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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **FRIENDS OF LACKAWANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-063-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee** | : | **Issued: November 8, 2017** |

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

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

## Synopsis

The Board in a third-party appeal from the renewal of Keystone Sanitary Landfill's solid waste management permit adds a condition requiring Keystone to prepare a groundwater assessment plan with respect to groundwater degradation being seen in one of its monitoring wells in accordance with 25 Pa. Code § 273.286. The Board rejects all of the third party's other objections to the permit renewal.

## FINDINGS OF FACT

### The Parties

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and authority to administer and enforce the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101 – 4000.1904 ("Act 101"), and the rules and regulations promulgated under those statutes, including the municipal waste regulations codified at 25 Pa. Code Chapters 271 - 285.

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2. The Permittee, Keystone Sanitary Landfill, Inc. ("Keystone"), owns and operates a municipal solid waste landfill located in Dunmore and Throop Boroughs, Lackawanna County pursuant to Solid Waste Management Permit No. 101247. (Friends of Lackawanna Exhibit No. ("FOL Ex.") 1.)

3. A portion of Dunmore Borough is a designated Environmental Justice Area. (Notes of Transcript page ("T.") 1132, 3302-05; FOL Ex. 176; Commonwealth Exhibit No. ("C. Ex.") 5.)

4. Friends of Lackawanna ("FOL") is a Pennsylvania registered Non-Profit, Non-Stock, 501(c)(3) corporation with its registered address located at 201 South Blakely Street #305, Dunmore, Lackawanna County, Pennsylvania 18512. (T. 186; FOL Ex. 292.)

5. FOL was created in October 2014 to oppose the continued operation and proposed expansion of the Keystone Landfill. (T. 168, 186, 188-89; FOL Ex. 292.)

6. FOL's articles of incorporation filed with the Pennsylvania Department of State provide that its "purposes shall include, but shall not be limited to: supporting the health, welfare and education of individuals in need in Northeastern Pennsylvania." (FOL Ex. 292.)

7. FOL's mission includes protection of the environment in the area of the landfill. (T. 69-70, 96-97, 117-20, 185-90, 200-02, 204-05, 270, 290-91, 307; FOL Ex. 8, 9, 12, 13, 14, 292.)

8. FOL holds events and educational seminars, organizes members of the community to attend public meetings involving the landfill, puts on happy hour events and fundraisers, and raises awareness in the community about the landfill through the information it disseminates at its events, online, through social media, and through radio and television interviews. (T. 120, 186, 201-02.)

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9. FOL has been involved in borough council meetings and zoning hearing board proceedings and has participated in other public hearings regarding the Keystone Landfill. (T. 119-20, 201.)

10. FOL has prepared and submitted comments to the Department on the proposed expansion, and made a presentation to the Department's Environmental Justice Advisory Board regarding its concerns over the impacts from the landfill to the community. (T. 186-87; FOL Ex. 12, 13, 14.)

11. FOL's comments express concerns that include landfill leachate impacting groundwater, subsurface fires at the landfill, and impacts from the landfill on local property values and on the region's reputation. (T. 190, 270, 290-91, 307; FOL Ex. 13, 14.)

12. FOL is also concerned that there have been no health studies done on the impact of the landfill's odors on the local community, and it has requested that health studies be performed by the Department of Environmental Protection and the Department of Health. (T. 180-82, 291, 305, 337.)

13. FOL maintains a website containing information about its activities, events, and its mission. (T. 117-18, 144; FOL Ex. 8, 9.)

14. FOL considers people to be members of the organization if they have engaged with the organization, supported its cause, shown up to FOL's meetings, written a letter in opposition of the landfill, signed a petition, participated in canvassing or fundraising events, "liked" FOL's Facebook page, donated to FOL's causes, or are on FOL's mailing list. (T. 119, 185-86.)

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15. FOL presented the testimony of three individuals closely associated with FOL at the hearing on the merits, Beverly Mizanty, Katharine Spanish, and Patrick Clark. (T. 69, 115, 185.)

16. Beverly Mizanty joined FOL when it first organized. She has attended meetings and events organized by FOL, contributed to its campaign, and gone to public hearings before government agencies in her role as a member of FOL. (T. 69-70, 89, 97.)

17. She considers herself a member of FOL by province of joining its Facebook page, attending its meetings and open sessions, and by donating to its cause. (T. 69-70, 96.)

18. Mizanty receives emails from FOL that keep her informed of what is going on with the group's activities. (T. 97.)

19. Mizanty has lived in Dunmore within a quarter-mile of the landfill, which she can see from her house, for more than 25 years. (T. 62-64.)

20. Mizanty is primarily concerned about the landfill's odors and their impact on her health, which have a chemical smell and make her nauseous. (T. 65, 67, 96.)

21. Mizanty has lodged more than 15 complaints with the Department in the last five years regarding odors either by phone, online, or in writing. (T. 88-89; DEP Ex. 31.)

22. Mizanty is also concerned about water contamination and fires from the landfill due to the proximity of the landfill to her house. (T. 67-68.)

23. Katharine Spanish is a member of FOL and the secretary of its board. She attends weekly board phone calls, is active in FOL's social media presence, email distribution network, and website, and she participates in FOL's community activities. (T. 115.)

24. She lives about a half-mile from the landfill with her three children who attend school and daycare about a quarter-mile from the landfill. (T. 109, 111.)

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25. Spanish experiences odors from the landfill at her home and throughout the community, which she describes as strong, pungent, and foul, and which have become more persistent over the last seven years. (T. 112-13, 163-64.)

26. Spanish has experienced noxious odors one to two dozen times within the last several years, and she has complained to the Department about odors approximately a dozen times. (T. 129-30.)

27. She is concerned about the health of her children while at daycare due to the odors. (T. 135.)

28. In addition to air quality she is also concerned about leaking leachate, possible fires, radioactive material, and litter. (T. 114, 158, 172.)

29. Patrick Clark, who lives approximately two miles from the landfill, is a member of FOL, he is on the board of directors, and he is the organization's treasurer. (T. 177, 185, 202.)

30. He is considering no longer allowing his children to play soccer at nearby Sherwood Park because of his concerns over air quality. (T. 179-80, 313.)

31. Clark is also concerned over the landfill's impacts on the local economy and on the reputation of the region as the landfill continues to accept more waste. (T. 184-85, 273.)

32. Clark authored the comments FOL submitted to the Department on the landfill's expansion. (T. 211-12; FOL Ex. 13, 14.)

33. FOL also introduced for purposes of establishing standing a transcript of testimony of Joseph May given before the Dunmore Zoning Board on March 26, 2015. (T. 355-56, 1375-76; FOL Ex. 3a.)

34. Joseph May is a member of FOL. (FOL Ex. 3a (at 62).)

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35. May lives within a quarter-mile of the landfill with his wife and daughter. (FOL Ex. 3a (at 31).)

36. May passes the landfill every day on his way to work and frequently walks his dog and rides his bicycle and motorcycle in the vicinity of the landfill. (FOL Ex. 3a (at 32-34).)

37. May has experienced a distinct, pungent odor that he attributes to the landfill, which he smells at his house almost every day. (FOL Ex. 3a (at 34, 39).)

38. May is concerned about the health impacts to his family from the landfill. (FOL Ex. 3a (at 52-53).)

39. The odors FOL's members experience become stronger the closer they get to the landfill. (T. 66, 79-80, 170, 179; FOL Ex. 3a (at 42-44).)

**The Site**

40. The Board conducted a site view with all parties in attendance on October 26, 2016.

41. The landfill site is located very close to Exit 1 of Interstate 380. (T. 3056-57; FOL Ex. 294; Keystone Sanitary Landfill Exhibit No. ("KSL Ex.") 36, 49; C. Ex. 1.)

42. Keystone's permit covers 714 acres, 335 acres of which have been approved for waste disposal. (C. Ex. 1.)

43. The site has been consistently used for waste disposal since the 1950s. (T. 1603, 2867-71.)

44. Before it was used for waste disposal, the site was extensively mined for coal by surface and underground methods. (T. 2867-69, 3367-84; KSL Ex. 64A, 64B, 64C, 64D.)

45. Keystone has been permitted and operating at the site for more than 30 years. (FOL Ex. 200, 322; C. Ex. 1.)

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46. Keystone's permit has been renewed and modified several times over the years. (FOL Ex. 200, 201, 205, 211, 215, 216, 217; KSL Ex. 40C, 40D, 40E, 40F; C. Ex. 1-4.)

47. The Keystone site consists of separate waste disposal areas, commonly known as Keystone/Dunmore Landfill, Phase I (Tabor and Logan), and Phase II. (T. 2867-71; KSL Ex. 36, 36A, 96A (at 4).)

48. The original Keystone/Dunmore Landfill operated from the early 1970s through the late 1980s by filling old strip mine pits. The original Keystone/Dunmore Landfill was active before the existing landfill regulations were enacted in 1988 and it is an unlined disposal site. (T. 2867-71, 3367.)

49. The Tabor and Logan sites, which made up Phase I, are double-lined disposal areas that were permitted by the Department in July 1988. Waste disposal activities commenced in Phase I in May 1990. (T. 2870-71, 3390; KSL Ex. 36, 36A.)

50. Keystone closed the Tabor portion of Phase I by 2003 and the Logan portion of Phase I by 2007. (T. 2871.)

51. The Department approved a major permit modification for the Phase II expansion at the Landfill on June 10, 1997. The Phase II expansion added 186 acres of waste disposal area to the facility. Phase II is the current disposal area of the landfill. (T. 2871, 3057; FOL Ex. 201; C. Ex. 1.)

52. Keystone began waste placement in Phase II in 2005. (T. 3024.)

53. On April 3, 2012, the Department approved a major permit modification for an increase in the average and maximum daily volume limits for the landfill. The average daily volume was raised from 4,750 to 7,250 tons per day and the maximum daily volume was raised from 5,000 to 7,500 tons per day. (C. Ex. 2, 6.)

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54. On January 13, 2014, the Department approved a minor permit modification for a project intended to relocate approximately 8.8 million tons of waste from the Keystone/Dunmore site to a new lined area of the landfill. (FOL Ex. 215.)

55. On February 24, 2015, the Department approved a minor permit modification for Keystone to construct and operate a new leachate treatment plant at the landfill with a capacity of 150,000 gallons per day. The existing treatment plant was to be refurbished and kept as a backup facility. (FOL Ex. 216.)

56. On August 3, 2015, the Department approved a minor permit modification for the construction of a new access road to the Keystone facility. The construction included a new guard house, access gates, employee parking lot, access road, and sediment traps 1, 2, and 3. (FOL Ex. 217.)

57. On August 25, 2016, the Department approved a minor permit modification authorizing Keystone to make improvements to the two existing leachate storage lagoons at the site, including elimination of existing penetrations within the lagoons, replacement of the existing gravity discharge system with leachate pumping system and double containment force main pipelines, and installation of a new liner system over the existing primary liner. The new system will include a primary liner, a secondary liner, a leachate detection zone with a side slope riser pump with pressure transducers, alarms, and automated pumping protocols. (C. Ex. 4.)

58. Keystone completed and submitted the Form 37 as-built certification package to the Department on October 17, 2016 for the west lagoon, being the first phase of the lagoon improvements project authorized by the Department's August 25, 2016 modification to the Permit. The second phase of this project, being the east lagoon improvements, was scheduled to commence in mid-2017. Currently, only the re-lined west lagoon is being used for leachate

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storage, with the east lagoon being used only for potential backup. (T. 1593-94, 1597-98, 3142-46; KSL Ex. 115, 130.)

59. Keystone upgraded its on-site treatment plant. (T. 3140-41; KSL Ex. 52.)

60. Keystone has an application pending for a permit modification that would allow it to expand within the existing permit limits in the area where some of the waste in the Keystone/Dunmore area is to be excavated and relocated as part of Phase II. (C. Ex. 5.) This appeal does *not* involve the expansion application.

61. Prior to the renewal that is at issue in this appeal, Keystone's landfill permit was last renewed on March 4, 2005, which allowed the landfill to operate for ten more years, until April 6, 2015. (FOL Ex. 205.)

62. On February 11, 2014, Keystone filed an application for the latest renewal of the permit. (FOL Ex. 266.)

63. The Department approved the application and issued the permit renewal on April 6, 2015. (FOL Ex. 1.) This appeal is from that permit renewal.

64. The permit renewal allows Keystone to operate the landfill for an additional ten years, until April 6, 2025. (FOL Ex. 1.)

65. The permit renewal did not add any new conditions or terms to the underlying permit. (FOL Ex. 1.)

**Groundwater**

66. Leachate is a liquid that has permeated through or drained from solid waste. 25 Pa. Code § 271.1.

67. Leachate generated by a landfill can be characterized by elevated levels of nitrate, ammonia, alkalinity, sodium, chloride, calcium, total organic carbon, volatile organic compounds

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(VOCs), total dissolved solids (TDS), and/or potassium. (T. 1983-84, 2007-08, 3433-35, 3589, 3728.)

68. In order to minimize and control the potential for contamination of groundwater from leachate, landfills are required to install groundwater monitoring wells. 25 Pa. Code §§ 273.281 – 273.288.

69. Keystone's landfill has an extensive groundwater monitoring well system, which consists of 34 wells. (T. 1703-04, 2404; FOL Ex. 218-23, 304, 325; KSL Ex. 103, 104, 107, 110, 111, 112; C. Ex. 34.) The regulations require a minimum of four wells (one upgradient, three downgradient). 25 Pa. Code §§ 273.282.

70. The landfill's monitoring wells are frequently sampled to ensure the landfill is not polluting the groundwater. (T. 3512-13; FOL Ex. 218-23, 325; KSL Ex. 93, 104; C. Ex. 16.)

71. With the exception of the area in the vicinity of monitoring well MW-15 (discussed below), the landfill's existing monitoring well network provides adequate coverage both horizontally and vertically for detecting any degradation of the groundwater resulting from landfill practices. No additional wells have been shown to be necessary at this time. (T. 1703-06, 1757-59, 1783, 3398-3418, 3440-41, 3451-53, 3460-63, 3482-83, 3499-3501, 3586, 3591-93, 3760-63, 3876-78, 3890-3900, 3932-33, 3973-74, 4064-68; FOL Ex. 218-23, 304, 325; KSL Ex. 64A, 93, 96B, 96C, 110, 111, 112; C. Ex. 34.)

72. With the exception of MW-15, Keystone's monitoring system has not detected any groundwater contamination that can reasonably be attributed to landfill operations at this time. (T. 1621-24, 1651, 1721-31, 1757-59, 2182-83, 3500-03, 3512-19, 3526-28, 3543, 3614-15, 3731-33, 3770, 3782-83; FOL Ex. 218-23, 243, 248, 249; KSL Ex. 93, 158.)

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73. Elevated levels of sodium and chloride are being detected in some monitoring wells but it has not as of yet been demonstrated that those elevated levels can be attributed to the landfill's activities. (T. 1713, 2006-08, 2182-83, 2537-43, 3434-37, 3534-38, 3613-15, 3728-33, 3749-51, 4144-56; FOL Ex. 221; KSL Ex. 41 (at 22-24), 41A, 90, 93, 155, 158, 173, 174, 175[1]; C. Ex. 16.)

74. With the exception of groundwater being monitored at MW-15, it has not been shown that groundwater quality at the landfill requires further assessment at this time. (T. 1624, 1628, 1704-06, 1754-55, 1761-62.)

75. The landfill is contaminating the groundwater with leachate that is being detected in MW-15. (T. 1630, 1666-71, 1716-19, 1774-75, 1976-79, 1983, 2047-48, 3517-19, 3589, 3654; FOL Ex. 218, 219, 220, 232, 234, 250 263, 297; KSL Ex. 93; C. Ex. 5, 12, 14, 17, 18, 21, 22, 23.)

76. The contamination in MW-15 has been present since at least 2002. (T. 1521, 1629-30, 3654; FOL Ex. 218-24, 243, 245, 248; KSL Ex. 93; C. Ex. 18.)

77. Increases have included nitrate (the most significant one), potassium, chloride, sodium, alkalinity, total organic carbon, and biological oxygen demand (BOD). (T. 1629-30, 1974-75.)

78. The contamination exceeds the maximum contaminant limits (MCLs) for drinking water for nitrate (averaging about 120-130 mg/l since 2014) (standard = 10 mg/l), chloride (around 600-750 mg/l since 2013) (standard = 250 mg/l), and total dissolved solids (consistently above 2,000 mg/l since 2013) (standard = 500 mg/l). 25 Pa. Code § 109.202 (incorporating 40

[1] Two different exhibits were inadvertently marked and admitted as KSL Ex. 175. (*See* T. 4150, 4191, 4280, 4358-59.) The exhibit cited in support of this Finding of Fact is a PennDOT construction drawing for the Lackawanna Valley Industrial Highway. (T. 4150.)

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CFR Part 141, Subpart G; 40 CFR § 143.3). (T. 1979, 3733; FOL Ex. 249, 263; KSL Ex. 93; C. Ex. 17, 18.)

79. The contamination has not been shown to present any immediate risk to human health or safety. (T. 1279-80, 1521, 1706, 1755-60, 1768-69, 3386-89, 3561, 3572-73, 3733-34, 3834-38, 4340, 4354; FOL Ex. 249; KSL Ex. 136.)

80. MW-15 is a shallow well, with a depth of about 109 feet below the surface. (FOL Ex. 224.)

81. MW-15 monitors shallow groundwater, much of which is flowing through abandoned coal workings. (T. 1628, 1701, 1827.)

82. The well produces about three to five gallons per minute. (T. 3709.)

83. A nearby deep well, MW-16, is not showing contamination. (T. 1723.)

84. MW-15 is very close to the downgradient and downdip border of the site, which suggests that there is an as yet undetermined possibility that the landfill may be contaminating groundwater offsite. (T. 1981-84, 1991-92, 2012-13, 2063-64, 2307-12, 3636, 3657, 3971-72; C. Ex. 12, 34.)

85. MW-15 is close to and downgradient of Keystone's treatment plant and leachate storage lagoons. (T. 1721-22, 3517-19, 3634-35, 3657, 3971-72; FOL Ex. 218, 219, 221, 222, 223; KSL Ex. 153; C. Ex. 34.)

86. Although the leachate storage lagoons are potentially a source of the contamination being detected in MW-15, it has not been shown that they are in fact the source of the contamination. (T. 1046, 1058-63, 1278-79, 1291-92, 1512-14, 1521-24, 1532-34, 1600-01, 1667-68, 2565-67, 3711-18, 4016-27, 4321; FOL Ex. 206, 207, 208, 232, 337 (at 104-10); KSL Ex. 62, 132; C. Ex. 12, 22.)

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87. Although MW-15 is not a remediation well, groundwater is regularly pumped from the well and put in the lagoons. (T. 2015, 3533-34; FOL Ex. 249.)

88. The Department by letter and other informal action has been requesting Keystone to assess the MW-15 area contamination since 2003. (C. Ex. 17.)

89. The source of the contamination being seen in MW-15 has not been determined. (T. 1046-49, 1058-63, 1278-79, 1291-92, 1512-14, 1521-24, 1718-35, 1788, 2565-67, 4011-13, 4016-27, 4321; FOL Ex. 229, 337 (at 104-10); KSL Ex. 62, 130, 132; C. Ex. 12.)

90. The groundwater contamination at MW-15 has yet to be fully or adequately characterized or assessed. (T. 1718-35, 1784-86, 2578, 4321.)

91. Despite the lengthy investigations conducted over several years of possible nearby sources of the contamination and repairs to the treatment plant and the lagoons, Keystone has still not been able to pinpoint or arrest the source of contamination being detected in MW-15. (T. 1046-48, 1053, 1158-59, 1718-35, 1780-81, 1788, 3517-24, 3634-36, 3656-61, 3671-74, 4009-19; FOL Ex. 207, 208, 218-24, 235, 238, 242, 243, 245, 248, 249, 327; KSL Ex. 4A, 62, 93, 94, 108, 130; C. Ex. 17, 18.)

92. On November 9, 2016, the Department issued a Notice of Violation (NOV) to Keystone. (FOL Ex. 297.)

93. At the time of the hearing, Keystone had submitted a proposal to the Department to perform additional characterization work near MW-15 in an effort to pinpoint the source and take appropriate remedial action, which would include lagoon improvements and drilling three more monitoring wells, one of which would be a deep well. (T. 1591-94; KSL Ex. 130; C. Ex. 4.)

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94. The Department approved the well locations. (KSL Ex. 175.[2])

95. The Department did not require Keystone to take any action with respect to the groundwater contamination being detected in MW-15 as a condition for the renewal of its permit. (FOL Ex. 1.)

96. Part of the liner system below waste disposal areas is a leachate detection zone (LDZ), which under current standards must rapidly detect and collect liquid entering the zone. 25 Pa. Code § 273.255.

97. Flow rates in the LDZs at Keystone have not been shown to exceed the action level established in the solid waste regulations of 10 gallons/acre/day, 25 Pa. Code § 273.255. (T. 1675-77, 1738-48, 1763; FOL Ex. 221, 222, 223, 251, 257 (at A0006686), 258.)

98. It is not expected that LDZs will have absolutely no flow in them. (T. 1738-48, 3236-41, 4282, 4337-39.)

99. The low flows being measured in the LDZs at Keystone do not support a finding that the landfill liners have been breached. (T. 1738-48, 1760, 3146-50, 3236-41, 4282, 4337-39.)

100. However, actual leachate flow in the Tabor LDZ is unknown because proper metering access is not possible due to the way in which the LDZ manholes were constructed, so Keystone uses and the Department accepts a calculated number derived through a process of elimination using known flows from the other disposal areas. (T. 1645-50, 1730-31, 1787; C. Ex. 21.)

101. The Department is also not satisfied with the measurement of actual flows in the LDZ at the Logan area. (T. 1645-46; FOL Ex. 220, 258; C. Ex. 21.)

[2] The exhibit cited in support of this Finding of Fact is a letter from the Department dated January 4, 2017 responding to and approving Keystone's proposal (KSL Ex. 130) to perform additional groundwater characterization around MW-15. (T. 4358-59.) (*See* note 1, *supra*.)

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102. There is insufficient evidence at this time to show that disposal areas at the landfill are contributing to the contamination being detected at MW-15. (T. 1650-51, 1705-06, 1730-31, 1743-44, 1758-59, 1787-90, 3502.)

103. MW-29U was an upgradient monitoring well installed at or near the highest point on the landfill's property to monitor background groundwater quality, that is, the quality of groundwater before it flows under disposal cells at the landfill. (T. 1710-13, 1777, 2015-16, 2374-75; FOL Ex. 256; C. Ex. 16, 34.)

104. MW-29U was abandoned in 2012 after it was determined that there was a crack in the well casing and problems with the pump, and it was replaced in 2013 with MW-29UR, which is approximately 50 feet from the location of MW-29U. (T. 1625-27, 1712, 1825, 1832-33, 2017; FOL Ex. 211, 256.)

105. MW-29UR has levels of chloride, sodium, calcium, barium, alkalinity, and TDS that are higher than the levels of those constituents that were measured in MW-29U. (T. 1625-26, 1713, 1771-72, 2016.)

106. MW-29UR yields about one gallon per minute. (T. 3975.)

107. There is not a sufficient basis at this time to attribute the elevated parameters being seen in MW-29UR to the landfill because it appears that groundwater under disposal areas would unrealistically need to flow updip across bedding planes to get to the area of the well. (T. 1712-13, 3910-16; KSL Ex. 153; C. Ex. 16, 34.)

108. Based on the existing record, MW-29UR is located at a point hydraulically upgradient from the disposal areas in the direction of increasing static head, and it has not been shown that it is incapable of providing data representative of groundwater not affected by the facility. (*Id*.)

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109. There is no credible record evidence of any actual or likely hydrogeological connection between the landfill and Pennsylvania American Water Company's Dunmore Reservoir No. 1, a backup drinking water supply located about 900 feet from the landfill and on the other side of the Lackawanna Valley Industrial Highway from the landfill. (T. 2189-91, 2199, 2313-14, 3912-16; KSL Ex. 43 (at KSL002776-78), 44 (Exhibit DC, DF), 125 (Section B.6).)

**Compliance History Review**

110. The Department reviewed Keystone's operational and compliance history before deciding to renew Keystone's permit. (T. 1128, 1281-89.)

111. The purpose of reviewing an applicant's compliance history is to determine whether any adjustments need to be made to the applicant's operations, and to predict future performance, based on past performance, and decide whether the applicant is willing and able to comply with the law going forward. (T. 3263-64, 4320.)

112. The Department relies upon formal, memorialized violations in conducting its review of Keystone's compliance history, but the Department, with rare exceptions, never memorializes any of Keystone's violations. (T. 1281-83, 2789-90, 2826-27, 2834.)

113. The Department has guidance documents that require its personnel to record violations even if the violations are minor and/or corrected. (T. 1144-50; FOL Ex. 298, 299.)

114. The Department ignored these guidance documents with respect to Keystone. (T. 1144-48, 1280-83, 2831-34.)

115. The Department conducted a limited review of the compliance history of Keystone's related parties. (T. 1153-54, 2767-78, 2788-90, 2799-2801, 2804-05, 2814-19, 2827-30, 2845-47, 4129-33; FOL Ex. 269-78; KSL Ex. 170, 171, 172; C. Ex. 25.)

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116. Keystone did not supply in its compliance history submission, and the Department did not consider, Keystone's compliance history with the Susquehanna River Basin Commission (SRBC). (T. 1353-54, 1356-59, 1361-63, 1409-10, 2777-78, 2829-30; FOL Ex. 32, 34, 36, 37, 270, 272, 273.)

117. That SRBC matters were resolved with an agreement with the SRBC. (T. 1351-53, 1364-69; FOL Ex. 31; KSL Ex. 128.)

118. David Golobek, the Department inspector at the landfill since 2007, has never identified a violation at the facility. (T. 637, 721.)

119. Until 2006, the only NOVs the Department issued to Keystone was for two daily tonnage exceedances. (T. 721, 1281, 1289, 2754.)

120. The Department has never issued any NOVs or taken any enforcement action against Keystone for odors. (T. 1084, 1280-81, 1288-89.)

121. The Department has not recorded or considered any violations for Keystone's direct discharges of untreated leachate to the POTW. (T. 1281, 1285-86, 1289, 1318.)

122. The Department did not issue any NOVs relating to MW-15 degradation for 14 years, until November 9, 2016. (T. 1053-54, 1056-57; FOL Ex. 297.)

123. The Department did not issue any NOVs or take other enforcement action with respect to exceedances of reserve capacity in Keystone's leachate lagoons. (T. 1058, 1281, 1289; KSL Ex. 42A, 42B, 42C, 42D, 42E.)

124. Mr. Roger Bellas, the Department's Regional Manager of the Waste Program for the Northeast Region and the person responsible for approving the permit renewal, was generally aware of operational issues at the landfill and considered them before issuing the renewal. (T. 1073, 1131-32, 1138-39, 1140-41, 1283-89.)

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125. Based on his review, Mr. Bellas "did not hesitate for a second" before approving the renewal. (T. 1285.)

126. Keystone's compliance history does not demonstrate a lack of ability or willingness to comply with the law during the renewal period. (T. 1257-58.)

**Odors**

127. A landfill will typically have odors associated with the garbage disposed of at the site as well as with the gas and leachate generated by the landfill. (T. 1078.)

128. Keystone has a Nuisance Minimization and Control Plan that, among other things, outlines the steps it takes to control odors at the site. (KSL Ex. 49.)

129. Landfills apply daily cover to the working face of the landfill to control garbage odors. (T. 1079.)

130. There is limited ability to control landfill gas odors from the working face of a landfill. (T. 1079-80.)

131. The Department conducts its own odor patrols to determine whether offsite odors are emanating from the landfill. (T. 1207-08.)

132. An offsite odor is an odor observed by Department staff that can be traced back to a source. (T. 1082.)

133. The Department has received hundreds of odor complaints from citizens regarding the Keystone Landfill from January 2011 through October 2016. (T. 88-89, 129-30; C. Ex. 31.)

134. Odors from the landfill have negatively affected persons who live near and/or use the area surrounding Keystone. (T. 65-67, 79-80, 96, 112-13, 135, 163-64, 170, 179-80, 313; FOL Ex. 3a (at 34, 39, 42-44, 52-53).)

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135. Despite numerous inspections documenting odors and landfill gas issues at the site, the Department has never issued a violation to Keystone for the odors. (T. 663-64, 673, 697, 1084-91, 1094-1104, 1280-81, 1289; FOL Ex. 88, 150, 153-57.)

136. On November 9, 2011, the Department conducted an inspection at Keystone and documented three areas that were potential sources of odors. The Department used a flame ionization detector (FID) to detect volatile organic compounds (assumed to be methane from a landfill) in excess of 500 ppm, which is a federal regulatory action level for landfill surface monitoring. Although methane does not have an odor itself, it is typically associated with decomposing organic matter, which emits other odor-causing compounds. No violations were noted. (T. 1085-88, 1090; FOL Ex. 150.)

137. On August 4, 2012, during the course of an odor patrol conducted by the Department and in response to citizen complaints the Department noticed mild gas odors before noticing "strong and constant/lasting gas odors." The Department contacted Keystone and requested a written report addressing the cause of the odors and outlining measures to control and minimize offsite odors going forward. No violations resulted. (T. 1092-94; FOL Ex. 153.)

138. The following day, August 5, 2012, the Department noted "strong and constant/lasting gas odors deriving from KSL" lasting 15 minutes during an odor patrol. The Department met with Keystone and Keystone attributed the continuing odors to a perforated leachate pipe that had not yet been repaired. No violations were issued. (T. 1095-96; FOL Ex. 154.)

139. On August 10, 2012, the Department detected offsite odors that were traced back to Keystone. No violations were issued. (T. 1096-97; FOL Ex. 155.)

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140. On August 21, 2012, using an FID, the Department detected four exceedances of the 500 ppm limit for landfill gas. The Department also observed "strong landfill gas odors." No violations were noted. (T. 1098-1102, 1104; FOL Ex. 156.)

141. On August 24, 2012, the Department again observed "strong landfill gas odors" and six elevated readings were detected with the FID monitor. The Department suggested that Keystone review and modify its Nuisance Minimization and Control Plan to address monitoring and controlling odors. No violations were noted. (T. 1103-04; FOL Ex. 157.)

142. Generally, the Department does not issue a violation for offsite odors traced back to a facility unless the facility is not following its Nuisance Minimization and Control Plan or it has not followed the Department's recommendations for further controlling odors. (T. 1090-92.)

143. The Department may also decide to issue a violation if the offsite odor meets the criteria of a "malodor" from the Department's air quality regulations, 25 Pa. Code § 121.1. (T. 673-74, 1210.)

144. A malodor is defined as "[a]n odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1.

145. The Department interprets a malodor to be a strong, persistent odor that is detected by the Department on a complainant's property during an inspection while the complainant is present and it is determined by the Department that the odor affects the general public. (T. 674.)

146. The Department over time has recommended and requested that Keystone take additional measures to control odors, including installing additional gas wells, using a temporary

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synthetic cap, conducting odor patrols, and revising its Nuisance Minimization and Control Plan. (T. 1083-84, 1104, 3095, 3326-27; FOL Ex. 148, 150, 157.)

147. The Department has found that Keystone has followed its Nuisance Minimization and Control Plan even on occasions when offsite odors were traced back to the landfill. (T. 1082-83.)

148. Despite the persistence of odors from the facility, Keystone has taken measures to control and minimize odors, including enhancements to its gas collection system and implementing temporary synthetic cap in the intermediate slope areas. (T. 663-64, 676, 1200-06, 3282-83, 3315; FOL Ex. 90, 211; KSL Ex. 49.)

**Leachate Management**

149. Keystone has two onsite leachate lagoons. (T. 361, 1020.)

150. Each lagoon holds approximately 5.5 million gallons of leachate. (FOL Ex. 177, 178.)

151. Any water that comes into contact with the landfill's waste areas or leachate is to be directed into the leachate collection system. (T. 371-72.)

152. When leachate is generated in the disposal areas, it flows through double-lined HDPE piping to the leachate lagoons. (T. 473, 1020.)

153. Keystone pumps the leachate from the lagoons into the treatment plant. (T. 473.)

154. The treatment plant has a number of components that are involved in treating the leachate, including an ammonia stripper. (T. 473-74.)

155. The effluent is then discharged to the Scranton Sewer Authority system. (T. 474-75.)

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156. Rainfall in the disposal areas will ultimately result in leachate in the lagoons, and as the landfill receives rainfall, the levels in the lagoons may rise. (T. 481-82.)

157. This can be due to rainfall percolating through waste, or to open construction areas where a primary liner has been installed in a cell and connected to the leachate collection system. (T. 1028-29.)

158. Keystone has used more than 25 percent of the total leachate storage capacity of its lagoons on a regular basis, as late as 2015. (T. 482, 509-22, 712-14, 851-52, 961, 1021-22, 2541-42, 2545-47, 2568-69, 2571-72; FOL Ex. 54-60, 62, 88, 247, 311; KSL Ex. 127.)

159. The Department considers Keystone's exceedances of the 25 percent level to be violations of 25 Pa. Code § 273.275(b). (T. 2658-68, 2713-16.)

160. The Department has never issued an NOV to Keystone for exceeding the 25 percent level. (T. 650-51, 713-14, 1281, 1289.)

161. The lagoons have never overflowed. (T. 952-54.)

162. Keystone, at the time of the hearing, was engaged in refurbishing and upgrading the lagoons. (T. 648, 694; KSL Ex. 147; C. Ex. 4.)

163. Keystone's solid waste management operating permit provides that Keystone will collect its leachate and pretreat it before discharging it to a POTW. (T. 2547-48, 2621; FOL Ex. 200 (at 24).)

164. The permit renewal did not change this condition. (FOL Ex. 1.)

165. There is no exception for the condition in the permit. (FOL Ex. 1, 200.)

166. When Keystone constructed its new leachate treatment plant, its minor permit modification provided that Keystone could only discharge leachate from that plant to a municipal wastewater treatment facility after pretreatment. (FOL Ex. 216 (Condition 5).)

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167. Keystone is authorized by the Scranton Sewer Authority to discharge industrial wastewater in the form of landfill leachate from the landfill to the Authority's publicly owned treatment works. (T. 2646; FOL Ex. 50.)

168. Keystone discharges its leachate to the Authority at discharge points known as Drinker Street and Reeves Street. (T. 847-48.)

169. Keystone normally pretreats its leachate before sending it to the Authority. (T. 912, 2621.)

170. However, Keystone has on occasion directly discharged leachate without pretreatment from its leachate lagoons to the Scranton Sewer Authority. (T. 591, 849-51, 853, 881-83, 912, 961, 1023-28, 2541-42, 2545-46, 2572; FOL Ex. 110, 111; KSL Ex. 126, 127; C. Ex. 24.)

171. Keystone pays the Scranton Sewer Authority for the amount of pre-treated leachate it sends to the Authority for treatment. Keystone also pays surcharges to the Authority if certain constituents in the discharge, such as ammonia, exceed certain levels. (T. 599, 609-10.)

172. The discharges have not caused any upset conditions to the Authority's system or violations of the effluent limits contained in the Authority's NPDES permit. (T. 820, 1012-13.)

173. The extent to which the Department was aware of all of the direct discharges that have occurred is not clear. (*See* T. 862, 911-12, 1023-27, 2688.)

174. There are unexplained discrepancies between the amount of "leachate treated" that Keystone has reported to the Department and the amount of leachate that Keystone has reported to the Authority. (T. 521-29, 598-604, 609, 629-32; FOL Ex. 61-68.)

175. Notwithstanding Keystone's permit condition requiring pretreatment, it is the Department's position that Keystone may send untreated leachate to the Scranton Sewer

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Authority so long as the Authority is amenable to it and it does not cause problems with the Authority's operations. (T. 849, 855, 911, 2646-47, 2689, 3325-26.)

176. The Department does not care if Keystone is sending untreated leachate to the Authority so long as the Authority is okay with it. (T. 855-60; 2688-89.)

**Miscellaneous**

177. Keystone's Department-approved Nuisance Minimization and Control Plan addresses known and potential nuisances that may arise from the handling and disposal of solid waste, collection and treatment of leachate, the generation, collection, and distribution of methane gas, and on-site quarry operations. The plan outlines Keystone's measures to prevent and mitigate conditions that may cause a nuisance to neighbors and surrounding communities and addresses weather monitoring, traffic, noise, vector and bird control, dust, odor, litter, and transportation compliance vehicle safety. (KSL Ex. 49.)

178. The Department credibly concluded after a thorough investigation that a strong odor that emanated from a sewer line near the landfill on the night of September 24, 2015 could not be attributed to a discharge from Keystone into the line. (T. 389, 398, 402-03, 1030, 1189-98; FOL Ex. 80, 112, 121.)

179. Birds inevitably congregate at the landfill (T. 1266-67; KSL Ex. 125 (Section C.6); C. Ex. 5.)

180. The presence of an unnatural congregation of birds at and near the landfill is a nuisance to local citizens including members of FOL, but it cannot be completely eliminated. (T. 1267; FOL Ex. 3 (at 39-42); C. Ex. 5.)

181. Keystone is required pursuant to its Nuisance Minimization and Control Plan to reduce the tendency of the landfill to attract an excessive amount of birds. (KSL Ex. 49.)

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182. Pursuant to a contract with Keystone, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service Wildlife Services manages bird populations at the landfill. (KSL Ex. 125 (Section C.6).)

183. Keystone has effectively managed bird populations at the landfill to the extent possible by, among other things, maintaining a compact working face, applying daily cover, and employing nonlethal harassment measures such as noisemakers. (T. 3060-61, 4335-36, 4351; KSL Ex. 125 (Section C.6); C. Ex. 5.)

184. Keystone operates pursuant to a Title V air quality operating permit. (KSL Ex. 59.)

185. Keystone controls gas emissions with an active gas extraction system. (T. 3067-81; KSL Ex. 37, 59.)

## DISCUSSION

### Standing

Keystone has vigorously contested FOL's standing to maintain this appeal throughout the duration of the case. The Department has not contested FOL's standing. We previously denied Keystone's motion for summary judgment seeking a determination that FOL lacks standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641. In our full Board Opinion, we found that FOL has standing in its own right and on behalf of its members. *Id.* at 643-49. Keystone has preserved and reiterated its challenge in its post-hearing brief, which it is fully entitled to do. When challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant such as FOL must demonstrate by a preponderance of the evidence at the hearing on the merits that it has standing, even where a motion for summary judgment by opposing parties has been denied. *See*

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*Stedge v. DEP*, 2015 EHB 577, 594; *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2001 EHB 713, 729-30.

We hereby adopt and incorporate our summary judgment Opinion herein in its entirety. Although that Opinion was based on the summary judgment standard, we have no hesitation in concluding that FOL has demonstrated by a preponderance of the evidence following the hearing on the merits that it has standing itself and on behalf of its members.

FOL is a 501(c)(3) organization that was created in October 2014 to oppose the proposed expansion of the Keystone Landfill, which then gradually included opposition to the continued operation of the landfill pursuant to the renewal permit. (T. 168, 186, 188-89; FOL Ex. 292.) FOL primarily engages in community education activities, holding events and educational seminars and getting people to attend public meetings involving the landfill. (T. 186.) FOL also organizes happy hour gatherings and fundraisers, and its members have spoken to other communities about waste disposal issues. (T. 120.) FOL maintains a website containing information about its activities and events and its mission. (T. 117-18, 144; FOL Ex. 8, 9.) FOL raises awareness in the community about the landfill through its events and through the information it disseminates online, through social media, and through radio and television interviews. (T. 201-02.)

FOL considers people to be members of FOL if they have engaged with the organization, supported its cause, shown up to FOL's meetings, written a letter in opposition of the landfill as a member of FOL, signed a petition, participated in FOL's canvassing or fundraising events, "liked" FOL's Facebook page, donated to FOL's causes, or if they are on FOL's mailing list. (T. 119, 185-86.) People can resign as a member of FOL by sending an email to the organization. (T. 119.)

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FOL presented the testimony of three self-identified members at the hearing on the merits, Beverly Mizanty, Katharine Spanish, and Patrick Clark.[3] Beverly Mizanty is a member of FOL. (T. 69.) She joined FOL when it first organized, she has attended meetings and events organized by FOL, and she has contributed to its campaign. (T. 69-70, 89, 97.) Ms. Mizanty has gone to public hearings before government agencies in her role as a member of FOL. (T. 70.) She considers herself a member of FOL by reason of joining its Facebook page, attending its meetings and open sessions, and by donating to its cause. (T. 69-70, 96.) She receives emails from FOL keeping her informed of what is going on with the organization's activities. (T. 97.) Ms. Mizanty has email addresses for the people in leadership at FOL and she could send them an email if she wanted to cancel her membership. (T. 106, 119.)

Ms. Mizanty has lived in Dunmore in the Swinick development, within a quarter-mile of the Keystone Landfill, for more than 25 years. (T. 62-64.) She can see the landfill from her house. (T. 64.) Her biggest concern from the landfill is the odors, which she attributes to the landfill because the smell becomes stronger down by the reservoir, which is near the landfill. (T. 65-66, 79-80.) She is concerned about the impact on her health from the odor, which she says has a chemical smell. (T. 67.) She gets nauseous over the landfill smell. (T. 96.) Ms. Mizanty has lodged more than 15 complaints with the Department in the last five years either by phone, online, or in writing. (T. 88-89; DEP Ex. 31.) She has smelled odors many times and not called the Department, but has called the Department recently (and filed online complaints) because she says the odors have increased. (T. 85-86.) She would have registered more complaints with the Department but she felt that, because the odors were an ever-present problem, there was nothing

[3] FOL also introduced, without objection to its admissibility, for purposes of establishing standing, a transcript of testimony of FOL member Joseph May given before the Dunmore Zoning Board on March 26, 2015. (T. 1376; FOL Ex. 3a.)

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she could do about it. (T. 90-91.) Ms. Mizanty is also concerned about water contamination and fires from the landfill due to the proximity of the landfill to her house. (T. 67-68.)

Katharine Spanish is a member of FOL and the secretary of the board. (T. 115.) She attends weekly board phone calls, is active in FOL's social media presence, email distribution network, and its website, and she participates in FOL's community activities. (T. 115.) She lives about a half-mile from Keystone with her three children who attend school and daycare about a quarter-mile from the landfill. (T. 109, 111.) Odors are the most prominent impact Ms. Spanish experiences from the landfill, with what she describes as a strong, pungent, foul smell. (T. 112.) She smells the odor at her home and throughout the community. (T. 112-13.) She attributes the odors to the landfill because the smell is stronger as she gets closer to the landfill. (T. 170.) She says that the odors have been more persistent over the last seven years. (T. 163-64.) She is concerned about the health of her children while at daycare due to the odors. (T. 135.) Ms. Spanish has experienced noxious odors one to two dozen times within the last several years. (T. 129.) She has complained to the Department about odors approximately a dozen times during her 35 years of living in Dunmore. (T. 129-30.) In addition to air quality she is also concerned about leaking leachate, possible fires, radioactive material, and litter. (T. 114, 158, 172.) Ms. Spanish says she has been fighting on behalf of FOL to make sure her children are afforded their constitutional right to clean water and air. (T. 169-70.)

Patrick Clark is a member of FOL, he is on the board of directors, and he is the organization's treasurer. (T. 185.) He lives in Dunmore approximately two miles from Keystone. (T. 177, 202.) He experiences odors while driving up the Lackawanna Valley Industrial Highway. (T. 179.) He is considering no longer allowing his children to play soccer at nearby Sherwood Park because of his concerns over the air quality. (T. 179-80, 313.) Mr. Clark

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is concerned over the reputation of the region with respect to the landfill and its expansion and acceptance of more waste. (T. 184-85, 273.) He is also concerned with the landfill's impact on the local economy. (T. 273.) Mr. Clark has sent emails and letters to the Department and had phone conversations with the Department regarding his concerns with the landfill. (T. 204.) Mr. Clark authored comments FOL submitted to the Department on Keystone's expansion. (T. 211-12; FOL Ex. 13, 14.)

Joseph May is also a member of FOL and he lives within a quarter-mile of Keystone. (FOL Ex. 3a at 31, 62.) Mr. May has lived in the vicinity of the landfill for most of his life. (FOL Ex. 3a at 30-32.) Almost every day at his house he smells what he describes as a pungent odor that he attributes to the landfill. (FOL Ex. 3a at 34, 39.) Mr. May is concerned about the health impacts of the landfill to his family. (FOL Ex. 3a at 52-53.)

FOL as an organization has been involved in borough council meetings and zoning hearing board proceedings and has participated in other public hearings on the Keystone Landfill. (T. 119-20, 201.) FOL has made a presentation to the Department's Environmental Justice Advisory Board regarding FOL's concerns over the impacts from the landfill to the community. (T. 186-87; FOL Ex. 12.) FOL has prepared and submitted comments to the Department on the proposed expansion. (FOL Ex. 13, 14.) FOL's comments express concerns about landfill leachate impacting groundwater, subsurface fires at the landfill, and impacts from the landfill on local property values and on the region's reputation. (T. 190, 270, 290-91, 307.) FOL is also concerned that there have been no health studies done on the impact of the landfill's odors on the local community, and it has requested that health studies be performed by state agencies. (T. 180-82, 291, 305, 337.) FOL's advocacy efforts with respect to the landfill for all intents and purposes serve as a surrogate for voicing the concerns of its members.

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Without repeating everything we said in our earlier Opinion, by way of summary, an organization has standing if at least one individual associated with the group has standing. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)). Our review of the record shows that Mizanty, Spanish, and Clark are individuals actively and legitimately associated with FOL. They have advanced and directed the mission and work of FOL. They have all credibly testified that they use the area affected by Keystone's activities and they have in fact been adversely affected by those activities, which the Department's renewal decision will perpetuate. If nothing else, they all credibly testified that they have suffered and continue to suffer from the noxious odors that regularly emanate from the facility. Joseph May provided similar testimony.

Their interest in the Department's decision to allow these conditions to continue is substantial, direct, and immediate, which gives them and FOL standing to pursue this appeal. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975). Their interest is substantial because being impacted in their daily lives by the landfill's odors surpasses a general interest of all citizens in having Keystone comply with the law; it is direct because they have shown a causal connection between the odors they routinely experience and the landfill; it is immediate because the connection between the odors and the landfill is not remote or speculative. *Id. See also Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009); *Funk*, 144 A.3d 228, 244. It is notable that Keystone's post-hearing brief does not say anything about why FOL's individual members would not have standing in their own right.[4] Keystone never cites to the record in its brief to

[4] Keystone asserts that FOL has not demonstrated that the permit renewal will result in harm to anyone. However, a merits inquiry is not appropriate for a standing analysis. *Sierra Club v. DEP*, EHB Docket

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contest the standing of FOL's members, and Keystone comes close to conceding that they would have had standing as named appellants. (KSL Brief at 88-89.) Because Mizanty, Spanish, Clark, and May have standing, FOL has associational standing.

With respect to FOL itself, the record has confirmed beyond any doubt that FOL's mission includes protection of the environment in the vicinity of the landfill. (Finding of Fact ("FOF") 7.) Therefore, FOL itself has standing in addition to the standing it has on behalf of its constituents who have standing. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839.

As discussed in our prior Opinion, Keystone's continuing, rather odd insistence on discussing standing concepts at considerable length regarding the standing of persons to sue in federal courts under federal law has no relevance here. *Housing Auth. of the Cnty. of Chester v. Pa. State Civ. Serv. Comm'n*, 730 A.2d 935, 940-41 (Pa. 1999). *See also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability…."); *In re Hickson*, 821 A.2d 1238, 1243 n.5 (Pa. 2003) (state courts are not governed by Article III and are not bound to adhere to the federal definition of standing).[5]

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No. 2015-093-R, slip op. at 12 (Opinion and Order, Jul. 10, 2017) ("an appellant need not prove its case on the merits in order to establish standing"); *Delaware Riverkeeper v. DEP*, 2004 EHB 599, 632 (same); *Ziviello v. State Conservation Comm'n*, 2000 EHB 999, 1005 (same). *See also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal…").

[5] It is perhaps worth noting that, even if we were to apply the "indicia of membership" test in assessing FOL's associational standing under the standard sometimes applied by federal courts, *see Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344-45 (1977), Mizanty, Spanish, and Clark clearly have the indicia of membership in FOL. Here, as in *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663 (E.D. La. 2010),

> [FOL] has a clear and understandable membership structure: a person becomes a member through active, voluntary involvement, such as by attending neighborhood or strategy

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Keystone also makes the argument that FOL lacks standing to assert challenges under Article I, Section 27 of the Pennsylvania Constitution because it is a corporate entity. We are not aware of any separate standing inquiry for constitutional claims. In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), a majority of the Pennsylvania Supreme Court Justices joined in the standing analysis and found standing for an organization to assert challenges to the Oil and Gas Act of 2012, which included challenges premised on Article I, Section 27. 83 A.3d 901, 921-23. The Pennsylvania Supreme Court never parsed out the constitutional claims or carved out different standards for an organization making constitutional challenges. The individual members of FOL, on whose behalf FOL is litigating, are precisely the sort of people

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> team meetings, providing input, canvassing, and networking. [FOL] has three or four dozen "active members" who regularly attend meetings, keep up to date on issues, meet with other members, and organize their community. New members join because they are "quite energized about meeting their neighbors." Although a formal list of members is not maintained, members are linked through informal networks, and email contact lists.

686 F. Supp. 2d at 675. *See also United Automobile Workers v. Brock*, 477 U.S. 274 (1986), where the United States Supreme Court said,

> [T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring); *see NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their views"). The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

477 U.S. at 290; and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2017 U.S. Dist. LEXIS 84663 at *18 (D. Mass. Jun. 2, 2017) ("where [SFFA] has consistently, and recently, in highly public ways, pursued efforts to end alleged racial discrimination in college admissions through litigation, and where its members voluntarily associate themselves with the organization, it can be presumed for the purposes of standing that SFFA adequately represents the interests of its current members without needing to test this further based on the indicia-of-membership factors"). In short, we have no doubt that, for purposes of an "indicia of membership" inquiry, FOL "provides the means by which [its members] express their collective views and protect their collective interests." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 345 (1977).

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that Article I, Section 27 is designed to protect, and FOL unquestionably has standing to advance Article I, Section 27 challenges on their behalf.

Finally, although we have tried to avoid repeating our earlier Opinion, one point that we made there is worth reiterating here:

> To this we would add that any effort to delve into the internal workings of [FOL] tends to bump up against our often expressed concern that citizens should not be intimidated and unduly harassed simply because they pursue their constitutionally protected right to due process review of a Department action that adversely affects them. Indeed, we have already so held in this case. *Friends of Lackawanna v. DEP*, 2015 EHB 772, 774. *See also Sludge Free UMBT v. DEP*, 2014 EHB 939, 950; *Hanson Aggregates PMA*, *Inc. v. DEP*, 2003 EHB 1, 6. If details regarding every particular of an organization's incorporation, operation, hierarchy, and membership list were relevant, they would be discoverable and the subject of examination at the hearing, which would have the intended or unintended but unavoidable consequence of enabling the very intimidation tactics that must be avoided. It is, at best, a distraction that does not contribute in any way to the Board's statutory duty to ensure that the Department has acted lawfully and reasonably.

*Friends of Lackawanna*, 2016 EHB at 647.

**Standard and Scope of Review**

FOL contends the Department erred by unconditionally renewing Keystone's operating permit for another ten years.[6] The Department erred in FOL's view for three main reasons. First, the facility is adversely affecting groundwater. There is known degradation in one area and enough reason to suspect degradation in other areas that at a minimum further investigation should have been required. Second, the Department's review of Keystone's operations and compliance history was inadequate, but even the limited review that was conducted demonstrates that Keystone lacks the ability and intent to comply with the law. At a minimum, additional

[6] FOL has said in passing that renewing the permit for ten years is too long a period of time. FOL has not explained why some period less than ten years would be appropriate based on, e.g., limited remaining capacity. Keystone is entitled to cut back on the waste that it receives, keeping in mind that it is legally obligated to reserve enough capacity in Phase II for the relocation project.

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protective measures should have been required. Third, by renewing the permit, the Department failed to fulfill its responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

Keystone and the Department[7] concede that the landfill has caused groundwater degradation in one area, but they say the degradation is minor and it is being addressed. Otherwise, they dispute all of FOL's contentions. Keystone adds that the scope of the Board's review in this case is extremely limited by the doctrines of administrative finality and prosecutorial discretion.

The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017). In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

As the third-party appellant challenging the Department's action, FOL bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). It is important to keep in mind that we do not so much review the Department's review process leading up to a final decision as the final decision itself. *Chester Water Auth. v. DEP*, 2016 EHB 280, 289-90; *Shuey v. DEP*, 2005 EHB 657, 712. Even though we have full authority and power to take whatever action we deem appropriate regarding

[7] With limited exceptions (e.g. standing; whether Keystone exceeded regulatory reserve capacity requirements in its lagoons; administrative finality), Keystone's and the Department's positions are the same. The Department has vigorously defended its decision to renew Keystone's permit. Accordingly, unless otherwise noted, when we refer to Keystone's positions, we are including the Department.

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the Department's action if we determine the Department erred, we generally will not correct harmless errors. *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Shuey, supra*.

Exactly what statutory and regulatory standards the Department applies in reviewing an application for a renewal of a municipal waste landfill permit is somewhat of a mystery. Unfortunately, the Department's brief sheds very little light on the subject, other than to say that "typically, renewal applications are reviewed to determine if the facility has any compliance related issues that would prohibit the renewal, and it would be reviewed to determine if there are any new operating requirements, technology, and management practices that apply to the facility." (DEP Brief at 54.) The Department does not cite any authority in support of this review standard.

The only regulation undeniably on point is 25 Pa. Code § 271.223, which reads as follows:

> § 271.223. Permit renewal.
>
> (a) A permittee that plans to dispose of or process municipal waste after the expiration of the term set under § 271.211 (relating to term of permits) shall file a complete application for permit renewal on forms provided by the Department. The complete application for a processing facility shall be filed at least 270 days before the expiration date of the permit term and for a disposal facility at least 1 year before the expiration date of the permit term…
>
> (b) An application for renewal of a municipal waste disposal permit shall include a clear statement of the remaining permitted capacity of the facility, with documentation, in relation to the requested term of the permit renewal.
>
> (c) A permit renewal, if approved by the Department, may only continue the term of the permit on its presently permitted acreage, including the terms and conditions of the permit. An applicant that seeks to add permitted acreage or change the terms or conditions of the permit shall also file an application for a permit modification.
>
> (d) A permit renewal shall be for a term not to exceed the term of the original permit.

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Despite the rather limited review apparently contemplated by Section 271.223, we agree with the testimony of Roger Bellas, the Regional Manager of the Waste Program for the Northeast Region of the Department, who was ultimately responsible for issuing the permit, that the Department clearly has the authority to condition a permit at the renewal stage. (T. 1062.) Indeed, if circumstances warrant, the Department can modify, condition, or even revoke a solid waste permit at *any* time. 35 P.S. §§ 6018.104, 6018.503, 6018.602; 25 Pa. Code §§ 271.3(b), 271.211, 271.422. Section 503(c) of the Solid Waste Management Act, 35 P.S. § 6018.503, provides in part that the Department may deny, suspend, modify, or revoke any permit if it finds that the permittee has failed or continues to fail to comply with the law or its permit, or the permittee has shown a lack of ability or intention to comply with the law or its permit as indicated by past or continuing violations. Section 503(d) says that a permittee shall be denied a permit if it has engaged in unlawful conduct unless it demonstrates to the satisfaction of the Department that the unlawful conduct has been corrected. 35 P.S. § 6018.503(d). The waste management regulation codified at 25 Pa. Code § 271.211(d) provides:

> The Department will, from time to time, but at intervals not to exceed 5 years, review a permit issued under this article. In its review, the Department will evaluate the permit to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices. The Department may require modification, suspension or revocation of the permit when necessary to carry out the purposes of the act, the environmental protection acts and this title. The Department will require the operator to provide a summary of changes to the operations since the initial permit or latest major permit modification was approved.

Thus, regardless of whether the general "criteria for permit issuance or denial" set forth in 25 Pa. Code § 271.201 apply to permit renewals, a point on which FOL and Keystone (but not the Department) strongly disagree, we think the Department, and, therefore, this Board, may consider the issues raised by FOL in this appeal in the context of a permit renewal application.

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For example, the Department would have the discretion under appropriate circumstances to deny or condition a renewal of a permit for a facility that is polluting the waters of the Commonwealth. Similarly, no one would argue that the Department lacks the authority to deny or condition the renewal of a permit for a facility that has a continuing, abysmal compliance record. Indeed, all of the issues raised by FOL can arguably be characterized as compliance history issues. Since the Department has the authority to deny or condition a renewal, its decision *not* to exercise that authority is equally reviewable by this Board.

Of course, the Department's and our review must be informed by the fact that the subject of our inquiry is a permit *renewal*, not a permit for a new facility. Although conditioning a renewal is not necessarily an extreme measure, denial of a renewal would be the equivalent of requiring that the facility be shut down. The Department in 1997 approved an operation that was expressly designed to extend beyond the initial 10-year term of the initial approval. The permittee has legitimate and substantial investment-based expectations based upon that permitting decision. Although those expectations must be tempered by the fact that renewals are neither an entitlement nor certain, they are nevertheless entitled to be recognized in the course of our review.

Regardless of which statutory or regulatory provisions apply, Article I, Section 27 applies to the Department's decision to renew a municipal waste landfill permit.[8] The Department may not take such an action in derogation of its constitutional responsibilities. Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including

[8] The regulatory harms-benefits test set forth at 25 Pa. Code §§ 271.126 and 271.127 does not apply to permit *renewals*.

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> generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

We recently described the Department's duties and responsibilities under the Pennsylvania Constitution in *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017) ("*CCJ*"), wherein we applied the Pennsylvania Supreme Court's recent holding in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). We had this to say in *CCJ*:

> The Supreme Court [in *PEDF*], citing *Robinson* [*Twp. v. Cmwlth*. 83 A.3d 901 (Pa. 2013)] held that Section 27 grants two separate rights to the people of Pennsylvania. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state's power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic, and esthetic values of the environment. The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries.
>
> The Supreme Court in *PEDF* next turns its attention to defining the Commonwealth's responsibilities as trustee. After discussing private trust law principles, it finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties and 2) act affirmatively via legislative action to protect the environment. The Supreme Court further states that
>
> > Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and trustee's fiduciary duties, and does not equate 'to mere subjective judgment.' The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.'

*Id*., slip op. at 57-58 (citations omitted). We held in *CCJ* that the proper approach in evaluating the Department's decision under the first part of Article I, Section 27 is, first, for the Board to

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ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be. *Id*. *Cf. Blue Mtn. Preservation Ass'n. v. DEP*, 2006 EHB 589 (failure to conduct proper analysis alone justifies a remand); *Hudson v. DEP*, 2015 EHB 719 (same). We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. *CCJ*, slip op. at 60-61.

In *CCJ*, we expressly rejected the notion, advocated here by Keystone, that "the Article I, Section 27 Constitutional standard [is] coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *PEDF* clearly rejected such an approach when it rejected the *Payne* [*v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978)] test." *Id.*, slip op. at 62. Thus, in theory, an operation may be compliant with all specific regulatory requirements and yet not be permittable due to the unreasonable degradation it will cause. This is admittedly a rather vague standard, but as the Department has correctly pointed out, it is not that different from the standard that this Board has employed for decades, *Solebury School v. DEP*, 2014 EHB 482, 519; *Coolspring Twp. v. DER*, 1983 EHB 151, 178, and it is not unlike the judgment that must be brought to bear regarding other constitutional provisions, *see, e.g., Commonwealth v. Henderson*, 47 A.3d 797 (Pa. 2012) (discussing tension between privacy and law enforcement in the context of search and seizure under Article I, Section 8 of the Pennsylvania Constitution); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004) (analyzing the balance in a defamation action between freedom of expression in the First Amendment to the United States

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Constitution and Article I, Section 7 of the Pennsylvania Constitution and a citizen's right to reputation under Article I, Section 1 of the Pennsylvania Constitution).

Turning our attention to the second right granted to the people by Article I, Section 27, we identified that right in *CCJ* as being the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id*., slip op at 63. We held that the streams at issue in *CCJ*, including streams not in the public park, were without question the type of public natural resources covered by Section 27.

We next described the Department's duties as trustee of those public natural resources. We held that the plain language of the Constitution

> requires the Commonwealth to conserve and maintain Pennsylvania's public natural resources for the benefit of all the people. As previously discussed, the Supreme Court in *PEDF* states that the trust provision of Article I, Section 27 creates two basic duties for the Commonwealth…The Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties. In performing its trust duties, the Commonwealth is a fiduciary and must act towards the natural resources with prudence, loyalty, and impartiality. According to the Supreme Court in *PEDF*, the duty of prudence requires the Commonwealth "to 'exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'" The duty of loyalty imposes an obligation to manage the corpus of the trust, i.e. the natural resources, so as to accomplish the trust's purpose for the benefit of the trust's beneficiaries. Finally, the duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. Putting all of this together, the issue for the Board to decide is whether the Department properly carried out its trustee duties of prudence, loyalty, and impartiality to conserve and maintain the [public natural resources] by prohibiting their degradation, diminution, and depletion…

*Id*., slip op. at 63-64 (citations omitted).

Keystone strenuously argues that state action is required in order for Section 27 to apply. If that is true, the state action here is obvious: the Department's permitting action, without which Keystone would no longer be able to operate a landfill. The state may not sanction the use of

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private property that will impermissibly infringe upon the constitutional rights of others. *See Machipongo Land & Coal Co. v. Dep't of Envtl. Prot.*, 799 A.2d 751, 754-55 (Pa. 2002) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492 (1987)); responsibility of government to protect environment from private injury is clear).

In summary, we must decide based on our *de novo* review of the facts whether the Department's decision to renew Keystone's permit complied with all applicable laws. We must ensure that the Department has fully considered the environmental effects of its action. Any infringement of the people's constitutional right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment must not be unreasonable. Finally, we must determine whether the Department has acted with respect to the beneficiaries of the natural resources impacted by the permitted activity, which include the air and waters in the area, with prudence, loyalty, and impartiality.

**Administrative Finality**

Defining the precise boundaries of what should be evaluated in a permit renewal can undoubtedly be challenging. Permit "renewals require something more than the mindless application of a rubber stamp but something less than a reexamination of the merits of any earlier permitting decisions regarding the landfill." *Friends of Lackawanna*, 2016 EHB 815, 819. Our review of a permit renewal, of course, is not whether the landfill should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *See Sierra Club v. DEP*, EHB Docket No. 2015-093-R, slip op. at 6 (Opinion and Order, Jul. 10, 2017). A party may not use an appeal from a later Department action as a vehicle for reviewing

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or collaterally attacking the appropriateness of a prior Department action. *Love v. DEP*, 2010 EHB 523, 525. However, we have repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835. Permits are issued with limited terms for precisely that reason. Here, even without a renewal application pending, the Department is required to "from time to time, but at intervals not to exceed 5 years, review permits issued under [the municipal waste] article…[and] evaluate the permit to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices." 25 Pa. Code § 271.211(d).

In *Wheatland Tube Co. v. DEP*, 2004 EHB 131, we reiterated our support for our holding in *Tinicum Township v. DEP*, 2002 EHB 822, that the Department, and in turn the Board, must ensure the continuation of a permitted activity is still appropriate in the context of current information and standards:

> The Department argued [in *Tinicum Township*] that the Board was only permitted to consider whether the permit limits had changed, and if so, whether the changes were appropriate. We rejected the argument. We explained that, even in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.

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*Wheatland Tube*, 2004 EHB at 135-36. *See also Sierra Club, supra*, slip op. at 6 ("A permit renewal is an appropriate time to ensure that an operation is being run in accordance with the law." (quoting *Rausch Creek, LP v. DEP*, 2011 EHB 708, 727)).

Keystone has argued throughout this case that the proper scope of FOL's appeal is significantly restricted by the doctrine of administrative finality and that we cannot consider many if not all operational issues associated with the landfill.[9] Keystone's position is somewhat difficult to follow because it never asserts that *the Department* was precluded from considering Keystone's operational status or its compliance history, but it seems to argue that we are.[10] For example, Keystone acknowledges that "the Department was fully aware of, and considered, Keystone's current and historic operations and compliance when vetting the Permit Renewal application…." (KSL Brief at 112.) Keystone's posited dichotomy makes no sense to us. Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision. *See Love v. DEP*, 2011 EHB 286, 291.

[9] Keystone asserts that the following issues are off the table because they could have or should have been raised, were necessarily considered, were a factor, relate to, or were actually addressed during prior Department actions regarding the landfill: (1) the siting and location of the landfill; (2) the engineering design, construction, and operation of the landfill; (3) the characterization of the geologic and hydrogeologic setting of the landfill; (4) the adequacy of the monitoring well network; (5) the groundwater impact observed at MW-15A; (6) the potential for subsidence and related mitigation at the site; (7) the adequacy of the landfill liner systems; (8) the adequacy of the leachate collection and detection systems; (10) the adequacy of the lagoons; (11) the adequacy of the wastewater treatment facilities; (12) the adequacy of the gas management and collection systems; (13) the adequacy of the stormwater management system; (14) the acceptance and disposal of drill cuttings; (15) noise; (16) vibrations; (17) odors; (18) dust; (19) vectors; (20) thermal events; (21) potential impacts to streams, wetlands, and other water bodies; (22) impact on Dunmore Reservoir No. 1 and associated watershed impacts; (23) impacts on fish, wildlife, plants, aquatic habitat, and water quality; and (24) potential harms and benefits related to Phase II and the ongoing operation of Phase II of the landfill. (*See* KSL Brief at 115-16.) In other words, virtually everything, and certainly everything actually considered by the Department in its review.

[10] The Department also discusses administrative finality in its brief, saying that the concept should influence the scope of review in this appeal, but the Department does not tell us what issues should or should not be litigated in the appeal. The Department does not argue that FOL should be precluded from raising all operational issues associated with the landfill.

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Trying to parse out certain issues as off limits as a result of the doctrine of administrative finality in the context of a permit renewal as Keystone has attempted to do is doomed to failure. Take, for example, Keystone's position that this Board is not allowed to consider whether the characterization of the hydrogeological setting of the landfill is accurate because that characterization was done in connection with earlier permitting actions. The characterization is written in stone and can never be reevaluated when a permit is modified or comes up for a renewal, according to Keystone. Thus, if significant new information has come to light in the last few years, that information must be ignored, even if it unquestionably shows that the earlier characterization was severely flawed. We cannot endorse such willful ignorance. Furthermore, it is beyond reasonable dispute that the Department should consider whether the landfill is actively polluting the groundwater, but it is impossible for the Department (or us) to address that issue without a basic understanding of the hydrogeological setting of the landfill.

Keystone points out that the only change to its permit made by the renewal was the extension of its operating term to April 6, 2025; no other conditions of the permit were changed. However, as *Wheatland Tube* makes clear, whether or not permit conditions have changed is not the sole or even primary focus of our inquiry. The actual facial change in a permit may belie the consideration that went into deciding whether to grant or deny the permit renewal and, if granted, under what terms and conditions. Simply because only one permit condition was changed here does not mean that our review is correspondingly limited. *Cf. Love*, 2011 EHB 286, 290-91 ("When the Department reconsiders a matter, its decision becomes subject to Board review. The fact that the Department arrives at the same conclusion upon reconsideration is largely irrelevant. Appealability turns on whether a properly requested application or request was considered on its merits and acted upon by the Department.") Indeed, as we recently held in *PQ Corp. v. DEP*,

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EHB Docket No. 2016-086-L (Opinion and Order, Aug. 21, 2017), an adversely affected party should not be precluded from challenging a Department action even if that action was a renewal of a permit without any changes. "Whether there should have been changes is well within the appropriate scope of our review at the renewal stage. The Department's decision not to make any changes is no less a decision of the Department subject to the Board's review than a decision to make changes." *Id.*, slip op. at 6.

The testimony of Department witnesses over several days of hearing suggests that it conducts a rather extensive review of renewal applications that appears entirely consistent with our articulation of our own review of permit renewals. Roger Bellas testified that in a review of a renewal application the Department conducts an engineering review, a review of general operations, and a review of a facility's compliance history. (T. 1128.) To this end, the Department's review of Keystone's renewal application involved a team of program staff, including the waste engineer, the primary facility inspector, the lead hydrogeologist, and the compliance specialist. (T. 1130.) Bellas stated that if there are any ongoing operational issues at a facility then they should be addressed in the renewal. (T. 1128, 1130.) Tracey McGurk, the Department's Waste Management Facilities Supervisor, likewise testified that she understood a permit renewal to provide an opportunity to review a facility's operations and any operational issues from the prior renewal period to determine whether the facility could continue to operate. (T. 3319.) She also testified that, in its review of Keystone's renewal application, the Department drew upon its entire base of knowledge of the Phase II operation since that area was first permitted in 1997. (T. 3344.)

We have no idea why, as Keystone argues, all operational issues arising during the last renewal period would be insulated from review in a Board appeal of a permit renewal, or how we

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could fully evaluate whether the Department's decision to renew the permit was reasonable if all operational issues are off the table. The Department has a clear obligation to ensure that the landfill operations should be allowed to continue knowing what is known now. The environmental effects of a major landfill in close proximity to residential areas are too great to allow the operation to continue indefinitely without meaningful periodic evaluations.

We do not detect any effort by FOL to collaterally attack any now-final decisions the Department made in the past with respect to the Keystone Landfill. FOL is not challenging whether the landfill should have been permitted in the first place or whether the Phase II expansion should have been permitted. Instead, its challenges in this appeal are focused mostly on compliance issues in the form of various aspects of the landfill's operations occurring during the most recent permit term. Our consideration of these issues is not precluded by the doctrine of administrative finality.

**Enforcement Discretion**

Keystone correctly argues that the Board does not review the Department's exercise of its enforcement discretion. Enforcement discretion, or prosecutorial discretion, is a term used to describe the Department's decision regarding whether or not it will pursue enforcement against a party it is tasked with regulating. *Bernardi v. DEP*, 2016 EHB 580, 586. In *Law v. DEP*, 2008 EHB 213, we described the concept as

> deriv[ing] from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department.

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2008 EHB at 215 (citations omitted). *See also Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 26 (Adjudication, Jun. 9, 2017); *Ridenour v. DEP*, 1996 EHB 928; *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 268-69.

Keystone contends that FOL's arguments related to the landfill's operational issues are essentially a backdoor challenge to the Department's enforcement discretion. Under Keystone's construct, we cannot consider any problem at the site if the Department did not take enforcement action with respect to that problem. However, whether or not the Board can order the Department to take an enforcement action on the basis of alleged violations, *see Mystic Brooke Dev., L.P. v. DEP*, 2009 EHB 302, 304, there is no question that we can certainly review issues with the ongoing operations of a facility in the context of a permit renewal to see if the renewal was properly issued. It is important to focus on what Department action is being reviewed. Here, we are not reviewing the Department's decisions to take or not take any enforcement action against Keystone during the prior permit term. Rather, we are reviewing the Department's decision to renew the permit. Relevance in conducting that review does not turn on whether the Department took any enforcement action with respect to any particular issue. Deciding whether the operational concerns identified by FOL render the Department's renewal of Keystone's permit unreasonable in any way is neither a direct nor indirect review of the Department's enforcement discretion.

**Groundwater**

FOL says that the Department erred by renewing the permit because the landfill is polluting the groundwater. At a minimum, it says the Department should have conditioned the renewal on a requirement that Keystone conduct a groundwater assessment in accordance with

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25 Pa. Code § 273.286 with respect to the contamination being detected in monitoring wells MW-15, MW-29UR, and perhaps more generally for the whole site.

However, there is no evidence that Keystone is causing widespread groundwater contamination at the site. Furthermore, FOL has not carried its burden of proving that an assessment of possible groundwater contamination is needed anywhere on the site except with respect to MW-15. We are unable to credit the opinion of Daniel Fisher, FOL's expert hydrogeologist, to the contrary. Except as discussed below regarding MW-15, we see no refinements that should have been mandated in Keystone's groundwater monitoring system in connection with the permit renewal.

*MW-15*

There was no dispute in this case that groundwater degradation is being detected in MW-15.[11] There is also no dispute that the degradation is being caused by landfill operations. Section 273.286 creates a clear requirement and Keystone violated the law by not complying with it.[12] Section 273.286(a) reads as follows:

> A person or municipality operating a municipal waste landfill shall prepare and submit to the Department a groundwater assessment plan within 60 days after one of the following occurs:
>
> (1) Data obtained from monitoring by the Department or the operator indicates groundwater degradation at any monitoring point for parameters

[11] Keystone says its "first priority is to mitigate the source of the nitrates found in MW-15." (KSL Brief at 147.) "Groundwater degradation" is defined as a measurable increase in the concentration of one or more contaminants in groundwater above background concentration for those contaminants. 25 Pa. Code § 271.1.

[12] *See also* 25 Pa. Code § 273.301 (facility must be operated to prevent release of solid waste constituents to the waters of the Commonwealth); 25 Pa. Code § 273.281 (landfill operator must install, operate, and maintain a monitoring system that can detect the entry of solid waste, solid waste constituents, leachate, contaminants, or constituents of decomposition into the groundwater). Failure to comply with a regulation constitutes "unlawful conduct." 35 P.S. § 6018.610. Failing to correct unlawful conduct can be a basis for denying a permit renewal. 35 P.S. § 6018.503. In light of Keystone's clear regulatory duty to assess groundwater degradation, we need not resolve the parties' debate, in which the Department has vigorously supported Keystone's position, whether Keystone's degradation constitutes "pollution" as that term is used in 25 Pa. Code § 273.241.

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> other than chemical oxygen demand, pH, specific conductance, total organic carbon, turbidity, total alkalinity, calcium, magnesium and iron.
>
> (2) Laboratory analysis of one or more public or private water supplies shows the presence of degradation that could reasonably be attributed to the facility.

25 Pa. Code § 273.286(a). Section 273.286 goes on to describe exceptions not applicable here and the specific contents of the plan and the procedures to be followed.

The degradation being observed in MW-15 is certainly not enough to justify denying Keystone's application for a renewal. However, renewing the permit without requiring that this violation be corrected and the longstanding groundwater degradation be addressed as a condition of the renewal was unreasonable. It is also inconsistent with the Department's duties as trustee of the Commonwealth's natural resources. Surely a trustee of ordinary prudence who discovers that the trust corpus under its care is actively being degraded must take meaningful steps to ensure that the cause of that degradation is revealed. Otherwise, the corpus cannot be conserved and maintained. The Department's action was particularly unreasonable because MW-15 is close to the downgradient and downdip border of the site, which raises a legitimate concern that off-site pollution may be occurring.[13]

The Department has rather belatedly addressed the MW-15 issue by issuing a Notice of Violation (NOV) on November 9, 2016, five days before the beginning of the hearing in this matter. The NOV in pertinent part reads as follows:

> The Pennsylvania Department of Environmental Protection ("Department") has determined that Keystone Sanitary Landfill, Inc. ("Keystone") was in violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. Sections 6018.101 et seq. ("Solid Waste Management Act"), and the Municipal Waste Management Rules and Regulations found at 25 Pa. Code Chapters 271 to 285, as follows:

[13] An assessment plan that Keystone submitted in 2003 (C. Ex. 17) is obviously out of date and does not support the Department's renewal decision. Keystone's 14-year long effort to identify the source pursuant to the Department's informal requests is not a proper substitute for an assessment plan conducted in accordance with Section 273.286.

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….

2. As a result of the Department's review of files, including, but not limited to the March 2016 Geophysical Survey and Keystone's May 17, 2016 response to the Department's environmental assessment review letter dated October 13, 2015, the Department has determined that leachate lagoon liner leakage and/or pipe boot penetration leakage and/or pipe leakage has been occurring at the west lagoon. Therefore, Keystone failed to maintain sufficient structural integrity to prevent failure of the lagoon(s), in violation of 25 Pa. Code §§ 285.123(5) and 273.201(c).

   The Department acknowledges that Keystone has applied and received approval for a minor permit modification for leachate storage lagoon improvements.

3. As a result of the Department's review of groundwater analysis data in the area of the leachate lagoons, the Department has determined that groundwater degradation has occurred. Therefore, Keystone has failed to store waste in a manner that does not cause groundwater degradation, in violation of 25 Pa. Code §§ 285.116(c) and 273.201(c).

   The Department acknowledges that Keystone has conducted investigations into potential sources of contaminants and implemented measures in an attempt to abate the introduction of contaminants into the environment.

Within fifteen (15) days of receipt of this notice, please submit a response to the Department that identifies how Keystone will prevent these violations from occurring in the future.

Keystone's response should also include an explanation and status of how the groundwater in the area of the lagoons and/or effluent pump station has been or is currently impacted. Keystone should include a plan for any proposed abatement and a plan and schedule to, at a minimum, monitor MW-8, MW-4AR, MW-15A, and MW-23. The response should be sent to my attention at the letterhead address.

You are hereby notified of both the existence of the violations as well as the need to provide for prompt correction. Under the Solid Waste Management Act, each day a violation continues is considered a distinct and separate offense. The violations noted herein may result in an enforcement action under the Solid Waste Management Act.

This Notice of Violation is neither an Order nor any other final action of the Department. It neither imposes nor waives any enforcement action available to the Department under any of its statutes. If the Department determines that an enforcement action is appropriate, you will be notified of the action.

(FOL Ex. 297.)

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The NOV does not correct the Department's error in issuing the permit renewal without requiring a groundwater assessment plan. To begin with, the NOV is not a binding, legally enforceable document. Although Keystone was complying with the recommendations in the NOV when the record closed, the NOV itself does not prevent Keystone from stopping at any time. Secondly, the NOV does not direct Keystone to perform a groundwater assessment plan in accordance with 25 Pa. Code § 273.286. Although Keystone's response sounds like it is for all intents and purposes a groundwater assessment plan, the permit should specifically require it. Third, an assessment plan should not define the cause of the degradation in advance. The Department's NOV reads as if there is no doubt the contamination is being caused by Keystone's leachate storage lagoons. That defeats the entire purpose of the investigation. It creates an illusory requirement. It puts the rabbit in the hat before the investigation is even conducted, which is not scientifically or otherwise justified. After 18 days of hearing in this appeal, it is not at all clear that the leachate lagoons are in fact the source of contamination.

FOL describes what it believes the assessment plan should contain in order to be compliant with 25 Pa. Code § 273.286. For example, it says that the plan should provide for a more comprehensive investigation that determines whether disposal areas (such as Tabor) are contributing to the contamination being seen at MW-15. We believe that FOL's request is premature. The permit should require an assessment plan but not try to dictate in advance what should be in it, other than it should comply with Section 273.286. Similarly, FOL's demand that the permit should also include a requirement for an *abatement* plan under 25 Pa. Code § 273.287 is likewise premature. The Department will need to decide if an abatement plan is necessary following its review of the results of the assessment plan. An informed review of an abatement

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plan should not be conducted without an assessment plan that complies with regulatory requirements.

No action other than adding a permit condition mandating a groundwater assessment is necessary in order to bring the Department's action into harmony with Article I, Section 27. Although the groundwater at the site is clearly a public natural resource entitled to protection under the constitution, and there is, of course, no right to pollute water simply because it is already polluted, *CAUSE v. DEP*, 2007 EHB 632, 689-90, context matters. As part of our calculus in evaluating whether the Department's decision to renew Keystone's permit was reasonable in spite of the groundwater degradation, we include the fact that MW-15 is a shallow well with very low flow measuring acid mine drainage associated with decades of historical coal mining. The water mixes in with billions of gallons of acid mine drainage-impacted water from numerous old mines in the valley and is ultimately discharged through old mine tunnels into the river. Some of the parameters involved are naturally occurring. The levels are not extraordinarily high. There has been no showing of an adverse effect on any use of the water, and no showing of any immediate threat to the public health or safety.

In assessing whether the Department's action is reasonable despite the groundwater degradation, we must not forget that all people have an inherent right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. However, we must also bear in mind that, until society figures out a way to eliminate all waste, landfills will remain a public necessity. *Eagle Envtl. II, L.P. v. Dep't of Envtl. Prot.*, 884 A.2d 867, 880 (Pa. 2005). Environmental incursions that must unfortunately be disproportionately borne by the waste disposal site's neighbors will accompany waste disposal wherever it occurs. By prohibiting waste disposal at one location, so long as waste must be disposed of somewhere,

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we are simply moving the harm. The renewed use of an existing facility, to the extent it can be done lawfully and without unduly infringing upon its neighbors' rights to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment, reduces the need to develop new sites that would perforce affect new neighbors' rights.

Keystone says that, in assessing the constitutionality of the Department's action, we should not forget that the people's right to enjoy a quality environment is served by having a relatively safe, heavily regulated place to dispose of waste. While this is true, it must be taken with a healthy pinch of salt at this particular facility because it is mostly the environment and residents of New York, New Jersey, and Connecticut who are benefiting from access to a disposal site while the residents of Pennsylvania, who live near the landfill, must bear more than their share of the unavoidable side effects of waste disposal. In 2015, it appears that 65 percent of the waste disposed at Keystone came from New York, New Jersey, and Connecticut. (FOL Ex. 164; *see also* FOL Ex. 163 (66 percent in 2014).) Approximately 10 to 11 percent of the waste comes from Lackawanna County, the location of the landfill. It also appears that there is no shortage of regional disposal capacity. (T. 342, 3004, 3287; C. Ex. 5.)

*MW-29UR*

FOL also points to monitoring well MW-29UR as evidence that Keystone is causing groundwater pollution, but FOL's arguments here are less convincing. MW-29UR was drilled as a replacement well for MW-29U after problems were encountered with MW-29U. (The "R" indicates that it is a replacement well.) Both wells are at or near the highest point on Keystone's property. They were installed in an effort to comply with 25 Pa. Code § 273.282(a)(1), which requires a monitoring well to be installed hydraulically upgradient from the disposal area to obtain data representative of groundwater not affected by the facility. Upon installation of MW-

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29UR, sampling revealed that some parameters, such as alkalinity, sodium, TDS, barium, potassium, and calcium, were higher than they were in the original well. FOL's primary critique is that neither Keystone nor the Department conducted an appropriate investigation of the cause of the heightened parameters. FOL complains that Keystone was not required to develop a groundwater assessment plan under 25 Pa. Code § 273.286(a) in response to observing the sustained elevations of parameters in MW-29UR.

The difficulty with FOL's argument is that FOL has not shown that MW-29UR is anything other than a hydraulically upgradient well that is only monitoring background water quality. FOL has offered no proof that there is any way for groundwater impacted by the landfill's disposal areas to be getting into the area of MW-29UR. FOL's expert, Mr. Fisher, speculated that there might be fractures that might allow groundwater to buck all of the other flow patterns at the site and essentially travel uphill, but he offered no proof to support that conjecture. Indeed, FOL concedes that "Mr. Fisher did not postulate a release mechanism for what was in MW-29UR…." (FOL Brief at 243.) On the other hand, Keystone's expert credibly opined that it is unlikely that the landfill disposal areas are causing the elevated parameters that are being seen in MW-29UR. The Department's hydrogeologist concurred.

FOL says that the mere fact that MW-29UR is detecting higher levels of certain parameters than the levels that were seen in the well it replaced, MW-29U, deserves an investigation. However, FOL does not explain why it would be meaningful to compare the results from two upgradient wells both of which are measuring nothing but background water quality. Without any evidence that the landfill could possibly be the cause of the difference in the levels, the comparison is meaningless.

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Mr. Fisher expended considerable effort in attempting to show that the water quality in MW-29UR is similar to the chemistry of flowback water from gas drilling operations. Putting aside our doubts about whether the two chemistries are in fact similar, we are once again left to wonder why it matters. Even if we assume that Keystone accepted wastes with flowback-like chemistry, without even a hint of a showing of a possible pathway for water impacted by that waste to get to MW-29UR, the comparison has no value.

We do not mean to suggest that MW-29UR is not worthy of *any* attention going forward. The Department says it is continuing to evaluate trends at MW-29UR. (T. 1073.) We note that the well does appear to have somewhat elevated levels of some parameters, and those levels are not going down. We simply hold that FOL has failed to prove that there is enough evidence relating to water quality in MW-29UR to carry its burden of proving that the Department erred in renewing Keystone's permit without requiring an assessment plan under Section 273.286 for that area of the site.

FOL adds that the MW-29UR results show that there is cause for concern that the landfill could contaminate Pennsylvania American Water's nearby Dunmore Reservoir No. 1. However, the best that FOL could do to support that concern was speculative, unsubstantiated testimony from its expert, Mr. Fisher, that there might be a series of fractures in the area that might theoretically act as a conduit if there were any contamination. (*See* T. 2199.) Of course, no contamination from the landfill in this area has been shown to exist, but even if it did, FOL presented no credible proof of any actual or even likely hydrogeological connection between the landfill and the reservoir.

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**The Department's Compliance History Review**

FOL objects to Keystone's permit renewal based upon the adequacy of the Department's investigation of Keystone's operational status and compliance history. FOL accuses the Department of having conducted a rather slipshod investigation into Keystone's compliance history as part of its review of Keystone's application for a permit renewal.

As we mentioned above, we focus for the most part on the Department's final decision, not the process it used to get there. *Chester Water Auth.*, 2016 EHB at 289-90; *Shuey*, 2005 EHB at 712. The Department's decision with respect to Keystone's history was that (1) no operational changes needed to be made at the facility as a condition of renewing the permit, and (2) Keystone's history did not demonstrate an inability or unwillingness to comply with the law in the future. (T. 1128-30, 1257-58, 1285, 1288, 1317.) Our role is to determine based upon our *de novo* review of the record developed before us whether those conclusions are supported by the facts, and if they are, whether the Department's action based on those conclusions – renewal of the permit without condition – was lawful and reasonable. With respect to inability or unwillingness to comply with the law, we rarely remand a compliance history review for further consideration, viewing it as the responsibility of the complaining party to come forward with specific allegations rather than a generalized claim of an inadequate review. *O'Reilly v. DEP*, 2001 EHB 19, 45.

Regarding the adequacy of the Department's review of Keystone's ongoing operations, with perhaps a few isolated examples, FOL has failed to show that the Department is anything less than fully knowledgeable about conditions at the site. Mr. Bellas credibly testified that he is very familiar with operational issues at the site and that he thoroughly considered those issues before renewing the permit. (E.g. T. 1285.) With the exception of the groundwater degradation

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at MW-15, FOL failed to show that there are specific additional environmentally protective measures Keystone can and should be taking that it is not taking that would support a finding that the Department erred.

Regarding the adequacy of the Department's review of Keystone's compliance history as a predictor of future compliance, we tend to agree with FOL that the Department's compliance review was rather less than exhaustive. The biggest deficiency with the Department's review was that it relied almost entirely on recorded violations, yet the Department almost never records any violations at Keystone, even if they undeniably occurred. The Department's own policies say that even minor and/or corrected violations are to be documented (FOL Ex. 298, 299), but the Department routinely ignores that policy. Indeed, surprisingly, the Regional Manager did not appear to know the policy existed. (T. 1144-49.) The Department may internally have a comprehensive understanding of the issues at Keystone, but it conducts its oversight in what can hardly be considered a formalized or transparent manner. By never memorializing any violations, the Department essentially guarantees that the permittee will pass the formal compliance history review with flying colors.

It is true that the Department, after 14 years, issued an NOV requesting (not requiring) Keystone to address groundwater degradation at MW-15. However, that, and NOVs based on two overweight vehicles, are the sum total of Keystone's recorded violations after decades of operation, even though the Department itself concedes there were, in fact, other violations. Our independent review of the record would clearly suggest that there have been odor violations, but the Department has consistently limited itself to informal requests that Keystone address the situation, usually only after a chorus of community complaints. The NOV regarding degradation at MW-15 was issued five days before the hearing in this matter, and it is difficult to believe it

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was issued for any purpose other than to bolster Keystone's and the Department's litigation position in this case. Other less jarring deficiencies in the Department's compliance review include the Department's rather limited review of Keystone's related parties[14] and a failure to consider a compliance matter that Keystone had with the Susquehanna River Basin Commission involving Keystone's consumptive use of water without approval. (T. 2777-78, 2829-30; FOL Ex. 31, 32.) Nevertheless, we cannot conclude that FOL met its burden of proof on this issue. It has not convinced us that the Department erred in finding that Keystone is willing and able to comply with the law, and it has not convinced us that further review of Keystone's compliance history would add any value in connection with the renewal determination.

**Odors**

FOL also contends that Keystone's permit should not have been renewed because the landfill consistently produces offsite odors. There are two regulations the parties have referred us to that relate to offsite odors. The performance standard for municipal waste landfills is set forth at 25 Pa. Code § 273.218(b), which reads as follows:

> (1) An operator shall implement the plan approved under § 273.136 (relating to nuisance minimization and control plan) to minimize and control public nuisances from odors. If the Department determines during operation of the facility that the plan is inadequate to minimize or control public nuisances, the Department may modify the plan or require the operator to modify the plan and obtain Department approval.
>
> (2) An operator shall perform regular, frequent and comprehensive site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation.

[14] A "related party" is a person or municipality engaged in solid waste management that has a financial relationship to a permit applicant or operator. The term includes a partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor, agent, or principal shareholder of another person or municipality, or a person or municipality that owns land on which another person or municipality operates a municipal waste processing or disposal. 25 Pa. Code § 271.1. *See also* 35 P.S. § 6018.503(c), which provides in part that "[i]n the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act."

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> (3) An operator shall promptly address and correct problems and deficiencies discovered in the course of inspections performed under paragraph (2).

Interestingly, the regulation does not so much prohibit offsite odors outright as require regular inspections and compliance with the landfill's nuisance minimization plan, and modification of that plan if it is not working. In other words, it seems that the operator does not violate the regulation if it is causing offsite odors so long as it is doing everything that can be done to minimize the problem.

The second regulation is 25 Pa. Code § 123.31(b), which reads as follows:

> A person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated.

Under Section 123.31(b), it would seem that trying hard is not enough. Offsite malodors are prohibited. A malodor is an "odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1. It can be difficult to prove a malodor violation. Board precedent suggests that a representative of the Department and more than one member of the public must experience the odor at the same time and place. *See DER v. Franklin Plastics Corp.*, 1996 EHB 645, 661-62.

These regulations obviously leave the Department with a lot of discretion, and the Department has exercised that discretion in this case by *never* citing Keystone for any odor violations. Nevertheless, FOL has failed to show that there is anything else that Keystone can do to further minimize offsite odors. Keystone implements its nuisance minimization and control plan and has amended that plan in response to requests from the Department. Keystone applies daily cover to the working face of the landfill, conducts its own odor patrols, and maintains a log of those patrols. Keystone has also upgraded its landfill gas management system.

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Unfortunately, despite Keystone's efforts, offsite odors have been detected on innumerable occasions and there can be little doubt those odors will continue. In the words of Mr. Bellas, "garbage stinks." (T. 1080.) FOL has pointed out several Department inspections that were either in response to odor complaints, self-discovered during the Department's odor patrols, or were noted during the course of routine inspections. Some of these inspection reports document "strong odors." (FOL Ex. 153, 154, 156, 157.) The Department also maintains a log of odor complaints, which reflects more than 300 citizen complaints from January 2011 to October 2016. (C. Ex. 31.) FOL's members described the odors as strong, pungent, foul, distinct, and chemical in nature. It is by far the most burdensome aspect of the landfill on FOL's members and we presume on the greater community. One of FOL's members, Beverly Mizanty, even seemed resigned to accept the odors as part of her daily life, testifying that she would have filed more complaints with the Department but she thought there was nothing she could do about the persistent smell. (T. 90-91.)

We cannot review the Department's exercise of its enforcement discretion, but we can decide whether the Department erred in renewing Keystone's permit in light of the landfill's apparently unavoidable propensity to produce offsite odors. In addition to regulatory compliance, the Department has correctly recognized that offsite landfill odors are a cognizable injury subject to evaluation and control pursuant to Article I, Section 27 of the Pennsylvania Constitution. (T. 3266; C. Ex. 5.) The people have a right to clean air, and offsite landfill odors unquestionably interfere with that right. The question, then, is whether those odors are causing an *unreasonable* degradation or deterioration of the environment and the quality of life of the landfill's neighbors such that the Department violated the neighbors' constitutional rights by renewing the permit and thereby effectively allowing the odors to continue for another ten years.

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Without discounting the aggravation that must be associated with being subjected to landfill odors on a regular basis, we nevertheless are not willing to conclude that FOL carried its burden of proving that the Department erred in renewing Keystone's ability to use its existing, previously permitted capacity. Shutting down this facility at this juncture is simply too extreme a resolution in the context of a permit renewal.

We do have some doubts about whether the Department has fulfilled its responsibilities as a prudent, loyal, and impartial trustee of the public natural resources. The record does not demonstrate that it has consistently exercised vigorous oversight of the landfill consistent with its regulatory and constitutional responsibilities with just as much concern about the rights of the landfill's neighbors as the rights of the landfill. The Department appears to have been rather tolerant of chronic odor and leachate management issues. At one point, a Department witness cynically speculated that community complaints regarding odors seem to go up when Keystone has a permit application pending. (T. 1309.) The record does not support that allegation. The witness was not willing to opine on the extent to which odor complaints go down when it becomes clear that they are falling on deaf ears. (T. 1310.) Aside from the odor issue, it is difficult to understand how the Department could allow the groundwater degradation being seen at MW-15 to go unresolved for 14 years. The Department's limited oversight has in turn resulted in what appears to be a less than comprehensive review of the landfill's compliance history in support of the renewal decision. Article I, Section 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day operating in such close proximity to densely populated areas. If the Department is unable or unwilling to exercise that responsibility, the permit cannot be renewed consistent with Section

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27. The lack of effective oversight will almost certainly lead to an impingement of the neighbors' constitutionally assured rights.

**Leachate Management**

The landfill generates leachate when rainfall comes in contact with the waste. Keystone operates a leachate collection system that transports the leachate to two 5.5 million gallon holding lagoons. Leachate is taken from the lagoons to Keystone's treatment plant, and it is then discharged to the Scranton Sewer Authority's POTW. At the time of the hearing, Keystone was in the midst of refurbishing and upgrading the lagoons, which included work on the liners.

Section 273.275(b) provides:

> An onsite leachate storage system shall be part of each leachate treatment method used by the operator. The storage system shall contain impoundments or tanks for storage of leachate. The tanks or impoundments shall have sufficient storage capacity at least equal to the maximum expected production of leachate for any 30-day period for the life of the facility estimated under § 273.162 (relating to leachate treatment plan), or 250,000 gallons, whichever is greater. No more than 25% of the total leachate storage capacity may be used for flow equalization on a regular basis.

25 Pa. Code § 273.275(b).

FOL has accurately pointed out that Keystone has used more than 25 percent of the total leachate storage capacity of the lagoons on a regular basis. Although the Department in its post-hearing brief writes a lengthy apologia on behalf of Keystone explaining that excess levels are understandable (DEP Brief at 79-87), it nevertheless believes that Keystone's exceedances constitute violations of 25 Pa. Code § 273.275(b). However, it has never issued an order or an NOV calling for correction of the violations. The Department's engineer testified that the issue is "not important to me." (T. 2568-69, 2667.)

Keystone argues that the Department is interpreting the regulation incorrectly. It says that the 25 percent requirement should relate to the *calculated* storage capacity needed at the

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particular site, not the actual, constructed capacity of the lagoons. Keystone has failed to comply with the 25 percent requirement if the regulation refers to constructed capacity, as the Department contends, but not if it refers to the calculated storage needs as contended by Keystone. Keystone says an operator should not be punished for voluntarily building excess capacity into its leachate management system. The Department stands by its position that 25 percent applies to the constructed capacity.

We need not resolve this difference in interpretation here. The point that emerges is that, even though the Department has repeatedly found Keystone in violation of the law, it at best considered those violations informally as part of its compliance review. Because the Department in violation of its own policy never formalizes the violations, the public is left unaware and the legality of Keystone's conduct is never formally recorded or resolved.

Keystone generally directs its landfill leachate to the Scranton Sewer Authority after Keystone treats that leachate in its leachate treatment plant. Keystone has a permit from the Scranton Sewer Authority for this purpose. (FOL Ex. 50.) However, as late as 2015, Keystone has occasionally discharged untreated leachate directly to the Authority's system, which Keystone says is an aberration from the norm that occurs because of significant storm events resulting in the generation of substantially more leachate and/or problems with its plant.

FOL argues that Keystone's direct discharges of leachate to the Scranton Sewer Authority are an example of Keystone's lack of an ability or intent to comply with the law. FOL points to Keystone's solid waste management operating permit, which provides: "Leachate shall be collected and handled by direct discharge into a permitted publicly-owned treatment works, following pretreatment, or other permitted treatment facility." (FOL Ex. 200 (at 24).) Keystone's February 2015 minor permit modification authorizing the construction and operation

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of a new leachate treatment plant provides: "The new LTP [leachate treatment plant] is a pre-treatment facility and shall only discharge pre-treated effluent to a municipal wastewater treatment facility for additional treatment." (FOL Ex. 216 (Condition 5).)

Notwithstanding these clear permit conditions, the Department takes the position that the permit may be disregarded as long as the Scranton Sewer Authority continues to meet its own NPDES permit requirements. The Department construes Keystone's leachate treatment permit condition as one of many "generic recitation[s] of conditions applicable to all landfills." (DEP Brief at 89.) The Department is not concerned if Keystone occasionally violates its permit and discharges leachate to the Authority's system without first pretreating that leachate. The Department argues that Keystone's operating permit contains a truncated restatement of the relevant portion of the applicable regulation pertaining to leachate treatment, which provides:

> (a) Except as otherwise provided in this section, leachate shall be collected and handled by direct discharge into a permitted publicly-owned treatment works, following pretreatment, **if pretreatment is required by Federal, State or local law** or by discharge into another permitted treatment facility.

25 Pa. Code § 273.272(a) (emphasis added). The Department contrasts the language at the end of Subsection (a) adding a caveat that pretreatment is only necessary if required by federal, state, or local law, as opposed to the more categorical pretreatment requirement in Keystone's permit.

Although Keystone's permit, issued in 1990, appears to predate the promulgation of the regulation in 2000, it is not clear why Keystone's permit has not been changed at the renewal stage or otherwise to reflect the current regulatory requirements, if they are in fact different. (*See* FOL Ex. 1, 201, 205.) The minor permit modification issued in 2015 did not modify the categorical pretreatment requirement. (FOL Ex. 216.)

It is true that Keystone's direct discharges have not impacted the Authority's operations to the extent that the discharges have caused upset conditions or exceedances of the Authority's

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effluent limitations contained in its NPDES permit. However, conditions in a permit create binding requirements that should be honored, not ignored by both the permittee *and* the Department. *See PQ Corp. v. DEP*, EHB Docket No. 2015-198-L, slip op. at 18-19 (Adjudication, Sep. 6, 2017). The Department's argument that Keystone's permit really just means that pretreatment is optional is not a persuasive reading of the permit language. The Department does not provide any legal support for its apparent argument that some permit conditions are more important or more binding than others.

There is no indication on the record that the Department gave any consideration to Keystone's direct discharges in considering Keystone's renewal application. (*See* T. 1023.) Clearly the issue was worthy of some attention, at least as part of considering Keystone's overall leachate management issues. If nothing else, the Department could have adjusted the permit language to reflect its view of what the regulations require. However, once again, FOL has not directed us to specific measures that should be taken that are not being taken. The lagoons have never overtopped or been shown as ever having been in imminent danger of overtopping.[15] FOL presented no evidence that the lagoons are undersized from an engineering rather than regulatory perspective.[16] Keystone's leachate management has not been shown to have caused or threatened any demonstrable harm to the environment or the public health or safety.

Furthermore, Keystone's reserve capacity issues and its direct discharges to the Scranton Sewer Authority do not so clearly reflect a lack of ability or intent to comply with the law as to warrant the Department's denial of Keystone's permit renewal. The evidence shows that

[15] That may be in part because Keystone, contrary to the terms of its permit, has discharged untreated leachate directly from the lagoons to the Authority's POTW.

[16] Keystone on at least one occasion accepted leachate from another landfill for storage and treatment at its landfill. FOL refers us to this incident but does not explain why this constituted a violation. The Department approved Keystone's request to accept the waste, although it is not clear that Keystone has been permitted to accept off-site leachate.

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Keystone pretreats its leachate at its treatment plant the majority of the time before sending it to the Authority for further treatment. Indeed, it has built a treatment plant capable of treating 150,000 gallons per day for that very purpose. Importantly, it does not appear that Keystone is routinely discharging untreated leachate to the Authority to the detriment of the Authority's operations or the Authority's ability to comply with its NPDES permit. Neither the Authority nor the Environmental Protection Agency, which administers the pretreatment program, have expressed any concerns.

FOL refers us to an odor incident that occurred in a sewer line near the landfill on the night of September 24, 2015. An overpowering chemical-type odor emanated from a sewer line that night. After a thorough investigation, the Department credibly concluded that the odor could not be attributed to a discharge from Keystone into the line. Even assuming *arguendo* that Keystone did cause the odor, that isolated incident either by itself or in combination with Keystone's other operational issues would not justify overturning the Department's renewal decision.

**Miscellaneous**

FOL has previously raised issues associated with truck traffic at the facility, but has not pursued those issues with any degree of specificity in its brief. We will consider them no further here. FOL notes that there have been some outbreaks of what appear to be leachate through the cover material on disposal areas at the site. These outbreaks have been referred to as "seeps." The record indicates that such outbreaks have been properly repaired and have not been shown to have resulted in any environmental damage. (T. 3153-56; FOL Ex. 220, 228, 253, 254; KSL Ex. 129.) FOL says the Department should have required a "health study" before issuing the renewal. It did not provide any evidence to back up that claim.

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FOL says in its proposed findings of fact that there have been four "thermal events" at the landfill. These events are not uncommon even at properly operated landfills and consist of small areas of waste smoldering under the surface. (T. 1163-74, 1274.) Keystone properly addressed those incidents. (T. 1174.) There was no evidence of any environmental damage.

Birds tend to congregate in unnatural numbers at Keystone, or at any other landfill for that matter. Keystone has managed the bird population at the landfill to the fullest extent possible. No additional measures are called for. Nevertheless, excessive birds cannot be completely eliminated and some local citizens consider them to be a nuisance.

In addition to its concerns regarding odors, FOL complains about Keystone's air emissions more generally. It points out that Keystone is the county's largest, or one of its largest, emitters of ammonia, NOx, carbon monoxide, and particulate matter below 2.5 microns. (FOL Ex. 332-35.) However, Keystone operates pursuant to a Title V operating permit (KSL Ex. 59), which was not appealed, and there is no evidence that Keystone has violated its permit. FOL presented no credible evidence that Keystone's air quality controls are inadequate or that its emissions pursuant to its permit are resulting in an unreasonable deterioration of the peoples' right to clean air.

FOL faults the Department for failing to conduct a thorough enough investigation into whether Keystone was the source of carbon monoxide and perhaps other gases that migrated from somewhere underground into nearby residences from some unknown source twenty years ago. The presiding judge excluded evidence offered by FOL regarding the investigation conducted by the Department and others in 1997 due to its age, the admitted inconclusiveness of the investigation, and FOL's failure to call any expert witness on the issue. Among other things, the judge struck the testimony of Robert Gadinski, a former employee of the Department, for the

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above reasons, and because it became clear that Mr. Gadinski's supposed factual testimony regarding the 1997 investigation was actually expert testimony in disguise. Mr. Gadinski was neither offered nor qualified as an expert.

FOL has preserved a challenge to this evidentiary ruling in its post-hearing brief. (FOL Brief at 280, 306.) However, other than restating that Mr. Gadinski had knowledge regarding the facts related to the investigation, FOL does not explain why facts related to an inconclusive investigation conducted in 1997 (eight years before Keystone's previous permit renewal) would have any material, probative value in reviewing the Department's renewal decision. FOL seems to intimate that mysterious forces were at work to squelch the investigation just when things started pointing to the landfill as the source. It ventures that the landfill may still be a "potential source." However, this is pure, unsubstantiated speculation. Even if it were true, we fail to see how mysterious forces squelching an investigation twenty years ago would factor into our review. FOL has not substantiated a claim that some sort of gas migration study should have been conducted as a condition of the renewal. Any such claim would have required expert testimony to back it up based on current information. FOL had neither expert testimony nor any current information. The Board held 18 days of hearings in this matter and afforded FOL considerable leeway in an appeal from a permit *renewal*. Even if we assume FOL's unfounded claims regarding a decades-old migration study had any probative value, that value was clearly outweighed by undue delay and wasting time and resources. Pa.R.E. 403; *M & M Stone Co. v. DEP*, 2009 EHB 213, 218; *F. R. & S., Inc. v. DEP*, 1999 EHB 241, 272-73.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 6018.108; 35 P.S. § 7514.

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2. When challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant must demonstrate by a preponderance of the evidence at the hearing on the merits that it has standing, even where a motion for summary judgment by opposing parties has been denied. *See Stedge v. DEP*, 2015 EHB 577, 594; *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2001 EHB 713, 729-30.

3. FOL has standing as a representative of its members. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)); *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643-49.

4. FOL's members have an interest in the Department's decision to renew Keystone's permit that is substantial, direct, and immediate, which gives them standing to pursue this appeal. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975).

5. FOL's members' interest is substantial because being impacted in their daily lives by the landfill's odors surpasses a general interest of all citizens in having Keystone comply with the law; it is direct because they have shown a causal connection between the odors they routinely experience and the landfill; it is immediate because the connection between the odors and the landfill is not remote or speculative. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975); *Funk v. Wolf*, 144 A.3d 228, 244 (Pa. Cmwlth. 2016).

6. FOL as an organization itself has standing in addition to the standing it has on behalf of its members because FOL's mission includes protection of the environment in the

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vicinity of the landfill. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643-49; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839.

7. The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017).

8. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

9. As the third-party appellant challenging the Department's action, FOL bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

10. A permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835.

11. Our review of a permit renewal is not whether an operation should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *Sierra Club v. DEP*, EHB Docket No. 2015-093-R, slip op. at 6 (Opinion and Order, Jul. 10, 2017); *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135-36; *Tinicum Township v. DEP*, 2002 EHB 822.

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12. The Board's review of a permit renewal is not confined to the facial changes, if any, that were made to a permit during the renewal. *PQ Corp. v. DEP*, EHB Docket No. 2016-086-L, slip op. at 6 (Opinion and Order, Aug. 21, 2017); *Love v. DEP*, 2011 EHB 286, 290-91.

13. FOL is not precluded by reason of administrative finality from raising ongoing operational issues with the Keystone Landfill in this appeal.

14. Keystone violated 25 Pa. Code § 273.286 by failing to prepare a groundwater assessment of the groundwater degradation that is causing at monitoring well MW-15.

15. Renewing Keystone's permit without requiring that the violation at MW-15 be corrected and the longstanding groundwater degradation be addressed as a condition of the renewal in the form of a groundwater assessment plan was unreasonable and a violation of the Department's duties as trustee of the Commonwealth's natural resources. PA. CONST. art I, § 27; 25 Pa. Code § 273.286.

16. The Department may deny, suspend, modify, or revoke any permit if it finds that the permittee has failed or continues to fail to comply with the law or its permit, or the permittee has shown a lack of ability or intention to comply with the law or its permit as indicated by past or continuing violations. 35 P.S. § 6018.503(c).

17. Except for the groundwater degradation associated with MW-15, FOL did not meet its burden of proving by a preponderance of the evidence that the Department acted unreasonably or not in accordance with the law, including Article I, Section 27, in renewing Keystone's operating permit without conditions.

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COMMONWEALTH OF PENNSYLVANIA
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| **FRIENDS OF LACKAWANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-063-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee** | : | |

**O R D E R**

AND NOW, this 8th day of November, 2017, it is hereby ordered that, as a condition of its renewal, Keystone Sanitary Landfill, Inc.'s Solid Waste Management Permit No. 101247 is revised to contain the following condition:

> The Permittee within 60 days shall prepare and submit to the Department a groundwater assessment plan in accordance with 25 Pa. Code § 273.286 that addresses the groundwater degradation detected in Monitoring Well 15.

This appeal is in all other respects dismissed. Keystone's request for oral argument is denied.

**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**

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

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: November 8, 2017**

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

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