



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



PATRICIA A. WILSON, et al.	:	
	:	
v.	:	EHB Docket No. 2013-192-M
	:	(Consolidated with 2013-200-M)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: August 31, 2015
PROTECTION and NEWTOWN TOWNSHIP,	:	
Permittee	:	

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the Appellant’s challenge to the Department’s approval of the Township’s 2013 Plan Update. The Appellant did not meet her burden to show that the Department’s approval of the Plan was inappropriate or otherwise not in conformance with law.

FINDINGS OF FACT

Parties

1. The Township, Ms. Wilson, and the Department, stipulated to certain facts and submitted to the Hon. Judge Richard P. Mather, Sr. on October 14, 2014. Exhibit (“Ex.”) EHB-1; N.T. 8-9.)
2. The Department is the administrative agency vested with the authority and responsibility to administer and enforce the requirements of the Sewage Facilities Act, 35 P.S. §§ 750.1 *et seq.* (“Sewage Facilities Act” or “SFA” or “Act 537”) and the rules and regulations promulgated thereunder. Ex. EHB-1, Para.1.
3. Newtown Township, Delaware County (“Township”) is a second class township that obtained approval of an Act 537 Plan Update (“2013 Plan Update”) from DEP on September 24,

2013. Ex. EHB-1, Para. 2.

4. Patricia A. Wilson (“Appellant” or “Ms. Wilson”), is a resident of Newtown Township. She resides at 4111 Battles Lane, Newtown Square, PA 19073. Ms. Wilson is a resident of the Echo Valley neighborhood of the Township whose residence is served by an on-lot sewage disposal system. Ex. EHB-1, Para. 3.

5. Marc and Therese DeRita, 336 Crum Creek Lane, Newtown Square, PA 19073, Craig and Lara Toerien, 334 Crum Creek Lane, Newtown Square, PA 19073, and Joseph and Victoria Graham, 332 Crum Creek Lane, Newtown Square, PA 19073 (“DeRita Appellants”) are residents of the Echo Valley neighborhood of the Township. Ex. WILSON-63.

6. Springton Pointe Estates Homeowners Association (“SPEHOA”) is an association composed of all owners of homes in the Springton Pointe Estates residential subdivision in Newtown Township. There are 115 homes in the Springton Pointe Estates subdivision. Ex. WILSON-62.

Procedural History of Legal Challenges to 2013 Plan Update

7. On October 24, 2013, Ms. Wilson filed an appeal of the Township’s 2013 Plan Update with the Board. *See* EHB Docket No. 2013-192-M.

8. On November 1, 2013, the DeRita Appellants filed an Appeal of the 2013 Plan Update with the Board. *See* EHB Docket No. 2013-200-M.

9. On November 18, 2013, SPEHOA filed a Petition to Intervene in the *Wilson* Appeal. *See* EHB Docket No. 2013-192-M.

10. The Board granted SPEHOA’s Petition to Intervene on January 2, 2014. *Id.*

11. On March 6, 2014, the Board issued an Order consolidating the *Wilson* and *DeRita* appeals. *See* EHB Docket No. 2013-192-M (Consolidated with 2013-200-M).

12. A “Settlement Agreement and Mutual Release” was entered into on October 14, 2014 between Newtown Township, the Department, Marc and Terese DeRita, Craig and Lara Toerien, Joseph and Victoria Graham, Adelio Pierini and Lino A. Pierini to settle the issues raised in EHB Appeal 2013-200-M. Ex. WILSON-62. The Agreement specifically provides that “[t]he appeal brought by the DeRitas, the Toerians and the Grahams will be withdrawn with prejudice.” *Id.*, Term 2.j., p. 5.

13. On February 17, 2015, the DeRita Appellants withdrew their Appeal with prejudice. The DeRita Appellants did not participate in, or present any evidence at, the EHB Hearing, and did not file a post-hearing memorandum.

14. A “Settlement Agreement” was entered into between Newtown Township, the Newtown Township Municipal Authority, and SPEHOA on October 14, 2014 to settle the issues raised in SPEHOA’s intervention in EHB Appeal 2013-192-M. Ex. WILSON-63. The Agreement specifically provides that “[t]he appeal/intervention of the SPEHOA will be withdrawn with prejudice.” *Id.*, Term 2.h., p. 7.

15. On February 18, 2015, the SPEHOA Intervenors withdrew their Appeal/Intervention with prejudice. SPEHOA Intervenors did not participate in, or present any evidence at, the EHB Hearing and did not file a post-hearing memorandum.

Prior Act 537 Planning in Newtown Township

16. The Crum Creek Basin of Newtown Township is currently served by an Act 537 Plan, dated May 23, 2002, as supplemented August 13, 2002, and approved by DEP on August 29, 2002 (“2002 Plan”). Ex. TWP-2, Appendix T at Para. M (page 2); DEP-3; EHB-1, Para. 6.

17. The 2002 Plan divides the sewer service area into two sewer districts, Sewer District 1 (“SD-1”) and Sewer District 2 (“SD-2”). The 2002 Plan requires that the SD-1 sewer

area be hooked up to the Central Delaware County Authority (“CDCA”), which operates sewer lines that ultimately convey sewage to the Delaware County Regional Water Quality Authority (“DELCORA”) for wastewater treatment and discharge into the Delaware River, while the SD-2 sewer area would be served by a regional land application system on the Garrett-Williamson site. (N.T. 380-381); Ex. DEP-3.

18. In 2005, the Township prepared a Plan Update evaluating the concept of land application on the Garrett-Williamson site. The Department’s review found that, due to hydrogeologic issues, this was not a viable alternative to meet the Township’s sewage disposal needs. (N.T. 381.)

19. In 2007, the Township started to explore membership in the CDCA to meet its sewage disposal needs for the Crum Creek Basin. (N.T. 382.)

20. On May 21, 2007, the Township submitted to DEP a Plan Update to address sewage needs in its Crum Creek Basin. The initial submission was supplemented by information provided by the Township on January 8, 2008, February 21, 2008, April 10, 2008, July 18, 2008, August 11, 2008, September 3, 2008, and September 8, 2008. Ex. TWP-2, Appendix T, Para. U; EHB-1, Para. 12.

21. The Township entered into a contract with CDCA on December 21, 2007 that allows it to send up to 961,975 gallons per day (“gpd”) of sewage through CDCA’s collection and conveyance system to DELCORA for wastewater treatment and discharge into the Delaware River. Ex. TWP-2 at Appendix W; TWP-2 at pp. 12, 40; EHB-1, at Para. 13.

22. On February 6, 2009, DEP approved the Township’s Plan Update (“2009 Plan Update”) to its 2002 Plan. Ex. TWP-2 at p. 12; TWP-2, Appendix T, Para. U; EHB-1, at Para. 14.

23. The 2009 Plan Update was appealed by Ms. Wilson and others. *See* EHB Docket Nos. 2009-024-L, 2009-026-L, and 2009-033-L. Ex. EHB-1, at Para. 15.

24. The challenge to the 2009 Plan Update was sustained by the Board on November 1, 2010, on the ground that the Township was not committed to implementing its 2009 Plan Update. *Patricia A. Wilson and Paul I. Guest, Jr. v. DEP and Newtown Township, BPG Entities, The Rouse Group Development Company, LLC, and Ashford Land Company, L.P.*, 2010 EHB 827 (Adjudication); Ex. EHB-1, at Para. 16; N.T. 382.

2010 Consent Order and Agreement between DEP and the Township

25. On January 28, 2010, the Department and the Township executed a Consent Order and Agreement (“CO&A”) that required the Township to prepare and submit a new Act 537 Plan Update to DEP. Ex. TWP-2, Appendix T; EHB-1, at Para. 17.

26. Ms. Mahoney, a Sewage Facilities Supervisor in the Department’s Southeast Regional Office, was involved in preparing the 2010 CO&A. *Id.*; (N.T. 383.)

27. The CO&A with the Township compelled the Township to prepare and implement a new sewage facilities plan. *Id.*; Ex. TWP-2, Appendix T.

28. The 2010 CO&A requires that the Township prepare and submit an Act 537 Plan Update to DEP within 215 days of its execution. (N.T. 383); Ex. TWP-2, Appendix T.

Township’s 2010 Plan Update Submission

29. On April 20, 2010, the Department approved the Township’s Plan of Study for evaluating sewage disposal alternatives for areas of future growth and areas with malfunctioning on-lot sewage systems within the Crum Creek watershed. Ex. EHB-1, at Para. 18

30. The Township submitted a 2010 Plan Update to DEP for review in August, 2010. (N.T. 382-383.)

31. On November 29, 2010, DEP issued a review letter identifying numerous deficiencies with the 2010 Plan Update submission. Ex. DEP-4; EHB-1, Para. 20.

Township Development of Post-2010 Plan Update, with DEP Input

32. Following the November 29, 2010 review letter, the Department met with representatives of the Township’s Municipal Authority in January and February, 2011; the Authority pushed the idea of Act 537 special studies¹ for Florida Park and Echo Valley as its new Plan Update. The Township prepared a Plan of Study indicating it would pursue the special studies, but never submitted any special studies to DEP for review. (N.T. 385-386.)

33. In June or July of 2011, the Township changed managers. (N.T. 387.)

34. The new Township Manager, Michael Trio, contacted Ms. Mahoney to discuss Act 537 planning issues in the Township. *Id.*

35. On November 28, 2011, Mr. MacCombie, an Engineer working on behalf of the Township, submitted a Plan of Study to DEP indicating that the Township proposed to abandon the Echo Valley and Florida Park Special Studies and instead pursue a sewage facilities plan update for the Township’s Crum Creek Basin. Ex. TWP-2, Appendix V; EHB-1, Para. 25.

36. In December, 2011, the Township submitted a new Plan of Study to DEP for review, which the Department approved on February 10, 2012. (N.T. 386-387); Ex. TWP-2, Appendix V.

Mr. MacCombie’s Preparation of the Township’s 2013 Plan Update

37. Mr. MacCombie prepared the 2013 Plan Update. (N.T. 24.)

¹ A “special study” is defined as a type of Official plan revision that is “A study, survey, investigation, inquiry, research report or analysis which is directly related to an update revision. The studies provide documentation or other support necessary to solve specific problems identified in the update revision.” 25 Pa. Code 71.1 (defn. of “Official plan revision” (iii)). The special studies for Florida Park and Echo Valley would have focused on the on-lot malfunctions in those neighborhoods.

38. Mr. MacCombie's opinions with respect to sewage facilities planning in the Township are contained in the 2013 Plan Update. (N.T. 289-290.)

39. Mr. MacCombie was first asked to participate in sewage facilities planning in the Township in June or July of 2011 by new Township Manager Michael Trio. (N.T. 290-291.)

40. Mr. MacCombie was asked to prepare a whole new Act 537 Plan Update for the Township "from scratch" and to do what he felt "was in the best interest of the Township from an economical and environmental standpoint." (N.T. 294.)

41. Mr. MacCombie used the DEP document "Pennsylvania Sewage Facilities Act Guide for Preparing Act 537 Update Revisions" in preparing the 2013 Plan Update. (N.T. 326-327); Ex. TWP-4.

42. Mr. MacCombie used Act 537 in preparing the 2013 Plan Update. (N.T. 327); Ex. TWP-5.

43. In preparing the Plan Update in the area where there were existing homes, Mr. MacCombie and his staff looked at topographic information, including aerial topographic plans, and then physically went out to the areas where sewers were being considered, and met with people out in the field, including various property owners. (N.T. 303.)

44. Mr. MacCombie also met with the owners of parcels in the Township that are either under development, have potential for development, or have preliminary plans for development. (N.T. 304.)

45. In addition, Mr. MacCombie met with representatives of existing institutions, businesses, and corporate campuses to discuss their sewage needs. (N.T. 304-305.)

46. In preparing the 2013 Plan Update, Mr. MacCombie tried to minimize interactions with floodplains, wetlands, and steep slopes. He tried to stay out of areas with

endangered species. (N.T. 309.)

47. One particular area of environmental concern was the possibility of running a pipe along Lewis Run in the Echo Valley area. Mr. MacCombie looked at the impacts of running a pipe along Lewis Run and determined that the Plan would be able to accommodate a gravity system with only “minimal effect” on the stream from a stream crossing. *Id.*

48. Another issue of concern was a proposed force main coming from the Springton Pointe Estates through a wetland in the Hunters Run area. Directional drilling to replace an existing 4 inch force main would eliminate impact to the wetland area. (N.T. 310.)

49. Mr. MacCombie investigated potential costs to the residents of the system set out in the 2013 Plan Update. (N.T. 335-336.)

50. One of the items considered in Mr. MacCombie’s cost investigation is the cost of grinder pumps to Marple Township, as offset by a state grant. (N.T. 335-338); Ex. TWP-26.

Township Sewage Flow and Capacity Information for 2013 Plan Update

51. After gathering information on sewer needs, Mr. MacCombie prepared a sewage flow summary. (N.T. 305-306); Ex. TWP-2, Appendix L.

52. In developing the flow information, Mr. MacCombie used census data, physical coordination with developers, site views, metered flows, pump and haul records, topography, and environmental factors. (N.T. 307-309.)

53. A document prepared by Kaplin Stewart, on behalf of BPG Properties (“BPG”), states that 185,000 gallons per day of sewage capacity is sufficient for BPG. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 328); Ex. TWP-9.

54. A document prepared by Joseph D’Amico, Jr., on behalf of Claude DeBotton,

who owns various properties in the Township, states that their requirements for sewage capacity would be approximately 175,000 gallons per day. (N.T. 328-329); Ex. TWP-10. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. *Id.*

55. Mr. MacCombie met with Mr. DeBotton, and Mr. DeBotton's consultants, Evans Mill Environmental, regarding needed capacity. *Id.*

56. Mr. MacCombie examined planning modules submitted on behalf of Mr. DeBotton by Evans Mill Environmental, and determined that they were consistent with the Plan Update. (N.T. 330); Ex. TWP-11.

57. Mr. MacCombie also examined the average flow per day being discharged from Episcopal Academy. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 330-331); Ex. TWP-17.

58. Mr. MacCombie believed he was conservative in calculating anticipated sewage generation because he uses a flow of 262.5 gallons per day for older parts of town, based on an average of 3.5 people per household generating 75 gallons per day. (N.T. 21-22, 332.)

59. Under current Act 57 of 2003, that amends the Municipal Authorities Act, 2010 census data shows 2.49 individuals per household using 90 gallons per day each, equaling 224.1 gallons per day. Mr. MacCombie used a figure of 225 gallons per day for anything built after 2002, which is the advent of low flow toilets. (N.T. 21-22, 332-333.)

60. Mr. MacCombie used 262.5 gallons per day for anything built before 2002. He believed there is actually more capacity in the system than the Township is planning for. (N.T. 333.)

61. Mr. MacCombie considered water meter readings to determine anticipated

sanitary sewer flows from a property. (N.T. 333-334); Ex. TWP-18.

62. Melmark has requested a 25,000 gallon per day allocation. (N.T. 335); Ex. TWP-19.

63. Exhibits TWP-18 and TWP-19 are the type of documents upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 335.)

Gravity System vs. Low Pressure Sewer System

64. A force main is “the line that takes the discharge from the pump and takes it to a discharge point. (N.T. 243.) A force main is typically under pressure. *Id.*

65. A low pressure system is typically used in connection with a grinder pump. (N.T. 244.)

66. A grinder pump grinds up waste and puts it through a small diameter pipe at low pressure and then ties into a gravity line. (N.T. 244-245.)

67. A grinder pump can save excavation costs, since it can be installed only three or four feet down, which would be shallower than a gravity system in areas of undulating hills such as Echo Valley. *Id.*

68. One concern about grinder pumps is that anything mechanical can break, particularly if you lose electricity and do not have a backup generator. (N.T. 245.)

69. In Echo Valley, concerns were raised about the electricity issue with grinder pumps. *Id.*

70. Grinder pumps can cost \$6,000, for which the homeowner is responsible, along with increased maintenance costs, and the home served by a grinder pump must pay the same tap-in fee as those homes served by a gravity system. (N.T. 245-246.)

71. Because of the concerns with low pressure sewer and grinder pumps, after talking

to residents of Echo Valley, and walking the site, Mr. MacCombie was able to provide a gravity system in the 2013 Plan Update for Echo Valley. *Id.* In a gravity system, sewage flows by means of gravity and there is no need for grinder pumps and use of electricity. *Id.*

Township Efforts in Seeking and Responding to Public Input in Plan Update Development

72. Before the 2013 Plan Update was submitted to DEP, the Township conducted public outreach and meetings including 2 publications (of the Draft Plan Update and the 2013 Plan Update) for comment, on October 17, 2012 and February 14, 2013, respectively; separate meetings with residents that raised concerns about the Draft Plan Update in Echo Valley (December 21, 2012), Springton Pointe Woods and Springton Pointe Estates (January 8, 2013), on the location of the Goshen Road Pump Station (January 2, 2013), and the location of the Newtown Hunt Pump Station (January 14, 2013). Ex. TWP-2, Appendix CC, page 1.

73. Township officials undertook 16 separate public outreach and community meetings seeking input on the Draft Plan Update and the 2013 Plan Update. *Id.*

74. The Township also held five Board of Supervisors meetings about the Draft Plan Update and the 2013 Plan Update including the presentation of Alternative 1 of the Draft Plan Update (December 10, 2012); a meeting with residents to get public comment and respond to questions on the Draft Plan Update (December 27, 2012); a presentation of Alternatives 1 and 2 of the 2013 Plan Update (February 4, 2013); a meeting where the Board passed a motion to move forward with Alternative 2 of the 2013 Plan Update (February 11, 2013); and a meeting to adopt Resolution 2013-10 (Approval of Act 537 Sewage Facilities Plan Update)(March 25, 2013). Ex. TWP-2, Appendix CC, page 1.

75. The Township held at least 3 public meetings with residents in developing the Plan Update; depending upon questions asked at the meetings, follow up meetings were held.

(N.T. 263.)

76. Mr. MacCombie's office reviewed all the public comments that were received and participated in responding to the comments. *Id.*

77. Also, in August, 2012, a meeting was held to discuss the Draft Plan Update with the residents; another meeting with the residents was advertised and held in October, 2012, and yet another meeting with the residents was held in January, 2013. (N.T. 316-318.)

78. The Township published, on January 30, 2013, a Notice in the *County Press* of a special meeting to be held to discuss the Plan Update. Ex. TWP-2, Appendix S.

79. The Board of Supervisors opened the January, 2013 public meeting up to discuss the Plan Update, and made Mr. MacCombie available to answer any questions. (N.T. 317-318.)

80. At that meeting, residents asked a number of questions about different aspects of the Plan Update. *Id.* The Board directed Mr. MacCombie and his staff to follow up by holding additional meetings and further evaluating different issues brought up by residents at the meeting including: (1) the location of sewer line direction and where the lines were going; (2) moving a pump station's location; (3) concerns from residents in Echo Valley about having low pressure sewers; (4) what was going to happen at Springton Pointe Estates with wastewater treatment plant decommissioning and pump station installation; (5) what was going to happen in the area of Hunt Valley Circle; (6) other specific issues concerning residents of Echo Valley; and (7) specific issues on Florida Park. (N.T. 319-321.)

81. After the January, 2013 public meeting on the Plan Update, the Board directed Mr. MacCombie to follow up on outstanding issues by holding breakout sessions in areas of the Township where concerns were raised, including with the residents of Springton Pointe Woods and Springton Pointe Estates, Hunt Valley Circle, Echo Valley, and Florida Park. (N.T. 320-

321.) Attendees included Ms. Wilson. (N.T. 321.)

82. As a result of public comments from the meetings, Mr. MacCombie's staff held field meetings in Hunt Valley Circle to discuss with property owners potential locations for a pump station. (N.T. 321-322.)

83. Mr. MacCombie's staff also participated in field visits with residents of Echo Valley with regard to location of gravity sewers or low pressure sewers. (N.T. 322.) Field visits were also held with the Acciabattis, the Pierinis, and the DeRitas. *Id.*

84. The field visit meetings resulted in changes to the Draft Plan Update. (N.T. 323.)

85. As a result of the meeting with the Hunt Valley Circle residents, the pump station direction was moved to the west. *Id.*

86. From meetings with the homeowners of Echo Valley and Mr. Acciabatti, the pump station along Goshen Road was moved further west onto the Pierini property. *Id.*

87. Echo Valley residents generally preferred a gravity system, so the sewer service area was changed to accommodate this preference and to provide flow to the Ashford Pump Station. (N.T. 323-324.)

88. Another change as a result of the meetings was showing a force main being constructed to discharge up Goshen Road and tie directly to the Ashford pump station. Thus, the whole service area ties into the Ashford pump station. (N.T. 323-324.)

89. After the field visit public meetings, the Board readvertised the 2013 Plan Update on February 14, 2013 and received additional public comment. (N.T. 324-325); Ex. TWP-2, Appendix S, CC.

90. Mr. MacCombie's office reviewed all the public comments that were received and participated in responding to the comments. (N.T. 325.)

91. The Township also sought municipal input on the Plan Update from several municipal entities. The Newtown Township Planning Commission was asked for input (via certified mail dated October 22, 2012) and provided input on December 13, 2012, moving to send the Draft Plan Update to the Board of Supervisors. Ex. TWP-2, Appendix Q.

92. Neighboring townships (Marple Township and Edgmont Township) were asked for input on the Draft Plan Update on October 31, 2012; Marple did not respond, but Edgmont provided comments on November 30, 2012. *Id.* Additionally, input from the Delaware County Planning Department (“DCPD”) was sought on October 22, 2012; DCPD responded with general support for the recommendations in the Plan on November 1, 2012. Ex. TWP-2, Appendix R.

Analysis of Sewage Facilities Planning Alternatives

93. Mr. MacCombie performed an analysis of various sewage facilities alternatives. (N.T. 310.)

94. The possible alternatives included new on-site disposal, a drip irrigation system in the area adjacent to Florida Park, the use of existing on-lot disposal systems, and connection via public sewer through CDCA for treatment by DELCORA. (N.T. 311-312.)

95. The CDCA public sewer alternative minimizes the potential damage of seepage or overflows getting into streams. (N.T. 312.)

96. The homes in Florida Park are on small lots with limited space for a grinder pump system, so a gravity approach “would be more cost-effective and more reasonable to serve these areas.” (N.T. 313.) This would avoid a pump and haul situation and upgrade water quality in Preston Run by minimizing any overflows or system malfunctions. (N.T. 313-314.)

97. Mr. MacCombie examined different alternatives “to provide adequate sewage but also to make sure it’s handled appropriately and you end up with a benefit by decreasing the

probability of discharges into the streams and the surrounding ground water in the area.” (N.T. 314.)

98. Mr. MacCombie performed the alternatives analysis for the entire sewer service area. (N.T. 314.)

99. Mr. MacCombie and his staff vetted the alternatives and then prepared a Draft Plan Update for the Board of Supervisors in August, 2012. (N.T. 314-315.)

100. Mr. MacCombie and his staff considered different alternatives and compiled them into a Plan Update to present to the Board that “was a workable plan and a feasible plan.” *Id.*

101. The Draft Plan Update was advertised, and public comment was received. (N.T. 315.)

102. Mr. MacCombie and his staff prepared responses to all the public comments. (N.T. 315.)

103. Mr. MacCombie used the DEP document “Sewage Disposal Needs and Identification” in preparing the 2013 Plan Update. (N.T. 326-327); Ex. TWP-6.

Malfunctions in Echo Valley Neighborhood

104. Mr. James Curcio and his family reside at 4114 Battles Lane in the Echo Valley neighborhood of the Township. (N.T. 361.)

105. Mr. Curcio moved into his current residence in 2003. *Id.*

106. The Curcio residence has a failing on-lot septic system. *Id.*

107. Shortly after moving in, Mr. Curcio hired an engineer to examine replacement of the on-lot system. (N.T. 362.)

108. The engineer hired by Mr. Curcio noted the presence of wetland plants and

recommended that he would be better off waiting for public sewer. (N.T. 363.)

109. Mr. Curcio has been pumping sewage from his septic tank more and more frequently, every three weeks. *Id.*

110. Each time Mr. Curcio pays to have his system pumped it costs \$90 – 100. *Id.*

111. The cost to replace his on-lot system is \$45,000 – 50,000. (N.T. 364.)

112. Mr. Curcio’s family is adversely affected by not having public sewer in several ways. (N.T. 365-365.)

113. One way Mr. Curcio and his family are affected by the absence of public sewer is that he could not put a deck in his yard. (N.T. 365.)

114. Another way Mr, Curcio and his family are affected by the absence of public sewer is that his yard is a mushy mess that sometimes “cannot even be mowed.” *Id.*

115. Mr. Curcio “absolutely” supports the 2013 Plan Update. (N.T. 366-367.)

116. According to Mr. Curcio, the Township has kept neighbors informed of its plans for public sewer. *Id.*

117. The Township held an on-site meeting in Echo Valley to discuss public sewer options with residents. (N.T. 368.)

118. Mr. Curcio is aware of neighbors that have problems with their on-lot Systems. “More than a handful” are pumping, and he is aware of a holding tank, a stream discharge system, and “some folks discharging their washing fluid out back.” (N.T. 368-369.)

119. David Dugery is a resident of the Echo Valley neighborhood of the Township; he resides at 3330 Echo Valley Lane. (N.T. 443.)

120. Mr. Dugery has lived in his residence since the Fall of 2007. (N.T. 444.)

121. Mr. Dugery has a non-functional septic system. *Id.*

122. There are wet areas in Mr. Dugery's yard. *Id.*

123. There are persistent sewage odors that make it difficult to walk outside. *Id.*

124. Mr. Dugery and his family experience smells "when you're walking in and out of the house based on whether someone is utilizing the plumbing." *Id.*

125. Mr. Dugery pumps his septic tank every 10-14 days, at a cost of \$220/pumpout, or approximately \$6,000 per year. *Id.*

126. According to Mr. Dugery, the Township has kept neighbors informed of its plans for public sewer, listened to public comment, and came out to the neighborhood where neighbors could walk through areas being considered for gravity sewer versus low pressure. N.T. 444 - 445.

127. The non-functioning septic system adversely impacts the value of his home. *Id.*

128. The absence of public sewer adversely impacts the ability to sell his home. *Id.*

129. Mr. Dugery would not have bought his home if he knew then what he knows now. *Id.*

130. Mr. Dugery was advised that it would not be a good investment to install a new on-lot septic system because public sewer would be coming to Newtown Square. (N.T. 446.)

131. Mr. Dugery would "feel cheated" if he installed a replacement on-lot system and then public sewer comes into the neighborhood to which he must connect. *Id.*

132. Ms. Mahoney is currently reviewing an application for an alternate sewage disposal (drip dispersal micromound) system for the Gormley property in Echo Valley. (N.T. 429.)

133. Mr. Gormley is trying to sell his home but needs a functioning septic system for the transaction to go through and his current system is failing. (N.T. 430.)

Further Input from DEP in Township's Development of 2013 Plan Update

134. On August 13, 2012, Dave Porter, of Mr. MacCombie's office, contacted Ms. Mahoney by e-mail about the status of the Plan Update. (N.T. 388); Ex. DEP-14.

135. On September 19, 2012, Mr. Porter contacted Ms. Mahoney by e-mail, attaching a draft of a public notice for the Plan Update. (N.T. 388-389); Ex. DEP-15.

136. On January 16, 2013, Mr. Porter contacted Ms. Mahoney by e-mail with questions regarding the Plan Update. (N.T. 389); Ex. DEP-16.

137. On January 28, 2013, Mr. Porter contacted Ms. Mahoney by e-mail with more questions for Ms. Mahoney regarding the Plan Update. (N.T. 389); Ex. DEP-17.

Township's Submission of 2013 Plan Update to DEP

138. In late March, 2013, the Township's 2013 Plan Update was submitted to Ms. Mahoney for review. (N.T. 390); Ex. TWP-2.

139. The 2013 Plan Update submitted by the Township to DEP in late March, 2013 consists of an Executive Summary that includes 6 Titles: (I) Previous Wastewater Planning; (II) Physical and Demographic Analysis; (III) Existing Sewage Facilities in the Planning Area; (IV) Future Growth and Land Development; (V) Alternatives to Provide New or Improved Wastewater Disposal Facilities; (VI) Evaluation of Alternatives; (VII) Institutional Evaluation; and (VIII) Selected Treatment and Institutional Alternative. TWP-2, Exec. Summary.

140. The submitted 2013 Plan Update also includes two Tables: (1) Projected Dwelling Unit Connections per Year and (2) Population Projections, and Appendices including: (A) Study Area; (B) Zoning Map; (C) 2010 Land Use; (D) Soils, Soil Limitations for on-Lot Disposal Systems; (E) Geology; (F) Topography; (G) Water Resources; (H) Public Water Supply; (I) Schematic of Springton Pointe Estates WWTP; (J) Proposed and Existing Development; (K)

Proposed Collection and Conveyance System; (L) Flow Projection Summary Table; (M) PNDI Response; (N) PHMC Response; (O) Detailed Cost Opinions; (P) Ordinances Being Considered for Adoption; (Q) Municipal Comments and Responses; (R) County Comments and Responses; (S) Proof of Publication; (T) Commonwealth of Pennsylvania Department of Environmental Protection Consent Order and Agreement; (U) Adopted Resolutions; (V) Approved Plan of Study and Task Activity Report; (W) Central Delaware County Authority (CDCA) Agreement; (X) Ashford Agreement; (Y) “7-Party” Agreement; (Z) Marple Township Acknowledgement; (AA) Pennoni Associates, Inc. - Door-to-Door Needs Survey; (BB) Act 537 Sewage Disposal Needs Surveys; and (CC) Public Comments and Responses. Ex. TWP-2.

Township’s Ability and Commitment to Implement 2013 Plan Update

141. The Township is an established entity with sufficient staff and administrative resources to implement the 2013 Plan Update. It has adequate financial resources to implement the 2013 Plan Update, including available funding methods such as municipal bonds, bank loans, and commitments from developers, and it has existing legal authority to implement the 2013 Plan Update, including but not limited to the ordinances adopted on October 14, 2014. Ex. TWP-2, Exec. Summary, pp. 47-54; TWP-40, 41.

142. Newtown Township adopted Resolution 2013-10, titled “Approval of Act 537 Sewage Facilities Plan Update,” on March 25, 2013. Ex. TWP-2, Appendix U.

143. Resolution 2013-10 provides, in relevant part, that:

“NOW, THEREFORE, BE IT RESOLVED that the Board of Supervisors of the Township of Newtown hereby adopt and submit to the Department of Environmental Protection for its approval as an update to the “Official Plan” of the municipality, the above referenced Facility Plan. **The municipality hereby assures the Department of the complete and timely implementation of the said plan** as required by law.”

Id. (emphasis added).

144. Ms. Mahoney is familiar with Appendix U. (N.T. 423); Ex. TWP-2, Appendix U. She reviewed Resolution 2013-10 and found it to be adequate. *Id.*

145. The Board of Supervisors is “[a] hundred percent” committed to the 2013 Plan Update that was adopted. (N.T. 265.)

146. The Township is “absolutely” committed to implementing the 2013 Plan Update, (N.T. 276-277.) The Township is “extremely committed and would like to build it exactly the way it’s shown on the Plan...” (N.T. 60.)

147. The Township adopted two ordinances to implement the Township’s sewage management program² under the 2013 Plan Update on October 14, 2014. (N.T. 268-269, 273); Ex. TWP-40, 41.

148. The 2013 Plan Update that was submitted to the Department in March, 2013, contained proposed versions of those ordinances. (N.T. 345); Ex. TWP-2, Appendix P.

149. Ordinance 2014-2 enacts the Township’s sewage management program. Ex. TWP-40; (N.T. 441.)

150. Ordinance 2014-3 details the public sewer connection requirement and connection deferral. Ex. TWP- 41; (N.T. 441.)

151. Ms. Mahoney had the opportunity to review the ordinances adopted by the Township. (N.T. 441-442.)

152. Ms. Mahoney found no problems with the ordinances and found them to be acceptable. (N.T. 442.)

² A “sewage management program” is defined as “A program authorized by the official action of a municipality for the administration, management and regulation of the disposal of sewage.” 25 Pa. Code §71.1 (defn. of “sewage management program”).

153. Ms. Mahoney reviewed the Plan documents and testified that numerous Plan documents, and other information in the record, provide the Department with assurance that the Plan is able to be implemented and the Township is committed to implement it. (N.T. 414.)

154. Ms. Mahoney examined whether the Township is able and committed to implement the 2013 Plan Update by considering: (1) the Resolution adopting the 2013 Plan Update enacted by the Township (*see* TWP-2, Appendix U); (2) the fact that the Township went “above and beyond” in soliciting public input and changing alternatives where the public had requested changes, most notably for Ms. Wilson’s Echo Valley neighborhood; and (3) the information contained in the 2013 Plan Update. (N.T. 424.)

155. After her review, Ms. Mahoney determined that that the Township was able to implement the Plan. (N.T. 414.)

156. The Township is able and committed to implement the 2013 Plan Update that was approved by the Department. (N.T. 425.)

Financial Feasibility, Costs, and Cost Effectiveness of 2013 Plan Update

157. The Township prepared a preliminary cost estimate in support of the 2013 Plan Update. (N.T. 410); Ex. TWP-2, Exec. Summary, page 46; Appendix O.

158. The Township is required to use projected or estimated costs, not actual costs, in sewage facilities planning. (N.T. 411.)

159. The “tap in fee” for the 2013 Plan Update is estimated to be between \$4,500 and \$6,000. Ex. TWP-2, Exec. Summary, page 46; Appendix O; (N.T. 411.)

160. The annual user fee for the 2013 Plan Update is estimated to be between \$500 and \$750. *Id.*

161. The Township's 2013 Plan Update would cost approximately \$27 million. (N.T. 17.)

162. The Township prepared information on how the estimated costs compare to other sewage facilities plans in the area. (N.T. 411-412); Ex. TWP-2, Appendix O, p. 2.

163. Tap-in fees for Easttown Township and Willistown Township range from \$15,000 to \$19,000. *Id.*

164. In other townships, such as Marple, Haverford and Radnor, which have older public sewer systems, tap-in fees range from \$850 - \$1,500. *Id.*

165. In a neighboring township, Edgmont Township, that is similar to Newtown because it is a member of CDCA, tap-in fees are between \$4,500 and \$6,000. *Id.*

166. Based on the cost estimates set forth in the 2013 Plan Update, the tap-in fees and annual fees were in line with what Ms. Mahoney has seen in other Act 537 planning documents. (N.T. 414.)

167. The Township also examined the cost-effectiveness of its 2013 Plan Update. (N.T. 413); Ex. TWP-2, Exec. Summary, page 55.

168. The Township concluded that in areas of the Township where there are sewer malfunctions, and where future development is planned, as described in pages 43-50 of the Executive Summary, the CDCA alternative is the most cost-effective. Ex. TWP-2, Exec. Summary, pp. 43-50, 56.

169. The CDCA alternative is the most cost-effective. (N.T. 413.)

170. Smaller land application or package plants that serve a small number of systems, become very expensive over time due to the limited user base. (N.T. 413-414.)

The 2013 Plan Update is Comprehensive

171. The Township has several mechanisms available to revise a plan including an update revision, as was done by the Township here, or it may do a special study, or planning modules for specific developments, which are like mini plan updates. (N.T. 425-426.)

172. If a Plan is revised by the Township, the Township need not revise the entire Township Plan for the revision to be “comprehensive”; the Township may elect to only revise a portion of the Plan. (N.T. 426.)

173. The Township has the option of focusing on a particular study area. *Id.*

174. The Township focused on its Crum Creek Basin, which “is a natural choice” because that area would be more readily served by CDCA rather than the Radnor, Haverford, Marple Authority that serves the other half of the Township. *Id.*

175. The 2013 Plan Update is “comprehensive” based upon the fact that the Township evaluated not only the needs of existing property owners but also included projections of the needs for new land development projects. (N.T. 426-427.)

Department Review of Township’s 2013 Plan Update

176. Ms. Mahoney has been familiar with sewage facilities planning issues in Newtown Township for approximately seven years. (N.T. 380.)

177. Ms. Mahoney reviewed the 2013 Plan Update. *Id.*; (N.T. 397.)

178. Ms. Mahoney completed an administrative review of the 2013 Plan Update. She concluded that the 2013 Plan Update was complete as submitted. (N.T. 398.)

179. Ms. Mahoney also performed a technical review of the 2013 Plan Update. She “concluded that the Plan met regulatory requirements, and...recommended it for approval.” *Id.*

Department Review of the Township's Need for Public Sewer

180. Ms. Mahoney is familiar with the DEP guidance document titled “Act 537 Sewage Disposal Needs Identification.” The document provides guidance to municipalities on how to conduct on-site system surveys in support of Act 537 Plan Updates, and includes a suggested categorization of on-site systems. (N.T. 391-392); Ex. TWP-6.

181. The Sewage Disposal Needs Identification Guidance lists four general classifications. (N.T. 391-393); Ex. TWP-6. The first category is confirmed malfunctions, including actively malfunctioning systems. *Id.* The second category is suspected malfunctions, including systems with abnormally lush grass, absorption areas located in unsuitable soils, and cesspools. *Id.* A third category is potential malfunctions, systems that appear to operate correctly but are installed in areas unlikely to be approved, or are on sites that have limitations for the placement of on-site sewage disposal systems. *Id.* The fourth category is no malfunction. *Id.*

182. Ms. Mahoney is familiar with the October 2, 2009 survey of sewage needs titled the “Echo Valley Area Door-to-Door Needs Survey for On-Lot Sewage Systems.” that was prepared by Pennoni Associates for Newtown Township. (N.T. 393-394); Ex. TWP-2, Appendix AA. The survey found 8 percent of the surveyed properties are confirmed malfunctions, 20 percent are suspected malfunctions, 57 percent are potential malfunctions, and 15 percent have no malfunctions. (N.T. 393-394); Ex. TWP-2, Appendix AA.

183. Ms. Mahoney is also familiar with a second sewage needs survey, prepared by Mr. MacCombie’s firm for the Township, titled “Act 537 Update Revision Sewage Disposal Needs Identification Survey Report,” (N.T. 394-395); Ex. TWP-2, Appendix BB. The survey included areas of the Township other than Echo Valley. (N.T. 395.)

184. Ms. Mahoney noted that the Florida Park and Echo Valley areas of the Township

have the most immediate sewage disposal needs from a public health standpoint. Ex. TWP-2, Exec. Summary, p. 24; (N.T. 393.)

185. Other areas of the Township with sewage disposal needs, such as Llangollen, which has a high number of suspected malfunctions, were not prioritized because there were no confirmed malfunctions in that area. *Id.*

186. In addition to the sewage needs surveys, the Township also looked at studies of soils types and characteristics within the sewer study area covered by the 2013 Plan Update. (N.T. 395); Ex. TWP-2, Appendix D.

187. Ms. Mahoney reviewed the Township's soil information. *Id.*

188. Soils in Florida Park "have severe limitations for on-site sewage disposal," and that Echo Valley soils have "moderate to severe limitations." (N.T. 395-396.)

189. The soils in the Llangollen and Sleepy Hollow areas also have moderate to severe limitations. *Id.*

190. The Township also evaluated other factors, such as the needs of future land development, zoning, lot size, and the age of neighborhoods, to determine sewage needs. (N.T. 396.)

191. The information provided by the Township demonstrates that the study area is in need of public sewers. (N.T. 397.)

192. The Township published notice of its Draft Plan Update and 2013 Plan Update for public comment, respectively, on 2 occasions. (N.T. 398.) The first publication for public comment is required by Chapter 71 of DEP's regulations, and the second publication for public comment was established to advertise changes to the Draft Plan Update. (N.T. 398.)

193. The Township received public comments in response to both publications. (N.T.

398-399.)

194. Ms. Mahoney reviewed the 2013 Plan Update to see if the Township adequately considered the comments, and concluded that they did. (N.T. 399.)

DEP Review of the Township’s Identification of Sewage Facility Planning Alternatives

195. Ms. Mahoney described the various sewage disposal alternatives considered by the Township: (1) connection to public sewer via gravity sewer and pump station conveyance system; (2) low pressure sewer grinder pumps, with attendant operation and maintenance requirements; (3) on-site sewage disposal system community disposal; (4) individual on-site sewage disposal system; (5) holding tanks; and (6) a no action alternative. (N.T. 399-400); Ex. TWP-2, Exec. Summary, Page 34.

196. Ms. Mahoney reviewed the alternatives identified by the Township. (N.T. 400.)

197. Ms. Mahoney determined that, the Township satisfied statutory and regulatory requirements for identifying alternatives. (N.T. 400-401.)

DEP Review of the Township’s Evaluation of Sewage Facility Planning Alternatives

198. The Township evaluated the alternatives by conducting a two-part analysis. The Township first eliminated infeasible alternatives, such as holding tanks, small-flow sewage treatment facilities, and the regional land application concept. The Township then focused on various options for collection and conveyance through the selected alternative (public sewer). (N.T. 401-402.)

199. Ms. Mahoney reviewed consistency with the Clean Streams Law (“CSL”). (N.T. 402.)

She agreed with the Township’s finding that public sewer is consistent with the CSL since the sewage would be conveyed from the Township via public sewer to the DELCORA wastewater

treatment plant for treatment and discharge into the Delaware River. *Id.*

200. Ms. Mahoney reviewed the consistency of public sewer with Chapter 94 (Wasteload Management). She agreed that public sewers are generally consistent with Chapter 94. (N.T. 402-403.)

201. The Chapter 94 wasteload analysis suggested that new connections to the sewer service area might overload the Camelot Pump Station. (N.T. 402-403.)

202. The Township resolved the inconsistency by proposing the expansion of the Camelot Pump Station so that it could accept the anticipated sewage flow. (N.T. 408-409.)

203. The Township evaluated the consistency of public sewer alternative with Comprehensive Plans under the Municipalities Planning Code (“MPC”). She agreed with the Township’s conclusion that public sewer was consistent with the MPC. The Township solicited comments from both the local and county planning agencies and neither of those agencies had any adverse comments on the Plan. (N.T. 403-404.)

204. Ms. Mahoney also reviewed whether the public sewer alternative is consistent with the Antidegradation requirements of Chapters 93, 95 and 102. (N.T. 404-405.) She agreed with the Township’s conclusion that the selective alternative was consistent with Antidegradation requirements because: (1) the 2013 Plan Update does not propose any discharge to Special Protection streams and (2) implementation of the 2013 Plan Update will improve water quality by eliminating failing on-site septic systems from the immediate needs area. (N.T. 404-405.)

205. Ms. Mahoney also examined whether the public sewer alternative is consistent with the State Water Plan, Prime Agricultural Lands Policies, and the Delaware County Stormwater Management Plan (N.T. 405-406.) She agreed with the Township’s conclusion that

there are no conflicts between public sewers and these programs. (N.T. 405-406.)

206. Ms. Mahoney agreed with the Township that there may be some temporary wetland disturbances as a result of sewer construction, but those disturbances would be covered under a separate Department permitting process in 25 Pa. Code Chapter 105. (N.T. 406.)

207. The Township evaluated the consistency of the selected alternative (public sewer) with requirements for the protection of threatened, rare and endangered plant and animal species, and for historic and archaeological resource protection. (N.T. 407-408.) The Township conducted a large project Pennsylvania Natural Diversity Index (“PNDI review”), and contacted the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, and the United States Fish and Wildlife Service. (N.T. 407.)

208. Appendix N includes the Township’s submittal of information to the Historical and Museum Commission (“PHMC”). Ex. TWP-2, Appendix N; (N.T. 407.)

209. The Township performed an analysis of water quality standards and effluent limits. The Township’s conclusion that the selected alternative (public sewer) would not have an adverse impact on public water supplies, and, in fact would likely have a positive impact on such supplies, was reasonable because implementation of the selected alternative will result in “the elimination of confirmed failures, suspected failures, marginal septic systems.” (N.T. 409-410.)

210. The public sewer alternative involves no direct discharge of wastewater in the Township, which also is protective of the public water supply. (N.T. 410.)

211. Ms. Mahoney determined that the Township evaluated, for each alternative, cost estimates for construction, financing, ongoing administration, operation and maintenance. (N.T. 412.)

212. The Township’s evaluation is a preliminary cost estimate that includes

information on the expected tap-in fee (between \$4,500 and \$6,000) and the annual user fee (between \$500 and \$750 per year). Ex. TWP-2, Appendix O; (N.T. 411-412.)

213. Ms. Mahoney examined the cost estimates set forth in the 2013 Plan Update and concluded that “the tap-in fees and annual fees were in line with what I’ve seen in other Act 537 planning documents.” Ex. TWP-2, Appendix O; (N.T. 414.)

214. The Township prepared estimated costs, not actual costs; only estimated costs are required to be prepared for an Act 537 Plan. (N.T. 411.)

215. The Township is not required to choose the least costly option, only an option that is administratively, environmentally, and technically acceptable. (N.T. 412-413.)

216. The CDCA alternative is the most cost-effective sewage alternative for the Township. (N.T. 413.)

217. In Ms. Mahoney’s experience, smaller land application or package plants that serve a small number of systems become very expensive to run over time due to the limited user base. (N.T. 413-414.)

218. The Township has the ability to implement the 2013 Plan Update or instruct its Municipal Authority to implement portions of the 2013 Plan Update. (N.T. 414-416, 420.)

219. The Township examined a “no action” alternative and concluded that, by doing nothing, it would not meet its obligations with regard to growth potential, and would not protect drinking water sources, water quality, and public health. (N.T. 416-417.)

220. The selected sewage alternative, the public sewer alternative, will protect the environment and public health and also provide for potential growth within the Township. (N.T. 417.)

221. The Township’s selected alternative is technically feasible because CDCA is an

existing authority that provides sewage conveyance infrastructure, DELCORA is an existing wastewater treatment provider, and the Township has the ability to enact ordinances to effect implementation of the Plan, the ability to enter into contracts, and the ability to apply for Department permits and any other approvals that may be needed in order to construct the selected alternative. (N.T. 419-420.)

222. Ms. Mahoney reviewed the 2013 Plan Update to see if the Township selected an alternative that is environmentally, technically and administratively acceptable. She concluded that the 2013 Plan Update satisfied this requirement. (N.T. 433-434); 25 Pa. Code § 71.21(a)(6).

223. The Township is not required to select the “best” alternative, only an alternative that is environmentally, technically and administratively acceptable. (N.T. 433); 25 Pa. Code § 71.21(a)(6).

224. The Township’s identification, evaluation, and selection of the public sewer sewage facilities alternative provides adequately for the collection, conveyance, and treatment of sewage from immediate sewage needs areas in the study area, and satisfies statutory and regulatory requirements. (N.T. 420.)

Department Review of the Sewage Capacity of the 2013 Plan Update

225. Appendix L (Flow Projection Summary Table) demonstrates that the Township has sufficient capacity through its current contract with CDCA to meet the needs of its immediate sewer service area. (N.T. 420-421); Ex. TWP-2, Appendix L.

226. 961,975 gallons per day of sewer capacity is adequate for the area covered by the 2013 Plan Update. (N.T. 423.)

227. Mr. MacCombie’s approach of reaching out to developers and others, on various capacity items, was a reasonable one. *Id.*

228. Act 537 requires that new land developments prepare their own sewage planning modules. *Id.*

229. If any of the future planning modules come in at or below existing capacity, the Township would not need to secure additional capacity for them. (N.T. 422.)

230. In Ms. Mahoney’s expert opinion, to a reasonable degree of scientific certainty, the 2013 Plan Update provides adequate capacity for the immediate sewage needs of the sewer study area. (N.T. 422.)

231. The Township is able and committed to implement the 2013 Plan Update that was approved by the Department. (N.T. 425.)

232. The Township’s 2013 Plan Update was “comprehensive” because the Township evaluated not only the needs of existing property owners but also included projections of the needs for new land development projects.” (N.T. 426-427.)

233. In Ms. Mahoney’s expert opinion, the approved 2013 Plan Update is comprehensive. (N.T. 427.)

Department Approval of 2013 Plan Update

234. On September 24, 2013, the Department approved the 2013 Plan Update submitted by the Township. Ex. DEP-1.

235. Notice of the Department’s approval of the 2013 Plan Update was published in the *Pennsylvania Bulletin* on October 5, 2013. 43 Pa.B. 5881- 82; Ex. EHB-1, at Para. 35.

236. The September 24, 2013 approval document was signed by Ms. Mahoney’s Program Manager, Jennifer Fields, P.E., upon Ms. Mahoney’s recommendation. (N.T. 428); DEP-1.

237. Ms. Mahoney recommended that Ms. Fields sign the September 24, 2013

approval letter because, as a result of Ms. Mahoney’s review, Ms. Mahoney concluded that the Township met regulatory requirements in terms of developing the 2013 Plan Update, and selected an alternative that was technically, administratively, and environmentally acceptable. (N.T. 428); Ex. DEP-1.

238. Ms. Mahoney tracked sewage facilities related events in the Township that occurred after September 24, 2013. (N.T. 428.)

239. Nothing since September 24, 2013 has changed Ms. Mahoney’s opinion about the viability of the approved 2013 Plan Update. (N.T. 433.)

240. Sewage facilities planning requires development of a general concept of how sewage will be conveyed and disposed of within the relevant area to protect the health, safety and welfare of the community, given the approximate locations of facilities and the anticipated methodologies of sewage conveyance and disposal. (N.T. 149-150, 284-285, 373-374, 409.)

241. Sewage facilities design, on the other hand, determines the exact locations, metes and bounds, and depths of the facilities to be installed. (N.T. 35-36, 150, 285-286.)

242. In order to actually build its system, the Township will have to design the system, at a more pinpoint level, for engineering purposes. *Id.*

243. The Township has not yet sought any design approvals. *Id.*

244. When the prior engineers who developed the 2009 Plan Update engaged in design work before the 2009 Plan Update was final, “it was probably a waste of money by going to the next phase before the approval process was completed.” (N.T. 267.)

245. In addition to needing to obtain the various new permits and approvals from DEP, the Township will also need to “re up” its information on PNDI, PHMC, Fish and Boat Commission, Game Commission, and endangered species when it designs and constructs its

sewer system. (N.T. 63.)

246. The Township may also need to obtain federal approvals or permits, should its design proposals come under federal jurisdiction, such as if it proposes as part of the project the dredge and fill of waters of the United States, including wetlands, which would require a permit under Section 404 of the Clean Water Act, 33 U.S.C. §1344; *Id.*

ELIZABETH MAHONEY

247. Ms. Elizabeth Mahoney is a Sewage Facilities Supervisor in the Department's Southeast Regional Office whose duties include the review of Act 537 sewage facilities plans, sewage facilities plan updates, sewage facility planning modules, private requests for sewage facility planning, and overseeing the sewage enforcement officer on-lot program. (N.T. 371-72.)

248. Ms. Mahoney has worked for the Department for over 21 years. She was a Water Quality Specialist from 1993 to 1998 and a Sewage Planning Specialist II from 1998 to 2007. She has been a Sewage Planning Supervisor since 2007. Ex. DEP-21; (N.T. 372.)

249. Ms. Mahoney's job duties include supervising four Sewage Planning Specialists and one Soil Scientist in the Southeast Region; she administers the Act 537 program by reviewing Act 537 plans, plan updates, sewage facility planning modules for new land development, and private requests to revise sewage facility plans. She also oversees the sewage enforcement officer on-lot permitting program. (N.T. 371-72.)

250. Ms. Mahoney has reviewed approximately 90 sewage facilities planning updates or revisions during her 21 plus year DEP career. (N.T. 375.)

251. Ms. Mahoney has reviewed approximately 90 plan of study submittals for sewage facilities planning. (N.T. 387.)

252. Ms. Mahoney has reviewed over 600 revisions to land development plans during

her DEP career. (N.T. 375.)

253. Ms. Mahoney has reviewed approximately 6 private requests during her DEP career. (N.T. 376.)

254. Ms. Mahoney is a certified sewage enforcement officer (“SEO”). She earned the certification in 2003. (N.T. 376-377.)

255. Ms. Mahoney has been involved in sewage facilities planning enforcement including drafting orders requiring municipalities to update their Act 537 plans, and drafting consent orders and agreements with municipalities. (N.T. 376.)

256. Ms. Mahoney has a Bachelor of Science degree in Biology from the Pennsylvania State University. (N.T. 377.)

257. Ms. Mahoney has received continuing education to maintain her SEO certification as well as training in soils. (N.T. 377-78.)

258. Ms. Mahoney’s *curriculum vitae* accurately reflects her academic and work record and achievements. Ex. DEP-21; (N.T. 379.)

259. Ms. Mahoney was qualified by the Board as an expert on sewage facilities planning and regulation, including technical and regulatory review and evaluation of municipal sewage facilities plan updates. (N.T. 379-80.)

260. In Ms. Mahoney’s expert opinion, to a reasonable degree of scientific certainty, the Township’s 2013 Plan Update that was approved by the Department adequately provides for the collection, conveyance and treatment of sewage in the immediate sewage needs areas of the 2013 Plan Update Study Area in the Crum Creek Basin of the Township. (N.T. 434.)

JAMES MACCOMBIE, P.E., P.L.S.

261. James W. MacCombie, P.E., P.L.S., is an engineer and a principal at Herbert E.

MacCombie, Jr., Consulting Engineers and Land Surveyors. (N.T. 279.)

262. Mr. MacCombie has been a registered professional engineer, and a registered professional land surveyor since 1982. *Id.* He has been doing sewage facilities planning for over 30 years. (N.T. 282.)

263. The largest sewage facilities plan prepared by Mr. MacCombie was the plan for West Brandywine Township. (N.T. 16.)

264. Mr. MacCombie represents several sewer authorities and municipal authorities in Chester and Delaware counties in addition to Newtown Township, including Tincum Township, Avondale Borough, Sadsbury Township, East Fallowfield Township. (N.T. 279-282.)

265. Mr. MacCombie is also the Engineer for the Newtown Township Municipal Authority. (N.T. 329.)

266. Mr. MacCombie has experience in sewage facilities design. (N.T. 284.)

267. Mr. MacCombie was qualified as an expert in sewage facilities planning with respect to the opinions contained in the Act 537 Plan. (N.T. 290.)

268. In Mr. MacCombie's professional opinion, the 2013 Plan Update is technically competent. (N.T. 345); Ex. TWP-2.

269. Mr. MacCombie believes that the 2013 Plan Update is feasible. *Id.*

JOSEPH CATANIA

270. Joseph Catania is chairman of the Board of Supervisors of Newtown Township. (N.T. 259.)

271. Mr. Catania has been on the Board since 2003, and has been Chairman for at least 3 years. (N.T. 259.)

272. Mr. Catania is familiar with the 2013 Plan Update. (N.T. 259.)

273. Mr. Catania and the rest of the Board hired Mr. MacCombie to do the Plan Update, and “left in his hands” how the Plan Update would be developed. (N.T. 259-61.)

274. The Board of Supervisors is “[a] hundred percent” committed to the 2013 Plan Update that was adopted. (N.T. 265.)

275. Mr. Catania testified that he is “absolutely” committed to implement what’s in the 2013 Plan Update. (N.T. 276-277.)

PATRICIA A. WILSON

276. Ms. Wilson filed an appeal raising 33 wide-ranging appeal points.

277. Ms. Wilson did not testify at the EHB Hearing.

278. Ms. Wilson submitted 92 comments on the October, 2012 Draft Plan Update the Township was preparing for submission to DEP. Ex. TWP-2, Appendix CC.

279. Ms. Wilson submitted an additional 10 new comments on the February, 2013 Plan Update the Township later submitted to DEP, along with 42 supplemental comments to her October, 2012 comments. *Id.*

DISCUSSION

Background

The matter before the Board today is a consolidated appeal of the Department’s approval of the Township’s 2013 Plan Update on September 24, 2013. The Crum Creek Basin of Newtown Township is currently served by an Act 537 Plan, dated May 23, 2002, as supplemented on August 13, 2002 and approved by the Department on August 29, 2002 (“2002 Plan”). In 2007, the Township submitted a Plan Update to address sewage needs in the Crum Creek Basin. On February 6, 2009, the Department approved the Township’s Plan Update (“2009 Plan Update”) to its 2002 Plan. The 2009 Plan Update was appealed by Wilson and

others. *See* EHB Docket Nos. 2009-024-L, 2009-026-L and 2009-033-L. After a hearing, the Board issued an Adjudication and sustained the challenge to the 2009 Plan Update. *Wilson v. DEP*, 2010 EHB 827.

The Department and the Township executed a Consent Order and Agreement dated January 28, 2010, which required the Township to prepare and submit a new Act 537 Plan Update to the Department within 215 days of its execution. In August 2010, the Township submitted a 2010 Plan Update to the Department for review. On November 29, 2010, the Department issued a review letter to the Township identifying numerous deficiencies with the 2010 Plan Update submission. Following the Township's receipt of November 29, 2010 review letter, the Department met with the Township in early 2011 to discuss means to address the numerous deficiencies identified in the 2010 Plan Update submission.

In June of 2011, the Township hired a new Township Manager, J. Michael Trio, who contacted the Department to clarify the Department's planning expectations. The Township hired a new engineer, Mr. MacCombie, to develop a new Plan Update.³ Mr. MacCombie, on behalf of the Township, submitted a new Plan of Study to the Department for review in December, 2011. The Department approved the new Plan of Study on February 12, 2012. As a result of the Township's hiring of Mr. MacCombie, the Township asked Mr. MacCombie to prepare a whole new Act 537 Plan Update "from scratch" and to do what he believed was necessary to prepare an acceptable plan.

Mr. MacCombie prepared the 2013 Plan Update, with the assistance of his staff. The 2013 Plan Update was submitted to the Department for review in March 2013. On September 24, 2013, the Department approved the Township's 2013 Plan Update. Notice of the

³ Mr. MacCombie, P.E., P.L.S. is an engineer and a principal at Herbert E. MacCombie, Jr., Consulting Engineer and Land Surveyors. (N.T. 279.)

Department's approval of the 2013 Plan Update was published in the *Pennsylvania Bulletin* on October 5, 2013. 43 Pa. B. 5881-82 (October 5, 2013). On October 24, 2013, Ms. Wilson filed a notice of appeal with the Board. *See* EHB Docket No. 2013-192-M. On November 1, 2013, the De Rita Appellants filed a related appeal with the Board. *See* EHB Docket No. 2013-200-M. On November 18, 2013, the SPEHOA filed a Petition to Intervene in the Wilson Appeal which the Board granted on January 2, 2014. On March 6, 2014, the Board issued an Order consolidating the Wilson and DeRita appeals. Beginning on October 14, 2014, the Board held a hearing on the consolidated appeals. The hearing concluded on October 15, 2014.

On the day before the hearing on October 13, 2014, the Township, the Department and the DeRita Appellants entered into a "Settlement Agreement and Mutual Release" which provided that the DeRita Appellants would withdraw their appeal with prejudice. The DeRita Appellants did not participate at the hearing or file a post-hearing brief. On January 22, 2015, the DeRita Appellants notified the Board that they wished to withdraw their appeal. On February 17, 2015, the Board issued an order granting the DeRita Appellants' request and the appeal was closed and discontinued.

On the day before the hearing on October 13, 2014, the Township, the Newtown Township Municipal Authority and SPEHOA entered into a Settlement Agreement to settle the issues raised by the SPEHOA Intervenors. The Settlement Agreement specifically provided that "the appeal/intervention of the SPEHOA will be withdrawn with prejudice." On February 3, 2015, SPEHOA withdrew its intervention, and on February 18, 2015, the Board issued an order to close and discontinue SPEHOA's intervention in the appeal.

At the hearing in this matter, only Appellant Ms. Wilson presented evidence in support of her appeal. Counsel for the DeRita Appellants and the SPEHOA Intervenors notified the Board

in writing that they would not appear at the hearing or provide any evidence or argument, in light of the separate settlement agreements. Neither parties prepared or submitted a post-hearing brief after the conclusion of the hearing. The Board, therefore, only has to address the objections and issues raised by the remaining Appellant, Ms. Wilson.

In her notice of appeal, Ms. Wilson listed detailed 33 objections. In her Pre-Hearing Memorandum and later in her Post-Hearing Brief, Ms. Wilson only pursued a small subset of these objections. If a party decides to not pursue an issue or objection in the party's Pre-Hearing Memorandum or Post-Hearing Memorandum the issue is waived. *See* 25 Pa. Code §§ 1021.104 and 1021.131(c); *DEP v. Seligman*, 2014 EHB 755-779; *Rural Area Concerned Citizens (RACC) v. DEP*, 2014 EHB 391, 411. The Board will therefore only address those issues or objections that Ms. Wilson preserved in her Post-Hearing Briefs.

The Department and the Township argue that Ms. Wilson lacks standing to raise numerous issues in her notice of appeal.⁴ The Board does not have to address this standing argument because, as set forth above, the Board only has to address those issues preserved by a party in their Post-hearing Memorandum. The Department and the Township do not challenge the standing of the Appellant to raise the issues listed in her Post-hearing Memorandum, and they instead focus on those issues earlier listed in her notice of appeal. As a practical matter, the Board will not consider any issues that are not preserved by a party in their Post-hearing Memorandum, so the Board will not consider any of the issues listed in Ms. Wilson's notice of appeal that are not preserved in her Post-hearing Memorandum. The Board's Rule at 25 Pa. Code § 1021.131(c) limits the issues that the Board will address in this Adjudication and not any

⁴ The Department and the Township both assert that Ms. Wilson does not have standing to raise issues numbered 2, 3, 5, 8, 9, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 33 in her notice of appeal. Department's Post-hearing Memorandum, Conclusion of Law No. 25, page 85; Newton Township's Post-hearing Brief, Conclusion of Law No. 42, page 40.

lack of standing on the part of the Appellant.⁵

At the hearing, the Appellant only called two witnesses: Mr. MacCombie, who was hired by the Township to prepare the 2013 Plan Update; and Ms. Mahoney, who is the Department employee that conducted the primary review of the Township's 2013 Plan Update. Ms. Wilson did not have any expert witnesses testify on her behalf, and her challenge to the technical aspects of the 2013 Plan Update was limited to her examination and later cross-examination of the witnesses identified above.⁶ Ms. Wilson, who is a resident of the Echo Valley neighborhood in the Plan study area, did not testify on her own behalf. Her challenge to the technical merits was, therefore, limited in scope, and her challenges to the Plan focused on regulatory requirements and her claim that either the Township or the Department failed to satisfy its obligations under various Department regulations in Chapter 71 governing the Department's sewage facility planning program.

Ms. Wilson identified eight issues or objections in her Post-Hearing Brief. (Appellant's Post-Hearing Brief at page 3.) Ms. Wilson argues that:

1. Newtown Township did not properly provide public notice of the 2013 Plan Update;
2. Newtown Township did not adequately respond to public comments;
3. The Department did not require the Township to respond or resolve the issues raised by the public comments;
4. The Township's inadequate responses to public comments ultimately resulted in

⁵ The Board has serious reservations regarding the merits of the Department's and the Township's challenge to Ms. Wilson's standing. *See Citizens Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 674 (Standing is specific to each Department's action, not whatever objections there may be to the action.) As a homeowner, and likely fee and rate payer who will be subject to the requirements of the 2013 Plan Revision, the Board has some difficulty identifying any aspect of the Plan that she lacks the standing to challenge. For the reasons set forth above, the Board need not address the limited standing arguments raised by the Department and the Township in this appeal.

⁶ The Department called Ms. Mahoney as its principal witness and the Township called Mr. MacCombie as its principal witness. Ms. Wilson therefore had two opportunities to examine these principal witnesses.

settlement agreements with DeRita Appellants and SPEHOA Intervenors that require further changes to the 2013 Plan Update under appeal;

5. 2013 Plan Update allocates capacity to future development over needs of existing developments;
6. 2013 Plan Update may not be financially feasible;
7. Newtown Township is not committed to implement the 2013 Plan Update as approved; and
8. The Department should not have approved the 2013 Plan Update as submitted.

(Appellant Wilson's Post-Hearing Brief at page 3.) The Board will address each of these preserved objections in order.

The Appellant's outline of her arguments in her initial Brief addressed some, but not all of these issues. *See* Section IV of Appellant Wilson Post-hearing Brief. The Appellant also identifies a few additional issues in the Applicable Legal Authority portion of her Brief. *See* Section III of Appellant's Brief, Paragraphs D, E, F, G, I, J, K and L. While there is significant overlap among the three lists of objections or issues, some of the listed concerns or issues were not developed in the Appellant's Brief or Reply Brief. The Board will, nevertheless, attempt to address all of the issues that the Appellant raised in her Post-Hearing Briefs to the extent that Appellant Wilson developed the issues.

Standard of Review

The Appellant bears the burden of proof in this matter. Under the Board's Rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action. 25 Pa. Code § 1021.122(c)(2); *See e.g., Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 410; *Gadinski v. DEP*, 2013 EHB 246, 269. Specifically, the Appellant must prove by a preponderance of the evidence that the Department's approval of the Township's 2013 Plan Update was not a lawful and reasonable exercise of the Department's discretion

supported by the evidence presented. See *Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772. In addition, the Appellant may prevail if the Department's decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Payne v. Rassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), aff'd, 361 A.2d 263 (Pa. 1976); *Brockway Borough Municipal Authority v. DEP*, Docket No. 2013-080-L (Adjudication issued April 24, 2015).

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

[T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. See, e.g., *Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156. The Board is also entitled to consider evidence that the Department did not consider when it made the decision under appeal.

Public Notice of the 2013 Plan Update

Appellant Wilson asserts that the Township's public notice of the 2013 Plan Update was improper, inaccurate and inadequate. Appellant Wilson's Post-Hearing Brief at 38. The Appellant does little to develop this argument other than to mention that the Township attempted

to improperly restrict public comments, when it sought public comments for a second time, after items in the Plan were changed following the initial public notice. *See* Appellant Wilson’s Post-Hearing Brief at 22.

The Department and the Township disagree with Ms. Wilson that the public notices and requests for public comments on the 2013 Plan Update were improper, inaccurate or inadequate. The Board agrees with the Department and the Township that the public notices for the 2013 Plan Update complied with the regulatory requirements for public notice for plans at 25 Pa. Code § 71.31(c). Section 71.31 is entitled “Municipal responsibility to review, adopt and implement official plans” and subsection (c) of this regulation provides:

(c) A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan’s major recommendations, including a list of the sewage facilities alternatives considered. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

25. Pa. Code § 71.31(c). This provision provides that a municipality preparing a plan shall submit evidence that it has published notice of the proposed plan in a newspaper of general circulation in the municipality.⁷ The notice shall contain several specified items and provide for a 30-day public comment period.

There is no dispute that the Township’s first public notice of the draft 2013 Plan Update appeared in the *Delaware County Times* on October 17, 2012. Sixty-six sets of comments were

⁷ The provision also provides that the municipality shall also submit a copy of all public comments received and the municipal response to each comment to the Department when it submits the plan to the Department. This aspect of subsection 71.31(c) will be addressed in the next portion of this adjudication.

submitted in response to this initial public notice. Ms. Wilson was one of the commentators and she submitted 92 comments to the Township.

The Township made changes to its 2013 Plan Update after receiving these public comments and it published a second notice in the *Delaware County Times* on February 14, 2013 and again requested public comments.⁸ The second notice and request for public comments is allowed under the Department's regulations at 25 Pa. Code § 71.31(c), but it is not required. In response to the second public notice and request for public comments, the Township received additional public comments from five persons including Ms. Wilson. She submitted ten new comments on the February 14, 2013 proposal and 42 supplemental comments to her earlier comments on the October 2012 proposal.

In her second set of comments, Ms. Wilson appears to object to the Township's second public notice that in her view "restricted public comments to those items specified in the notice as changed." Wilson Ex. 20; Appellant's Brief at page 22. The Department and the Township disagree and assert that the 2013 Plan Update was properly noticed both times the Township requested public comments. In support of their position, they rely upon the Board's decision in *Don Noll and Stephanie Clark v. DEP*, 2005 EHB 505, 528-532. In this decision the Board stated:

This Board has addressed issues regarding the adequacy of public notice and participation in the process of developing official plans or revisions of official plans before and stated:

The seminal case in this issue which both parties refer to is *Green Thornbury Committee v. DER*, 1995 EHB 636. Both parties agree that the test under *Green Thornbury* for whether there has been adequate public notice and participation in the module review process is "whether[appellant actually had access to the module to

⁸ One of the changes was in the method of sewage disposal for the Echo Valley Neighborhood where Ms. Wilson resides. The Township changed the method in response to public comments.

comment on it.” *Ainjar Trust v. DEP*, 2001 EHB 927, 980; *aff’d* 806 A.2d 482 (Pa. Cmwlth. 2002).

Id. The record is clear that Ms. Wilson actually had access to the revised proposal and submitted new comments on the revised proposal as well as supplemental comments on the initial proposal. In addition, the Department describes the Township’s extensive public outreach efforts and community meetings as support for their position that the Township properly noticed the 2013 Plan Update.⁹ Department’s Brief at pages 50-53.

The Board agrees with the Department and the Township that the public notice for its 2013 Plan Update was adequate under the test that the Board first announced in *Thornbury Committee v. DER*, 1995 EHB 636. In *Don Noll and Stephanie Clark v. DEP*, 2005 EHB at 532, the Board concluded:

Given the number of meetings over several years at which sewage issues were discussed by the Township Supervisors and the public, including the Appellants, the written comments submitted by both Appellants and the review of the actual plan by the Appellants prior to adoption of the plan, it is clear that the test set forth in *Green Thornbury* and reiterated in *Ainjar Trust* has been met in this case.

Id. In this matter the Board has a similar record before it. The Township conducted extensive public outreach and participation efforts concerning the development and adoption of the 2013 Plan Update. The public, including the Appellant, had two opportunities to submit public comments on the proposed 2013 Plan Update.¹⁰ The Appellant and the public had access to the 2013 Plan Update prior to its adoption. The Appellant took full advantage of both opportunities

⁹ The Board agrees with the Department that the Township had an extensive public outreach program as part of its efforts to prepare and develop the 2013 Plan Update. See Finding of Fact Nos.72-92 at pages 11-14.

¹⁰ The regulations at 25 Pa. Code 71.31(c) only require public notice and an opportunity for public comment “at least once.” Here, the Township decided that a second public notice and opportunity for public comments was warranted in light of proposed revisions.

to submit public comment. These facts demonstrate that the Township satisfied the test set forth in *Don Noll* and reiterated in *Green Thornbury* and *Ainjar Trust*.

Ms. Wilson also suggests that the Township should have sought additional comments from area planning agencies or other adjacent municipalities when it revised the Plan and sought additional public comments on February 14, 2013. The Department and the Township disagree and assert that the Township did request and obtain input from several municipal entities around the time that the Township published notice of the 2013 Plan Update and for the first time on October 17, 2012. The Township asked for input from the Newtown Township Planning Commission by letter dated October 22, 2012, from neighboring townships (Marple Township and Edgmont Township) on October 31, 2012 and from the Delaware County Planning Department (DCPD) on October 22, 2012. The Board agrees that the Township did not need to request or obtain additional comments or input from the municipal entities listed above when it sought additional public comments on the proposed revisions to the 2013 Plan Update on February 14, 2013.

Newtown Township's Response to Public Comments

The Appellant also asserts that the township did not adequately respond to the numerous public comments it received on its 2013 Plan Update. The Appellant believes that the Township improperly dismissed or ignored public comments in violation of 25 Pa. Code § 71.32(d)(2). As proof of the inadequate response to various public comments, Ms. Wilson asserts that the appeal of the DeRita's Appellants and the intervention of the SPEHOA Intervenors and the subsequent settlement agreements with these parties are evidence that that the Township's responses to certain public comments were inadequate. Finally, Ms. Wilson objects to the Township's

response to some of the public comments that merely stated: “Your comment is noted.”¹¹ She believes that such a response is inadequate on its face.

The Township and the Department disagree with Ms. Wilson that the Township inadequately responded to questions raised by the Appellants. They assert that the Township fully complied with its obligation to adequately respond to all questions raised in comments by the public. *See* 25 Pa. Code §§ 71.31(c) and 71.32(d)(2).

The Board agrees with the Department and the Township that the Township satisfied its regulatory obligation under 25 Pa. Code § 71.31(c) to provide for a public comment period and to submit a copy of all written questions received and the Township’s responses to each comment with the Plan. The facts before the Board clearly establish that the Township provided for two public comment periods: after the October 17, 2012 public notice; and after the February 12, 2013 public notice. There is no dispute that the Township submitted all of the public comments it received to the Department when it submitted its 2013 Plan Update to the Department.

The point of contention is the adequacy of the Township’s response to some public comments and whether the Township’s response to some comments that “Your comment is noted” is inadequate on its face. In this appeal the Appellant has the burden of proof as previously stated, and Ms. Wilson has not identified any facts in the record, other than a facial challenge to the above referenced general response, to support her claim that the Township’s responses to some public comments were inadequate under 25 Pa. Code § 71.31(c).

¹¹ Ms. Wilson also appears to challenge the fact that Mr. MacCombie did not personally review each and every comment. *See* Appellant’s Proposed Findings of Fact No. 10, at page 5. Mr. MacCombie was the person retained by the Township to prepare the 2013 Plan Update. While Mr. MacCombie did not personally read each and every comment, he supervised a staff that did. His supervision of the staff directly reviewing the public comments is sufficient to address this concern.

The Board begins the discussion of this point with the well-established observation that an adequate response to a public comment does not require the party receiving the public comment to adopt the comment. In considering the obligation imposed on the Department to consider public comments under the municipal waste regulations at 25 Pa. Code § 271.141(a) the Board decided: “the Department is not required to adopt the comments, but it is required to consider them.” *Throop Property Owners Ass’n v. DEP*, 1998 EHB 618, 624; *County Commissioners Somerset County v. DEP*, 1996 EHB 351, 375-76. (The Department did not fail to consider public comments simply because it came to a different conclusion than that advocated by the commentators). The Sewage Facilities Planning regulations impose a similar obligation on a municipality submitting a plan or plan revision to the Department for review under 25 Pa. Code § 71.31(c). The similarity is clear when the Board considers the duty imposed on the Department under 25 Pa. Code § 71.32(d)(2) to consider whether the municipality “adequately considered questions raised in comments” from the general public. The Township was not required to adopt the public comments. It only had to consider them. The Appellant has not identified any specific comments that the Township failed to consider.

The Appellant’s facial objection to the general response that “Your comment is noted” is not sufficient to satisfy the Appellant’s burden of proof without more. This general response may be inadequate under certain circumstances if an appellant provides the Board with specific evidence regarding a specific comment and response, but Ms. Wilson did not develop this objection at the hearing or in her Post-Hearing Brief. She did not identify any specific comments and related responses where she believed this general response is inadequate. The Appellant has the burden of proof in this appeal, and the lack of proof regarding specific comments and responses defeats her generalized facial objection to the above quoted general response.

Finally, Ms. Wilson asserts that the DeRita Appellants' public comments, their appeal and subsequent settlement are evidence of the Township's inadequate response to the DeRitas' public comments. She raises a similar point regarding the SPEHOA Intervenors' comments, their intervention and subsequent settlement with the Township. The Board disagrees with these assertions. The fact that the Township reached settlement with the DeRitas Appellants and the SPEHOA Intervenors on the eve of trial does not change the Board's view that the Township adequately considered and responded to the DeRitas Appellants' comments and the SPEHOA Intervenors' comments when the Township prepared its response to the public comments. The Township was able to settle the appeal and intervention at a later date without affecting the adequacy of the earlier response and consideration.

In conclusion, the Appellant did not satisfy her burden of proof to establish that the Township failed to comply with 25 Pa Code § 71.31(c). The record before the Board does not support Ms. Wilson's claim that the Township's responses to public comments were inadequate and that the Township failed to consider all public comments. The fact that the parties settled their disputes at a later date is not evidence that the Township failed to adequately consider the public comment submitted earlier.

Department's Review of Newtown Township's Consideration of Public Comments

In a related objection, Ms. Wilson also asserts that the Department failed to comply with its independent regulatory obligation to consider whether the Township had adequately considered questions raised in the comments of the general public. *See* 25 Pa. Code § 71.32(d)(2). Section 71.32(d)(2) provides, in part:

(d) In approving or disapproving an official plan or official plan revision, the Department will consider:

(2) Whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public.

Id. This regulation imposes an oversight role on the Department to insure that the Township adequately considered questions raised by the general public.

The Department and the Township disagree with the Appellant that the Department violated its regulatory duty. They assert that the Department met its obligation under 25 Pa. Code § 71.32(d)(2). After the Department received the 2013 Plan Update, including the public comments and the Township's responses, Ms. Mahoney testified that she reviewed these materials to determine that the Township adequately considered these comments.

The Board agrees with the Department and the Township that the Department satisfied its obligation to ensure that the Township adequately considered questions raised by the public comments. The Board has determined that the Township properly considered and responded to the public comments as set forth in the preceding portion of this Adjudication. The Appellant's failure to demonstrate that the Township's responses were inadequate, as set forth above, has a direct bearing on the Department's independent, but related, obligation to ensure that the Township adequately considered questions raised by the public comments. The Department met its obligation because the Township considered all of the questions raised by the public comments, even though the Township did not accept all of the public comments. A municipality may consider all public comments without accepting them. Sections 71.31(c) and 71.32(d)(2) of the Department's regulations only require consideration of the public comments and not acceptance, as the Appellant suggests.

Financial Feasibility of Plan

Ms. Wilson asserts that the Township is not financially able to implement the 2013 Plan Update as approved. She asserts that the Township has not yet entered into contracts with two local developers even though over 50% of the unused capacity in the 2013 Plan Update has been designated for these two developers.¹² According to the Appellant, the financial viability of the plan depends upon their financial contribution and without a legal agreement to reserve this capacity, it is not clear when or if the two developers will use the capacity.

The Department and the Township disagree with the Appellant's challenge and assert that the Appellant has misconstrued the regulatory requirement regarding the evaluation of funding methods. According to the Township and the Department, the regulation at 25 Pa. Code § 71.21(a)(5)(v) sets forth the requirement to evaluate funding methods available to finance all aspects of the proposed alternatives. Under this regulatory requirement, the Department asserts that the municipality shall evaluate, for each proposed alternative, funding methods to finance the proposed alternatives and shall establish the financial alternative of choice and a contingency financial plan to be used if the preferred method of financing is not able to be implemented. Under this provision the Township evaluated three funding methods: 1) Municipal Bonds; 2) Bank Loans; and 3) Direct funding by developers. Ex. Twp-2, Exec. Summary, pp. 47-50, 68. The Township's financial alternative of choice is to borrow \$27 million in a bond issue. Ex Twp-2; Appendix O; (N.T. 139). The Department reviewed the Township's financial alternative of choice, the combination of a municipal bond issue, tap-in fees and developer contributions.

¹² In developing flow and capacity information for the 2013 Plan Update, Mr. MacCombie received a document prepared by Kaplin Stewart, on behalf of BPG. The document stated that 185,800 gallons per day of sewer capacity is sufficient for the BPG development in the study area. Mr. MacCombie also received a document prepared by Joseph D'Amico, Jr., on behalf of Claude DeBotton who owns various properties in the Township. The document stated that the DeBotton properties in the study area require approximately 175,000 gallons per day of sewer capacity.

(N.T. 194). The Department decided it was a fairly common financing proposal. *Id.* The Township's evaluation contained a preliminary cost estimate, including expected tap-in fees between \$4,500 and \$6,000 and annual user fees of between \$500 and \$750 per year. (N.T. 411-412). The Department's primary plan reviewer, Ms. Mahoney, evaluated these cost estimates and concluded that they were in line with cost estimates she had seen in other Act 537 planning documents for other municipalities. The Department concluded that the Township's evaluation of funding methods complied with 25 Pa. Code § 71.21(a)(5)(v).

The Board agrees with the Department and the Township. At this stage of the Act 537 planning process the regulations do not require that the Township has signed agreements with the two developers that Ms. Wilson identified. At this planning stage under 25 Pa. Code § 71.21(a)(5)(v), the Township needs to identify its financial alternative of choice to finance the proposed alternative, and a contingency financial plan to be used if the preferred method of financing is not able to be used. The Township's 2013 Plan Update contained this information. Ms. Wilson did not offer any evidence to challenge this aspect of the 2013 Plan Update. Instead she pursued a broader attack on the financial feasibility of the Plan and asserts that more detailed financial information is needed at the current planning stage. The regulations do not require the level of financial detail that Ms. Wilson desires at this stage, and the Board rejects her challenge to the financial feasibility of the Township's 2013 Plan Update.

On a related point, the Appellant questions whether Township has included all known costs in their financial estimates in the Plan. Specifically, she asserts the Township should have known that the CDCA will require upgrades to their Crum Creek Pump Station to accept increased flows from the Township under the Plan. Costs to Newtown for the upgrades will be

an additional \$800,000 according to the Appellant. Appellant Wilson Post-hearing Brief at page 27-28. The CDCA is currently in the process of revising its Act 537 Plan to upgrade its system.

The Township disagrees with the Appellant's challenge for several reasons. First, the Township asserts that it has a written agreement with the CDCA since 2007 to accept 971,975 gallons of sewage per day that will be treated by DELCORA. See Ex. TWP-2 Appendix W. According to the Township, substantial payments have already been made under this agreement, including payments by developers. Mr. MacCombie testified that the CDCA currently has the ability to accept the additional flows from the Township. While the CDCA is currently in the process of revising its Act 537 Plan, Mr. MacCombie stated that the CDCA is able under its current plan to accept the additional flow from the Township under its current agreement with the Township. Second, as Ms. Mahoney testified it is appropriate for municipalities to revise their plans as necessary and the fact that the CDCA is currently in the process of revising its plan does not block the Township efforts to revise its plan until the CDCA revisions are final. The revisions to the CDCA plan may prompt the Township to further revise its Plan, but that can happen in the future.

The Board agrees with the Township. Mr. MacCombie's uncontested testimony is that the CDCA is currently able to accept Township's additional flow identified in the 2013 Plan Update. In addition, the Board recognizes that Act 537 Plans are not static documents, but they need to be evaluated and revised on a regular basis. *Carrol Twp. v. DER*, 404 A.2d 1378, 1379 (Pa. Cmwlth. 1980). (A municipality is not locked into its initial plan after approval, and it may revise its plan at any time subject to the Department's approval.) Where the Township intends to rely upon the CDCA to accept its flow for treatment and discharge, the Plans need to be compatible, but they do not need to be updated on the same schedule. Here, the CDCA is

currently able to accept the Township's flow, according to Mr. MacCombie, and if the CDCA modifies its Plan in the future, the Township will need to evaluate whether it will need to further revise its plans. The Township is following the CDCA's efforts to upgrade its current system, and the Board agrees with the Township that these ongoing efforts on the part of the CDCA to update its plan do not render the Township's 2013 Plan Update invalid.

Finally, on the issue of financial feasibility, the Appellant asserts that the Township's connection ordinance, which allows building more than 150 feet from a sewer line to avoid mandatory hook-up to the sewer line, calls the financial viability of the Plan into question. Appellant Wilson's Post-hearing brief at page 28. She also asserts that the Department should not have approved the Plan without greater certainty regarding the number of properties that are eligible for the exemption from the mandatory hook-up requirement.

The Township disagrees and asserts that the connection ordinance provides sufficient certainty for the required financial planning. The Township points out that the connection ordinance is consistent with the Second Class Township Code which limits the Township's ability to require connections to public sewers if the principal building is more than 150 feet from a public sewer line. 53 Pa.C.S.A. § 67101. In addition, the Township argues that the ordinance allowing some properties to defer connection for up to 10 years is not without restrictions. To qualify for a deferment a property must be inspected annually, and connection will be required upon sale of the property. A deferment is also contingent upon entry into an agreement to pay the tap-in fee up front, regardless of the duration of the deferment.

The Board agrees with the Township and the Department that the connection ordinance does not establish that the 2013 Plan Update is not financially feasible. At this stage of the

planning process, the regulations do not require the level of detail that the Appellant suggests is necessary.

Settlement Agreements with DeRita Appellants and SPEHOA Intervenors

The Appellant asserts that the Township is not able to implement its 2013 Plan Update as approved on September 24, 2013. In support of her claim, Ms. Wilson relies upon the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors. In addition, the Appellant asserts that the Township does not yet have the CDCA's complete approval to accept the flow that the 2013 Plan Update will send its way.

The Township and the Department disagree with Appellant's assertions. First, they argue that neither settlement agreement alters the Township's commitment to implement the 2013 Plan Update as approved by the Department. They also assert that the Township has a written agreement with the CDCA to accept the allocated flow under the 2013 Plan Update.

The Board agrees with the Township and the Department that neither settlement agreement affects the Township's commitment to implement the 2013 Plan Update, as approved, based upon a closer examination of the terms of the settlement agreements. Neither agreement anticipates changes to the 2013 Plan Update that could in any meaningful way alter the Township's commitment to implement the plan as approved.

The settlement agreement with the DeRita Appellants resolves a dispute regarding the Goshen Road Pump Station. The DeRita Appellants had concerns regarding the placement of the structure containing the pump house on the designated property, and the use of an access road on a cul-de-sac rather than use of an access road from Goshen Road.¹³ To resolve the concerns the Township agreed to move the structure closer to Goshen Road and away from

¹³ The 2013 Plan Update provides for an access road on the cul-de-sac and did not include an access road from Goshen Road.

homes on the cul-de-sac. The Township also agreed to construct a primary access road to the structure from Goshen Road, and to only use the original access road on the cul-de-sac in the case of emergencies such a flooding on the Goshen Road. The Township will be able to address the DeRita Appellants' concerns regarding the placement of the structure during the design stage. The Township will still use the same property for the pumping station, but it will move the foot print of the structure closer to Goshen Road. The settlement agreement does not add or delete any houses from the Plan, it does not change in any manner how any house will receive sewer service and it does not change how sewage is collected or conveyed. The addition of an alternate primary access road to the pump station will also not affect in any manner the Township's commitment to implement the Plan as approved. It will simply reduce or eliminate additional vehicle traffic on the cul-de-sac in most instances.

The settlement agreement with the SPEHOA Intervenors resolved a dispute with the Intervenors about the use of a new pump station in their neighborhood to convey sewage from outside their neighborhood through their neighborhood to the Camelot pump station. The settlement agreement provides that the Township will evaluate another route for sewage flow that redirects the sewage flow originating outside the SPEHOA neighborhood to the Camelot pump station by a different route that avoids the new pump station in the SPEHOA neighborhood. The Township could consider use this alternative route if it was economically neutral or, more environmentally responsible without any appreciable additional expense to implement. Wilson Ex. 63 at page 5. The Township committed to conduct the evaluation during the design phase of implementing the 2013 Plan Update.

While this evaluation of the possible rerouting of some sewage flow around the new pump station in the SPEHOA neighborhood could affect in a minor manner how some sewage

flow from outside the SPEHOA area is conveyed to the Camelot pump station, the settlement agreement does not evidence a lack of commitment on the part of the Township to implement the 2013 Plan Update as approved. The rerouted sewage flow, which originates outside the SPEHOA neighborhood, will still go to the Camelot pump station for conveyances to the CDCA.

The situation before the Board today is different than the situation in *Patricia A. Wilson and Paul I. Guest, Jr., v. DEP*, 2010 EHB 827. In this earlier Adjudication involving many of the same parties and an appeal of an earlier Department approval of the earlier Township 2009 Plan Update, the Board rescinded a Department approval of the 2009 Plan Update. The Board rescinded the Department’s approval because the record developed before the Board at its *de novo* hearing revealed that the Township was not committed to implementing the 2009 Plan Update under appeal. Before the Department approved the 2009 Plan Update, the Township held a public meeting and as a result of the meeting, the Township decided to “change its mind” regarding its commitment for low-pressure systems for certain neighborhoods. The 2009 Plan Update included a commitment for low-pressure systems with grinder pumps in these neighborhoods. After the Department approved the 2009 Plan Update, the Township also adopted an ordinance in direct contradiction to the 2009 Plan Update. Based on these two “glaring examples” and others, the Board concluded that the Township lacked the commitment to implement the 2009 Plan Update as approved by the Department.

In the appeal before the Board today involving the 2013 Plan Update, there are no examples of the Township’s lack of commitment to implement the 2013 Plan Update. The evidence presented at the hearing in this appeal supports the Township’s claim that it is committed to implement the 2013 Plan Update. The two settlement agreements do not change the Township’s commitment to implement the 2013 Plan Update as approved.

Allocation of Capacity to Future Development

The Appellant asserts that the 2013 Plan Update should not have been approved because it allocates capacity for future commercial development instead of existing residential neighborhoods including the Llangollen and Springton Pointe-Sleepy Hollow areas. Appellant Wilson’s Post-hearing Brief at pages 34-36. She asserts that such an allocation does not meet the requirements of Act 537 “to ensure the health, safety and welfare of the citizens by providing for a technically competent, integrated and coordinated system of sanitary sewage disposal.” *Id.* Ms. Wilson asserts that the Board has the authority under its *de novo* review to order the Township to include the existing development areas including Llangollen and Springton Pointe-Sleepy Hollow as immediate needs planning areas and to change the two future development areas (BPG and DeBotton) to future needs planning areas. The Appellant does not challenge the overall sewage capacity of the 2013 Plan Update, but she disagrees with the manner in which it was allocated among immediate and future planning needs.

According to the Appellant, the 2013 Plan Update “allocates” almost 50% of Newtown’s unused available capacity under its agreement with the CDCA to two proposed and ongoing developments.¹⁴ The Appellant objects to the Township’s decision to allocate a portion of the unused and available capacity to future development while there are existing developments that have needs.

The Township and the Department disagree that the 2013 Plan Update improperly allocated sewer capacity to future development over existing immediate needs. According to the Department and the Township the 2013 Plan Update properly identified areas of future needs.

¹⁴ The 2013 Plan Update identifies that Mr. DeBotton’s properties will need 175,000 gallons per day of capacity, and the BPG properties in the study area will need 185,000 gallons per day of sewer capacity. (N.T. 22, 101, 104, 328.) While there is some current development in these areas, the 2013 Plan Update includes capacity for future development. *Id.*

Some areas of the Township, such as Florida Park and Echo Valley, have immediate needs for public sewers based on high percentages of confirmed, suspected and potential on-lot sewer malfunctions. (N.T. 391-395.) Other areas such as Llangollen did not have confirmed malfunctions (N.T. 191, 393). The 2013 Plan Update identified these areas as future planning needs.¹⁵

The Board agrees with the Department and the Township that the Township appropriately identified needs of various areas in the study area of the 2013 Plan Update. The Board does not agree that the 2013 Plan Update improperly allocated capacity to future development over the needs of existing neighborhoods. The 2013 Plan Update identified capacity needs for the two areas where development is expected and it included the expected capacity for these areas in the 2013 Plan Update. Without the 2013 Plan Update, there would be no approved plan for the expected development in these areas. The Department testified that the Township is required to identify and address the need of existing property owners, but it is also required to include projections of needs for new land development projects expected in the study area. (N.T. 426-427). That is what the Township did in preparing its 2013 Plan Update regarding the expected land development in the DeBotton and BGP areas. The Board agrees.

The Board also agrees that the Township's 2013 Plan Update properly identified the Llangollen and Springton Pointe-Sleepy Hollow areas as future needs areas rather than immediate needs areas. The 2013 Plan Update included areas of confirmed on-lot sewer malfunction as areas of immediate needs for public sewer, but it included areas of suspected on-lot sewer malfunctions as areas of future needs. The Township also considered other factors

¹⁵ The 2013 Plan Update did not ignore Llangollen and it was identified as a future planning need. The Township has begun steps to coordinate with Edgemont Township and DELCORA to address Llangollen's future needs. (N.T. 27-30, 74-75, 174).

such as an assessment of the soils in these areas, the need for future development, current zoning, lot size and age of the neighborhoods. These other factors supported the Township's decision to identify some areas as immediate needs areas and others as future needs areas.

The Board rejects the Appellant's challenge to the 2013 Plan Update based upon the allocation of capacity to future development. The Township's made the correction decision when it identified needed capacity for future development of the DeBotton and BPG properties and when it identified the Llangollen and the Springton Pointe-Sleepy Hollow areas as future planning needs areas.

At the hearing, Mr. MacCombie testified that he would include Llangollen in the Plan if he were starting the process to update the plan today rather than two years ago. (N.T. 80). Ms. Wilson asserts that this is evidence that the 2013 Plan Update is defective. The Board disagrees when you consider Mr. MacCombie's answer in the context of the entire exchange at the hearing. Mr. MacCombie testified that following submission and approval of the 2013 Plan Update he restarted and pursued discussions with Edgemont Township and DELCORA and their consultants to evaluate the possibility of connecting Llangollen into public sewers. This possibility requires the cooperation of these entities to connect Llangollen into public sewers, and it is not related to the changes approved in the 2013 Plan Update. The Township's ongoing efforts to address future planning needs identified in the 2013 Plan Update do not support a conclusion that the Township's 2013 Plan Update was defective.

Ms. Wilson also appears to question whether the Township's 2013 Plan Update is comprehensive because it did not include Llangollen as an immediate needs area. In support of her concern, she points to Mr. MacCombie's response that if he were beginning process today rather than two years ago, he would include Llangollen. The Department asserts that Ms. Wilson

appears to have a fundamental misunderstanding of what is meant by a “Comprehensive Sewer Plan.” Department’s Post-Hearing Memorandum at page 76. According to the Department, “comprehensive” in planning terms means the plan must not only evaluate existing needs, but also potential needs of existing development.(N.T. 425.) A Township need not revise the entire plan for a Township to be comprehensive, and a Township may decide to revise only a portion of its plan and focus on a particular study area. In this case, the Township focused on the Crum Creek Basin, which the Department concluded was “a natural choice.” *Id.* This area is more readily served by CDCA. Ms. Mahoney decided that the 2013 Plan Update was comprehensive because it evaluated both the needs of existing property owners and the projected needs for new land development within the study area. The Board agrees with the Department that the 2013 Plan Update is comprehensive for these reasons.

Newtown Township’s Commitment to Implement 2013 Plan Update

The Appellant asserts that Township is not committed to implementing the 2013 Plan Update. Under the applicable regulations at 25 Pa. Code § 71.31(f), a municipality must have a commitment to implement the plan within the time limit established in an implementation scheduled. Ms. Wilson claims that “a review of the Township’s actions and inactions, after approval, prove by a preponderance of the evidence that Newtown is not committed to implement the plan update.” Appellant Wilson’s Post-hearing Brief at page 36. She claims that the lack of action to construct the approved sewers “is probative” of the Township’s lack of commitment.¹⁶ Ms. Wilson also claims that the Township’s delay in adopting ordinances to implement the 2013 Plan Update is evidence of the Township’s lack of commitment to

¹⁶ Ms. Wilson also claims that the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors are evidence of the Township’s lack of commitment. The Board addresses this specific claim in an earlier portion of this Adjudication at 56-59.

implement the Plan. She asserts that there are unresolved and outstanding issues that prevent the Township from meeting its obligation to have a commitment to implement the 2013 Plan Update.

The Department and the Township disagree and assert that the Township has the necessary commitment to implement the 2013 Plan as approved by the Department. The Township adopted Resolution 2013-10 committing the Township to implement the 2013 Plan Update. Ex. TWP-2 Appendix U. Resolution 2013-10 provided the Department with assurance that it was committed to the complete and timely implementation of the Plan. When the Department approved the Plan, it contained proposed ordinances to implement the Township's sewage manage plan under the 2013 Plan Update. The Township adopted Ordinance 2014-2, which enacts the Township's sewage management program and Ordinance 2014-3, which details public sewer connection requirements. The Department has reviewed these ordinances adopted by the Township and has found them acceptable and consistent with the Township's commitment to implement the Plan.¹⁷

The Chairman of the Board of Supervisors of Newtown Township, Joseph Catania testified at the hearing regarding the Township's commitment to implement the 2013 Plan Update. He testified that the Board of Supervisors is a "hundred percent" committed to the Plan.

The Board agrees with the Department and the Township that the record before the Board supports the Department's decision that the Township is able and committed to implement the 2013 Plan Update that the Department approved. The Resolution and Ordinances, which the Township adopted and the Department reviewed, support the Department's decision that the Township has the necessary commitment to implement the 2013 Plan Update.

¹⁷ These Ordinances were not adopted when the Plan was approved in 2013, but they were enacted in 2014 before the Board held the hearing in this matter.

Ms. Wilson also asserts that the Township has not yet begun to implement the Plan, and this lack of actual implementation is evidence of the Township's lack of commitment. The Township responds that the lack of implementation of the Plan, under these circumstances, do not support Ms. Wilson's claim. The next step in implementation is the design phase, and the Township is entitled to wait to begin the design phase while the appeal is pending. In connection with the 2009 Plan Update, the Township prepared design plans for 2009 Plan Update when the Plan was prepared and these efforts were wasted when the Board rescind the Department's approval of the 2009 Plan Update. The Township testified that it wants to avoid the possibility of repeating this waste of municipal time and resources. The Board agrees that the Township's is able to wait for this appeal to be resolved before beginning further implementation and the design phase for the 2013 Plan Update.

Department's Approval of 2013 Plan Update

The Appellant asserts that the Board should rescind the Department's approval and require under its *de novo* review, that the Township update its 2013 Plan Update. In support of her argument, Ms. Wilson points to four new facts that the Department did not consider: the existence of the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors; the need to include the Llangollen area as an immediate needs area; anticipated upgrades to the CDCA collection system; and the need for updated PNDI and PHNMC approvals. The Board disagrees that these developments provide a basis to overturn the Department's approval of the Township's 2013 Plan Update.

As discussed above, the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors do not provide a basis to overturn the Department's decision to approve the 2013 Plan Revision. The settlement agreements are not evidence of the Township's lack of

commitment to implement the Plan. Neither settlement commits the Township to change its approved plan in any meaningful manner.

The Board also recognizes that there are upgrades to the CDCA collection system that may impact the Township's plan. Changes to the CDCA Plan may in fact prompt additional changes in the Township's Plan in the future. The Sewage Facility Planning process is a dynamic process, and the possibility of the need for future plan revisions is not a basis to rescind the Department's approval of the Township's 2013 Plan Update. *Carrol Twp. v. DER*, 404 A.2d at 1397.

As previously discussed, the Board accepted the Township's decision to identify Llongollen as a future needs planning area rather than as an immediate planning needs areas as the Appellant suggests. The Appellant provided no evidence to support her claim that Llangollen should have been identified as an immediate needs area. The Township's decision to identify Llangollen as a future needs area was supported by the record.

The Board also rejects the Appellant's argument that new PNDI and PHMC reviews are needed to support approval of the 2013 Plan Update. The Appellant asserts that consistency clearances for the protection of threatened, rare, and endangered plant and animal species and for historical and archeological resources have expired. She believes that the Department should have required the Township to resubmit its Plan to the various resource agencies for additional review and updated clearances.¹⁸

¹⁸ The Department of Conservation and Natural Resources is the resource agency for state protected plants (Wild Resources Conservation Law, 32 P.S. § 5307; the Pennsylvania Fish and Board Commission is the resource agency for state protected fish, amphibians, reptiles and aquatic organisms (Fish and Boat Codes, 30 Pa. C.S.A. § 2305); the Pennsylvania Game Commission is the resource agency for state protected mammals and birds (Game and Wildlife Code, 34 Pa. C.S.A. § 2167); the United State Fish and Wildlife Service is the resource agency for federal protected animals (50 CFR Part 17.11-12), and the Pennsylvania Historic Museum Commission is the resource agency for historic and archeological resources. (History Code, 37 Pa. C.S.A. 101 et seq).

The Department and the Township disagree that an additional round of consistency reviews is still needed at the planning stage. After the planning stage, the Township will begin to implement the Plan, and it will begin the design and permitting stage of the sewer project. They assert that the Township will have to secure new consistency reviews and clearances for the protection of threatened and endangered species and historical and archeological resources during the design and permitting stage of this process.

The Board agrees with the Department and the Township. The Township had the necessary consistency clearances when the Department approved the 2013 Plan Update. The Township will need to obtain new PNDI and PHMC consistency reviews and clearances from the various state and federal resource agencies as it moves forward into design and related permitting phases of implementation of the approved 2013 Plan Update. The need for a new round of PNDI and PHMC reviews for the design and permitting stage does not change the conclusion that the clearances that were previously obtained by the Township were sufficient to support the Department's approval of the 2013 Plan Update.

Changes in 2013 Plan Update for Echo Valley Area

Ms. Wilson is a resident of Newtown Township and she resides in the Echo Valley neighborhood of the Township. Her residence is currently served by an on-lot sewage system. The Echo Valley neighborhood is one of the areas identified in the Township with confirmed on-lot sewage system malfunctions. As a result of the confirmed malfunctions, the 2013 Plan Update identified the Echo Valley neighborhood as an immediate needs area.

The Echo Valley and Florida neighborhoods have the most immediate needs for public sewers based upon their high percentage of confirmed, suspected and potential on-lot sewage systems malfunctions. (N.T. 391-95). As the 2013 Plan Update was developed, the plan for

addressing the immediate needs in the Echo Valley neighborhood changed in response to public comments and further evaluation of site and technical considerations by Mr. MacCombie.

In the initial efforts to address the immediate needs for public sewers in the Echo Valley neighborhood, the Township considered a low pressure sewer system used in connection with a grinder pump.¹⁹ Grinder pumps can cost about \$6,000, along with increased maintenance and electricity costs. (N.T. 245-46). These costs are in addition to the costs a homeowner must pay to tap-in and use the sewer system. A homeowner served by a gravity system does not have these additional costs.

Many residents of the Echo Valley neighborhood, including the Appellant, expressed concerns with the low pressure sewer and grinder pump system under consideration for the Echo Valley neighborhood. After talking to the residents of Echo Valley and walking the site, Mr. MacCombie was able to provide a gravity sewer system in the 2013 Plan Update for Echo Valley. The use of gravity sewers will eliminate the addition costs for homeowners associated with the use of a low pressure sewer system used in connection with grinder pumps. The approved 2013 Plan Update was changed to address the concern of many residents of the Echo Valley neighborhood, including Ms. Wilson, with the low pressure sewer system with grinder pumps.

Although Ms. Wilson did not testify at the hearing, two residents of the Echo Valley neighborhood testified, Mr. James Carcio testified that he has a failing on-lot system causing him substantial harm and additional costs. See Finding of Facts Nos. 111-121, pages 16-17. He testified that he was in favor of the 2013 Plan Update (N.T. 361-367). Mr. David Dugery also

¹⁹ A grinder pump grinds up waste and pumps it to a higher elevation at low pressure where it can then be tied into a gravelly line (N.T. 244-45). A grinder pump can save evacuation costs, but it is subject to breakdown and if you lose electricity it will not work unless you have a backup generator.

testified that he has a failing on-lot sewer system and that he significantly suffered. (N.T. 443-446). See Finding of Facts Nos. 127-133, pages 17-18. He is also strongly supportive of the Plan. The testimony of these two witnesses provided the Board with compelling reasons to support the conclusion that public sewers are needed in the Echo Valley neighborhood to remedy confirmed malfunction of on-lot sewer systems currently in use.²⁰

To a great extent Ms. Wilson involvement in the Township's Act 537 planning process has been beneficial and successful. In the prior appeal, she convinced the Board to rescind the Department's approval of the Township's 2009 Plan Update because the Township lacked the required commitment to implement that Plan. In this appeal, the record establishes that the Township revised its 2013 Plan Update in response to public comment to eliminate the low-pressure sewer system with grinder pumps for the Echo Valley neighborhood. She wanted the change. The Township was able to provide a gravity sewer system in the 2013 Plan Update for Echo Valley.

The Appellant has, however, been less successful in this appeal in meeting her burden of proof to sustain her appeal. The Board has also heard from other residents living in the Echo Valley neighborhood about the serious and on-going malfunctions of on-lot sewer systems in use in that neighborhood. The 2013 Plan Update is intended to remedy these problems. The Board has no reason to overturn the Department's decision to approve the Plan.

Additional Issues

In her Post-Hearing Brief, the Appellant raised a few questions in the Applicable Legal Authority portion of her Brief that she did not develop in any meaningful manner. She asked

²⁰ Ms. Mahoney also discussed the current problems of a third Echo Valley residents, Mr. Gormley. He is currently trying to sell his house, but his current on-lot sewer system is failing. Ms. Mahoney is reviewing an application for an alternative onlot sewer system for Mr. Gormley.

“Did the DEP abuse its discretion in determining that the Township considered and evaluated alternatives to the Plan submitted by the Township to the Department?” Appellant Wilson’s Post-hearing Brief at page 21, Paragraph K. Other than this brief question, the Appellant did not pursue this issue in her Brief in any meaningful manner. The Department addressed this question in its Post-hearing Memorandum in some detail. Department’s Post-hearing Memorandum, Proposed Finding of Facts Nos. 215-240, pages 30-34 and 66-67. In the absence of any evidence or argument in her Brief, the Board agrees with the Department that the Appellant has not carried her burden to establish that the Department abuse its discretion in determining that the Township considered and evaluated alternatives when preparing the plan. Based upon the record before the Board, it is obvious that the Township did consider alternatives when preparing the Plan.

The Appellant also asked: “Has the DEP ensured that Newtown’s plan provides an adequate and accurate assurance of capacity to provide sewage disposal for all those areas included in the plan as required by the Department’s regulations?” Appellant Wilson’s Post-hearing brief at page 21, paragraph L. Again, Appellant did not pursue this question in any meaningful manner in her Brief. The Department addressed this question in Memorandum in some detail. Department Post-Hearing Memorandum Proposed Finding of Facts Nos. 246-252, page 35, 67-71. The Appellant failed to develop her argument regarding assurances of capacity, and the Department provided a detailed explanation of its review of the Township’s efforts to identify an adequate and accurate assurance of capacity. Based upon the record before the Board it is obvious that Township did provide an adequate and accurate assurance of capacity in the approved Plan.

In an appeal where the Appellant has the burden of proof, the Appellant needs to do more than simply raise questions regarding compliance with legal requirements to sustain the burden of proof. *See Shuey v. DEP*, 2005 EHB 657, 712 citing *Giordano v. DEP*, 2001 EHB 713, 736. In cases where the Appellant has the burden of proof, the Appellant needs to present evidence and explain why the Department's action or inaction failed to meet the regulatory standard. Ms. Wilson did not satisfy her burden on these additional issues.

Deference to the Department's Decisions to Approve the Township's 2013 Plan Update

There is one last issue that the Board should address. In its Post-Hearing Memorandum, the Department argues that the "Approval of the Township's 2013 Plan Update should be accorded deference." Department's Post-Hearing Memorandum at page 80. In support of its assertion, the Department relies upon the well-established case law that provides the Department's reasonable interpretation of the environmental regulations it implements is, as a general rule, entitled to great deference. *See, e.g., Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1190 (Pa. 2007); *DEP v. North American Refractories Company*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002). The Department wants the Board to apply the general rule of deference to an agency's interpretation of its regulations to a broader category of Department decisions implementing those regulations.

The Board disagrees with the Department's assertion that its approval of the 2013 Plan Update should be "accorded deference." While the Board recognizes that the Department's reasonable interpretation of its regulations is entitled to deference, as a general rule, the extension of the deference rule is not warranted in situations where the Department has simply applied various regulations to a set of facts when making a particular decision.²¹ Here the

²¹ There are exceptions to the general rule. For example, an agency's interpretation of a statutory or regulatory provision is not entitled to deference if the interpretation is simply developed in anticipation of

Department applied various regulations in Chapter 71 of Title 25 of the Pennsylvania Code to approve the Township's 2013 Plan Update. The Department has not identified any interpretation of a particular regulation to claim deference. The Department mistakenly believes its approval of the Plan is entitled to deference because the Department reviewed and applies various unidentified regulatory requirements in making its decision.

To be entitled to deference for a regulatory interpretation, the Department needs to specifically identify the regulatory language in question, and then the Department needs to specifically identify the regulatory interpretation of the specified language. At that point, the Board will be able to determine whether the Department's interpretation is entitled to deference. Deference for a regulatory interpretation is not a blanket to pull over any and all decisions that the Department might make when applying various regulations to a particular situation. The Department's decision to approve the Township's 2013 Plan Update is therefore not entitled to deference. The Board, nevertheless, upholds the Department's decision to approve the 2013 Plan Update and dismisses Ms. Wilson's appeal.

CONCLUSIONS OF LAW

1. Arguments not preserved in the post-hearing brief are waived. 25 Pa. Code 1021.131(c); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 291, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth. 2004).

litigation or if the interpretation is an abrupt change from an earlier interpretation of the provision. *See e.g., Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1154 (Pa. 2009) (Interpretation developed in anticipation of litigation is not entitled to deference); *Pennsylvania School Boards Ass'n, Inc., v. Public School Retirement Board*, 863 A.2d 432 (Pa. 2004) (New interpretation is an abrupt change from prior interpretation and is not entitled to deference) cited in *RAG Cumberland Resources, LP v. Dep't of Env'tl. Prot.*, 869 A.2d 1065, 1072, n. 11 (Pa. Cmwlth. 2005.) The general rule and the exceptions are not applicable in this appeal and the Board does not need to further discuss the exceptions in this Adjudication.

2. The Appellant as a third-party appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Appellant must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

4. The Board reviews Department actions *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156-160; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Env'tl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

5. In an appeal from the Department's approval of an update to a municipality's Act 537 Plan, an Appellant must establish by a preponderance of the evidence "that the Department's approval of the Township's...Plan was inappropriate or otherwise not in conformance with law." *Moosic Lakes Club v. DEP et al.*, 2002 EHB 396, 404.

6. The Appellant has not met her burden to demonstrate that the Department's approval of the Newtown Township's 2013 Plan Update is "inappropriate or otherwise not in conformance with law." *Moosic Lakes Club v. DEP et al.*, 2002 EHB 396, 404.

7. The Appellant has not met her burden of demonstrating that the Department abused its discretion in approving Newtown Township's 2013 Plan Update. *See Browning-Ferris Industries, Inc. v. DEP et al.*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003) *citing Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

8. As a general rule, the Department's reasonable interpretations of laws and regulations are afforded deference by the Board. *See, e.g. Tire Jockey Service, Inc. v.*

Commonwealth of Pennsylvania, Department of Environmental Protection, 591 Pa. 73, 114-15, 915 A.2d 1165, 1190 (2007); *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002); *UMCO Energy, Inc. v. DEP*, 2007 EHB 215, 220; and *County of Schuylkill et al. v. DER*, 1989 EHB 1241, 1267, but deference does not extend to any and all decisions that the Department makes applying the laws and regulations to a specific set of facts.

9. The Department acted reasonably when it determined that the Newtown Township 2013 Plan Update satisfied all applicable laws and regulations and approved the Plan Update on September 24, 2013. 35 P.S. §750.1 et seq., 25 Pa. Code Chapters 71-73.

10. The Department properly determined that the Township satisfied all applicable public notice and comment requirements in preparing its 2013 Plan Update and responding to comments. 25 Pa. Code §§71.31(c), 71.32(d)(2).

11. The Department properly determined that the Township reasonably identified, evaluated, and selected sewage disposal alternatives. 25 Pa. Code §§71.21(a)(6), 71.61(c).

12. The Department properly determined that the 2013 Plan Update is “technically, environmentally and administratively acceptable” for the Township’s current and planned sewage disposal needs. 25 Pa. Code § 71.21(a)(6).

13. The Department reasonably determined that the Township’s 2013 Plan Update provides adequate sewage disposal capacity for the sewer service area. *Barbara Eisenhardt, et. al v. DEP*, 2001 EHB 563, 575.

14. The Department reasonably determined that the Township was able and committed to implement its 2013 Plan Update when it approved the Plan Update. 25 Pa. Code §§ 71.32(d)(4), 71.31(f).



15. The Department properly determined that the 2013 Plan Update is comprehensive.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



PATRICIA A. WILSON, et al.

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and NEWTOWN TOWNSHIP,
Permittee**

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**EHB Docket No. 2013-192-M
(Consolidated with 2013-200-M)**

ORDER

AND NOW, this 31st day of August, 2015, it is hereby ordered that this appeal is
dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand

THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman

MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.

RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: August 31, 2015

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

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