IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

Protecting Our Indian River, and Inland Bay Foundation., Inc.,	:	
Appellants,	:	C.A. No: S14A-07-003 RFS
v.	:	
Delaware Department of Natural Resources and Environmental Control, and Allen Harim Foods, LLC,	:	
Appellee.	:	

MEMORANDUM OPINION

Upon Appellants' Appeal from the Environmental Appeals Board-**Affirmed.**

Date Submitted: May 5, 2015

Date Decided: August 14, 2015

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STOKES, J.

Presently before the Court is an appeal from the Environmental Appeals Board, ("EAB"), brought by Protecting Our Indian River, an unincorporated Association, and Inland Bays Foundation, Inc. (collectively "Appellants"). One of the Appellees, Allen Harim Foods, LLC ("Harim") seeks to utilize the Pinnacle site ("Pinnacle Site" or "Site")[1] as a chicken processing plant. Harim entered into a Brownfields Development Agreement requiring Harim to conduct a Brownfields Investigation concerning contamination at the Pinnacle site. The Brownfields Agreement enables Harim to renovate and utilize the Pinnacle Site as a chicken processing plant. Pursuant to the Brownfields Agreement, Delaware Department of Natural Resources and Environmental Control ("DNREC") approved the proposed plan as the Final Plan of Remedial action which set the stage for using the Site as intended.

Appellants appealed the Secretary's Order to the EAB. Following an adversarial hearing, the EAB issued a Decision and Final Order. The EAB affirmed the order issued by the Secretary of DNREC approving the Final Plan of Remedial Action, finding the plan was in accordance with the Delaware Hazardous Substances Cleanup Act ("HSCA"). Appellants seek to reverse the EAB's decision and final order approving the order issued by the Secretary of DNREC.

[1] The "Pinnacle site" is the subject matter of this case and the underlying orders issued by the Secretary of DNREC and EAB. The site is located at 29984 Pinnacle Way, Dagsboro, DE.

Appellants argue EAB erred by approving the order issued by the Secretary of DNREC for two reasons: (1) upholding and approving the Final Plan of Remedial Action that violated the HSCA and supplemental regulations, and (2) the EAB's factual findings are not supported by substantial evidence of the record. Harim and DNREC maintain approval of the Final Plan of Remedial action was lawful and consistent with the requirements and regulations of the HSCA and substantial evidence supports the decision. As such, Harim and DNREC both seek to affirm the EAB's decision.

Following oral argument and written submissions by the parties, the Court **AFFIRMS** the decision of EAB for the reasons set forth herein.

Procedural Posture

On August 26, 2013, Harim and DNREC entered into a Brownfields Development Agreement regarding utilizing the Pinnacle Site as a chicken processing plant.[2] In accordance with the Brownfields Development Agreement, Harim was required to perform an environmental investigation of the Site.[3] If the investigation determined it was appropriate to utilize the site in accordance with the proposed use, Harim then would be able to utilize the property as intended but

[2] Brownfields Development Programs are codified at *7 Del C.* §§ 9121–9126.
[3] For a detailed description of the provisions and requirements Brownfields Development Agreement, *see* DNREC: Brownfields, http://www.dnrec.delaware.gov/dwhs/SIRB/Pages/Brownfields.aspx. A party seeking to develop property that may be contaminated may seek to develop such sites with an appropriate remedial plan. *Id.*

it would be subject to a plan to monitor conditions or remediate the site to ensure the public health and safety, unless DNREC determined the Site did not require further action.

Pursuant to the Brownfield Development Agreement, Harim collaborated with DNREC and performed a thorough investigation of the site. Harim submitted the results and data generated by the investigation to DNREC in November of 2013. On November 26, 2013, DNREC issued a Proposed Plan of Remedial Action after reviewing the data Harim provided. The public was notified of the approval,[4] and a public hearing was conducted on December 17, 2013, regarding the Proposed Plan of Remedial Action.[5] On December 24, 2013, the Secretary of DNREC issued an order approving the Proposed Plan as the Final Plan of Remedial Action for the Pinnacle Site.[6]

On January 16, 2014, Appellants filed a Statement of Appeal with EAB appealing the Secretary's Order approving the Proposed Plan as the Final Plan of Remedial Action. EAB conducted a hearing on May 13, 2014, regarding the approval of the Proposed Plan. EAB unanimously voted to approve the Secretary's decision and issued a decision and final order to that effect on June 24, 2014.[7]

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[4] The public is required to have notice pursuant to 7 *Del. C.* § 9107(e)(2).
[5] A public hearing is required pursuant to 7 *Del. C.* § 9112.
[6] *Decision & Order of the Secretary of Del. Dept. of Natural Resources and Environmental Control*, No. 2013-WH-0061 (Dec. 24, 2013) (hereinafter "*Secretary's Order"*).
[7] *Decision & Order of the Envtl. Appeals Bd.,* Appeal No.2014-01,(June 24, 2013) (hereinafter "*Envtl. Appeals Bd.* Appeal*"*).

Appellants filed this appeal[8] of EAB's decision and final order seeking reversal. The Opening Brief was filed on October 6, 2014.[9] Harim and DNREC filed separate Answering Briefs on October 27, 2014.[10] On November 6, 2014, Appellees filed a Reply Brief.[11] On April 4, 2015 oral argument was held where the parties briefed their legal positions.

Statement of Facts

The subject property of this case is the Pinnacle Site located in Sussex County. The Site constitutes approximately 107.3 acres located in close proximity to the center of the Town of Millsboro. Adjacent and northwest to the site is the NCR Corporation Superfund site. The site also borders agricultural and residential land to the southeast, an asphalt company to the southwest, and residential land to the northeast.[12] The Pinnacle Site itself was utilized for agricultural purposes and later used as a Vlasic pickle production plant from approximately 1973– 2012. Harim expressed an interest in the Pinnacle Site and sought to purchase the property in order to utilize the property as a chicken processing plant. Accordingly, Harim conducted preliminary environmental investigations of the

[8] This appeal is filed pursuant to 7 *Del. C.* § 9110(b)(2), 7 *Del. C.* § 6009, 29 Del. C. §10142, and Delaware Superior Court Civil Rule 72.
[9] *See generally*, Appellants' Op. Br.
[10] *See* Appellee DNREC Answering Br.; Appellee Harim Answering Br.
[11] *See* Appellant Reply Br.
[12] Appellee DNREC Br. at 3; *see also,* Brownfields Investigation Report at 1–3. The full Brownfields Investigation Report became part of the record at the December 17, 2013 Public Hearing as DNREC Ex. 3.

Site to determine its present condition and potential compatibility with the intended use of the Site.

First, Harim conducted a Phase I Environmental Assessment ("Phase I") with the assistance of BP Environmental. This assessment was conducted in March of 2013. Phase I provided a preliminary overview of the site's history and the present environmental conditions at the site. The results of Phase I indicated there was possible contamination at the site resulting from the site's history. As such, a more thorough investigation was required.

Next, Phase II Investigations commenced. During Phase II Investigations, a Limited Subsurface Investigation, ("LSI"), was undertaken and completed in April 2013. The results from the LSI revealed contaminants were located in the Site's subsurface. This study hypothesized contaminants, such as elevated levels of nitrates, sodium, and chloride, may be present on the site and in the groundwater due to waste sludge applications to the spray irrigation fields. The LSI report noted "[a] review of the DNREC groundwater Discharges Section records also indicate that dissolved nitrates were migrating off-site to the north/northeast towards residential housing utilizing relatively shallow domestic water wells."[13] Also, the LSI report revealed the presence of various heavy metals in the groundwater. The presence of these contaminants, according to the LSI, may

[13] Phase II Report at 4.

require additional investigation and remedial action even though they were under the January 2013 DNREC screening values.

Utilizing the data gathered, Harim and DNREC entered a Brownfields Development Agreement ("BDA"). This agreement required Harim to conduct a DNREC supervised Brownfields Investigation to determine whether remedial action is appropriate, or if the site required no further action.

At the direction of DNREC, the Brownfields Investigation was conducted on the Pinnacle site. During the investigation, Harim gathered soil, groundwater, and vapor samples. There was no sampling done off-site, particularly between the site and Holiday Acres, Colonial Estates, and Possum Point—residential areas adjacent to the site— to the south and northeast.

Harim submitted a draft of a Brownfields Investigation; however, DNREC required the report to be supplemented. Upon receipt of additional data gathered from the supplemental testing, DNREC approved the Brownfields Investigation on November 25, 2013.

According to the Brownfields Investigation Report, waste sludge was applied to the irrigation field from approximately 1978–1987. During this period, dissolved nitrates were migrating off-site through groundwater discharge to the north-by-northeast direction. Following a pickle brine spill in 2007, DNREC required Vlasic to remediate the site in order to address the migration of nitrates.

Vlasic remediated the property for several years. Vlasic discontinued the use of the remediation system when DNREC concluded the contamination was remediated.

The onsite sampling from the Brownfields Investigation Report indicated there were contaminants of concern in the groundwater. Based on the identification of certain contaminants, such as arsenic, aluminum, cadmium, barium, lead, manganese and cobalt, a human health risk assessment ("HHRA") was performed using target organ analysis. HHRA results revealed utilizing the subject property as a chicken processing plant would not pose an undue risk to humans who reasonably may come into contact with the contaminants of concern.

One contaminant of concern, cobalt, was evaluated in the report. The report noted the cobalt identified in the groundwater was "related to the entrainment and/or dissolution of natural formation material."[14] Additionally, the arsenic found in the ground water was not related to site soil conditions. Rather, the arsenic was the result of "artificial entrainment of formation materials, dissolution of formation materials or from an upgradient, offsite source."[15]

The data and reports generated by the investigation of the site were submitted to DNREC for consideration. DNREC reviewed the data pertaining to the site and requested a Proposed Plan of Remedial Action ("Proposed Plan") for the site. The Proposed Plan was approved by DNREC on November 26, 2014.

[14] Brownfields Investigation Report at 8-4.
[15] *Id.* at 6-2.

This plan required, *inter alia*, two additional remedial steps. First, Harim was required to develop a Long Term Monitoring Plan ("LTM") to monitor groundwater. A contingency of the LTM is that Harim is responsible for remediation should monitoring identify offsite migration of contaminants, or an increasing trend of contaminants by a later agreed upon date. Second, Harim was required to develop a Contaminated Materials Management Plan ("CMMP") to ensure the safety of workers performing construction on the site who may encounter contaminated soil.

Following a public hearing held on December 17, 2013, the Proposed Plan was adopted by Secretary's Order on December 24, 2013.[16]

John Austin ("Austin"), a resident of Sussex County and a retired United States Environmental Protection Agency employee, conducted a private sampling of residential water wells in and around Colonial Estates and Possum Point in January of 2014. The samples were sent to Lancaster Laboratories and analyzed for arsenic, chromium, lead, and cobalt. The samples revealed the presence of cobalt in six of the samples.

Austin contacted Delaware Department of Health and Social Services ("DHSS") regarding the potential health risks to the residents given the presence of cobalt in the sampled water wells. DHSS conducted their own sampling and

[16] *Secretary's Order* at 3.

confirmed the presence of cobalt in six of the tested sites. Three of the thirteen samples identified higher concentrations of cobalt than DNREC's acceptable risk standards via the hazard index scale.[17] Generally, a hazard index quantifies an individual contaminant's hazard quotient. A hazard index above one represents the possibility of observing an adverse health effect in individuals. Here, three of the fourteen wells tested by DHSS were above acceptable risk.

EAB held a public hearing on May 13, 2014. Appellants presented numerous exhibits and the testimony of Kathy Martin ("Martin") and Austin. Martin, a civil engineer from Oklahoma, studied groundwater flow in college. Martin claimed she did not visit the Site because there was nothing that could be learned about the geological features of groundwater movement that would be relevant to determining whether a bona fide contamination issue exists. Martin acknowledged the nitrate remediation that occurred due to the waste sludge applied to the spray fields. She also testified the Brownfields Investigation performed on the site was inadequate, particularly near the wastewater treatment plant, and the outdoor vat where pickles were treated in a brine solution.

Austin testified regarding the well sampling he performed and the levels of cobalt. According to Austin's testimony, US EPA Region III's Risk Assessment Tables Action levels were exceeded for the amount of cobalt that was found in the

[17] Appellee DNREC Br. at 6, n.5 (discussing HSCA regulations and acceptable risk per target organ analysis).

three wells with the highest concentration of cobalt. The high levels of cobalt, according to Austin, will result in a significant part of the population suffering an adverse medical effect in the event of exposure.

In his testimony, Austin also referenced the historical sampling data based on a brine spill in 2007. Two years following the brine spill of 2007, increased levels of contaminants were noted in the Colonial Estates area. The increased level of contaminants offsite following the spill suggests there was an offsite impact from the 2007 brine spill. Further, Austin testified monitoring in accordance with the Remedial Action Plan was insufficient because there are gaps where contaminants could feasibly migrate offsite without being detected.

Next, Harim presented two witnesses. First, to testify was Curtis Herman ("Herman"), a hydrologist and licensed Professional Geologist in the State of Delaware with extensive experience investigating and remediating contaminated sites. Second, Paul Miller ("Miller"), a principal engineer and Vice President of Environmental Alliance, a Delaware certified environmental consulting firm.

Herman testified about the extensive sampling performed on the Site. Samples taken from the Site include: soil characterization, groundwater characterization, soil vapor characterization, and sediment sampling. Herman stated the sampling performed was more than adequate to determine the potential source of contaminants on the Site in addition to the nature and extent of

contamination given groundwater movement and potential contamination migration.

Herman noted the metallic elements found in the samples from the private wells are the result of many different land use factors, including the location of the well itself. For example, Herman explained cobalt levels in the well water could be elevated due to activities on the land, such as septic tank waste. Cobalt is inherent in the background,[18] and certain brine solutions utilized in the disposal of septic tank waste can increase the pH in the area which can lead to the dissolution of metallic elements, such as cobalt. Similarly, Herman testified that nitrates are ubiquitous to the area and high concentration levels of nitrates, including those located offsite, are in fact not related to migration offsite. Rather, nitrate levels would be expected to be high in this area and perhaps were elevated based on the land use where the particular well is located.

Next, Miller testified based upon the risk assessment he performed and his expertise in the field, the appropriate remedy for the Pinnacle site is monitoring.

DNREC presented the testimony of Timothy Ratsep ("Ratsep"), the program administrator for the Site Investigation and Restoration Section ("SIRS") of DNREC. His testimony included an overview of the economic and social benefits

[18] Herman testified cobalt is present to the area because concentration levels of Cobalt below 23ug/L are considered background—the level of concentration of a substance found widely present in the area tests due to natural causes or human activities other than releases from, or activities on, the facility as determined by the Department.

of the Brownfields Program as well as his responsibilities as a program administrator. Ratsep's responsibilities include overseeing the application of the HSCA rules and regulations as they relate to the cleanup of hazardous substances. Ratsep explained SIRS has certified approximately 200 Brownfields sites and remediated one thousand sites upon which hazardous substance releases occurred.

Further, Ratsep discussed how monitoring is a common remedy employed by DNREC when the data generated from preliminary investigations reveal low levels of contamination and the present environmental conditions do not pose a significant risk to human health or the environment. In fact, Ratsep stated approximately half of the hazardous substance release sites that went through a SIRS cleanup program include a LTM, or similar long term stewardship plan.

Ratsep also discussed the purpose of the monitoring plan is to ensure DNREC has the ability to re-evaluate and address any such changed conditions as necessary should the environmental conditions changes. DNREC under the LTM will maintain the ability to monitor the site. If warranted, DNREC can require additional sampling or designate additional wells should additional monitoring be required. Also, DNREC can require an active remedial response, depending on the conditions of the Site, through the agreed upon date.

Lastly, with respect to the Brownfields Investigation in this case Ratsep testified "the Department has no data and the record does not indicate that there is any releases off-site from this facility."[19]

The unanimous decision rendered by EAB was issued June 24, 2014.[20] EAB found an appropriate investigation was performed at the Site,[21] the Site was adequately assessed, offsite issues were properly considered, the Final Plan of Remedial Action is adequate, sufficient sampling was done, additional investigation was not necessary, and finally that the contaminants existing in the residential areas near the property are not the result of contaminants migrating from the Site.[22] According to the EAB, the groundwater was moving in a north-by-northwest direction such that no contaminants were leaving the site towards the residential communities.[23] Also, EAB held the contaminants found on site are coming from community areas and traveling on the Site.[24] Further, EAB noted the

[19] Tr. At 320.
[20] *See generally, Envtl. Appeals Bd.,* Appeal.
[21] *Id.* Appeal at 25 (stating "[i]t appears to the Board that an appropriate investigation was done at this site and it revealed that no contaminants were moving from the site to the surrounding residential areas").
[22] *Id.* (finding "[c]ontrary to Appellants' assertion the Board finds that this site was adequately assessed, that off-site issues were properly considered and that the Final Plan of Remedial Action is adequate").
[23] *Id.* (explaining "[t]he Board finds that the groundwater at this site is moving in a north by north/northwest direction, as stated by Harim's witnesses. All of the investigation, including pump testing that was done, appears to confirm this. Therefore, no contaminant is leaving the site and going toward the residential communities. Rather, the contaminants found on site are coming from those community areas and traveling to the site").
[24] *Id.*

contaminants coming from community areas are likely the by-product of septic tank waste.[25]

Standard of Review

The standard of review on appeals from EAB[26] is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.[27] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[28] Absent an abuse of discretion or an error of law, if the Board's decision is supported by substantial evidence a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first instance.[29] "Thus, even if it would have reached a different conclusion, the Court will not substitute its judgment for that of the Board."[30] This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[31]

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[25] *Id.*
[26] There were contentions raised by Appellees regarding whether deference should be afforded to the Board below, however, this Court is utilizing a standard of review consistent with similar appeals from the EAB.
[27] 29 *Del. C.* §10142; *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *The Glade v. DNREC*, 2001 WL 845750, at *2 (Del. Super. July 12, 2001).
[28] *Miller v. Bd. of Adjustment of Dewey Beach*, 1994 WL 89022, *2 (Del. Super. Feb. 16, 1994).
[29] *The Glade*, 2001 WL 845750 at *2; *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super.1988), *aff'd*, 567 A.2d 422 (Del. 1989).
[30] *The Glade*, 2001 WL 845750 at *2.
[31] *Johnson v. Chrysler Corp.*, 312 A. 2d 64, 66 (Del. 1965).

Analysis

I. Whether EAB Erred as a Matter of Law by Approving the Final Plan of Remediation

Appellants contend the Final Plan of Remedial Action is inconsistent with the requirements and regulations of HSCA. The approved plan is inconsistent, according to Appellants, because the Brownfields Investigation did not sample beyond the perimeter of the site and failed to investigate areas of likely areas of contamination onsite. As such, Appellants contend the failure to sample offsite and the amount of testing conducted onsite were insufficient to meet HSCA standards. Hence, Appellants claim EAB's approval of the Final Plan of Remediation that failed to meet HSCA standards was an error of law.

Conversely, Appellees contend the approval of the Final Plan of Remedial Action and onsite investigation was properly performed in accordance with the requirements and regulations of HSCA. The first question for this Court is whether EAB erred as a matter of law by approving the Final Plan of Remediation based on these contentions.

1. Whether Offsite Testing was Required By HSCA Prior to Approval of the Final Plan of Remedial Action by EAB

Appellants assert the Final Plan of Remedial Action, which was approved by both DNREC and EAB, was inadequate because the Brownfields Investigation did not sample beyond the perimeter of the site. Alternatively, Appellees contend there was no requirement to test offsite *per se*. Moreover, Appellees argue offsite testing is required only when the evidence demonstrates there was a release of a contaminant that migrated offsite, which was not the case here.

Before making a determination as to whether the failure to conduct offsite testing rendered EAB's approval of the Final Plan an error as a matter of law, it is useful to look at the historical origins of the Brownfields Program. The Brownfields Programs finds its origins in Delaware in 1990 when HSCA, legislation that was modeled after the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") was enacted. Initially, HSCA embodied the national policy of CERCLA which sought to make the polluter pay for necessary remedial efforts. HSCA regulations and requirements mandate whoever is responsible for a release, or imminent threat of release, of a hazardous substance is liable.[32] Also, if there is more than one party responsible for the release or threat of release then the liability of such persons is strict, joint and several.[33]

[32] 7 Del. C. § 9105(a)(1)-(b).
[33] *Id.*

In many instances, the previous owner was the polluter and the present owner was held jointly and severally liable.[34] In these cases, the polluter who was no longer the property owner would become unavailable, due to bankruptcy or other reasons, and the present owner of the property was left footing the bill for remedial clean-up. In turn, this lead to investors and developers electing to take on the costs of developing unused properties, rather than renovate an existing location that had previously been developed for industrial use, in an effort to minimize risk.

A task force consisting of various stakeholders, including attorneys, environmental consultants, developers, local and state government officials, and community members proposed new legislation—the Brownfields Program—in order to address the shortcomings of the HSCA. The genesis of the Brownfields Development Program, which is a separate sub-chapter within HSCA today, was in 2004. The Brownfields Development program seeks to allow developers to use existing potentially contaminated sites, in an effort to preserve green-space. The program affords full liability protection for past pollution provided that developers' land use is in accordance with an approved clean-up plan.

The scope of a clean-up plan required to obtain statutory protection for a given site depends largely on the facts, circumstances, and condition of the "facility." Facility is defined as "any site or area where a hazardous substance has been

[34] *Id.*

generated, manufactured, refined, transported, stored, treated, handled, recycled, released, disposed of, placed, or otherwise come to be located."[35] HSCA regulations provide "[a] facility also includes all property where hazardous substances may have migrated to or come to be located since being released."[36] According to the rules and regulations, a developer may be required to go beyond the property limits of a site if there was a release of a hazardous substance on the property that has come to be located elsewhere due to migration.[37]

HSCA rules and regulations provide guidelines for analyzing a facility to assess the proper extent of a Brownfields Developer's obligation based on the facts, circumstances, and condition of the site. As such, the extent of a Brownfields Developer's obligations is determined by threshold questions: (1) whether a release of a hazardous substance occurred on the subject property; (2) if such a release has in fact occurred, whether the Developer must expand investigations, if needed, to determine the nature and extent of the release in order to identify the specific conditions that require potential remediation. The data generated from the investigations is analyzed and a determination is made as to what appropriate remedial measures will be required in the clean-up plan.

[35] 7 *Del. C.* §9103(1).
[36] HSCA Regulations §2.1; 7 *Del. Admin C.* 1375.
[37] *Id.*

Appellants reference the contemplation of the possibility of a developer being required to investigate beyond the perimeter of a site to reach the conclusion that the investigatory work must include onsite and offsite components. This interpretation is incorrect. Neither the Code nor the regulations relating to the HSCA require investigation beyond the perimeter of the Site *per se*.

Assuming there was a release, or an imminent threat of release present, the purpose of the investigation is to "characterize the nature and extent of the release or the potential release of hazardous substances" and "identifying specific conditions that require potential remediation."[38] Based on the preliminary investigation, "remedial objectives" which consider many factors, including surrounding properties, are developed.[39] Next, based on this information derived from the remedial investigation and risk assessment, the Proposed Plan of Remedial action is issued, and upon public hearing, a Final Plan of Remedial Action is developed.[40] In creating the remedial action plan DNREC and the Brownfields Developer's proposal is required to meet criteria in order to ensure the public health, welfare, or the environmental objectives complies with the rules and regulations controlling contamination.[41]

[38] HSCA Reg. §9.4
[39] HSCA Reg. §11.1.
[40] HSCA Reg. §§ 9.4; 12.5; 12.6.
[41] HSCA Reg. §8.

Thus, it is the collaborative effort of the Developer and the parties that create the agreement based on the factors. The parties, as stated above, must consider properties proximate to the site in developing their objectives, but need not conduct a full blown investigation beyond the perimeter of the site prior to developing a Proposed Plan of Remedial Action, or the approval of a Final Plan of Remedial Action, unless the circumstances warrant such measures.

Here, Harim adequately investigated the nature and extent of potential releases by performing various investigations. The record reflects Harim undertook a comprehensive investigation on the Site in order to assess the condition of the site and determine the nature and extent of a release, if any occurred, on the property. Specifically, Phase II Limited Subsurface Investigation and the Brownfields Investigation provided a detailed characterization of the property identifying certain potential remedial aspects for the final plan.

The data generated by these investigations revealed the nature and extent of the impacts from the release of hazardous substances did not go beyond the perimeter of the Site. There was no *per se* requirement for conducting an investigation offsite, and the data indicated the impact of contamination was limited to the Site itself. Accordingly, Harim and DNREC properly moved forward with developing a proposal for a Brownfields Development Agreement focusing solely onsite.

Appellants attempt to disprove the finding that environmental impact of the release of hazardous substances was limited to the Site itself by referencing the historic pickle brine spill that had an offsite environmental impact. However, the onsite and offsite impact of the pickle brine spill was remediated after years of DNREC mandated mitigation. Martin, Appellant's expert witness, acknowledged the remediation of the historic spill. The record reflects remediation was successful and the evidence of present contamination is limited to the Site itself.

Additionally, Appellants argue the presence of nitrates and cobalt in the soil indicates offsite testing should have been conducted prior to the approval of the Final Plan of Remediation. Appellees demonstrate the presence of cobalt alone is a non sequitur. The mere presence of cobalt does not establish the release of cobalt from the Site to surrounding properties. As noted above, absent evidence of a release of cobalt on the Site, the presence of cobalt offsite does not render the approval of the plan inconsistent with HSCA or de facto warrant additional testing onsite, or offsite. As such, the presence of cobalt offsite does not require additional testing onsite or offsite unless there is a nexus between the site and the evidence of contaminants.

Furthermore, the offsite presence of cobalt and nitrates in surrounding properties is not surprising. Cobalt levels are found in the background of the soil and can be attributed to other land use issues. Similarly, nitrates are ubiquitous

throughout the soil. Also, nitrate levels can be attributed to other land use issues because nitrate levels fluctuate based on activities on the land where the sample was taken. Evidence of other contaminants offsite therefore does not require offsite testing because the contaminants are not present in the surrounding areas as the result of a release that occurred on the Pinnacle site and there is no nexus between the contaminants found offsite and the Site.

In sum, the perceived concerns raised by Appellants are insufficient to support a finding that EAB's approval of the Final Plan of Remedial Action was inconsistent with HSCA and an error of law. The nature and extent of the impact of contamination was analyzed properly and the investigations identified remedial objectives in the clean-up plan consistent with HSCA rules and regulations. The plan as a whole is not called into question by a historic pickle brine spill, given the adequacy of remediation and the conclusion that there was not a release of hazardous substances on the property migrating off property. Thus, the approval of the Final Plan of Remediation was not an error of law because offsite testing conducted near the Pinnacle site was not necessary.

2. Whether the Onsite Investigations Conducted Were Consistent with HSCA Rules and Regulations and Sufficient to Warrant Approval of the Final Plan of Remediation by the EAB

Appellants claim as a matter of law the approval of the Final Plan of Remediation was erroneous because the investigations performed onsite were inadequate and inconsistent with HSCA rules and regulations. Appellants suggest the Brownfields Investigation ignored areas where contamination was likely to be found on the site, referencing the depths and distances between locations where soil sampling was conducted on the site. Appellants assert if you do not sample you will not find any contamination. Appellees argue the Final Plan of Remedial Action and preliminary onsite investigation was properly performed in accordance with the requirements and regulations of HSCA.

Appellees refute Appellants' argument by referencing the extensive investigation that was conducted on the site. Appellees also cite the testimony of Herman, who noted the sampling conducted on the site was "more than adequate" to determine the potential source area on the site as well as the nature and extent of the movement of groundwater.[42]

Appellants argue the site was not adequately investigated because samples were not taken proximate to the wastewater field. Appellants note the record reflects the closest monitoring well was 800 feet from the wastewater lagoon, and the sample from that area was not taken at a proper depth.

[42] Tr. 220.

These alleged oversights in the investigation onsite are not sufficient to warrant the entire investigation of the Site inadequate as a whole. The record itself reflects there was extensive sampling conducted, not a dearth of sampling aimed at purposely avoiding areas where contamination might be located. During the LSI, seventeen soil borings were taken, twelve temporary groundwater wells were installed, six soil vapor points were installed, seven existing groundwater monitoring wells were sampled, and samples were taken from fifteen soil locations and thirty-one groundwater locations. These locations were selected in order to target the location of the underground storage tanks, the past petroleum releases, the fueling location of an above ground storage tank, the location of a brine underground storage tank, the northwest corner of the Site (adjacent to the NCR property), the location of the battery wash drainage field, the spray irrigation field, and the chemical storage room.

Additionally, following the LSI, the Brownfields Investigation resulted in extensive additional testing. Fifty-one soil borings were taken, twelve additional wells were installed, and six more soil vapor points were installed. Samples also were collected during the Brownfields Investigation, including fifty-one subsurface soil samples, twenty-one groundwater samples, six sediment samples, and five sub-slab soil gas samples. Also, samples from nine existing groundwater monitoring

wells were taken. It is evident that the sampling conducted on the Site was substantial.

Investigations onsite by Harim, with the assistance of DNREC, were adequate and consistent with HSCA's requirements. Given the comprehensive onsite testing, Appellants' claim that the investigation is inadequate as a matter of law is without merit. Therefore, the testing was adequate and EAB's reliance on the propriety of the investigation does not render the approval of the Final Plan erroneous as a matter of law.

II. Whether EAB's Approval of the Final Plan of Remediation and Subordinate Findings Were Based on Substantial Evidence

Appellants assert EAB's decision to approve the Final Plan of Remediation was not based on substantial evidence. Appellants home in on two factual findings made by EAB to conclude the approval of the Final Plan of Remediation was erroneous. First, Appellants submit there is insufficient evidence on record to support the EAB's conclusion that contaminants in residential communities are likely the result of septic tank waste. Second, Appellants contend there is insufficient evidence on the record to support EAB's conclusion that contaminants on the site are coming from offsite residential communities.

The question for this Court is whether EAB's decision and subordinate findings that ultimately approved the Secretary's decision were supported by substantial evidence. Substantial evidence essentially is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[43] Substantial evidence is "more than a scintilla but less than a preponderance. . ."[44] Below, each of the Appellants contentions are addressed in turn.

1. Whether EAB's Finding that Offsite Contaminants Were the Result of Septic Tank Waste from Residential Property Was Based on Substantial Evidence

The evidence supporting EAB's finding that contaminants in the surrounding properties were the likely result of septic tank waste and other issues in the community was substantial. EAB's order states: "[t]hese contaminants are likely the result of septic tank waste and other issues in the residential communities themselves, and are not caused by contaminants traveling from the Pinnacle site into the neighborhoods."[45] This conclusion is supported by Herman's testimony which theorized lower pH levels result in higher acidity which can lead to the dissolution of metal in the natural formation. Herman testified the higher metallic

[43] *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).
[44] *Cross v. Califano*, 475 F. Supp. 896, 898 (M.D. Fla. 1979)
[45] *Envtl. Appeals Bd.*, Appeal at 26.

levels found offsite, including increased levels of cobalt, were likely caused by septic systems in the area lowering pH levels.

Appellants contend this finding is contradicted by the documented evidence of cobalt and pH levels submitted to EAB. The samples taken by Austin illustrate some of the wells with lower pH levels[46] had lower cobalt concentrations rather than higher cobalt concentrations in contravention of Herman's theory. Appellants also dispute whether cobalt exists in the natural formation, a premise of Herman's theory. Appellants contend cobalt is not part of the natural formation and as such an acidic pH level would not result in dissolution of cobalt because it is not present in the background of soil in Sussex County, Delaware.[47]

Appellees refute Appellants' contentions by noting Herman's testimony indicated there was not a clear correlation from well to well, but that each property was affected based on the activity on each individual property. Therefore, Herman did not testify that there would be a perfect correlation between low pH and higher levels of cobalt. Instead, Herman believed that there were activities on the site itself that could lead to higher levels of cobalt based on land use. Therefore, it is inconsequential that the data reflects a few outliers based on Austin's samples.

[46] Including one well in particular that has a pH between two and four times less than other wells.
[47] Appellants' Opening Br. at 24 (citing a DNREC report documenting soils samples in the Redden State Forest did not detect levels of cobalt).

Herman, an expert certified in Delaware, further testified cobalt was inherent to Delaware's soil. Herman stated cobalt exists in the background at a level of twenty-three, and EAB was free to make a finding based on Herman's testimony.

The Delaware Superior Court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[48] "[T]he sole function of the Superior Court" "is to determine whether or not there was substantial competent evidence to support the finding of the Board, and, if it finds such in the record, to affirm the findings of the Board."[49] The reason underlying this rule of caution is premised upon the fact that { "pageset": "S8d the Board below sees and hears the witnesses and is, therefore, better able to determine the credit and weight to be given their testimony."[50]

EAB was free to disregard Appellants' attempt to link the cobalt found offsite to activity conducted onsite. Austin believed cobalt could have resulted from metallic uptake in the cucumbers when they were grown offsite. Austin stated when the cucumbers were processed on the Site, the dregs of the cucumbers left over from the pickle making process were ground up and sprayed on the irrigating

[48] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *see also, Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Natural Res. & Envtl. Control*, 2004 WL 440410, at *7 (Del. Super. Feb. 26, 2004) aff'd sub nom. *Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Natural Res. & Env't Control & Delaware Envtl. Appeals Bd.*, 865 A.2d 522 (Del. 2005).
[49] *Id. see also, Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del. Super. 1995).
[50] *Wright v. Am. Brake Shoe Co.*, 90 A.2d 681, 684 (Del. Super. 1952).

field. Austin testified as to his belief that this process resulted in a release of cobalt on the property caused by Vlasic. Austin submitted to the EAB that when the nitrates were 'pushed' off the site, cobalt also also pushed around as well. The EAB was free to find this theory unpersuasive. { "pageset": "S8d

As previously noted, Herman testified cobalt exists in the background in Delaware. Again, the impact of the application of cucumber waste to the irrigation field was mitigated by 1997 with respect to nitrates. There is no documented impact of cobalt release from the site. Appellants' expert witness, Martin, testified to the release and subsequent mitigation of the brine spill that Austin suggests is the cause of a release of cobalt onsite that migrated offsite. In addition to there being no historical evidence regarding the release of cobalt from the site, Herman's testimony indicated there are presently no plumes leaving the site based on his evaluation of all of the data collected in or around the site.

Again, this goes to credibility.[51] The Superior "Court moves with prudent caution in reversing a finding of fact by the Board below. [The Superior Court] never disturb[s] such a finding, if there is evidence in the record from which its

[51] *See e.g., Gen. Motors Corp. v. Freeman,* 164 A.2d 686, 689 (Del. 1960) (stating "[t]he position of the Superior Court and of this Court on appeal is to determine only whether or not there was substantial evidence to support the findings of the Board. If there was, these findings must be affirmed"); *see also, Tulou,* 659 A.2d at 802.

conclusions could have been fairly and reasonably drawn."[52] Based on the record, there is evidence from which EAB could fairly and reasonably draw a conclusion based on the testimony of Appellees' expert witnesses and inconsistent with Austin's belief. Therefore, when EAB determined there had been no release from the Site, and the contaminants found offsite were the result of land use activities, such as septic tank waste, that was conducted offsite, those determinations were based on substantial evidence in the record. Further, this Court will not disturb the finding of the Board below over the weight and credibility of evidence assessed by the Board. [53]

2. Whether EAB's Finding that Offsite Contaminants from Residential Areas Were Migrating Onsite was Supported By Substantial Evidence

Second, Appellants suggest there is not substantial evidence to support EAB's finding that contaminants from offsite are coming onto the site. EAB stated in its order "the contaminants found on site are coming from those community areas and traveling to the site."[54] It appears EAB referred to the residential community areas collectively rather than specifically referring to Holiday Acres. Herman testified Holiday Acres utilizes a brine solution, and the septic field area was located near

[52] *Wright v. Am. Brake Shoe Co.,* 90 A.2d 681, 684 (Del. Super. 1952); *see also, Tulou,* 659 A.2d at 802.
[53]*Tulou,* 659 A.2d at 802*; see also, Gooden v. Mitchell*, 2 Terry 301, 21 A.2d 197; *Rudnick v. White Bros*., 7 Boyce 576, 109 A. 881; *Children's Bureau v. Nissen*, 3 Terry 209, 29 A.2d 603.
[54] *Envtl. Appeals Bd.*, Appeal at 26.

the supply well which affects the groundwater well. While the EAB's statement is overbroad given the evidence of record, it is evidently only a misstatement. This clear misstatement by EAB is harmless error and it does not impact whether substantial evidence is on the record to support the approval of the plan.

Aside from referring to community areas collectively rather than specifically referencing Holiday Acres, Appellants also contend the evidence was unrebutted that levels of pH and higher concentration of metallic contaminants do not correlate with the documented evidence submitted to EAB. Appellants submit pH levels in MW-4[55] are in fact less than other wells closer to Holiday Acres, such as well MW-24. Appellants note, even assuming the groundwater is flowing north-by-northwest, there are wells not north-by-northwest that show contamination. Also, Appellants demonstrate the data reveals the wells that are north-by-northwest, including MW-17, MW 19, MW-21, and MW-24, do not reflect contaminants that would be present if contaminants were entering the site from Holiday Acres.

Appellees illustrate there was evidence on the record countering this assertion based on Herman's direct examination and cross-examination. On direct examination, Herman testified about the brine solution utilized by Holiday Acres

[55] This well is the well closest to Holiday Acres that theoretically would be most affected by the pH levels resulting from offsite septic systems.

and the septic field location near the supply well. Further, Herman testified regarding how the proximity of the supply well and septic would affect the contaminants in the groundwater overall. On cross-examination, Herman was questioned regarding his belief as to groundwater flow resulting in contaminant migration from offsite to onsite.

Again, this goes to credibility and EAB was free to determine that Herman's testimony more weighty than Austin's.[56] It appears EAB disregarded the contentions of Appellants; however, EAB's findings nonetheless are supported by the testimony presented by the litigants. Even if Appellants point to inconsistencies on the record, EAB was entitled to evaluate the credibility of the experts based on the testimony to reach a fair and reasonable conclusion. Based on Herman's testimony there was substantial evidence on the record from which the EAB could conclude that contaminants were present offsite based on contaminants from residential activities, including septic and wastewater treatment. This Court will not uproot the findings of EAB and substitute its judgment for EAB's when the record reflects there was substantial evidence on the record from which EAB could reach all of the factual findings listed in the Final Order. Therefore, the key factual findings of the EAB were supported by substantial evidence and were not made by EAB in error.

[56] *Wright*, 90 A.2d at 684.

Conclusion

Considering the foregoing, EAB's approval of the Final Plan of Remediation was consistent with the law and based on substantial evidence. It is evident based on the facts of record that the nature and extent of the contamination was evaluated properly. First, offsite testing was not required. Harim was not under a statutory duty, based on HSCA rules or regulations, to test offsite. The conditions at the facility did not warrant additional testing offsite because there was ample evidence demonstrating the contamination was limited to the site itself. The data revealed there was not a release, or imminent threat of release, of a hazardous substance resulting from onsite activity. Moreover, the historic brine spill, which was remediated long ago, and the presence of nitrates or cobalt offsite fail to establish a release of contaminants occurred on the site or contaminants migrated from onsite to offsite.

Second, the investigations conducted onsite were comprehensive and consistent with HSCA. Finally, EAB's factual findings undergirding the decision to approve the Final Plan of Remedial Action, regarding septic tank waste and migration of contaminants from offsite on site, were based on substantial evidence on the record. Therefore, EAB's unanimous approval of the Final Plan of Remediation following the Secretary of DNREC's approval was proper and

consistent with HSCA. For the aforementioned reasons, the Court **AFFIRMS** the decision of EAB.

IT IS SO ORDERED

/s/ Richard F. Stokes

Richard F. Stokes, Judge