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SMP 79712M3

April 10, 2015

Via Email

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PA Department of Environmental Protection
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PA Department of Environmental Protection
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Pottsville, PA 17901-2522

Re: NPDES Renewal No. PA0595853

Dear Mr. Taber, Mr. Menghini and Mr. Kutney:

On behalf of Solebury School, I write to respond to several submissions by New Hope Crushed Stone & Lime Co.'s representatives regarding the quarry's ongoing operations, including its application to renew National Pollutant Discharge Elimination System ("NPDES") Permit No. PA0595853, and revisions to its mining permit and plans.

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Specifically, Solebury School responds to technical submissions made by EarthRes Group on behalf of the quarry on October 10, 2014 and March 24, 2015, and additional comments made by William Benner in correspondence to the Department dated February 27, 2015.

Solebury School believes that:

- NHCS has not adequately responded to the fundamental issue regarding how it may continue to operate in the face of an unchallenged legal conclusion that its operations are causing an ongoing, unabated nuisance.
- NHCS has not responded to the Department's direction to submit revisions to both its surface mining permit and its water discharge permit to bring both permits into compliance with the EHB's July 31, 2014 Adjudication.
- NHCS does not have an updated or complete plan regarding how it will meet its statutory reclamation obligations.
- NHCS's bond is inadequate to appropriately assure that funds will be available to pay for reclamation.
- NHCS has not responded to the Department's request for a schedule of restoration of groundwater under Solebury School's property.
- NHCS has not adequately responded to the Department's questions regarding other NPDES permit issues, including its requests for total suspended solids and turbidity data.

These issues are discussed in turn below.

NHCS Has Failed to Address the Existing Nuisance

The July 31, 2014 Adjudication by the Environmental Hearing Board is clear in its conclusion that the quarry's operations constitute a continuing nuisance, causing the unabated formation of collapse sinkholes on Solebury School's campus, endangering public health and safety, and depriving Solebury School of the quiet use and enjoyment of its property.¹ (Adj. at 63-65, Conclusions of Law No. 4, 8, 12). Specifically, the EHB found that "[c]ontinued mining will perpetuate the unstable hazardous conditions at the School." (Adj. at 28.) Therefore, the EHB found, "New Hope failed to affirmatively demonstrate that its mining activities could be reasonably accomplished under the Non Coal Act..." (Adj. at 64, Conclusion of Law No. 11.) The EHB also found that the "quarry is creating a public nuisance," and "[t]he Department has a duty to abate and remove public nuisances." (Adj.

¹ NHCS's contention, in Mr. Benner's letter of February 27, 2015, that the EHB did anything other than conclude that the quarry is creating a nuisance, is incorrect.

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at 65, Conclusions of Law Nos. 12 and 13.) Moreover, the EHB was clear that the question before it was "whether it is appropriate to let the permitted activity continue in light of the current information that shows that mining is causing hazardous conditions at Solebury School." (Adj. at 46.) These unequivocal findings by the EHB put into question whether NHCS's mining should continue at all. The same analysis the EHB applied to its review of NHCS's ongoing mining applies to the NPDES renewal application presently before the Department. As the EHB noted, the Department must "ensure that a continuation of the permitted activity is appropriate based on up-to-date information." (Adj. at 45.) The NPDES permit renewal application must be evaluated in the context of current information, which includes the EHB's conclusion that the quarry is creating hazardous conditions on Solebury School's campus which constitute a nuisance.

In recognition of the EHB's conclusion that quarry operations constitute, and continue to constitute, a nuisance, the Department asked NHCS on September 11, 2014 to submit revisions to *both* its surface mining permit and its application for renewal of its NPDES permit to "bring both permits into compliance with the Environmental Hearing Board Adjudication...addressing the existing nuisance due to active mining on this site." While NHCS's compliance obligations include any direct order from the EHB, as acknowledged in Mr. Benner's letter of February 27, 2015, they extend, as they always have, to any requirements from the Department, including all of the Department's requirements that flow from the EHB's Findings of Fact and the Conclusions at Law in this case. NHCS's submissions are not responsive to the Department's September 11, 2014 letter and are insufficient to address the existing nuisance.

First, NHCS points to its voluntary cessation of mining of Dike #1, contending that the preservation of this geologic feature will mitigate groundwater drawdown impacts. However, the EHB, in its adjudication, evaluated Dike #1 and concluded that "it is undisputed that water is still finding a way around the dike and making it into the quarry, meaning the dike is still allowing the quarry to dewater the area under the School." (Adj. at 55.) NHCS's preservation of Dike #1 will not abate the active nuisance.

Second, NHCS points to its revision to its mining plan to protect the Furlong Fault. While this is an appropriate revision, it is important to emphasize that the Fault is a critical feature for groundwater levels to rise after the close of mining. However, as the EHB noted, "[t]he Fault currently plays a limited role because during mining the quarry intercepts the groundwater before it reaches the Fault." (Adj. at 23.) Protecting the Fault, while absolutely necessary for the ultimate return of groundwater, does not address the ongoing nuisance created by the continued mining, including the ongoing formation of collapse sinkholes on the Solebury School campus.

NHCS's Reclamation Plan is Inadequate

NHCS also indicates that it is just beginning to plan for reclamation. Reclamation must include meeting statutory and regulatory reclamation requirements, including

reshaping the perimeter of the quarry pit, grading around the quarry perimeter, constructing dikes as needed to maintain the required pool level in the quarry, creating a stable entry point for the stream into the quarry, constructing an outlet structure to control flows and maintain the quarry pool, pumping to maintain downstream flow in Primrose Creek, monitoring and security post closure. It appears that none of these items has been addressed even on a cursory level. It is also clear that NHCS's reclamation plan has not been updated in at least a decade. It is certainly time for an updated reclamation plan.

NHCS's Responses Clearly Show its Bond is Inadequate

NHCS seems to contend that the ultimate reclamation of the quarry requires the continuation of mining at this time in order to pay the cost of reclamation activities. This response ignores the fundamental nature of its obligations. NHCS is required to complete reclamation at the quarry. This obligation is not in any way connected with "the completion of mining," nor can it be. The fact that the quarry must pay for reclamation cannot provide a justification for continued mining in the face of an existing nuisance. NHCS is required to meet its statutory reclamation obligations, regardless of the effort and cost involved. The exact purpose of a bond requirement is to assure that funds are available to pay for the costs of reclamation, regardless of the ability of a quarry to continue to operate and generate funds for such costs. To assure this, it is also essential that the bond be updated and maintained in a sufficient amount to cover the updated cost of reclamation.² The fact that NHCS now posits that continued mining is needed in order to pay for reclamation is a clear indication that its bond is inadequate, and cannot constitute a legitimate justification for its continuation of an existing nuisance.

NHCS Has Not Established a Plan or Schedule for the Restoration of Groundwater

The EHB concluded that "movement toward" the goal of abating the hazardous conditions caused by collapse sinkholes on Solebury School's campus "should commence

² NHCS's assertion in Mr. Benner's February 27, 2015 letter that the Department does not have a statutory or regulatory basis to alter the bond is patently incorrect, based on the unambiguous language of the statute and regulations. "The department may require additional bonding at any time to meet the intent of subsection (a) [the general rule requiring a bond]." 52 P.S. § 3309(h). The statute also provides that it does not "prohibit the department from requiring additional bond amounts for the permitted area should such an increase be determined by the department to be necessary to meet the requirements" of the Noncoal Surface Mining Act. 52 P.S. § 3309 (b). The regulations additionally require the Department to "determine the amount of the bond required for the permit areas, including adjustments to the initial amount from time to time as land acreages in the permit area are revised, costs to the Department of reclamation change or when other relevant conditions change..." 25 Pa. Code § 77.195(d); see also 25 Pa. Code § 77.205 (titled "Bond Adjustments").

immediately." (Adj. at 62.) The EHB also concluded that "...when the quarry stops pumping, the pit will fill up and the sinkholes will eventually stop." (Adj. at 52.) To that end, the Department rightly requested that NHCS provide a schedule for its restoration of the groundwater below the School's campus. NHCS's response in its March 24, 2015 submission fails to provide any such schedule or a plan for the restoration of groundwater.

NHCS states that "[t]he completion of mining as currently permitted is required to achieve reclamation and stream restoration efforts." This statement fails to respond to the Department's clear request for a schedule for groundwater restoration. NHCS's assertion that it needs to continue mining to perform reclamation, while tangentially related to timing of restoration of groundwater under the School, is not a response. NHCS's experts should be able to develop a schedule for groundwater restoration based on various assumptions regarding continued mining (e.g., timing of permitted extraction of deeper materials and the ability to start allowing the quarry pit to fill) and cessation of mining. The development of such a schedule would likely be another reason to require NHCS to evaluate and update its current reclamation plan. In addition to the deficiencies noted above, the plan is lacking in fundamental details regarding, for example, water movement, such as the location of inlets and outlets for water from Primrose Creek, and how the recovery of the groundwater will be controlled and monitored during restoration to assure its recovery. This information is critical for an evaluation of the reclamation plan's ability to restore (and the timing of such restoration of) the groundwater under Solebury School.

A significant amount of the groundwater entering the quarry does so at the major outfall into the quarry at 0 MSL, which likely includes "groundwater from both above and to a certain extent below 0 feet MSL." (Adj. at 25). It is therefore likely that Solebury School will not see any significant restoration of the groundwater under its property until quarry dewatering no longer affects the sources that feed this outfall. As a result, Solebury School anticipates that the groundwater under its property may not begin to rise until the water in the pit has recovered to 0 MSL. NHCS must factor this scenario in its estimation of the time it will take to restore groundwater under the School. Moreover, NHCS's observation that the water has risen approximately 25 feet in the north pit does not address this issue or the requirement for a schedule for restoration.

NHCS also once again asserts, without justification, that its "robust monitoring program assures minimization of impacts to surface water and groundwater." As the EHB correctly concluded, groundwater monitoring has not been, and cannot be, protective of Solebury School. "[I]t only reveals a problem after it has already occurred, and the effects can be subtle." (Adj. at 36.) Moreover, as Solebury School's experts explained at trial, and with which the EHB agreed, the groundwater data and modeling that NHCS and the Department have relied on is inadequate to reflect the actual groundwater conditions in the Primrose Creek Basin and under Solebury School. (Adj. at 36-37; 57-59.) Therefore, NHCS's reliance on its monitoring is misplaced. Furthermore, the monitoring program data are not useful for predicting groundwater recovery rates, and clearly do not answer the Department's request for a schedule.

NHCS Has Not Adequately Responded to Other NPDES Permit-Related Issues

Additionally, while not directly related to the issue of restoration of groundwater, the Department had, in its letter of September 11, 2014, requested that NHCS provide additional monitoring data, as well as an explanation of the findings and correlations between turbidity and total suspended solids ("TSS"). NHCS did not provide all the requested data or an explanation of the turbidity/TSS relationship. The TSS data provided were for a limited time period, from 2009-2011, and not the full monitoring record. For example, in May 2013, NHCS says that it began sampling once per week (an increase from once per month), and following storm events, yet none of those data were provided. No turbidity data are provided at all, and in fact, Solebury School's understanding is that NHCS does not collect turbidity data. No discussion of the relationship between turbidity and total suspended solids was provided in ERG's response to comments. Solebury School strongly believes that turbidity should be a required parameter for continuous measurement at the discharge point, and the relationship between turbidity and total suspended solids should be developed based on sampling to enable more rigorous assessment of compliance with NPDES permit limits.

Additionally, current NHCS monitoring requirements are insufficient to evaluate compliance with its permit limits, even considering the more frequent TSS sampling implemented as part of the settlement with the Department and the Primrose Creek Watershed Association (May 24, 2013 consent order). The NPDES permit limits are expressed as monthly average, daily maximum, and instantaneous maximum TSS concentrations. With weekly sampling, it is only possible to evaluate compliance with the monthly average limit. Without continuous turbidity monitoring tied to a correlation with TSS, there is presently no way to evaluate compliance with either the daily or instantaneous maximum permit limits.


Conclusion

From the facts noted above, at a minimum, NHCS has not responded to the Department's requests with regard to the NPDES renewal application and has not revised either its surface mining permit or its NPDES permit to address the existing nuisance from active mining. Issuance of the NPDES permit renewal without addressing the issues identified in the EHB's Adjudication would therefore be an error of law, and would perpetuate the ongoing nuisance, placing Solebury School at continued risk of sinkhole hazards. As the EHB noted, the Department has an obligation to remove and abate the nuisance caused by NHCS. (Adj. at 65, Conclusion of Law No. 13.) It is therefore incumbent on the Department to require a clear response on this issue from NHCS. Moreover, NHCS has not provided the required schedule for restoration of groundwater under the School. In addition, NHCS has admitted that its bond is inadequate and the Department should require revisions to its bond and reclamation plan.

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We ask that you take the actions needed to protect Solebury School and enforce the EHB's clear finding that the quarry activities are creating an as-yet-unabated nuisance. We would welcome the opportunity to meet to discuss these issues further.

Sincerely,



Steven T. Milano

cc via email: William Benner, Esq., Benner and Wild
Louis F. Vittorio, Jr., P.G., ERG
Tom Wilschutz, Solebury School