hope submit appropriate documentation and revisions to its surface mining permit, its NPDES permit, and its reclamation plan to bring both permits into compliance with the 2014 Adjudication and to address the existing public nuisance. The back-and-forth between the Department and New Hope extended from September 2014 through August 2015. (Stip. 12, 13, 14, 15, 16; Notes of Transcript page ("T.") 29, 32; DEP Ex. 1.)

9. The Department repeatedly asked New Hope to submit a reclamation plan that proposed to expeditiously abate the public nuisance, and New Hope continually failed to do so. (T. 29, 32-33; DEP Ex. 1.)

10. New Hope's reclamation plan submissions to the Department consistently had timelines based on the amount of time needed to remove all mineable mineral reserves from the quarry instead of being based on the amount of time required to restore the groundwater levels to pre-mining conditions to abate the public nuisance. (T. 29, 32-33, 83-84; 347-49; DEP Ex. 1, 14, 16, 26.)

11. On October 1, 2015, the Department issued a Compliance Order requiring New Hope to modify its reclamation plan to expeditiously abate the public nuisance, and to submit to the Department "[a] reclamation plan based on the amount of time required to reclaim the quarry, not based on mineable reserves." (Stip. 17; T. 32-33; DEP Ex. 1, 14.)

12. The October order found that New Hope was in violation of Sections 7(c)(5) and 10 of the Noncoal Surface Mining Act, 52 P.S. §§ 3307(c)(5) and 3310. The order stated:

NHCS [New Hope Crushed Stone] has failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. Specifically, NHCS has failed to submit to the Department an adequate Reclamation Plan and Sequence that addresses an acceptable timeline for reclamation of the quarry and how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater. Specifically, the reclamation plan provided by NHCS fails to address the following: (1) The reclamation plan provided by NHCS is based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The reclamation plan does not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 is unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The reclamation plan does not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the

Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit. (4) The reclamation plan does not address installation of a monitoring well on Solebury School's campus to monitoring [sic] groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requests an update regarding the installation of the above-referenced monitoring well. (5) The reclamation plan does not identify approximate acreages that will be reclaimed during the proposed timeframe, nor does it identify these areas on a map.

(DEP Ex. 14.)

13. The October order required New Hope to submit the following:

1. A reclamation plan based on the amount of time required to reclaim the quarry, not based on mineable reserves. Mining may occur concurrently with reclamation, however timely abatement of the public nuisance caused by NHCS's lowering of the water table under Solebury School is required.

At a minimum, the reclamation plan and schedule submittal must include the following:

- A) A timetable for the reclamation of each highwall area of the quarry. This timetable must include a specific description of the reclamation methods for each highwall (i.e., blasting and/or backfilling), and the associated estimated reclamation costs. For each method to be utilized, the description must include the following:
  - 1) The amount of blasting needed for each highwall area in order to achieve the required final reclamation grades. This description must include, at a minimum, the required number of blasts, the time required to drill and blast each area and any other associated or pertinent information.
  - 2) The amount of excavation, filling and/or grading work required to achieve the final reclamation grades. This description must include, at minimum, the volumes of fill material required for each highwall area, the source of the fill material, the equipment to be utilized to achieve reclamation slopes, and the estimated time required for this equipment to backfill highwall areas.
  - 3) The reclamation plan must include a proposed timeframe for reclaiming all affected acreage within the surface mining permit. A map showing the stages of reclamation must be included.
  - 4) A detailed cost estimate, to include line items for each phase of reclamation.
- B) A timetable for the stream restoration work required under the existing Primrose Creek Consent Order and Agreement. The stream restoration

timetable must be detailed in the same manner as the timetable for reclamation required under Section A above.

2. A schedule describing when the lower lifts of the quarry will be flooded. The EHB decision requires abatement of the public nuisance, thus restoration of water table under the school must be conducted concurrently with the reclamation plan.
3. A plan to install a monitoring well on Solebury School's campus to monitor groundwater elevations.

(DEP Ex. 14.)

14. New Hope was required to submit a revised reclamation plan and the other requested information by October 30, 2015. At New Hope's request, that deadline was extended to November 30, 2015 by an order dated November 2, 2015. (Stip. 17; DEP Ex. 1, 14, 16.)

15. New Hope appealed both the October and November 2015 compliance orders at EHB Docket Nos. 2015-164-L and 2015-187-L, respectively. (Stip. 18; T. 34.)

16. On February 11, 2016, New Hope entered into a Consent Assessment of Civil Penalty (CACP) with the Department to resolve the two compliance orders and New Hope's appeals of those orders. (T. 29-31; DEP Ex. 1.)

17. In the CACP, the Department made the following findings, which New Hope agreed were accurate and agreed not to challenge in any future proceeding involving the Department:

- F. Section 7(c)(5) and (10) of the Noncoal Surface Mining Conservation and Reclamation Act, Act No. 1984-219, 52 P.S. § 3307(c)(5) and (10) provides that:
  - (c) Reclamation plan: The applicant shall also submit a complete and detailed plan for the reclamation of the land affected. Each plan shall include the following: (5) A detailed timetable for the accomplishment of each major step in the reclamation plan the operator's estimate of the cost of each step and the total cost to the operator of the reclamation program; and (10) Such other information as the Department may require.
- G. On July 31, 2014, the Environmental Hearing Board (EHB) rescinded a depth correction that authorized NHCS to mine from -120' MSL to -170' MSL, citing that the quarry's ongoing dewatering operations are causing unabated

sinkhole formation at the nearby Solebury School. The EHB also declared the quarry a public nuisance. Following the EHB's Adjudication, the Department and NHCS exchanged a series of correspondences culminating in the Compliance Order dated October 1, 2015.

- H. On September 11, 2014, the Department sent NHCS a deficiency letter requesting revisions to the mining and NPDES permit to bring both permits into compliance with the EHB adjudication. The revisions were due October 11, 2014. These revisions included requests for information concerning the Reclamation Plan for the quarry in Solebury Township.
- I. On September 15, 2014, the Department received an email from EarthRes Group (ERG), NHCS' consultant, requesting an additional month as well as requesting a meeting with the Department.
- J. On October 10, 2014, ERG sent a response to the Department's deficiency letter.
- K. On February 24, 2015, the Department sent NHCS a letter stating that the October 10, 2014 response was unacceptable and again asked NHCS to provide the information requested in the September 11, 2014 deficiency letter.
- L. On March 24, 2015, ERG, on behalf of NHCS, sent a letter attempting to address the Department's deficiency letter.
- M. On May 13, 2015, Department staff, NHCS and its technical representatives met at the Pottsville District Mining Office to discuss Department expectations for how to bring the mining and NPDES permits into compliance with the EHB adjudication. The Department gave NHCS ninety days to provide a response.
- N. On June 30, 2015, ERG, on behalf of NHCS, sent the Department a letter with a proposed reclamation and mine closure sequence for the quarry in Solebury Township.
- O. On July 10, 2015, the Department sent NHCS a letter explaining why the proposed reclamation and mine closure sequence was unacceptable. The letter also gave NHCS thirty days to file a response.
- P. On August 7, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department.
- Q. On August 11, 2015, the Department sent a response to NHCS stating the Reclamation Plan was unacceptable and providing NHCS with fifteen days to file an acceptable plan.
- R. On August 26, 2015, ERG submitted another Reclamation Plan on behalf of NHCS which the Department found to be unacceptable.
- S. On October 1, 2015, the Department issued Compliance Order No. 15-5-048-N requiring NHCS to submit the deficient information for its Reclamations Plan to the Department by 8:00 AM on October 30, 2015. The Compliance Order stated that NHCS failed to conduct mining and/or mining related

- activities in accordance with the terms and conditions of the permit and applicable rules and regulations of the Department. Specifically, NHCS failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. NHCS failed to submit an adequate Reclamation Plan and Sequence that addresses how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater within an acceptable schedule. The Reclamation Plan provided by NHCS did not address the following: (1) The reclamation plan provided by NHCS appeared to be based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The Reclamation Plan did not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 was unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The Reclamation Plan did not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit. (4) The Reclamation Plan did not address installation of a monitoring well on Solebury School's campus to monitor groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requested an update regarding the installation of the above-referenced monitoring well. (5) The Reclamation Plan did not identify approximate acreages that will be reclaimed during the proposed timeframe, nor did it identify these areas on a map.
- T. On November 2, 2015, the Department issued Compliance Order No. 15-5-048-N(A) to amend the compliance date from October 30, 2015 as specified in Compliance Order No. 15-5-048-N to November 30, 2015. All terms and conditions specified in Compliance Order No. 15-5-048-N remained in full force and effect.
  - U. On November 30, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department. After review, the Department determined that the November 30, 2015 Reclamation Plan was also deficient.
  - V. On January 29, 2016, the Department issued a letter to NHCS modifying the November 30, 2015 proposed Reclamation Plan.

(T. 30-31; DEP Ex. 1.)

18. Pursuant to the CACP, New Hope agreed to pay a penalty of \$4,000 and withdraw its appeals of the two orders within five days. (T. 34; DEP Ex. 1.)

19. New Hope withdrew the appeals of the October and November compliance orders on February 12, 2016. (Stip. 21; T. 34.)

20. Before entering into the CACP, New Hope submitted a revised reclamation plan to the Department on November 30, 2015. (Stip. 19; T. 58; DEP Ex. 17(2).)

21. New Hope's proposed plan involved backfilling the quarry and allowing the water levels to rise in the pit. (T. 101, 130; DEP Ex. 17(2).)

22. Reclamation by backfilling is done by piling up soil at the top of the quarry highwall and pushing it over the edge with a bulldozer. (T. 310-11.)

23. The slope is then built out until it reaches the appropriate reclamation slope, which is the angle of repose, or the angle at which a given material will naturally settle if placed in a pile. (T. 44, 54, 310-11.)

24. The November 30, 2015 plan dedicated a reclamation crew of two people, one using a loader/excavator and one using a haul truck, moving 100 cubic yards of fill material per hour. (T. 61-62; DEP Ex. 17(2).)

25. The November plan envisioned that stream restoration work on Primrose Creek would be completed in May 2017, upon which time reclamation would begin and be completed in July 2022, approximately 5.23 years later. (T. 59-60; DEP Ex. 17(2).)

26. New Hope proposed to lower its pumping rate to 500,000 gallons per day (gpd) after the completion of reclamation in July 2022. (T. 60, 74; DEP Ex. 17(2).)

27. According to the plan, the water level in the quarry pit would be at -2 MSL in July 2022 with a goal of reaching a final elevation of +98 MSL at an undetermined point in the future. (T. 60, 348-49; DEP Ex. 17(2).)

28. New Hope's plan contemplated that mining and reclamation would occur simultaneously. (T. 335-36; DEP Ex. 17(2).)

29. New Hope's plan proposed to conduct reclamation for 46 weeks per year, allowing two weeks for holidays, two weeks for vacation, and two weeks for "inclement weather." (DEP Ex. 17(2).)

30. On January 29, 2016, the Department issued the letter that is the subject of this appeal, determining that New Hope's November 30, 2015 reclamation plan remained deficient because, among other things, the plan did not expeditiously abate the previously identified public nuisance. (Stip. 20; T. 29; DEP Ex. 26.)

31. The Department's objective in issuing the letter was to restore groundwater beneath the School and in the surrounding area as soon as possible to abate the public nuisance. (T. 74-75, 77-78, 100, 103, 120, 174.)

32. The Department's letter, among other things, added additional personnel and equipment to reclamation activities, required a greater amount of fill be placed, and lowered the quarry's pumping rate to 500,000 gpd. (T. 57, 61-63, 65, 67, 108-11, 162; DEP Ex. 26.)

33. Specifically, the January 2016 letter made the following modifications to New Hope's reclamation plan:

1. The Primrose Creek stream work and/or the highwall reclamation work currently underway shall continue to be conducted on a continuous basis until completed to the Department's satisfaction.
2. NHCS shall conduct the stream and reclamation work for a minimum of 160 hours per week, utilizing at least four (4) workers/laborers who each work a 40 hour week.
3. NHCS shall place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during the highwall reclamation phases of operation.
4. The flooding of the quarry and lowering of the required daily pumping of pit water to the permit-required minimum of 500,000 gallons per day shall begin immediately. Pumping rates may increase only if water levels rise to an

- elevation that prohibits safe reclamation of the quarry walls. There shall be at least two (2) safety benches below the active highwall reclamation area and the pit water. The Department reserves the right to modify pumping rates based on site conditions and other related issues.
5. A reclamation progress report shall be included with the quarterly groundwater and surface water monitoring report.
  6. The quarterly report shall include the Mine & Reclamation Phase Development Plan map with the current +48' MSL contour and the inflow and outflow structure locations highlighted.
  7. NHCS shall install a monitoring well designed to monitor groundwater elevations on the Solebury School property within 90 days of the date of this letter. Prior to installation of the monitoring well, NHCS shall discuss NHCS' plans for placement and design of the monitoring well with the Department.

(DEP Ex. 26.)

34. After reviewing New Hope's November 2015 reclamation plan, the Department performed its own reclamation timetable calculations based upon the information provided by New Hope and determined that New Hope could reasonably complete reclamation and stream restoration work in approximately 3.12 years. (T. 60-63; DEP Ex. 23.)

35. The Department modified New Hope's reclamation schedule as proposed in its November plan by adding two additional people to work on reclamation—one using a 65-ton haul truck, and one using a bulldozer—with equipment already present onsite. (T. 61-63, 65, 108-10, 111, 112; DEP Ex. 23.)

36. New Hope's existing loader/excavator has the capacity to service two 65-ton haul trucks for reclamation work. (T. 61-62, 111.)

37. The Department estimated that adding an additional truck would allow New Hope to move 200 cubic yards of fill per hour as opposed to 100 cubic yards per hour, thereby approximately cutting in half the time needed to complete reclamation. (T. 61-61; DEP Ex. 23.)

38. At the time the Department made the modification, New Hope's onsite equipment included four 65-ton haul trucks, one 30-ton haul truck, one loader/excavator, and one bulldozer. (T. 61, 111; DEP Ex. 23.)

39. The January letter also allows for the further modification of the reclamation plan if safety or environmental concerns arose, and permits New Hope to submit its own work plan as an alternative to the modified reclamation plan, subject to the approval of the Department. (T. 72-73, 121-23; DEP Ex. 26.)

40. New Hope has requested waivers from the reclamation activities outlined in the January 2016 letter and the Department has granted these requests when appropriate, some on the basis of inclement weather. (T. 72-73, 123, 350-351.)

41. Through proper planning and engineering, and by employing standard industry practices, a quarry can safely conduct reclamation activities concurrently with active mining even in the winter, as is done in many other quarries. (T. 37, 39, 42-54, 55, 72, 75-77, 108, 120-21, 201, 204; DEP Ex. 25.)

42. The January letter imposed a 500,000 gpd limit on the water that New Hope pumps out of the quarry from the discharge point to Primrose Creek east of the quarry. (T. 67, 162, 210-11; DEP Ex. 26, 30.)

43. The Department chose that rate because it would allow the water level in the quarry to rise as quickly as possible to abate the nuisance while still maintaining adequate flow to Primrose Creek as it exists downstream of the quarry. (T. 163-64, 168-69, 174.)

44. The rate of 500,000 gpd had been previously set in New Hope's NPDES permit as a minimum pumping rate that was designed to replicate the flow to the downstream portion of

Primrose Creek that existed naturally prior to New Hope's mining through the creek to connect its two quarry pits. (T. 115, 163, 164; DEP Ex. 29, 30.)

45. New Hope previously pumped an average of more than 2 million gpd to keep the quarry dry and facilitate mining. (T. 115, 116, 167; DEP Ex. 21.)

46. By adhering to the 500,000 gpd pumping limit, the water level in the quarry pit will return to pre-mining conditions in approximately 3.5 years. (T. 164-68, 211-12; DEP Ex. 21.)

47. The pumping limit of 500,000 gpd provides flow to Primrose Creek that is comparable to that in similar streams (T. 264), and it is a reasonable temporary measure until water fills the quarry pit (T. 261, 262-63, 279-80).

48. Once the quarry pit fills, water will naturally outflow from the pool and into Primrose Creek. (T. 280, 281.)

49. Groundwater levels beneath the School will not begin to rise until there has been a significant rise in water levels in the quarry. (T. 223, 224-25.)

50. At least seven collapse sinkholes have opened near the School's campus in the time from the Board's July 31, 2014 Adjudication until the conclusion of the hearing on the merits on March 21, 2017. (T. 212-13.)

51. On January 13, 2017, New Hope completed installation of the monitoring well on the School's property, as required by the January 2016 letter. (Stip. 35.)

52. The requirements of the January 2016 letter are consistent with the October and November compliance orders, including the requirement that restoration of the water table take place concurrently with quarry reclamation. (T. 83-84; DEP Ex. 14, 16, 26.)

## DISCUSSION

New Hope Crushed Stone & Lime Company (“New Hope”) has appealed the Department of Environmental Protection’s (the “Department’s”) January 29, 2016 letter disapproving and modifying New Hope’s reclamation plan for the limestone quarry it operates in Solebury Township, Bucks County. Mining at the quarry property has taken place since at least 1829. The Department issued New Hope its first mining permit in 1976. This Board’s first involvement was in 2002 when Solebury Township challenged the Department’s decision to renew New Hope’s NPDES permit. We issued an Adjudication in that case holding that the Department failed to adequately consider the impact to the area’s hydrologic balance caused by the quarry’s continued operation. *Solebury Twp. v. DEP*, 2004 EHB 95. There have been several appeals involving the quarry since then. (See EHB Docket Nos. 2005-183-MG, 2006-116-MG, 2011-135-L, 2011-136-L, 2015-164-L, 2015-187-L, and 2016-132-L.)

The appeal docketed at EHB Docket No. 2011-136-L culminated in the Board’s issuance of an Adjudication on July 31, 2014 rescinding a depth correction the Department had issued to New Hope, which would have allowed it to mine 50 feet deeper to a level of 170 feet below mean sea level (-170 MSL). *Solebury School v. DEP*, 2014 EHB 482. The Adjudication followed a hearing lasting ten days during which numerous fact and expert witnesses testified and hundreds of exhibits were admitted into evidence. That appeal was initiated by Solebury School, a private school whose campus is located immediately adjacent to the New Hope quarry. Solebury School complained that New Hope’s quarrying, and the associated need to pump water out of the quarry to keep it dry to facilitate mining, had depressed the water table beneath the School by approximately 100 feet, which led to the propagation of at least 29 collapse sinkholes between 1989 and the time of the hearing in the fall of 2013. Some of the sinkholes were as

large as a quarter of an acre in size, while others were small but no less dangerous. We ultimately agreed with the School in that appeal and concluded that New Hope was causing a public nuisance.

Our Adjudication rescinding the depth correction did not otherwise affect New Hope's existing surface mining permit authorizing the quarry to be mined to a depth of -120 MSL. New Hope continued to mine out its reserves above the -120 MSL level. A prolonged back and forth between the Department and New Hope followed the Adjudication as the Department worked with New Hope to revise its reclamation plan to address the abatement of the public nuisance New Hope was causing. The Department eventually determined that New Hope's submissions of a revised reclamation plan were inadequate and issued an order on October 1, 2015, finding that New Hope was in violation of Sections 7(c)(5) and 10 of the Noncoal Surface Mining Act, 52 P.S. §§ 3301 – 3326, and formally requiring New Hope to revise its reclamation plan so that it was based on the amount of time required to reclaim the quarry and not on the amount of time needed to mine out the rest of the quarry's reserves above -120 MSL. The Department issued another order on November 3, 2015, granting New Hope's request for an extension to comply with the October order.

New Hope appealed those compliance orders to the Board. (*See* EHB Docket Nos. 2015-164-L and 2015-187-L.) New Hope also submitted a reclamation plan to the Department on November 30, 2015 in an effort to comply with those orders, but the Department again found the plan to be inadequate to timely abate the nuisance. On January 29, 2016, the Department issued the letter that is the subject of the current appeal, modifying New Hope's plan so that it satisfied the requirements of the two orders and timely abated the nuisance. New Hope filed the current appeal on February 29. Both Solebury School and Solebury Township intervened. Meanwhile,

New Hope entered into a Consent Assessment of Civil Penalty (CACP) with the Department and withdrew its appeals of the October and November orders on February 12, 2016. On May 5, 2016, we held a hearing on New Hope's petition for supersedeas. At the parties' request, we ruled from the bench and denied the petition.

As we first observed in our ruling at the supersedeas hearing, the scope of the instant appeal is actually quite narrow. In response to a motion for a protective order filed by the School earlier in this appeal, we wrote at length in a five-judge opinion about how the boundaries of this appeal have been hemmed in by the doctrines of administrative finality and collateral estoppel due to New Hope's withdrawal of its appeals of the October and November compliance orders and entering into the CACP with the Department, the findings in which New Hope agreed not to challenge. *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666. In granting the protective order in large part, we found:

[B]ecause the Board's role in hearing an appeal is necessarily circumscribed by the action under appeal, *Love v. DEP*, 2010 EHB 523, 530; *Winegardner v. DEP*, 2002 EHB 790, 793, the focus of this case is narrowly confined to the letter and the modifications to New Hope's reclamation plan made by the letter. Our role will be to decide whether the Department, in determining that New Hope's reclamation plan was deficient and modifying the plan in the way that it did, acted reasonably and in accordance with the law, whether its decision is supported by the facts, and whether the decision is consistent with the Department's obligations under the Pennsylvania Constitution. See *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op at 12 n.2 (Adjudication, Feb. 29, 2016); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.

Any attempt by New Hope to contest what has already been determined by the underlying orders is outside the scope of this appeal. The doctrine of administrative finality precludes a future attack on an action that was not challenged by a timely appeal. *Kalinowski v. DEP*, EHB Docket No. 2016-032-R, slip op. at 3 (Opinion, Jun. 28, 2016) (citing *Dep't of Env'tl. Res. v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977)). "It is well-settled that a party may not use an appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action." *Love v. DEP*, 2010 EHB 523, 525. By the same token, if a party appeals an order and then

later withdraws that appeal before it is adjudicated, that order becomes final and cannot be attacked in another, separate appeal. *White Glove, Inc. v. DEP*, 1998 EHB 372. New Hope withdrew its appeals of the October and November orders and these orders are now final. Every aspect of the underlying orders has now been established and cannot be attacked in the current appeal of the letter.

Because the underlying compliance orders are final, the factual predicate giving rise to New Hope's submission of a revised reclamation plan is now beyond the purview of this appeal. Therefore, that New Hope's existing reclamation plan was in violation of the Noncoal Surface Mining Act and that it was required to revise its reclamation plan in a way that more expeditiously abated the nuisance being caused by the quarrying are determinations that are now final. New Hope can no longer contest that its prior reclamation plan was deficient in the ways that the Department found in its two orders. New Hope can no longer challenge whether it had to submit a new reclamation plan. New Hope cannot challenge that it had to submit a reclamation plan that timely abates the public nuisance. It cannot contest that the restoration of the water table underneath the School must occur with all deliberate speed concurrently with reclamation. All that remains, then, is the specifics of the reclamation plan, including the pumping schedule. The operative question being: Do the details of the plan as modified by the Department reflect a lawful and reasonable exercise of the Department's discretion?

*Id.* at 684-85.

Therefore, what we are tasked with deciding here is whether the Department's modifications of New Hope's reclamation plan are reasonable, supported by the facts, and in accordance with the law, including the Department's obligations under the Pennsylvania Constitution.<sup>1</sup> We conclude that they are.

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<sup>1</sup> During the hearing on New Hope's petition for supersedeas, the parties agreed that the Department's January 2016 letter was the functional equivalent of an order from the Department. Under our rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4). This burden also carries over to the similarly aligned intervenors, Solebury School and Solebury Township. The Department and Intervenors must prove by a preponderance of the evidence that the Department's issuance of the letter to New Hope and the modifications contained therein constitute a lawful and reasonable exercise of the Department's discretion and that the letter is supported by the facts. *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 14 (Adjudication, Apr. 10, 2017); *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Mgmt. Co. v. DEP*, 2010 EHB 456, 474-75. The Department's action must also be consistent with its obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 24-25 (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). See also *Pa. Env'tl. Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017). The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedje v.*

In New Hope’s posthearing brief it only addresses Requirements 2, 3, and 4 in the January 2016 letter—those being, conducting at least 160 hours of reclamation work per week (using four individuals working 40-hour weeks) (Requirement 2), placing at least 200 cubic yards of fill per hour for reclamation purposes (Requirement 3), and pumping no more than 500,000 gallons per day (gpd) out of the quarry (Requirement 4). Under our rules, “[a]n issue which is not argued in a posthearing brief may be waived.” 25 Pa. Code § 1021.131(c). *See, e.g., B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 12 (Adjudication, Aug. 9, 2017); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246. Therefore, it appearing that Requirements 1, 5, 6, and 7 are uncontested, we will only address Requirements 2, 3, and 4.<sup>2</sup>

### **Requirements 2 and 3**

Requirements 2 and 3 are intertwined. They both involve New Hope’s obligations to conduct reclamation work on a sustained and continuous basis week by week so that reclamation occurs concurrently with rising water levels and so the quarry can be properly reclaimed around the same time that it becomes flooded. The Department’s modifications of New Hope’s reclamation plan in this regard are straightforward. New Hope proposed in its November 2015 plan to use two of its employees working eight-hour shifts moving 100 cubic yards of fill per hour to conduct reclamation work throughout the year. One employee would operate a loader/excavator and the other would operate a haul truck. The Department’s modifications merely add two more people to the reclamation crew operating two additional pieces of equipment.

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*DEP*, 2015 EHB 577, 593; *O’Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep’t of Env’tl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

<sup>2</sup> We note that New Hope has already installed a monitoring well on the School’s campus per Requirement 7. (Finding of Fact (“FOF”) 51.)

The Department's modifications are relatively minor and generally consistent with the thrust of New Hope's own plan from November 2015. In response to the now final Department orders requiring New Hope to submit a reclamation plan that timely abated the public nuisance, New Hope proposed to backfill the quarry and let the water levels rise in the quarry and eventually underneath the School. The Department determined that New Hope's proposal would not accomplish this quickly enough.

In terms of backfilling, the Department looked at New Hope's proposal to use one 65-ton haul truck and one loader, and augmented it by an additional 65-ton truck and a bulldozer, both of which New Hope already had onsite. The Department determined that New Hope's loader/excavator had the capacity to accommodate filling two trucks instead of just one. The Department noted that New Hope did not have any equipment in its plan designated for pushing fill or doing final grading work so the Department utilized New Hope's bulldozer. (T. 65.) The Department concluded that doubling the haul trucks from one to two would essentially cut in half New Hope's predicted time for completing reclamation. Thus, instead of moving 100 cubic yards of fill per hour as New Hope proposed, the Department required 200 cubic yards per hour to be moved. This requirement was simply a result of relying on New Hope's own projections and concluding that, by adding two more people, New Hope could double the amount of reclamation it conducted per hour.

It is hard to see the argument of how the Department's modifications are not reasonable. Michael Menghini, the Department's District Mining Manager, reclamation expert, and author of the letter under appeal, credibly testified that the backfilling requirements imposed on New Hope did not amount to moving a significant amount of dirt, and that other quarries move much more material than that. (T. 121-22.) The School's reclamation and geotechnical engineering expert,

Michael Byle, P.E., testified that Menghini's calculations were accurate and that the reclamation requirements were achievable and will help ensure the timely reclamation of the quarry. (T. 208-09.) Indeed, Byle believed that the Department could have been imposed more stringent requirements. (T. 207.) He opined that the reclamation could be completed more quickly, and that there should have been requirements for more detailed reporting, better monitoring, and additional controls. (T. 228, 231.) Even New Hope's own mining and reclamation expert and long-time consulting hydrogeologist, Lou Vittorio, P.G., testified that as a general matter using four employees for reclamation activities is "certainly reasonable." (T. 325.) We do not think the Department has made an unreasonable demand on the quarry by requiring four people to be devoted to reclamation work moving 200 cubic yards of fill per hour.

New Hope primarily argues against the Department's requirements by contending that they ignore significant safety concerns, mostly due to winter weather conditions. Lou Vittorio testified that reclamation is riskier in the winter because of freezing and thawing. (T. 310-13.) He contrasted reclamation work from the mining that New Hope routinely conducts during the winter by saying that mining takes place on rock, which is more stable than the soil where reclamation is conducted. Vittorio said that soil can be influenced by precipitation, which could become unstable during freeze and thaw conditions. Vittorio was particularly concerned about the potential for a slip to develop on the highwall and someone falling over the edge. He also said that vegetation does not have the chance to develop on the reclamation slopes during the winter, which would provide greater stability to the slopes. (T. 320.) Vittorio opined that working beneath unvegetated slopes (conducting mining) poses a safety risk in that rocks or boulders could dislodge from the reclamation slope and tumble down to where people could be

working. He maintained that New Hope needs to continue to mine while conducting reclamation work in order to pay for the reclamation. (T. 355-56.)

Michael Byle credibly testified that concurrent mining and reclamation can be done safely in any season if it is properly planned and engineered through measures such as engineering stable slopes and installing catch berms on the benches. Byle testified that the materials being used for reclamation were crucial to determining the appropriate slopes that would remain stable, and that reclamation could occur safely even during the winter if such matters were taken into account like material specifications, material placement, and the sequencing of reclamation. (T. 204.) The overarching theme of Byle's testimony is that there are always safety issues that go along with conducting mining or reclamation in a quarry, but through thoughtful and proper planning, design, and engineering, the safety concerns can be allayed, including those raised by New Hope.

We tend to agree. The Department presented significant evidence of other quarries conducting concurrent reclamation and mining even during the winter months. (T. 42-54, 72, 108, 120-21; DEP Ex. 25.) In fact, since the 1990s newly permitted noncoal surface mines have been required to conduct concurrent mining and reclamation pursuant to 25 Pa. Code § 77.595.<sup>3</sup>

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<sup>3</sup> 25 Pa. Code § 77.595 provides:

- (a) Reclamation procedures, including backfilling, grading, topsoil replacement and revegetation of land that is disturbed by noncoal surface mining shall be kept concurrent with the progress of the proposed operation to the greatest extent possible in conformance with §§ 77.456, 77.592—77.594, this section, § 77.596 and the approved reclamation plan.
- (b) If site conditions dictate that reclamation cannot begin until mineral extraction is terminated, the reasons for this delay shall be detailed in the reclamation plan required under § 77.456 (relating to reclamation information).
- (c) Reclamation shall begin within 30 days of when mineral extraction is terminated, and be completed within the period specified in the approved reclamation plan.
- (d) Mineral extraction is considered to be terminated when the permitted extent of the mineral reserves has been extracted.

Notably, New Hope's own proposed reclamation plan from November 2015 only carved out two weeks for what it called "inclement weather." (DEP Ex. 17(2).) It is not clear why New Hope now takes an uncompromising stance against reclaiming in the winter in this litigation. The Department testified that the only difference between its reclamation calculations and New Hope's was the addition of two people and two pieces of equipment. (T. 65.) We take this to mean that the Department has left intact New Hope's two-week buffer for unfavorable weather conditions. In any event, based on the evidence and testimony, we do not believe that there is a categorical bar against performing reclamation in the winter due to safety reasons. As a general matter, winter reclamation can be safely performed so long as appropriate precautions are taken such as those outlined by Michael Byle, some of which are inherent to reclaiming even during optimal weather conditions.

Nevertheless, should New Hope experience weather-related issues or any other complications, the Department has provided an avenue for relief in the form of what it calls a waiver request. The January letter provides:

The Department reserves the right to modify this work plan should safety or environmental concerns arise that were not considered or known at this time.

New Hope Crushed Stone & Lime Co. may propose its own work plan at any time. However, any plan submitted by NHCS requires formal, written approval from the Department prior to its implementation. Until the Department approves an alternate work plan, NHCS shall perform stream and reclamation work in accordance with the requirements set forth in this letter.

(DEP Ex. 26.) Michael Menghini testified that he did consider potential seasonal impacts to New Hope's work, which is why this provision was placed in the letter. (T. 121-23.) The Department says that in the event New Hope experiences difficulty complying with the requirements of the letter due to unforeseen issues, New Hope may request a temporary waiver of those requirements. The Department has in fact granted New Hope waivers in the past,

allowing New Hope to suspend reclamation activities on the basis of inclement weather or hazardous site conditions. (T. 72-73, 123.) Menghini even suggested that, if New Hope did not want to reclaim at all in the winter, New Hope could, for instance, submit a plan that shows how it would conduct increased amounts of reclamation during warmer months to make up for the deficit. (T. 122.) The text of the letter appears to explicitly reserve the possibility that safety or environmental concerns could arise for which the letter on its face does not account. Therefore, we believe New Hope's weather concerns are overstated.

New Hope also argues that the Department did not consider the appropriate sequencing of reclamation when it mandated that 200 cubic yards of fill be moved per hour. The Department reasonably responds that it left the sequencing of the reclamation work to the best judgment of New Hope. New Hope's sequencing complaint stems from one of the primary sources of dispute over the reclamation requirements, which is a difference of opinion between the Department and New Hope over what should take precedence at the quarry, mining or reclamation. New Hope believes that it should be mining, and that it is entitled to mine out the stone in the quarry that exists above the -120 MSL mark. The Department's position is that reclamation has priority over mining and that New Hope's mining is more or less incidental to its obligation to reclaim the quarry—some mining can occur but mostly as a way to facilitate the reclamation. (T. 78, 103, 120.) In the event that New Hope determines that it cannot concurrently mine and reclaim the quarry, the Department expects New Hope to stop mining and conduct reclamation work. (T. 147.) We find the Department's position to be reasonable. New Hope's obligation to timely abate the nuisance is administratively final. It is up to New Hope to determine the appropriate sequencing for its reclamation, even if that means it will at times need to sacrifice mining.

New Hope also spends a significant amount of time critiquing the reclamation requirements on the basis of the difficulties it says it will experience in complying with the Department's directives to meet the reclamation objectives. New Hope says it does not have enough people to conduct the required reclamation work while still conducting mining. New Hope's Chief Financial Officer, Christina Cursley, testified that New Hope has suffered attrition in its workforce recently and it has had a difficult time hiring and retaining new employees. (T. 367-69.) She said that New Hope has also had a hard time finding qualified workers, and that it has had to hire unskilled workers and then spend time training them, which has slowed down the reclamation work.<sup>4</sup> (T. 370-72.) Vittorio likewise testified that, while the Department's allocation of four people for reclamation was generally reasonable, it was excessive for New Hope because of its staffing issues. (T. 325.) Because of these staffing issues, which New Hope contends the Department did not consider, New Hope argues that the reclamation requirements in the letter are unreasonable.

However, if a directive is objectively reasonable, as the directive to New Hope is, the recipient's ability to comply with the directive due to its own individual, say, financial circumstances is irrelevant in determining the validity of the directive and whether it is a lawful and reasonable exercise of the Department's discretion. *B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 19-20 (Adjudication, Aug. 9, 2017); *Rozum v. DEP*, 2008 EHB 731, 735; *M & M Stone Co. v. DEP*, 2008 EHB 24, 67; *Starr v. DEP*, 2003 EHB 360, 373; *Wasson v. DEP*, 1998 EHB 1148, 1158; *Ramey Borough v. Dep't of Env'tl. Res.*, 351 A.2d 613, 615 (Pa. 1976). The issue of one's ability to comply based on its individual circumstances, if it is to be

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<sup>4</sup> On cross-examination, Cursley admitted that New Hope has not reached out to any contractors or unions in order to compensate for any staffing shortfalls. (T. 378-79.) New Hope has already contracted out the stream restoration work for Primrose Creek. (T. 339, 376.)

raised at all, is properly addressed to an enforcement proceeding, not in an appeal to this Board. *Dirian v. DEP*, 2013 EHB 224, 232.

#### **Requirement 4**

The fourth requirement in the Department's letter imposes a limit on the amount of water that the quarry can pump out, which the Department set at 500,000 gpd. The quarry previously pumped more than 2 million gpd out of the quarry in order to keep it dry to facilitate mining. The water pumped from the quarry discharges to Primrose Creek. The rate of 500,000 gpd had been earlier established in New Hope's NPDES permits as a minimum pumping rate that was designed to replicate the flow to the downstream portion of Primrose Creek that existed naturally prior to New Hope's mining through the creek to connect its two quarry pits. (T. 164; DEP Ex. 29, 30.) *See also Solebury Twp. v. DEP*, 2007 EHB 729; *Solebury Twp. v. DEP*, 2007 EHB 713. The Department chose to impose that rate in the January letter because it would allow the water level in the quarry to rise as quickly as possible while still maintaining adequate flow to Primrose Creek. By pumping out less water the quarry has begun to fill up. Under the current pumping rate, the Department estimates that the quarry will fill up approximately three-and-a-half years from the date of the January 2016 letter.

The School presented the expert testimony of Jennifer Wollenberg, PhD, who evaluated stream flow in streams comparable to Primrose Creek and determined that the 500,000 gpd pumping limit was in the same range as the comparison streams. (T. 264.) She credibly opined that the pumping limit was a reasonable means of providing adequate flow to Primrose Creek as a temporary measure while allowing groundwater within the quarry's zone of influence to rise. (T. 261, 279-80.) Once the quarry pit fills then the downstream portion of Primrose Creek will naturally outflow from the pool within the pit.

New Hope allots only around one page of its posthearing brief to Requirement 4, arguing that the 500,000 gpd pumping limit is arbitrary because the Department did not evaluate other, higher pumping limits. Given the entirely reasonable goal of expeditiously abating the public nuisance, we find the limit to be appropriate.

New Hope somewhat relatedly argues that the Department did not undertake an analysis of alternative means to achieve the abatement of the nuisance that were not merely allowing the quarry to fill with water as expeditiously as possible, and which would not hinder the quarry's mining. New Hope critiques the Department for not performing any studies or exploring other potential engineering solutions to prevent the propagation of sinkholes in the area and on the School's campus. For instance, New Hope contends that the Department should have considered things like geotechnical investigations to identify sinkhole-prone areas on the School's campus and on other neighboring properties. The Department takes the altogether rational position that the onus was on New Hope to propose other plausible solutions to abating the public nuisance. The Department points out that New Hope never proposed any of these alternative ideas in its own reclamation plans. The Department never received any submission from New Hope with respect to geophysical testing (T. 118), which the Department's expert hydrogeologist, Michael Kutney, P.G., credibly testified would do nothing with respect to restoring groundwater levels beneath the School (T. 179). The Department gave New Hope several opportunities to propose an appropriate plan, and each time New Hope's submissions did not reflect an effort to expeditiously abate the public nuisance. The Department merely took New Hope's own proposal of backfilling and flooding the quarry and tweaked it so that it would occur faster than what New Hope proposed.

Further, our standard of review does not require the Department to have reached the “best” plan possible in making its modifications, or to have investigated the entire universe of possibilities for stopping sinkholes around the quarry; it only requires the Department to have acted reasonably and in accordance with the law. *Cf. Borough of Kutztown v. DEP*, 2016 EHB 80, 94 (in the context of sewage facilities planning, recognizing that it is not the Department’s responsibility to determine whether a municipality has selected the “best” plan, but merely to ensure that the plan satisfies the regulations and is otherwise reasonable); *Guerin v. DEP*, 2014 EHB 18, 25 (recognizing under the Hazardous Sites Cleanup Act that there is nothing requiring the Department to choose the “very best” location for installing a monitoring well, only a reasonable location).

New Hope contends that its November 2015 reclamation plan went a long way to expeditiously abating the public nuisance. It emphasizes that it voluntarily sacrificed significant mineable reserves, shortening the operational life of the quarry by more than five years. According to the reclamation timeline New Hope submitted with its November 30, 2015 plan, it projected that the water level inside the quarry would reach -2 MSL by July 2022 when it concluded its reclamation work. (DEP Ex. 17(2).) At that point, New Hope intended to reduce its pumping to 500,000 gpd. (T. 74.) However, -2 MSL is still 100 feet below the quarry’s elevation of +98 MSL. It is unclear how long beyond the July 2022 projection before the water level would have reached +98 MSL, although Menghini postulated that under New Hope’s proposal it could have taken until 2026. (T. 74.) A plan that does not provide for restoring groundwater levels for more than a decade is unreasonable, and it does not satisfy the requirements of the now final October and November 2015 orders to submit a plan that timely abates the nuisance.

## **New Hope's Other Arguments**

New Hope devotes the bulk of its arguments in its posthearing brief to attempting to relitigate the past, whether that is our 2014 Adjudication, the decision we made in our Opinion and Order granting in part the School's protective order, or in subsequently relying on that Opinion to grant in part a motion in limine filed by the School to preclude the testimony of two of New Hope's experts, and to restrict the testimony of its third, Lou Vittorio. For instance, New Hope maintains that administrative finality and collateral estoppel do not apply in this case (and for the first time New Hope provides legal support for its contentions that its claims should not be barred by these doctrines). It says we improperly restricted discovery and precluded its experts from testifying about sinkhole causation. To the extent that New Hope presents any new arguments, we nonetheless find them unavailing.

We have already addressed these issues extensively, as indicated by the quote from our earlier Opinion near the beginning of our discussion. We incorporate additional points here:

Collateral estoppel has considerable application here. Many of the facts and legal conclusions underpinning the Department's letter cannot be relitigated in this appeal. For example, although we did not specifically direct the Department to do anything in our Adjudication, we did find that it had the legal authority, and indeed a duty, not to allow a noncoal operator to perpetuate an ongoing threat to the public's health and safety. We held that New Hope was perpetuating such a threat by continuing to draw down groundwater, which was in turn causing hazardous sinkholes on an ongoing basis. We held that the only way to abate the threat was to allow the groundwater to return to normal levels. These matters were all essential to our conclusion that a rescission was needed, which we decided in the course of rendering a final decision on the merits in a case vigorously disputed by the same parties in this case.

With these concepts of relevance, administrative finality, collateral estoppel, and proportionality in mind, we turn to New Hope's disputed discovery requests. The School argues that most if not all of New Hope's discovery requests are improper and burdensome because they seem to be aimed at the issue of sinkhole causation, and specifically New Hope's efforts to attribute causation to the School's use of its own property. The School contends that not only is sinkhole causation not relevant to the narrow appeal of the Department's letter modifying the quarry's reclamation plan, but that causation has already been conclusively established by

our 2014 Adjudication and the Department's compliance orders. The School says that causation has been attributed to the quarry's pumping, and New Hope is barred from relitigating this in the current appeal.

New Hope responds that its discovery requests are not seeking information regarding causation, but rather its discovery is necessary to assess the effects of the Department's letter on the School. New Hope reiterates slight variations of this rather vague statement throughout its response. ("The desired discovery will assist [New Hope] in the important task of insuring that the Letter's requirements properly impact the area of the quarry"); ("discovery is needed for evaluation of the Letter's requirements related to the response at the quarry"); (discovery will "help us determine what advances safety and health at the School"); (discovery will "help [New Hope] determine how the requirements of the Letter affect the environmental conditions in the area of the quarry, the School, and the vicinity"); ("help determine the effect of the letter"); ("help assess the safety of the School"); and ("assess...whether the actions that are currently being taken are having any impact on the School"). We are certainly receptive to explanations of why discovery is relevant when the relevance is not obvious to us, but these vague statements are not particularly helpful. We have already held that the School grounds are unsafe because of the ever present threat of collapse sinkholes being caused by the quarry's groundwater pumping, and that the only way to make the School safe again is to allow groundwater levels to return to normal. Again, although we did not specifically require it to do so, the Department took our findings to heart and is requiring New Hope to immediately allow groundwater levels to gradually recover so that the School can, some day, eventually return to providing a safe environment for the children and faculty that live on and use its grounds. New Hope withdrew its appeals from the compliance orders requiring it to allow groundwater levels to begin to recover, and it signed a consent assessment promising not to challenge the Department's findings.

The basic flaw in New Hope's response is that it never truly articulates how the School's building records, historical construction of buildings and stormwater facilities since 1978, geotechnical studies, sinkhole remediation efforts, and groundwater use relate to any of the requirements of the letter. New Hope never tells us, for example, that if the School's gymnasium was built in such a way that it will exacerbate sinkhole formation, it somehow follows that the Department's limitation on the quarry's groundwater pumping should be lower or higher. The only reason we can think of why information regarding construction of the gymnasium would be relevant is if we were trying to determine what is causing sinkholes to form on the campus, but that issue is off the table. We simply cannot imagine how details regarding the School's gymnasium could possibly relate to the Department's modifications, nor should we need to. New Hope has not supplied an explanation.

New Hope never explains why it needs, say, a detailed history of the School's sinkhole repairs in order to be able to challenge the requirement that the quarry devote a certain number of man-hours per week to reclamation. It never connects the dots between the School's management of sewage going back to 1978 and the

requirement to place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during highwall reclamation. We could go on along these lines, but the point is that we agree with the School's conclusion that the only logical reason for inquiring into these matters is to relitigate the sinkhole causation issue, and that we will not allow.

New Hope says that it "is attempting to address health and safety. It is attempting to determine the effect of the Letter's requirements on that health and safety and whether the requirements are arbitrary and capricious. Details relating to construction and safety will be able to determine whether the Department's requirements in the Letter are appropriate. Therefore, the information is relevant." We have a difficult time following New Hope's chain of deductive reasoning. While safety was of particular concern the last time around, and while that case serves as important context, this appeal is really about whether the Department's modifications to the reclamation plan are reasonable to bring about a goal that is no longer subject to challenge. New Hope never tells us how it reaches the conclusion that the information it seeks is relevant apart from stating it as self-evident when its relevance is in fact not readily apparent.

At one point New Hope argues that it "is not re-litigating the cause of the sinkholes—it is attempting to determine the effect of the Letter. Even if it were at this time, this would not be barred by collateral estoppel." Once again, we are not sure what this means. To the extent New Hope is arguing that, while collateral estoppel may bar issues from being relitigated at trial it does not operate to bar *discovery* on these issues, New Hope offers no support for this argument, and it is deeply flawed. If an issue is barred from being litigated at trial, we do not see how it can possibly be relevant to the subject matter of the appeal, and thus a proper topic of discovery.

*New Hope Crushed Stone & Lime Co.*, 2016 EHB at 686-90.

Although New Hope complains that we improperly limited its discovery, as just demonstrated, New Hope presented a series of weak and conclusory arguments in response to the School's motion for a protective order, and its arguments were no more convincing when it came back seeking reconsideration, which we denied in another five-judge Opinion:

Our primary issue with New Hope's motion for reconsideration is that New Hope never cites to or otherwise addresses what it is required to show under our rules on reconsideration of final or interlocutory orders. New Hope never discusses the extraordinary circumstances it believes justifies reconsideration of our Opinion and Order. It never cites to any case in support of its position. In fact, the motion does not contain any legal authority apart from a somewhat errant reference to the Department's authority under the Noncoal Act to issue orders to abate nuisances. *See* 52 P.S. § 3311(b). Our rule permits a party seeking reconsideration to file a memorandum of law with its motion or petition, but no memorandum of law was

filed here. Our Order did not rest on a legal ground or a factual finding that had not been proposed by any party. New Hope presents no new crucial and inconsistent facts.

In fact, New Hope has not presented anything new at all. New Hope essentially does nothing more in its motion for reconsideration than repeat the same vague assertions that it made in its original response to the School's motion for a protective order that it needs the discovery to assess the "effect of the letter." It continues to fail to explain what that means or why, say, building plans from the 1970s would help it assess those effects in the narrow appeal before us. New Hope understandably disagrees with our earlier decision, but mere disagreement is not an appropriate basis for reconsideration. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118. Reconsideration of interlocutory orders demands extraordinary circumstances because it asks for extraordinary relief. *Harriman Coal Corp. v. DEP*, 2001 EHB 1, 5. New Hope has failed to allege, let alone demonstrate, that any such circumstances exist.

*New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 741, 744-75 (footnote omitted).

New Hope also says that the Board exceeded its authority in "unilaterally" declaring that the quarry was creating a public nuisance when we found that New Hope was causing the unabated, unpredictable, and dangerous formation of collapse sinkholes across the School's campus and throughout the surrounding area, constituting a significant threat to the health, safety, and welfare of the students and faculty who live on and attend the campus as well as to the other neighbors of the quarry. We are not sure what New Hope has to gain in the context of the current appeal even if the words "public nuisance" were not employed in our 2014 Adjudication. Sinkhole causation was aggressively and exhaustively litigated by the parties in the prior action, and after ten days of hearing and a plethora of evidence, it was clear that the cause was undeniably New Hope and its prolonged dewatering of the area water table. Even New Hope agreed in that case that quarry dewatering was at least a contributing factor to sinkhole formation. *See, e.g., Solebury School*, 2014 EHB at 521 ("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."); *id.* at 529 ("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.”)

In any event, the time for New Hope to challenge any factual or legal conclusions in our 2014 Adjudication was in an appeal to the Commonwealth Court, which it filed and then discontinued before any decision was reached (*see* Cmwlth. Ct. Docket No. 1497 C.D. 2014), not in an appeal of a separate and subsequent Department action to the Board. We have evaluated the merits of the Department’s action that is the subject of *this* appeal and find ample evidence to uphold the modifications to New Hope’s reclamation plan in the face of New Hope’s protestations.

### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514.
2. The Department bears the burden of proof when it issues an order or a directive that otherwise has the effect of an order. 25 Pa. Code § 1021.122(b)(4).
3. The Department and Intervenors must prove by a preponderance of the evidence that the Department’s issuance of the letter to New Hope and the modifications contained therein constitute a lawful and reasonable exercise of the Department’s discretion and that the letter is supported by the facts. *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 14 (Adjudication, Apr. 10, 2017); *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Mgmt. Co. v. DEP*, 2010 EHB 456, 474-75.
4. The Department’s action must also be consistent with its obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B,

slip op. at 24-25 (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, aff'd, 131 A.3d 578 (Pa. Cmwlth. 2016). *See also Pa. Env'tl. Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017).

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

6. "An issue which is not argued in a posthearing brief may be waived." 25 Pa. Code § 1021.131(c). *See, e.g., B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 12 (Adjudication, Aug. 9, 2017); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246.

7. New Hope did not contest in its posthearing brief Requirements 1, 5, 6, and 7 in the letter under appeal.

8. New Hope's obligations under the October and November 2015 compliance orders are administratively final. *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 684-85; *White Glove, Inc. v. DEP*, 1998 EHB 372.

9. If a directive is objectively reasonable, the recipient's ability to comply with the directive due to its own individual circumstances is irrelevant in determining the validity of the directive and whether it is a lawful and reasonable exercise of the Department's discretion. *B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 19-20 (Adjudication, Aug. 9, 2017); *Rozum v. DEP*, 2008 EHB 731, 735; *M & M Stone Co. v. DEP*, 2008 EHB 24, 67; *Starr v. DEP*, 2003 EHB 360, 373; *Wasson v. DEP*, 1998 EHB 1148, 1158; *Ramey Borough v. Dep't of Env'tl. Res.*, 351 A.2d 613, 615 (Pa. 1976).

10. Our standard of review does not require the Department to have reached the “best” plan possible in making its modifications, or to have investigated the entire universe of possibilities for stopping sinkholes around the quarry; it only requires the Department to have acted reasonably and in accordance with the law. *Cf. Borough of Kutztown v. DEP*, 2016 EHB 80, 94; *Guerin v. DEP*, 2014 EHB 18, 25.

11. The issue of the cause of sinkholes opening up on the School’s property and in the surrounding area is barred by the doctrine of collateral estoppel. *New Hope Crushed Stone & Lime Co.*, 2016 EHB 666, 686-90.

12. The Department’s modifications to New Hope’s reclamation plan were lawful, reasonable, and supported by the facts.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD



<b>NEW HOPE CRUSHED STONE</b>	:	
<b>&amp; LIME COMPANY</b>	:	
	:	
v.	:	<b>EHB Docket No. 2016-028-L</b>
	:	
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:	
<b>PROTECTION, SOLEBURY SCHOOL and</b>	:	
<b>SOLEBURY TOWNSHIP, Intervenors</b>	:	

**ORDER**

AND NOW, this 7<sup>th</sup> day of September, 2017, it is hereby ordered that New Hope Crushed Stone & Lime Company’s 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: September 7, 2017**

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

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