Exhibit K

Wolfe, Jill

From:	EP, Right-to-Know
Sent:	Friday, April 22, 2016 5:55 PM
To:	Wolfe, Jill; klsmith@smithbutzlaw.com; Arnold, Roy W.
Cc:	Barnett, Jacqueline Conforti (DEP)
Subject:	Smith v. DEP OOR Dkt 2016-0587, (consolidated) - part 1
Attachments:	DEP Appeal Response.pdf; DEP Appeal Response - Privilege Logs.pdf; Affidavit - SERO.PDF; Affidavit - NERO.PDF

Please find attached this Department's response to the above appeal. Due to size limitations, the affidavits will follow under separate cover. This the first of 3 emails.

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April 22, 2016

GOVERNOR'S OFFICE OF GENERAL COUNSEL

Via Electronic Mail

Jill Wolfe, Esq.
Appeals Officer
PA Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
jiwolfe@pa.gov

RE: *Smith v. Pennsylvania Department of Environmental Protection*,
OOR Docket Nos: 2016-0587; 0602; 0603; 0604; 0605; 0606; and 0607 (Consolidated)

Dear Appeals Officer Wolfe:

The Pennsylvania Department of Environmental Protection (DEP) submits this response to the above appeals filed with the Office of Open Records (OOR) by Kendra L. Smith (Smith) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). On April 1, 2016, the OOR consolidated all of Smith's appeals. This response, filed on behalf of all DEP offices, will demonstrate by a preponderance of the evidence that DEP acted in full accordance with the RTKL.

I. PROCEDURAL HISTORY

On February 1, 2016, DEP's Agency Open Records Officer (AORO) received Smith's RTKL request. Affidavit of Dawn Schaef (Schaef), DEP's AORO, ¶ 25 and Attachment A. The AORO's duty station is at DEP's Central Office in Harrisburg. Schaef Affidavit, ¶ 3.

The subject of Smith's request required its assignment to the DEP's Central Office, and the Southeast, Northeast, Southcentral, Northcentral, Southwest, and Northwest Regional Offices. Schaef

Affidavit, ¶ 27. Offices are assigned to a RTKL request by the AORO when she believes responsive records are possibly in an office's custody, control, or possession. Schaef Affidavit, ¶¶ 10, 17-18.

On February 3, 2016, Smith modified her request by email to Department Legal Counsel, Edward Stokan. Schaef Affidavit, ¶ 28 and Attachment B.

On February 8, 2016, the AORO sent Smith a timely 30-day continuance letter on behalf of all assigned offices via email to klsmith@smithbutzlaw.com. Schaef Affidavit, ¶ 29, and Attachment C. In DEP's February 8, 2016, continuance letter, the AORO notified Smith that DEP required an additional 30 days, until March 9, 2016, to respond to her request. Schaef Affidavit, ¶ 30.

On or before March 9, 2016, final responses were issued by DEP's Central Office, Schaef Affidavit, ¶ 35 and Attachment D, and all other assigned offices but the Southwest Regional Office. The Southwest Regional Office completed its letter and placed it in the office's mail system on March 9, 2016, but for unexplained reasons, the letter was not postmarked until March 10, 2016. All offices, but the Northeast Regional Office, granted in part and denied in part Smith's request. The Northeast Regional Office possessed no records in its custody, control, or possession. Affidavit of Colleen Stutzman (Stutzman), Assistant Regional Director of DEP's Northeast Regional Office, ¶ 10.

On or prior to March 28, 2016, Smith filed multiple appeals with the OOR to the responses of the Department's Central Office and each Regional Office. On April 1, 2016, these appeals were consolidated.

II. FACTUAL HISTORY

Smith's RTKL request sought the following records from DEP:

- "Any and all approvals, permits, licenses/licensures, applications for permits and/or licenses, reciprocity letters, reciprocity licenses, reciprocity agreements and/or

reciprocity arrangements, including, but not limited to all licenses issued by the Department to Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP (hereinafter, "Protechnics") for use, storage and possession of radioactive materials and/or other licensed material. Additionally, this request seeks any and all investigation reports, Notices of Violation(s), Consent Order and Agreement(s) issued to Protechnics by the Department and/or between Protechnics and the Department for any and all work or services performed by Protechnics at any natural gas well site in the Commonwealth of Pennsylvania. Included in this request is a request for copies of all Notices of Violation issued by the Department to Protechnics, including but not limited to Notices of Violation dated June 15, 2010, January 28, 2010, November 26, 2013, September 13, 2013 and October 14, 2013, Violation Numbers 677913, 677915, 677914, 682834, 682833, 682829, 682835 and all corresponding inspection reports, field notes and other related writings. Further, this request seeks any and all Consent Order and Agreements between the Department and Protechnics, including, but not limited to, Consent Orders and Agreements dated November 2, 2013 and November 2, 2010.

- Copies of all enforcement activity taken by the Department against Protechnics, including but not limited to Enforcement ID Numbers 305057, 259202 and 263973, as well as all inspection reports completed by the Department regarding Protechnics, including, but not limited to, Inspection ID Numbers 1891418, 1919964, 2147772, 2204156 and 2221258.

- Any and all Radioactive Tracer Well Site Agreements made between Protechnics and any well site operator(s) for each and every well traced in the Commonwealth of Pennsylvania that is or was submitted to the Department, including, but not limited to, the April 7, 2013, Radioactive Tracer Well Site Agreement between Protechnics and a well operator.

- Any and all notifications submitted to the Department by Protechnics or the associated operator or subcontractor regarding Protechnics confirmation that licensed material, including, but not limited to, radioactive material, was returned to the surface at any well site in which Protechnics operated/performed work or services in the Commonwealth of Pennsylvania.

- Any and all documents, correspondence, e-mails and any other communication(s) between Protechnics and the Department and/or Range Resources and the Department regarding Protechnics and any and all work/services performed in the Commonwealth of Pennsylvania by Protechnics.

- Any and all MSDS/SDS (material data safety sheets and safety data sheets) in the possession of the Department regarding any and all products utilized by Protechnics at any well site in Pennsylvania, including, but not limited to, all MSDS/SDS for Protechnics Radioactive Tracer Products, as well as any and all Chemical Frac Tracer

("CFT") products, including, but not limited to, CFT 1000, CFT 1100, CFT 1200, CFT 1300, CFT 2000, CFT 2100, CFT 1900, CFT 1700."

Schaef Affidavit, ¶ 26

On February 3, 2016, Smith amended her RTKL request in an email to Department Legal Counsel, Edward Stokan. It was amended to include all drill sites in the Commonwealth, including but not limited to, the Yeager Drill site. Schaef Affidavit, ¶ 28 and Attachment B.

A. Radiation Actions Plans and Landfills

Waste disposal and processing facilities, like landfills, are regulated by DEP's Radiation Protection Program, in addition to other DEP programs. Affidavit of David J. Allard, CHP, (Allard) Director of DEP's Radiation Protection Program, ¶ 94[1]. Landfills are required to submit a Radiation Action Plan (Plan) to DEP under 25 Pa. Code § 273.223. Allard Affidavit, ¶ 94; Forney Affidavit, ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59. The submittal of a Plan became a requirement in December 2000. Allard Affidavit, ¶ 94; Forney Affidavit, ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59. Landfills prior to December 2000 had to apply for a permit modification to incorporate the use of the Plan. Allard Affidavit, ¶ 94; Forney Affidavit ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59. New facilities had to include a Plan as part of their permit application. Allard Affidavit, ¶ 94; Forney Affidavit, ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59.

[1] *See also* Affidavit of Lisa A. Forney, MEPC (Forney), Radiation Protection Supervisor for Radioactive Materials and Special Projects Section in DEP's Southcentral Regional Office, ¶ 89; Affidavit of Barbara Bookser (Bookser), Section Chief, DEP's Radiation Protection Program for DEP's Southwest and Northwest Regional Offices, ¶ 59; Affidavit of Dwight Shearer (Shearer), Program Manager, Radiation Protection Program, DEP's Southwest and Northwest Regional Offices, ¶ 59.

The purpose of the Plan is to protect the environment and the public's health, safety, and welfare from the possible dangers of radioactive material delivered to solid waste processing and disposal facilities. Allard Affidavit, ¶ 95; Forney Affidavit, ¶ 90; Bookser Affidavit, ¶ 60; Shearer Affidavit, ¶ 60. The Plan is reviewed by staff in DEP's Waste Management and Radiation Protection Programs to ensure that a comprehensive radiation monitoring program is in place. Allard Affidavit, ¶ 96; Forney Affidavit, ¶ 91; Bookser Affidavit, ¶ 61; Shearer Affidavit, ¶ 61. The program must effectively monitors waste entering the landfill, screen for radioactive material, and provide for an appropriate response if waste contains radioactive material is present in a waste load. Allard Affidavit, ¶ 96; Forney Affidavit, ¶ 91; Bookser Affidavit, ¶ 61; Shearer Affidavit, ¶ 61.

DEP created a guidance document for a plan's contents. Allard Affidavit, ¶ 97, Attachment H; Forney Affidavit, ¶92, Attachment 2. The Plan submitted by the landfill must include the following:

- A discussion of the type of monitoring equipment that will be used to monitor inbound waste for radioactive material;
- A list of individuals responsible for monitoring radioactive materials in the inbound waste;
- An established isolation area for waste to be temporarily stored until it can be tested to determine what isotope is present and how much activity is present;
- Established action levels for responding to radiation alarms and proper procedures to ensure compliance; and
- Established points of contact with DEP to report radiation alarms.

Allard Affidavit, ¶ 97; Forney Affidavit, ¶ 92; Bookser Affidavit, ¶ 62; Shearer Affidavit, ¶ 62.

B. **DEP's Investigations of Non-Acceptable Disposal of Radioactive Materials**

Upon receiving notification from a waste disposal facility that non-acceptable radioactive material is contained in a load of waste, DEP conducts a noncriminal investigation pursuant to its authority under the Radiation Protection Act and its regulations. Allard Affidavit ¶¶ 46, 50-52; Forney Affidavit, ¶¶ 43, 47-49; Affidavit of Terry W. Derstine (Derstine), Environmental Program Manager, DEP's Southeast Regional Office, ¶ 35, ¶¶ 38-40; Bookser Affidavit, ¶¶ 28, 32-34; Shearer Affidavit, ¶¶ 28, 32-34. The Radiation Protection Program will request information from the facility including the type and volume of the waste load; the isotope identified; the activity of the isotope; the generator of the waste; the identity of the person(s) who performed the radiation survey; the type of equipment used to survey the waste; the current location of the waste; and a determination from the facility of its plans for the waste load. Allard Affidavit, ¶ 46(a); Forney Affidavit, ¶ 43(a); Derstine Affidavit, ¶ 35(a); Bookser Affidavit, ¶ 28(a); Shearer Affidavit, ¶ 28(a).

One potential source of radiation in waste loads is "flowback" from oil and gas drilling. Flowback is a water-based solution that flows back to the surface during and after hydraulic fracturing. Allard Affidavit, ¶ 36; Forney Affidavit, ¶ 33. Because each flowback incident produces waste containing an isotope that does not meet established exemptions for municipal waste, it cannot be disposed in a landfill. Allard Affidavit, ¶ 46(a); Forney Affidavit, ¶ 43(a); Derstine Affidavit, ¶ 35(a); Bookser Affidavit, ¶ 28(a); Shearer Affidavit, ¶ 28(a). Therefore, when a load contains flowback and cannot be accepted at a landfill, a Department of Transportation (DOT) Special Permit Shipment Approval Form is issued authorizing the return of the rejected load to its place of origin. Allard Affidavit, ¶ 46(a); Forney Affidavit, 43(a); Derstine Affidavit, 35(a); Bookser Affidavit, ¶ 28(a); Shearer Affidavit, ¶ 28(a).

Next, the Regional Radiation Protection Program will contact the waste generator directly and/or assign a radiation health physicist to investigate the flowback/loss of control incident at the well site, seek to identify all parties involved, and investigate how the loss of control of licensed material occurred. Allard Affidavit ¶ 46(b); Forney Affidavit, ¶ 43(b); Derstine Affidavit, ¶ 35(b); Bookser Affidavit, ¶ 28(b); Shearer Affidavit, ¶ 28(b). Whenever possible, the radiation health physicist will document site conditions in a formal inspection report and obtain photographs of the well site. Allard Affidavit ¶ 46(b); Forney Affidavit, ¶ 43(b); Derstine Affidavit, ¶ 35(b); Bookser Affidavit, ¶ 28(a); Shearer Affidavit, ¶ 28(a).

Upon completion of the on-site investigation, all documentation is submitted to Regional Radiation Protection Management Staff for review and approval of the inspection findings. Allard Affidavit, ¶ 46(c); Forney Affidavit, ¶ 43(c); Derstine Affidavit, ¶ 35(c); Bookser Affidavit, ¶ 28(c); Shearer Affidavit, ¶ 28(c). Depending upon the severity of the violation, Regional Radiation Protection Management Staff will disclose inspection findings in accordance with its established compliance and enforcement guidance document. If additional information is needed prior to disclosing inspection findings, DEP will schedule a conference with the regulated entity. Allard Affidavit, ¶ 46(c); Forney Affidavit, ¶ 43(c); Derstine Affidavit, ¶ 35(c); Bookser Affidavit, ¶ 28(c); Shearer Affidavit, ¶ 28(c).

C. First Investigation by DEP of ProTechnics: December 2009

On December 22, 2009, DEP began an investigation of ProTechnics after being alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. Allard Affidavit, ¶ 31; Forney Affidavit, ¶ 28; Derstine Affidavit, ¶ 26. DEP, through staff in both the Central Office and the Southcentral Regional Office, worked with the landfill to track the shipment of radioactive residual waste back to its

generator, a well site that engaged ProTechnics. Allard Affidavit, ¶ 31; Forney Affidavit, ¶ 28; and Derstine Affidavit, ¶ 26.

DEP immediately contacted ProTechnics to gather information about the incident and scheduled an in-person compliance conference with ProTechnics personnel. Allard Affidavit, ¶ 32; Forney Affidavit, ¶ 29; and Derstine Affidavit ¶ 26. As a result of the compliance conference, ProTechnics agreed to discontinue using radioactive material within Pennsylvania under a reciprocity (out-of-state) radioactive materials license. Allard Affidavit, ¶ 32; Forney Affidavit, ¶ 29; and Derstine Affidavit, ¶ 26. Rather, ProTechnics would request from DEP authorization under a specific DEP radioactive materials license. Allard Affidavit, ¶ 32; Forney Affidavit, ¶ 29; and Derstine Affidavit, ¶ 26.

Following DEP's investigation, a Notice of Violation (NOV) was issued to ProTechnics on January 28, 2010, detailing DEP's conclusion that "ProTechnics failed to ensure proper handling and disposal of the radioactive material." Allard Affidavit, ¶ 33, and Attachment B; Forney Affidavit, ¶ 30; Derstine Affidavit, ¶ 27. The investigation also resulted in ProTechnics submitting an incident report to DEP detailing the corrective actions it took as a result of its noncompliance. Allard Affidavit, ¶ 33; Forney Affidavit, ¶ 30; and Derstine Affidavit, ¶ 27.

D. Second Investigation of ProTechnics by DEP: May 2010

In May 2010, DEP conducted its second ProTechnics investigation after it was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. Allard Affidavit, ¶ 34; Forney Affidavit, ¶ 31; Derstine Affidavit, ¶ 28; and Affidavit of Staci Gustafson (Gustafson), Assistant Regional Director of DEP's Northwest Regional Office, ¶ 15. DEP, through staff in both the Central Office and the Southcentral Regional Office, worked with the landfill to track the shipment of

waste back to a generator well site that had engaged ProTechnics. Allard Affidavit, ¶ 34; Forney Affidavit, ¶ 31; and Derstine Affidavit ¶ 28.

DEP again reached out to ProTechnics to discuss the second incident and obtain further documentation. Allard Affidavit, ¶ 34; Forney Affidavit, ¶ 31; and Derstine Affidavit, ¶ 28. The Waste Management Program in DEP's Northcentral Regional Office inspected the well site where the waste originated and prepared an inspection report. Gustafson Affidavit, ¶ 16. The Program Manager of the Waste Management Program in the Northwest Regional Office then prepared a summary of the events which occurred at the landfill for the Northwest Regional Office's weekly report. Gustafson Affidavit, ¶ 17.

As a result of the May 2010 incident, Inspection ID Number 1891418 was generated in DEP's eFACTS database by the Southcentral Regional Office for violations by ProTechnics. Allard Affidavit, ¶ 36; Forney Affidavit, ¶ 33.[2] These violations consisted of improperly transferring radioactive material to an unauthorized entity and failing to comply with its license conditions. Allard Affidavit, ¶ 36; Forney Affidavit, ¶ 33. This Inspection ID Number is listed in eFACTS as an "administrative file review,"

[2] eFACTS is DEP's Environmental Facility Application Compliance Tracking System (eFACTS) that allows members of the public to search for authorizations, clients, sites and facilities. Allard Affidavit, ¶ 35; Forney Affidavit, ¶ 32. Users of eFACTS can also search the database to find inspection and pollution prevention visits, as well as inspection results data, including enforcement information when violations are noted. DEP provides a name search to use when it is not known if the entity is a client, site, or facility. Allard Affidavit, ¶ 35; Forney Affidavit, ¶ 32; Derstine Affidavit, ¶ 31.

For a short time in November 2015 and January 2016, sensitive radiation protection licensing and inspection data were inadvertently available from eFACTS. Once DEP learned of its error, it immediately took steps to remove this information from public access. Information related to the Bureau of Radiation Protection, and its regional programs, are not currently available on the public website for the reasons explained within this response. Allard Affidavit, ¶ 67.

meaning that documents were provided to DEP and a subsequent review revealed violations. Allard Affidavit, ¶ 36; Forney Affidavit, ¶ 33. These documents relate to the flowback/loss-of-control incident and are noted in the Southcentral Regional Office's privilege log. Allard Affidavit, ¶ 36; Forney Affidavit, ¶ 33.

On June 15, 2010, as a result of DEP's investigation, a second NOV was issued to ProTechnics stating that ProTechnics failed to comply with DEP's regulations and the conditions of ProTechnics' radioactive materials license. Allard Affidavit, ¶ 37 and Attachment C; Forney Affidavit, ¶34. To resolve its noncompliance, ProTechnics entered into a Consent Order and Agreement (COA) with DEP on November 2, 2010. Allard Affidavit, ¶ 38 and Attachment D; Forney Affidavit, ¶ 35; Derstine Affidavit, ¶ 29; Bookser Affidavit, ¶27; Shearer Affidavit, ¶ 27.

The COA assessed a civil penalty of $29,000 against ProTechnics and required corrective actions including the signing of a well-site agreement to educate well owners and operators of proper procedures in the event of a flowback, notification obligations to DEP by ProTechnics in the event of flowback, a license amendment request, and an increased presence by DEP to inspect returns for *in situ* decay and stabilization efforts. Allard Affidavit, ¶ 38; Forney Affidavit, ¶ 35; Derstine Affidavit, ¶ 29; Bookser Affidavit, ¶ 27; and Shearer Affidavit, ¶ 27.[3]

[3] The program generated Inspection ID No. 1919964 in eFACTS from an October 5, 2010, inspection of a ProTechnics temporary job site in Butler County, Buffalo Township. At this site, ProTechnics conducted a radioactive tracer study on one well and a standard logging study on a second well. The program inspector found no violations. Bookser Affidavit, ¶ 25; Shearer Affidavit, ¶ 25.

E. Third Investigation of ProTechnics by DEP: September 2013[4]

In September 2013, DEP began its third investigation of ProTechnics after DEP was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. Allard Affidavit, ¶ 39; Forney Affidavit, ¶ 37; Derstine Affidavit, ¶ 30. DEP staff in the Central Office, and the Southcentral and the Southeast Regional Offices, began an investigation, working with the landfill to track the shipment of waste back to a well pad generator that engaged ProTechnics. Allard Affidavit, ¶ 39; Forney Affidavit, ¶ 37; Derstine Affidavit, ¶ 30. DEP again contacted ProTechnics to discuss the incident and obtain documentation. Allard Affidavit, ¶ 39; Forney Affidavit, ¶ 37; Derstine Affidavit, ¶ 30.

On September 13, 2013, the Southeast Regional Office conducted an inspection related to ProTechnics' activities to a flowback/loss-of-control event. Allard Affidavit, ¶ 40; Forney Affidavit, ¶ 38; Derstine Affidavit, ¶ 32. This inspection is documented in eFACTS under inspection ID 2204156. Allard Affidavit, ¶ 40; Forney Affidavit, ¶ 38; Derstine Affidavit, ¶ 32. Violation numbers 677913 (violation of 10 CFR 20.1802 for failure to control and maintain constant surveillance of license material); 677914 (violation of 10 CFR 20.1902(e) for failure to control and post a radioactive-materials area); and 677915 (violation of 10 CFR 30.34 for failure to adhere to the terms and conditions of a license) are also included with this eFACTS entry. Allard Affidavit, ¶ 40; Forney Affidavit, ¶ 38; Derstine Affidavit, ¶ 32.

[4] On March 12, 2013, the Southcentral Regional Office attempted to inspect ProTechnics' use of radioactive materials at a well pad. Forney Affidavit, ¶ 36. This inspection was prompted by ProTechnics' submission to DEP that it intended to use radioactive materials in Pennsylvania. Forney Affidavit, ¶ 36. ProTechnics is required to provide a minimum of 72-hour notice to DEP before beginning work with radioactive materials in the Commonwealth. Forney Affidavit, ¶ 36. The attempted inspection is memorialized in eFACTS under Inspection ID 2147772. Forney Affidavit, ¶ 36. However, no inspection report was completed because ProTechnics cancelled work at the well pad on the date the inspection was to take place. Forney Affidavit, ¶ 36. No records exist for this inspection ID. Forney Affidavit, ¶ 36.

On October 13, 2013, the Southcentral Regional Office performed an administrative file review, documented in eFACTS under Inspection ID 2221258. Allard Affidavit, ¶ 41; Forney Affidavit, 39. This Inspection ID contains four Violation IDs as follows: 682829 (for violation of 35 P.S. § 7110.309(b) for failure to comply with a Department Order, namely Section 3(b) of the 2010 COA regarding failure to send copies of well site agreements within 5 days of signing); 682833 (for violation of 35 P.S. § 7110.309(b) for failure to comply with a Department Order, namely section 3(h) of the 2010 COA regarding failure to submit 30-day report following flowback); 682834 (for violation of 35 P.S. § 7110.309(b) for failure to comply with a Department Order, namely Section 3(g) of the 2010 COA regarding failure to conduct and document surveys); and 682835 (for violation of 35 P.S. § 7110.309(b), failure to comply with a Department Order, namely Section 3(f) of the 2010 COA regarding failure to immediately notify DEP of a flowback occurrence). Allard Affidavit, ¶ 42; Forney Affidavit, ¶ 40.

On November 26, 2014, as a result of DEP's investigation, an NOV was issued to ProTechnics. Allard Affidavit, ¶ 43; Forney Affidavit, ¶ 41; Derstine Affidavit, ¶ 33. The NOV detailed DEP's conclusions that ProTechnics failed to comply with DEP's regulations; the November 2, 2010, COA; and the conditions of ProTechnics' radioactive materials license. Allard Affidavit, ¶ 43 and Attachment E; Forney Affidavit, ¶ 41; Derstine Affidavit, ¶ 33.

To resolve its noncompliance, ProTechnics paid a stipulated civil penalty of $75,000 and executed an addendum to the November 2, 2010, COA. Allard Affidavit, ¶ 44; Forney Affidavit, ¶ 42; Derstine Affidavit, ¶ 34. The addendum required ProTechnics to amend its radioactive materials license. Allard Affidavit, ¶ 45; Forney Affidavit, ¶ 42; Derstine Affidavit, ¶ 34. It also required ProTechnics to revise the acknowledgement form given to well owner operators who contract with ProTechnics to conduct

radioactive tracer studies in Pennsylvania. Allard Affidavit, ¶ 45 and Attachment F; Forney Affidavit, ¶42; and Derstine Affidavit, ¶ 34.

III. ISSUES

A. Can DEP meet its burden with sworn affidavits?

Proposed Response: Yes

B. Does the Radiation Protection Act, and its regulations, preclude public access to DEP's investigatory records of radiation sources and radiation source users?

Proposed Response: Yes

C. Can DEP withhold records of its authorized noncriminal investigation of a radiation material licensee whose business activities DEP believes violated the Radiation Protection Act and its regulations?

Proposed Response: Yes

D. Does the public safety and security exception of the RTKL permit DEP to withhold records containing sensitive information---such as the location, volume, and types of radioactive materials possessed by a licensee---so that the public is not threatened by health risks associated with exposure to radiation sources?

Proposed Response: Yes

E. Do DEP's internal discussions and draft records of proposed enforcement proceedings, interim investigatory actions, and potential strategies for dealing with a regulated entity containing no final decision of the agency fall within the exemption under the RTKL for internal, predecisional, and deliberative records?

Proposed Response: Yes

F. Do the attorney-client privilege and attorney-work product doctrine protect internal communications between DEP attorneys and DEP employees where legal advice was requested or received, which contain the mental impressions, thoughts, or opinions of DEP attorneys?

Proposed Response: Yes

G. **Are secondary telephone numbers of DEP employees, and the driver's license number of a member of the public, exempt from access as personal identification information under the RTKL?**

Proposed Response: Yes

H. **Are ProTechnics' records that were submitted to DEP containing confidential proprietary information exempt from public access under the Radiation Protection Act, its regulations, and the RTKL?**

Proposed Response: Yes

I. **Does the RTKL require DEP to provide redacted records if the records are protected by one, or more, RTKL exceptions or privileges?**

Proposed Response: No

J. **Did DEP prove by a preponderance of the evidence that its Northeast Regional Office had no responsive records in its custody, control, or possession?**

Proposed Response: Yes

K. **May DEP's Southwest Regional Office provide evidence in an OOR appeal despite a deemed denial response?**

Proposed Response: Yes

IV. ARGUMENT

A. DEP May Meet Its Burden with Sworn Affidavits.

1. Definition of a Public Record

As a Commonwealth agency, DEP's records are subject to public access under the RTKL. 65 P.S. § 67.301(a). The RTKL defines a public record as "a record, including a financial record, of a Commonwealth or local agency that is not exempt under section 708; is not exempt from being disclosed

under any Federal or State law or regulation or judicial order or decree; or is not protected by a privilege." 65 P.S. § 67.102. Pursuant to Section 305 of the RTKL, records of an agency are presumed to be public unless: "(1) the record is exempt under section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.305.

2. DEP's Burden of Proof

An agency bears the burden of proving the applicability of any cited exceptions as a basis to withhold requested records under the RTKL. 65 P.S. § 67.708(a). Section 708(a)(l) of the RTKL states, "the burden of proving that a record of a Commonwealth agency is exempt from public access shall be on the Commonwealth agency by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). The preponderance of evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry. *Delaware Cnty. v. Schaefer ex rel. Philadelphia. Inquirer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012) (*en banc*).

3. Use of Testimonial Affidavits

The Commonwealth Court has repeatedly recognized the appropriateness of "OOR's request for, and use of, testimonial affidavits in rendering decisions" and that affidavits may serve as "credible evidence sufficient to support a claimed exception." *Radnor Twp. Sch. Dist. v. Sherry*, 20 A.3d 515, 520 (Pa. Cmwlth. 2011). The Court in *Radnor* stated that the "use of such affidavits is especially significant given the strict time limitations imposed on agencies and the OOR to make a determination." *Radnor*, 10

A.3d at 520. However, affidavits must be relevant and credible. *Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069, 1073 (Pa. Cmwlth. 2013).

DEP will reference throughout this response, affidavits from its following employees as evidence in support of all final responses issued by DEP to Smith on or about March 7-10, 2016:

1. Dawn Schaef, DEP's Agency Open Records Officer (AORO);
2. David J. Allard, CHP, Director, DEP's Bureau of Radiation Protection Program
3. Lisa A. Forney, MEPC, Radiation Protection Supervisor, Radioactive Materials and Special Projects Section, DEP's Southcentral Regional Office;
4. Terry W. Derstine (Derstine), Environmental Program Manager, Radiation Protection Program, DEP's Southeast Regional Office;
5. Colleen B. Stutzman, Assistant Regional Director, DEP's Northeast Regional Office
6. Patrick Brennan, Environmental Program Manager, Waste Management Program, DEP's Northcentral Regional Office;
7. Jennifer Means, Program Manager, Oil and Gas Management Program, DEP's Northcentral Regional Office;
8. Barbara Bookser, Section Chief, Bureau of Radiation Protection for DEP's Southwest and Northwest Regions;
9. Dwight Shearer, Program Manager, Bureau of Radiation Protection, for DEP's Southwest and Northwest Regions; and
10. Staci Gustafson, Assistant Regional Director, DEP's Northwest Regional Office.

DEP also submits the affidavit of Will Williams, Director of U.S. Operations for the ProTechnics division of Core Laboratories, LP.

DEP will demonstrate that these affidavits contain factual information that establishes beyond a preponderance of the evidence that it acted in compliance with the RTKL, statutory and regulatory authority, and legal precedent. *See McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-383 (Pa. Cmwlth. 2014), *reargument denied* (December 19, 2014), (finding an affidavit sufficient that provided factually detailed, non-conclusory statements). Absent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013)(*en banc*).

B. The Radiation Protection Act, and its Regulations, Precludes Public Access to DEP's Investigatory Records of Radiation Sources and Radiation Source Users.

Smith believes that DEP's regulatory preclusion to releasing its investigatory records is primarily due to the trade secret provision contained in 25 Pa. Code § 215.14(1). Although a limited group of records may be protected under the provision she cites, the primary protection of investigatory records under the Radiation Protection Act and its regulations in response to her request is contained within 25 Pa. Code § 215.14(2).[5]

1. DEP's Investigatory Authority under the Radiation Protection Act and its Regulations

The General Assembly enacted the Radiation Protection Act because radiation exposure has the potential to cause undesirable health effects and the citizens of the Commonwealth should be protected from unnecessary and harmful exposure resulting from use of radioactive materials, radiation sources, accidents involving nuclear power, and radioactive material transportation. 35 P.S. § 7110.102 and 25 Pa. Code § 215.1(a). The purpose of the Act was to establish and maintain a comprehensive program of radiation protection within DEP; to provide for licensing and regulations in cooperation with the Federal Government, other states agencies and appropriate private entities; to maintain a comprehensive radiation monitoring program; to maintain a technical emergency radiation response capability within DEP; and establish an emergency response program. 35 P.S. § 7110.102.

The Radiation Protection Act designated DEP as the agency of the Commonwealth with the authority to control ionizing radiation sources. 35 P.S. § 7110.301(a). DEP is also charged with developing

[5] DEP will discuss the issue of confidential proprietary information in Section IV(H) of this answer.

and conducting a program to control and evaluate the hazards associated with radiation sources and radiation source users. 35 P.S. § 7110.301(c)(1).

Under the Radiation Protection Act, DEP has the power and duty to conduct studies and investigations relating to the control, regulation, and monitoring of radiation sources, and to collect and to disseminate information related to the control of radiation sources and the effects of radiation exposure. 35 P.S. § 7110.301(c)(12)-(13). These powers also include the ability to enter a facility for the purpose of determining compliance with the Radiation Protection Act; any license conditions; or any rules, regulations, or orders issued under the Radiation Protection Act. As part of its investigatory authority, DEP can conduct tests, inspect or examine any radiation source records, or other physical evidence related to the use of a radiation source. 35 P.S. § 7110.305.

DEP's regulations under the Radiation Protection Act provide DEP may "enter the premises of a licensee" in order to conduct an investigation or inspection for purposes of ascertaining whether the licensee is in compliance with the Radiation Protection Act and its regulations. 25 Pa. Code § 215.12(b)(3). DEP can also conduct an investigation or inspection to protect health, safety, and the environment. 25 Pa. Code § 215.12(b)(3). Lastly, the regulation states DEP can access records and other physical evidence, and can require a licensee to make a report or furnish information to DEP. 25 Pa. Code § 215.12(b)(1)-(2).

2. DEP Conducted Investigations of ProTechnics' Regulated Activities under the Radiation Protection Act and its Regulations.

Under the statutory authority given to DEP pursuant to the Radiation Protection Act and its regulations, DEP investigated ProTechnics on three occasions. As a result of those investigations, DEP issued NOVs to ProTechnics on January 28, 2010; June 15, 2010; and November 26, 2013. The affidavits

of Allard, Forney, and Derstine, and others, attest to their personal knowledge of the investigation and the investigatory steps taken by DEP prior to issuing enforcement documents. Allard Affidavit ¶ 29; Forney Affidavit, ¶¶ 26, 109; Derstine Affidavit, ¶ 35; Bookser Affidavit, ¶ 26; and Shearer Affidavit, ¶ 26.

Most of the records that are the subject of Smith's request relate to shipments of residual waste triggering a landfill's radiation alarm. Allard Affidavit, ¶¶ 31, 34, 39; Forney Affidavit, ¶¶ 28, 31, 37; and Derstine Affidavit, ¶¶ 26, 28, 30. In each case, DEP immediately tracked the shipment of radioactive residual waste back to its generator, well sites that had contracted with ProTechnics. Allard Affidavit, ¶¶ 31, 34, 39; Forney Affidavit, ¶¶ 28, 31, 37; Derstine Affidavit, ¶¶ 26, 28, 30. DEP took the steps under its duty to investigate matters regarding the control, regulation, and monitoring of radiation sources, 35 P.S. § 7110.301(c)(12)-(13), and to ensure that a licensee complies with the Radiation Protection Act and its regulations. 25 Pa. Code § 215.12(b)(3).

Specifically, DEP took the following actions for each of its investigations of ProTechnics:

a. Upon receiving notification from a waste disposal facility of non-acceptable radioactive material, the Radiation Protection Program requested information from the facility, including the type of waste and volume; the isotope identified; the activity of the isotope; the generator of the waste; the identity of the person who performed the radiation survey; the type of equipment used to survey the waste; the current location of the waste; and a determination from the facility of its plans for the waste load. Because each flowback incident produced waste containing an isotope that did not meet established exemptions for municipal waste, the flowback waste could not be disposed in a landfill. Therefore, a DOT Special Permit Shipment Approval Form was issued authorizing the return of the rejected load and return to its place of origin.

b. The Regional Radiation Protection Program contacted the waste generator directly or assigned a radiation health physicist to investigate the flowback/loss-of-control incident at the well site, sought to identify all the parties involved, and investigated how the loss of control of licensed material occurred. Whenever possible, the radiation health physicist documented site conditions in a formal inspection report and obtained photographs of the well site.

c. Once completed, all documentation was submitted to the Regional Radiation Protection Management Staff for review and approval of the inspection findings.

Allard Affidavit, ¶ 46; Forney Affidavit, ¶ 43; Derstine Affidavit, ¶ 35; Bookser Affidavit, ¶28; Shearer Affidavit, ¶ 28. All three investigations undertaken by DEP as outlined above, resulted in enforcement actions by DEP. Allard Affidavit, ¶¶ 33, 37-38, 43 and Attachments B - F; Forney Affidavit, ¶¶ 30, 34-35, 41-42; Derstine Affidavit, ¶¶ 27-29, 32-34.

3. Investigatory Records under the Radiation Protection Act and its Regulations are not Publicly Accessible.

Section 215.14 of DEP's regulations, 25 Pa. Code § 215.14, provides, in pertinent part:

> The following Department records *are not available for public inspection,* unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:
>
> (1) Trade secrets or secret industrial processes customarily held in confidence.
>
> (2) A report of investigation, *not pertaining to safety and health in industrial plants,* which would disclose the institution, progress or results of an investigation undertaken by the Department.

(emphasis added). 25 Pa. Code § 215.14. To put it more clearly, only investigation reports pertaining to the safety and health of industrial plants, are available to the public. Allard Affidavit, ¶ 53; Forney Affidavit, ¶ 50; Derstine Affidavit, ¶ 41; Bookser Affidavit, ¶ 35; and Shearer Affidavit, ¶ 35. Investigation reports concerning well pads are not available to the public because well pads are not "industrial plants."

"Industrial plant" is not a defined term within DEP's regulations under the Radiation Protection Act.[6] Absent a definition of a regulatory term, tribunals must defer to DEP's interpretation of its regulations. *Dep't of Envtl. Prot. v. N. Am. Refractories Co.*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002)

[6] Radiation Protection Act Regulations are at 25 Pa. Code §§ 215.1-240.502.

(DEP's interpretation of environmental regulations is entitled to great deference unless it is clearly erroneous). A two-prong test was adopted when analyzing the validity of DEP's interpretations: (1) whether the interpretation is erroneous or inconsistent with the regulation, and (2) whether the regulation is consistent with the statue under which it is promulgated. *Tire Jockey Serv. Inc. v. Pa. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1186 (Pa. Cmwlth. 2007).

When an agency enacts a regulation pursuant to its legislative rulemaking power, "it is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure,[7] and (c) reasonable." *Id.* "Regarding the reasonableness prong, appellate courts accord deference to agencies and *reverse* agency determinations *only if* they were made in bad faith or if they constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." *Id.* (emphasis added).

When interpreting undefined terms such as "industrial plant," DEP staff is guided by its common usage in an identical or similar context. Allard Affidavit, ¶ 54; Forney Affidavit, ¶ 51. DEP staff will reference dictionary definitions, Federal and state environmental statutes, and technical materials. Allard Affidavit, ¶ 54; Forney Affidavit, ¶ 51; Derstine Affidavit, ¶ 42.

There is no common and approved usage for the term "industrial plant." Allard Affidavit, ¶ 54; Forney Affidavit, ¶ 51. However, the term "industrial" as an adjective is defined as: of or relating to industry; of or relating to factories, the people who work in factories, or the things made in factories; having a developed industry; having factories that actively make a product; coming from or used in

[7] DEP may enact regulations to the Radiation Protection Act, 35 P.S. §§ 7110.101-7110.703, pursuant to 35 P.S. § 7110.102(2). The regulations referenced in this discussion were issued pursuant to the proper procedure noted within the Administrative Code, 71 P.S. § 235, the Regulatory Review Act, 71 P.S. §§ 745.1-745.14, the Commonwealth Documents Law, 45 P.S. §§ 1102, 1201-1208, and the Commonwealth Attorneys Act, 71 P.S. §§ 732.201(b) and 732.301(10).

industry; made or used in factories. http://www.merriam-webster.com/dictionary/industrial. Plant is defined as "a building or factory where something is made." http://www.merriam-webster.com/dictionary/plant. A building is defined as a structure with a roof and walls. http://www.merriam-webster.com/dictionary/building. A factory is a building or group of buildings where products are made. http://www.merriam-webster.com/dictionary/factory. Allard Affidavit, ¶ 55; Forney Affidavit, ¶ 52.

DEP does not interpret a well pad to be an industrial plant. Unlike a factory, nothing is created or made at a well pad. Natural gas at a well pad is extracted from the ground in its raw state and removed from the site. Refining and processing, necessary steps for the creation of an end product, are done at a refinery, which is at another location and in a different type of facility. Allard Affidavit, ¶ 56; Forney Affidavit, ¶¶ 52-54.

Well pads are not buildings. They possess no walls or roofs. A well pad is the area that has been cleared for a drilling rig on a plot of land designated for natural gas or oil extraction. The pad is constructed by clearing all trees and obstacles to allow for the engineering of a foundation. An area typically is 3-5 acres of cleared land. The pad is for the drilling derrick and all of its supporting equipment. Allard Affidavit, ¶ 57.

Finally, even assuming that well pads were "industrial plants," the investigations concerning the triggering of the landfill radiation alarms are not "investigation[s]...pertaining to safety and health in industrial plants" within the meaning of the regulation because the investigation does not pertain to safety and health in (or even at) the well pad. The investigation concerns how flowback known to be present at the well pad came to be misdirected to the landfill.

Consequently, all investigations by DEP of ProTechnics' activities that are the subject of Smith's request fall outside of the regulatory provisions requiring record production. Allard Affidavit, ¶ 58; Forney Affidavit, ¶ 55; Derstine Affidavit, ¶ 43. None of DEP's investigations were a health and safety matter *pertaining to an industrial plant* (emphasis added). 25 Pa. Code § 215.14.

Therefore, DEP's investigatory records relating to its investigation of ProTechnics are not public under 25 Pa. Code § 215.14(2).

4. The Radiation Protection Act and its Regulations Supersede the RTKL Regarding Record Production.

A public record is defined by the RTKL as "a record, including a financial record, of a Commonwealth or local agency that:

(1) is not exempt under section 708[8]
(2) is not exempt from being disclosed under any Federal or State law or regulation or judicial order or decree; or
(3) is not protected by a privilege."

65 P.S. § 67.102. Furthermore, a record in the possession of a Commonwealth agency is not presumed to be public for RTKL purposes if the record is exempt from disclosure under any state law or regulation. 65 P.S. § 67.305(a)(3).

In *Jones v. Office of Open Records*, 993 A.2d 339 (Pa. Cmwlth. 2010), the Commonwealth Court was clear regarding the supremacy of specific laws over that of the RTKL regarding record disclosure. In referencing 65 P.S. § 67.305(a)(3), the court stated:

> The [RTK] Law is clear that its enactment does not "supersede or modify the public or nonpublic nature of a record or document established in regulation...."

[8] In Argument C of this response, DEP will assert that its investigatory records discussed in Argument B are also protected by the RTKL's noncriminal investigation exception. 65 P.S. § 67.708(b)(17).

Based on this clear authority, the investigatory records of ProTechnics are not public records subject to the RTKL because their release is restricted by the Radiation Protection Act and its regulations as noted in the preceding subsection. Consequently, these records are exempt from production.[9]

C. DEP Can Withhold Records of an Authorized Noncriminal Investigation of a Radiation Material Licensee that DEP Believes Violated the Radiation Protection Act and its Regulations.

1. The RTKL Noncriminal Exception

The RTKL exception at Section 708(b)(17) applies to:

A record of any agency relating to a noncriminal investigation including:

(ii) Investigative materials, notes, correspondence and reports;

....

(vi) A record that, if disclosed, would ...:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

65 P.S. § 67.708(b)(17)(vi)(A).

[9] Records withheld from Smith in response to her RTKL request as exempt under the Radiation Protection Act and its regulations, are also exempt records of confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; personal identification information; and public safety and security under the RTKL, and as attorney-client and attorney work-product privileges as outlined within DEP's affidavits and privilege logs. Allard Affidavit, ¶ 59; Forney Affidavit, ¶ 55; Derstine Affidavit, ¶ 44; Bookser Affidavit, ¶ 38; Shearer Affidavit, ¶ 38.

Although the RTKL does not define "investigation," the Commonwealth Court has stated that "as used in Section 708(b)(17), the term 'investigation' means a systematic or searching inquiry, a detailed examination, or an official probe." *Dep't of Envtl. Prot. v. Delaware Riverkeeper Network,* 113 A.3d 869 (Pa. Cmwlth. 2015) (holding that a DEP study conducted by the Bureau of Radiation Protection of technically enhanced naturally occurring radiation sources (TENORM) constituted a noncriminal investigation) *citing Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-811 (Pa. Cmwlth. 2010) (holding that inspections and surveys of nursing home facilities, records, residents, staff and family members were noncriminal investigations). The inquiry must be within the agency's official duties, *Dep't of Health*, 4 A.3d at 814, and concern a noncriminal matter. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Cmwlth. 2011).

2. DEP's Investigations of ProTechnics are "Official" because They are within DEP's Statutory Authority under the Radiation Protection Act and its Regulations.[10]

Section 305(a) of the Radiation Protection Act states:

> The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

[10] DEP's authority to investigate and inspect radiation materials and radiation materials licensees was discussed at length in Argument B of this response.

Section 301(c)(5) of the Radiation Protection Act, 35 P.S. § 7110.301 (c)(5), provides that DEP has the power and authority to "[c]arry out a comprehensive program of monitoring levels of radioactivity in Pennsylvania's environment ... in all appropriate media." Similarly, Section 301(c)(12) of the Radiation Protection Act, 35 P.S. § 7110.301(c)(12), provides that DEP has the power and authority to "conduct studies, investigations, . . . [and] research relating to control, regulation and monitoring of radiation sources."

Lastly, Section 215.12 of the Radiation Protection Act's Regulations[11] provides, in part:

...

(b) Rights of the Department. The Department and its agents and employees will:
   (1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.
   (2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.
   (3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.

(c) Inspections and investigations by the Department. The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.

(d) Additional inspections and investigations. The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated.

[11] 25 Pa. Code §§ 215.1-240.502

25 Pa. Code § 215.12

DEP investigated ProTechnics because of its potential loss of control of radioactive materials and possible mishandling of the disposal of radioactive materials. Allard Affidavit, ¶¶ 31, 34, 39; Forney Affidavit, ¶¶ 28, 31, 37; Derstine Affidavit, ¶¶ 26, 28, 30. DEP's three investigations of ProTechnics as a radioactive materials licensee were to determine whether radioactive materials were handled within the terms of its license. Allard Affidavit, ¶ 20; Forney Affidavit, ¶ 17; Derstine Affidavit, ¶ 18. These investigations were initiated as part of DEP's official duties to protect the health and safety of the Commonwealth's citizens as outlined in the Radiation Protection Act and its regulations. Allard Affidavit, ¶¶ 50-52; Forney Affidavit, ¶¶ 44-49; Derstine Affidavit, ¶¶ 36-41; Bookser Affidavit, ¶¶ 31-34; and Shearer Affidavit, ¶¶ 31-34.

3. Each of DEP's Noncriminal Investigations of ProTechnics Consisted of a Systematic or Searching Inquiry, or Detailed Examination.

Merely stating that an investigation occurred is insufficient when asserting the noncriminal investigation exception of the RTKL. *Heavens v. Dep't of Envtl. Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013). However, as noted in Argument B and in the preceding subsection of this argument, DEP demonstrated that a searching inquiry or a detailed examination of ProTechnics was undertaken as part of DEP's official duties. *Dep't of Envtl. Prot. v. Delaware Riverkeeper Network*, 113 A.3d 869, 875 (Pa. Cmwlth. 2015) *citing Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Cmwlth. 2012).

All three investigations of ProTechnics by DEP began after a shipment of residual waste triggered a landfill's radiation alarm. Allard Affidavit, ¶¶ 31, 34, 39; Forney Affidavit, ¶¶ 28, 31, 37; and Derstine Affidavit, ¶¶ 26, 28, 30. These triggering events required DEP to immediately track the shipment of

radioactive residual waste back to its generator. In each case, the generator was a well site that had engaged ProTechnics. Allard Affidavit, ¶¶ 28, 31, 37; Forney Affidavit, ¶¶ 31, 34, 39; and Derstine Affidavit, ¶¶ 26, 28, 30. DEP commenced its inquiries because of its duty to investigate matters regarding the control, regulation, and monitoring of radiation sources, 35 P.S. § 7110.301(c)(12)-(13), and to ensure that a licensee is compliant with the Radiation Protection Act and its regulations. 25 Pa. Code § 215.12(b)(3).

For each step taken in these three investigations, DEP conducted a systematic probe of whether ProTechnics, by triggering the landfill radiation alarms, had violated any provisions of the Radiation Protection Act or its regulations. DEP requested information from the landfill where alarms were activated, contacted the waste generator directly and assigned a radiation health physicist to investigate the flowback/loss-of-control incident at the well site, sought to identify all parties involved, and inquired as to how the loss of control of licensed material occurred. This process also included an inspection by a radiation health physicist of site conditions and a formal inspection report of the well site. Once completed, all documentation was submitted to the Regional Radiation Protection Management Staff for review and approval of the inspection findings. Allard Affidavit, ¶ 46 (a-c); Forney Affidavit, ¶ 43 (a-c); Derstine Affidavit, ¶ 35 (a-c); Bookser Affidavit, ¶ 28 (a-c); and Shearer Affidavit, ¶ 28 (a-c).

Based on this evidence, DEP's step-by-step activities concerning ProTechnics were conducted under its statutory and regulatory authority as noted, and was a "systematic or searching inquiry, [or] detailed examination" of ProTechnics' activities so DEP could assess whether ProTechnics was operating within its license requirements and in compliance with the Radiation Protection Act and its regulations.

4. Records Created During the Course of DEP's Investigations are Not Subject to Production because Disclosure Would Reveal the Institution and Progress of DEP's Investigations into ProTechnics.

While performing its three investigations of ProTechnics, DEP created records including, but not limited to, inspection reports, photographs, internal pre-enforcement documents, emails, draft enforcement documents, and records of staff reviews of ProTechnics' materials license registration. Allard Affidavit, ¶ 113; Forney Affidavit, ¶ 110; Derstine Affidavit, ¶ 81; Bookser Affidavit, ¶¶ 84-85, 89; and Shearer Affidavit, ¶¶ 84-85, 89. *See also* DEP's multiple privilege logs. These records do not contain purely factual information. Allard Affidavit, ¶ 114; Forney Affidavit, ¶ 111; and Derstine Affidavit, ¶ 81. These records exist and were solely created because of DEP's official investigations into ProTechnics' activities that were subsequently found to have violated the Radiation Protection Act and its regulations. Allard Affidavit, ¶ 115; Forney Affidavit, ¶ 112; Derstine Affidavit, ¶ 81; Bookser Affidavit, ¶ 89; and Shearer Affidavit, ¶ 89.

These records, that memorialize the various steps taken throughout DEP's investigations, would reveal the institution and progress of DEP's three noncriminal investigations of ProTechnics, or would hinder DEP's ability to secure an appropriate or civil sanction. Allard's Affidavit ¶ 116; Forney Affidavit, ¶ 113; Derstine Affidavit, ¶ 82; Bookser Affidavit, ¶ 88; and Shearer Affidavit, ¶ 88.

Therefore, records created during the course of DEP's three official investigations of ProTechnics are exempt from production under the RTKL's noncriminal investigation exception.[12]

[12] Records withheld from Smith as exempt under the noncriminal exception of the RTKL, are also exempt records of confidential proprietary information; internal, predecisional deliberations; public safety and security; and personal identification information under the RTKL, as well as attorney-client and attorney-work product privileges as outlined within DEP's affidavits and privilege logs. Allard Affidavit, ¶ 119; Forney Affidavit ¶ 117; Derstine Affidavit, ¶ 85; Bookser Affidavit, ¶ 90; and Shearer Affidavit, ¶ 90.

D. The Public Safety and Security Exception of the RTKL Permits DEP to withhold Records Containing Sensitive Information, including but not Limited to, the Location, Volume, and Types of Radioactive Materials Possessed by a Radioactive Material Licensee.

1. The RTKL's Public Safety Exception

The public safety exception of the RTKL, 65 P.S. § 67.708(b)(2), exempts the following records from public production:

> A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threated public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

65 P.S. § 67.708(b)(2).

To establish the public safety exception of the RTKL, an agency must prove by a preponderance of the evidence that the disclosure of the requested records "would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity...." *Fennell v. Pa. Dep't of Corr.*, No. 1827 C.D. 2016 (Pa. Cmwlth. February 5, 2016) (*unreported opinion*), *citing Carey v. Dep't of Corr.*, 61 A.3d 367, 374 (Pa. Cmwlth. 2013) and *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012).

Fennell, an inmate housed at a State Correctional Institute, sought records including training manuals regarding the physical restraint of inmates and report writing. In evaluating whether the production of these records would create a public safety issue, the Commonwealth Court applied the following two-prong test: 1) the record must relate to a public safety activity and 2) the disclosure of the record would be "reasonably likely" to threaten public safety or a public protection activity. *Fennell*, slip

op. at 4. Whether an agency establishes this exception depends on the level of detail in the supporting affidavit. *Carey*, 61 A.3d at 376 (discussing the level of detail the affidavit in the case at issue should have possessed).

2. DEP'S Records were Created while DEP was Fulfilling its Obligations under the Radiation Protection Act, and its Regulations, Related to Public Safety Activities.

The General Assembly's purpose in enacting the Radiation Protection Act was to protect public safety. The statute confers powers and duties upon DEP, to protect the public from the adverse health effects of radiation exposure. Allard Affidavit, ¶ 47; Forney Affidavit, ¶ 44; Derstine, ¶ 36; Bookser Affidavit, ¶29; and Shearer Affidavit, ¶ 29. This includes shielding citizens of the Commonwealth from unnecessary and harmful exposure resulting from use of radioactive materials, radiation sources, accidents involving nuclear power, and radioactive material transportation. 35 P.S. § 7110.102 and 25 Pa. Code § 215.1(a). The Act requires DEP to establish and maintain a comprehensive program of radiation protection; provide for licensing and regulations in cooperation with the Federal Government, other state agencies and appropriate private entities; maintain a comprehensive radiation monitoring program; maintain a technical emergency radiation response capability within DEP; and establish an emergency response program. 35 P.S. § 7110.102. All of these obligations are intended to protect the public's safety regarding the possession and use of radioactive materials.

DEP's obligations under the Radiation Protection Act, and its regulations, are to ensure among other things, that licensees of radioactive materials operate in accordance with the law so as not to compromise public safety. As a result, DEP is charged with developing and conducting a program to control and evaluate the hazards associated with radiation sources and radiation source users. 35 P.S. § 7110.301(c)(1). DEP's regulations contain extensive controls to protect the public from radiation

exposure. 25 Pa. Code 219.5(a). Allard Affidavit, ¶ 105; Forney Affidavit, ¶ 100. The consequences of radiation exposure from sources regulated by DEP include, but are not limited to, cell, tissue, and organ damage; burns; nausea; vomiting; diarrhea; headaches; narcosis; blindness; cancer; and even death. Allard Affidavit, ¶ 64; Forney Affidavit, ¶ 60; and Derstine Affidavit, ¶ 49. These health consequences represent a significant potential harm to public safety. Allard Affidavit, ¶ 64; Forney Affidavit, ¶ 60; Derstine Affidavit, ¶ 49; Bookser Affidavit, ¶ 41; and Shearer Affidavit, ¶ 41.

The language of the Radiation Protection Act and its regulations, in conjunction with DEP's affidavits, conclusively show that DEP's duty to protect the public from radiation exposure and its potential health consequences, are public safety activities; and the records created in the course of complying with these statutory and regulatory obligations memorialize those activities.

3. The Disclosure of DEP's Records of Radiation Sources and Radiation Material Licensees Would Reasonably Likely Threaten Public Safety.

a. Meeting the "Reasonably Likely Test"

To establish the "reasonably likely" component of the RTKL's public security exception, sufficient evidence must be submitted showing a likelihood that disclosure would cause the alleged harm. *Fennell*, slip op. at 5. The harm cannot be speculative. *Carey*, 61 A. 3d at 375.

In *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010), the Commonwealth Court concluded that records withheld by the Pennsylvania Emergency Management Agency (PEMA) regarding the location of emergency goods and services would not endanger public safety, and, therefore, should not have been withheld under the public safety exception of the RTKL. As an example, the court

noted that divulging the location of "bungee cords" would not endanger public safety. *Id.* at 25. However, radioactive materials are not bungee cords.

The court in *Bowling* agreed that PEMA appropriately withheld records pertaining to the location of computer servers because knowledge of the location of the servers has the "potential to endanger" an information storage system. *Id.* The court also agreed with PEMA that the knowledge of the location of biochemical testing equipment could indicate a taskforce's ability to effectively respond to a chemical threat and, thus, these records were also properly withheld. *Id.* The information in the records DEP is withholding---which discusses the current location, quantity, and security measures of radioactive materials---is similar in sensitivity and has the "potential to endanger" the public if obtained by someone with malicious intent.

b. Security Concerns: Failing to Safeguard Radiation Material Information

The U.S. Government Accountability Office (GAO), is an independent, nonpartisan agency that works for Congress. It is often called the "congressional watchdog." Allard Affidavit, ¶ 69; Forney Affidavit, ¶ 65. In 2012, the United States Senate Committee on Homeland Security and Governmental Affairs asked the GAO to review the security of radiological sources at U.S. industrial facilities. *See* Allard Affidavit, ¶ 70, Attachment G; Forney Affidavit, ¶ 65: *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014). In 2014, the GAO issued a report concluding that challenges exist in reducing the security risks faced by licensees using high-risk industrial radiological sources. GAO states in the report that "in the hands of terrorists, these radiological sources could be used to produce a simple and crude, but potentially dangerous weapon,

known as a radiological dispersal device or dirty bomb, whereby conventional explosives are used to disperse radioactive material." *Id.* at 1. Allard Affidavit, ¶ 71; Forney Affidavit, ¶ 67.

More importantly, the GAO's report also states that, since 1993, there have been 615 confirmed incidents involving the theft or loss of nuclear and radioactive materials worldwide. Allard Affidavit, ¶ 72. *Id.* at 2. The report notes that some industrial radiological sources are portable and susceptible to theft or loss. Allard Affidavit, ¶¶ 74-75, *Id.* at 12. The radioactive material used by ProTechnics is small enough to be easily transported and, therefore, poses a greater risk of theft of loss. Allard Affidavit, ¶ 76. Lastly, the report criticizes Nuclear Regulatory Commission's (NRC) practices in regards to safeguarding radioactive material at well logging sites. *Id.* at 39. Allard Affidavit, ¶ 73. *See also*: Forney Affidavit, ¶¶ 68-73; Derstine Affidavit, ¶¶ 55-57;

This reports, and the other reports and articles found in Allard Affidavit, Attachment G, highlight the nexus between the disclosing the contents of radioactive materials license files and the realistic scenarios DEP is seeking to avoid. Allard Affidavit, ¶ 80; Forney Affidavit, ¶ 75; Derstine Affidavit, ¶ 62; Bookser Affidavit, ¶ 46; Shearer Affidavit, ¶ 46. By withholding all radioactive material files, DEP hopes to thwart access by individuals with malicious intent to obtain radioactive materials in the first instance. Allard Affidavit, ¶ 108; Derstine Affidavit, ¶62; Bookser Affidavit, ¶ 46; Shearer Affidavit, ¶ 46. By exempting these records as permitted under the RTKL, DEP hopes to deny individuals the basic information required to prepare fraudulent documents or otherwise unlawfully obtain radioactive materials in the Commonwealth. Allard Affidavit, ¶ 65; Forney, ¶ 61. Withholding the records is an important step in protecting public security from potential hazards caused by inappropriate possession and unapproved uses of radioactive materials.

c. Security Concerns Regarding Radioactive Material Files: The Application and License Process

There are substantiated security concerns of why radioactive material files should not be released so as not to threaten public safety. Despite Smith's assertions, the Department is not overreacting. Instead, it is making informed safety and security decisions. Individuals have manipulated the information contained in radioactive materials licenses, and other files, to unlawfully obtain radioactive materials thus creating the potential to endanger the public. Allard Affidavit, ¶ 65; Forney Affidavit, ¶ 61; Derstine Affidavit, ¶ 50, 53; Bookser Affidavit, ¶ 44; and Shearer Affidavit, ¶ 44.

The sensitive content in all radioactive materials files provides insight into the radioactive materials license application process and the documentation needed to fraudulently obtain radioactive materials. Allard Affidavit, ¶ 65; Forney Affidavit, ¶ 61; Derstine Affidavit, ¶ 50; Bookser Affidavit, ¶ 44; Shearer Affidavit, ¶ 44. This insight includes what a radioactive materials license looks like, the type of training that DEP requires that licensees complete, specifics regarding radiation protection programs, and internal DEP tracking numbers. Allard Affidavit, ¶ 65; Forney Affidavit, ¶ 61; Derstine Affidavit, ¶ 50; Bookser Affidavit, ¶ 44; and Shearer Affidavit, ¶ 44.

The creation of fraudulent licenses and the misappropriation of radioactive materials are far from unfounded concerns. Documented cases exist of other regulatory agencies approving license applications from fictitious entities that then fraudulently obtained radioactive materials. *See* Allard Affidavit, ¶68, Attachment G: *Nuclear Security: Actions Taken by NRC Strengthens Its Licensing Process for Sealed Radioactive Sources Are Not Effective*, Government Accountability Office (2007); Kathleen Day, *Sting Reveals Security Gap at Nuclear Agency*, The Washington Post, July 12, 2007; and David Kestenbaum, *GAO Sting Uncovers Nuclear Security Shortcomings*, NPR, July 12, 2007. Allard Affidavit, ¶ 68; Forney

Affidavit, ¶ 64; Derstine Affidavit, ¶ 53; Bookser Affidavit, ¶ 45; and Shearer Affidavit, ¶ 45. These articles highlight the nexus between the disclosure of radioactive materials license files and the realistic scenarios DEP seeks to avoid so it may best protect the safety of Commonwealth citizens. Allard Affidavit, ¶ 80; Forney Affidavit, ¶ 75; Derstine Affidavit, ¶ 62; Bookser Affidavit, ¶ 46; and Shearer Affidavit, ¶ 46. These articles show the danger is real, not speculative as Smith argues.

Smith alleges that DEP's actions are an attempt to obscure whether ProTechnics possesses a license. However, DEP purposefully redacted the license number from the documents it provided to Smith to limit publicly available information that one could use to track down a specific license and obtain the information within the license discussed above. Allard Affidavit, ¶ 66; Forney Affidavit, ¶ 62; Derstine Affidavit, ¶ 51. DEP's intent in redacting the license number was to protect the information in the license itself. DEP's intent was not to be vague on whether ProTechnics had a license as claimed in Smith's response. Allard Affidavit, ¶ 66; Forney Affidavit, ¶62; Derstine Affidavit, ¶ 51. To the contrary, DEP wants the public to know that it regulates companies like ProTechnics that use radioactive material. Allard Affidavit, ¶66; Forney Affidavit, ¶ 62; Derstine Affidavit, ¶ 51. For this reason, DEP released redacted records to Smith with the specific license number redacted and did not redact the words "license number." Allard Affidavit, ¶ 66; Forney Affidavit, ¶ 62; Derstine Affidavit, ¶ 51.

Smith, as shown by attachments submitted with her appeal, was able to obtain information regarding ProTechnics' radioactive materials license issued by the NRC and the agreement states of Texas and Colorado. Allard Affidavit, ¶ 87; Forney Affidavit, ¶ 82; Derstine Affidavit, ¶ 67; Bookser Affidavit, ¶ 53; and Shearer Affidavit, ¶ 53. As discussed in the Allard Affidavit, ¶ 21 and Attachment A, the Commonwealth of Pennsylvania is an NRC Agreement State and, therefore, is the agency with current authority to regulate most radioactive materials within the Commonwealth. Allard Affidavit ¶ 87; Forney

Affidavit, ¶ 82; Derstine Affidavit, ¶ 67; Bookser Affidavit, ¶ 53; Shearer Affidavit, ¶ 53. As an NRC Agreement State, DEP takes its duty seriously to protect the citizens of the Commonwealth from the hazards of radiation sources. Allard Affidavit ¶¶ 88-90; Forney Affidavit ¶¶ 83-86; Bookser Affidavit, ¶ 55; Shearer Affidavit, ¶ 55. But, Agreement States, like Pennsylvania, do not have control over how the NRC decides to release the event notification on its website once the state provides information to the NRC. Allard Affidavit, ¶ 90; Forney Affidavit, ¶ 85; Derstine Affidavit, ¶ 68; Bookser Affidavit, ¶ 54; Shearer Affidavit, ¶ 54.

Federal regulatory agencies, such as the NRC, are bound by the Freedom of Information Act, 5 U.S.C. § 522 (FOIA). Allard Affidavit, ¶91; Forney Affidavit, ¶ 86; Derstine Affidavit, ¶ 69; Bookser Affidavit, ¶56; Shearer Affidavit, ¶ 56. FOIA has substantially fewer exceptions to the release of Federal records than the RTKL, and Federal agencies may be statutorily required to make certain information more publicly available. Other states possess their own public record laws. However, DEP protects its records related to radiation sources to the extent allowed by Commonwealth law to prevent fraudulent acquisition of radioactive materials within the Commonwealth and the subsequent threat that would cause to the health, safety, and security of its citizens. Allard Affidavit, ¶ 91; Forney Affidavit, ¶ 86; Derstine Affidavit, ¶ 69; Bookser Affidavit, ¶ 56; Shearer Affidavit, ¶ 56.

By withholding radioactive material files, DEP hopes to thwart individuals with malicious intent from gaining access to these materials in the first instance. As a direct result of exempting licensing records as permitted under the RTKL, these individuals will lack the basic information required to prepare fraudulent documents and obtain radioactive materials in this Commonwealth. Allard Affidavit, ¶ 65; Forney Affidavit, ¶ 86; Derstine Affidavit, ¶ 62; Bookser Affidavit, ¶ 46; and Shearer Affidavit, ¶ 46.

d. Security Concerns Regarding Files Containing the Quantity and Location of Radioactive Materials, and Security Measures Associated with Them

DEP's radioactive material files also contain information regarding the current location and quantity of radioactive materials possessed by licensees, and the security measures taken to protect these materials. Allard Affidavit, ¶ 92; Forney Affidavit, ¶ 87; Derstine Affidavit, ¶ 70; Bookser Affidavit, ¶¶ 43, 57; Shearer Affidavit, ¶¶ 43, 57. Making this information available to the public presents a risk "reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity" because location and quantity information, if publicly available, could be used by terrorists or other criminals who want to obtain radioactive materials, or could create an increased threat to the licensee housing the materials, thus making it a target of criminal activity. Allard Affidavit, ¶ 93; Forney Affidavit, ¶ 87; Derstine Affidavit, ¶ 70; Bookser Affidavit, ¶¶ 43, 58; Shearer Affidavit, ¶¶ 43, 58.

For example, inspection reports contain information regarding the documentation of security controls that ProTechnics has in place at each well site where radioactive tracers are used. Allard Affidavit, ¶ 62; Forney Affidavit, ¶ 58; Derstine Affidavit, ¶ 47. DEP believes this information requires protection for public safety reasons because it describes the measures used by ProTechnics to maintain constant control of its radioactive materials and how ProTechnics specifically prevents the materials' removal from well sites. Allard Affidavit, ¶ 62; Forney Affidavit, ¶ 58; Derstine Affidavit, ¶ 47. Should an individual overcome these security measures and remove the radioactive materials, an increased threat would exist of exposing others persons to the associated health risks caused by radiation exposure. Allard Affidavit, ¶

62; Forney Affidavit, ¶ 88; Derstine Affidavit, ¶ 47. The events in Brussels, Belgium only weeks ago, evidences actual and not speculative safety concerns.[13] Forney Affidavit, ¶ 76; Derstine Affidavit, ¶ 63.

e. Public Security Concerns for Individuals Working in the Radioactive Materials Field

Additionally, the release of license records, or other investigatory and sensitive information regarding radioactive materials, could pose a potential threat to the safety of individuals using them. If ProTechnics, or the well owner or operator's personal contact information was released, a person with malicious intent could target them to obtain unauthorized access to radioactive material. Allard Affidavit, ¶ 63; Forney Affidavit, ¶ 59; Derstine Affidavit, ¶ 48; Bookser Affidavit, ¶ 40; and Shearer Affidavit, ¶ 40.

DEP did not provide the following information for ProTechnics' employees: names, mailing addresses, phone numbers, or email addresses. Allard Affidavit, 84; Forney Affidavit, ¶ 79; Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50. As highlighted in the CNN article, employees who manage radioactive materials have been targeted by terrorist groups. Allard Affidavit, ¶ 84; Forney Affidavit, ¶ 79. Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50. As Smith states in her appeal and in Attachment 2, it is true that ProTechnics' has it headquarter's address and main telephone listed on its public website. Allard Affidavit, ¶ 84; Forney Affidavit, ¶ 79; Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50. However, the names of the individuals,

[13] *See* Forney Affidavit ¶ 76 and Attachment 1; Joe Cirincione, *Nuclear Terrorist Threat Bigger than You Think*, CNN, April 1, 2016, at http://www.cnn.com/2016/04/01/opinions/nuclear-terrorism-threat-cirincione/index.html.

their direct telephone lines, and their email addresses are not provided. Allard Affidavit, ¶ 84; Forney Affidavit, ¶ 79; Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50. DEP redacted mailing addresses to prevent the possibility of someone with ill intent to narrow down which specific office an individual from ProTechnics is assigned. Allard Affidavit, ¶ 84; Forney Affidavit, ¶ 79; Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50. This effort was made to avoid public safety concerns like those discussed in the CNN article. Allard Affidavit, ¶ 84; Forney Affidavit, ¶ 79; Derstine Affidavit, ¶ 65; Bookser Affidavit, ¶ 50; Shearer Affidavit, ¶ 50.

However, if ProTechnics makes public its contact information and the identity of its personnel, that is ProTechnics' decision; DEP will not be the source for records that can place individuals at risk. Furthermore, absent research which DEP is not required to conduct under the RTKL, DEP evaluated it records based on content and the exceptions provided under the RTKL. From the records it possessed, it was not evident that ProTechnics' general address and contact information was readily available. *Campbell v. Pamlerton Area School Dist.*, No. AP-2011-0133 (Pa. O.O.R.D. March 21, 2011) (An agency cannot be required to look outside the content of the record at issue and review other records not at issue in performing research to assess if information not expressly included in a record must be redacted).

f. **Public Security Concerns: Landfills and Gas Well Sites**

Waste disposal and processing facilities, like landfills, are regulated by DEP's Radiation Protection Program, in addition to other DEP programs. Allard Affidavit, ¶ 94; Forney Affidavit, ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59. Landfills are required to submit to DEP a Radiation Action Plan (Plan), also known as a "Plan X," under 25 Pa. Code § 273.223. Allard Affidavit, ¶ 94; Forney Affidavit, ¶ 89; Bookser Affidavit, ¶ 59; Shearer Affidavit, ¶ 59. The purpose of the Plan is to protect the

environment and the public's health, safety, and welfare from the possible dangers caused by the delivery of radioactive materials to solid waste processing and disposal facilities. Allard Affidavit, ¶ 95; Forney Affidavit, ¶ 90; Bookser Affidavit, ¶ 60; Shearer Affidavit, ¶ 60.

The Plan is reviewed by staff in DEP's Waste Management and Radiation Protection Programs to ensure that a landfill has a comprehensive radiation monitoring program in place. Allard Affidavit, ¶95; Forney Affidavit, ¶ 91; Bookser Affidavit, ¶ 61; Shearer Affidavit, ¶ 61. DEP also reviews the Plan to ensure that a facility established an adequate radiation protection program that effectively monitors waste entering the landfill, screens for radioactive material, and provides for an appropriate response if waste contains radioactive material. Allard Affidavit, ¶ 96; Forney Affidavit, ¶ 91; Bookser Affidavit, ¶ 61; Shearer Affidavit, ¶ 61.

To assist landfills with developing their plans, DEP created a guidance document on a Plan's contents. A Plan submitted by a landfill must include the following:

- A discussion of the type of monitoring equipment that will be used to monitor inbound waste for radioactive material;
- A list of individuals responsible for monitoring radioactive materials in the inbound waste;
- An established isolation area for waste to be temporarily stored until it can be tested to determine what isotope is present and how much activity is present;
- Established action levels for responding to radiation alarms and proper procedures to ensure compliance; and
- Established points of contact with DEP to report radiation alarms.

Allard Affidavit, ¶ 97; Forney Affidavit, ¶ 92; Bookser Affidavit, ¶ 62; Shearer Affidavit, ¶ 62.

As noted by Smith within her appeal, DEP did not redact the names of the landfills where ProTechnics' radioactive tracers were taken for disposal because ProTechnics' radioactive tracers were not disposed of at these landfills. Allard Affidavit, ¶ 98; Forney Affidavit, ¶ 93; Bookser Affidavit, ¶ 63;

Shearer Affidavit, ¶ 63. Absent the existence of radioactive material, there were no safety concerns and hence no reason for DEP to redact the landfill names.

ProTechnics' radioactive tracers triggered an alarm upon each of the three investigated occassions. Allard Affidavit, ¶ 99; Forney Affidavit, ¶ 94; Bookser Affidavit, ¶ 64; Shearer Affidavit, ¶ 64. The landfill followed its Plan and contacted DEP. Allard Affidavit, ¶ 99; Forney Affidavit, ¶ 94; Bookser Affidavit, ¶ 64; Shearer Affidavit, ¶ 64. DEP subsequently issued a DOT Special Permit 11406 Shipment Approval Form. Allard Affidavit, ¶ 100; Forney Affidavit, ¶ 95; Derstine Affidavit, ¶ 74; Bookser Affidavit, ¶ 65; Shearer Affidavit, ¶ 65. This special permit allowed the landfill to reject the noncompliant load and return it to its point of origin at the well pad. Allard Affidavit, ¶ 100; Forney Affidavit, ¶ 95; Derstine Affidavit, ¶ 74; Bookser Affidavit, ¶ 65; Shearer Affidavit, ¶ 65. Since the load containing radioactive material was rejected, it was never disposed of at the landfill. Allard Affidavit, ¶ 100; Forney Affidavit, ¶ 95; Derstine Affidavit, ¶ 74; Bookser Affidavit, ¶ 65; Shearer Affidavit, ¶ 65. With no radioactive material on-site, and no public security concerns, DEP saw no reason to exclude the landfill names in its response to Smith's RTKL request. Allard Affidavit, ¶100; Forney Affidavit, ¶ 95; Derstine Affidavit, ¶ 74; Bookser Affidavit, ¶ 65; Shearer Affidavit, ¶ 65. This supports DEP's good faith efforts that when a record does not fall within a RTKL exception or privilege, it is provided to a requester.

Despite Smith's contentions within her appeal, gas well sites where radioactive tracer materials are injected are not akin to landfills. Allard Affidavit, ¶ 102; Forney Affidavit, ¶ 97; Bookser Affidavit, ¶ 67; Shearer Affidavit, ¶ 67. Well sites involve highly flammable gas. Allard Affidavit, ¶ 102; Forney Affidavit, ¶ 97; Bookser Affidavit, ¶ 67; Shearer Affidavit, ¶ 67. Workers, as well as government inspectors, are required to wear flame retardant clothing and complete safety training before even entering a well pad. Allard Affidavit, ¶ 102; Forney Affidavit, ¶ 97; Bookser Affidavit, ¶ 67; Shearer Affidavit, ¶

67. Gas well sites also contain large drilling equipment. Allard Affidavit, ¶ 103; Forney Affidavit, ¶ 98; Bookser Affidavit, ¶ 68; Shearer Affidavit, ¶ 68. Often, the visibility of an operator is obstructed with considerable blind spots that can result in someone being struck by heavy equipment resulting in loss of limbs, blunt trauma, or death, depending on the equipment involved. Allard Affidavit, ¶ 103; Forney Affidavit, ¶ 98; Bookser Affidavit, ¶ 68; Shearer Affidavit, ¶ 68. According to the United States Department of Labor, Occupational Safety and Health Administration, the job fatality rate for oil and gas extraction workers is seven times greater than the rate for all other U.S industries.[14] Allard Affidavit, ¶ 103; Forney Affidavit, ¶ 98; Bookser Affidavit, ¶ 68; Shearer Affidavit, ¶ 68. Simply put, gas well sites are more dangerous than landfills. They are not analogous as Smith claims.

If gas well names were provided where radioactive materials are stored, someone with malicious intent would have access to a highly volatile site that contains both radioactive and highly flammable materials. Allard Affidavit, ¶104; Forney Affidavit, ¶ 99; Bookser Affidavit, ¶ 69; Shearer Affidavit, ¶ 69. A person could cause great harm to workers at the site, in addition to the general public, through explosions, fires, and resulting exposure to radioactive material that can cause a number of detrimental health effects. Allard Affidavit, ¶ 104; Forney Affidavit, ¶ 99; Bookser Affidavit, ¶ 69; Shearer Affidavit, ¶ 69.

g. The Release of Radioactive Material Files and the Impact on Public Safety

If someone illicitly obtained radioactive materials with criminal intent, the public's health and safety could be severely compromised. Allard Affidavit, ¶ 61; Forney Affidavit, ¶ 57; Derstine Affidavit,

[14] *See* https://www.osha.gov/SLTC/oilgaswelldrilling/

¶ 46. An individual could potentially cause radioactive materials to be widely dispersed resulting in environmental contamination and public exposure which could lead to harmful health effects. Allard Affidavit, ¶ 62; Forney Affidavit, ¶ 58; Derstine Affidavit, ¶ 47. Recent world events highlight why radioactive material information requires protecting. As emphasized in the provided CNN article, even small amounts of radioactive material, the size of a pencil eraser, can be used to spew a radioactive cloud over tens of square blocks. Allard Affidavit, ¶ 82; Forney Affidavit, ¶ 77; Derstine Affidavit, ¶ 63; Bookser Affidavit, ¶ 48; Shearer Affidavit, ¶ 48. A cloud could cause an area to be uninhabitable for years until scrubbed clean. Allard Affidavit, ¶ 82; Forney Affidavit, ¶ 77; Derstine Affidavit, ¶ 63; Bookser Affidavit, ¶ 48; Shearer Affidavit, ¶ 48. This could cause economic losses in the trillions to the affected area and an increased risk of cancer to those exposed. Allard Affidavit, ¶ 82; Forney Affidavit, ¶ 7; Derstine Affidavit, ¶ 63; Bookser Affidavit, ¶ 48; Shearer Affidavit, ¶ 48.

The article is consistent with DEP's position that the best way to prevent terrorist attacks is to eliminate, reduce, and secure all supplies of nuclear materials so that terrorists would find it too difficult to get them. Allard Affidavit, ¶ 83; Forney Affidavit, ¶ 78.

As noted above, the health consequences related to unintentional exposure to radiation sources range from cell, tissue, and organ damage; burns; nausea; vomiting; diarrhea; headaches; narcosis; blindness; cancer; and even death. Allard Affidavit, ¶ 64; Forney Affidavit, ¶ 60; Derstine Affidavit, ¶ 49; Bookser Affidavit, ¶ 41; Shearer Affidavit, ¶ 41. These health consequences represent a significant potential harm to public safety. Allard Affidavit, ¶ 64; Derstine Affidavit, ¶ 49; Bookser Affidavit, ¶ 41; Shearer Affidavit, ¶ 41.

Even radioactive materials that have decayed at the time of their disposal can still be used to harm the public, and can cause environmental contamination and adverse health effects. Allard Affidavit, ¶ 85;

Forney Affidavit, ¶ 81; Derstine Affidavit, ¶ 66; Bookser Affidavit, ¶ 52; and Shearer Affidavit, ¶ 52. Even after one or more half-lives are reached through the decay process, radioactive material is still radioactive and can harm persons exposed to it. Allard Affidavit, ¶ 86; Forney Affidavit, ¶ 81; Derstine Affidavit, ¶ 66; Bookser Affidavit, ¶ 52; and Shearer Affidavit, ¶ 52. While the rate of exposure may have decreased, prolonged contact may result in radiation effects ranging from burns; headaches; diarrhea; cell, tissue, and organ damage; cancer; and possibly death. Allard Affidavit, ¶86; Forney Affidavit, ¶ 81; Derstine Affidavit, ¶ 66; Bookser Affidavit, ¶ 52; and Shearer Affidavit, ¶ 52.

In light of the public safety and security issues raised in this response, the referenced affidavits, and articles contained in Allard Affidavit, Attachment G; and Forney Affidavit, Attachment 1, DEP believes that withholding radioactive materials files is necessary to protect public health and safety from radiation exposure. The release of this sensitive information, as explained within DEP's affidavits, is reasonably likely to threaten public safety.

4. The Public Safety and Security Exception of the RTKL Required Redacting of DEP's NOVs, COAs, and an Addendum Issued to ProTechnics.

The noncriminal investigation exception of the RTKL exempts from production noncriminal investigation records, including, a record that if disclosed would:

> (A) Reveal the institution, progress or result of an agency investigation, *except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.*

65 P.S. § 67.708(b)(17)(vi)(A) (emphasis added).

However, Smith's RTKL request presents the unique situation that a final decision of DEP subject to production under the noncriminal investigation exception of the RTKL, also contains information that

DEP asserts is otherwise protected under the public security exception of the RTKL, 65 P.S. § 67.708(b)(2).

DEP granted Smith's RTKL request with respect to the NOVs, COAs, and Addendum in its possession, custody, and control, but redacted information that could compromise public health, safety, and security. Allard Affidavit, ¶¶ 107, 118; Forney Affidavit, ¶ 103; and Derstine Affidavit, ¶¶ 75, 84. Redacted information included isotope type, activity concentration, quantities, licensee contact information, radioactive materials license number, specific license conditions, authorized locations of use, well owner operator name and contact information, and internal DEP tracking numbers. Allard Affidavit, ¶¶ 107; 118; Forney Affidavit, ¶ 103; and Derstine Affidavit, ¶¶ 75, 84.

DEP redacted this information because its public release would create the potential for radioactive material to be fraudulently obtained, misused, or stolen resulting in harm to the public's health, safety, and environment as previously noted in this response and for reasons contained within DEP's affidavits. Allard Affidavit, ¶¶ 107, 118; Forney Affidavit, ¶ 103; and Derstine Affidavit, ¶¶ 75, 84.

However, DEP also believed that it was in the public's interest, to the extent possible and in compliance with the noncriminal investigation exception, to release redacted NOVs, COAs, and an Addendum, reflecting DEP's final decisions regarding its investigations into ProTechnics' activities. Allard Affidavit, ¶¶ 107, 118; Forney Affidavit, ¶ 104; and Derstine Affidavit, ¶ 75. Thus, the Department made the other, non-redacted portions of those documents available.[15]

[15] Records withheld from Smith in response to her RTKL request as exempt under the public safety and security exception of the RTKL are also exempt records of confidential proprietary information; internal, predecisional, deliberations; noncriminal investigations; and personal identification information under the RTKL, as well as attorney-client and attorney-work product privileges, as outlined within DEP's affidavits and privilege logs. Allard Affidavit, ¶ 109; Forney Affidavit, ¶ 106; Derstine Affidavit, ¶ 77; Bookser Affidavit, ¶ 74; and Shearer, ¶ 74.

E. DEP's Internal Discussions and Draft Records of Proposed Enforcement Proceedings, Interim Investigatory Actions, and Potential Strategies for Dealing with a Regulated Entity Containing no Final Decision of the Agency Fall within the Exemption under the RTKL for Internal, Predecisional, and Deliberative Records.

1. The RTKL's Internal, Predecisional Deliberative Exception

Records containing or reflecting an agency's internal, predecisional deliberations are specifically exempt from public disclosure under Section 708(b)(10) of the RTKL. 65 P.S. §67.708(b)(10). Section 708(b)(10)(i)(A) of the RTKL states that a record which reflects, "[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including . . . contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" is purposefully exempt from public access. 65 P.S. §67.708(b)(10)(i)(A). This exception is meant to foster open and honest communications among agency officials and employees without fear of public ridicule or intimidation.

"According to the language of Section 708(b)(10)(i), protected records must be internal, predecisional and deliberative." *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Cmwlth. 2011). The RTKL internal, predecisional deliberation exception also includes the internal, predecisional deliberative records between government agencies. *Kaplin,* 19 A.3d at 1216.

Furthermore, in addition to protecting records that are internal, predecisional deliberations, Section 708(b)(10)(i)(A) also protects records that "reflect" deliberations. Although "reflect" is not

expressly defined in the RTKL, it was discussed at length by the Commonwealth Court in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*). The Court stated:

> [W]e recognize that the General Assembly utilized the specific term "*reflect*," 65 P.S. § 67.708(b)(10) (*emphasis added*), and did not use the term "*reveal*." The term *reflect* means "mirror" or "show," while the term *reveal* means "to make publicly or generally known" or, in other words, "disclose." *Webster's Third New International Dictionary* 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written.

Scolforo, 65 A.3d at 1101.

Accordingly, the General Assembly's specific use of the word "reflect" in the internal, predecisional deliberation exception signifies that there is no requirement that the course of action being deliberated be detailed, set forth, or summarized in a record in order for the protection of this exception to be conferred. 65 P.S. § 67.708(b)(10)(i)(A). Thus, a record is protected from disclosure even if it reflects an agency's deliberations.

2. Analysis of the Terms Internal, Predecisional, and Deliberative

Consistent with the authorities above, the OOR routinely applies the following test to determine if a requested record is exempt pursuant to Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10), namely: "1) the deliberations reflected are 'internal' to the agency; 2) the deliberations reflected are predecisional, *(i.e.,* before a decision on an action); and 3) the contents are deliberative in character, *(i.e.,* pertaining to proposed action)." *Wellock v. City of Philadelphia. Fire Dep't,* No. AP-2010-1026 (Pa. O.O.R.D. November 24, 2010); *Johnson v. Pa. Convention Ctr. Auth.,* No. AP-2011-0914 (Pa. O.O.R.D. August 31, 2011). Thus, this interpretation by the OOR is consistent with the Commonwealth

Court's determination that protected records must be internal, predecisional, and deliberative in character. *Kaplin,* 19 A.3d at 1214.

Records satisfy the internal element of the exception when they are maintained internal to one agency or among governmental agencies. *In re Interbranch Comm'n on Juvenile Justice*, 988 A.2d 1269, 1277-78 (Pa. 2010).

To demonstrate that the withheld records are deliberative, an agency must submit evidence of specific facts showing how the information relates to deliberation of a particular decision. *McGowan*, 103 A.3d at 383 quoting *Carey* at 61 A.3d at 379.

3. The DEP Records Withheld as Predecisional Deliberations Involved only DEP Employees and are Internal Records under the RTKL.

DEP ensured that the records withheld under this exception were shared only among DEP employees. The records DEP withheld under this RTKL exception do not include ProTechnics or any shared with ProTechnics other third-party. Allard Affidavit, ¶ 123; Forney Affidavit, ¶ 121; Derstine Affidavit, ¶ 89; Bookser Affidavit, ¶¶ 76, 80; Shearer Affidavit, ¶¶ 76, 80.

For example, DEP's Central Office identified the following individuals as the only participants in records withheld on the basis that they constitute or reflect predecisional deliberations:

- Kenneth Reisinger, Deputy Secretary, Office of Waste, Air, Radiation and Remediation
- Joseph Melnic, Radiation Protection Program Manager
- Terry Derstine, Radiation Protection Program Manager
- Jennifer Kelly, Radiation Health Physicist 2[16]
- Joseph Deman, Radiation Health Physicist 2
- John Chippo, Radiation Protection Program Supervisor
- Robert Maiers, Radiation Protection Program Manager

[16] Jennifer Kelly is now Jennifer Daly

- Bryan Werner, Radiation Protection Program Manager
- James Barnhart, Radiation Health Physicist 2
- George Vargo, Radiation Health Physicist 2
- John Krueger, Acting Radiation Protection Manager
- William Wagner, Radiation Protection Program Supervisor
- Joseph Pryber, Radiation Protection Program Supervisor
- Francis Costello, Radiation Health Physicist 2
- James Yusko, Radiation Protection Program Manager
- Barbara Bookser, Radiation Protection Program Supervisor
- Stephen Socash, Environmental Program Manager
- Neil Shader, Press Secretary 2, Office of Communications
- Lisa Forney, Environmental Protection Compliance Specialist[17]
- Robert Zaccano, Radiation Protection Program Manager
- Benjamin Seiber, Radiation Health Physicist 2
- Curtis Sullivan, Assistant Counsel, Bureau of Regulatory Counsel
- Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel
- Keith Salador, Assistant Counsel, Bureau of Regulatory Counsel
- Mary Lou Barton, Assistant Counsel, Bureau of Regulatory Counsel
- Rachel Diamond, Southcentral Regional Director
- Frank Peffer, Radiation Health Physicist 2
- Stephen Acker, Radiation Protection Program Manager
- Brooke Reynolds, Radiation Health Physicist 2
- Robert Yowell, Regional Environmental Fields Operations Director
- George Jugovic, Regional Environmental Field Operations Director
- Kelly Burch, Special Assistant, Oil and Gas Strategic Initiatives
- Jennifer Means, Environmental Program Manager, Office of Oil and Gas Management
- Alan Eichler, Environmental Program Manager, Office of Field Operations
- Craig Lobins, District Manager, Office of Oil and Gas Management
- Martin Seigel, Assistant Counsel, Southcentral Regional Office,
- Rich Janati, Radiation Program Manager, Nuclear Safety Division,
- Tonda Lewis, Radiation Protection Program Supervisor
- Stevan Portman, Assistant Counsel, Southcentral Regional Office
- Patrick Brennan, Environmental Group Manager
- William Tomayko, Waste Management Program Manager
- Anita Stainbrook, Environmental Group Manager
- Richard Croll, Radiation Health Physicist 2
- Jennifer Niki Noll, Radiation Protection Program Supervisor
- Anthony Rathfon, Environmental Program Manager

[17] Lisa Forney became a Radiation Protection Program Supervisor in 2014 and currently holds this position.

- Michael Sherman, Field Operations Deputy Director
- Mark Carmon, Environmental Community Relations Specialist
- Susan Seighman, Assistant Counsel, Bureau of Regulatory Counsel[18]
- Michael Bedrin, Regional Director
- Barbara Sexton, Acting Deputy Secretary
- Nels Taber, Regional Director
- Stefanie Muzic, Clerical Supervisor 2
- John Spang, Environmental Chemist 1
- Scott Walters, Environmental Group Manager
- Julie Lalo, Communications Director

Allard Affidavit, ¶ 122.

Each individual is, or was at the time, a DEP employee. This diligent review by DEP's Central Office to identify all individuals who participated in predecisional deliberations also occurred at each DEP Regional Office that asserted the internal, predecisional deliberation exception.[19] Only DEP employees participated in the deliberations identified in DEP's affidavits and privilege logs.

Consequently, DEP has demonstrated that its predecisional deliberations were internal.

4. DEP's Affidavits and Privilege Logs Evidence that the Records withheld Pertain to Specific Subjects of Deliberation and do not Contain Final Decisions of DEP.

To demonstrate that the withheld records are deliberative, an agency must submit evidence of specific facts showing how the information relates to deliberation of a particular decision. *McGowan*, 103 A.3d at 383, quoting *Carey* at 61 A.3d at 379.

DEP employees, sometimes with program legal counsel, met and discussed among themselves the process needed to investigate the multiple incidents involving ProTechnics, various interim actions to be

[18] Susan Seighman is now Susan Despot.

[19] *See also* Forney Affidavit, ¶ 120; Derstine Affidavit, ¶ 88; Bookser Affidavit, ¶ 76; and Shearer Affidavit, ¶ 76.

taken during its investigations, possible strategies to be employed for meetings with the regulated entity, and preliminary discussions and drafts of proposed enforcement actions. Allard Affidavit, ¶ 120; Forney Affidavit, ¶118. During the course of these discussions, records containing the internal, predecisional discussions of proposed enforcement proceedings, draft NOVs, and draft COAs regarding ProTechnics and its activities, were created. Allard Affidavit, ¶¶ 120-121; Forney Affidavit, ¶119.

DEP's affidavits, and its privilege logs, explain the subject of these deliberations. The information provided is not merely a restatement of Smith's request, but are specific descriptions revealing what DEP employees were discussing while the agency attempted to arrive at a final decision.

For instance, the Allard affidavit notes that the following issues were discussed among DEP's Central Office employees in the records it withheld as predecisional deliberations:

- Steps to take by DEP regarding the first ProTechnics investigation;
- DEP staff preparations for meetings with ProTechnics' representatives;
- Potential actions for DEP to take following in-person meeting with ProTechnics;
- How DEP can best monitor cleanup and removal of ProTechnics' radioactive material;
- DEP's enforcement options and possible actions after the first ProTechnics investigation;
- DEP's reviews of ProTechnics' license application;
- DEP's reviews of sample results;
- Proposed steps DEP could take regarding the second ProTechnics investigation;
- DEP's enforcement options and possible actions after the second ProTechnics investigation;
- DEP's internal coordination efforts with other DEP programs regarding ProTechnics and potential DEP action;
- DEP's review of reports submitted by ProTechnics; and
- Plans by DEP personnel to brief upper level management regarding ProTechnics.

Allard Affidavit, ¶ 124. The same detailed accounting of DEP's deliberations are also contained in the affidavits and privilege logs of records withheld by DEP's Regional Offices.[20]

[20]*See also* affidavits of Forney Affidavit, ¶ 122; Derstine Affidavit, ¶ 86-87, 90-91; Bookser Affidavit, ¶ 75; Shearer Affidavit, ¶ 75.

The records containing DEP's deliberations are varied and consist of emails discussing proposed enforcement actions that DEP contemplated taking against ProTechnics; draft notification letters; draft NOVs; draft COAs; draft Addendum; meeting notes pertaining to the NOVs issued by DEP to ProTechnics on January 28, 2010, June 15, 2010, and November 26, 2013; ProTechnics' radioactive materials license application; and ProTechnics' radioactive materials license amendments. Allard Affidavit, ¶ 125; Forney Affidavit, ¶ 123; Derstine Affidavit, ¶ 91; Bookser Affidavit, ¶ 77; and Shearer Affidavit, ¶ 77.

Furthermore, none of the withheld internal, predecisional deliberative records were created after the final decision to which they relate. Allard Affidavit, ¶ 127; Forney Affidavit, ¶ 125; Derstine Affidavit, ¶ 93; Bookser Affidavit, ¶ 79; and Shearer Affidavit, ¶ 79. For example, no records were created by DEP regarding its January 28, 2010, NOV decision once the NOV was issued. The NOV is the final decision of DEP regarding that matter. Allard Affidavit, ¶ 127; Forney Affidavit, ¶ 125; and Derstine Affidavit, ¶ 93. Any records regarding the subsequent violation of this NOV by ProTechnics pertain to DEP's investigation and internal, predecisional discussions regarding ProTechnics subsequent violation. Allard Affidavit, ¶ 127; Forney Affidavit, ¶ 125; and Derstine Affidavit, ¶ 93.

Lastly, the records do not contain purely factual information, Allard Affidavit, ¶ 127; Forney Affidavit, ¶ 125; Derstine Affidavit, ¶ 93.; Bookser Affidavit, ¶ 79; and Shearer Affidavit, ¶ 79; and do not contain final decisions of DEP. Allard Affidavit, ¶ 126; Forney Affidavit, ¶ 124; Derstine Affidavit, ¶ 92; Bookser Affidavit, ¶ 81; and Shearer Affidavit, ¶ 81.

Smith notes minimal inconsistencies between DEP's Central Office and its six Regional Offices concerning records withheld and released under this exception, and others. Some inconsistencies are inevitable when an agency that possesses decentralized records and employees at 7 different locations,

reviews thousands of pages of responsive records within the short period of time as required by the RTKL. This does not make the records released any less protected (but, arguably, waived), nor does the release of singular records negate the applicability of the RTKL exception for those records DEP withheld.

Consequently, DEP has established the appropriateness of withholding the records it identified within its privilege logs, and as described within its affidavits, as internal, predecisional, and deliberative.[21]

F. The Attorney-Client and Attorney-Work Product Privileges exempt from Public Access Records of Communications between DEP Legal Counsel and DEP Employees where Legal Advice was Requested, Received, or that Contain the Mental Impressions, Thoughts, or Opinions of DEP Legal Counsel Provided to DEP Employees.

1. The Attorney-Client Privilege

A record protected by a privilege is not a public record under the RTKL. 65 P.S. § 67.102. The RTKL defines "privilege" as "the attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102.

The attorney-client privilege provides that:

[21] Records withheld as internal, predecisional, and deliberative are also excepted from production under the Radiation Protection Act and its regulations, the public safety and security exemptions of the RTKL, and partially under the noncriminal investigation exemption. Records were also exempt from production as constituting attorney-client and attorney-work product privileges. These exemptions and privileges are outlined in DEP's affidavits and privilege logs. Allard Affidavit, ¶ 129; Forney Affidavit, ¶ 127; Derstine Affidavit, ¶ 95; Bookser Affidavit, ¶ 78; and Shearer Affidavit, ¶ 78.

> In a civil matter, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5928. *See also* 42 Pa. Cons. Stat. § 5916 (providing the same privilege in the context of a criminal matter).

Four elements must be satisfied to invoke the attorney-client privilege:

(1) the asserted holder of the privilege is or sought to become a client,
(2) the person to whom the communication was made is a member of the bar of a court, or a subordinate,
(3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort, and
(4) the privilege has been claimed and is not waived by the client.

Bagwell v. Dep't of Educ., 103 A.3d 409, 420 n.12 (Pa. Cmwlth. 2014), *appeal denied*, 117 A.3d 1282 (Pa. 2015) (quoting *Commonwealth v. Sandusky*, 70 A.3d 886, 898 (Pa. Super. 2013)

The Pennsylvania Supreme Court has stated that the attorney-client privilege covers both confidential client to attorney communications, and confidential attorney to client communications made for the purpose of obtaining or providing legal advice, *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011), and that the privilege "extends to the agency setting where attorneys are working in their professional capacity." *Id.* (*citing Okum v. Unemployment Compensation Board of Review*, 641 A.2d 1243 (Pa. Cmwlth. 1994). The OOR acknowledged that the attorney-client privilege applies to even less formal communications between a public agency and its attorneys, such as email communications. *Gusler v. Jefferson Twp.*, No. AP-2009-0367 (Pa. O.O.R.D. June 5, 2009).

The objective of the attorney-client privilege is to protect communications "made for the purpose of obtaining or providing professional legal advice, regardless of whether that communication traveled from attorney to client or client to attorney." *Heavens*, 65 A.3d at 1076.

2. The Attorney-Work Product Doctrine

The attorney-work product doctrine also exempts certain agency records from public access. According to this doctrine, "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics, including those of a party's representative who is not the party's attorney" are protected from disclosure. *Lavelle v. OGC*, 769 A.2d 449 (Pa. 2001), *citing* Pa.R.C.P. 4003.3. The Commonwealth Court has ruled that records reflecting attorney-work product are not considered public records under the RTKL. *Maleski v. Corporate Life Ins. Co.*, 641 A.2d 1 (Pa. Cmwlth. 2007).

The purpose of the attorney-work product doctrine is "to guard the mental processes of an attorney, [by] providing a privileged area within he can analyze and prepare his client's case." *Pa. Dep't of Educ. v. Bagwell*, No, 1617 C.D. 2014 (Pa. Cmwlth. January 29, 2016), *citing Bagwell v. Dep't of Educ.*, 103 A. 3d 409, 415-16 (Pa. Cmwlth. 2014), *appeal denied*, 117 A.3d 1282 (Pa. 2015), quoting *Commonwealth v. Sandusky*, 70 A.3d 886, 898 (Pa. Super. 2013).

The attorney-work product privilege "only applies to mental impressions, theories, notes, strategies, research and the like *created by an attorney*, in the course of his or her professional duties…" *Bagwell*, No, 1617 C.D. 2014, slip op. 28-29 *citing Pa. Pub. Util. Comm'n v. Seder*, 106 A.3d 193, 201 (Pa. Cmwlth. 2014) (emphasis added by the Court).

Neither the attorney-client privilege nor the attorney-work product privilege protect mere facts. *Bagwell*, 114 A.3d at 1124.

3. Records were Appropriately withheld by DEP as Attorney-Client Privilege and Attorney-Work Product Privilege in Response to Smith's RTKL Request.

Before and after the issuance of the NOVs to ProTechnics, DEP employees consulted DEP legal counsel for legal advice. Allard Affidavit, ¶ 130; Forney Affidavit, ¶ 128; and Derstine Affidavit, ¶ 96. As a result of these inquiries, DEP legal counsel provided responses to the DEP employees that contained their mental impressions, conclusions, opinions, and written work product regarding the issues for which legal advice was sought and provided. Allard Affidavit ¶ 134; Forney Affidavit, ¶ 132; Derstine Affidavit, ¶ 100.

For example, the following DEP Central Office employees sought legal advice on matters pertaining to ProTechnics:

- Joseph Melnic, Radiation Protection Program Manager
- John Chippo, Radiation Protection Program Supervisor
- John Krueger, Acting Environmental Program Manager
- Lisa Forney, Radiation Protection Program Supervisor
- Francis Costello, Radiation Health Physicist 2
- Terry Derstine, Radiation Protection Program Manager
- Stephen Acker, Radiation Protection Program Manager
- Robert Yowell, Regional Environmental Field Operations Director
- George Jugovic, Regional Environmental Field Operations Director
- Kelly Burch, Special Assistant, Oil and Gas Strategic Initiatives
- Jennifer Means, Environmental Program Manager, Office of Oil and Gas Management
- Alan Eichler, Environmental Program Manager, Office of Field Operations
- Joseph Deman, Radiation Health Physicist 2, and
- Neil Shader, Press Secretary 2, Office of Communications.

Allard Affidavit, ¶ 133. Similarly, DEP employees at its Regional Offices also consulted with DEP legal counsel on issues pertaining to ProTechnics. Forney Affidavit, ¶ 128; and Derstine Affidavit, ¶ 97.

The subjects of these legal inquiries related to DEP's noncriminal investigations of ProTechnics, preparation for meeting with ProTechnics, enforcement actions against ProTechnics, ProTechnics' license

application, ProTechnics' reporting obligations, draft tracer well site agreements, and draft COAs. Allard Affidavit, ¶ 131; Forney Affidavit, ¶ 129; and Derstine Affidavit, ¶ 97.

In DEP's Central Office, legal advice was sought from the following DEP attorneys:

- Alexandra Chiaruttini, Chief Counsel
- Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel
- Mary Lou Barton, Assistant Counsel, Bureau of Regulatory Counsel
- Curtis Sullivan, Assistant Counsel, Bureau of Regulatory Counsel
- Keith Salador, Assistant Counsel, Bureau of Regulatory Counsel

Allard Affidavit, ¶ 130.

Each DEP attorney identified within DEP's affidavits and privilege logs are members of the Office of Chief Counsel and are licensed attorneys duly admitted by the Pennsylvania Supreme Court as members of the Pennsylvania Bar. Allard Affidavit, ¶ 132; Forney Affidavit, ¶ 130; and Derstine Affidavit, ¶ 98. At no time were the communications of DEP legal counsel shared by DEP employees outside of DEP, such as with a third party. Allard Affidavit, ¶ 135; Forney Affidavit, ¶ 133; and Derstine Affidavit, ¶ 102. At no time were the communications of DEP legal counsel made in the presence of a third party resulting in the waiver of the attorney privileges. Allard Affidavit, ¶ 136; Forney Affidavit, ¶ 134; and Derstine Affidavit, ¶ 103. Lastly, no DEP employee on behalf of DEP elected to waive the privileges. Allard Affidavit, ¶ 137; Forney Affidavit, ¶ 135; and Derstine Affidavit, ¶ 104. Contrary to Smith's unsubstantiated claims, DEP provided no legal advice to ProTechnics. The records withheld under these privileges only involve communications between DEP staff and DEP legal counsel.

Once an agency establishes that the attorney-client privilege was properly invoked under the first three prongs, the party challenging the invocation of the privilege must prove waiver under the fourth prong. *Office of the Governor v. Davis*, 122 A.3d 1185 (Pa. Cmwlth. 2015) (*en banc*). Smith provided no such credible evidence.

Therefore, DEP's records identified within its affidavits and privilege logs asserting these privileged are protected and not subject to production under the RTKL.[22]

G. The Secondary Telephone Numbers of DEP Employees, and the Driver License Number of a Member of the Public, Are Exempt from Access as Personal Identification Information under the RTKL.

1. Personal Identification Information under the RTKL

The RTKL exempts the personal identification information of an individual from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information is defined as a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number, a spouse's name, marital status, beneficiary or dependent information or the home address of a law enforcement officer or judge. 65 P.S. § 67.708(b)(6).

Based on the types of information listed, this exception is clearly intended to protect information that is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information that is specific to the individual, not shared in common with others and, that which makes an individual distinguishable from another. *Delaware Cnty. v. Schaefer,* 45 A.3d 1149 (Pa. Cmwlth. 2011).

[22] Records withheld from Smith in response to her RTKL request as exempt under attorney-client privilege and attorney-work product are also subject to protection under the Radiation Protection Act, and the public safety and security, noncriminal investigation, and internal, predecisional, deliberation exemptions of the RTKL. These exemptions and privileges are additionally explained in DEP's affidavits and privilege logs. Allard Affidavit, ¶ 138; Forney Affidavit, ¶ 136; and Derstine Affidavit, ¶ 105.

2. Personal Commonwealth Telephone Numbers Are Unique to the Assigned DEP Employee and Constitute Personal Identification Information.

Personal telephone numbers assigned to Commonwealth employees does not mean that it has to involve a public official's "personal affairs" but are personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012). The fact that government business may be discussed over an employee's government-issued personal telephone does not make that telephone any less "personal" within the meaning of the RTKL. *Office of the Governor v. Raffle*, 65 A.3d 1105 (Pa. Cmwlth. 2013).

DEP makes available for the public's general use office numbers where individual employees may be contacted for conducting Commonwealth business. Allard Affidavit, ¶ 141; Forney Affidavit, ¶ 139; Derstine Affidavit, ¶ 108; and Gustafson Affidavit, ¶ 24. However, employees are also provided individual, or internal, telephone numbers unique to them for purposes of conducting DEP business in their employee capacity. Allard Affidavit, ¶ 140; Forney Affidavit, ¶ 138; Derstine Affidavit, ¶ 107; and Gustafson Affidavit, ¶ 23. These are secondary numbers unique to these individuals and assigned to them for their use. Allard Affidavit, ¶ 140; Forney Affidavit, ¶ 138; Derstine Affidavit, ¶ 107; and Gustafson Affidavit, ¶ 23. These secondary numbers are personal identification information and not subject to public production. *Pa. State System of Higher Education v. The Fairness Center,* No. 1203 C.D. 2015 (Pa. Cmwlth. March 30, 2016) (unreported) (Distinguishing between primary email addresses that are public and non-public secondary email addresses that are personal identification information).

The only telephone numbers excepted from production in response to Smith's request were the secondary telephone numbers of DEP employees. Forney Affidavit, ¶ 139.

Additionally, the Northwest Regional Office possessed a singular record containing the driver's license number of an Elk Waste Services employee. Gustafson Affidavit, ¶ 22. A driver's license number is personal identification information under the RTKL. 65 P.S. § 67.708(b)(6).

Smith asserts that the personal identification information should be redacted and provided. However, these records are not subject to this singular exception. Redaction of the personal identification information would not eliminate the additional exceptions and privileges that protect these records from public production.[23] Furthermore, DEP's Southeast Regional Office did not withhold Priority Mail Delivery Confirmation Numbers, addresses of public companies, or names of attorneys representing companies as personal identification information as stated on page 18 of Smith's appeal. Derstine Affidavit, ¶ 110.

[23] Records withheld from Smith in response to her RTKL request and exempt as containing personal identification information were not redacted and provided because these records are also subject to protection under the Radiation Protection Act, and fall within the exemptions for public safety and security, noncriminal investigative records, and internal, predecisional deliberations under the RTKL, as outlined within DEP's affidavits and contained in DEP's privilege logs. Allard Affidavit, ¶ 142; Forney Affidavit, ¶ 140; and Derstine Affidavit, ¶ 109.

H. ProTechnics' Records that Were Submitted to DEP as Required by Law and Contain Confidential Proprietary Information Are Exempt from Public Access under the Radiation Protection Act, its Regulations, and the RTKL.

1. Confidential Proprietary Information Under the Radiation Protection Act, its Regulations, and the RTKL

Records responsive to Smith's request but contain confidential proprietary information (CPI) or trade secrets are exempt from production under 25 Pa. Code § 215.14 of the Radiation Protection Act's regulations and the RTKL, 65 P.S. § 67.708(b)(11).

The Radiation Protection Act's regulations state:

> The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:
>
> (1) Trade secrets or secret industrial processes customarily held in confidence.
> (2) A report of investigation, not pertaining to safety and health in industrial plants, which would disclose the institution, progress or results of an investigation undertaken by the Department.
> (3) Personnel, medical and similar files, the disclosure of which would operate to the prejudice or impairment of a person's reputation or personal safety.

25 Pa. Code § 215.14.

Additionally, CPI is defined under the RTKL as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102.

Also, under the RTKL "trade secrets" are defined as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

2. ProTechnics Records that are Responsive to Smith's Request Constitute CPI.

Submitted with DEP's appeal response is the affidavit of Will Williams, Director of U.S. Operations for the ProTechnics division of Core Laboratories LP (Williams). Williams Affidavit, ¶ 1. Williams provides the following to support why the records identified by ProTechnics constitute CPI under the Radiation Protection Act and the RTKL:

- Included within the information submitted by ProTechnics to the DEP are copies of ProTechnics' Trace and Logging Services Field Receipt Agreements ("Field Receipt Agreements"). Trace and logging services are cutting edge completion diagnostic services (measuring fracture height, zonal coverage, proppant distribution, wellbore connectivity and fracture fluid performance) that are accurate and proven, providing the information required to allow ProTechnics' customers to send more oil and gas down the pipeline, deliver incremental production and reduce production costs. Williams Affidavit, ¶ 8.

- These Field Receipt Agreements provide detailed descriptions of the trace and logging services rendered by ProTechnics for its clients, including confidential customer information concerning the exact type and amount of tracer used in conjunction with ProTechnics' services at the clients' request. Williams Affidavit, ¶9.

- The exact type and amount of tracer used in ProTechnics trace and logging services is confidential proprietary information because most job designs are unique and client specific. If this information were shared publicly, competitors could gain access to information regarding ProTechnics' completion designs, its clients' well dynamics, and production estimates. The release of the information to the public would negatively impact ProTechnics because ProTechnics' clients trust in ProTechnics' ability to maintain their confidential information and disclosure would cause ProTechnics' competitive position in the marketplace to suffer substantial harm. For example, from this information, competitors could gain insight into ProTechnics' clients' preferences regarding completion designs, well dynamics and production information and then use that information to tailor

their pitches to ProTechnics' clients accordingly. ProTechnics' competitors should not be permitted to reap the benefit of either the relationships ProTechnics has developed over many years or the cutting-edge technologies that it employs. Williams Affidavit, ¶ 10.

- Furthermore, the Field Receipt Agreements also reflect ProTechnics' confidential pricing information for its trace and logging services. The release of this information to the public would negatively impact ProTechnics because, given current market conditions, the disclosure of client confidentiality would result in substantial competitive harm to Core Laboratories and/or ProTechnics. Core Laboratories has taken extensive measures to ensure the services and data provided by all of its worldwide companies are of the highest quality and integrity. Its commitment to applying and developing new technologies to optimize reservoir performance is unsurpassed in the oilfield service industry. The company would lose the competitive advantages it has gained through its substantial investment in innovative products if this information were disclosed. This loss of competitive advantage would occur worldwide. As a result, Core Laboratories and/or ProTechnics revenues would decline significantly. Williams Affidavit, ¶ 11.

- ProTechnics also submitted to the DEP a copy of confidential correspondence with the State of California ("Correspondence") (together with the Field Receipt Agreements, the "Confidential Documents") concerning ProTechnics' tracer materials located at a California facility. The Correspondence contains confidential customer information including the location of ProTechnics' customer's facility, the materials stored there, and the low-level radiation levels at that location. This reflects customer information that ProTechnics treats as confidential and proprietary and does not disclose publicly because ProTechnics is trusted by its customers to keep this sensitive commercial information confidential. Williams Affidavit, ¶ 12.

- Additionally, the Correspondence contains sensitive information regarding low-level radioactive materials including a description of the exact type of low-level radioactive material at issue, the amount of activity and low-level radiation levels of those materials. Williams Affidavit, ¶ 13.

- The Confidential Documents at issue all include information about client names, specific projects and pricing for ProTechnics' work that is proprietary to ProTechnics and/or its clients and, as detailed below, is not information that is publicly released by ProTechnics. Williams Affidavit, ¶ 15.

- To the extent that the Requester seeks ProTechnics' raw data or a detailed discussion of the methodology ProTechnics' uses in conjunction with the services it provides, ProTechnics would also suffer harm from the public disclosure of such information. Disclosure of the raw data obtained from ProTechnics' gas chromatography and mass spectrometry analysis or ProTechnics' methodology would enable ProTechnics' competitors to copy ProTechnics' valuable and proprietary business methods and, if ProTechnics' competitors or customers gained access to ProTechnics' most sensitive and proprietary, valuable trade secret information, it would severely harm ProTechnics' by

posing significant competitive and financial detriment to ProTechnics. Williams Affidavit, ¶ 16.

- Indeed, ProTechnics goes to great lengths to protect its confidential proprietary information, including the Confidential Documents at issue here. Such information is only shared with third parties when legally obligated, in confidence and with those who ProTechnics provides services. ProTechnics has multiple service agreements and/or contracts that specify confidentiality terms between ProTechnics and its clients. All recipients of this sensitive information receive notification that it is confidential proprietary information. This information within ProTechnics is accessible to only a limited number of individuals and on a "need-to-know" basis. ProTechnics has taken specific steps to protect the confidentiality of this information, including the implementation of strict work practice requirements to ensure that the necessary internal company controls are in place to ensure the limited use of confidential information. Confidential information is maintained in a company password-protected system. Employees of ProTechnics that have access to such information have, in addition to their common law obligations, undertaken a written obligation to maintain the confidentiality and secrecy of that information. Williams Affidavit, ¶ 17.

Three primary points are evident from Williams' Affidavit. The records DEP received contain commercial information of ProTechnics' business operations; ProTechnics takes proactive steps to ensure that the information is protected, it is available only to limited individuals and on a need-to-know basis, and the disclosure of these records would cause substantial harm to ProTechnics' competitive position.

ProTechnics, through the Williams' affidavit, demonstrated that its records possessed by DEP and received during regulatory and enforcement activities, are subject to protection as confidential proprietary information.[24]

[24] Records withheld from Smith in response to her RTKL request as confidential proprietary information are also exempt and protected under the Radiation Protection Act and the public safety and security exemptions of the RTKL as reflected within DEP's affidavits and privilege logs. Allard Affidavit, ¶ 150; Forney Affidavit, ¶ 148; and Derstine Affidavit, ¶ 33.

I. The RTKL Does Not Require DEP to Provide Redacted Records if the Records Are Protected by One, or More, RTKL Exceptions and Privileges.

1. DEP Need Not Redact Records to Fulfill Smith's RTKL Request.

Any final determination by the OOR requiring records exempt under the RTKL to be redacted and produced is not legally appropriate. The Commonwealth Court has held that excepted records requiring redaction do not meet the RTKL's definition of a public record.

For instance, in *Heavens v. Dep't of Envtl. Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court held that, "under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access." *Id.*, at 1077. Additionally, in *Saunders v. Dep't of Corrs.*, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court held that the Department of Corrections need not redact and produce records that contain information protected by a number of exceptions under Section 708(b) of the RTKL. The Court explained:

> Petitioner's argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a *public record* contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "[a] record, including a financial record, of a Commonwealth ... agency that: (1) *is not exempt* under section 708." Section 102, 65 P.S. § 67.102 .... Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a "public record."

Saunders, 48 A.3d at 543 (citations omitted).

Lastly, in *Dep't of Health v. Office of Open Records*, 4 A.3d 803 (Pa. Cmwlth. 2010), the Court held that the Department of Health need not redact and produce records containing information protected by the exceptions under Section 708(b) of the RTKL. The Court explained:

> The OOR contends that...the Department was ... required to "make every effort to provide as much information as possible from the records through redaction." We disagree....
>
> As established by the introductory language of Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "[a] record, including a financial record, of a Commonwealth ... agency that: (1) *is not exempt* under section 708." 65 P.S. § 67.102...). Thus, whereas here, a record is determined to fall within one of the exemptions set forth in Section 708, that record does not constitute a "public record" as defined by Section 102. Consequently, Section 706 does not apply.
>
> . . .
>
> Although Section 506(c) grants an agency the discretion to release an otherwise exempt record under certain circumstances, it does not require an agency to do so....Thus, contrary to the OOR's argument, the Department was not required to redact nonpublic information from what are nonpublic records in order to make such records public and subject to disclosure.

Dep't of Health, 4 A.3d at 815 (citations omitted).

Because records that fall within the exceptions at Section 708(b) are not "public records," and the redaction requirement at Section 706 applies to "public records," records that fall within the exceptions at Section 708(b) need not be redacted. Thus, the reference to "information not subject to access" in Section 706 does not refer to information that falls within the exceptions at Section 708(b). It applies to other types of information in public documents to which a requester is not entitled—for instance, information outside the scope of the request, or information within the exceptions under Section 708(b) but in a record the agency has made available pursuant to the agency's discretion under Section 506(c) of the RTKL, 65 P.S. § 67.506(c).

2. Appellate Decisions Requiring Redaction under the RTKL are Distinguishable from Smith's Current Request.

Decisions by the Commonwealth Court that required redacting are factually distinguishable from a record withheld in its entirety under Section 708(b).

For instance, in *Levy v. Senate of Pennsylvania*, 34 A.3d 243, 254 (Pa. Cmwlth. 2011) (*en banc*), *aff'd in part and reversed in part on other grounds* by 619 Pa. 586, 65 A.3d 361 (Pa. 2013), the Senate produced the records at issue with redactions prior to the requester's appeal; the Senate did not argue that the records were not public or that it need not redact them because they were not public records. The only issue was which redactions were appropriate.

In *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435 (Pa. Cmwlth. 2011), Judge McCullough noted in her concurring opinion that while the records in that case were exempt in their entirety because they contained information protected by an exception under Section 708(b), the agency exercised its discretion under Section 506(c), 65 P.S. § 67.506(c), to make the records available, and consequently redaction was appropriate there. *Id.*, at 444-445.

The Commonwealth Court also addressed the proper scope of redactions to records containing information protected by a Section 708(b) exception in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*). However, that case is similar to *Pennsylvania State Troopers Association*, because the Office of the Governor did not attempt to withhold the entire documents at issue, but instead exercised its discretion under Section 506(c) to make the records available with redactions. *Id.*, at 1098-1100.

3. To Redact Records Otherwise Protected by a RTKL Exception or a Privilege so that a Portion of a Record Characterized as "Purely Factual Information" Can Be Produced, imposes a Significant Hardship on Agencies Not Contemplated by the RTKL.

In *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374 (Pa. Cmwlth. 2014); *reargument denied* (December 19, 2014), DEP established that the records it withheld fell within the internal, predecisional deliberations exception contained in Section 708(b)(10)(i)(A) of the RTKL. Nevertheless, the Court remanded the case to the OOR for "*in camera* review to determine whether [two of the records] contain severable information that is purely factual." *McGowan*, 103 A.3d at 387. This obligation to extract purely factual information from records otherwise protected under a RTKL exception or privilege is not only inconsistent with the appellate authority noted within the first subsection of this argument, but on a practical level, is not sustainable for requests that yield voluminous records that must be reviewed and produced within the strict timelines of the RTKL. In *McGowan,* DEP asserted that two records were protected by one RTKL exception. Smith's request yielded thousands of records that are subject to multiple RTKL exceptions and privileges.

The obligation to redact and produce records otherwise protected, but containing limited portions of purely factual information, places an undue burden on an agency not contemplated by the Legislature. It is evident that the limited response times imposed upon an agency under the RTKL intended to expediently place government records in the hands of the public. The Legislature, by providing 30 exceptions to production under the RTKL, and acknowledging the applicability of various protective privileges, other statutes and regulations, and protective judicial orders, clearly intended an agency to purposely and thoughtfully review its records prior to production.

Last calendar year, DEP received 1,492 RTKL requests. Schaef Affidavit, ¶¶ 7, 41. Currently, in calendar year 2016, DEP receives an average of 185 requests per month. Schaef Affidavit, ¶ 8. If the current volume continues, DEP will process 2,220 requests in 2016, an increase of 728 RTKL requests from the preceding year. Smith's request alone yielded approximately 7,120 of exempt records that fell within multiple exceptions and privileges as supported by DEP's affidavits and logs. To require redaction of voluminous records that are protected by one or more RTKL exceptions or privileges, to release information that may be or may not be discernable to DEP employees as purely factual information, places a strain on agency resources not intended by the statute and its limited timeframes for a required response.

Furthermore, DEP is comprised of six regional offices and a central office, all of which were assigned to Smith's request. Schaef Affidavit, ¶¶ 14, 27. Smith's request, as others received by DEP where more than one office is assigned, required all offices to coordinate their final responses to ensure that DEP spoke in one voice. Significant time and effort was exerted by the seven DEP offices to produce final responses as consistently as possible so as not to mislead the requester and to ensure compliance with the RTKL. Requiring DEP to redact thousands of records (most of which are not in electronic medium, Schaef Affidavit, ¶ 40) that are protected by multiple exceptions and privileges, to produce pockets of purely factual information in a coordinated and consistent fashion for a request assigned to multiple offices, would require extensive time and staffing beyond the ability and budgets of most public agencies.

Therefore, because of the multiple exceptions and privileges applicable to the records withheld (and thus removing them from the definition of public records), DEP asserts that it has no obligation to redact and produce any records subject to Smith's request unless it does so voluntarily. 65 P.S. § 67.506(c).

J. DEP Proved by a Preponderance of the Evidence that its Northeast Regional Office had no Responsive Records in its Custody, Control or Possession.

As DEP indicated in its final response to Smith, "[i]t is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them." *Jenkins v. Pa. Dep't of State*, OOR Dkt. AP-2009-065 (Pa. O.O.R.D. April 2, 2009). Nor is an agency required "to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705. *Dep't of Corrections v. Disability Rights Network of Pa.*, 35 A.3d 830, 832 (Pa. Cmwlth. 2012).

However, DEP bears the burden of proving by a preponderance of the evidence that responsive records do not exist in DEP's possession, custody, or control. *Bowling v. Office of Open Records*, 75 A.3d 461, 457 (Pa. 2013); *Hodges v. Pa. Dep't of Health*, 29 A.3d 29 A.3d 1190 (Pa. Cmwlth. 2011).

As explained in Section A of this response, the use of testimonial affidavits is appropriate in appeals before the OOR. Additionally, the Commonwealth Court has held that such affidavits are acceptable to support the nonexistence of requested records. *Moore v. OOR,* 992 A.2d 907 (Pa. Cmwlth. 2010). In *Moore*, a prison inmate sought a record from the Department of Corrections, and the agency responded that the record did not exist. *Id.* at 908. On appeal, the agency provided an unsworn attestation subject to penalty of perjury and a notarized affidavit attesting to the nonexistence of the record. *Id.* at 908-09. The OOR determined that the affidavits submitted sufficiently demonstrated that the record did not exist, and the Commonwealth Court affirmed. In its opinion, Commonwealth Court stated that the agency "searched its records and submitted both sworn and unsworn affidavits that it was not in possession of [the record] . . .. These statements are enough to satisfy the [agency's] burden of demonstrating the

non-existence of the record in question, and obviously the [agency] cannot grant access to a record that does not exist." *Id.* at 909.

In *Hodges,* an inmate sought a record under the RTKL from the Department of Corrections. The agency initially failed to respond, resulting in a deemed denial of the request. But during the appeal to the OOR, the agency submitted an affidavit from its AORO. *Id.* at 1191. In her affidavit, the AORO attested that she made a good faith and thorough inquiry to determine if the agency possessed the record and that, based on her search, she determined that no responsive records existed. *Id.* The OOR concluded that the affidavit, which was signed under penalty of perjury, was adequate to prove the nonexistence of the requested record. On appeal, Commonwealth Court agreed with the OOR and found the affidavit adequate. *Id.* at 1192.

Colleen B. Stutzman (Stutzman), Assistant Regional Director of DEP's Northeast Regional Office, attests in her affidavit that the Northeast Regional Office had no responsive records in its custody, control, or possession.

Stutzman possesses 33 years of experience with DEP. Stutzman Affidavit, ¶ 1. She has experience searching and retrieving records for RTKL requests. Stutzman Affidavit, ¶ 3. Knowing the contents of Smith's request, she conducted and supervised searches for records that may exist in hard copy or electronically stored information within individual offices or file rooms. Stutzman Affidavit, ¶¶ 4, 6. Stutzman discussed Smith's RTKL request with employees within her regional office in an attempt to identify and locate responsive records that may be in its custody, control, or possession. Stutzman Affidavit, ¶¶ 6-8.

Despite these good faith efforts, no responsive records were located. Stutzman Affidavit, ¶ 10.

Furthermore, the fact that the Northeast Regional Office possessed no responsive records is not surprising despite Smith's allegations. DEP's Northeast Regional Office does not administer or oversee the oil and gas permitting and inspection programs pursuant to the Oil and Gas Act, 58 Pa.C.S. §§ 2301-2318. Stutzman Affidavit, ¶ 9. Regulated activities under this Act for the eastern portion of the Commonwealth are administered by DEP's Northcentral Regional Office. Stutzman Affidavit, ¶ 9. Consequently, records pertaining to these activities are normally not in the custody, control, or possession of the Northeast Regional Office. Stutzman Affidavit, ¶ 9. However, despite this fact, a search was conducted. Stutzman Affidavit, ¶¶ 6-9.

When an agency asserts that no records exist, the scope of the OOR's review is not to determine whether a Department should have records, but whether the requested records actually do, in fact, exist. *Perano v. Pennsylvania Dep't of Envtl. Protection*, No. AP-2011-0822 (Pa. O.O.R.D. July 12, 2011).

The Northeast Regional Office, as evidenced by Stutzman's affidavit, fulfilled its obligations under the RTKL by individual and collective efforts to search for records that may be responsive to Smith's request and no further action on the part of this office should be required. Absent evidence to the contrary, the Pennsylvania Supreme Court presumes that Commonwealth agencies act in good faith when discharging their statutory duties under the RTKL. *Office of the Governor v. Donahue,* 98 A.3d 1223, 1239 (Pa. 2014).

K. The Southwest Regional Offices Deemed Denial Does Not Preclude it from Providing Evidence before the OOR.

Smith argues that the Southwest Regional Office's final response should be considered a deemed denial pursuant to Section 901 of the RTKL. However, Smith does not indicate how a

deemed denial should impact the position of the Southwest Regional Office in respect to her appeal.

In *McClintock v. Coatesville Area School District*, 74 A.3d 378 (Pa. Cmwlth. 2013), the Court makes clear that the Southwest Regional Office preserves in full those RTKL exceptions cited in its final response and may argue the merit of those reasons within any OOR appeal.

Consistent with the Pennsylvania Supreme Court's holding in *Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d 361 (Pa. 2013) the court stated:

> The General Assembly specified that failure to respond to a RTKL request would result in a deemed denial of the request; it did not also sanction that failure with the waiver of otherwise legitimate reasons for non-disclosure.... [P]ursuant to *Levy*, we hold that a deemed denial of a RTKL request, as provided for in Section 901 of the RTKL, does not result in a deemed waiver of an agency's right to raise the exceptions set forth in Section 708(b) of the RTKL, 65 P.S. § 67.708(b), as defenses on appeal to the OOR.

McClintock,74 A.3d at 384.

Therefore, Smith is wrong when she suggests that, as a deemed denial, the denial of her request made by the Southwest Regional Office is without basis. The Southwest Regional Office legally can assert and defend the exceptions it cited in its belated final response to Smith within this appeal response.

L. DEP's Northcentral Regional Office Acted in Good Faith When Fulfilling Smith's RTKL Request.

The Northcentral Regional Office's search for records responsive to Smith's request was conducted by individuals within the offices of Waste Management, and the Oil and Gas Programs.[25] Initially, an NOV issued to Citrus Energy was located by employees of the Oil and Gas Program, and because it was related to an incident involving ProTechnics, the NOV was disclosed to Smith in redacted form. Means Affidavit, ¶¶ 9, 10. However, subsequent to the Northcentral Regional Office's final response, a closer reading of Smith's request revealed that the redacted record, and emails related to that record which were withheld, were not responsive to Smith's request. Means Affidavit, ¶ 11. The NOV was not issued to ProTechnics. Means Affidavit, ¶ 11. In good faith, and with the intention of correcting its error, the Northcentral Regional Office sent to Smith a corrective letter explaining that the NOV issued to Citrus Energy was not responsive to her request and that no other responsive records were located. Means Affidavit, ¶ 12.

The Northcentral Regional Office conducted a search for records as evidenced by the initial discovery and erroneous disclosure of the Citrus Energy NOV. The Bureau of Radiation Protection has primary responsibility for the investigation of incidents involving radioactive material and those regions that have staff from this program would have the bulk of records responsive to Smith's request. There is no radiation program staff at the Northcentral Regional Office.

[25] *See* Affidavits of Patrick Brennan (Brennan), Environmental Program Manager, DEP's Waste Management Program, Northcentral Regional Office; and Jennifer Means (Means), Program Manager, DEP's Oil and Gas Program, Northcentral Regional Office.

However, at the time an appeal was filed with the OOR, the Northcentral Regional Office wanted to ensure that no records were unaccounted for in the searches conducted by the Waste Management, and the Oil and Gas Programs. Consequently, additional searches were conducted. Means Affidavit, ¶ 13; Brennan Affidavit, ¶ 10.

In response to this appeal, the Northwest Regional Office included in its privilege log a withheld report from a well site inspection that was performed by a Waste Management Inspector in the Northcentral Regional Office. Brennan Affidavit, ¶¶ 11, 12. Based on that information, staff in the Northcentral Regional Office Waste Management Program conducted an additional search for that particular record and located it in the solid waste general file for County and Township. It was not found in the initial search because it was not a "ProTechnics" document and the Northcentral Regional Office Waste Management Program does not maintain a ProTechnics file.

Once located, the Northcentral Regional Office disclosed the inspection report in its privilege log and addressed it in Brennan's affidavit. Brennan Affidavit, ¶¶ 11-13. Copies of emails related to this incident and generated by individuals in the Southcentral Regional Office and DEP's Central Office were also located. Brennan Affidavit, ¶¶ 14-16. The emails concern the attempted disposal of radioactive waste by ProTechnics at the McKean County Landfill. This was the subject of the Inspection Report. Brennan also received a copy of ProTechnics Radioactive Materials License with one of the emails he retained. The Radioactive Materials License was attached to an email generated by the Northwest Regional Office.

These records are accounted for in the Northcentral Regional Office's privilege log, as well as the Central Office, Southcentral Regional Office, and Northwest Regional Office's privilege logs. A November 15, 2010, unredacted email from Forney to Brennan was provided to Smith by the Northwest

Regional Office. Brennan did not retain this email and therefore, did not possess it at the time that Smith filed her request.

The Northcentral Regional Office's Oil and Gas Program initially searched for ProTechnics' records contained in Smith's request. As explained earlier, only the Citrus Energy NOV and related emails were located. Means Affidavit, ¶ 9. Following the filing of an OOR appeal, it was discovered that Means was copied to emails that were accounted for by the Central Office and the Southcentral Regional Office. *See* Privilege Logs of Central Office and Southcentral Regional Office. Means conducted an additional search to determine if she had retained any of the identified emails related to ProTechnics. ¶ 13. A small number of emails were identified. Means, ¶¶ 14-18. All of the responsive emails were generated by Southcentral Regional Office and Central Office personnel. Attached to one email was a copy of the November 2, 2010, COA with the attached Radioactive Tracer Well Site Agreement. Means Affidavit, ¶ 20. The COA was provided to Smith by the Southcentral Regional Office in redacted form. All emails still possessed by Means, as well as the November 2, 2010, COA, are accounted for in the Northcentral Regional Office's privilege log, as well as the Southcentral Regional Office and Central Office's privilege logs.

While these records were not initially discovered in response to Smith's RTKL request, DEP takes its role in responding to RTKL requests very seriously. Once it came to the attention of the Northcentral Regional Office that it may possess records responsive to Smith's request, a second search was conducted. This search for records was aided by the identification of overlapping records identified by DEP's other regions that are primarily responsible for the regulation and investigation of incidents involving radioactive materials.

Smith, in her appeal, takes issue with Northcentral Office's language in its corrective final letter dated March 24, 2016, which describes Citrus Energy as being contracted "by" ProTechnics. Smith is correct that Citrus Energy contracted ProTechnics to conduct a radioactive tracer study and not the other way around. The use of the word "by" was in error, but it does not change the fact that the NOV was issued to Citrus Energy, not ProTechnics. Nevertheless, Smith received the redacted NOV that was issued to ProTechnics on that same date and related to the same incident, from the Southcentral Regional Office. The Northcentral Regional Office does not possess the NOV issued to ProTechnics.

Smith is incorrect in her assertion that "Notices of Violation were issued by the Northcentral Office related to ProTechnics." First and foremost, the Northcentral Regional Office did not issue an NOV to either ProTechnics or Citrus Energy. It is clear from the office stationary and the signature of Lisa Forney, that these records were issued by the Southcentral Regional Office. However, the redacted NOV issued to Citrus Energy that Smith attached to her appeal was not provided by the Southcentral Regional Office because that office correctly deemed the record unresponsive to Smith's request. Forney Affidavit, ¶ 102.

Second, Smith argues "[q]uite obviously, since the Department provided records related to a Notice of Violation involving a wellpad where ProTechnics was operating, the Department possesses responsive records." As explained, the Northcentral Regional Office did not issue the NOV to Citrus Energy. Smith does not request NOVs "related" to well pads where ProTechnics was operating, she requests "[a]ny and all investigation reports, Notices of Violation(s), Consent Orders and Agreement(s) issued **to** Protechnics by the Department…." (emphasis added). Smith received redacted versions of all NOVs issued to ProTechnics by the offices that possessed them.

Smith also argues that the Northcentral Regional Office is withholding the "same type of documents that were produced by the Northwest regional office." The Northcentral Regional Office has

not withheld any documents that the Northwest Regional Office has not otherwise disclosed. The records provided by the Northwest Regional Office are not privileged and do not fall within any of the RTKL exemptions.

Responsive records not previously identified by the Northcentral Regional Office have not prejudiced Smith. Those same records were identified by other regions responding to her request. Because of the Northcentral Regional Office's very limited, and mostly indirect involvement with ProTechnics, there was no reason for the Region to retain much of the email correspondence in 2009 and 2010. The Northcentral Regional Office's privilege log accounts for those records still retained and in its possession. If the Northcentral Regional Office was not committed to transparency and responding in good faith, it would not have conducted multiple secondary searches to ensure that the answer it provided was as accurate as possible.[26]

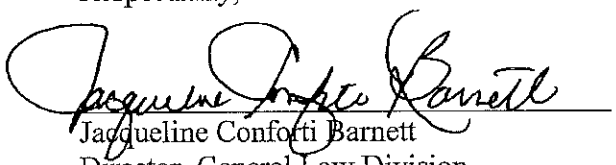
[26] Smith appeal states that the Southcentral Regional Office disclosed an NOV directed to Citrus Energy Corporation. Southcentral did not disclose this record because it was unresponsive. The document attached to Smith's RTKL request as "Attachment 5," is erroneously attributed to the Southcentral Regional Office. Forney Affidavit, ¶ 102.

V. CONCLUSION

No rule of law requires a tribunal to presume that an agency will act in bad faith in complying with its statutory duties under the RTKL. *Office of the Governor v. Donahue*, 59 A.3d 1165 (Pa. Cmwlth. 2013). Additionally, a presumption exists that "Commonwealth agencies will act in good faith in discharging their statutory duties under the RTKL." *Office of the Governor v. Donohue*, 98 A.3d 1223, 1239 (Pa. 2014).

Consequently, for all of the reasons stated above and the evidence contained within DEP's testimonial affidavits and logs, DEP respectfully requests that Smith's appeal be dismissed and no further action required of it be required.

Respectfully,



Jacqueline Conforti Barnett
Director, General Law Division
Office of Chief Counsel

Enclosures

DEP Southeast Regional Office

AFFIDAVIT OF TERRY W. DERSTINE

I, Terry W. Derstine, do hereby say, verify and attest to the following statements as true and accurate to the best of my knowledge, information, and belief, under penalty of perjury, and subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities:

1. I have worked for the Pennsylvania Department of Environmental Protection (DEP) for twenty-seven years in the DEP's Southeast Regional Office, located at 2 East Main Street, Norristown, Pennsylvania.

2. During my twenty-seven years at DEP, I have served in many different roles in Southeast Regional Office's Radiation Protection Program. Since 2005, I have been the Environmental Program Manager in the DEP's Radiation Protection Program in the Southeast Regional Office.

3. The Radiation Protection Program in the Southeast Regional Office inspects the users of radiation sources, including all radioactive materials and X-ray equipment, in the Northeastern and Southeastern regions of Pennsylvania. It implements an emergency radiation response program which includes nuclear power plant events, lost sources,[1] transportation events involving radioactive materials, fixed events involving radioactive materials, and scrap recycle and solid waste facilities radiation alarms. It enforces violations of the Radiation Protection Act and subsequent rules and regulations.

4. I am in charge of the Southeast Regional Office's Radiation Protection Program. My responsibilities include technical management of program areas including radioactive materials, radiation producing machines, radon, nuclear safety, low-level radioactive waste, emergency response, and environmental surveillance. I am also responsible for ensuring that

[1] Lost sources are radioactive materials that have been abandoned, whether intentionally or unintentionally, and require an emergency response to recover.

DEP regional office staff effectively implement statewide program activities, such as inspections and enforcement, of approximately five hundred radioactive material licensees and approximately four thousand eight hundred radiation producing machine registrants.

5. The Radiation Protection Program's mission is to ensure that public, occupational, and environmental exposure to radiation from man-made and controllable natural sources is as low as reasonably achievable.

6. Since 2008, the Radiation Protection Program inspects users of radioactive materials as part of an agreement with the U.S. Nuclear Regulatory Commission. In addition, it inspects all licensed and/or registered radiation-producing machines in Pennsylvania.

7. The Southeast Regional Office's Radiation Protection Program is divided into two sections to ensure compliance with license, registration, and regulatory requirements:

- The X-ray Division. The X-ray Division verifies through inspections the safe use of X-ray equipment by medical, industrial, and academic users; ascertaining compliance with the Commonwealth of Pennsylvania radiological rules and regulations for the eastern area of the State. The X-ray Division also performs inspections of certified mammography facilities in accordance with the Mammography Quality Standards Act contract with the FDA.

- The Radioactive Materials Division. The Radioactive Materials Division verifies through inspections the safe use of radioisotopes by medical, industrial and academic users in accordance with the procedures in the agreement with the U.S. Nuclear Regulatory Commission. The Radioactive Materials Division also conducts inspections of PA DEP certified companies providing radon testing, laboratory and mitigation services.

8. I am familiar with the February 1, 2016, Right-to-Know Law (RTKL) request filed by Kendra L. Smith (Smith), seeking records for Core Laboratories d/b/a ProTechnics, Division of Core Laboratories LP, located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. Her RTKL requested the following as filed:

- Any and all approvals, permits, licenses/licensures, applications for permits and/or licenses, reciprocity letters, reciprocity licenses, reciprocity agreements and/or reciprocity arrangements, including, but not limited to all licenses issued by the Department to Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP (hereinafter, "Protechnics") for use, storage and possession of radioactive materials and/or other licensed material. Additionally, this request seeks any and all investigation reports, Notices of Violation(s), Consent Order and Agreement(s) issued to Protechnics by the Department and/or between Protechnics and the Department for any and all work or services performed by Protechnics at any natural gas well site in the Commonwealth of Pennsylvania. Included in this request is a request for copies of all Notices of Violation issued by the Department to Protechnics, including but not limited to Notices of Violation dated June 15, 2010, January 28, 2010, November 26, 2013, September 13, 2013 and October 14, 2013, Violation Numbers 677913, 677915, 677914, 682834, 682833, 682829, 682835 and all corresponding inspection reports, field notes and other related writings. Further, this request seeks any and all Consent Order and Agreements between the Department and Protechnics, including, but not limited to, Consent Orders and Agreements dated November 2, 2013 and November 2, 2010.

- Copies of all enforcement activity taken by the Department against Protechnics, including but not limited to Enforcement ID Numbers 305057, 259202 and 263973, as well as all inspection reports completed by the Department regarding Protechnics, including, but not limited to, Inspection ID Numbers 1891418, 1919964, 2147772, 2204156 and 2221258.

- Any and all Radioactive Tracer Well Site Agreements made between Protechnics and any well site operator(s) for each and every well traced in the Commonwealth of Pennsylvania that is or was submitted to the Department, including, but not limited to, the April 7, 2013, Radioactive Tracer Well Site Agreement between Protechnics and a well operator.

- Any and all notifications submitted to the Department by Protechnics or the associated operator or subcontractor regarding Protechnics confirmation that licensed material, including, but not limited to, radioactive material, was returned to the surface at any well site in which Protechnics operated/performed work or services in the Commonwealth of Pennsylvania.

- Any and all documents, correspondence, e-mails and any other communication(s) between Protechnics and the Department and/or Range Resources and the Department regarding Protechnics and any and all work/services performed in the Commonwealth of Pennsylvania by Protechnics.

- Any and all MSDS/SDS (material data safety sheets and safety data sheets) in the possession of the Department regarding any and all products utilized by Protechnics at any well site in Pennsylvania, including, but not limited to, all MSDS/SDS for Protechnics Radioactive Tracer Products, as well as any and all Chemical Frac Tracer ("CFT") products, including, but not limited to, CFT 1000, CFT 1100, CFT 1200, CFT 1300, CFT 2000, CFT 2100, CFT 1900, CFT 1700.

9. I am also familiar with the February 3, 2016, amendment to the Smith request which sought "all drill sites in the Commonwealth, including but not limited to, the Yeager drill site."

10. As the Regional Manager for the Radiation Protection Program in the Southeast Regional Office, I am familiar with the requested records contained in DEP's Southeast Regional Office regarding ProTechnics.

11. A Notice of Violation (NOV) ordinarily indicates that a matter may become the subject of further enforcement action. An NOV is issued when a violation of state law or regulation is discovered during an inspection conducted by DEP at a regulated entity's location or through DEP's review of a regulated entity's records.

12. An NOV documents, with specificity, that a regulated entity is in violation.

13. "Fracking" is a colloquial term for hydraulic fracturing; a type of drilling that involves tapping shale and other tight-rock formations. This is accomplished by drilling a mile or more below the surface before gradually turning horizontal and continuing several thousand feet more.

14. Once a well is drilled, cased, and cemented, small perforations are made in the horizontal portion of the well pipe, through which a typical mixture of water (90 percent), sand (9.5 percent), and additives (0.5 percent) is pumped at high pressure to create micro-fractures in the rock that are held open by the grains of sand. Additives play a number of roles, including

helping to reduce friction (thereby reducing the amount of pumping pressure from diesel-powered sources, which reduces air emissions) and prevent pipe corrosion.

15. The oil and gas industry uses both sealed and unsealed radioisotopes. Well-tracing studies, such as those carried out by ProTechnics, use radioactive materials trapped in solids (i.e. granular forms), to investigate or "trace" the movement of sand materials to determine the adequacy of well completion. The most common use of these radiotracers is injection of insoluble granular forms in the well for assessment of the effectiveness of rock fracturing.

16. Use of radioactive tracers is strictly controlled because the radioactive materials may only be used by individuals who have been properly trained to use them safely. Additionally, it is also important that any company using these materials maintain constant control of them to prevent any unauthorized use, theft, or loss that could result in harm to public health, safety, and/or the environment. Also, as noted within 10 CFR 20.1201(a) that is incorporated by reference in 25 Pa Code 219.5(a), the licensee must control occupational radiation exposure and insure that an individual does not receive an excess of 5 rems (0.05 Sv) total effective dose equivalent per year to avoid potential harmful health effects.

17. Users of all radioactive byproduct, source, and specific nuclear material are required to obtain a license from DEP prior to obtaining those radioactive materials.

18. The objective of DEP's licensing program is to ensure radioactive material is used safely, disposed of properly, and that facilities are free from contamination when licensed operations cease.

19. On March 31, 2008, in order to more efficiently, uniformly, and safely control radioactive material, Pennsylvania entered into an agreement with the U.S. Nuclear Regulatory Commission (NRC) to expand DEP's authority over the licensing and regulation of byproduct,

source, and special nuclear material. A copy of the agreement is incorporated into this affidavit. *See* Affidavit of David J. Allard, CHP (Allard), Attachment A[2].

20. Operators are required to ensure that licensed material is used, transported, stored, and disposed of in such a way that members of the public will not receive more than 1 mSv (100 mrem) in one year, with no more than 25 percent of that dose limit from a given source, and the dose in any unrestricted area will not exceed 0.02 mSv (2 mrem) in any one hour. 10 CFR 20.1301(a)(1)-(2). DEP regulations must be at least as stringent as Federal regulations. Federal standards were created with the understanding that there are natural background radiation levels, and this dose contribution is not included in the public dose limit. However, facilities that utilize radioactive materials, or radiation producing machines, are required to use practices, procedures, and controls to achieve doses that are as-low-as-reasonably-achievable (ALARA) per 10 CFR 20.1101(b) to protect the general health and safety.

21. Operators are required to secure stored licensed material from access, removal, or use by unauthorized personnel. 10 CFR 20.1801. They are also required to control and maintain constant surveillance of licensed material when in use and not in storage. 10 CFR 20.1802. These Federal Regulations were created and adopted by DEP because it is imperative that operators maintain control of their materials and do not provide opportunities for unauthorized access or removal of their licensed materials. If these materials were not under constant surveillance it is possible that radioactive materials could be stolen and used with malicious intent to harm the public through the creation of a radioactive dispersal device (RDD), or "dirty bomb," and cause unwilling or unwanted radiation exposure to others. Exposure to high level radiation, even if it is

[2] I have read the affidavit of David J. Allard, CHP submitted in response to this appeal. For the sake of eliminating unnecessary duplication of attachments and records submitted on behalf of DEP, Allard's affidavit, and its attachments, are incorporated by reference into this affidavit where noted.

still contained in the sealed source, can cause cell, tissue, and organ damage, loss of limbs, tissue narcosis, cancer and/or death. Exposure to low level radiation may increase an individual's cancer risk. The fact that a source is sealed does not mean that it is shielded to the extent that it would prevent a person from receiving external radiation exposure.

22. Federal and state nuclear regulatory agencies maintain records of the amount and type of radionuclides used by licensees. Radionuclides are atoms that have excess energy that makes them unstable. This excess energy can create and emit from the nucleus or electron orbits new radiation, a new particle or photon, or transfer this excess energy to one of its sub-particles causing it to be ejected.

23. The NRC, and approved state agencies, regulate the use of injected tracer radionuclides during hydraulic fracturing. DEP is an approved state agency.

24. I have personal knowledge of most of DEP's investigation activities that lead to the issuance of NOVs against ProTechnics, a division of Core Laboratories, L.P. (ProTechnics), on January 28, 2010; June 15, 2010; and November 26, 2013.

25. ProTechnics offers services in the field of completion, reservoir, and drilling diagnostics. Completion diagnostic services use image and tracing services that provides direct measurements of a fracture height, zonal coverage, sand (or proppant) distribution, wellbore connectivity, and fracture fluid performance. Reservoir diagnostic services provide surveillance of injected fluid flow within a reservoir. Tracer services for a reservoir diagnostic surveillance can be used in the cases of a water flood, gas flood, steam flood, and surfactant flood. Drilling diagnostic services use tracers to determine the amount of drilling fluid invasion in core samples and formation fluid samples that provide the following: the *in situ* solid waste and hydrocarbon

saturations of a formation; the residual waste formation for log calibration purposes, and contamination in downhole formation fluid samples.

26. The first ProTechnics investigation began on December 22, 2009, when DEP was alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP, through staff in both the Central Office and the Southcentral Regional Office, then began an investigation by working with the landfill to track the shipment of radioactive residual waste back to its generator—a well site that had engaged ProTechnics. DEP immediately contacted ProTechnics to gather information about the incident and scheduled an in-person compliance conference with ProTechnics personnel. As a result of the conference, ProTechnics agreed to discontinue work using radioactive materials within Pennsylvania under a reciprocity (out-of-state) radioactive material license. Rather, it would request from DEP authorization under a specific DEP radioactive materials license.

27. As a result of DEP's investigation, an NOV was issued against ProTechnics on January 28, 2010, detailing DEP's conclusion that "ProTechnics failed to ensure proper handling and disposal of the radioactive material." A copy of the NOV is incorporated. *See* Allard Affidavit, Attachment B. DEP's investigation also resulted in ProTechnics submitting an incident report detailing the corrective actions taken by ProTechnics as a result of its non-compliance.

28. The second ProTechnics investigation began in May 2010 after DEP was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP staff in both the Central Office and the Southcentral Regional Office then began an investigation by working with the landfill to track the shipment of waste back to a generator—well site that had engaged ProTechnics. DEP again reached out to ProTechnics to discuss the

incident and obtain documentation. As a result of DEP's investigation, an NOV was issued against ProTechnics on June 15, 2010, detailing why DEP concluded that ProTechnics failed to comply with DEP's regulations and the conditions of ProTechnics' radioactive materials license. A copy of the NOV is incorporated. *See* Allard Affidavit, Attachment C.

29. To resolve its non-compliance, ProTechnics entered into a Consent Order and Agreement with DEP on November 2, 2010. A copy of the Consent Order and Agreement is incorporated. *See* Allard Affidavit, Attachment D. The Consent Order and Agreement assessed a civil penalty of $29,000 against ProTechnics and required the following corrective actions:

- A requirement that ProTechnics must provide a well site agreement to each well owner operator to educate them of the proper procedures in the event of flowback—containing radioactive tracer sand. Flowback is a water based solution that flows back to the surface during and after the completion of hydraulic fracturing;

- A requirement that ProTechnics must provide an instructional session to each well owner/operator that included radiation safety proper procedures for handling flowback incidents and acceptable disposal methods for radioactive residual waste;

- A requirement that ProTechnics must notify notification to DEP when a flowback event has occurred and that it verified to see if any radioactive material returned back to the surface of the well;

- A requirement that ProTechnics must complete a survey and area sketch of the flowback area after the event occurred per the specifications of their emergency and operating procedures;

- A requirement that ProTechnics must complete a formal report within 30 days of the flowback event and submit it to DEP;

- A requirement that ProTechnics amend its license to include the submission of a properly executed well site agreement with the well owner/operator within five business days of its completion;

- A requirement that ProTechnics amend its license to add a condition that would require it to coordinate with the well owner operator to stabilize an area used to contain the radioactive residual waste for onsite *in situ* decay until

complete decay has occurred and that the pit remained intact and did not wash out during weather events;

- A requirement that ProTechnics amend its license to add a condition that it would at least annually inspect the area where the radioactive residual waste is maintained to make sure containment is intact, marked and fenced off;
- A requirement that ProTechnics immediately notify DEP upon confirming that radioactive material detected in a flowback incident;
- A requirement that ProTechnics amend its license to include proper notification methods to DEP.

30. The third ProTechnics investigation began in September 2013 after DEP was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP staff in the Central Office, the Southcentral Regional Office, and the Southeast Regional Office, then began an investigation by working with the landfill to track the shipment of waste back to a well pad generator—that engaged ProTechnics. DEP again reached out to ProTechnics to discuss the incident and obtain documentation.

31. eFACTS is DEP's Environmental Facility Application Compliance Tracking System (eFACTS) that allows members of the public to search for authorizations, clients, sites and facilities. Users can also search the database to find inspection and pollution prevention visits as well as inspection results data, including enforcement information when violations are noted. DEP provides a name search to use when it is not known if the entity is a client, site, or facility.

32. On September 13, 2013, the Southeast Regional Office conducted an inspection of ProTechnics' activities in response to a flowback/loss of control event. This inspection is documented in eFACTS under inspection ID 2204156. Violation numbers 677913 (violation of 10 CFR § 20.1802 for failure to control and maintain constant surveillance of license material),

677914 (violation of 10 CFR § 20.1902(e) for failure to control and post a radioactive materials area) and 677915 (violation of 10 CFR § 30.34 for failure to adhere to the terms and conditions of a license) are also included with this eFACTS entry.

33. As a result of DEP's investigation, an NOV was issued to ProTechnics on November 26, 2013, detailing why DEP concluded that ProTechnics failed to comply with the DEP's regulations; the November 2, 2010, Consent Order and Agreement; and the conditions of ProTechnics' radioactive materials license. A copy of the NOV is incorporated. *See* Allard Affidavit, Attachment E.

34. To resolve its non-compliance, ProTechnics paid a civil penalty of $75,000 and executed an Addendum to the November 2, 2010, Consent Order and Agreement requiring ProTechnics to amend its radioactive materials license. ProTechnics' radioactive materials license has a condition that it must use the approved well site agreement form and any changes to this form would require DEP approval and a license amendment. Under the Addendum to the Consent Order and Agreement, an amendment to ProTechnics' license was necessary to revise language in the well site agreements to make it clear that ProTechnics is the party that is responsible for maintaining control of the radioactive material in a flowback incident and not the well owner/operator party to the agreement. A copy of the addendum to the Consent Order and Agreement is incorporated. *See* Allard Affidavit, Attachment F.

35. For the noncriminal investigations noted in paragraphs 26-34 of this affidavit, DEP routinely performs the following general steps for its inquiry:

> a. Upon receiving notification from a waste disposal facility of non-acceptable radioactive material, the Radiation Protection Program will request information from the facility about the load of waste including, but not limited to: the type of waste and volume, the isotope identified, the activity of the isotope, the generator of the waste, the identity of the person(s) who performed a radiation survey, the type of equipment used to survey the waste, the current location of the waste, and

a determination from the facility of its plans for the waste load. Since each flowback incident produces a load of waste containing an isotope that does not meet established exemptions for municipal waste, it cannot be disposed in a landfill. Therefore, a Department of Transportation Special Permit Shipment Approval Form is issued to reject the load and return it to its place of origin.

b. The Regional Radiation Protection Program will contact the waste generator directly and/or assign a Radiation Health Physicist to investigate the flowback/loss of control incident at the well site, seek to identify all parties involved, and investigate how the loss of control of licensed material occurred. Whenever possible, the Radiation Health Physicist will document site conditions in a formal inspection report and obtain photographs of the well site.

c. Once completed, all documentation is submitted to the Regional Radiation Protection Management Staff for review and approval of the inspection findings. Depending upon the severity of the violation, Regional Radiation Protection Management Staff will disclose inspection findings in accordance with its established Compliance and Enforcement Guidance Document. If additional information is needed prior to disclosing inspection findings, DEP will schedule a conference.

Radiation Protection Act and Regulations

36. The General Assembly passed the Radiation Protection Act because it determined that radiation exposure has the potential for causing undesirable health effects and that the citizens of the Commonwealth should be protected from unnecessary and harmful exposure resulting from use of the radioactive materials, radiation sources, accidents involving nuclear power, and radioactive material transportation. 35 P.S. § 7110.102 and 25 Pa Code § 215.1(a). The purpose of the Radiation Protection Act was to establish and maintain a comprehensive program of radiation protection within DEP; provide for licensing and regulations in cooperation with the Federal Government, other states agencies, and appropriate private entities; maintain a comprehensive radiation monitoring program; maintain a technical emergency radiation response capability within DEP; and establish an emergency response program. 35 P.S. § 7110.102.

37. The Radiation Protection Act designated DEP as the agency of the Commonwealth with the authority to control ionizing radiation sources. 35 P.S. § 7110.301(a).

DEP is also charged with developing and conducting a program to control and evaluate the hazards associated with radiation sources and radiation source users. 35 P.S. § 7110.301(c)(1).

38. DEP has the power and duty through the Radiation Protection Act to conduct studies and investigations relating to the control, regulation, and monitoring of radiation sources, and to collect and to disseminate information related to the control of radiation sources and the effects of radiation exposure. 35 P.S. § 7110.301(c)(12)-(13).

39. DEP has the authority to enter a facility for the purpose of determining compliance with the Radiation Protection Act; any license conditions; or any rules, regulations, or orders issued under the Radiation Protection Act. DEP also has the authority in an investigation to conduct tests; or to inspect or examine any radiation source, records, or other physical evidence related to the use of a radiation source. 35 P.S. § 7110.305.

40. DEP's regulations promulgated under the Radiation Protection Act provides DEP with the authority to "enter the premises of a licensee" in order to conduct an investigation or inspection to ascertain whether the licensee is in compliance with the Radiation Protection Act and its regulations. 25 Pa. Code § 215.12(b)(3). Under this regulation, DEP has the authority to conduct an investigation or inspection to protect health, safety, and the environment. 25 Pa. Code § 215.12(b)(3). This regulation includes the right to access records and other physical evidence, and requires a licensee to make a report or furnish information to DEP. 25 Pa. Code § 215.12(b)(1)-(2).

41. Section 215.14 of DEP's regulations, 25 Pa. Code § 215.14, provides, in pertinent part:

> The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:

> (1) Trade secrets or secret industrial processes customarily held in confidence.
> (2) A report of an investigation, *not pertaining to safety and health in industrial plants which would disclose the institution, progress or results of an investigation undertaken by the Department.*

(emphasis added). To put more clearly, if an investigation report does not pertain to the safety and health of industrial plants, it is not publicly available.

42. DEP interprets the reference to "industrial plant" in 25 Pa. Code § 215.14(2) as a building for carrying out industrial labor. DEP's interpretation of this term is consistent with the interpretation of the United States Government Accountability Office (GAO).

43. The ProTechnics investigations detailed in paragraphs 26-34 of this affidavit did not involve an "industrial plant." The well pads where the events took place that resulted in DEP's investigations fall outside of the definition. Therefore, the information relating to the investigations are not public records under 25 Pa. Code § 215.14(2) as claimed on page seventeen of Smith's appeal statement.

44. Records withheld from Smith in response to her RTKL request as exempt under the Radiation Protection Act and its regulations are also exempt records as confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; and personal identification information under the RTKL as outlined within this affidavit and the Southeast Regional Office's privilege log.

Public Health, Safety, and Security

45. Radioactive material files cannot be released because of safety and security reasons. These files include, but are not limited to, the following:

- Notices of Violations;
- Consent Orders and Agreements;
- License applications, attachments and amendments;

- Inspection reports, photographs, site surveys, drawings, documentation of security controls;
- Internal correspondence among DEP staff;
- Documentation from a company regarding the company's general operations and procedures;
- Correspondence from a company to the Department providing greater detail on how radioactive material is handled;
- Notes, agendas and meeting sign-in sheets from meetings between DEP and a company;
- A list of authorized users who handle radioactive materials;
- Information contained in eFacts;
- Well site agreements/acknowledgment forms;
- Sample results;
- Other information related to a company's operation.

46. If the information contained in the radioactive materials files were released to the public and obtained by an individual with criminal intent, the public's health and safety could be severely compromised.

47. For example, inspection reports contain information regarding the documentation of security controls that ProTechnics has in place at each well site. DEP believes this information needs to be protected for safety and security reasons because it describes measures used by ProTechnics to maintain constant control of its radioactive material and how it specifically prevents its removal from the well site. An individual who obtained this information could cause radioactive material to be widely dispersed resulting in greater environmental contamination and public exposure to radioactive material potentially leading to harmful health effects.

48. Furthermore, release of sensitive information could pose a potential threat to the personal safety of individuals employed in the use of radioactive materials. If ProTechnics or the well owner operator's personal contact information was released, a person with malicious intent could target them to obtain unauthorized access to radioactive material.

49. The health consequences related to unintentional exposure to radiation sources range from burns, vomiting, diarrhea, headaches, cell, tissue and organ damage, narcosis,

blindness, cancer, and even death. These health consequences represent a significant potential harm to public safety.

50. In other states, individuals have manipulated the information contained in a radioactive materials license and other files to unlawfully obtain radioactive materials and use those radioactive materials to harm the public. The sensitive nature of the subject matter contained in all radioactive material files provides an individual with insight regarding how the radioactive materials license application process works and the documentation needed to fraudulently obtain radioactive materials. This insight includes what a radioactive materials license looks like, the type of training licensees must complete as required by DEP, specifics regarding radiation protection programs, and internal DEP tracking numbers.

51. DEP purposefully redacted the license number from the documents it provided to Smith to limit publically available information that one could use to track down a specific license and obtain the information within the license discussed above. DEP's intent in redacting the license number was to protect the information within the license itself. DEP's intent was not to be vague on whether ProTechnics had a license as claimed in Smith's response. To the contrary, DEP wants the public to know that it regulates companies like ProTechnics for use of radioactive material. That is why DEP released redacted records to Smith with the specific license number redacted and did not redact the words "license number."

52. As pointed out in footnote 1 of Smith's appeal, DEP redacted the eFACTS Inspection ID Number and the eFACTS Enforcement ID Number on the records it provided to her. Information related to DEP's Bureau of Radiation Protection and Regional Radiation Protection Programs involves sensitive information that is not available on the public website. For a short time in November 2015 and in January 2016, portions of sensitive radiation

protection license data were inadvertently available on the public DEP website. Once DEP learned of its error, it immediately took steps to remove this information from its public website. Information related to the Bureau and regional programs are not currently available on the public website.

53. There are documented cases of other regulatory agencies approving license applications from fictitious entities that then fraudulently obtained radioactive materials. *See* Allard Affidavit, Attachment G: *Nuclear Security: Actions Taken by NRC Strengthens Its Licensing Process for Sealed Radioactive Sources Are Not Effective*, Government Accountability Office (2007); Kathleen Day, *Sting Reveals Security Gap at Nuclear Agency*, The Washington Post, July 12, 2007; and David Kestenbaum, *GAO Sting Uncovers Nuclear Security Shortcomings*, NPR, July 12, 2007.

54. The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government spends taxpayer dollars. GAO conducts investigations at the request of congressional committees or subcommittees or is mandated by public laws or committee reports in order to

- Audit agency operations to determine whether federal funds are being spent efficiently and effectively;
- Investigate allegations of illegal and improper activities;
- Report on how well government programs and policies are meeting their objectives;
- Perform policy analyses and outlining options for congressional consideration; and
- Issue legal decisions and opinions, such as bid protest rulings and reports on agency rules.

55. In 2012, the United States Senate Committee on Homeland Security and Governmental Affairs asked GAO to review the security of radiological sources at U.S.

industrial facilities. *See* Allard Affidavit, Attachment G: *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014).

56. GAO issued a report in 2014 which found that challenges exist in reducing the security risks faced by licensees using high-risk industrial radiological sources. GAO describes in their report that "[i]n the hands of terrorists, these sources could be used to produce a simple and crude, but potentially dangerous weapon, known as a radiological dispersal device or dirty bomb, whereby conventional explosives are used to disperse radioactive material." *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 1.

57. GAO's report also states that since 1993 there have been 615 confirmed incidents involving theft or loss of nuclear and radioactive materials worldwide. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 2. The report notes that some industrial radiological sources are portable and susceptible to theft or loss. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 12. The report criticizes NRC's practices in regards to safeguarding radioactive material at well logging sites. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 39.

58. "High risk sealed radiological sources that contain cobalt-60, cesium-137, or iridium-192 could pose a greater threat to the public and the environment and a potentially more significant security risk, particularly if acquired by terrorists to produce a dirty bomb.

59. Industrial radiological sources are used in, among other things: (1) industrial radiography devices for testing the integrity of welds, (2) well logging devices in oil and gas

production, (3) research irradiators in the aerospace sector, and (4) panoramic and underwater irradiators used to sterilize industrial products." *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 6.

60. The quotes and details from the GAO report confirms DEP's public safety and security concerns regarding the release of ProTechnics' information because it provides examples of isotopes that are used at well sites and it confirms that these isotopes are desirable to terrorist due to the quantity available and their dispersive nature that can cause widespread radioactive contamination.

61. Other governmental agencies have recognized the threat posed by a radiological attacked. *See* Allard Affidavit, Attachment G: *Radiological Attack: Dirty Bombs and Other Devices*, U.S. Department of Homeland Security and The National Academies (2004); *Written testimony of DNDO Director Huban Gowadia for a House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation hearing titled "Prevention of and Response to the Arrival of a Dirty Bomb at a U.S. Port"*, U.S. Department of Homeland Security (2015).

62. These articles highlight the nexus between the disclosure of radioactive materials license files and the realistic scenarios DEP is seeking to avoid. By withholding radioactive material files, DEP hopes to thwart individuals with malicious intent in the first instance. As a direct result of exempting these records as permitted under the RTKL, these individuals will lack the basic information required to prepare fraudulent documents and obtain radioactive materials in this Commonwealth. DEP believes that this is a very important step in protecting public health and welfare from the hazards of radiation sources.

63. Recent current events highlight why information related to radioactive material needs to be protected. As emphasized in a recent CNN article, the ISIS terrorists who blew up the airport and attacked the metro in Brussels were secretly videotaping a Belgian nuclear official. The official worked at a facility that had radiological material that terrorists could use for a "dirty bomb." The article also underscores how even small amounts of radioactive material, such as the size of a pencil eraser, can be used to spew a radioactive cloud over tens of square blocks. Such a cloud could cause the area to be uninhabitable for years until scrubbed clean. This could cause economic losses in the trillions to the affected area and increase the risk of getting cancer to those who were exposed to the cloud. The article explains that the best way to prevent terrorist attacks is to eliminate, reduce and secure all supplies of nuclear materials so that terrorists would find it too difficult to get them. *See* Allard Affidavit, Attachment G: Joe Cirincione, *Nuclear terrorist treat bigger than you think*, CNN, April 1, 2016, http://www.cnn.com/2016/04/01/opinions/nuclear-terrorism-threat-cirincione/index.html.

64. In light of the issues raised in this affidavit and in Attachment G of Allard's Affidavit, DEP believes that withholding radioactive materials files from public access is necessary to protect public health, safety, and security from radiation exposure.

65. DEP did not provide the following information for ProTechnics' employees: names, home mailing addresses, phone numbers, or email addresses. As highlighted in the CNN article, employees who manage radioactive material have been targeted by terrorist groups. As Smith states in her appeal and in Attachment 2, it is true that ProTechnics' has it headquarter address and main telephone listed on its website. However, the names of the individuals, their direct lines, and email addresses are not provided. DEP redacted mailing addresses to prevent the possibility of someone with malicious intent to be able to narrow down which specific office

the individual from ProTechnics is assigned. This effort was made in order to avoid public safety concerns like those discussed in the CNN article.

66. Although, the half-life of the radioactive materials possessed by ProTechnics is less than 120 days, the records contained in the ProTechnics file (and in any radioactive materials licensee's file), are sensitive and if made public threaten public safety and security as previously noted. Furthermore, radioactive material with a half-life of less than 120 days can be used to harm the public and cause environmental contamination that could lead to harmful health effects. Even after one or more half-lives are reached through the decay process, radioactive material is still radioactive and will result in a person being exposed to radiation. While the rate of exposure may have decreased, prolonged contact can result in radiation effects ranging from burns, headaches, diarrhea, cell, tissue and organ damage, cancer, and possibly death.

67. Smith obtained information regarding ProTechnics' radioactive materials license issued by the NRC agreement states of Texas and Colorado for work using radioactive material in their states. Smith was also able to obtain the NRC event notification report for an event that Colorado reported to the NRC. As discussed in Allard's Affidavit, including Attachment A, the Commonwealth of Pennsylvania is an NRC Agreement State and therefore is the agency with current authority to regulate most radioactive materials within the Commonwealth.

68. Agreement states must meet minimum requirements to remain an agreement state such as providing the NRC with event notification reports. An agreement state also undergoes a periodic Integrated Materials Performance Evaluation Program (IMPEP). During an IMPEP, the NRC evaluates the agreement state by using performance indicators that include the following: its materials inspection program; the technical quality of inspection, staffing and training; the quality of licensing actions; and the technical quality of incident and allegation activities. The

evaluation's purpose is to determine whether an agreement state is compatible with NRC's established program. Agreement states, like Pennsylvania, do not have direct control over how the NRC decides to release the event notification information on the NRC website once it provides the information to the NRC.

69. Federal regulatory agencies, such as the NRC, operate under federal law, such as the Freedom of Information Act, 5 U.S.C. § 522, and may make certain information publically available. Similarly, Texas and Colorado regulatory agencies are bound by their state record laws and may make certain information publically available. However, DEP protects information related to radiation sources to the full extent allowed by state law to prevent fraudulent acquisition of radioactive materials in the Commonwealth and the subsequent threat that would cause to the health, safety, and security of its citizens.

70. DEP's radioactive materials files also contain information regarding the current location and quantity of radioactive materials possessed by licensees. Making this information available to the public presents a risk "reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity." Location and quantity information, should it be publicly available, could be used by terrorists or other criminals who want to obtain radioactive materials or create an increased threat to the licensee housing the materials, thus making it a target of criminal activity. An increased threat would exist of exposing other persons to radioactive materials after the materials were taken from the licensee.

71. As noted by Smith on page 9 of her appeal, DEP did not redact the names of the landfills where ProTechnics radioactive tracers in the flowback from the well were taken for disposal. However, ProTechnics radioactive tracers were not disposed of at these landfills.

72. For each incident, loads containing ProTechnics radioactive tracers triggered a radiation alarm at each of the landfill.

73. There are no Pennsylvania landfills specifically licensed to receive low-level radioactive waste. Therefore, ProTechnics' radioactive tracers cannot be buried on any landfill site within the Commonwealth.

74. As a result, the landfill contacted DEP and DEP issued a DOT Special Permit 11406 Shipment Approval Form. This special permit allowed the landfill to reject the noncompliant load and return it to its point of origin at the well pad. Since the load containing radioactive material was rejected, it was never disposed of at the landfill. With no radioactive material on-site, and there no public security concerns, DEP saw no reason to exclude the landfill names in its response to Smith's RTKL request.

75. DEP granted Smith's RTKL request with respect to the NOVs and Consent Order and Agreements, but redacted information that could compromise public health, safety, and security. Among the redacted information were the isotope types, activity concentrations, quantities, licensee contact information, radioactive materials license number, specific license conditions, authorized locations of use, well owner/operator name and contact information, and internal DEP tracking numbers. This information was redacted because its public release would create the potential for radioactive material to be fraudulently obtained, misused, loss, stolen, or lost in a manner to harm the public health, safety, and environment as previously discussed in this affidavit. However, DEP determined that it was in the public interest, to the extent possible, to release redacted NOVs, Consent Order and Agreements, and an Addendum, because these records reflect DEP's final decisions regarding its investigation into ProTechnics.

76. In light of the public safety and security issues raised in this affidavit and contained in Allard Attachment G and Attachment 1 of this affidavit, DEP believes that withholding radioactive materials files from public access is necessary to protect public health, safety, and security from radiation exposure.

77. Records withheld from Smith in response to her RTKL request as exempt under the public safety and security exception of the RTKL are also exempt records of confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; and personal identification information under the RTKL, as well as attorney-client and attorney-work product privileges as outlined within this affidavit and the Southeast Regional Office's privilege log.

Noncriminal Investigations

78. Pursuant to 35 P.S. § 7110.305(a) and 35 P.S. § 7110.301(c)(12) of the Radiation Protection Act, DEP has the following statutory authority to conduct investigations:

> The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

In addition, DEP has the authority to:

> Encourage, participate in or conduct studies, investigations, training, research, remedial actions and demonstrations relating to control, regulation and monitoring of radiation sources.

35 P.S. § 7110.301(c)(12).

79. Additionally, Section 215.12 of the Radiation Regulations states:

(a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at permanent sites or facilities of use identified in a license or registration issued under this article.

(b) *Rights of the Department.* The Department and its agents and employees will:

(1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.
(2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.
(3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.

(c) *Inspections and investigations by the Department.* The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.

(d) *Additional inspections and investigations.* The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated."

80. Pursuant to these statutory and regulatory authorities, DEP conducted an official investigation at the ProTechnics temporary job site because of the series of events detailed in paragraphs 26-34 of this affidavit.

81. Records exist that pertain to the noncriminal investigations DEP conducted and consist of inspection reports prepared by the Radiation Protection Program, internal pre-enforcement documents, such as emails, draft enforcement documents and agreements, and

internal communications regarding the investigation of ProTechnics. These records do not contain purely factual information. These records exist and were solely created because of DEP's investigations into ProTechnics activities as outlined within this affidavit and as required under the Radiation Protection Act and its regulations.

82. Releasing these records would reveal the institution and progress of DEP's noncriminal investigations of ProTechnics.

83. Noncriminal investigative records redacted and provided to Smith in response to her RTKL request memorialize the imposition of a fine or civil penalty; the suspension, modification, or revocation of a license, permit, registration, certification or similar authorization issued by DEP; or is an executed settlement agreement, redactions were required.

84. The information redacted within the noncriminal investigative records produced is subject to protection under the public safety and security exception of the RTKL as outlined within this affidavit. The redacted information included the isotope type, activity concentration, quantities, licensee contact information, radioactive materials license number, specific license conditions, authorized locations of use, well owner operator name and contact information, and internal DEP tracking numbers. This redacted information, if made generally public, creates a public safety and security issue because it is possible that the information could be used with malicious intent to harm the public such as the creation of a "dirty bomb" and/or provide unwilling radiation exposure to others causing harmful health effects as described above. However, DEP believed it was in the public interest, to the extent possible, to release the redacted NOVs, Consent Order and Agreements, and the Addendum, because these records reflect DEP's final decisions.

85. Records withheld from Smith in response to her RTKL request as exempt under the noncriminal exception of the RTKL are also exempt records of confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; and personal identification information under the RTKL, as well as attorney-client and attorney-work product privileges as outlined within this affidavit and the Southeast Regional Office's privilege log.

Internal, Predecisional Deliberative

86. Prior to issuing an NOV and afterwards, DEP employees, with program counsel, met and discussed among themselves the process needed to investigate the multiple incidents, various interim actions to be taken during its investigation, possible strategies to be employed for meetings with the regulated entity, and preliminary discussions and drafts of proposed enforcement actions for all three DEP investigations of ProTechnics. These discussions and drafts were circulated between and amongst DEP personnel through emails, memorandums, and meeting notes for further consideration prior to arriving at final determinations.

87. These documents contain the internal, predecisional discussions of proposed enforcement proceedings, draft NOVs, and drafts of Consent Order and Agreements pertaining to ProTechnics and its activities that were subject of DEP's investigations outlined in paragraphs 26-34 of this affidavit.

88. DEP's internal, predecisional deliberative records involving ProTechnics, that are responsive to Smith's request, included myself and the following DEP personnel:

- David Allard, Director of DEP's Bureau of Radiation Protection;
- Joseph Melnic, Radiation Protection Program Manager
- John Chippo, Radiation Protection Program Supervisor
- Francis Costello, Radiation Health Physicist 2
- Joseph Deman, Radiation Health Physicist 2
- Robert Maiers, Radiation Protection Program Manager

- Bryan Werner, Radiation Protection Program Manager
- James Barnhart, Radiation Health Physicist 2
- George Vargo, Radiation Health Physicist 2
- John Krueger, Acting Radiation Protection Program Manager
- William Wagner, Radiation Health Physicist 2
- Joseph Pryber, Radiation Protection Program Supervisor
- James Yusko, Radiation Protection Program Manager
- Barbara Bookser, Radiation Protection Program Supervisor
- Stephen Socash, Environmental Program Manager
- Stephen Acker, Radiation Protection Program Manager
- Jennifer Kelly, Radiation Health Physicist 2[3]
- Kenneth Reisinger, Deputy Secretary, Office of Waste, Air, Radiation and Remediation
- Richard Croll, Radiation Health Physicist 2
- Jennifer Noll, Radiation Protection Program Supervisor
- Robert Zaccano, Radiation Protection Program Manager
- Scott Walters, Environmental Group Manager, Bureau of Waste Management
- John Spang, Environmental Chemist 1
- Mary Lou Barton, Assistant Counsel, Bureau of Regulatory Counsel
- Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel
- Susan Seighman,[4] Assistant Counsel, Bureau of Regulatory Counsel
- Brooke Reynolds, Radiation Health Physicist 2
- Rachel Diamond, Southcentral Regional Director
- Robert Maiers, Radiation Protection Program Manager
- Rich Janati, Radiation Program Manager, Nuclear Safety Division
- Lisa Forney, Environmental Protection Compliance Specialist[5]

89. Withheld records for this RTKL exception did not involve ProTechnics or any other third-party.

90. The issues deliberated between and among DEP personnel included the following:

- How DEP can best monitor cleanup and removal of ProTechnics radioactive material; and

- DEP's internal coordination efforts with other DEP programs and regions regarding ProTechnics and potential DEP action.

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[3] Jennifer Kelly is now Jennifer Daly.

[4] Susan Seighman is now Susan Despot.

[5] Lisa Forney became a Radiation Protection Program Supervisor in 2014 and currently holds this position.

91. Records considered as being or reflecting DEP's deliberations were communications discussing proposed enforcement actions that it contemplated taking against ProTechnics, draft notification letters, draft NOVs, draft Consent Order and Agreements, draft Addendum, and meeting notes all of which pertained to the NOVs issued by DEP to ProTechnics on January 28, 2010, June 15, 2010, and November 26, 2013; ProTechnic's radioactive materials license and amendments.

92. Records withheld from Smith in response to her RTKL request as exempt under the internal, predecisional deliberative records exception contain no final decisions of DEP.

93. None of the withheld internal, predecisional deliberative records were created after the final decision to which they correlate. For example, no records were created by DEP regarding its January 28, 2010, NOV decision once that NOV was issued. The NOV is the final decision of DEP regarding that matter. Any records regarding the subsequent violation of this NOV pertain to DEP's investigation and internal predecisional discussions of ProTechnics next violation. The records do not contain purely factual information.

94. The final decisions of DEP in the matters deliberated are the following records: NOV dated January 28, 2010; NOV dated June 15, 2010; NOV dated November 26, 2013; a Consent Order and Agreement dated November 2, 2010, and its subsequent addendum, dated May 7, 2014.

95. These records are also subject to protection under the Radiation Protection Act, the public safety and security exemptions of the RTKL, and partially under the noncriminal investigation exemption. Records were also exempt from production as constituting attorney-client and attorney-work product privileges. These exemptions and privileges are additionally explained in this affidavit and are reflected in the Southeast Regional Office's privilege log.

Attorney-Client Privilege/Attorney-Work Product

96. Prior to and after the issuance of the NOVs to ProTechnics, the Radiation Protection Program consulted with its DEP Legal Counsel:

- Kenneth Gelburd, Assistant Counsel, Southeast Regional Office
- Curtis Sullivan, Assistant Counsel, Bureau of Regulatory Counsel

97. These conversations sought legal advice on issues related to DEP's noncriminal investigations of ProTechnics, preparation for meetings with ProTechnics and enforcement actions against ProTechnics.

98. Counsel are licensed attorneys duly admitted by the Pennsylvania Supreme Court as members of the Pennsylvania Bar.

99. These communications between DEP employees and DEP Legal Counsel were memorialized in twenty-four pages of records where legal advice was sought and provided from counsel to myself, including the following DEP employees, or between the following DEP employees and DEP legal counsel:

- Joseph Melnic, Radiation Protection Program Manager
- David Allard, Director of DEP's Bureau of Radiation Protection
- Dennis Angelo, Radiation Protection Program Supervisor
- Stephen Acker, Radiation Protection Program Manager
- Benjamin Seiber, Radiation Health Physicist 2
- John Chippo, Radiation Protection Program Supervisor
- Bryan Werner, Radiation Protection Program Manager
- Robert Maiers, Radiation Protection Program Manager
- Dennis Ferguson, Radiation Protection Program Supervisor
- James Yusko, Radiation Protection Program Manager
- Francis Costello, Radiation Health Physicist 2
- Rachel Diamond, Southcentral Regional Director
- Jennifer Kelly, Environmental Protection Compliance Specialist
- Sandra Martin, Nuclear Safety Specialist, Bureau of Radiation Protection
- Rich Janati, Radiation Protection Program Manager, Nuclear Safety Division

100. These communications also contained the mental impressions of DEP legal counsel regarding the issues for which legal advice was sought as noted in paragraph 97 above.

101. The records withheld as attorney-client privilege do not contain mere facts.

102. At no time were these communications shared outside of DEP, such as with a third-party, as misstated on page seventeen and eighteen of Smith's Appeal Statement.

103. At no time were these communications made in the presence of a third-party.

104. I, as Environmental Program Manager, or any other individual listed, never elected to waive the privileges that protect communications between DEP employees and DEP's legal counsel.

105. Records withheld from Smith in response to her RTKL request as exempt under attorney-client privilege and attorney-work product are also subject to protection under the Radiation Protection Act, the public safety and security, and noncriminal investigation exemptions of the RTKL. These exemptions and privileges are additionally explained in this affidavit and are reflected in the Southeast Regional Office's privilege log.

Personal Identification Information

106. Records noted within this affidavit and withheld under Radiological Protection Act and as noncriminal investigative records under the RTKL, also contain the personal identification information of DEP employees' internal telephone numbers.

107. The internal telephone numbers are unique to the named DEP employee and assigned to them by the Commonwealth for their use. They are secondary numbers.

108. The Bureau, its Divisions, and the Regional Offices provides other general telephone numbers for the public to use when contacting their offices.[6] Those phone numbers are not assigned to individual employees and were not treated as personal identification information for purposes of DEP's response.

109. Records withheld from Smith in response to her RTKL request and exempt as containing personal identification information were not redacted and provided because these records are also subject to protection under the Radiation Protection Act, and fall within the exemptions for public safety and security and noncriminal investigative records under the RTKL, as outlined within this affidavit and contained in the Southcentral Regional Office's privilege log.

110. DEP's Southeast Office did not withhold Priority Mail Delivery Confirmation Numbers, addresses of public companies or names of attorneys representing companies as personal identification information, as stated on page eighteen of Smith's appeal.

Confidential Proprietary Information/Trade Secret

111. ProTechnics, for purposes of complying with DEP's investigations and for obtaining radioactive materials licenses, provided DEP records that were identified at the time of their submission as containing confidential proprietary information (CPI) or trade secrets.

112. ProTechnics represented to DEP that the identified records constitute CPI or trade secrets because the process used to create ProTechnics' product used in its well logging activity is unique to the company and changed the way their business was conducted.

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[6] General office telephones for the Bureau of Radiation Protection, and its divisions, are available at: http://www.dep.pa.gov/About/Regional/SoutheastRegion/Pages/Phone-Directory.aspx#.VvrHs53D-Uk

113. ProTechnics represented to DEP that the identified records constitute CPI or trade secrets because the process used to create ProTechnics' product used in its well tracing activity is unique to the company and changed the way its business was conducted.

114. The Radiological Health Regulations, 25 Pa. Code § 215.14, provide that records of trade secrets or secret industrial processes customarily held in confidence are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act.

115. Additionally, confidential proprietary information and trade secrets are also protected records under the RTKL. 65 P.S. § 67.708(b)(11).

116. DEP also determined that disclosure of these records is not in the public interest because of the public safety and security threat involved with disclosing radioactive materials files to the public.

117. The disclosure of these records is not necessary for DEP to carry out its duties under the Radiological Health Regulations because, by withholding these records, DEP is protecting the public from the hazards of radiation sources as required by the Radiation Protection Act.

118. Submitted with DEP's response to Smith's OOR appeal is the affidavit of Will Williams, Director of U.S. Operations for ProTechnics, detailing the factual basis of why its records constitute confidential proprietary information or trade secrets.

119. Records withheld from Smith in response to her RTKL request as confidential proprietary information are also exempt and protected under the Radiation Protect Act; and the public safety and security exemptions of the RTKL.

* * * * * *

120. A thorough search was conducted by Southeast Regional Office staff for responsive records in the office's custody, control or possession. This record search included personal files, the Southeast Regional Office's file room, and electronically stored information.

121. I communicated with each person in the Radiation Protection Program and directed that all responsive records be identified and provided to a designated individual.

122. Each person in the Radiation Protection Program that I contacted responded to me and/or appropriate staff that each respective person did not have responsive records to this RTKL request, other than those records provided to Smith and/or accounted for in the Southeast Regional Office's privilege log.

123. I reviewed DEP's Privilege Log detailing records in the custody, control, and possession of the Southeast Regional Office and prepared for the OOR in response to Smith's appeal.

124. The Southeast Regional Office Privilege Log is an accurate reflection of the records within DEP's Southeast Regional Office and withheld in response to Smith's request as supported by this affidavit.

125. For any records not provided or accounted for in the Southeast Regional Office's Privilege Log, no other responsive records exist in its custody, control or possession.

4-18-2016
Date

Terry W. Derstine

DEP Northeast Regional Office

AFFIDAVIT OF COLLEEN B. STUTZMAN

I, Colleen B. Stutzman, declare under penalty of perjury pursuant to 18 Pa.C.S. § 4904 that the following statements are true and correct based upon my personal knowledge, information and belief:

1. I have been an employee of the Pennsylvania Department of Environmental Protection (DEP) for more than 33 years.

2. I currently serve as the Assistant Regional Director of the Northeast Regional Office (NERO) of the DEP.

3. The responsibilities of my position include coordinating searches for records in DEP's possession, custody or control that are responsive to RTKL requests assigned to NERO. These searches are conducted in consultation with representatives from all applicable programs administered by or within NERO. I am also responsible for issuing all interim and final responses to assigned Right to Know Law (RTKL) requests, including the providing of records responsive to a submitted request.

4. I have personally reviewed and I am aware of the RTKL request submitted to DEP on February 1, 2016, by Ms. Kendra L. Smith and her February 3, 2016, amendment.

5. This request was assigned to multiple DEP Regional Offices including NERO. NERO's RTKL tracking number for its response was 4200-16-023 (RTKL Request).

6. In consultation with representatives from the various programs administered by NERO, a thorough search was conducted by staff for responsive records in NERO's possession, custody or control. This record search included NERO's file room, staff offices, and electronically stored information.

7. I communicated in writing with each designated representative for all of the Programs administered by NERO and directed that all responsive records be identified and provided to a designated individual.

8. Each Program representative that I contacted responded to me and/or appropriate staff that each respective Program did not have records responsive to the RTKL Request.

9. DEP's Northeast Regional Office does not administer or oversee the oil and gas permitting and inspection programs pursuant to the Oil and Gas Act, 58 Pa.C.S. §§ 2301-2318. The regulation of activities pursuant to the Oil and Gas Act in the eastern portion of the Commonwealth is administered by DEP's Northcentral Regional Office. Consequently, records pertaining to these activities are normally not in the custody, control or possession of the Northeast Regional Office. Despite this fact, a search was conducted as outlined in paragraphs 6-8 above.

10. On March 9, 2016, and after the search by appropriate NERO personnel as outlined above, I issued a final response on behalf of DEP's NERO indicating that NERO does not have the requested records in its custody, control, or possession.

Colleen B. Stutzman
Assistant Regional Director
Northeast Regional Office

4/13/16
Date

Wolfe, Jill

From: EP, Right-to-Know
Sent: Friday, April 22, 2016 5:55 PM
To: Wolfe, Jill; klsmith@smithbutzlaw.com; Arnold, Roy W.
Cc: Barnett, Jacqueline Conforti (DEP)
Subject: Smith v. DEP OOR Dkt 2016-0587, (consolidated) - part 2
Attachments: Affidavit - SCRO.PDF; Affidavit - NCRO.PDF; Affidavit - SWRO.PDF; Affidavit - NWRO.PDF; Affidavit - Will Williams ProTechnics.pdf

Please find attached part 2 of 3 of the Department's above appeal.

Dawn Schaef | Agency Open Records Officer | Chief, Records Mgmt & Library Support
Department of Environmental Protection | Bureau of Office Services
Rachel Carson State Office Building
400 Market St | Hbg PA 17101
Phone: 717.787.2043 | Fax: 717.705.8023
www.dep.pa.gov

DEP Southcentral Regional Office

AFFIDAVIT OF LISA A. FORNEY, MEPC

I, Lisa A. Forney, MEPC, do hereby say, verify and attest to the following statements as true and accurate to the best of my knowledge, information, and belief, under penalty of perjury, and subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

1. I have worked for the Pennsylvania Department of Environmental Protection (DEP) for over ten years and I hold a Bachelor of Arts degree in Environmental Studies from Gettysburg College, and a Master of Environmental Pollution Control (MEPC) degree from Pennsylvania State University.

2. I am employed by DEP in its Southcentral Regional Office, 909 Elmerton Avenue, Harrisburg, Pennsylvania.

3. I am the Radiation Protection Program Supervisor for the Radioactive Materials and Special Projects Section in the Southcentral Regional Office. My chief responsibility is to ensure that radioactive materials are possessed, used, stored, transferred, secured, and transported by authorized licensees to safely deliver services to Pennsylvania citizens. Furthermore, I am responsible for safeguarding security related information. I directly supervise four field inspectors, who are identified as Radiation Health Physicist II positions. I am responsible for ensuring that my staff receives adequate training opportunities and on-the-job training as they complete the formal qualification process to inspect facilities that utilize radioactive materials for medical, industrial, and academic applications within the Commonwealth. I provide each Radiation Health Physicist II with a minimum of 24 hours of retraining within each 24 month cycle to promote current knowledge of changing technologies and security concerns as well as topics relative to the inspection and regulation of radioactive materials licensees. I review all Pennsylvania radioactive materials licenses pertinent to the 29 counties that comprise the

Southcentral and Northcentral Regional Offices. I ensure that each is inspected in a timely and adequate manner. I review and approve all radioactive material inspections and associated documentation prior to disclosing inspection findings to a regulated facility in order to promote clear, concise communications. I provide guidance to the general public on topics related to radioactive materials. I am responsible for initiating enforcement proceedings. I update the Radiation Protection Compliance and Enforcement Guidance document to account for regulatory authority changes and I am accountable for compliance with its standards. In the event that complaints or allegations are received pertinent to the use of radioactive materials, I coordinate the investigation and ensure compliance. I search, retrieve, and redact information pertinent to record requests. Annually, I participate in a nuclear power plant drill to monitor conditions during a variety of simulated situations and I coordinate the formation of field teams to patrol an established radius around the nuclear power plant.

4. Prior to working as the Radiation Protection Program Supervisor for the Radioactive Materials and Special Projects Section, I was employed as an Environmental Protection Compliance Specialist in the Program from 2009-2014. I was responsible for initiating enforcement actions, calculating civil penalties, administering settlement conferences, preparing enforcement documents, tracking compliance, gathering information relative to information requests, and safeguarding security related information.

5. The Radiation Protection Program's (Program) mission is to ensure that public, occupational, and environmental exposure to radiation from man-made and controllable natural sources is as low as reasonably achievable.

6. Since 2008, the Program inspects users of radioactive materials as part of an agreement with the U.S. Nuclear Regulatory Commission. In addition, it inspects all licensed and/or registered radiation-producing machines in Pennsylvania.

7. The Program, working in conjunction with the DEP Central Office's Bureau of Radiation Protection, is divided into two sections to ensure compliance with license, registration, and regulatory requirements:

- Radioactive Materials and Special Projects Section. This section is responsible for complaint/allegation response as well as inspecting all licensed facilities to promote public safety and security. This is accomplished by safeguarding information from unauthorized and/or potentially malicious entities with intention to harm the public.

- X-Ray and Accelerator Section. This section is responsible for inspecting all licensed or registered radiation producing machines and ensuring compliance with state and federal regulations. Radiation producing machines are used for an array of uses including, but not limited to medical and industrial institutions as well as academia.

8. I am familiar with the February 1, 2016, Right-to-Know Law (RTKL) request filed by Kendra L. Smith (Smith), seeking records of Core Laboratories d/b/a ProTechnics, Division of Core Laboratories, LP located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. Her RTKL requested the following as filed:

- Any and all approvals, permits, licenses/licensures, applications for permits and/or licenses, reciprocity letters, reciprocity licenses, reciprocity agreements and/or reciprocity arrangements, including, but not limited to all licenses issued by the Department to Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP (hereinafter, "Protechnics") for use, storage and possession of radioactive materials and/or other licensed material. Additionally, this request seeks any and all investigation reports, Notices of Violation(s), Consent Order and Agreement(s) issued to Protechnics by the Department and/or between Protechnics and the Department for any and all work or services performed by Protechnics at any natural gas well site in the Commonwealth of Pennsylvania. Included in this request is a request for copies of all Notices of Violation issued by the Department to Protechnics, including but not limited to Notices of Violation dated June 15, 2010, January 28, 2010, November 26, 2013, September 13, 2013 and October 14, 2013,

Violation Numbers 677913, 677915, 677914, 682834, 682833, 682829, 682835 and all corresponding inspection reports, field notes and other related writings. Further, this request seeks any and all Consent Order and Agreements between the Department and Protechnics, including, but not limited to, Consent Orders and Agreements dated November 2, 2013 and November 2, 2010.

- Copies of all enforcement activity taken by the Department against Protechnics, including but not limited to Enforcement ID Numbers 305057, 259202 and 263973, as well as all inspection reports completed by the Department regarding Protechnics, including, but not limited to, Inspection ID Numbers 1891418, 1919964, 2147772, 2204156 and 2221258.

- Any and all Radioactive Tracer Well Site Agreements made between Protechnics and any well site operator(s) for each and every well traced in the Commonwealth of Pennsylvania that is or was submitted to the Department, including, but not limited to, the April 7, 2013, Radioactive Tracer Well Site Agreement between Protechnics and a well operator.

- Any and all notifications submitted to the Department by Protechnics or the associated operator or subcontractor regarding Protechnics confirmation that licensed material, including, but not limited to, radioactive material, was returned to the surface at any well site in which Protechnics operated/performed work or services in the Commonwealth of Pennsylvania.

- Any and all documents, correspondence, e-mails and any other communication(s) between Protechnics and the Department and/or Range Resources and the Department regarding Protechnics and any and all work/services performed in the Commonwealth of Pennsylvania by Protechnics.

- Any and all MSDS/SDS (material data safety sheets and safety data sheets) in the possession of the Department regarding any and all products utilized by Protechnics at any well site in Pennsylvania, including, but not limited to, all MSDS/SDS for Protechnics Radioactive Tracer Products, as well as any and all Chemical Frac Tracer ("CFT") products, including, but not limited to, CFT 1000, CFT 1100, CFT 1200, CFT 1300, CFT 2000, CFT 2100, CFT 1900, CFT 1700.

9. I am also familiar with the February 3, 2016, amendment to the Smith request which sought "all drill sites in the Commonwealth including but not limited to the Yeager Drill."

10. As Radiation Protection Program Supervisor, I am familiar with the requested records in DEP's Southcentral Office regarding ProTechnics.

11. A Notice of Violation (NOV) ordinarily indicates that a matter may become the subject of further enforcement action. An NOV is issued when a violation of federal and/or state law or regulation is discovered during an inspection conducted by DEP at a regulated entity's location or through DEP's review of a regulated entity's records.

12. An NOV documents, with specificity, the regulated entity's violations and places it on notice that the conditions are violations.

13. "Fracking" is a colloquial term for hydraulic fracturing, a type of drilling that involves tapping shale and other tight-rock formations. This is accomplished by drilling a mile or more below the surface before gradually turning horizontal and continuing several thousand feet more. Once a well is drilled, cased, and cemented, small perforations are made in the horizontal portion of the well pipe, through which a typical mixture of water (90 percent), sand (9.5 percent) and additives (0.5 percent) is pumped at high pressure to create micro-fractures in the rock that are held open by the grains of sand. Additives play a number of roles, including helping to reduce friction (thereby reducing the amount of pumping pressure from diesel-powered sources, which reduces air emissions) and prevent pipe corrosion.

14. The oil and gas industry uses both sealed and unsealed radioisotopes. Well-tracing studies, such as those carried out by ProTechnics, use radioactive materials trapped in solids (i.e. granular forms), to investigate or "trace" the movement of sand materials to determine the adequacy of well completion. The most common use of these radiotracers is the injection of insoluble granular forms in the well to assess the effectiveness of rock fracturing.

15. Use of radioactive tracers is strictly controlled because the radioactive materials may only be used by individuals who have been properly trained to use them safely. It is important that any company using these materials maintain constant control over them to prevent

any unauthorized use, theft, or loss that could result in harm to public health, safety, and/or the environment. Also per 10 CFR 20.1201(a) that is incorporated by reference in 25 Pa Code § 219.5(a), the licensee must control occupational radiation exposure and ensure that an individual does not receive an excess of 0.05 Sv (5 rem) total effective dose equivalent per year to avoid potential harmful health effects.

16. Users of all radioactive byproduct, source, and specific nuclear material are required to obtain a license from DEP prior to obtaining those radioactive materials.

17. The objective of DEP's licensing program is to ensure that radioactive material is used safely and disposed of properly, and that facilities are free from contamination when licensed operations cease.

18. On March 31, 2008, in order to more efficiently, uniformly, and safely control radioactive material, Pennsylvania entered into an agreement with the NRC to expand DEP's authority over the licensing and regulation of byproduct, source, and special nuclear material. A copy of the agreement is incorporated into this affidavit. *See* Affidavit of David J. Allard, CHP (Allard), Attachment A[1].

19. Operators are required to ensure that licensed material is used, transported, stored, and disposed of in such a way that members of the public will not receive more than 1 mSv (100 mrem) in one year, with no more than 25 percent of that dose limit from a given source, and the dose in any unrestricted area will not exceed 0.02 mSv (2 mrem) in any one hour. 10 CFR 20.1301(a)(1)-(2). DEP regulations must be at least as stringent as the Federal regulations, but not less. Federal standards were created with the understanding that there are natural background

[1] I have read the affidavit of David J. Allard, CHP submitted in response to this appeal. For the sake of eliminating unnecessary duplication of attachments and records submitted on behalf of DEP, Allard's affidavit, and its attachments, are incorporated by reference into this affidavit where noted.

radiation levels, and this dose contribution is not included in the public dose limit. However, facilities that utilize radioactive materials or radiation producing machines are required to use practices, procedures, and control doses that are as-low-as-reasonably-achievable (ALARA) per 10 CFR 20.1101(b) to protect the general health and safety.

20. Operators are required to secure stored licensed material from access, removal, or use by unauthorized personnel. 10 CFR 20.1801. Operators are also required to control and maintain constant surveillance of licensed material when in use and not in storage. 10 CFR 20.1802. These Federal Regulations were created and adopted by DEP because it is imperative that operators maintain control of their materials and do not provide opportunities for unauthorized access or removal of their licensed materials.

21. If these materials were not under constant surveillance, it is possible that radioactive materials could be stolen and used with malicious intent to harm the public through the creation of a radioactive dispersal device (RDD), or "dirty bomb," and cause unwilling or unwanted radiation exposure to others.

22. Exposure to high level radiation, even if it is still contained in the sealed source, can cause cell, tissue and organ damage, loss of limbs, tissue narcosis, cancer and/or death. Exposure to low level radiation may increase an individual's cancer risk.

23. The fact that a source is sealed does not mean that it is shielded to the extent that it would prevent a person from receiving external radiation exposure.

24. Federal and state regulatory agencies maintain records of the amount and type of radionuclides used by licensees. Radionuclides are atoms that have excess energy that makes them unstable. This excess energy can create and emit (from the nucleus or electron orbits) new

radiation, a new particle or photon, or transfer its excess energy to one of its sub-particles causing it to be ejected.

25. The NRC, and approved state agencies, regulate the use of injected tracer radionuclides during hydraulic fracturing. DEP is an approved state agency.

26. I have personal knowledge of DEP's investigation activities that lead to the issuance of NOVs against ProTechnics, a division of Core Laboratories, L.P. (ProTechnics), on January 28, 2010; June 15, 2010; and November 26, 2013.

27. ProTechnics offers services in the field of completion, reservoir, and drilling diagnostics. Completion diagnostic services use image and tracing services to provide direct measurements of a fracture height, zonal coverage, sand (or proppant) distribution, wellbore connectivity, and fracture fluid performance. Reservoir diagnostic services provide surveillance of injected fluid flow within a reservoir. Tracer services for a reservoir diagnostic surveillance are used in cases of a water flood, gas flood, steam flood, and surfactant flood. Drilling diagnostic services uses tracers to determine the amount of drilling fluid invasion in core samples and formation fluid samples that provide the following: the *in situ* solid waste and hydrocarbon saturations of a formation; the residual waste of a formation for log calibration purposes; and contamination in downhole formation fluid samples.

28. The first ProTechnics investigation began on December 22, 2009, when DEP was alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP, through staff in both the Central Office and the Southcentral Regional Office, then began an investigation and worked with the landfill to track the shipment of radioactive residual waste back to its generator—a well site that had engaged ProTechnics.

29. DEP immediately contacted ProTechnics to gather information about the incident and scheduled an in-person compliance conference with ProTechnics personnel. As a result of the conference, ProTechnics agreed to discontinue work using radioactive materials within Pennsylvania under a reciprocity (out-of-state) radioactive material license. Rather, it would request from DEP authorization under a specific DEP radioactive materials license.

30. As a result of DEP's investigation, an NOV was issued against ProTechnics on January 28, 2010, detailing DEP's conclusion that "ProTechnics failed to ensure proper handling and disposal of the radioactive material." A copy of the redacted NOV is incorporated. *See* Allard Affidavit, Attachment B. DEP's investigation also resulted in ProTechnics submitting an incident report detailing the corrective actions taken by ProTechnics as a result of its non-compliance.

31. The second ProTechnics investigation began in May 2010 after DEP was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP staff in both the Central Office and the Southcentral Regional Office, began an investigation by working with the landfill to track the shipment of waste back to a generator—well site that had engaged ProTechnics. DEP again reached out to ProTechnics to discuss the incident and obtain documentation.

32. eFACTS is DEP's Environmental Facility Application Compliance Tracking System (eFACTS) that allows members of the public to search for authorizations, clients, sites and facilities. Users can also search the database to find inspection and pollution prevention visits as well as inspection results data, including enforcement information when violations are noted. DEP provides a name search to use when it is not known if the entity is a client, site, or facility.

33. As a result of the May 2010 incident, Inspection ID Number 1891418 was generated in eFACTS by the Southcentral Regional Office for violations by ProTechnics. These violations consisted of improperly transferring radioactive material to an unauthorized entity and failing to comply with its license conditions. This Inspection ID Number is listed in eFACTS as an "administrative file review" meaning that documents were provided to DEP and a subsequent review revealed violations. These documents relate to the flowback/ loss of control incident and are noted in the Southcentral Regional Office's privilege log. Flowback is a water based solution that flows back to the surface during and after the completion of hydraulic fracturing.

34. As a result of DEP's investigation of this matter, an NOV was issued to ProTechnics on June 15, 2010, detailing why DEP concluded that ProTechnics failed to comply with both DEP's regulations and the conditions of ProTechnics' radioactive materials license. A copy of the redacted NOV is incorporated. Allard Affidavit, Attachment C.

35. To resolve its non-compliance, ProTechnics entered into a Consent Order and Agreement with DEP on November 2, 2010. A copy of the redacted Consent Order and Agreement is incorporated. Allard Affidavit, Attachment D. The Consent Order and Agreement assessed a civil penalty of $29,000 against ProTechnics and required the following corrective actions:

- A requirement that ProTechnics must provide a well site agreement to each well owner/operator to educate them of the proper procedures in the event of a flowback-containing radioactive tracer sand;
- A requirement that ProTechnics must provide an instructional session to each well owner/operator that included radiation safety, proper procedures for handling flowback incidents and acceptable disposal methods for radioactive residual waste;
- A requirement that ProTechnics must notify DEP when a flowback event has occurred and that it verified to see if any radioactive material returned back to the surface of the well;

- A requirement that ProTechnics must complete a survey and area sketch of the flowback area after the event occurred per the specifications of their emergency and operating procedures;

- A requirement that ProTechnics must complete a formal report within 30 days of the flowback event and submit it to DEP;

- A requirement that ProTechnics amend its license to include the submission of a properly executed well site agreement with the well owner/operator within five business days of its completion;

- A requirement that ProTechnics amend its license to add a condition that would require it to coordinate with the well owner/operator to stabilize an area used to contain the radioactive residual waste for onsite in situ decay until complete decay has occurred and that the pit remained intact and did not wash out during weather events;

- A requirement that ProTechnics amend its license to add a condition that it would at least annually inspect the area where the radioactive residual waste is maintained to make sure containment is intact, marked and fenced off;

- A requirement that ProTechnics immediately notify DEP upon confirming that radioactive material detected in a flowback incident; and

- A requirement that ProTechnics amend its license to include proper notification methods to DEP.

36. On March 12, 2013, the Southcentral Regional Office attempted to inspect ProTechnics' use of radioactive materials at a well pad. This inspection was prompted by ProTechnics' submission that it intended to use radioactive materials in Pennsylvania. ProTechnics is required to provide a minimum of 72-hour notice to DEP before beginning work with radioactive material in the state. The attempted inspection is memorialized in eFACTS under Inspection ID 2147772. No inspection report was completed as ProTechnics cancelled work at the well pad on the date the inspection was to take place. No records exist for this Inspection ID.

37. The third ProTechnics investigation began in September 2013 after DEP was again alerted by a landfill that a shipment of residual waste had triggered the landfill's radiation alarm. DEP staff in the Central Office, the Southcentral Regional Office, and the Southeast Regional Office, then began an investigation by working with the landfill to track the shipment of waste back to a well pad generator—that engaged ProTechnics. DEP again reached out to ProTechnics to discuss the incident and obtain documentation.

38. On September 13, 2013, the Southeast Regional Office conducted an inspection of ProTechnics' activities in response to a flowback/loss of control event. This inspection is documented in eFACTS under inspection ID 2204156. Violation numbers 677913 (violation of 10 CFR § 20.1802 for failure to control and maintain constant surveillance of license material), 677914 (violation of 10 CFR § 20.1902(e) for failure to control and post a radioactive materials area) and 677915 (violation of 10 CFR § 30.34 for failure to adhere to the terms and conditions of a license) are also included with this eFACTS entry.

39. On October 13, 2013, an "administrative file review" was conducted by the Southcentral Regional Office and is documented in eFACTS under Inspection ID 2221258.

40. This Inspection ID contains four Violation IDs as follows: 682829 (for violation of 35 PS § 7110.309(b) for failure to comply with a Department Order, namely section 3(b) of the 2010 COA regarding failure to send copies of well site agreements within 5 days of signing) 682833 (for violation of 35 PS § 7110.309(b) for failure to comply with a Department Order, namely section 3(h) of the 2010 COA regarding failure to submit 30 day report following flowback), 682834 (for violation of 35 PS § 7110.309(b) for failure to comply with a Department Order, namely section 3(g) of the 2010 COA regarding failure to conduct and document surveys); and 682835 (for violation of 35 PS § 7110.309(b), failure to comply with a

Department Order, namely section 3(f) of the 2010 COA regarding failure to immediately notify DEP of a flowback occurrence).

41. As a result of DEP's investigation into ProTechnics' activities contained in the preceding paragraph, an NOV was issued to ProTechnics on November 26, 2013, detailing why DEP concluded that ProTechnics failed to comply with DEP's regulations; the Consent Order and Agreement of November 2, 2010; and the conditions of ProTechnics' radioactive materials license. A copy of the redacted NOV is incorporated. Allard Affidavit, Attachment E.

42. To resolve its non-compliance, ProTechnics paid a civil penalty of $75,000 and executed an Addendum to the November 2, 2010, Consent Order and Agreement. The Addendum required ProTechnics to amend its radioactive materials license. ProTechnics' radioactive materials license contains a condition that it must use the approved well site agreement form and any changes to it, would require DEP's approval and a license amendment. The Addendum necessitated an amendment to ProTechnics' license to revise language in the well site agreements to clarify that ProTechnics is the party that is responsible for maintaining control of the radioactive material in a flowback incident and not the well owner/operator party to the agreement. A copy of the redacted addendum to the Consent Order and Agreement is incorporated. Allard Affidavit, Attachment F.

43. For DEP's noncriminal investigations noted in paragraphs 28-42 of this affidavit, DEP routinely performs the following general steps:

a. Upon receiving notification from a waste disposal facility of non-acceptable radioactive material, the Radiation Protection Program will request information from the facility about the load of waste, including but not limited to, the type of waste and volume; the isotope identified; the activity of the isotope; the generator of the waste; the identity of the person(s) who performed a radiation survey; the type of equipment used to survey the waste; the current location of the waste; and a determination from the facility of its plans for the waste load. Because each flowback incident produces waste

containing an isotope that does not meet established exemptions for municipal waste, it cannot be disposed in a landfill. Therefore, a Department of Transportation Special Permit Shipment Approval Form is issued to reject the load and return it to its place of origin.

b. The Regional Radiation Protection Program will contact the waste generator directly and/or assign a radiation health physicist to investigate the flowback/loss of control incident at the well site, seek to identify all parties involved, and investigate how the loss of control of licensed material occurred. Whenever possible, the radiation health physicist will document site conditions in a formal inspection report and obtain photographs of the well site.

c. Once completed, all documentation is submitted to the Regional Radiation Protection Management Staff for review and approval of the inspection findings. Depending upon the severity of the violation, Regional Radiation Protection Management Staff will disclose inspection findings in accordance with its established compliance and enforcement guidance document. If additional information is needed prior to disclosing inspection findings, DEP will schedule a conference.

Radiation Protection Act and Regulations

44. The General Assembly enacted the Radiation Protection Act because radiation exposure has the potential for causing undesirable health effects and the citizens of the Commonwealth should be protected from unnecessary and harmful exposure resulting from use of the radioactive materials, radiation sources, accidents involving nuclear power, and radioactive material transportation. 35 P.S. § 7110.102 and 25 Pa Code 215.1(a).

45. The purpose of the Radiation Protection Act was to establish and maintain a comprehensive program of radiation protection within DEP; provide for licensing and regulations in cooperation with the Federal Government, other states agencies and appropriate private entities; to maintain a comprehensive radiation monitoring program; to maintain a technical emergency radiation response capability within DEP; and establish an emergency response program. 35 P.S. § 7110.102.

46. The Radiation Protection Act designated DEP as the agency of the Commonwealth with the authority to control ionizing radiation sources. 35 P.S. § 7110.301(a). DEP is also charged with developing and conducting a program to control and evaluate the hazards associated with radiation sources and radiation source users. 35 P.S. § 7110.301(c)(1).

47. DEP has the power and duty through the Radiation Protection Act to conduct studies and investigations relating to the control, regulation, and monitoring of radiation sources, and to collect and to disseminate information related to the control of radiation sources and the effects of radiation exposure. 35 P.S. § 7110.301(c)(12)-(13).

48. DEP has the statutory authority to enter a facility for the purpose of determining compliance with the Radiation Protection Act; any license conditions; or any rules, regulations, or orders issued under the Radiation Protection Act. DEP also has the statutory authority in an investigation to conduct tests, inspect or examine any radiation source records, or other physical evidence related to the use of a radiation source. 35 P.S. § 7110.305.

49. DEP's regulations promulgated under the Radiation Protection Act provide DEP with the authority to "enter the premises of a licensee" in order to conduct an investigation or inspection to ascertain whether the licensee is in compliance with the Radiation Protection Act and its regulations. 25 Pa. Code § 215.12(b)(3). Under this regulation, DEP also has the authority to conduct an investigation or inspection to protect health, safety, and the environment. 25 Pa. Code § 215.12(b)(3). This regulation includes the right of DEP to access records and other physical evidence, and requires a licensee to make a report or furnish information to DEP. 25 Pa. Code § 215.12(b)(1)-(2).

50. Section 215.14 of DEP's regulations, 25 Pa. Code § 215.14, provides, in pertinent part:

> The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:
>
> (1) Trade secrets or secret industrial processes customarily held in confidence.
>
> (2) A report of investigation, *not pertaining to safety and health in industrial plants, which would disclose the institution, progress or results of an investigation undertaken by the Department.*

(emphasis added). To put it more clearly, if an investigation report does not pertain to the safety and health of industrial plants, it is not publicly available.

51. There is no common and approved usage for the term "industrial plant." When interpreting undefined terms such as "industrial plant," DEP staff is guided by its common usage in an identical or similar context. DEP staff will reference dictionary definitions, Federal and state environmental statutes, and technical materials. DEP interprets the reference to "industrial plant" in 25 Pa. Code § 215.14(2) as a building for carrying out industrial labor. DEP's interpretation of this term is consistent with the interpretation of the United States Government Accountability Office (GAO).

52. The term "industrial" as an adjective is defined as: of or relating to industry; of or relating to factories, the people who work in factories, or the things made in factories; having a developed industry; having factories that actively make a product; coming from or used in industry; made or used in factories. http://www.merriam-webster.com/dictionary/industrial. Plant is defined as a building or factory where something is made. http://www.merriam-webster.com/dictionary/plant. A building is defined as a structure with a roof and walls. http://www.merriam-webster.com/dictionary/building. A factory is a building or group of buildings where products are made.DEP's investigation of ProTechnics detailed in paragraphs 28-42 of this affidavit did not involve an "industrial plant." Unlike a factory, nothing is

created or made at a well pad. Natural gas at a well pad is extracted from the ground in its raw state and removed from the site. Refining and processing, necessary steps for the creation of an end product, are done at a refinery, which is at another location and in a different type of facility.

53. Well pads are not buildings. They possess no walls or roofs. A well pad is the area that has been cleared for a drilling rig on a plot of land designated for natural gas or oil extraction. The pad is constructed by clearing all trees and obstacles to allow for the engineering of a foundation. An area typically is 3-5 acres of cleared land. The pad is for the drilling derrick and all of its supporting equipment.

54. The well pads where the events took place resulting in DEP's investigations fall outside of the definition. Therefore, the records relating to the ProTechnics investigations are not public under 25 Pa. Code § 215.14(2) as claimed in Smith's appeal statement.

55. Records withheld from Smith as exempt under the Radiation Protection Act and its regulations are also exempt records of confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; personal identification information; public safety and security; and working paper under the RTKL, and as attorney-client and attorney work-product privileges as outlined within this affidavit and the Southcentral Office's privilege log.

Public Safety and Security

56. Radioactive materials files cannot be released because of safety and security reasons explained within this affidavit. These files include, but are not limited to, the following:

- Notice of Violations;

- Consent Order and Agreements;
- License applications, attachments and amendments;
- Inspection reports, photographs, site surveys, drawings, documentation of security controls;
- Internal correspondence amongst DEP staff;
- Documentation from the company regarding the company's general operations and procedures;
- Correspondence from the company to the Department providing greater detail on how the radioactive material is handled;
- Notes, agendas and meeting sign in sheets from meetings between DEP and the company;
- A list of authorized users who handle the radioactive materials;
- Information contained in eFACTS;
- Well site agreements/ acknowledgement forms;
- Sample results; and
- Other information related to the company's operations.

57. If the information contained in radioactive materials files was released to the public and obtained by an individual with criminal intent, the public's health and safety could be severely compromised.

58. For example, inspection reports contain information regarding the documentation of security controls that ProTechnics has in place at each well site. DEP believes this information needs to be protected for safety and security reasons because it describes measures used by ProTechnics to maintain constant control of its radioactive material and how it specifically prevents its removal from the well site. An individual who obtained this information could cause radioactive material to be widely dispersed resulting in greater environmental contamination and public exposure to radioactive material potentially leading to harmful health effects.

59. Furthermore, the release of this sensitive information could pose a potential threat to the personal safety of individuals employed in the use of radioactive materials. If ProTechnics or the well owner/operator's personal contact information was released, a person with malicious intent could target them to obtain unauthorized access to radioactive material.

60. The health consequences related to unintentional exposure to radiation sources range from burns, nausea, vomiting, diarrhea, headaches, cell, tissue and organ damage, narcosis, blindness, cancer and even death. These health consequences represent a significant potential harm to public safety.

61. In other states, individuals have manipulated the information contained in a radioactive materials license and other files to unlawfully obtain radioactive materials resulting in the potential to use those radioactive materials to harm the public. The sensitive nature of the subject matter contained in all radioactive materials files provides an individual with insight regarding the radioactive materials license application process and the documentation needed to fraudulently obtain radioactive materials. This insight includes what a radioactive materials license looks like, the type of training licensees must complete as required by DEP, specifics regarding radiation protection programs, and internal DEP tracking numbers.

62. DEP purposefully redacted the license number from the documents it provided to Smith to limit publically available information that one could use to track down a specific license and obtain the information within the license discussed above. DEP's intent in redacting the license number was to protect the information within the license itself. DEP's intent was not to be vague on whether ProTechnics had a license as claimed in Smith's response. To the contrary, DEP wants the public to know that it regulates companies like ProTechnics for use of radioactive material. That is why DEP released redacted records to Smith with the specific license number redacted and did not redact the words "license number."

63. As pointed out in footnote 1 of Smith's appeal, DEP redacted the eFACTS Inspection ID Number and the eFACTS Enforcement ID Number on the records it provided to her. Information related to DEP's Bureau of Radiation Protection and Regional Radiation

Protection Programs involves sensitive information that is not available on the public website. For a short time in November 2015 and in January 2016, portions of sensitive radiation protection licensing and inspection data were inadvertently available on the public DEP website. Once DEP learned of its error, it immediately took steps to remove this information from its public website. Information related to the Bureau and regional programs is not currently available on the public website.

64. There are documented cases of other regulatory agencies approving license applications from fictitious entities that then fraudulently obtained radioactive materials. Allard Affidavit, Attachment G: *Nuclear Security: Actions Taken by NRC Strengthens Its Licensing Process for Sealed Radioactive Sources Are Not Effective*, Government Accountability Office (2007); Kathleen Day, *Sting Reveals Security Gap at Nuclear Agency*, The Washington Post, July 12, 2007; and David Kestenbaum, *GAO Sting Uncovers Nuclear Security Shortcomings*, NPR, July 12, 2007.

65. The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government spends taxpayer dollars. GAO conducts investigations at the request of congressional committees or subcommittees or is mandated by public laws or committee reports in order to:

a. Audit agency operations to determine whether federal funds are being spent efficiently and effectively;
b. Investigate allegations of illegal and improper activities;
c. Report on how well government programs and policies are meeting their objectives;
d. Perform policy analyses and outlining options for congressional consideration; and
e. Issue legal decisions and opinions, such as bid protest rulings and reports on agency rules.

66. In 2012, the United States Senate Committee on Homeland Security and Governmental Affairs asked GAO to review the security of radiological sources at U.S. industrial facilities. *See* Allard Attachment G: *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014).

67. The conclusion of the GAO's 2014 report notes that challenges exist in reducing the security risks faced by licensees using high-risk industrial radiological sources. The GAO warns that "[i]n the hands of terrorists, these sources could be used to produce a simple and crude, but potentially dangerous weapon, known as a radiological dispersal device or dirty bomb, whereby conventional explosives are used to disperse radioactive material." *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 1.

68. The GAO's report also states that since 1993, there have been 615 confirmed incidents involving theft or loss of nuclear and radioactive materials worldwide. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 2.

69. The GAO's 2014 report explains that the level of protection for radioactive material should be commensurate with the safety and security risk associated with an improper use of the material as follows:

> High risk sealed radiological sources that contain cobalt-60, cesium-137, or iridium-192 could pose a greater threat to the public and the environment and a potentially more significant security risk, particularly if acquired by terrorists to produce a dirty bomb. Industrial radiological sources are used in, among other things: (1) industrial radiography devices for testing the integrity of welds, (2) **well logging devices in oil and gas production,** (3) research irradiators in the aerospace sector, and (4) panoramic and underwater irradiators used to sterilize industrial products.

Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources, Government Accountability Office (2014), pages 6-7 (emphasis added).

70. Some industrial radiological sources are portable and susceptible to theft or loss. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 12.

71. In 2007, the GAO reported that International Atomic Energy Agency (IAEA) officials stated that transportation of high risk radiological sources is the most vulnerable part of the nuclear and radiological supply chain. Furthermore, according to IAEA documents the size of some of these mobile sources could make it easier for unauthorized removal by an individual as the source is small enough to be placed into the pocket of a garment. *Id.* at 12-13.

72. The radioactive material used by ProTechnics is small enough that it can easily be transported and therefore poses a greater risk of theft or loss as highlighted in the GAO's 2014 report discussed above.

73. Furthermore, the report criticizes NRC's practices in regards to safeguarding radioactive material at well logging sites. *Additional Actions Needed to Increase the Security of U.S. Industrial Radiological Sources*, Government Accountability Office (2014), page 39. The GAO's concerns further supports DEP's position of why it should vigorously protect the information for safety and security reasons even if the NRC publishes some information on its website.

74. Other governmental agencies have recognized the threat posed by a radiological attack. Specifically they have stated "Radiological and nuclear terrorism remains one of the greatest threats to our nation's security. An attack with a radiological dispersal device, also known as a "dirty bomb," at a U.S. port would have profound and prolonged impacts to our

nation and the world.". *See* Allard Affidavit G: *Written testimony of DNDO Director Huban Gowadia for a House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation hearing titled "Prevention of and Response to the Arrival of a Dirty Bomb at a U.S. Port"*, U.S. Department of Homeland Security (2015) page 1. *See also Radiological Attack: Dirty Bombs and Other Devices*, U.S. Department of Homeland Security and The National Academies (2004).

75. The articles and reports highlight the nexus between the disclosure of radioactive materials license files and the realistic scenarios DEP is seeking to avoid.

76. Recent events highlight why information related to radioactive material needs to be protected. As emphasized in a recent CNN article, the ISIS terrorists who bombed the airport and attacked the metro in Brussels, were secretly videotaping a Belgian nuclear official. The official worked at a facility that had radiological material that terrorists could use for a "dirty bomb." A copy of the CNN article is incorporated into this affidavit as Attachment 1. Joe Cirincione, *Nuclear terrorist treat bigger than you think*, CNN, April 1, 2016, http://www.cnn.com/2016/04/01/opinions/nuclear-terrorism-threat-cirincione/index.html.

77. The CNN article also underscores how even small amounts of radioactive material, such as the size of a pencil eraser, can be used to spew a radioactive cloud over tens of square blocks. Such a cloud could cause the area to be uninhabitable for years until scrubbed clean. This could cause economic losses in the trillions to the affected area and an increased risk of cancer to those exposed to the cloud.

78. The article is consistent with DEP's position that the best way to prevent terrorist attacks is to eliminate, reduce, and secure all supplies of nuclear materials so that terrorists would find it too difficult to get them.

79. DEP did not provide the following information for ProTechnics' employees: names, home mailing addresses, phone numbers, or email addresses. As highlighted in the CNN article, employees who manage radioactive material have been targeted by terrorist groups. As Smith states in her appeal and in Attachment 2, it is true that ProTechnics' has it headquarter address and main telephone listed on its website. However, the names of the individuals, their direct lines, and email addresses are not provided. DEP redacted mailing addresses to prevent the possibility of someone with malicious intent would be able to narrow down which specific office the individual from ProTechnics is assigned. This effort was made in order to avoid public safety concerns like those discussed in the CNN article.

80. Although, the half-life of the radioactive materials possessed by ProTechnics is less than 120 days, the records contained in the ProTechnics file (and in any radioactive materials licensee's file), are still sensitive if made public as a tool for obtaining access to licensed materials as previously noted. Half-life refers to the amount of time it takes for one half of a quantity of radioactive material to become stable. The overall radioactivity is therefore dependent upon the original quantity.

81. Furthermore, radioactive material with a half-life of less than 120 days can still be used to harm the public and cause environmental contamination and lead to detrimental health effects. Even after one or more half-lives are reached through the decay process, radioactive material is still radioactive and will result in a person being exposed to radiation. While the rate of exposure may have decreased, prolonged contact may result in radiation effects ranging from burns, headaches, diarrhea, cell, tissue and organ damage, cancer, and/or possibly death.

82. Smith did obtain information regarding ProTechnics' radioactive materials license issued by the agreement states of Texas and Colorado for work using radioactive material in their

states. Smith was also able to obtain the NRC event notification report for an event that Colorado reported to the NRC. As discussed in Allard's Affidavit, including Attachment A, the Commonwealth of Pennsylvania is an NRC Agreement State and therefore is the agency with current authority to regulate most radioactive materials within the Commonwealth.

83. Agreement states must meet minimum requirements to remain an agreement state such as providing the NRC with event notification reports. An agreement state also undergoes a periodic Integrated Materials Performance Evaluation Program (IMPEP).

84. During an IMPEP, the NRC evaluates the agreement state by using performance indicators that include the following: its materials inspection program; the technical quality of inspection, staffing and training; the quality of licensing actions; and the technical quality of incident and allegation activities.

85. The evaluation's purpose is to determine whether an agreement state is compatible with NRC's established program. Agreement states, like Pennsylvania, do not have direct control over how the NRC decides to release the event notification information on the NRC website once it provides the information to the NRC.

86. Federal regulatory agencies and their records, such as the NRC, are bound by the Freedom of Information Act, 5 U.S.C. § 522, and may make certain information publically available. Similarly, Texas and Colorado regulatory agencies are bound by state record laws and may make certain information publically available. However, DEP protects information related to radiation sources to the full extent allowed by Commonwealth law to prevent fraudulent acquisition of radioactive materials within the Commonwealth and the subsequent threat that would cause to the health, safety, and security of its citizens.

87. DEP's radioactive materials files also contain information regarding the current location and quantity of radioactive materials possessed by licensees. Making this information available to the public presents a risk "reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity."

88. Location and quantity information, should it be publicly available, could be used by terrorists or other criminals who want to obtain radioactive materials or create an increased threat to the licensee housing the materials thus making it a target of criminal activity. An increased threat would exist of exposing other persons to radioactive materials, and the associated health risks, after the materials were taken from the licensee. This is further highlighted in Allard Affidavit, Attachment G and Attachment 1 to this affidavit.

89. Waste disposal and processing facilities, like landfills, are regulated by DEP's Radiation Protection Program, in addition to other DEP programs. Landfills are statutorily required to submit a Radiation Action Plan (Plan) also known as a "Plan X" to DEP under 25 Pa. Code § 273.223. The submittal of a Plan became a requirement in December 2000. Landfills already permitted as of December 2000, applied for a permit modification to incorporate the use of the Plan. From this point in time, new facilities submitted the plan as part of their permit application.

90. The purpose of the plan is to protect the environment and the public's health, safety, and welfare from the possible dangers of radioactive material delivered to solid waste processing and disposal facilities.

91. The plan is reviewed by staff in DEP's waste management and radiation protection programs to ensure that a comprehensive radiation monitoring program is in place. DEP also reviews the plan to see that the facility established an adequate radiation protection

program that effectively monitors waste entering the landfill, screens for radioactive material, and implements proper actions in the event that radioactive material is present in a waste load.

92. DEP created a guidance document on a Plan's contents. A copy of the guidance document is incorporated into this affidavit as Attachment 2. The plan submitted by the landfill must include the following:

- Discussion of the type of monitoring equipment that will be used to monitor inbound waste for radioactive material;
- A list of individuals responsible for monitoring radioactive materials in the inbound waste;
- An established isolation area for waste to be temporarily stored until it can be tested to determine what isotope is present and how much activity is present;
- Established action levels for responding to radiation alarms and proper procedures to ensure compliance; and
- Established points of contact with DEP to report radiation alarms.

93. As noted by Smith within her appeal, DEP did not redact the names of the landfills where ProTechnics' radioactive tracers in the flowback from the well were taken for disposal. However, ProTechnics' radioactive tracers were not disposed of at these landfills.

94. ProTechnics' radioactive tracers triggered an alarm upon each of the three investigated arrivals to the landfill. Consequently, the landfill followed its Radioactive Action Plan and contacted DEP.

95. DEP subsequently issued a DOT Special Permit 11406 Shipment Approval Form. This special permit allowed the landfill to reject the noncompliant load and return it to its point of origin at the well pad. Since the load containing radioactive material was rejected, it was never disposed of at the landfill. With no radioactive material on-site, and no public security concerns, DEP saw no reason to exclude the landfill names in its response to Smith's RTKL request.

96. There are no Pennsylvania landfills specifically licensed to receive low-level radioactive waste. Therefore, ProTechnics' radioactive tracers cannot be buried on any landfill site within the Commonwealth.

97. Despite Smith's contentions within her appeal, the gas well sites where the radioactive tracer materials are injected are not akin to landfills. Additional safety concerns exist for gas well sites. Gas well sites involve highly flammable gas. Workers, as well as government inspectors, are required to wear flame retardant clothing and complete safety training before entering the well pad.

98. Gas well sites also contain large drilling equipment. Often, the visibility of an operator is obstructed with considerable blind spots that can result in someone being struck by the heavy equipment resulting in loss of limbs, blunt trauma, or death depending on the piece of equipment. According to the United States Department of Labor, Occupational Safety and Health Administration, the job fatality rate for oil and gas extraction workers is seven times greater than the rate for all other U.S industries. *See* https://www.osha.gov/SLTC/oilgaswelldrilling/.

99. If the gas well names were provided, someone with malicious intent would have access to a highly volatile site that contains both radioactive and highly flammable materials. A person could cause great harm to workers at the site, in addition to the general public, such as explosions, fires, and exposure to radioactive material that can cause a number of detrimental health effects as explained throughout this affidavit.

100. There are extensive regulatory controls in place to protect the public from radiation exposure, none of which require public disclosure of the location of radioactive materials. These regulatory controls, incorporated by reference by DEP in 25 Pa. Code § 219.5(a), include the following:

- Each licensee shall develop, document, and implement a radiation protection program commensurate with the scope and extent of licensed activities and sufficient to ensure compliance with the provisions of this part. 10 CFR 20.1101(a).

- Each licensee shall conduct operations so that - (1) The total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contributions from background radiation, from any administration the individual has received, from exposure to individuals administered radioactive material and released under § 35.75, from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage in accordance with § 20.2003, and (2) The dose in any unrestricted area from external sources, exclusive of the dose contributions from patients administered radioactive material and released in accordance with § 35.75, does not exceed 0.002 rem (0.02 millisievert) in any one hour. 10 CFR 20.1301(a)(1)-(2).

- The licensee shall make or cause to be made, as appropriate, surveys of radiation levels in unrestricted and controlled areas and radioactive materials in effluents released to unrestricted and controlled areas to demonstrate compliance with the dose limits for individual members of the public in § 20.1301. 10 CFR 1302(a).

- A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA). Determination of the levels which are ALARA must take into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal. 10 CFR 20.1402.

- The licensee shall secure from unauthorized removal or access licensed materials that are stored in controlled or unrestricted areas. 10 CFR 20.1801.

- The licensee shall control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area and that is not in storage. 10 CFR 20.1802.

- Unless otherwise authorized by the Commission (Department), the symbol prescribed by this part shall use the colors magenta, or purple, or black on yellow background. The symbol prescribed by this part is the three-bladed design. (1) Cross-hatched area is to be magenta, or purple, or black, and (2) The background is to be yellow. 10 CFR 20.1901(a).

- The licensee shall post each area or room in which there is used or stored an amount of licensed material exceeding 10 times the quantity of such material specified in appendix C to part 20 with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIOACTIVE MATERIAL(S)" or "DANGER, RADIOACTIVE MATERIAL(S)." 10 CFR 20.1902(e).

101. The regulatory requirements described in Paragraph 100 illustrate the extensive controls DEP requires radioactive materials licensees to employ in order to protect the public on a daily basis from the potential health consequences of radiation exposure.

102. Within Smith's appeal it states that the Southcentral Regional Office disclosed an NOV directed to Citrus Energy Corporation. DEP's Southcentral Regional Office did not provide any NOVs that discussed Citrus Energy Corporation because DEP's Southcentral Regional Office found this record unresponsive to Smith's RTKL request. Any document that Smith attached to her RTKL appeal in Attachment 5 is erroneously attributed to the Southcentral Regional Office.

103. DEP granted Smith's RTKL request with respect to the NOVs, Consent Order and Agreements, and Addendum, but redacted information that could compromise public health, safety, and security. Among the redacted information were the isotope type, activity concentration, quantities, licensee contact information, radioactive materials license number, specific license conditions, authorized locations of use, well owner/operator name and contact information, and internal DEP tracking numbers. This information was redacted because its public release would create the potential for radioactive material to be fraudulently obtained, misused, or stolen resulting in harm to the public's health, safety, and environment as noted within this affidavit.

104. However, DEP determined that it was in the public's interest, to the extent possible, to release redacted NOVs, Consent Order and Agreements, and an Addendum, because these records reflect DEP's final decisions regarding its investigation into ProTechnics' activities.

105. In light of the public safety and security issues raised in this affidavit and contained in Allard Attachment G and Attachment 1 of this affidavit, DEP believes that withholding radioactive materials files from public access is necessary to protect public health, safety, and security from radiation exposure.

106. Records withheld from Smith in response to her RTKL request as exempt under the public safety and security exception of the RTKL are also exempt records of confidential proprietary information; internal, predecisional deliberations; noncriminal investigations; personal identification information; and working paper under the RTKL, as well as attorney-client and attorney-work product privileges as outlined within this affidavit and the Southcentral Office's privilege log.

Noncriminal Investigations

107. Pursuant to 35 P.S. § 7110.305(a) and 35 P.S. § 7110.301(c)(12) of the Radiation Protection Act, DEP has the following statutory authority to conduct investigations:

> The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

It also states DEP has the authority to:

> Encourage, participate in or conduct studies, investigations, training, research, remedial actions and demonstrations relating to control, regulation and monitoring of radiation sources.

35 P.S. § 7110.301(c)(12).

108. Additionally, Section 215.12 of the Radiation Regulations states:

(a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at permanent sites or facilities of use identified in a license or registration issued under this article.

(b) *Rights of the Department.* The Department and its agents and employees will:

(1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.
(2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.
(3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.

(c) *Inspections and investigations by the Department.* The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.

(d) *Additional inspections and investigations.* The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated."

109. Pursuant to these statutory and regulatory authorities, DEP conducted an official investigation at ProTechnics' temporary job sites described in this affidavit because of the series of events detailed in Paragraphs 28-42 of this affidavit.

110. Records exist that pertain to the three noncriminal investigations DEP conducted and consist of inspection reports prepared by the Radiation Protection Program, photographs, internal pre-enforcement documents such as emails, draft enforcement documents, and staff reviews of ProTechnics' radioactive materials license registration.

111. These records do not contain purely factual information.

112. These records exist and were solely created because of DEP's investigations into ProTechnics activities as outlined within this affidavit and as required under the Radiation Protection Act and its regulations.

113. Releasing these records would reveal the institution and progress of DEP's noncriminal investigations into its investigation of ProTechnics as noted within paragraphs 28-42 of this affidavit.

114. Noncriminal investigative records redacted and provided to Smith in response to her RTKL request memorialize the imposition of a fine or civil penalty; the suspension, modification, or revocation of a license, permit, registration, certification or similar authorization issued by DEP; or is an executed settlement agreement, redactions were required.

115. The information redacted within the noncriminal investigative records produced is subject to protection under the public safety and security exception of the RTKL as outlined within this affidavit. The redacted information included the isotope type, activity concentration, quantities, licensee contact information, radioactive materials license number, specific license

conditions, authorized locations of use, well owner/operator name and contact information, and internal DEP tracking numbers.

116. The redacted information, if made generally public, creates a public safety and security issue because it is possible that the information could be used with malicious intent to harm the public such as the creation of a "dirty bomb" and/or provide unwilling radiation exposure to others causing harmful health effects as previously noted. However, DEP believed it was in the public interest, to the extent possible, to release redacted NOVs and Consent Order and Agreements because these records reflect DEP's final decisions.

117. Records withheld from Smith in response to her RTKL request as exempt under the noncriminal exception of the RTKL are also exempt records of confidential proprietary information; internal, predecisional deliberations; public safety and security, and personal identification information and working paper under the RTKL, as well as attorney-client and attorney-work product privileges as outlined within this affidavit and the Southcentral Office's privilege log.

Internal, Predecisional, Deliberative Records

118. Prior to issuing an NOV and afterwards, DEP employees, with program counsel, met and discussed among themselves the process needed to investigate the multiple incidents, various interim actions to be taken during its investigations, possible strategies to be employed for meetings with the regulated entity, and preliminary discussions and drafts of proposed enforcement actions for all three investigations. These discussions and drafts were circulated among DEP personnel through emails, memorandums, and meeting notes for further consideration prior to arriving at final determinations.

119. These documents contain the internal, predecisional discussions of proposed enforcement proceedings, draft NOVs, and drafts Consent Order and Agreements regarding ProTechnics, and its activities, described in paragraphs 28-42 of this affidavit.

120. DEP's internal, predecisional deliberative records pertaining to ProTechnics, and its activities, as described in paragraphs 28-42 of this affidavit included myself and the following DEP personnel:

- Kenneth Reisinger, Deputy Secretary, Office of Waste, Air, Radiation and Remediation
- Joseph Melnic, Radiation Protection Program Manager
- Terry Derstine, Radiation Protection Program Manager
- Jennifer Kelly, Radiation Health Physicist 2[2]
- Joseph Deman, Radiation Health Physicist 2
- John Chippo, Radiation Protection Program Supervisor
- Robert Maiers, Radiation Protection Program Manager
- Bryan Werner, Radiation Protection Program Manager
- James Barnhart, Radiation Health Physicist 2
- George Vargo, Radiation Health Physicist 2
- John Krueger, Acting Radiation Protection Manager
- William Wagner, Radiation Protection Program Supervisor
- Joseph Pryber, Radiation Protection Program Supervisor
- Francis Costello, Radiation Health Physicist 2
- James Yusko, Radiation Protection Program Manager
- Barbara Bookser, Radiation Protection Program Supervisor
- Stephen Socash, Environmental Program Manager
- Neil Shader, Press Secretary 2, Office of Communications
- David Allard, Bureau Director
- Robert Zaccano, Radiation Protection Program Manager
- Benjamin Seiber, Radiation Health Physicist 2
- Curtis Sullivan, Assistant Counsel, Bureau of Regulatory Counsel
- Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel
- Keith Salador, Assistant Counsel, Bureau of Regulatory Counsel
- Mary Lou Barton, Assistant Counsel, Bureau of Regulatory Counsel
- Rachel Diamond, Southcentral Regional Director
- Frank Peffer, Radiation Health Physicist 2
- Stephen Acker, Radiation Protection Program Manager
- Brooke Reynolds, Radiation Health Physicist 2
- Robert Yowell, Regional Environmental Fields Operations Director

[2] Jennifer Kelly is now Jennifer Daly

- George Jugovic, Regional Environmental Field Operations Director
- Kelly Burch, Special Assistant, Oil and Gas Strategic Initiatives
- Jennifer Means, Environmental Program Manager, Office of Oil and Gas Management
- Alan Eichler, Environmental Program Manager, Office of Field Operations
- Craig Lobins, District Manager, Office of Oil and Gas Management
- Martin Seigel, Assistant Counsel, Southcentral Regional Office,
- Rich Janati, Radiation Program Manager, Nuclear Safety Division,
- Tonda Lewis, Radiation Protection Program Supervisor
- Stevan Portman, Assistant Counsel, Southcentral Regional Office
- Patrick Brennan, Environmental Group Manager
- William Tomayko, Waste Management Program Manager
- Anita Stainbrook, Environmental Group Manager
- Richard Croll, Radiation Health Physicist 2
- Jennifer Niki Noll, Radiation Protection Program Supervisor
- Anthony Rathfon, Environmental Program Manager
- Michael Sherman, Field Operations Deputy Director
- Mark Carmon, Environmental Community Relations Specialist
- Susan Seighman, Assistant Counsel, Bureau of Regulatory Counsel
- Michael Bedrin, Regional Director
- Barbara Sexton, Acting Deputy Secretary
- John Repetz, Environmental Community Relations Specialist
- Nels Taber, Regional Director
- Stefanie Muzic, Clerical Supervisor 2
- Martin Sokolow, Regional Counsel
- John Spang, Environmental Chemist 1
- Scott Walters, Environmental Group Manager
- Julie Lalo, Communications Director

121. Withheld records for this RTKL exception did not include ProTechnics or any other third-party.

122. The issues being deliberated among DEP personnel in the records withheld, included the following:

- Steps to take by DEP regarding the first ProTechnics investigation;
- DEP staff preparations for meetings with ProTechnics representatives;
- Potential actions for DEP to take following in-person meeting with ProTechnics;
- How DEP can best monitor cleanup and removal of ProTechnics radioactive material;
- DEP's enforcement options and possible actions after the first ProTechnics investigation;
- DEP's reviews of ProTechnics' license application;

- DEP's reviews of sample results;
- Proposed steps DEP could take regarding the second ProTechnics investigation;
- DEP's enforcement options and possible actions after the second ProTechnics investigation;
- DEP's internal coordination efforts with other DEP programs regarding ProTechnics and potential DEP action;
- DEP's review of reports submitted by ProTechnics; and
- Plans by DEP personnel to brief upper level management regarding ProTechnics.

123. Records considered as being, or reflecting, DEP's deliberations were emails discussing proposed enforcement actions that DEP contemplated taking against ProTechnics; draft notification letters; draft NOVs; draft Consent Order and Agreements; draft Addendum; internal DEP emails; meeting notes pertaining to the NOVs issued by DEP to ProTechnics on January 28, 2010, June 15, 2010, and November 26, 2013; ProTechnics' radioactive materials license application, and ProTechnics' radioactive materials license amendments.

124. Records withheld from Smith in response to her RTKL request as exempt under the RTKL's internal, predecisional deliberative records exception contain no final decisions of DEP.

125. None of the withheld internal, predecisional deliberative records were created after the final decision to which they correlate. For example, no records were created by DEP regarding its January 28, 2010, NOV decision once the NOV was issued. The NOV is the final decision of DEP regarding that matter. Any records regarding the subsequent violation of this NOV by ProTechnics pertain to DEP's investigation and internal predecisional discussions of ProTechnics next violation. The records do not contain purely factual information.

126. The final decisions of DEP in the matters deliberated are the following records: the NOV dated January 28, 2010; the NOV dated June 15, 2010; the NOV dated November 26, 2013; a Consent Order and Agreement dated November 2, 2010, and its subsequent addendum dated May, 7, 2014.

127. These records are also subject to protection under the Radiation Protection Act, the public safety and security, confidential proprietary information, personal identification information, working papers exemptions of the RTKL, and partially under the noncriminal investigation exemption. Records were also exempt from production as constituting attorney-client and attorney-work product privileges. These exemptions and privileges are additionally explained in this affidavit and are reflected in the Southcentral Office's privilege log.

Attorney-Client Privilege/Attorney-Work Product

128. Before and after the issuance of the NOVs to ProTechnics, the Program consulted with its DEP legal counsel[3]:

- Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel
- Mary Lou Barton, Assistant Counsel, Bureau of Regulatory Counsel
- Curtis Sullivan, Assistant Counsel, Bureau of Regulatory Counsel
- Keith Salador, Assistant Counsel, Bureau of Regulatory Counsel
- Martin Sokolow, Regional Counsel
- Stevan Portman, Assistant Counsel
- Martin Siegel, Assistant Counsel

129. These conversations sought legal advice on issues related to DEP's noncriminal investigations of ProTechnics, preparation for meeting with ProTechnics, enforcement actions against ProTechnics, ProTechnics' license application, ProTechnics' reporting obligations, draft tracer well site agreements, draft consent order and agreements, and the issued NOVs.

130. Counsel are licensed attorneys duly admitted by the Pennsylvania Supreme Court as members of the Pennsylvania Bar.

[3] Scott Perry is currently DEP's Deputy Secretary of the Office of Oil and Gas Management. At the time his legal advice was sought and issued, he was an attorney within DEP's Bureau of Regulatory Counsel.

131. These communications between DEP employees and DEP legal counsel were memorialized in 22 records where legal advice was sought and provided from legal counsel to myself, including the following DEP employees, or between the following DEP employees and legal counsel:

- Joseph Melnic, Radiation Program Manager
- John Chippo, Radiation Program Supervisor
- John Krueger, Acting Environmental Program Manager
- David Allard, Bureau Director
- Francis Costello, Radiation Health Physicist 2
- Terry Derstine, Radiation Program Manager
- Stephen Acker, Radiation Protection Program Manager
- Robert Yowell, Regional Environmental Field Operations Director
- George Jugovic, Regional Environmental Field Operations Director
- Kelly Burch, Special Assistant, Oil and Gas Strategic Initiatives
- Jennifer Means, Environmental Program Manager, Office of Oil and Gas Management
- Alan Eichler, Environmental Program Manager, Office of Field Operations
- Joseph Deman, Radiation Health Physicist 2, and
- Neil Shader, Press Secretary 2, Office of Communications.

132. These communications also contained the mental impressions, conclusions, opinions, and written work product created by DEP legal counsel regarding the issues for which legal advice was sought as noted in paragraph 129 above.

133. At no time were the communications of DEP legal counsel shared with anyone outside of DEP, such as with a third party.

134. At no time were the communications of DEP legal counsel made in the presence of a third party.

135. Neither I, nor any other individual listed in Paragraphs 128 and 131 above, elected to waive the privileges that protect the Bureau's communications between them and DEP's legal counsel.

136. Records withheld from Smith in response to her RTKL request as exempt under attorney-client privilege and attorney-work product are also subject to protection under the Radiation Protection Act, and the public safety and security, noncriminal investigation, and internal, predecisional deliberation exemptions of the RTKL. These exemptions and privileges are additionally explained in this affidavit and are reflected in the Southcentral Office's privilege log.

Personal Identification Information

137. Records noted within this affidavit and withheld under the Radiation Protection Act, and as noncriminal investigative and internal, predecisional deliberative exceptions under the RTKL, also contain the personal identification information of DEP employees' internal telephone numbers.

138. The internal telephone numbers are unique to the named DEP employees and assigned to them by the Commonwealth for their use. They are secondary numbers.

139. The Bureau, its Divisions and the Regional Offices provide other general telephone numbers to the public to use when contacting their offices. Those phone numbers are not assigned to individual employees and were not treated as personal identification information for purposes of DEP's response.

140. Records withheld from Smith in response to her RTKL request and exempt as containing personal identification information were not redacted and provided to Smith because these records are also subject to protection under the Radiation Protection Act, and fall within the exemptions for public safety and security, noncriminal investigative records, and internal, predecisional deliberations under the RTKL, as outlined within this affidavit and contained in the Southcentral Office's privilege log.

Confidential Proprietary Information/Trade Secret

141. ProTechnics, for purposes of complying with DEP's investigations and for obtaining a radioactive materials license, provided DEP records that were identified at the time of their submission as containing confidential proprietary information (CPI) or trade secrets.

142. ProTechnics represented to DEP that the identified records constitute CPI or trade secrets because the process used to create ProTechnics' product used in its well tracing activity is unique to the company and changed the way its business was conducted.

143. The Radiation Protect Act Regulations, 25 Pa. Code § 215.14, provide that records of trade secrets or secret industrial processes customarily held in confidence are not available for public inspection, unless DEP determines that disclosure is in the public interest and is necessary for it to carry out its duties under the act.

144. Additionally, confidential proprietary information and trade secrets are also protected records under the RTKL. 65 P.S. § 67.708(b)(11).

145. DEP also determined that disclosure of these records is not in the public interest because of the public safety and security threat involved with disclosing radioactive materials files to the public.

146. The disclosure of these records is not necessary for DEP to carry out its duties under the Radiation Protection Act Regulations because, by withholding these records, DEP is protecting the public from the hazards of radiation sources as required by the Radiation Protection Act.

147. Submitted with DEP's response to Smith's OOR appeal is the affidavit of Will Williams, Director of U.S. Operations for ProTechnics, detailing the factual basis of why its records constitute confidential proprietary information or trade secrets.

148. Records withheld from Smith in response to her RTKL request as confidential proprietary information are also exempt and protected under the Radiation Protect Act and the public safety and security exemptions of the RTKL.

Personal Notes

149. Approximately 42 Records also contain the personal notes prepared by DEP staff and used solely for that employee's own personal use.

150. The handwritten records were personal notes of Steven Acker, Radiation Protection Program Manager and myself. Each set of notes remained in the takers sole and exclusive possession and used to refresh recollections. The notes were not shared with others but created for the takers own personal use. The subject of these notes was the pending enforcement about the flowback/loss of control incident involving ProTechnics that was the subject of a DEP investigation. The notes were not taken at the direction of anyone at DEP and were created in the sole discretion of each employee.

151. These records were not redacted and provided to Smith because they are exempt under the personal notes exemption of the RTKL and are also subject to protection under the Radiological Protection Act, and protected under the RTKL as exemptions of public safety and security; internal, predecisional deliberations, and noncriminal investigation exemptions of the RTKL as described within this affidavit.

* * * * * *

152. A thorough search was conducted by Southcentral Regional Office staff for responsive records in the office's custody, control, or possession. This record search included Southcentral Regional Office's file room, staff offices, and electronically stored information.

153. I communicated with all members of the Southcentral Radiation Protection Program and directed that all responsive records be identified and provided to me.

154. Each member of the Southcentral Radiation Protection Program that I contacted responded to me and/or appropriate staff that he or she did not have records responsive to the RTKL Request.

155. The Southcentral Regional Office does not have in its custody, control, or possession the following records requested by Smith: Inspection ID Number 1919964; September 13, 2013, NOV; October 14, 2013, NOV; and any and all documents, correspondence, emails, or any other communications between ProTechnics and the Department, and/or Range Resources and the Department, regarding ProTechnics and its work performed in the Commonwealth of Pennsylvania.

156. I reviewed the Southcentral Regional Office's Privilege Log detailing records in its custody, control, and possession prepared for the OOR in response to Smith's appeal.

157. The Privilege Log contains descriptions of approximately 1,299 pages of records, including 29 pages of redacted records previously provided to Smith. This number is less than the approximate 1,681 pages of records quoted in Southcentral Regional Office's March 9, 2016, response. The number is less because, upon further review of the records, several duplicates were found.

158. The Southcentral Office Privilege Log is an accurate reflection of the records within DEP's Southcentral Office as explained within this affidavit.

April 20, 2016
Date

Lisa A. Forney
Lisa A. Forney, MEPC