

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

BRUCE FOX AND PATRICIA FOX,

Appellants,

v.

ALLEGHENY COUNTY HEALTH
DEPARTMENT,

Appellee.

In re: 711 Worthington Ave
Clairton, PA 15025

**ALLEGHENY COUNTY HEALTH DEPARTMENT’S POST-HEARING
MEMORANDUM IN OPPOSITION TO APPELLANT’S NOTICE OF APPEAL**

The Allegheny County Health Department (hereinafter “ACHD” or “Department”) files this post-hearing memorandum in opposition to the Notice of Appeal submitted by Appellants, Bruce Fox and Patricia Fox. The Notice of Appeal was filed on November 9, 2017 and was based on an Administrative Order issued on October 27, 2017, by the ACHD against Appellants relating to a mulch fire and illegal dumping of solid waste material that occurred on their property. A full evidentiary hearing was held on January 8, 2019 (hereinafter “Hearing”). For the following reasons, the ACHD requests that Appellants’ Notice of Appeal be denied.

I. PROPOSED FINDINGS OF FACT

Based upon the credible evidence and testimony offered at the January 8, 2019 Administrative Hearing, the ACHD submits the following proposed findings of fact:

1. The Director of the ACHD has been delegated authority pursuant to the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q, the Pennsylvania Air Pollution Control Act, 35 P.S. §§ 4001-4014, the Pennsylvania Solid Waste Management Act, 35 P.S. §§ 6018.101-1003, the Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.101-1904, and the ACHD is a local health agency organized under the Local Health

Administration Law, 19 P.S. §§ 12001-12028, whose powers and duties include the enforcement of laws relating to public health within Allegheny County, including, but not limited to, the ACHD's Rules and Regulations, Article VIII ("Solid Waste And Recycling Management"), and Article XXI ("Air Pollution Control").

2. On July 15, 1998, Appellants, Bruce Fox and Patricia Fox, purchased a property located at 711 Worthington Avenue, Clairton, Pennsylvania 15025 (hereinafter referred to as "Fox Property"). (Ex. "D-18").

3. The Fox Property has a steep ravine along a boundary line shared with a property owned by the City of Clairton. (Ex. "D-18"; Ex. "D-19"; N.T. at 89, 153).

4. Since approximately 2004, Appellants were paid by landscapers to dump grass clippings, wood chips, leaves, and dirt on the Fox Property. (Ex. "D-3" at ACHD-0016; N.T. at 31, 32, 48; Ex. "D-22" at Interrog. No. 4(c), 4(g)¹; Ex. "D-23" at Interrog. No. 9(c)). Appellant Bruce Fox would then push the material off the hillside into the ravine in order to increase the size of his property. (Ex. "D-3" at ACHD-0016; N.T. at 32; Ex. "D-22" at Interrog. No. 4(e); Ex. "D-23" at Interrog. No. 9(d)).

5. From February 2017 to August 2017, Appellants received a total of \$2,778.00 from landscapers to dump on their property. (Ex. "D-22" at Interrog. No. 4(h) – referencing documents at Bates Nos. ACHD-0221–0223).

6. Over the years, Appellants expanded the size of the mulch pile onto the property owned by the City of Clairton. (Ex. "D-17"; N.T. at 133-134; Ex. "D-9"² at ACHD-68, 0071, 0074, 0083).

¹ Appellants' Answers to 2nd Set of Interrogatories only included the answers and did not include the interrogatories. In order to provide context, the ACHD offered as Exhibit "D-21" the ACHD's 2nd Set of Interrogatories submitted to Appellants.

² The ACHD offered as Exhibit "D-9" photographs taken by Deputy Fire Marshal Michelle Gregory. (N.T. at 23). During the Hearing, Deputy Fire Marshal Hollenberger testified that he was present when the photographs were taken

7. By July 2017, the size of the compost/mulch pile was 150 feet long, 75 feet wide, and approximately 75 to 100 feet deep. (N.T. 19, 153; Ex. “D-3” at ACHD-0016). The pile consisted of grass, wood chips, leaves and dirt. (Ex. “D-3”; N.T. at 19³, 24-25, 28-29, 89, 153⁴; Ex. “D-9” at ACHD-0052, 0063, 0064, 0068, 0071, 0074, 0107, 0111, 0121, 0125).

8. At all times relevant to this matter, Appellants did not conduct any farming activity or have a home garden on the Fox Property. (N.T. at 156).

9. Appellants did not obtain an annual operating permit from the ACHD or Pennsylvania Department of Environmental Protection (DEP) for the disposal of solid waste material on the Fox Property. (N.T. at 170; Ex. “D-19” at Admis. No. 4).

10. After the mulch material was pushed into the ravine, Appellants did not take any measures or actions, such as turning the pile, in order to prevent the mulch pile from combusting due to exothermic reaction from the decomposing material. (N.T. at 97, 159).

11. On July 14, 2017, the Clairton Fire Department responded to a fire at the Fox Property. (N.T. at 17; Ex. “D-3”).

12. The fire on the Fox Property produced a significant amount of smoke that spread through the surrounding streets in Clairton. (Ex. “D-16”).

and that the photographs in Exhibit “D-9” “fairly and accurately depict the scene at the time he was there.” (N.T. at 23). Counsel for Appellants objected and argued that the photographs should not be admitted because Deputy Fire Marshal Hollenberger did not take the actual photographs. This tribunal overruled the objection. It is anticipated that Appellants will assert in their Brief that this tribunal erred by admitting the photographs. It is well-established that a photograph may be entered into evidence by either the person who took the photograph or “by another person with sufficient knowledge to state that it fairly and accurately represents the object or place reproduced as it existed at the time of the accident.” Aiello v. Se. Pennsylvania Transp. Auth., 687 A.2d 399, 403 (Pa. Commw. Ct. 1996) (citing Semet v. Andorra Nurseries, Inc., 219 A.2d 357 (Pa. 1966)).

³ Deputy Fire Marshal George Hollenberger testified that on July 14, 2017, he observed that the material on the hillside “consisted of landscaping debris, sticks, branches, wood chips, leaves, grass.” (N.T. at 19).

⁴ Barbara Zirngibl, from the ACHD Solid Waste Management Program, testified that she observed on July 17, 2017 “a large amount of vegetative material, grasses, mulch, tree branches down the hillside” (N.T. at 153).

13. On July 14, 2017, Deputy Fire Marshals George Hollenberger and Michele Gregory from the Allegheny County Fire Marshal's Office arrived at the Fox Property to investigate the cause of the fire. (Ex. "D-3", N.T. at 21).

14. On July 14, 2017, smoke from the fire was emitting from the base of the pile and from several voids or cracks near the top of the pile. (Ex. "D-3"; N.T. at 19, 25, 43, 49, 52; Ex. "D-9" at ACHD-0068 (photo marked by witness), 0071, 0083 (photo marked by witness)).

15. Carbon monoxide (CO) readings taken by Deputy Fire Marshal Hollenberger were 50 to 70 parts per million at the top and bottom of the pile. (D-3; N.T. at 20, 55). This concentration of CO is considered harmful to humans for long exposure time. (N.T. at 20).

16. In the late afternoon on Friday, July 14, 2017, and on Monday, July 17, 2017, the ACHD received complaints from citizens and complaint referrals from the DEP and the U.S. Environmental Protection Agency (EPA) regarding the mulch fire on the Fox Property. (N.T. at 87-88, 125-127). The complainants stated that smoke from the fire on the Fox Property was crossing into the streets and entering people's homes. (N.T. at 126-127). There were also complaints about odors from the fire. Id. Residents near the Fox Property were evacuated due to high levels of carbon monoxide. (N.T. at 89-90).

17. In response to the complaints, Najeeb Basher⁵, from the ACHD Air Quality Program, and Barbara Zirngibl, from the ACHD Solid Waste Management Program, traveled to the Fox Property on July 17, 2017 to investigate the fire. (N.T. at 88, 152).

18. On July 17, 2017, Deputy Fire Marshal's Hollenberger and Gregory returned to the Fox Property. (N.T. 26, 33).

⁵ Najeeb Basher was an Air Quality engineer and inspection supervisor with the ACHD for 23 years. (N.T. at 85-86). He has a chemical engineering degree from the University of Pittsburgh. Mr. Basher retired from the ACHD on November 2, 2017. (N.T. at 85).

19. The Allegheny County Fire Marshal's Office determined that the fire on the Fox Property was caused by the heat generated from the decomposing mulch, leaves, and grass that was dumped and pushed over the hillside by Appellants. (Ex. "D-3"; N.T. at 33-34). The decomposition of landscape debris caused an exothermic reaction which created a smoldering state and fire. Id. The fire progressed vertically and horizontally through the compost pile. (Ex. "D-3"). The Fire Marshal's Office did not find evidence of any other ignition source. (N.T. 45).

20. The ACHD determined that the compaction of the mulch and vegetative material that Appellants illegally dumped for several years overheated and caused a fire in the material on the hillside. (Ex. "D-11"; Ex. "D-12"; N.T. at 99, 153-154, 161-162). The fire from the mulch created excessive smoke that was observed crossing the property. (Ex. "D-12"; N.T. at 99).

21. On July 19, 2017, the ACHD Waste Management Program issued a Notice of Violation (NOV) and Order against Appellants relating to the illegal dumping of solid waste material on the Fox Property. (Ex. "D-11"). The Waste Management Program Ordered that Appellants "[i]mmediately upon receipt of this Order, Cease and Desist all activities constituting illegal disposal of solid waste." Id.

22. On July 25, 2017, Appellants appealed the ACHD's July 19, 2017 NOV. (Ex. "D-25").

23. On August 4, 2017, the ACHD Air Quality Program issued a Notice of Violation against Appellants relating to the fire on the Fox Property. (Ex. "D-12").

24. On August 15, 2017, Barbara Zirngibl, from the ACHD Solid Waste Management Program, conducted a reinspection of the Fox Property and observed that additional grass clippings had been deposited on the property in violation of the July 19, 2017 Order. (N.T. at

163-164). Appellant Bruce Fox admitted to Ms. Zirngibl that he was continuing to allow dumping on his property in violation of the Order. Id.

25. The ACHD received a report from the Clairton Police Department which indicates that waste material was illegally dumped on the Fox Property in violation of the July 19, 2017 Order. (N.T. at 166).

26. On September 1, 2017, an investigation of a possible mine fire on the Fox Property was performed by the Pennsylvania Department of Environmental Protection, Bureau of Abandoned Mine Reclamation (DEP-BAMR). (N.T. at 63-64). The DEP-BAMR determined that the fire was not mining related. (N.T. at 74-75; Ex. “D-5”; Ex. “D-6”; Ex. “D-7”)

27. On October 27, 2017, the ACHD issued an Administrative Order against Appellants relating to the mulch fire and the dumping of solid waste that occurred on the Fox Property. The Administrative Order sets forth violations of the ACHD’s Article VIII (“Solid Waste and Recycling Management”) and Article XXI (“Air Pollution Control”) regulations and violations of an Order issued by the ACHD on July 19, 2017. The Administrative Order also assessed separate civil penalties against Appellants for the violations of the Article VIII and Article XXI.

28. On November 13, 2017, Appellants’ filed an Appeal of the October 27, 2017 Administrative Order with the Director.

II. JULY 30, 2018 INSPECTION OF THE PROPERTY

On July 30, 2018, this tribunal performed a site visit and inspection of the Fox Property. Pursuant to Article XXI, § 1108, this tribunal may rely on the observations and findings made during the inspection with regard to its findings of fact and determination of the violations.

III. ARGUMENT

A. Appellants violated the ACHD's Article VIII regulations by illegally dumping waste material on their property

The ACHD offered credible evidence at the Hearing to support a finding by this tribunal that Appellants violated Sections 810.A, 813.B, 813.C, and 813.E of the Article VIII ("Solid Waste And Recycling Management") regulations.⁶ The ACHD also offered evidence to support a finding that Appellants violated the July 19, 2017 Notice of Violation and Order by continuing to illegally dump material on the Fox Property after receiving the Order.

1. Violation of Article VIII § 810.A

In support of the violations of the Solid Waste regulations, the ACHD offered the testimony of Barbara Zirngibl, an Environmental Health Specialist II in the ACHD Water Pollution Control and Solid Waste Management Program. (N.T. at 150). Ms. Zirngibl's duties include inspecting permitted facilities such as landfills, transfer stations, recycling centers and to respond to complaints for solid waste disposal. (N.T. at 151). Ms. Zirngibl testified that there are 29 permitted mulch facilities in Allegheny County. (N.T. at 156). The facilities are usually located on a flat area and the mulch and organic material is placed in rows to allow the material to be turned. (N.T. at 157). The facilities are required to turn the mulch piles every three months to avoid the piles getting hot and combusting. (N.T. at 156-157). However, in order to reduce heat, these facilities will turn the piles more often. (N.T. at 157).

On July 17, 2017, Ms. Zirngibl traveled to the Fox Property to investigate the fire. (N.T. at 152). Ms. Zirngibl testified that she observed "a large amount of vegetative material, grasses, mulch, tree branches down the hillside" and it appeared that the vegetative material had been

⁶ In the October 27, 2017 Administrative Order, the ACHD included a violation of Article VIII, § 813.M. During the Hearing, the ACHD stated that it was withdrawing this violation.

dumped from the Fox Property. (N.T. at 153-154). She also observed that smoke was coming from the mulch and vegetative material. (N.T. at 153). She did not find any indication of turning or processing of the material on the hillside. (N.T. at 159). Ms. Zirngibl testified that the fire was caused by 70 feet of vegetative material pushing down the hillside resulting in the compaction of the material around the base. (N.T. at 161-162). The pressure from the compaction of the material created significant temperatures. (N.T. at 159, 161-162). Because the greatest pressure is at the base of the pile, this is more likely where the fire would originate. (N.T. at 162). This is consistent with her observation that smoke was coming from the base of the mulch pile.

With regard to the first violation, Section 810.A states as follows:

No person may own or operate a municipal waste disposal facility, processing facility, residual waste facility, construction/demolition waste facility, chemotherapeutic waste facility, infectious waste facility, special handling waste facility, resource recovery facility, leaf composting facility, yard waste composting facility or recycling facility **unless the person has obtained and is in possession of an unrevoked or unsuspended annual operating permit for the facility from the Department.** An annual operating permit is required until final closure of the facility.

Article VIII, § 810.A (emphasis added). Ms. Zirngibl testified that under Section 810.A, Appellants were illegally operating a municipal waste disposal facility. (N.T. at 167-168).

Article VIII defines “municipal waste” as follows:

Any garbage, refuse, lunchroom or office waste and other material including solid, liquid, semisolid, or contained gaseous material resulting from the operation of residential, municipal, commercial, or institutional establishments, including hospitals, nursing homes, orphanages, schools, universities, day care facilities, and personal care boarding homes, and from community activities, and any sludge not meeting the definition of residual or hazardous waste under 25 Pa. Code, Chapter 271 from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.

Article VIII, § 804. Ms. Zirngibl testified that municipal waste could be anything from an orange peel to yard waste to demolition material. (N.T. at 168). Article VIII defines “disposal”

as the “deposition, injection, **dumping**, spilling, leaking, or placing **of solid wastes into or on the land** or water in a manner that the solid wastes, or a constituent of the solid wastes, **enter the environment**, are emitted into the air, or enter the waters of the Commonwealth.” Article VIII, § 804 (emphasis added). The broad definition of “solid waste” includes “municipal waste.” Id. “Facility” is defined as “**all land**, structures, and other appurtenances or improvements where recycling or **solid waste disposal**, processing, transfer, or storage **is permitted or takes place.**” Id. (emphasis added).

Ms. Zirngibl testified that Appellants violated Section 810.A by operating a “municipal waste disposal facility” without an annual operating permit. (N.T. at 167). It is undisputed that for nearly 15 years, Appellants were paid by landscapers to dump municipal waste, such as grass clippings, wood chips, leaves, and dirt, on the Fox Property. (Ex. “D-3” at ACHD-0016; N.T. at 31, 32, 48; Appellants’ Answers to 2nd Set of Interrog. at No. 4 – Ex. “D-22”; Ex. “D-23”). From February 2017 to August 2017, Appellants received a total of \$2,778.00 from landscapers to dump on their property. (Ex. “D-22” at Bates Nos. ACHD-0221–0223). Mr. Fox then pushed the mulch material off the hillside into the ravine behind his property where it was left to decompose and enter the environment. Id. Further, Appellants did not have an annual operating permit from the ACHD or the DEP. (N.T. at 170; Ex. “D-19” at Admis. No. 1). Therefore, Appellants violated Article VIII § 810.A by operating a “municipal waste disposal facility” without an annual operating permit.

It is anticipated that Appellants will argue that they are entitled to an exception of the annual operating permit requirement in Section 810.A. Section 810.A. identifies a number of exceptions to the permitting requirement. Ms. Zirngibl testified that Appellants did not qualify for any of the exceptions under Section 810.A. (N.T. at 177-180). She also noted that during her visit on July 17, 2017, she did not observe any signs of farming or a garden on the Fox Property

to qualify Appellants for an exception under Section 810.A(4). (N.T. at 156, 178-179, 194). Additionally, the significant amount of material dumped on the property would not be consistent with someone using the material for a home garden. (N.T. at 179). Further, with regard to the exception under Section 810.A(5), Ms. Zirngibl did not consider the grass clippings, wood chips, and leaves dumped on hillside as “clean fill.” (N.T. at 179-180). Article XXI requires that “clean fill” be “[u]ncontaminated . . . non-decomposable” material. Article VIII, § 804. Clearly, as observed by this tribunal during the site inspection on July 30, 2018, the grass clippings, wood chips, and leaves dumped on the Fox Property is not “clean fill.”

Furthermore, the burden was on Appellants to prove that they are entitled to an exception under Section 810.A. It is well established that “[w]hen a statute defines the factual basis of an offense or entitlement, and then states a further factual element as a basis for an exception, the Pennsylvania Supreme Court has treated the exceptional element as a matter for affirmative defense, **placing the burden on the defending party to show the affirmative, rather than subjecting the other party to proof of a negative proposition.**” Com., Pennsylvania Liquor Control Bd. v. T.J.J.R., Inc., 548 A.2d 390, 392 (Pa. Cmwlth. 1988) (citing Keyes v. N.Y., Ontario & W. Ry. Co., 265 105, 108 A. 406 (Pa. 1919) (emphasis added)). This requirement is consistent with Article XI, § 1105.C.7., which states that “[i]t shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence.” In this case, Appellants failed to offer any evidence that they are entitled to an exception. Significantly, Appellants did not even testify at the Hearing to support their claim for an exception. Instead of offering evidence in support of an exception, Appellants’ counsel questioned the ACHD’s witnesses on hypothetical scenarios relating to the exceptions. However, Appellants failed to offer any facts to support the basis for the hypothetical.

Accordingly, this tribunal should find that Appellants violated Article VIII § 810.A by operating a “municipal waste disposal facility” without an annual operating permit.

2. Violation of Article VIII § 813.B

Section 813.B states as follows:

Solid Waste Management Systems, Prohibition. It shall be unlawful for any person to install, construct, or operate any solid waste management system, including disposal facility, transfer facility, recycling facility, composting facility, or any other approved method for the disposal of solid waste unless such person has complied with the requirements and standards contained in this Article, Article XXI, all other applicable rules, regulations, and laws of Allegheny County, the Commonwealth, and the United States.

Ms. Zirngibl testified that Appellants were operating a solid waste disposal facility. (N.T. at 170-71). As noted above, the broad definition of “solid waste” includes “municipal waste.” Article VIII, § 804. Ms. Zirngibl further testified that Appellants did not comply with Article VIII and DEP regulations because they illegally dumped waste material down the hillside and because they were not permitted by the ACHD or DEP. (N.T. at 171-72). Accordingly, because Appellants were operating a solid waste disposal facility that was not in compliance with Article VIII and DEP regulations, Appellants violated Section 813.B.

3. Violation of Article VIII § 813.C

Section 813.C states as follows:

Solid Waste Management, Prohibition of Un-permitted Disposal. It shall be unlawful for any person to dispose or cause the disposal of solid waste upon any public or private property or into the Waters of the Commonwealth except in an approved manner as provided by this Article.

As discussed above, the dumping of wood chips, grass clippings, and leaves on the Fox Property meets the definitions of “disposal” of “solid waste” under Article VIII. The material was also dumped on the public property owned by the City of Clairton. Ms.

Zirngibl testified that the disposal of the solid waste was not performed in an approved manner under Article VIII. (N.T. at 172). Specifically, Ms. Zirngibl testified that Appellants were required to have a liner system in place before dumping and to perform proper maintenance of the system. (N.T. at 172-173). Therefore, because Appellants disposed of solid waste material on public and private property in an unapproved manner, Appellants violated Article VIII, § 813.C.

4. Violation of Article VIII § 813.E

Section 813.E states as follows:

Standards. Planning, design, and operation of any recycling facility, solid waste management facility or area of a solid waste management system including municipal waste disposal facilities, construction/demolition waste disposal facilities, residual waste disposal facilities, incinerators, composting facilities, transfer facilities, processing facilities, and solid waste salvage operations, shall be in accordance with the applicable regulations in 25 PA Code, Chapters 271 through 299 inclusive. The Department may adopt such standards as it deems necessary to prevent nuisances and pollution of air, land, or waters of Allegheny County. Such standards shall include procedures to ensure suitability of the site and the proper operation of the solid waste management systems and recycling facilities. No person shall operate a solid waste management system or recycling facility which is not in compliance with these standards.

Ms. Zirngibl testified that Appellants were operating a “solid waste management system.” (N.T. at 173). Ms. Zirngibl testified that “25 PA Code, Chapters 271 through 299” refer to the DEP regulations that pertain to landfill activities, transfer stations, and incinerators. (N.T. at 173-174). Ms. Zirngibl stated that one of the requirements of these regulations is for a facility to obtain a professional certification that the facility is operating properly. (N.T. at 174). Appellants did not offer any evidence that they obtained a professional certification that the facility was operating properly. Therefore, because Appellants were operating a solid waste management system that was not in accordance with DEP regulations, Appellants violated Article VIII, § 813.E.

5. Violation of July 19, 2017 Notice of Violation and Order

On July 19, 2017, the ACHD Waste Management Program issued a Notice of Violation (NOV) and Order against Appellants relating to the illegal dumping of mulch material on the Fox Property. (Ex. "D-11"). The NOV states as follows:

In response to a complaint, an inspection was conducted on your property located at 711 Worthington Avenue, Clairton, 879-G-95, 879-G-91, 879-G-89, 879-G-87, 879-G-85 on July 17, 2017. At the time of the inspection, it was determined that the property was being used for illegal waste disposal. Several years of vegetative material have been pushed down the hillside for disposal. The compaction of the materials overheated and caused a fire at the lower levels of the slope. Some of the waste from your property may have progressed onto the City of Clairton's property.

The NOV included the following order:

[Y]ou are Ordered to perform the following corrective actions:

1. Immediately upon receipt of this Order, **Cease and Desist** all activities constituting illegal disposal of solid waste.

(Ex. "D-11" (emphasis in original)). This Order clearly requires that Appellants stop dumping solid waste material, such as grass clippings, wood chips, and leaves, on their property.

Appellants filed a notice of appeal of the NOV and Order on July 21, 2017. (Ex. "D-25"). This indicates that as of July 21, 2017, Appellants had received the Order requiring that they do not allow any further dumping of solid waste on the Fox Property.

The credible evidence presented at the Hearing supports a finding that the Appellants continued to dump solid waste material on the Fox Property after receiving the July 19, 2017 NOV and Order. On August 15, 2017, Ms. Zirngibl testified that she performed a reinspection of the Fox Property and observed fresh grass and brush that had been recently dumped on the Fox Property. (N.T. at 163). Ms. Zirngibl spoke to Mr. Fox on August 15, 2017 regarding the continued dumping of waste material. (N.T. at 163-164). Mr. Fox admitted to allowing material to be dumped on his property and indicated that he would continue to allow dumping. (N.T. at

164). The dumping of waste material on the Fox Property, as observed by Ms. Zirngibl on August 15, 2017, is a violation of the July 19, 2017 NOV and Order. Further, the ACHD received a report from the Clairton Police Department which indicated that Appellants were dumping material on the Fox Property. (N.T. at 166). This report from the Clairton Police Department provided the basis for a second violation of the July 19, 2017 NOV and Order. (N.T. at 166).

6. The Civil Penalty assessed for the Solid Waste violations was appropriate based on Appellants' conduct

On October 10, 2017, the ACHD issued an Administrative Order against Appellants in which it assessed a civil penalty of \$3,220.00 for the violations of Article VIII (“Solid Waste and Recycling Management”) regulations. (Ex. “D-14”). During the Hearing, the ACHD advised this tribunal that it was withdrawing the violation of Article VIII, § 813.M. As a result of withdrawing this violation, the assessed civil penalty was reduced to \$3,020.00.

Article XVI, § 1605.C (“Environmental Health Civil Penalties”), requires that the following factors be considered in assessing civil penalties:

Penalty Determination: In determining the amount of civil penalties to be assessed, the Director shall consider the economic benefit gained by such person by failing to comply with the Article, the willfulness of the violation, the actual and potential harm to the public health, safety and welfare and to the environment, the nature, frequency and magnitude of the violation, and any other relevant factors.

Article XVI, § 1605.B, provides that the ACHD may issue a civil penalty of \$10,000 per violation plus up to \$2,500.00 for each day of continued or repeated violation.

Joy L. Smallwood⁷ is an Environmental Health Administrator II in the ACHD Solid Waste Management Program and assessed the civil penalty for the violations of the Solid Waste

⁷ Ms. Smallwood has B.S. in environmental resource management from Penn State University and a Master of Science degree in environmental science and management from Duquesne University. (N.T. at 196). She also has a Pennsylvania recycling certification with a specialization in composting. Id.

regulations against Appellants. (N.T. at 199). Ms. Smallwood stated that the ACHD assessed a civil penalty of \$350.00 for each violation of the July 19, 2017 NOV and Order, for a total of \$700.00. (N.T. at 199). For the four violations of the Article VIII regulations, the ACHD assessed a civil penalty of \$200.00 for each violation for a total of \$800.00. (N.T. at 200). The ACHD also increased the civil penalty by \$160.00 due to the willfulness of Appellants conduct in dumping mulch material for years. (N.T. at 200-201). Finally, the ACHD assessed an economic benefit amount of \$1,360.00 based on Appellants not paying a permit fee of \$136.00 to the ACHD for 10 years⁸. (N.T. at 201). Under Article XVI, § 1605.B, the ACHD could have issued a civil penalty of \$10,000 for each of the four Article VIII violations, plus \$2,500.00 for each day Appellants illegally dumped material on their property. Given that Appellants admitted to illegally dumping waste material without a permit for nearly 15 years, a civil penalty amount of only \$3,020.00 is appropriate.

B. Appellants violated the ACHD’s Article XXI (Air Quality) regulation by causing air pollution resulting from the illegal dumping of solid waste

The ACHD offered credible evidence at the Hearing that Appellants violated Sections 2101.11.a.3, 2101.11.b, and 2101.11.c of the Article XXI (“Air Pollution Control”) regulations.

At the Hearing, the ACHD offered the following evidence in support of the violations:

1. Violation of Article XXI § 2101.11.a.3

Section 2101.11.a.3 states as follows:

- a. It shall be a violation of this Article to fail to comply with, or to cause or assist in the violation of, any requirement of this Article, or any order or permit issued pursuant to authority granted by this Article. No person shall willfully, negligently, or through the

⁸ During the Hearing, Appellants’ counsel questioned whether the ACHD had the authority to assess a civil penalty based on 10 years of violations. The Article VIII regulations were promulgated pursuant to the ACHD’s authority under the Pennsylvania Solid Waste Management Act. Article VIII, § 800; 35 P.S. § 6018.106. The Solid Waste Management Act states that actions for civil penalties “may be commenced at any time within a period of 20 years from the date the offense is discovered.” 35 P.S. § 6018.617. Therefore, the ACHD was permitted to assess a civil penalty relating to the economic benefit gained by Appellants in not paying for a permit fee for 10 years.

failure to provide and operate necessary control equipment or to take necessary precautions, operate any source of air contaminants in such manner that emissions from such source:

* * * *

3. May reasonably be anticipated to endanger the public health, safety, or welfare.

Before explaining the basis for Appellants' violation of Section 2101.11.a.3, it is important to define some of the relevant terms. Article XXI defines "air contaminant" to include "any air-borne smoke, dust, dirt, noxious or obnoxious acid, fume, oxide, gas, mist, vapor waste, toxic waste, particulate, pollen, radioactive solid, liquid or gaseous matter, malodorous matter, or any other materials, including but not limited to all regulated air pollutants, in the open air, but excluding uncombined water, or any combination thereof." Article XXI, § 2101.20. Carbon Monoxide is an air contaminant. (N.T. at 130). Article XXI defines a "source" broadly to include any "place, . . . operation, activity, or other thing or any combination thereof" that "may be emitted into the outdoor atmosphere any air contaminant emit air contaminants into the outdoor atmosphere." Article XXI, § 2101.20. The ACHD has interpreted this definition of a "source" to include "anything that can create air pollution in the county." (N.T. at 130). The Appellants' mulch dumping operations and activities clearly fall under this definition due to the air contaminants that may be emitted as a result of fires caused by the decomposing material. (N.T. at 130). It is for this reason that the Article XXI, § 2101.11.a.3, requires that Appellants "operate necessary control equipment or to take necessary precautions" to prevent the release of air contaminants that "[m]ay reasonably be anticipated to endanger the public health, safety, or welfare."

The credible evidence presented established that air contaminants, such as carbon monoxide, were emitted during the fire on the Fox Property. ACHD Air Quality Engineer

Najeeb Basher testified that during a mulch fire, there is incomplete combustion due to the lack of oxygen which results in smoke and carbon monoxide. (N.T. at 90, 94, 108, 109). Mr. Basher determined that the fire on the Fox Property “was of such magnitude, and because of the incomplete combustion, would necessarily have a carbon monoxide and probably odors.” (N.T. at 102). This determination is supported by Deputy Fire Marshal Hollenberger who testified that he recorded readings of 50 to 70 parts per million of Carbon monoxide (CO) at the top and bottom of the hillside.

The ACHD also presented evidence that Appellants failed to “operate necessary control equipment or to take necessary precautions” to prevent the air contaminants from being emitted. Testimony was presented that during the decomposition of organic material, such as mulch, wood chips, and grass clippings, heat is produced as a result of exothermic reaction. (N.T. at 94-95, 126). Due to the exothermic reaction, a mulch pile will catch fire if it is not properly tended. (N.T. 94, 126). In order to prevent a fire, mulch material must be turned. (N.T. at 97, 156-157). Because the mulch material was pushed into a steep ravine by Appellants, the material was not turned. (N.T. 113, 159). Therefore, Appellants failed “to take necessary precautions” of turning the pile in order to reduce heat generated by exothermic reaction. (N.T. at 97, 108, 111-113, 128-129). As a result, the mulch material ignited which resulted in significant smoke and air pollutants being emitted. (N.T. 113, 128-129, 161-162).

Finally, the ACHD produced evidence that emissions of air pollutant “[m]ay reasonably be anticipated to endanger the public health, safety, or welfare.” Deputy Fire Marshal Hollenberger testified that the CO readings were high enough to be considered harmful for long exposure time. (Ex. “D-3”; N.T. at 20, 55). As a result of the smoke and carbon monoxide produced by the fire, residents living near the Fox Property had to be evacuated. (N.T. at 89-90). The severity of the smoke caused by the fire was clearly depicted in the video of the news report

which showed smoke filling the streets around the Fox Property. (Ex. “D-16”). Accordingly, due to the Appellants failure to operate necessary control equipment or to take necessary precautions, air contaminants, such as CO, were emitted which endangered the public health, safety, and welfare of the Clairton residents.

It is anticipated that Appellants will argue that they cannot be responsible for the harm caused by air contaminants because the fire did not occur on their property. This argument is nonsensical and lacks any legal basis. Deputy Fire Marshal Hollenberger testified that when he arrived on the Fox Property, he observed smoke coming from “several voids or cracks near the top of the pile.” (Ex. “D-3”; N.T. at 19, 25, 43, 49, 52). This testimony was supported by photographs taken by the Fire Marshal’s Office which clearly show smoke coming from the top of the hill. (Ex. “D-9” at ACHD-0068, 0071, 0083). The location of the smoke was on Appellants’ property. (Ex. “D-18”).

Further, for nearly 15 years, Appellants allowed landscapers to dump grass clippings, wood chips, leaves, and dirt on their property. (Ex. “D-3” at ACHD-0016; N.T. at 31, 32, 48; Appellants Answers to 2nd Set of Interrog. at No. 4 – Ex. “D-22”; Ex. “D-23”). Mr. Fox then pushed the mulch material off the hillside into the ravine in order to increase the size of his property. Id. Over the years, Appellants expanded the size of the mulch pile onto the property owned by the City of Clairton. (Ex. “D-17”; N.T. at 133-134; Ex. “D-9” at ACHD-68, 0071, 0074, 0083). This significant expansion of the mulch pile is clearly depicted in the Google Earth photographs admitted during the Hearing. (Ex. “D-17”). By July 2017, the size of the compost/mulch pile was 150 feet long, 75 feet wide, and approximately 75 to 100 feet deep. (N.T. at 19; Ex. “D-3” at ACHD-0016). It was the grass clippings, wood chips and leaves that Appellants dumped and pushed into the ravine and onto the City of Clairton’s property that ignited and caused the fire and smoke. It is astonishing that Appellants are attempting argue that

they cannot be held responsible for material that they intentionally dumped on a neighboring property simply because the actual burning of the material may not have occurred on their property. Mr. Basher and Mr. DeLuca from the ACHD testified that the location of the actual fire does not matter because the mulch material that ignited originated from Appellants' property. (N.T. 104, 131).

It is further anticipated that Appellants will argue that there is no evidence to support that the fire was caused by the decomposing mulch dumped by Appellants. Again, this argument is contrary to the credible evidence presented at the Hearing. On July 14, 2017, Deputy Fire Marshal Hollenberger arrived at the Fox Property to investigate the cause of the fire. (Ex. "D-3", N.T. 21). As a Deputy Fire Marshal, Mr. Hollenberger's duties and responsibilities include "[t]o investigate the origin and cause of fires as requested within Allegheny County." (N.T. 12). Deputy Fire Marshal Hollenberger testified that based on his investigation, he determined that the ignition point for the fire on the Fox Property was the decomposing mulch, leaves, and grass that was dumped and pushed over the hillside by Mr. Fox. (Ex. "D-3", N.T. at 33-34). He explained that "decomposition of landscape debris which caused an exothermic reaction which creates a smoldering state. The smoldering state can occur anywhere within the pile and then it expands. Because the pile is so large, it doesn't reach exterior air when it can cool itself. So it expands throughout the pile and continues to smolder." (N.T. at 33-34) He determined that "there was also no other evidence of any other ignition source." (N.T. 45).

Mr. Hollenberger's conclusion was based on witness interviews, observations on scene, and the material he observed. (N.T. 45). Mr. Hollenberger also relied on the National Fire Protection Association (NFPA) 921 guide for certified fire and explosion investigation. (N.T. 39). NFPA 921 is the main document used for fire and explosion investigation. (N.T. 40). Specifically, he reviewed the section of NFPA 921 that deals with smoldering ignition and solid

phase burning where it discusses exothermic reactions and materials providing energy that can lead to ignition and burning.” (N.T. 39-40). Mr. Hollenberger’s opinion as to the cause of the fire was also reviewed and approved by Deputy Fire Marshal Gregory, Chief Deputy Fire Marshal Don Brucker⁹ and Chief Fire Marshal Matt Brown. (Ex. “D-3”, N.T. 36, 45).

It is also anticipated that Appellants will argue that the fire on the Fox Property was caused by an underground mine seam fire. However, Appellants offered no evidence to support this claim. Robert Silvis, PE, is a civil engineer for the Pennsylvania Department of Environmental Protection (DEP), Bureau of Abandoned Mine Reclamation. (N.T. 63). Mr. Silvis was asked by the ACHD to investigate an alleged underground mine fire on the Fox Property. (N.T. at 64). Mr. Silvis reviewed maps of the Clairton area to determine the location of coal seams and underground mine fires near the Fox Property. (Ex. “D-5”; N.T. 66-70). Mr. Silvis visited the Fox Property on September 1, 2017. (N.T. at 70). During the visit, he did not observe any coal refuse or coal waste product. (N.T. at 70-71). He observed that the hillside on the Fox Property was mulch or compost type material. (N.T. at 71) During the visit, he did not see any smoke or smell burning coal. (N.T. at 72). Mr. Silvis testified that he did not find any evidence of an underground mine fire under the Fox Property or the neighboring property. (N.T. at 74-75; Ex. “D-6”; Ex. “D-7”). This finding was based on his investigation that determined that there were no coal seams at the elevation of the property. (N.T. at 74-75; Ex. “D-5”; Ex. “D-6”; Ex. “D-7”).

2. Violation of Article XXI § 2101.11.b.1

Section 2101.11.b.1 states as follows:

b. It shall be a violation of this Article for any person to:

⁹ Chief Deputy Fire Marshal Brucker has 18 to 20 years of experience.

1. Operate, or allow to be operated, any source in such manner as to allow the release of air contaminants into the open air or to cause air pollution as defined in this Article, except as is explicitly permitted by this Article;

As discussed above, the ACHD determined that Appellants failed to properly operate their mulch dumping activities which caused a fire that resulted in the release of air contaminants, such as CO, into the open air. The release of air contaminants was not “explicitly permitted” under Article XXI. (N.T. at 129-130). As a result, Appellants are in violation of Section 2101.11.b.1. (N.T. at 103, 129-130).

3. Violation of Article XXI § 2101.11.c

Section 2101.11.c states as follows:

- c. It shall be a violation of this Article for any person to cause a public nuisance, or to cause air, soil, or water pollution resulting from any air pollution emission. No person who operates, or allows to be operated, any air contaminant source shall allow pollution of the air, water, or other natural resources of the Commonwealth and the County resulting from such source.

The violation of Section 2101.11.c was based on Appellants causing air pollution due to the mulch fire. Article XXI defines “air pollution” as “the presence in the ambient air of one or more air contaminants in sufficient quantity and of such characteristics and duration which may reasonably be anticipated to have an adverse effect upon the public health, safety, or welfare, human, plant, or animal life, or to property, or which interferes with the comfortable enjoyment of life and property.” Article XXI, § 2101.20.

In the late afternoon on Friday, July 14, 2017, and on Monday, July 17, 2017, the ACHD received complaints from citizens of Clairton and complaint referrals from the DEP and the EPA regarding the mulch fire on the Fox Property. (N.T. at 87-88, 125-127). The complainants stated that smoke from the fire on the Fox Property was crossing into the streets and entering their homes. (N.T. at 126-127). There were also complaints about odors from the fire. Id. The significant

amount of smoke from the fire is depicted in the video taken by local media. (Ex. “D-16”). Also, as discussed above, carbon monoxide is an air contaminant. (N.T. at 130). Deputy Fire Marshal Hollenberger testified that the CO readings taken were high enough to be considered harmful for long exposure time. (Ex. “D-3”; N.T. at 20, 55). Based on this evidence, it is evident that smoke from the mulch fire meets the definition of “air pollution.” Because Appellants caused the air pollution due to their improper dumping of mulch, Appellants violated Section 2101.11.c. (N.T. at 103, 130-131, 132, 134).

4. The Civil Penalty assessed for the Air Quality violations was appropriate based on Appellants’ conduct

On October 10, 2017, the ACHD issued an Administrative Order against Appellants in which it assessed a civil penalty of \$1,150.00 for the violations of Article XXI. (Ex. “D-14”). It is important to note that even though the ACHD issued three separate violations of Article XXI, only one civil penalty was issued. (N.T. at 136). The ACHD had the option of assessing a civil penalty for each violation which would have tripled the civil penalty. Therefore, so long as this tribunal finds that Appellants violated at least one section of Article XXI, the civil penalty against Appellants will still be \$1,150.

Article XXI, § 2109.06.b.1, requires that the following factors be considered in assessing civil penalties:

[T]he willfulness of the violation; the actual and potential harm to the public health, safety, and welfare; the damage to the air, soil, water, and other natural resources of the County and their uses; the economic benefit gained by such person by failing to comply with this Article; the deterrence of future violations; the costs of the Department; the size of the source or facility; the compliance history of the source; the nature, frequency, severity, and duration of the violation; the degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether or not the violation was voluntarily reported; other factors unique to the owners, operators, or other responsible parties of the source or facility; and other relevant factors.

Article XX, § 2109.06a.1, also provides that the ACHD may issue a civil penalty of \$25,000 per day for each Violation.

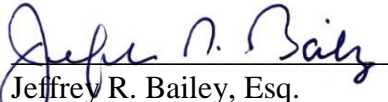
ACHD Air Quality Enforcement Chief, Dean DeLuca, testified that he considered all of the above factors before assessing the penalty. (N.T. 136-138). The factors supporting the civil penalty amount include the significant health effects of the smoke, the duration of the violation (i.e. fire lasted several days), impact on the public from the smoke, and Appellants continuing to dump material on their property after the fire. When assessing the civil penalty, Mr. DeLuca also considered that Appellants were individuals and had no prior violations. (N.T. at 137). These factors resulted in Appellants' civil penalty being lowered. (N.T. at 137). Based on these factors, the civil penalty amount of \$1,150.00 out of a potential \$25,000 is appropriate.

IV. CONCLUSION

For the reasons set forth herein, the Allegheny County Health Department respectfully requests that the Hearing Officer dismiss Appellants' Notice of Appeal and assess a civil penalty in the amount of \$3,020.00 for the violations of the Article VIII ("Solid Waste and Recycling Management") regulations and a civil penalty amount of \$1,150.00 for the violations of the Article XXI ("Air Pollution Control") regulations.

Dated: March 6, 2019

Respectfully submitted,


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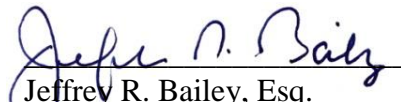
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Allegheny County Health Department's Post-Hearing Memorandum in Opposition to Appellants' Notice of Appeal has been served upon the following via electronic mail this 6th day of March, 2019:

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