

The Appellants have listed Randal Weiss, a Department employee, as a witness in their pre-hearing memorandum. The Department has filed a motion in limine asking us to preclude Weiss from testifying. According to the Department, Weiss was not involved in and has no direct knowledge relating to the Department's review and approval of the RI/CP. Rather, his involvement at the site began after the RI/CP was approved. In his affidavit submitted in support of the Department's motion, Weiss states as follows:

My first involvement regarding any matter related to the Site at issue in this appeal resulted from a routine inspection I conducted at the Frey Farm Landfill ("Landfill") in Lancaster County on May 15, 2009. At that time I became concerned that the Landfill may have been improperly using material from the Site as alternative daily cover. I subsequently became concerned that overweight trucks may have been transporting solid waste from the Site to the Landfill.

I visited the Site on May 18, June 2 and 9, and July 15, 2009 to investigate my concerns. These inspections were limited to addressing my concerns regarding alternative daily cover and overweight trucks. These are the only times I visited the Site.

At this time, the Department has not taken any enforcement actions regarding the issues of concern.

The Department's argument in support of its motion is that *all* evidence regarding events that occurred after the Department took the action being appealed is necessarily irrelevant. All such evidence is irrelevant in the Department's view because it cannot possibly shed any light on whether the Department acted reasonably and lawfully. Therefore, because Weiss only became involved with the Site after the Department approved the RI/CP, he cannot possibly provide any relevant information and he should be excused from the "significant burden" of testifying. TRRAAC opposes the motion, arguing that Weiss has relevant information and that requiring him to testify will not impose an untoward burden.

The Department's argument is much too broad. As a matter of both the rules of evidence and administrative law, the Department's argument overstates the significance of the date when the Department took the action being appealed, at least as that date relates to assessing the relevance of otherwise probative evidence.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. Pa.R.Ev. 401. Whether evidence has a tendency to make a given fact more or less probable is determined by this Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal. Pa.R.Ev. 401, *Official Comment*. We must decide whether the evidence sought to be admitted might change a reasonable person's assessment of the probabilities of a fact. OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE (2008-09 ed.).

Evidence of events that occurred after the supposedly critical incident often has undeniable relevance. The most obvious example is evidence of subsequent remedial measures, which is excluded in certain cases as proof of negligence or culpability not because it is irrelevant, but for the public policy reason of encouraging responsible parties to take added safety measures. *See* Pa.R.Ev. 407 and its *Official Comment*. Evidence of subsequent accidents can be admissible to demonstrate the existence of a hazardous condition. *Fernandez v. City of Pittsburgh*, 643 A.2d 1176 (Pa. Cmwlth. 1994). Flight, changing one's appearance, failing to appear at obligatory legal proceedings, threatening witnesses, concealing one's identity, and destroying evidence are all events that occur after a crime, accident, or event that may in certain circumstances be relevant. OHLBAUM § 401.08. Evidence regarding offers to compromise or to pay expenses can be relevant and admissible for any number of purposes other than proving

liability. Pa.R.Ev. 408 and 409. The Department is simply incorrect in postulating a categorical exclusion for all evidence regarding all events occurring after the primary incident in question.

Evidence regarding subsequent events can easily change a reasonable person's assessment of the probabilities of a fact. For example, suppose the Department issues a permit for the construction of a dam. While an appeal from the permit issuance is pending, the dam is built to specification but then fails, causing catastrophic loss of life and property downstream. Under the Department's view, the failure of the dam is not relevant for the simple reason that it concerns an event that occurred after the Department issued the permit. The Board must close its eyes to the dam failure and the catastrophe that it caused because the dam failed after the Department issued the permit. Or suppose that during excavation in preparation for construction it is revealed for the first time that the surrounding geology cannot support a dam. Or that the Department's experts or other party's experts conduct further study after the permit is issued that reveals the hazardous nature of the dam site. Or that the stream being dammed changes course as a result of, e.g., flooding or other acts of nature or mine subsidence, after the permit is issued. All of this evidence can in no way be said to be irrelevant simply because it relates to events that occurred after permit issuance. It clearly also relates to the propriety of the issuance of the permit in the first place. All of the evidence is probative on whether the Department's issuance of a dam permit should be sustained.

For the Department to disregard or ignore evidence of subsequent events suggesting that it may have made a mistake would be a dereliction of its duty to protect the Commonwealth's environment. It would be equally inappropriate for this Board to ignore such evidence. In fact, we can imagine no good reason why we would disregard such important information out of blind deference to an overly rigid interpretation of the rules of evidence.

The Department's argument that all evidence of subsequent events is by definition irrelevant is also incorrect as a matter of administrative law. To be precise, the events of which the Department speaks are not really "subsequent" at all. No action of the Department adversely affecting a person is final as to that person once that person perfects an appeal from the action with this Board. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). Although it is enforceable, absent a supersedeas, the Department's action does not become final in the legal sense until this Board decides that it is final. Since the Department's action is provisional with respect to an appellant once an appeal is filed, the date of the provisional action becomes largely insignificant. The pertinent inquiry in a Board appeal is not whether the Department made the correct decision when it made it. There is no reason to consider whether a nonfinal action was correct at the time. Rather, the pertinent question is whether we should approve the nonfinal action *now* and convert it into a final action *now*. Therefore, any evidence generated up until *now* is potentially relevant.

Admittedly, the phrasing of our standard of review (as distinct from our *scope* of review) can be misleading. Although we consider whether the Department violated the law or acted unreasonably, our appeals should not be thought of as tort cases. We are charged with reviewing the Department's decision, not its conduct. Our focus is on the action itself. That is why going through the record to pick at errors the Department may have made along the way in reaching a decision is usually an unnecessary and unproductive distraction. *O'Reilly v. DEP*, 2001 EHB 19, 51. What really matters is whether the Department made the right call in the end.

As has often been said, the Board's responsibility is to make a *de novo* determination of whether the Department's action should be sustained. *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003); *Warren Sand & Gravel v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

“*De novo* review involves full consideration of the case anew. The [EHB] ... is substituted for the prior decision maker, DER, and redecides the case.” *O’Reilly*, 2001 EHB at 32 (quoting *Young v. DER*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991)). Unlike many other administrative tribunals, we do not conduct a record review. Instead, we are required to create our own record, and that record may and almost always does include evidence not previously considered by the Department. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *Lower Salford Township Authority v. DEP*, EHB Docket No. 2008-238-MG slip of at 3 (Opinion and Order issued July 2, 2009). It would violate our responsibility to conduct a *de novo* review if we were to defer in even the slightest way to the Department’s *factual* findings. If we are not limited to evidence considered by the Department, we are at a loss to understand why we would only consider evidence relating to events that occurred before the Department took its action. Creating such a barrier in time is completely arbitrary. If evidence otherwise admissible regarding an event makes it more or less probable that the Department’s action is valid and should be sustained, we will consider it, regardless of when the event occurred.

The Commonwealth Court’s opinion in *CRY v. DER*, 639 A.2d 1265 (Pa. Cmwlth. 1994), is often incorrectly cited for the proposition that all evidence regarding events that occurred after the Department’s action can never be relevant. In *CRY*, a citizens’ group challenged the Department’s issuance of a permit for a residual waste impoundment. In its attack on the Department’s decision to issue a permit, *CRY* unsuccessfully attempted to introduce evidence that the impoundment’s liner was torn during installation. The Court upheld the Board’s exclusion of this evidence as irrelevant because the fact that a party allegedly did not act with due care or in accordance with the requirements of the law and the terms of its permit did not in that case suggest that the permit was improvidently issued in the first place. *CRY*, 639 A.2d at

1274. The Court found that improper operation under a properly issued permit raises issues of implementation and enforcement, not, in that case, permitting. As the *CRY* holding was later explained by the Court in *Leatherwood v. DEP*, 819 A.2d 604, 610 (Pa. Cmwlth. 2003), “whether an approved liner is subsequently damaged does not necessarily shed light on whether the liner *as specified* was appropriately approved.” In any event, TRRAAC concedes in its response to the Department’s motion that it does not intend to elicit testimony regarding implementation *per se* from Weiss.

Finally, evidentiary rulings regarding relevance are highly case-specific. Any attempt to create rigid rules or paint bright, impenetrable lines is doomed to failure. We see no basis for adopting the categorical exclusion advocated by the Department in this case.

In its response, TRRAAC describes what it believes to be the relevant testimony to be provided by Weiss. The Department’s motion, however, only related to timing. Accordingly, we will not use this occasion to decide one way or the other whether Weiss’s testimony is otherwise relevant.

Accordingly, we issue the Order that follows.



**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**THE RAIL ROAD ACTION AND
ADVISORY COMMITTEE AND DAN E.
GILLIS** :

v. :

EHB Docket No. 2008-315-L

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, LANCASTER COUNTY
SOLID WASTE MANAGEMENT
AUTHORITY, Recipient, AND FRANKLIN
& MARSHALL COLLEGE, Intervenor** :

ORDER

AND NOW, this 1st day of September, 2009, it is hereby ordered that the Department's motion in limine is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: September 1, 2009

c: DEP Bureau of Litigation:
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