COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME I

(Pages 1—430)

1988

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1988

Chairman.....MAXINE WOELFLING

Member .....WILLIAM A. ROTH

Member .....ROBERT D. MYERS

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1988 EHB 1

FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1988.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended. Section 21 of Act 275, §1921-A(a) of the Administrative Code, empowered the Board:

> "to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources."

1988

ADJUDICATIONS

OPINIONS AND ORDERS

1988 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY OF LEBANON and PINE GROVE TOWNSHIP	:	
v.	:	**EHB Docket No. 87-391-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PINE GROVE LANDFILL, INC. Permittee	:	**Issued:** January 8, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The County of Lebanon's appeal from the issuance of a Department of Environmental Resources' Solid Waste Management Permit is dismissed for lack of standing. Appellant, a non-situs county, has not alleged any interest that may be substantially, directly and immediately affected by the issuance of the Permit.

OPINION

On September 14, 1987, the County of Lebanon ("County") filed an appeal from the August 14, 1987, issuance of a permit authorizing Pine Grove Landfill, Inc. ("Permittee") to operate a landfill in Pine Grove Township, Schuylkill County. In its appeal, the County alleged that the proposed landfill's proximity to Swatara Creek poses a threat of pollution to water supplies and farmland in the County. While the County reserved the right to file supplemental reasons in support of its appeal, it has not done so.

On October 19, 1987, Permittee filed a Motion to Dismiss the County's appeal for lack of standing. The County answered this Motion on November 17, 1987, asserting that the facts alleged in its appeal are sufficient to establish standing. Both parties have filed Memoranda of Law in support of their positions.

The appeal rights of a county in which a landfill is proposed to be sited have been confirmed by Franklin Township v. DER, 499 Pa. 162, 452 A.2d 718 (1982), and Susquehanna County v. DER, 500 Pa. 512, 458 A.2d 929 (1983). The appeal rights, if any, of a non-situs county have not been resolved. The Permittee asserts that such a county should not be allowed to appeal as a matter of law, analogizing the situation to zoning cases where even abutting landowners have no right to appeal the issuance of zoning permits in adjacent municipalities. Cablevision v. Zoning Hearing Board, 13 Pa. Cmwlth. 232, 320 A.2d 388 (1974).

We are not prepared to accept this argument. While situs clearly establishes standing to appeal, the converse is not necessarily so. In certain fact situations, a non-situs county may be so detrimentally affected by the operation of a landfill that denying it standing to appeal would result in substantial injustice. (See, e.g., Borough of Crafton v. City of Pittsburgh, 113 P.L.J. 293 (1965)). We prefer, instead, to resolve the point by applying the principles of law announced in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Thus, to be accorded standing, a non-situs county must allege facts showing a direct and substantial interest and a close causal connection between the challenged action and the asserted injury.

In this case, the County has alleged that (1) Swatara Creek is located close to the proposed landfill site and may possibly be polluted by

discharge from the landfill; (2) Swatara Creek is a major water source for the County; (3) farmland in the County may be polluted by possible discharges from the landfill into Swatara Creek; and (4) the Permittee has not proposed sufficient steps to assure that Swatara Creek will not be polluted.

The County does not claim to abut the proposed landfill site; and, in fact, Swatara Creek first enters the County about six miles downstream from the proposed landfill site. Similar remoteness has been the basis for dismissing other appeals: Brill v. DER, 1981 EHB 43; Lincoln and Taylor v. DER, 1980 EHB 505. At the very least, it enhances the need for the County to allege substantial injury causally connected to the issuance of the landfill permit.

The County's Notice of Appeal fails to meet this need. It alleges the "great possibility" that water supplies will be polluted and that farmlands "may be polluted." It alleges that the Permittee has proposed insufficient steps to eliminate the possibility of pollution. These allegations of injury are hypothetical, at best, and are insufficient to confer standing: Strasburg Associates v. Newlin Township, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980); Snelling v. Pa. Dept. of Transportation, 27 Pa. Cmwlth. 276, 366 A.2d 1298 (1976).

In its Memorandum of Law, the County requests leave to file a supplemental appeal if the Board rules that its Notice of Appeal is inadequate. As noted previously, the County reserved the right to file supplemental reasons for its appeal within thirty (30) days after filing its Notice of Appeal. However, it did not file any supplemental reasons -- even in response to the Motion to Dismiss -- but asserted the sufficiency of the reasons originally given. Consistent with our holdings in Allegheny River Coalition v. DER and Davison Sand & Gravel Co., 1984 EHB 906, and Jerry Haney

and Pocono Environmental Club v. DER and Monroe County Authority, EHB Docket No. 87-189-W, (Opinion and Order issued December 30, 1987), we must also dismiss the County's appeal.

ORDER

AND NOW, this 8th day of January, 1988, Pine Grove Landfill, Inc.'s Motion to Dismiss is granted and the appeal of the County of Lebanon is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 8, 1988

cc: **Bureau of Litigation**
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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 87-358-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued January 12, 1988

OPINION AND ORDER
SUR
REQUEST FOR APPEAL NUNC PRO TUNC

Synopsis

An appeal nunc pro tunc is denied where Appellant fails to show fraud or breakdown of the Board's operation.

O P I N I O N

On November 9, 1987, Franklin Township Municipal Sanitary Authority (FTMSA) filed a request for an appeal nunc pro tunc. In an attachment to its notice of appeal form, FTMSA admits to receipt of notice of the issuance of its NPDES permit by the Department of Environmental Resources, on July 2, 1987. FTMSA's notice of appeal was not received by the Board until August 24, 1987.

The Board's jurisdiction does not attach unless an appeal is filed with the Board within 30 days after the Appellant has received notice of the appealable action. Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). However, the Board may allow an appeal nunc pro tunc where fraud or breakdown in the Board's procedures were the cause of the untimely filing

of the appeal. See Appalachian Industries v. DER, EHB Docket No. 521-W (Opinion and order issued May 24, 1987.

In this case, FTMSA has not shown that the untimely filing was due to fraud or a breakdown of Board procedures. The only basis advanced was FTMSA's detrimental reliance on purportedly misleading statements concerning FTMSA's appeal rights made by various DER officials. More specifically, it is alleged by FTMSA that DER represented to it that the appeal period would run from the date of publication of the permit issuance in the Pennsylvania Bulletin. This argument is flawed for two reasons. The Board exercises its adjudicatory function independent of DER, whose employees are not authorized to act on behalf of the Board. Therefore, actions of DER employees cannot be grounds for the allowance of an appeal nunc pro tunc. C & K Coal Company v. DER, 1986 EHB 1215. Furthermore, FTMSA is charged with constructive knowledge of the Board's rules and regulations governing practice and procedure, which are published at 25 Pa.Code §21.1 et seq. See also 1 Pa.Code §5.4. We have consistently interpreted 25 Pa.Code §21.52(a) to mean that the 30 day appeal period runs from the date of actual notice of a DER action or the date of publication of the DER action in the Pennsylvania Bulletin, whichever is earlier. City of Reading v. DER, EHB Docket No. 86-615-R (Opinion and order issued December 16, 1987). Accordingly, we deny FTMSA's request for an appeal nunc pro tunc.

O R D E R

AND NOW, this 12th day of January, 1988, it is ordered that the request for an appeal nunc pro tunc by Franklin Township Municipal Sanitary Authority is denied and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 12, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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For Appellant:
Ronald L. Kuis, Esq.
Kirkpatrick & Lockhart

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Robert D. Myers, Member

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SECRETARY TO THE BOARD

PALISADES RESIDENTS IN DEFENSE OF THE ENVIRONMENT (P.R.I.D.E.)	:	
v.	:	**EHB Docket No. 86-366-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 19, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Where an adverse party introduces an affidavit in opposition to a motion for summary judgment which raises genuine issues of material fact, the Board will not grant summary judgment.

OPINION

This matter was initiated on July 28, 1986 with the filing of a notice of appeal by Palisades Residents in Defense of the Environment (P.R.I.D.E.) from the Department of Environmental Resources' (Department) June 27, 1986 refusal to grant P.R.I.D.E.'s petition to declare a 900 acre tract of land in Nockamixon and Tinicum Townships, Bucks County, as unsuitable for surface mining. The Department's stated reason for the denial was that the tract contained no identified coal reserves.

P.R.I.D.E.'s petition was filed pursuant to Section 4.5 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L.

1198, as amended, 52 P.S. §1396.4e. The Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. 3301 et seq. (Noncoal Act) generally superseded the SMCRA as it applied to surface mining of minerals other than bituminous or anthracite coal. But, Section 4 of the Noncoal Act provides:

> (a) General rule.--Except as provided in subsection (b), all surface mining operations where the extraction of coal is incidental to the extraction of minerals and where the coal extracted does not exceed 16 2/3% of the tonnage of materials removed for purposes of commercial use or sale shall be subject to this act and shall not be subject to the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act. For purposes of this section, coal extraction shall be incidental when the coal is geologically located above the mineral to be mined and is extracted in order to mine that mineral.
>
> (b) Certain provisions of Surface Mining Conservation and Reclamation Act applicable.--All surface mining operations where the extraction of coal is incidental to the extraction of minerals and where the coal extracted does not exceed 16 2/3% of the tonnage of materials removed for purposes of commercial use or sale shall be subject to section 4.5(a) to (g), inclusive, of the Surface Mining Conservation and Reclamation Act.
>
> (emphasis added)

These provisions make the areas unsuitable provision of the SMCRA applicable to non-coal surface mining where there will be incidental extraction of coal.

The Department filed a motion for summary judgment on March 4, 1987, arguing that by P.R.I.D.E.'s own admission not only is there no coal geologically located above the minerals to be mined at the petition area, but no coal can be extracted at the petition area by surface mining methods. As support for its argument, the Department cites P.R.I.D.E.'s October 1, 1986 responses to the Department's interrogatories. In response to Interrogatory No. 11, P.R.I.D.E. stated that the kind of mining to be done at the petition area was for shale and argillite mining using standard surface quarrying

methods to a depth of well over 200 feet. As support for its contention that coal was present at the petition area, P.R.I.D.E. responded to Interrogatory No. 18 by citing a drill log done by E. C. Rosenzi and reported by J. P. Lesley in 1891. The drill log records show that no coal was encountered until 1569 feet below the surface. Since the coal is at a depth exceeding that normally surface mined, the Department maintains that §4.5(a)-(g) of SMCRA are inapplicable and that it correctly returned P.R.I.D.E.'s petition.

In its answer to the motion for summary judgment, P.R.I.D.E. avers that there are issues of material fact relating to the presence of coal in the petition area. P.R.I.D.E. had expressed reservations in its response to Interrogatory No. 18 regarding the finality of its investigation into the existence of coal at the petition area. In an affidavit attached to P.R.I.D.E.'s answer to the summary judgment motion, Professor John Adams reports that his examination of rock samples taken from the petition area revealed the presence of an organic carbonaceous shale associated with coal deposits. Professor Adams' affidavit raises the possibility that there is coal geologically located above the minerals to be mined at the petition area.

This Board has the authority to grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerdale Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978). An adverse party may file affidavits in opposition to a motion for summary judgment to introduce material which may create a genuine issue as to a material fact. Eitel v. Stroben, 66 D&C 2d 609, (1974). The Board must

read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987).

Rule 1035 of the Pennsylvania Rules of Civil Procedure provides that 1) affidavits shall be made on personal knowledge; 2) shall set forth such facts as would be admissible into evidence; and 3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. Goodrich-Amram 2d §1035(d):(2), p. 456. Professor Adams' affidavit satisfies these requirements. Furthermore, Professor Adams personally observed the rock samples from the petition area and his affidavit certainly raises a genuine issue of material fact as to whether or not incidental coal extraction could occur. Where an issue of material fact remains, this Board cannot grant summary judgment in a party's favor.

ORDER

AND NOW, this 19th day of January, 1988, it is ordered that:

1) the Department of Environmental Resources' Motion for Summary Judgment is denied; and

2) the Department of Environmental Resources shall file its pre-hearing memorandum on or before February 3, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 19, 1988

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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

MOUNTAIN MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 87-320-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 19, 1988

OPINION AND ORDER
SUR
MOTION TO QUASH

Synopsis

This appeal is dismissed as untimely filed. Appellant failed to file the appeal with the Board within thirty days of the date that it received notice of the action of the Department of Environmental Resources at issue.

OPINION

This matter was initiated on July 30, 1987, by Mountain Mining, Inc.'s (Mountain Mining) filing of an appeal from a June 8, 1987 civil penalty assessment issued by the Department of Environmental Resources (Department) to Zelanko Coal Company for violations of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) on Permit No. 0584301 in Broadtop Township, Bedford County. In its notice of appeal, Mountain Mining

stated that it received the civil penalty assessment on June 24, 1987.[1]

The Department, on September 8, 1987, filed a motion to quash, alleging that the Board lacks jurisdiction to hear the appeal because it was filed more than thirty days after Mountain Mining's receipt of the civil penalty assessment. Mountain Mining failed to respond to the Department's motion, and, pursuant to 25 Pa. Code §21.64(d), we will deem all relevant facts in the Department's motion as admitted by Mountain Mining.

Mountain Mining, by is own admission, received the assessment on June 24, 1987. The thirty day appeal period ended on July 24, 1987, and the appeal was not filed with the Board until July 30, 1987. Since Mountain Mining filed its appeal in this matter more than 30 days after receiving notice of the assessment of civil penalty, this Board is without jurisdiction to hear it and the appeal must be dismissed. 25 Pa. Code §21.52(2) and Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

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[1] Mountain Mining alleged no facts in its notice of appeal which established its standing to appeal the civil penalty assessment to Zelanko Coal Company. Since the Department has not raised this issue and we are disposing of this appeal on other grounds, we will not address it. Similarly, the Department has also not raised Mountain Mining's failure to pre-pay the civil penalty assessment under §18.4 of SMCRA.

ORDER

AND NOW, this 19th day of January, 1988, it is ordered that the Department of Environmental Resources' motion to quash is granted and the appeal of Mountain Mining, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 19, 1988

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Harrisburg, PA
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MOUNTAIN MINING, INC.

mjf

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3 L COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 87-321-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 19, 1988

OPINION AND ORDER
SUR MOTION TO LIMIT ISSUES

Synopsis

In reviewing the Department of Environmental Resources' motion to limit issues in an appeal of a civil penalty assessment, the Board, on its motion, raises its lack of jurisdiction over the appeal as a result of the Appellant's failure to pre-pay the assessment when filing its appeal. The Board then dismisses the appeal for lack of jurisdiction.

OPINION

This matter was initiated on July 30, 1987, with the filing of a notice of appeal by 3 L Coal Company (3-L) from a June 30, 1987 civil penalty assessment in the amount of $2000 by the Department of Environmental Resources (Department) pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (Surface Mining Act). The assessment stemmed from two earlier compliance orders issued to 3-L. The first order, issued May 6, 1986, cited 3-L for mining without a permit at 3-L's mining operation in West Cameron Township, Northumberland County. The second compliance order, a cease and desist order,

No. 87-P-073-U, issued July 29, 1986, cited 3-L for mining without a permit in violation of the May 6, 1986 compliance order. On October 28, 1987, the Department filed a motion for more specific pleading and to limit issues, asserting that 3-L's failure to appeal Compliance Order No. 87-P-073-U, which underlies the civil penalty assessment, now precludes the challenge of the factual basis of the civil penalty assessment in this proceeding. The Department maintains that the only issue properly before this Board is the reasonableness of the assessment. 3-L has filed no response to this motion.

Rather than ruling on the Department's motion, we will address the fundamental question of our jurisdiction over this appeal. Although the Department did not raise the issue of jurisdiction, we raise it here, since a tribunal may, on its own motion, raise the issue of lack of jurisdiction over the subject matter. Cathcart v. Crumlish, 410 Pa. 253, 189 A.2d 243 (1963). See, e.g., McKeesport Municipal Water Authority v. DER, EHB Docket No. 86-671-W (Opinion and order issued September 28, 1987). 3-L, by its own admission in its December 14, 1987 pre-hearing memorandum, has not perfected its appeal by filing either a properly executed appeal bond or escrow deposit in the amount of the civil penalty assessment, as required by Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22. Failure to perfect an appeal of a civil penalty assessment under the Surface Mining Act by pre-payment of the assessment within the 30 day appeal period deprives the Board of jurisdiction over an appeal of that assessment. McGal Coal Co. v. DER, EHB Docket No. 87-199-R (Opinion and order issued December 3, 1987). 3-L's failure to pre-pay the civil penalty assessment within the appeal period deprives us of jurisdiction, and we must dismiss this appeal.

O R D E R

AND NOW, this **19th** day of January, 1988, it is ordered that the appeal of 3 L Coal Company is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 19, 1988

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WILLIAM A. ROTH, MEMBER
ROBERT D. MYERS, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

ATRIUM CONDOMINIUM ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 86-556-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued January 20, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted where an issue raised is irrelevant and where the question of DER's authority has already been decided.

O P I N I O N

On October 1, 1986 the Atrium Condominium Association (Atrium) filed an appeal from the September 19, 1986 Department of Environmental Resources (DER) denial of its application for a bathing place permit. DER based its permit denial on an alleged safety hazard due to the pool's shape and an alleged hygienic problem related to a deck carpet. DER also advised Atrium that operation of its pool without a bathing place permit would be a violation of the Public Bathing Law, the Act of June 23, 1931, P.L. 899, as amended, 35 P.S. §672 et seq. (Public Bathing Law).

Among Atrium's contentions in this appeal is its assertion that DER's permit denial adversely affects the health, welfare and well-being of

Atrium's owner-members because of their being deprived of the use of the pool. In addition, Atrium argues that DER lacks authority to regulate the design of a condominium pool and to impose a permit requirement on such a pool.

On December 11, 1987, DER filed a motion to limit issues and requested the Board to preclude Atrium from raising these aforementioned issues. According to DER, because the parties have entered into a lengthy stipulation as to the conditions and setting of the pool, the only matters left to be litigated are whether the pool is safe and whether DER's permit denial was an abuse of discretion. DER also contends that the questions of DER authority to regulate condominium pools and to require permits have already been settled in Nemacolin Inc. v. DER, EHB Docket No. 86-546-R (Opinion and order issued April 28, 1987) and Dithridge House Association v. DER, EHB Docket No. 86-550-R (Opinion and order issued June 17, 1987).

Atrium counters DER's motion by maintaining that the question of therapeutic uses of the pool is relevant when evaluating the alleged design deficiency. Further, to the extent that Nemacolin and Dithridge House hold that DER has the authority to regulate the design of condominium swimming pools through the permitting process, Atrium argues that they should be reconsidered.

The question of DER's authority to regulate condominium pools has been decided by the Board. In Nemacolin, and in Dithridge House, the Board held that bathing place permits are required for condominium pools. Pursuant to §2(1) of the Public Bathing Law, 35 P.S. §673(1), DER may regulate pool features relating to safety, such as side or bottom slopes, or features relating to hygiene, such as deck carpeting. Accordingly, Atrium's pool falls within the purview of the Public Bathing Law.

Atrium's contention that its owner-members are being harmed is irrelevant. Atrium alleges that some of its owner-members use the pool for therapeutic purposes to mitigate the effects of, for example, arthritis. Because they have been unable to make use of the pool, Atrium asserts that the health, welfare and well-being of its owner-members are adversely affected. Even if we were to accept these contentions as true, we find nothing in the Public Bathing Law to suggest that a determination that a pool is safe or hygienic is in any way influenced by worthwhile and beneficial therapeutic uses.

The Board will grant DER's motion. At the hearing on the merits, Atrium will be limited to presenting evidence related to DER's two reasons for the denial of the pool permit, namely, safety and hygiene.

O R D E R

AND NOW, this 20th day of January, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: January 20, 1988

cc: **Bureau of Litigation**
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WILLIAM A. ROTH, MEMBER
ROBERT D. MYERS, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BOROUGH OF McKEAN	:	
	:	
v.	:	**EHB Docket No. 85-513-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, and McKEAN TOWNSHIP, Permittee	:	Issued January 21, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal as moot is granted where an appealed-from permit provision has been superseded. A request to appeal nunc pro tunc is denied where the appellant has failed to show any fraud or breakdown of the Board's operations which resulted in the untimely filing.

O P I N I O N

This action was commenced by the November 25, 1985 filing of an appeal by the Borough of McKean (Borough) from the October 9, 1985 issuance of an NPDES permit (original permit) by the Department of Environmental Resources (DER) to McKean Township (Township). The permit authorized the discharge of treated sewage from the Georgetown subdivision in the Township into an unnamed tributary of Elk Creek. On July 17, 1986, which, inter alia, modified fecal coliform limits, was issued to the Township.

On June 25, 1987, DER filed a motion to dismiss the appeal of the

original permit as moot. DER's position was that the revised permit superseded the original permit, thereby rendering the original permit null and void. Additionally, since the Borough did not appeal the revised permit, DER argues that there is no relief the Board can grant the Borough relative to the original permit.

In its response, the Borough admitted that the revised permit superseded the original permit but stated that, by virtue of the similarity of the two permits, it had, in effect, appealed the revised permit. The Borough further contended that representations made by DER counsel during the course of discussions relating to broader sewage planning issues affecting both the Borough and the Township had caused the Borough to believe that it was unnecessary to appeal the revised permit. The Borough further claimed that counsel for DER raised the mootness issue only in connection with her understanding that the dispute involved solely the fecal coliform limitation question. Therefore, the Borough claims surprise with respect to the mootness question as it is now being raised by DER in its motion. It further requests the Board to allow it to file an appeal of the revised permit nunc pro tunc, claiming that no prejudice would result if the appeal were allowed.

The Borough's request for an appeal nunc pro tunc of the revised permit is denied. An appeal nunc pro tunc is permitted only where an appellant can show that there was some fraud or breakdown in the Board's operations which resulted in untimely filing. Borough of Lilly v. DER, EHB Docket No. 87-187-R (Opinion and order issued December 15, 1987). No such circumstances exist here. The Borough's detrimental reliance on the representations of DER's counsel is not grounds for allowance of an appeal nunc pro tunc. C & K Coal Company v. DER, 1986 EHB 1215.

The Board will grant DER's motion to dismiss for mootness since DER

is correct in its assertion that where a DER action supersedes a prior appealed action, that prior action is null and void, there is no relief to be granted, and the appeal must be dismissed as moot. Glenworth Coal Company v. DER, 1986 EHB 1348 (citing Silver Spring Township v. DER, 28 Pa.Cmwlth. 302, 368 A.2d 866 (1977).

O R D E R

AND NOW, this 21st day of January, 1988 it is ordered that the Borough of McKean's petition for appeal nunc pro tunc is denied, the Department of Environmental Resources motion to dismiss is granted, and the appeal of the Borough of McKean at Docket No. 85-513-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 21, 1988

Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Gary Peters, Esq./Western Region

For Appellant:
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QUINN, GENT, BUSECK & LEEMHUIS, INC.
Erie, PA

For Permittee:
Albert E. Wehan III, Esq.
SCHROECK, SEGEL & MURRAY
Erie, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
ROBERT D. MYERS, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 87-222-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued January 21, 1988

OPINION AND ORDER

Synopsis

The Board only has jurisdiction to hear appeals of final actions of the Department of Environmental Resources (DER). DER's issuance of a draft NPDES permit is not a final action because such a draft permit does not affect the rights, privileges, immunities, duties, liabilities or obligations of any party.

O P I N I O N

This appeal was initiated on June 3, 1987 by the Franklin Township Municipal Sanitary Authority (FTMSA) with the filing of an appeal from the Department of Environmental Resources (DER) April 23, 1987 issuance of a draft NPDES permit to FTMSA.

Because it appeared that DER's issuance of a draft permit was not a final DER action--and thus not appealable--the Board, on November 17, 1987, entered a rule upon FTMSA to show cause why its appeal should not be dismissed for lack of jurisdiction. In responding to the rule, FTMSA asserted that there

is a commonality of issues in this appeal and those in FTMSA's appeal of the final NPDES permit at EHB Docket No. 87-358-R.

Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101 or "actions" under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa.Code §21.2(a). We have interpreted these statutes to confer jurisdiction on the Board to review any DER decision which affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. Springettsbury Township Sewer Authority v. DER, 1985 EHB 492.

The FTMSA draft permit appealed by FTMSA is clearly not a final action of DER. The regulations governing NPDES permit applications at 25 Pa.Code §92.61 establish a two-tiered process involving the preparation and publication of a draft permit for public comment and the issuance of a permit after the opportunity for comment. The document appealed by FTMSA is marked "draft" in various places, and the April 23, 1987 DER letter transmitting it to FTMSA states that "[w]e have made a tentative determination to issue an NPDES permit in response to your application. A copy of the draft permit is enclosed." The draft permit is not a final DER action and, therefore, the Board lacks jurisdiction to hear this appeal. Lancaster County Network v. DER and Lancaster County, Permittee, EHB Docket No. 86-644-W (Opinion and order issued July 13, 1987).

O R D E R

AND NOW this 21st day of January, 1988, it is ordered that the appeal of Franklin Township Municipal Sanitary Authority at Docket No. 87-222-R is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 21, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary Peters, Esq./ Western Region
For Appellant:
Ronald Kuis, Esq.
Kirkpatrick & Lockhart

dk

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221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

CADOGAN TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 87-440-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
Kittanning Equipment Leasing Company,	:	
Permittee	:	Issued January 22, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The date on which notice of a DER action appears in the Pennsylvania Bulletin marks the start of the 30-day appeal period, not the date the issue is received.

O P I N I O N

On October 13, 1987, the Cadogan Township Board of Supervisors (Cadogan Township) filed a notice of appeal from the Department of Environmental Resources' (DER) issuance of Encroachment Permit No. E03-220 (permit) to Kittanning Equipment Leasing Company (Kittanning Equipment). Cadogan Township stated in the notice of appeal that the notice of the permit's issuance appeared in the Pennsylvania Bulletin on September 5, 1987.

On November 19, 1987, DER filed a motion to dismiss this appeal as untimely, since it was filed 38 days after notice of issuance appeared in the

Pennsylvania Bulletin.

Cadogan Township responded by contending that its appeal was timely for two reasons. First, it alleges that it did not receive the September 5, 1987 issue of the Pennsylvania Bulletin until September 10, 1987. On this basis, the appeal would have been timely due to an intervening weekend and holiday. Second, Cadogan Township alleges that, on October 1, 1987, it sent, by certified mail, a notice of its intent to appeal to the Board at First Floor Annex, Blackstone Building, 112 Market Street, Harrisburg, Pa. 17101. The certified mail was returned to it, with an indication that the forwarding order had expired. Cadogan Township argues that it should not be prejudiced since it relied on the incorrect Board address as published by DER in the Pennsylvania Bulletin.

It is well settled that the Board has jurisdiction only over timely filed appeals. 25 Pa. Code §21.52(a) and Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). The Board has consistently held that §21.52(a) provides for a 30-day appeal period which begins to run either from the date of receipt of written notice of the action or the date of publication of notice of the action in the Pennsylvania Bulletin, whichever is earlier. Consolidation Coal Company v. DER and J & D Mining, Inc., 1983 EHB 339. In the present case, the appeal period began to run on September 5, 1987 and terminated on October 5, 1987. Cadogan Township's appeal filed on October 13, 1987 was untimely.

Cadogan Township's allegation that it relied on an incorrect DER-published Board address does not alter this conclusion for three reasons. First, the Board exercises its adjudicatory function independent of DER. DER is not authorized to make representations on behalf of the Board and, therefore, its actions cannot excuse an untimely filed appeal. C & K Coal

Company v. DER, 1986 EHB 1215. Second, Cadogan Township is charged with constructive knowledge of the Board's rules and regulations governing practice and procedure, which are published at 25 Pa.Code §21.1 et seq. See also 1 Pa.Code §5.4. In this regard, the Board's correct address is published at 25 Pa.Code §21.51(b). Third, the Board takes notice that the September 5, 1987 issue of the Pennsylvania Bulletin, which gave Cadogan Township notice of the permit's issuance, contained the Board's correct address. This notice is controlling in the present case. Cadogan Township cannot rely on an address published in connection with some other notice.

O R D E R

AND NOW, this 22nd day of January, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of the Cadogan Township Board of Supervisors is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 22, 1988

cc: **Bureau of Litigation**
Harrisburg
For the Commonwealth, DER:
Donna J. Morris, Esq.
George Jugovic, Esq.
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Natrona Heights, PA
For Permittee:
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Kittanning, PA

rm

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PERKIOMEN WOODS PROPERTIES CORPORATION	:	
	:	
v.	:	EHB Docket No. 85-223-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued January 27, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss is granted when, in the course of an appeal, an action is taken which makes it impossible for the Board to grant any relief.

O P I N I O N

This appeal was initiated on June 6, 1985, by Perkiomen Woods Properties Corporation (Perkiomen), a development corporation located in Upper Providence Township, Montgomery County. Perkiomen appealed the Department of Environmental Resources' (DER) denial of a proposed plan revision by Upper Providence Township to its official sewage facilities plan. That revision would have provided for the erection of a temporary on-site sewage treatment system on Perkiomen's property pending the availability of additional sewage capacity in Upper Providence Township. DER denied the Township's request pursuant to 25 Pa.Code §§71.16(e)(3) and 91.31(a), and the provisions of the Sewage Facilities Act, the Act of January 24, 1966, P.L.1535, as amended, 35 P.S. §750.1, et seq., and the Clean Streams Law, the Act of June 22, 1937, P.L. 1535, as amended, 35 P.S. §691.1, et seq.

On August 26, 1987, DER filed a motion to dismiss, contending that on March 9, 1987, DER approved the sewage facilities plan revision for the Perkiomen Woods subdivision. DER contends that this approval reverses the earlier denial which is the basis of this appeal. Accordingly, DER argues the appeal should be dismissed as moot since there is no relief the Board can now grant.

In its response to DER's motion, Perkiomen admits that the earlier action has been reversed. However, Perkiomen alleges that as a result of DER's earlier denial, its rights were violated and that its finances were sorely depleted. Perkiomen requests the Board review the propriety of DER's original action in denying Perkiomen's interim plan, because it contends that this appeal now fits squarely into the "capable of repetition" exception to the mootness doctrine.

The Board finds Perkiomen's arguments to be meritless. The relief sought has now been afforded by virtue of DER's March 9, 1987 approval. The Board is unable to grant any relief to Perkiomen and, therefore, the appeal must be dismissed as moot. Delta Excavating & Delta Quarries v. DER, EHB Docket No. 86-266-W (Opinion & order issued May 11, 1987), citing Glenworth Coal Company v. DER, 1986 EHB 1348.

O R D E R

AND NOW, this 27th day of January, 1988, the Department of Environmental Resources motion to dismiss is granted and the appeal of Perkiomen Woods Properties Corporation at EHB Docket No. 85-223-R is dismissed.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: January 27, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq./ Eastern Region
For Appellant:
Leslie Weisse, Esq.
Philadelphia, PA

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DOMINION CONSTRUCTION CO., INC.	:	
	:	
v.	:	**EHB Docket No. 85-535-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued January 28, 1988

OPINION AND ORDER

Synopsis

An appeal is dismissed for failure to prosecute.

O P I N I O N

This action was initiated by the December 13, 1985 filing of a notice of appeal by Dominion Construction Company (Dominion) from certain effluent limitations imposed by the Department of Enviromental Resources (DER) through Mining Activity Permit Number 26841301. The disputed effluent limitations pertained to discharges from Outfalls 001 and 003 at Dominion's underground coal mine in Georges Township, Fayette County.

On April 15, 1986, after the filing of the required pre-hearing memoranda, the parties were informed that this appeal had been placed on the Board's list of appeals ready for hearing on the merits and that it would be scheduled in due course. On October 8, 1987, the Board issued a notice and order informing the parties that the week of February 22-26, 1988 had been reserved for a hearing on the merits and that, on or before October 28, 1987, Dominion was to confer with DER and inform the Board in writing as to the

convenience of these dates. Receiving no response from Dominion, on November 19, 1987 the Board sent an amended notice and order which restated the terms of the orginal notice, and added that, if Dominion failed to respond within 20 days of the receipt of the notice, the hearing dates would be offered to another party. This second notice was sent certified mail, return receipt requested; it was returned by the U.S. Postal Service, marked "unclaimed".

On December 17, 1987, in view of the Board's inability to contact Dominion, the Board entered a rule upon Dominion to show cause why its appeal should not be dismissed for failure to prosecute. The rule to show cause, which was sent via certified mail, return receipt requested, was also returned by the U.S. Postal Service with an indication that it was unclaimed.

There are limits to the steps the Board must take in trying to contact an appellant. After two unsuccessful attempts the Board is under no obligation to expend more time and resources in searching for Dominion, and will dismiss its appeal for failure to prosecute. Granbay Coal Company v. DER, 1986 EHB 1092.

O R D E R

And now, this 28th day of January, 1988, it is ordered that the appeal of Dominion Construction Co., Inc. is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 28, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael E. Arch, Esq.
Western Region
Appellant (pro se):
Robert Webb
DOMINION CONSTRUCTION CO., INC.
Satsoma, FL 32089-0678

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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KENNETH D. ROTHERMEL COAL CO., INC.	:	
	:	
v.	:	**EHB Docket No. 87-217-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 28, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where the appellant has failed to file its pre-hearing memorandum after repeated notices from the Board.

OPINION

This matter was initiated on June 3, 1987, by Kenneth D. Rothermel Coal Co., Inc. (Rothermel) with the filing of a notice of appeal seeking review of certain special conditions in Underground Coal Mining Permit M15484306(C). The permit, which authorized the operation of an underground mine by Rothermel in Tremont Township, Schuylkill County, was issued by the Department of Environmental Resources on May 18, 1987. Because the notice of appeal failed to specify Rothermel's objections to the Department's imposition of the special conditions, it was docketed as a skeleton appeal under 25 Pa.Code §21.51 and Rothermel was directed to cure the deficiency.

Upon receipt of the information necessary to perfect Rothermel's appeal, the Board, on July 15, 1987, issued Pre-Hearing Order No. 1, directing

Rothermel to file its pre-hearing memorandum on or before September 28, 1987. When Rothermel failed to file its pre-hearing memorandum, the Board, via an October 2, 1987 letter sent certified mail, return receipt requested, notified Rothermel that it was in default of the Board's July 15, 1987 pre-hearing order and advised it that unless the pre-hearing memorandum were filed by October 13, 1987, it would incur possible sanctions under 25 Pa.Code §21.124.

When Rothermel again failed to file its pre-hearing memorandum, the Board, via a November 3, 1987 letter sent certified mail, return receipt requested, informed Rothermel of its default and indicated that the Board would apply sanctions if Rothermel's pre-hearing memorandum were not received by November 13, 1987. Rothermel received the Board's default letter on November 18, 1987.

Rothermel again failed to file its pre-hearing memorandum by the date required. The Board then, on November 20, 1987, issued a rule upon Rothermel to show cause why its appeal should not be dismissed for lack of prosecution. The rule was sent certified mail, return receipt requested, on November 20, 1987, and was returnable on or before December 10, 1987. Rothermel refused to claim the Board's correspondence after two notices from the United States Postal Service, and the letter was returned as unclaimed to the Board on December 8, 1987. The Board has received no correspondence from Rothermel since that date.

Rothermel has exhibited a disregard for the Board's rules of practice and procedure and has failed to prosecute his appeal in any way. In light of this, the sanction of dismissal is appropriate. Mary Louise Coal Company v. DER, 1986 EHB 1351.

O R D E R

AND NOW, this 28th day of January , 1988, it is ordered that the Board's rule of November 20, 1987 is made absolute and the appeal of Kenneth D. Rothermel Coal Co., Inc. is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: January 28, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Martin H. Sokolow, Jr., Esq.
Central Region
For Appellant:
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KENNETH D. ROTHERMEL COAL CO., INC.
R. D. 1
Klingerstown, PA 17941

bl

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SWISTOCK ASSOCIATES COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 86-572-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 2, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where appellant has not filed its pre-hearing memorandum despite repeated extensions and warnings from the Board concerning its default.

OPINION

This matter was initiated by Swistock Associates Coal Corporation (Swistock) on October 16, 1986, with the filing of a notice of appeal challenging the Department of Environmental Resources' defacto denial of Surface Mining Permit Application Nos. 07850101, 07850102, and 07860101. The Board issued its standard pre-hearing order on October 20, 1986, and directed Swistock to file its pre-hearing memorandum on or before January 5, 1987.

When Swistock failed to file its pre-hearing memorandum by the reuired date, the Board, on January 13, 1987, advised Swistock of the default and warned it that unless the pre-hearing memorandum were filed on or before January 23, 1987, the Board could apply sanctions under 25 Pa.Code §21.124. By motion dated January 19, 1987, Swistock requested an extension of time in which to conduct discovery and file its pre-hearing memorandum. By order

dated January 23, 1987, the Board granted Swistock an extension to March 13, 1987 to conduct discovery and to March 30, 1987 to file its pre-hearing memorandum.

Swistock again failed to file its pre-hearing memorandum by the required deadline, and the Board advised it of its default by letters dated April 20 and May 15, 1987. The May 15, 1987 letter required Swistock to file its pre-hearing memorandum on or before May 26, 1987, and Swistock again defaulted.

The Board then, on June 24, 1987, issued a rule upon Swistock to show cause why its appeal should not be dismissed for lack of prosecution. The rule was returnable on or before July 24, 1987, and Swistock responded on that date. The Board, by order dated August 3, 1987, discharged the rule and granted Swistock an extension to October 30, 1987 to file its pre-hearing memorandum.

Swistock failed to file its pre-hearing memorandum by October 30, 1987, and the Board advised Swistock of its default by letters dated November 13 and December 1, 1987. The Board's December 1, 1987 letter warned Swistock that the Board would apply sanctions if it failed to file its pre-hearing memorandum on or before December 11, 1987.

As of the date of this opinion and order, Swistock has neither filed its pre-hearing memorandum nor a request for an extension. The Board has been more than accommodating in granting Swistock extensions when it requested them. But, Swistock has shown no inclination to pursue its appeal and the Board can no longer devote any resources to attempts to prod Swistock into prosecuting its appeal. Under these circumstances, the sanction of dismissal under 25 Pa.Code §21.124 is appropriate.

O R D E R

AND NOW, this 2nd day of February, 1988, it is ordered that the appeal of Swistock Associates Coal Corporation is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Stephen C. Braverman, Esq.
BASKIN, FLAHERTY, ELLIOTT & MANNINO
Philadelphia, PA

bl

JOHN J. KARLAVAGE, M.D.	:	
v.	:	**EHB Docket No. 87-213-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 2, 1988
and	:	
SIGNAL FRACKVILLE CORPORATION, Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS, OR, IN
THE ALTERNATIVE TO LIMIT ISSUES

Synopsis

Appeal is dismissed as a sanction for failure to comply with the Board's orders and for lack of prosecution.

OPINION

Since the procedural history of this matter is described in the Board's October 30, 1987 opinion and order denying Signal Frackville Corporation's (Signal) July 22, 1987 motion to dismiss the appeal for untimeliness, we will not recount it here. The Board's order required Appellant John J. Karlavage, M.D. (Karlavage) to file his pre-hearing memorandum on or before November 16, 1987. Karlavage failed to do so, and, by letters dated November 19 and December 9, 1987, the Board notified Karlavage of his default and advised him of the sanctions which potentially could be imposed on him. The Board's December 9, 1987 letter required Karlavage to file his pre-hearing memorandum on or before December 19, 1987, and, as of the date of this opinion and order, he has neither filed his pre-hearing memorandum nor requested an extension.

While the Board was directing correspondence to Karlavage regarding his obligation to file a pre-hearing memorandum, Signal, on November 20, 1987, filed another motion to dismiss, or in the alternative to limit Karlavage's appeal. Signal again requested the Board to dismiss the appeal as untimely, but, in the alternative, requested that the Board dismiss the appeal as a sanction for failing to comply with the Board's orders, dismiss it for lack of standing, or limit the appeal to only those issues arising from the Department of Environmental Resources' (Department) February, 1987 modification of Signal's permit. The Board notified Karlavage of the motion and advised him that any response must be filed with the Board on or before December 14, 1987. Karlavage did not respond to the motion.

We need not again wade through the thicket of Karlavage's imprecise notice of appeal to attempt to divine what Department action Karlavage is appealing and his reasons for appealing, as Karlavage has given the Board ample indication that he has not the slightest intent to prosecute this appeal. He has failed to file his pre-hearing memorandum, to respond to Signal's July 22, 1987 motion to dismiss, and to respond to the motion at issue now. Under the circumstances, dismissal as a sanction under 25 Pa.Code §21.124 for disregarding the Board's orders and for failure to prosecute his appeal is warranted.

O R D E R

AND NOW, this 2nd day of February, 1988, upon consideration of Signal Frackville's motion to dismiss the appeal of John J. Karlavage, M.D., it is ordered that the motion is granted and the appeal of John J. Karlavage, M.D. is dismissed for failure to comply with the Board's orders and lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: February 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
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John J. Karlavage, M.D.
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For Permittee:
Harry B. Crosswell, Esq.
Pottsville, PA
and
Lois Reznick, Esq.
Philadelphia, PA

bl

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JOHN J. KARLAVAGE, M.D.	:	
v.	:	**EHB Docket No. 87-214-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 2, 1988
and	:	
CRS-SIRRINE CORPORATION, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Where an appellant fails to respond to a motion to dismiss for untimeliness, all relevant facts are treated as admitted under 25 Pa.Code §21.64(d) and his appeal is dismissed as untimely.

OPINION

This matter was initiated by John J. Karlavage, M.D. (Karlavage) on May 11, 1987 with the filing of a notice of appeal challenging the Department of Environmental Resources' (Department) February 11, 1987 issuance of plan approval to Westwood Energy Properties, Inc. (c/o CRS-Sirrine, Inc.) for the construction of a fluidized bed boiler to produce electricity in Frailey Township, Schuylkill County. The approval was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq.

CRS-Sirrine (CRSS) filed a motion to dismiss Karlavage's appeal on September 14, 1987, contending that the Board had no jurisdiction to hear the

appeal because it was untimely. CRSS argues that Karlavage's appeal is untimely because (1) Karlavage failed to appeal the Department's January 6, 1986 initial issuance of plan approval to CRSS within 30 days of its publication at 16 Pa.B. 353 (February 1, 1986), and (2) Karlavage failed to appeal the Department's February 11, 1987 issuance of revised plan approval until May 11, 1987. The Department joined in CRSS' motion. Although informed of the motion by Board letter dated September 17, 1987, and advised that he should file an answer on or before October 7, 1987, Karlavage has not filed any response to the motion.

Because Karlavage failed to respond to CRSS' motion, we will, pursuant to 25 Pa.Code §21.64(d), treat all relevant facts alleged in CRSS' motion as admitted. As a result, Karlavage is deemed to have admitted that he received notice of the Department's February 11, 1987 revised plan approval issuance to CRSS more than 30 days prior to the filing of his notice of appeal. Therefore, his appeal is untimely and we have no jurisdiction to hear it. C&K Coal Company v. Commonwealth, Department of Environmental Resources, No. 3633 C.D. 1986 (slip opinion filed January 13, 1988).

---

[1] Karlavage failed to properly perfect his appeal by providing the Board with the date he received notification of the Department's action, despite two requests to do so from the Board. Karlavage has also failed to file his pre-hearing memorandum. Either is grounds for dismissal under 25 Pa.Code §§21.52(c) and 21.124, respectively.

O R D E R

AND NOW, this 2nd day of February, 1988, it is ordered that CRS-Sirrine's motion to dismiss the appeal of John J. Karlavage, M.D. is granted and the appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 2, 1988

cc: **Bureau of Litigation**
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For Permittee:
Joseph R. Brendel, Esq.
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Pittsburgh, PA

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INGRAM COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-256-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 3, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted. Appellant is precluded from challenging the factual or legal basis of a civil penalty assessment where it failed to appeal the underlying compliance order. In this appeal, appellant may challenge only the amount of the assessment.

OPINION

On June 29, 1987, Ingram Coal Company filed this appeal from a $385.00 civil penalty assessment imposed by the Department of Environmental Resources (DER) pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. The assessment was issued in connection with various alleged violations at Ingram's surface mine in Union Township, Jefferson County.

On October 13, 1987, DER filed a motion to limit issues in the appeal solely to the amount of the assessment. DER contends that Ingram's failure to

appeal an earlier issued compliance order (CO), on which the assessment is based, precludes it from now challenging the CO's factual or legal basis. Accordingly, DER believes that Ingram should be restricted to challenging only the amount of the assessment in this proceeding. Ingram, however, contends that it is authorized by the language of Section 18.4 of SMCRA, 52 P.S. §1396.22 to challenge the underlying order, as well as the amount, despite its failure to previously appeal the CO.

This Board has consistently held that unappealed COs become final DER orders, the bases of which cannot be challenged in later appeals. Sugar Hill Limestone v. DER, EHB Docket Nos. 86-353-R, 86-428-R, 86-429-R (Opinion and order issued November 17, 1987). Further, the Board has held that Section 18.4 of SMCRA does not operate to create an exception to the well settled doctrine of administrative finality; the failure to challenge a prior CO precludes a challenge of the factual or legal bases of a civil penalty assessment arising from that CO. Kent Coal Mining v. DER, EHB Docket No. 86-433-R (Opinion and order issued September 3, 1987). In the instant appeal, Ingram failed to avail itself of the opportunity to timely appeal the CO. Consequently, DER's motion is granted and the only issue Ingram may challenge in this appeal is the amount of the civil penalty assessment.

ORDER

AND NOW, this 3rd day of February, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 3, 1988

cc: **Bureau of Litigation**
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WILLIAM BANE	:	
	:	
v.	:	**EHB Docket No. 87-479-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 4, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal of a civil penalty assessment is dismissed as untimely filed where the appellant failed to file his appeal with the Board within thirty days of the date that he received notice of the action of the Department of Environmental Resources at issue and where the appellant failed to pre-pay the assessment.

O P I N I O N

This matter was initiated on November 16, 1987 by William Bane's (Bane) filing of an appeal from an August 17, 1987 civil penalty assessment issued by the Department of Environmental Resources (DER) to Bane and his partner, James Rumble. The assessment was imposed as a result of various violations of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) on Surface Mining Permit No. 26840110 (the Wilkinson

strip) in Luzerne Township, Fayette County. Along with his appeal, Bane filed a petition for supersedeas, which we will not rule on in light of our disposition below.

DER, on November 22, 1987, filed a motion to dismiss, alleging that the Board lacked jurisdiction to hear the appeal because Bane had filed his appeal more than thirty days after his receipt of the civil penalty assessment and because Bane failed to pre-pay the assessment by filing a surety bond or money to be placed into an escrow account when he filed his appeal with the Board, as required by §18.4 of SMCRA. DER avers that Bane had actual notice of the assessment no later than September 18, 1987 because, on that date, Bane attended a conference concerning the assessment with DER. Bane stated in his appeal that "notice was never actually received", but since he failed to respond to DER's motion we will, pursuant to 25 Pa.Code §21.64(d), deem all relevant facts in DER's motion as admitted by Bane.

Since we have deemed Bane to have admitted that he received actual notice of the assessment no later than September 18, 1987,and Bane's appeal was not filed until November 16, 1987, the Board is without jurisdiction to hear this appeal and it must be dismissed. 25 Pa. Code §21.52(a) and Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A. 2d 761 (1976). Additionally, Bane's failure to pre-pay the assessment is grounds for dismissal. Boyle Land and Fuel Company v. Commonwealth of Pennsylvania, 82 Pa. Cmwlth. 452, 475 A. 2d 928 (1984), aff'd, 507 Pa. 135, 488 A. 2d 1109 (1985).

O R D E R

AND NOW, this 4th day of February, 1988, it is ordered that DER's motion to dismiss is granted and the appeal of William Bane at Docket No. 87-479-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 4, 1988

cc: **Bureau of Litigation**
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KIRILA CONTRACTORS, INC. :
:
v. : EHB Docket No. 87-282-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : (Issued February 9, 1988)

OPINION AND ORDER

Synopsis

A motion to limit issues is granted. Appellant is precluded from challenging the factual or legal basis of a civil penalty assessment where it failed to appeal the underlying compliance order. In this appeal, appellant may challenge only the amount of the assessment.

OPINION

On July 29, 1987, Kirila Contractors, Inc. (Kirila) filed this appeal from a $3500.00 civil penalty assessment imposed by the Department of Environmental Resources (DER) pursuant to Section 21 of the Non-Coal Surface Mining and Conservation Act (NCA), the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL). The assessment was issued in connection with Kirila's failure to procure both a surface mining license and surface mining permit before the commencement of mining at its mine site on Lynwood Drive in Hermitage Borough,

Mercer County, which DER asserts is in violation of Sections 5(a) and 7(a) of the NCA, 52 P.S., §3301.51(a) and Section 315(a) of the CSL, 35 P.S. 691.315(a).

On November 23, 1987 DER filed a motion to limit issues in the appeal solely to the amount of the assessment. DER alleges that, on or about October 1, 1986, Kirila conducted surface mining without obtaining a license or a permit. DER asserts that it issued a compliance order (CO) relative to the unpermitted and unlicensed mining, which CO was not appealed by Kirila and which formed the basis of the assessment from which Kirila took its appeal. DER argues that in view of Kirila's failure to timely appeal the CO, its current challenge to the underlying legal and factual bases for DER's issuance of the assessment amounts to a collateral attack against a final DER order. DER moves that Kirila be precluded from challenging the basis for the order and be restricted to challenging only the amount of the assessment. In the main, Kirila's response is obfuscated and difficult to comprehend. Kirila does not refute DER's allegation that it failed to appeal the CO, but appears to argue that the granting of DER's motion will preclude a meaningful review of the imposition of civil penalties since it cannot raise the facts on which the assessment was based.

This Board has consistently held that unappealed compliance orders become final DER orders, the bases of which cannot be challenged in later appeals. Ingram Coal Company v. DER, EHB Docket No. 87-256-R (Opinion and order issued February 3, 1988). In the instant appeal, Kirila failed to avail itself of the opportunity to timely appeal the CO. Consequently, DER's motion is granted and the only issue Kirila may challenge in this appeal is the amount of the civil penalty assessment. Kent Coal Mining v. DER, EHB Docket No. 86-433-R (Opinion and order issued September 3, 1987).

ORDER

AND NOW, this 9th day of February, 1988, it is ordered that the Department of Environmental Resources (DER) motion to limit issues is granted. It is further ordered that DER's pre-hearing memorandum will be due on or before February 24, 1988.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 9, 1988

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
ROBERT D. MYERS, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

PERRY BROTHERS COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-386-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 11, 1988

OPINION AND ORDER

Synopsis

An appeal is dismissed for failure to prosecute and failure to comply with Board orders.

O P I N I O N

This action was initiated by the September 18, 1985 filing of a notice of appeal by Perry Brothers Coal Company (Perry Brothers) from two compliance orders issued by the Department of Environmental Resources (DER) relating to manganese discharge on Mining Activity Permit Nos. 1079103 and 30775M1 at Perry's surface coal mine in Slippery Rock, Butler County.

On June 9, 1986, after the filing of the required pre-hearing memoranda, the parties were informed that this appeal had been placed on the Board's list of appeals ready for hearing on the merits and that it would be scheduled in due course.

On November 19, 1987, the Board issued a notice and order informing the parties that the week of January 25-29, 1988 had been reserved for a hearing on the merits, and that on or before December 9, 1987, Perry Brothers

was to confer with DER and inform the Board in writing as to the convenience of these dates. The notice and order continued that if Perry Brothers failed to respond within 20 days of the receipt of the notice, the hearing dates would by offered to another party. This notice was sent certified mail, return receipt requested.

On December 17, 1987, with no response from Perry Brothers, a rule was entered upon it to show cause why its appeal should not be dismissed for failure to prosecute and to obey a Board order. The rule to show cause was sent via certified mail, return receipt requested. To date there has been no response to the Board's rule.

There are limits to the efforts the Board must make in attempting to exhort recalcitrant litigants to prosecute their appeals. The Board has reached that limit and will dismiss Perry Brothers' appeal for failure to prosecute and failure to comply with Board orders. Western Allegheny Limestone Corporation v. DER, 1986 EHB 1159.

O R D E R

AND NOW, this 11th day of February, 1988, its ordered that the appeal of Perry Brothers Coal Company is dismissed for failure to prosecute and failure to obey a Board order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 11, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
Stephen E. Braverman, Esq.
Philadelphia, PA

C & K COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-306-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 16, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Motion for summary judgment is denied where there are material facts at issue. The appellant's failure to appeal three subsequent Department of Environmental Resources' actions concerning mining activities at the site for which it has applied for a permit does not bar appellant from contesting its responsibility for a continuing acid mine drainage discharge on the proposed permit site.

OPINION

This matter was initiated by C & K Coal Company's (C & K Coal) July 25, 1985 appeal of the Department of Environmental Resources' (Department) June 27, 1985 denial of C & K Coal's application to repermit its surface coal mine in Monroe and Piney Townships, Clarion County, known as the Gourley mine. The Gourley mine's operation was authorized by Mine Drainage Permit No. 1679123. The Department denied the repermitting application on the grounds that there were post mining discharges from the site which did not meet the

effluent criteria set forth in the Mine Drainage Permit and that C & K Coal failed to demonstrate that there was no presumptive evidence that further mining of the site would not cause pollution of the waters of the Commonwealth in violation of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL).

The Department, on February 26, 1986, served a first set of interrogatories on C & K Coal requesting that C & K state the facts and opinions to which its expert witnesses would testify. C & K Coal filed its responses to these interrogatories on April 30, 1986, and attached reports prepared by its expert witnesses setting forth the subject matter to which each expert would testify and the grounds for those opinions. These reports discussed the question of whether previous mining by C & K Coal at the Gourley mine was responsible for causing two discharges which are flowing from two pipes (Pipes 1 and 2) located below the mine. The reports did not discuss the overburden analyses which C & K Coal submitted to the Department as part of its repermitting application.

After receiving C & K Coal's responses to its interrogatories, the Department, on June 24, 1986, filed a motion for summary judgment. The basis of the Department's motion was that C & K Coal's appeal was predicated entirely on the notion that past mining at the site did not cause the discharges from the two pipes. Because C & K Coal failed to appeal two subsequent compliance orders issued on January 17 and February 9, 1986, and a bond release denial issued on February 5, 1986, which cited C & K Coal for mine drainage discharges from Pipes 1 and 2 in violation of its permit and 25 Pa. Code §87.102, the Department argues that C & K Coal is precluded from

contesting the findings of fact in those orders in C & K's permit denial appeal. Therefore, the Department contends that there are no material facts at issue and the Department is entitled to judgment as a matter of law because it cannot issue a surface coal mining permit where the operation has or is likely to cause pollution of the waters of the Commonwealth.

In its answer to the motion for summary judgment, filed on July 15, 1986, C & K Coal alleges that it will be presenting other evidence relating to the pollutional effects of mining at the Gourley operation. Furthermore, C & K does not deny its failure to appeal the Department's actions but alleges that Department officials unintentionally misled C & K Coal into believing that the Department had not finally decided whether C & K Coal was liable for the alleged discharges. For this reason, C & K Coal has now requested the Board to allow it to file appeals nunc pro tunc from the previous compliance orders and the bond release denial.[1]

The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987).

There is no doubt that the Department is explicitly prohibited from permitting or renewing the permit of a mine not currently meeting its effluent standards. In particular, 25 Pa. Code §86.37(a) provides that:

> No permit or revised permit application shall be approved, unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information set forth in the application or from information otherwise available, which is documented in the approval, and made

---

[1] We need not address this request for the reasons set forth below.

available to the applicant, that all of the following exist:

* * * * *

(3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of the Commonwealth.

* * * * *

(emphasis added)

And, 25 Pa. Code §86.55(g) states that:

A permit will not be renewed if the Department finds that:

(1) The terms and conditions of the existing permit are not being satisfactorily met;
(2) The present mining activities are not in compliance with the environmental protection standards of the Department.

* * * * *

(emphasis added)

The Department notes our repeated holdings that the findings of fact in unappealed orders are final and cannot be collaterally attacked in subsequent proceedings. See, e.g., James E. Martin v. DER, 1984 EHB 736. But that is not the case here. Rather, the Department is urging us to hold that the findings of subsequent unappealed orders are final and not subject to collateral attack in an on-going proceeding initiated prior to the issuance of the unappealed orders. We can find no support for this argument in our decisions or elsewhere. As a result, there are genuine issues of material fact in this case relating to the discharges from Pipes 1 and 2, and we cannot enter summary judgment in the Department's favor.

ORDER

AND NOW, this 16th day of February, 1988, the Department of Environmental Resources' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 16, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

CHAMBERS DEVELOPMENT COMPANY, INC., et al.	:	
v.	:	**EHB Docket No. 87-464-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CHARTIERS TOWNSHIP and THE MUNICIPALITY OF MONROEVILLE, Intervenors	:	**Issued:** February 16, 1988

OPINION IN SUPPORT OF
ORDER DENYING SUPERSEDEAS

Synopsis

A petition for supersedeas of orders restricting daily waste volumes at two landfills is denied where petitioners have failed to satisfy the criteria in 25 Pa.Code §21.78. The Board finds that petitioners failed to demonstrate irreparable harm where they executed contracts with four New Jersey counties to dispose of wastes in Pennsylvania with full knowledge of the Department of Environmental Resources' interpretation of permit conditions and even negotiated clauses in the contracts to deal with the consequences of the interpretation. Statements by the employee of a consulting firm retained by Essex County were not sufficient to establish public harm in New Jersey if the orders weren't superseded and no evidence concerning harm to Pennsylvania municipalities served by the landfills was presented. The Board found evidence of likely air pollution and danger to public health, safety, and

welfare as a result of increased noise and dust at one of the landfills since it began taking wastes in excess of the levels authorized under the Department's order.

The Board found that petitioners were not likely to succeed on the merits of the appeal because the Department's daily volume program did not violate the Commerce and Contracts Clauses and was, rather than rulemaking, a proper implementation of enforcement policy through an adjudication.

INTRODUCTION

This matter has a lengthy and complex procedural history before both the Board and the Commonwealth Court. Its origins lie in a May 15, 1987 letter from Charles A. Duritsa, the Pittsburgh Regional Manager of the Department of Environmental Resources' (Department) Bureau of Waste Management, to Chambers Development Company, Inc. (Chambers),[1] William H. Martin, Inc. (Martin), and Southern Alleghenies Disposal Services, Inc. (Southern Alleghenies). The letters, which were identical, advised Chambers, Martin, and Southern Alleghenies of the Department's interpretation of requirements of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (the Solid Waste Management Act) and the rules and regulations adopted thereunder at 25 Pa.Code §75.1 et seq. pertaining to limitations on daily volume waste intake at landfills. The letter, in its entirety, states:

> Recent correspondence from the Department outlined the bonding and permitting requirements for proposals to increase daily waste volume intake at permitted facilities. I would like to provide you with additional information which will be helpful as a background for completing such proposals.
>
> Some areas of Pennsylvania are experiencing a

[1] Chambers is the parent corporation of Martin and Southern Alleghenies.

severe shortage of permitted landfill disposal capacity. This shortage is a result of several factors including the closure of many landfills, the lack of adequate planning for replacements, the importation of out-of-state wastes, and increased enforcement effort by the Department.

Your landfill operates under a permit issued by the Department. Your permit may contain special conditions which limit the daily volume of wastes you can legally accept for disposal. Your permit is also based on the data contained in your permit application which specified the maximum volume of wastes you are to accept, and on an operational plan which details the methods you would use to safely and adequately handle this maximum volume of wastes.

Many operators now wish to increase the daily volume of waste to be disposed. Any significant increase in the daily volume of waste which changes the conditions used in developing your operational plan requires that you file an application with the Department for a permit modification. (Please reference the Department's correspondence of May 11, 1987). Major permit modifications require the Department to furnish the host municipality and the county government with a copy of the permit modification application. The Solid Waste Management Act, Act 97, requires the Department to wait up to sixty (60) days for comment from the local governments before action can be taken to modify the permit. Act 14 also requires advance notification of local governments.

The purpose of this letter is to remind you of these requirements. You may not exceed the daily volume restrictions of your operating permit. If you are considering applying for a permit modification you should contact the host municipality and the county government and seek their support. They will probably be interested in the origin of the new waste streams since they have a legitimate concern for the continued availability of your site for the disposal of locally generated municipal wastes.

Once again, I wish to remind you of your obligation to meet all of the terms and conditions of your permit which includes the information contained in your application. If you are in doubt about the maximum volume of wastes you can legally receive, or if you require any additional information, please contact this office.

Sincerely,
/s/
Charles A. Duritsa
Regional Manager
Bureau of Waste Management
Southwestern Region

An earlier letter from Duritsa to Chambers, William H. Martin, and Southern Alleghenies, dated May 11, 1987, described the Department's informational and bonding requirements for permit modifications authorizing increased daily waste volume intake.

Chambers, William H. Martin, and Southern Alleghenies appealed Duritsa's May 15, 1987 letter to the Board on June 17, 1987. The appeals were docketed, respectively, at Docket Nos. 87-229-W, 87-228-W, and 87-230-W. The three companies alleged similar objections, which will be described in detail below, to the Department's letter.

In the meantime, Chambers, Martin, and Southern Alleghenies filed a petition for review in the Commonwealth Court at No. 1757 C.D. 1987. The three companies sought a preliminary injunction to enjoin the Department from implementing the daily volume program in controversy here. A preliminary injunction was granted by Senior Judge Wilson Bucher on July 31, 1987, and the Department appealed the grant of that preliminary injunction to the Pennsylvania Supreme Court. On August 31, 1987, the Department filed motions to dismiss the three appeals at Docket Nos. 87-228-W, 87-229-W, and 87-230-W, contending that they were untimely and that they sought review of non-appealable actions. On September 9, 1987, Chambers, Martin, and Southern Alleghenies filed a motion to consolidate the three appeals and to stay the proceedings. Among other things, the three companies alleged that a stay of proceedings was appropriate because

> ...the proceedings in the Commonwealth Court action are progressing without delay. On the

> other hand, no discovery has commenced in the instant appeals before this Board and the only pleading filed subsequent to Appellants' notices of appeal has been DER's motion to dismiss.

and

> If Appellants continue to prevail in the Commonwealth Court and Supreme Court of Pennsylvania, their relief will be more expeditious than what it could now obtain from this Board through the instant appeals. If Appellants do not eventually prevail, DER will not be prejudiced by a stay of proceedings in the instant appeals.

The Department, by response filed September 14, 1987, concurred in the motion to consolidate, but opposed the motion to stay, arguing that the issues in the Commonwealth Court proceeding had no bearing on the appeals before the Board, since the former involved the adequacy of the remedy, while the latter involved jurisdiction. The Board, by order dated October 13, 1987, consolidated the three appeals at Chambers Development Company, Inc., et al. v. DER, EHB Docket No. 87-228-W, and stayed the proceedings pending disposition of the motions to stay and to dismiss.

The Commonwealth Court heard arguments on the Department's preliminary objections to the three companies' petition for review at No. 1757 C.D. 1987 on October 5, 1987, and issued an opinion on October 26, 1987, holding that Chambers had failed to exhaust its statutory remedy before the Board and dissolving the preliminary injunction.

In response to the Commonwealth Court's opinion, Chambers, Martin, and Southern Alleghenies filed a petition for supersedeas at Docket No. 87-228-W on November 2, 1987. But, two days after the filing of the petition for supersedeas, the three companies filed notices of appeal in response to orders issued by the Department on November 2, 1987. These appeals were docketed at Docket Nos. 87-464-W (Chambers), 87-465-W (Martin), and 87-466-W

(Southern Alleghenies) and consolidated at Docket No. 87-464-W by order dated November 5, 1987.

The order issued to Chambers prohibited it from accepting waste at the Chambers Landfill in Monroeville, Allegheny County, "in excess of 2125 tons per day on any given day, and in excess of 1700 tons per day on no more than five (5) operating days per calendar month" until the Department authorized additional waste volume through the issuance of a permit amendment. A conversion of three (3) cubic yards (yd^3) per ton was to be employed if scales were not available to accurately weigh the waste at the entrance to the Chambers Landfill. The 1700 tons per day limitation was derived from logs maintained by Chambers which indicated that an average daily volume of 1700 tons of waste had been disposed of at the Chambers Landfill in June, 1987.

Similarly, the order issued to Martin prohibited it from accepting wastes "in excess of 1094 tons per day on any given day, and in excess of 875 tons per day on no more than five (5) operating days per calendar month" until such time as the Department issued an amended permit to Martin which authorized the disposal of additional solid waste at Martin's Arden Landfill in Chartiers Township, Washington County. The Department's order to Southern Alleghenies prohibited it from accepting solid waste "in excess of 777 tons per day on any given day, and in excess of 615 tons per day on no more than five (5) operating days per calendar month" until such time as the Department issued an amended permit authorizing the disposal of additional wastes at Southern Alleghenies Landfill in Conemaugh Township, Somerset County.

The three companies stated similar objections to the Department's order. They contended it was an abuse of discretion and was violative of the Commerce, Contracts, Equal Protection, and Due Process Clauses of the United States Constitution. They further argued that the Department's daily volume

intake restrictions were, in reality, rulemaking and, therefore, violative of the Solid Waste Management Act and "Pennsylvnia administrative law." Petitions for supersedeas accompanied all three notices of appeal, and the petitions alleged these objections in greater specificity, as well as detailing the effect of the Department's order on the three companies' ability to fulfill their contractual obligations to dispose of wastes from four New Jersey counties.

The Board conducted a pre-hearing telephone conference call with the parties on Friday, November 6, 1987, to discuss scheduling of the supersedeas hearing, as well as disposition of the pending matters at Docket No. 87-228-W, in light of the Department's November 2 orders. It was agreed during the conference call that the record made at the preliminary injunction hearing before Judge Bucher on July 31, 1987 would be incorporated into the record of the supersedeas hearing and that the parties would be given the opportunity to make exceptions to any of Judge Bucher's evidentiary hearings. The supersedeas hearing was scheduled for November 12, 1987. Counsel for the three companies indicated that their appeals consolidated at Docket No. 87-228-W would probably be withdrawn as moot.

On November 9, 1987, the Township of Chartiers, the host municipality for Martin's Arden Landfill, petitioned to intervene in the Martin appeal at Docket No. 87-465-W. Chartiers contended that a supersedeas would permit Martin to reduce the life of the landfill and, therefore, accelerate the time when it would be unavailable for use by Chartiers' residents; that it would authorize the expansion of the Arden Landfill nonconforming use in violation of the Chartiers zoning ordinance; and that it would result in increased noise, malodors, traffic, and dust, which, in turn, would unreasonably interfere with the health, safety, and welfare of Chartiers' citizens. The

municipality of Monroeville, the host municipality of the Chambers Landfill, filed a petition to intervene in the Chambers appeal at Docket No. 87-464-W. Monroeville's grounds for intervention were similar to Chartiers, but Monroeville also alleged the existence of a methane gas problem in areas adjacent to the Chambers Landfill. Both petitions to intervene were granted at the November 12 hearing and confirmed by written order dated November 16, 1987.

Chambers withdrew its petition for supersedeas on November 23, 1987, and a second day of hearings on the Martin and Southern Alleghenies petitions was conducted on November 24, 1987. After the filing of memoranda of law, the Board, by order dated December 11, 1987, denied the petitions for supersedeas, stating briefly that Martin and Southern Alleghenies had failed to satisfy the criteria for grant of a supersedeas in 25 Pa.Code §21.78 and that grant of a supersedeas "would result in air pollution and injury to the public health, safety, and welfare." The Board also stated that a detailed opinion would follow.

On December 14, 1987, Martin and Southern Alleghenies filed a motion for certification for interlocutory appeal pursuant to 42 Pa. C.S.A. §702(b)

> "on the grounds that the matter before the Environmental Hearing Board contain (sic) controlling questions of law concerning which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter."

The controlling questions of law were identified as

> (1) Where a sanitary landfill operator has established a prima facie case that DER's volume controls are unconstitutional, and that imposition of DER's program will cause irreparable harm, are its due process rights violated if the EHB denies a supersedeas application based on increased pollution where the

> only evidence related to such a conclusion is speculative and involves operational aspects under DER regulation?
>
> (2) Is 25 Pa.Code §21.78 invalid because it conflicts with the Pennsylvania Supreme Court's requirement set forth in Pa. Public Utility Comm'n v. Process Gas Consumer Group, 502 Pa. 545, 467 A.2d 805 (1983), which requires a balancing test of factors including likelihood of success, irreparable harm and possible public injury?

The Board held a conference call with the parties, and Martin and Southern Alleghenies, in accordance with the Board's direction, amended their motion for certification for interlocutory appeal to include these questions:

> (1) Whether DER's Daily Volume Program violates the Commerce Clause of the United States Constitution?
>
> (2) Whether DER's Daily Volume Program constitutes a valid and enforceable regulation under Pennsylvania law?

The Board then, by order dated December 17, 1987, certified the latter two questions for interlocutory appeal and denied certification of the former two questions.

Chartiers and Southern Alleghenies then filed a petition for review, or in the alternative, a petition for permission to appeal, which was docketed at No. 392 Misc. Dkt. No. 4 in the Commonwealth Court. In a memorandum and order dated February 2, 1988, the Commonwealth Court, per the Honorable Joseph T. Doyle, held, inter alia, that Martin and Southern Alleghenies' petition for review of the Board's refusal to certify its order of December 11, 1987, would be granted and that the Commonwealth Court would hear an appeal from this issue:

> Is 25 Pa.Code §21.78 invalid because it conflicts with the Pennsylvania Supreme Court's decision in Pa. Public Utility Comm'n v. Process Gas Consumer Group, 502 Pa. 545, 467 A.2d 805 (1983)?

The Court also directed that the Board file an opinion in support of its December 11, 1987 order and the certified record of the supersedeas proceeding on or before February 16, 1988.

STANDARDS FOR GRANT OR DENIAL OF A SUPERSEDEAS

The Board's rules of practice and procedure at 25 Pa.Code §21.78 provide that:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are:
>
> (1) Irreparable harm to the petitioner.
>
> (2) The likelihood of the petitioner prevailing on the merits.
>
> (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.
>
> (c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

The party seeking the supersedeas bears the burden of satisfying all three criteria in 25 Pa.Code §21.78(a). Carroll Township Authority v. DER, 1983 EHB 239, 240. However, evaluation by the Board of the three criteria essentially requires the Board to perform a balancing test. Houtzdale Municipal Authority v. DER, EHB Docket No. 85-391-W (Opinion and order issued January 7, 1987).

The tests enunciated in 25 Pa.Code §21.78(a)(3) and (b) are, in some sense, a reiteration of the principle enunciated in Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 (1947), wherein the Pennsylvania Supreme Court held that a violation of statute constituted harm to the public per se. But, we have not been so rigid as to interpret the Israel doctrine as requiring the denial of a supersedeas where the violation

is purely a technical violation having no environmental consequences. William Fiore v. DER, 1983 EHB 528, 533.

Martin and Southern Alleghenies have urged that, in deciding their petition for supersedeas, we must apply the tests adopted in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983): a strong showing that the petitioner is likely to succeed on the merits of the appeal; a demonstration that the petitioner will suffer irreparable harm if not granted the stay; the effect of the stay on other interested parties; and the public interest. Taken together, §§21.78(a)(1)-(3) are essentially the same standards as the Process Gas standards, especially in light of the Board's precedent. We hold that Martin and Southern Alleghenies have failed to satisfy any of these criteria for the reasons set forth below.

IRREPARABLE HARM

Martin and Southern Alleghenies contend that they will suffer irreparable harm of several kinds. If a supersedeas is not granted, they believe that they will be forced to choose between accepting New Jersey wastes and accepting local Pennsylvania wastes. If they choose to take Pennsylvania wastes before New Jersey wastes, they will be subject to legal action by the New Jersey counties. If they turn away local wastes, they will lose local business, and, in any event, their goodwill and business reputation will have been damaged no matter which choice is made. They also argue that they will suffer financial losses if they do not take New Jersey wastes and/or are forced to secure alternate disposal sites for the New Jersey wastes and that they have expended substantial sums of money on equipment and consulting

services for which they will receive no return unless the Department's orders are superseded. Damages will not compensate them, they argue, because the Department is insulated by sovereign immunity.

The Department and Chartiers contend otherwise. The Department emphasizes that the companies proceeded to enter into the New Jersey contracts in deliberate disregard of the Department's interpretation of daily volume limits in solid waste permits. The contracts, the Department argues, all contain so-called escape clauses which address the consequences of changes in interpretation of laws and regulations by regulatory agencies. Furthermore, mere economic loss does not rise to the level of irreparable harm. Chartiers joins in the Department's arguments but frames this issue as one where Martin is, in essence, requesting the Board to relieve it of the consequences of bad business decisions.

John Rangos, Jr., Vice President of Operations and Secretary-Treasurer of Chambers, testified at length regarding the measures taken by the companies to prepare for taking wastes under the New Jersey contracts. Construction projects were accelerated, additional management staff and work force were added, and additional equipment was leased or purchased (N.T. II 42).[2] He also indicated that, assuming maximum waste volumes under the contracts, the companies would lose about $144,000 per day in revenues if the orders weren't superseded (N.T. II 114, 126).

However, Mr. Rangos also testified that the Department advised the companies prior to the execution of the Union and Somerset County contracts on

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[2] "N.T. I" refers to the transcript of the preliminary injunction hearing before the Commonwealth Court, while "N.T. II" refers to the supersedeas hearing before the Board.

May 15, 1987 of the necessity of permit amendments for aerial expansions of the landfills (N.T. II 101-103; Pet.Ex. H-15, 11), as the companies had received the letters from the Department regarding its interpretations of the permits which were the subject of the appeals at Docket No. 87-228-W. Mr. Rangos also stated he was aware prior to the execution of the contracts that the Department regarded the volume limits in the Martin and Southern Alleghenies permits as binding limits (N.T. II 103). Indeed, the contract with Essex County was executed on July 23, 1987 (N.T. II 103), well after Martin and Southern Alleghenies were aware of the Department's interpretation.

Mr. Rangos was also questioned about the existence of clauses in the New Jersey contracts which would alleviate the companies of their contractual obligations in the event of uncontrollable events or changes in interpretation by regulatory agencies. He indicated that these clauses were negotiated to deal with such situations as we presently have before us (N.T. II 103-104).

We agree with the Department and Chartiers that Martin and Southern Alleghenies have not demonstrated irreparable harm. It is quite clear from the testimony of Mr. Rangos that the companies negotiated the contracts with the New Jersey counties with full knowledge of the Department's interpretation of the daily volume limits in solid waste permits and even negotiated clauses in the contracts to protect themselves in the event the Department took action to enforce the permit conditions. We have broad testimony regarding loss of revenues and goodwill, yet, there is no testimony regarding efforts to secure alternate disposal sites for the New Jersey wastes, which is possible under the Essex, Union, and Somerset contracts and possible with Passaic County's assent under its contract. Although we do not necessarily adopt Chartiers' characterization of the companies' actions as a "bad business decision," we do believe that a knowing and deliberate decision was made to go forward with the

New Jersey contracts in spite of the Department's interpretation of the Solid Waste Management Act and the terms and conditions of permits issued thereunder. The companies' decision to pursue such a course of action and then litigate is one which must be made on their own time and at their own expense, not the public's. Commonwealth of Pennsylvania v. Bethlehem Steel Corp., 469 Pa. 578, 367 A.2d 222 (1977), cert.denied, 430 U.S. 955.

We also decline the opportunity of being placed in the position of advising the companies whether they are to accept Pennsylvania waste or New Jersey waste. That is a contractual matter over which we have no jurisdiction. Our task is to decide whether the Department's action was an abuse of discretion.

LIKELIHOOD OF INJURY TO THE PUBLIC OR OTHER PARTIES

In considering the question of injury to the public or other interested parties, we are mindful that "the public" has a broad meaning. Martin and Southern Alleghenies argue that we must assess the likelihood of injury to the public from the perspective of both the public in Pennyslvania and the public in the New Jersey counties from which wastes will be hauled to Pennsylvania. We will decide this issue without deciding whether we are legally obligated to assess the likelihood of injury to the public in other states in determining whether an appellant should receive a supersedeas from an action of the Department.

In this regard, Martin and Southern Alleghenies presented evidence concerning the effect of the Department's order on Essex County, New Jersey, the county from which waste is presently being disposed of at the Arden Landfill pursuant to a contract executed on July 23, 1987 (N.T. II 103). Martin Lund of Cupper Associates Consulting Engineers manages the solid waste transfer station in Essex County. Mr. Lund testified that Essex County is

required by virtue of a consent decree to cease disposing of its solid waste at the Hackensack/Meadowlands Landfill (N.T. II 135). Essex County has executed contracts with Waste Management, Inc. and Solid Waste Transfer and Recycling (SWT and R) for disposing of its wastes (N.T. II 147). SWT and R, in turn, has a contract with Chambers to haul wastes from the Essex County transfer station (N.T. II 135).

Lund stated that if Chambers could no longer take the Essex County waste, 400,000 residents would be without solid waste disposal services (N.T. II 135-136). He also testified that alternate disposal sites could not be secured in so short a time (N.T. II 136). On cross-examination, he stated that Essex County had no contingency plans or backup contracts in the event the primary means of disposal became unavailable (N.T. II 145). Mr. Lund also indicated that if Chambers did not haul the waste from the transfer station, it would not necessarily impact curbside removal (N.T. II 142) and noted that SWT and R, not Chambers, was responsible to Essex County for disposal (N.T. II 143).

Mr. Lund's testimony was of little probative value. He is not a municipal official and could not, other than in broad generalities, explain the effect of the order on Essex County. Even his assessment that 400,000 residents of Essex County would be impacted is suspect in light of his testimony concerning Waste Management, Inc. We do not know the extent of Waste Management's contract, particularly how much waste it hauls away from Essex County for disposal. And, we do not know if Waste Management or other entities could absorb the wastes Chambers is to haul.

There was no testimony regarding the impact the order would have on Pennsylvania municipalities, other than testimony from Mr. Rangos regarding

Chambers' contract with the City of Pittsburgh. Mr. Rangos testified that in order to perform the New Jersey contracts, Chambers may have to face the choice of excluding local wastes, which could be problematical, given an eight year bonded agreement with Pittsburgh (N.T. II 41).

We have considered the very issue of public harm in Armand Wazelle v. DER and Borough of Punxsutawney, 1984 EHB 865 and Chrin Brothers v. DER and the City of Easton et al., 1985 EHB 386. In Wazelle the Board granted a limited supersedeas of the Department's order closing Wazelle's landfill on the grounds that the residents of Punxsutawney and surrounding communities had no alternate disposal sites if Wazelle's site were to close. In granting a limited 30 day supersedeas of the Department's order the Board stressed that it was affording relief to the municipalities and that relief to Wazelle was not warranted. The Board chastised the communities for failing to make other arrangements for solid waste disposal over 18 months after the issuance of the closure order to Wazelle, but decided that the potential hazard to the public from trash which was not picked up was greater than the public's injury resulting from the operation of an illegal landfill.

Chrin stands in contradistinction to Wazelle on the issue of harm to the public. Using costs for sewage sludge disposal for five of the intervening municipalities at two other area landfills, the Board broadly extrapolated to reach its conclusion that there would be public harm if the Chrin landfill closed. The Board also asserted that the Department's alleged failure to develop a statewide solid waste plan in light of reports of a "landfill space crisis...in southeastern Pennsylvania" somehow heightened the injury to the public which would occur if the Chrin closure order were not superseded.

The situation we have here is different. No municipalities have intervened in support of Martin and Southern Alleghenies; rather, Chartiers has urged us not to supersede the order. We have no evidence regarding the effect of the order on Pennsylvania municipalities and only speculative assertions by the employee of a consulting firm concerning the effect of the Department's order on Essex County, New Jersey. In this respect, it is Martin and Southern Alleghenies' burden to put forth evidence in support of their claim; we cannot extrapolate or speculate on the basis of generalities.

POLLUTION OR INJURY TO THE PUBLIC HEALTH, SAFETY, AND WELFARE

We cannot issue a supersedeas where "pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect." 25 Pa.Code §21.78(b). Martin and Southern Alleghenies argue that this consideration is irrelevant, since the Department's November 2 orders were not predicated on pollution or the threat of pollution and the Department did not argue this issue in the preliminary injunction hearing. In the alternative, they argue that there is no pollution or threat of pollution and that the evidence proffered by the Department is speculative and irrelevant, as it deals with operational aspects. Chartiers and the Department urge us to find pollution or the threat of pollution.

While it is true that the Department's orders do not allege the existence of pollution or potential pollution in the findings, the statutory provisions under to which the orders were issued give the Department broad authority to issue orders to abate nuisances, e.g. §104(7) of the Solid Waste Management Act and §1917-A of the Administrative Code, or to prevent potential pollution, e.g. §402 of the Clean Streams Law. But, in any event, the Board is not precluded from considering evidence of pollution or potential pollution in deciding a petition for supersedeas where it is not clear on the face of

the Department's action whether pollutional problems were one of the bases for the Department's action. Our examination of this issue is an independent inquiry mandated by Rule 21.78(b) in considering a petition for supersedeas, and it is not necessarily related to whether the Department's action is an abuse of discretion.

In reaching our conclusion on this criteria we have two types of evidence before us, the parties' studies of the effects of increased vehicular traffic on this access and haul roads and evidence of actual conditions of the site as it would be operating under a supersedeas. We will first address the studies.

The companies' expert, Robert B. Anderson of GAI Consultants, testified about a traffic study his firm performed for both the Arden and Southern Alleghenies landfills (Pet.Ex. 25 and 26). The study involved visual observation of traffic conditions from the main arterial highways to the site and evaluation of noise, vehicular emissions and delay time at intersections as a result of three hypothetical mixes of increased truck traffic (N.T. II 386-389). GAI concluded that the increased truck traffic would not cause undue delays at intersections, that there would be insignificant increases in noise levels as a result of the increased truck traffic, and that there would be de minimis increases in the pollutants commonly associated with vehicular emissions (N.T. II 389-395). GAI did not evaluate the effects of increased vehicular traffic within the landfills or the effects of additional earth-moving equipment being used to move, cover, and compact refuse.

Allen Serper, an employee of EEA, testified concerning odors and fugitive emissions (dust). He broadly concluded that no odors would be generated if adequate cover was being placed on the refuse (N.T. II 429). He also opined that the haul roads at the site would not be a source of fugitive

emissions because they were covered with aggregate and they were always wetted down (N.T. II 435). He did not evaluate the effect of increased vehicular traffic from equipment moving, compacting and covering refuse and of increased earthmoving to cover increased volumes of refuse on fugitive emissions. He admitted that moving of cover material generates increased dust and that he never observed cover material being watered at the Arden landfill.

The Department presented the testimony of Joseph Pezze, an air pollution control engineer who has had experience in evaluating fugitive emissions generated from vehicular traffic on haul roads within surface mining and solid waste disposal facilities (N.T. II 306). Mr. Pezze's testimony was the most directly on point concerning the issue of the air quality effect of increased waste volume. We state this because particulate matter in the form of dust has the most obvious air quality impact on the residents of the area.

In assessing particulate emissions--dust--Mr. Pezze stated that the type of road, the number and speed of vehicles, and weather conditions influence the amount of emissions (N.T. II 308). Very simply stated, an increased volume of waste results in increased vehicles at a landfill site; an increase in the number of vehicles results in more vehicle miles traveled, which, in turn, results in a linear increase of particulate emissions (N.T. II 316). He estimated that, assuming 300 additional vehicle trips daily on the haul roads, there would be an additional 102 tons per year of total suspended particulate generated at the Southern Alleghenies landfill and an additional 79.44 tons per year generated at the Arden landfill as a result of the increased waste volumes (N.T. II 315; C.Ex. 5 and 6). While slag or gravel on the haul roads would reduce particulate emissions, it would be covered by dirt in time and emissions would increase (N.T. II 328).

We also have direct evidence of the effect of increased waste volume at the Arden Landfill. Martin has, since approximately August 1, 1987, been taking additional wastes from Essex County, New Jersey, much as it would if the Department's order were superseded by the Board. Mr. Rangos testified that initially 1600 tons (4800 yd^3) per day of wastes were received from Essex County and that the volume has now been reduced to 700 tons (2100 yd^3) per day or even 400 tons (1200 yd^3) per day (N.T. II 23-24). The limits in the Department's order are a daily maximum of 1094 tons (3282 yd^3) and a daily average of 875 tons (2625 yd^3). The Arden Landfill is presently receiving 1166 tons (3500 yd^3) per day of local wastes (N.T. II 92). Under the contracts, it could take as much as 2600 tons (7800 yd^3) per day of additional wastes from New Jersey. Assuming the reduced figure of 700 tons (2100 yd^3) per day of Essex wastes, it alone approaches the allowable daily average.

Rangos estimated that each truckload of wastes from New Jersey was about 22 tons (66 yd^3) (N.T. II 93). Applying this to the 400 tons (1200 yd^3), 700 tons (2100 yd^3), 1600 tons (4800 yd^3) and 2600 tons (7800 yd^3) per day volume, the range of additional wastes from Essex County, we have additional traffic of 18, 32, 72, and 118 trucks, respectively.

The effect of this additional waste from Essex County was testified to by Chartiers residents. The Arden Landfill is in a residential area (N.T. II 84, 382) and, at the time of the supersedeas hearing, it was receiving wastes sxi days a week (N.T. II 365). The residents testified about bulldozers running late at night and early on Saturday mornings and about the noise from the vehicles (N.T. II 365, 375). The increased truck traffic has damaged the

roads (N.T. II 367, 380) and the dust generated by the landfill has caked on screens (N.T. 364). Residents have also complained of malodors (N.T. II 365, 374).

Evaluating the studies and the evidence of existing conditions since August, 1987, it is our conclusion that, at the very least, there is a potential for air pollution through increased particulate emissions and that the increased particulate emissions already existing constitute a nuisance. The noise levels and the timing of the noise also interfere with the ability of residents to use and enjoy their property and the increased truck traffic has damaged roads and increased nuisance levels.[3]

LIKELIHOOD OF SUCCESS ON THE MERITS

Martin and Southern Alleghenies contend that they are likely to succeed on the merits of this controversy because the Department's daily volume limit program is legally flawed from several standpoints. Foremost is their argument that the Department's program is constitutionally flawed because it prevents the importation of out-of-state wastes in violation of the Commerce and Contracts clause of the United States Constitution. They urge us to adopt Judge Bucher's opinion on this issue as persuasive. They also assert that the policy is, in essence, a regulation and is invalid because it has not been adopted in accordance with the various statutes governing rulemaking by administrative agencies. Martin and Southern Alleghenies argue that the Department is estopped from instituting the daily volume program because it has not interpreted volume limits in solid waste permits as binding until now

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[3] It is also arguable that Martin's exceedance of its permit limits and its failure to have an air quality plan approval for its increased wastes, being violations of statutes, constitute harm to the public per se under the Israel doctrine. We do not address this in detail because of our other conclusions concerning noise and dust at the landfill.

and because the Department has failed in its duty to develop a comprehensive solid waste management plan for the state.

On the other hand, the Department alleges that the daily volume program is not unconstitutional because the policy applies the same requirements to both in-state and out-of-state wastes. The Department contends that it is permissible to regulate through adjudication, as well as rulemaking, that its daily volume program is authorized by the Solid Waste Management Act, and that it cannot be estopped from administering and enforcing the Solid Waste Management Act. Chartiers joins in the Department's arguments that daily volume limits are authorized by the Solid Waste Management Act and that the Department cannot be estopped from enforcing the Solid Waste Management Act.

We will address each of these arguments.

The Daily Volume Program and the Commerce Clause

It would be simple to, as Martin and Southern Alleghenies urge, adopt Judge Bucher's reasoning in granting the preliminary injunction. With all due respect to Judge Bucher and the Commonwealth Court, we will not, because the additional evidence presented to us compels a different result.

Martin and Southern Alleghenies aver first that the intent and effect of the daily volume program is to restrict the movement of out-of-state wastes into Pennsylvania in violation of the Commerce Clause, U.S. Const., Art. 1, §8, cl.3. In support of this claim, Chambers cites Philadelphia v. New Jersey, 437 U.S. 617 (1978), which held a New Jersey statute prohibiting importation of most solid or liquid waste originating or collected outside the state to be an economically protectionist measure and an unconstitutional violation of the Commerce Clause.

We find, however, that the daily volume program at issue here is distinguishable in both its origin and effect and, thus, it avoids pitfalls of the New Jersey statute in the Philadelphia case. A brief background summary of the events leading up to the creation of the daily volume program illustrates the differences in its purpose and effect.

Mr. William Pounds, the Chief of Division of Facilities Management at the Bureau of Waste Management, testified that the daily volume program was formulated to be a "guidance document" (N.T. II 356) in response to the dire situation created by the closings of three major landfills, Keystone, Amity and Westside, in the northeastern portion of the state. These landfills had been receiving waste from southeastern Pennsylvania and it took months to find alternative disposal sites for this waste. This forced the Department to formulate a statewide plan to address the increased waste flows that other landfills would now have to absorb.

In May, 1987, the Department requested information from all permitted landfills on current daily waste volume levels and notified landfill owners and operators of its intent to require permit amendments for facilities exceeding their authorized permit limits for daily intake. The Department learned that about 50% of the state's landfills were currently exceeding their authorized permit intake limits (N.T. II 354). The Department feared enforcing permit limits at this point in time would only exacerbate the impending waste crisis. Hence, the Department unilaterally extended the permits to cover any additional wastes already being received beyond authorized permit levels, but also required landfills receiving this additional waste to prepare permit amendments reflecting the increase. These amendments were to be subject to 60 days of public comment. The landfills were advised they would be held to these new daily volume limits. The program

applied to in-state and out-of-state disposal concerns. It affected every landfill in the state wishing to increase its daily volume limits.

When legislating in areas of local concern, such as environmental protection and resource conservation, states are nonetheless limited by the Commerce Clause. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 459 (1981). If a state law purporting to safeguard the health and safety of its people is in fact "simple economic protectionism, a virtually per se rule of invalidity has been erected." Philadelphia at 624. A balancing test as articulated in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), is appropriate where, as here, the state has advanced a rational purpose for its action and has not overtly discriminated against interstate commerce. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the local pertative benefits." Pike at 142.

Here, the Department explains its action was intended not only to ward off an impending waste crisis, but also to monitor substantial increases in landfills' daily waste volume which may affect the health of the public and the environment. Much testimony was heard by this Board regarding increases of dust, erosion, traffic, and noise. The increases in intake anticipated by the companies are substantial. The Arden landfill is operated under the authority of Solid Waste Permit No. 100594 which limits daily volume intake to 667 tons per day, or 2000 cubic yards (N.T. II 53, 248). The Southern Alleghenies landfill is operated under authority of Solid Waste Permit No. 100081 which limits daily waste volume intake to 360 tons per day, or 1150 cubic yards (N.T. II 248). Chambers has requested in its amended applications that the aggregate daily waste volumes for these two landfills be increased by

12,000 tons per day (N.T. II 248). The Department is seeking to insure that such substantial increases in daily waste volume intake take place only after a thorough regulatory review. This purpose is unquestioningly legitimate, rational and important and goes to the core of the state's police power.

The program also regulates evenhandedly, since waste volume increases resulting from out-of-state waste are treated the same as waste from within Pennsylvania. States may impose requirements on solid waste originating outside the state if the same requirements apply to solid waste originating within the state. Evergreen Waste Systems, Inc. v. Metropolitan Service District, 820 F2d 1482 (9th Cir.1987). In the Philadelphia case, although New Jersey conceded that out-of-state waste is no different from domestic waste, it barred the former while allowing landfills to take in New Jersey waste. Here, Pennsylvania has prohibited unregulated increases in waste received by landfills without regard to the source of the waste. As Mark McClellan, Deputy Secretary for Environmental Protection, testified at the Commonwealth Court's preliminary injunction hearing on July 31, 1987,

> "This policy will apply irrespective of the waste. The key trigger mechanism is any one who is operating in excess of what they are currently permitted to take needs to be reviewed in our judgment primarily because the implications it has for impacts and the need for equipment, soil cover, truck noise impact on the community, the capability of the landfill to really take those. Any one who has extended and expended their amount without this kind of review we cannot be sure that they are capable of actually handling those volumes in a way that protects public health and safety"
>
> (N.T. I 103)

The program is an evenhanded attempt to regulate all increases in daily waste volumes at state landfills.

Any burden borne by Martin and Southern Alleghenies as a result of this program is mitigated by the escape clauses contained in its contracts

with the New Jersey counties which have been discussed in a previous portion of this opinion. This burden is indidental when compared to the benefits for public health and planning for even distribution of increased waste throughout the state. The state has not prohibited all New Jersey wastes; it has merely provided for a case by case review of each landfill's request to increase its daily volume flow beyond current levels in order to subject any proposed increases to public review and commentary, as well as a thorough Departmental review of any environmental or public health hazards that might result from such an increase. The Department's decision to "grandfather" any unauthorized permit exceedances to date and subject only new increases in daily intake to review and the permit amendment process offers further evidence that the program is neither arbitrary or irrational. It is not discriminatory in either its purpose or its effect, much like the transporter bonding program under §505 of the Solid Waste Management Act considered by the Commonwealth Court in Chemclene Corp. v.Com., Dept. of Env. Res., Pa.Cmwlth. 316, 497 A.2d 268 (1985).

The Daily Volume Program and the Contracts Clause

Martin and Southern Alleghenies aver that the Department's daily volume program unlawfully affects Chambers' existing contracts for the movement and placement of interstate wastes in violation of the Contracts Clause, Article I, §10 of the United States Constitution and constitutes a taking without a just compensation in violation of the Due Process Clauses of the Fourth Amendment as applied to the states through the Fourteenth Amendment.

Chambers entered into its contracts with Union and Somerset Counties on May 15, 1987, two days after receipt of the Department's May 11, 1987

letter requesting permit amendments. As previously discussed, the contract with Essex County was executed on July 23, 1987, after Chambers had received the Department's May 15, 1987 and July 9, 1987 letters. The Department's 1981 policy guideline advising of the need for permit amendments for waste volume increases existed at the time of the April 10, 1987 contract with Passaic County. Hence, Chambers knowingly entered into contracts which would augment its daily volume of waste far beyond authorization levels (N.T. II 103). Rangos testified that, in anticipation of the Department action which is at issue here, provisions were negotiated in each contract which would relieve Chambers of the duty to comply with the contract terms in the event of a "change in law" (N.T. II 103-104). A change of law is defined as follows:

> Change in Law means any amendment to, or adoption, enactment or promulgation of, any Applicable Laws, or any change in the interpretation thereof by any Governmental Body reflected in a written document, that imposes more stringent requirements upon the construction or operation of the Licensor's Landfills than those in effect as of the Contract Date, and which imposes increases upon the costs of such construction or operation such that the aggregate increase in price determined pursuant to section 9.2 hereof is greater than One Hundred Thousand Dollars ($100,000), or which prevents Licensee from delivering Acceptable Waste to, or Licensor from accepting Acceptable Waste, or any category of Acceptable Waste, at its Landfills.
> (Pet.Ex. H-15)

Chambers will suffer no loss or economic retribution for its inability to perform under the contract due to a change in law. Moreover, the Supreme Court has recently ruled that Department subsidence control regulations imposing substantial limits on regulated parties was consistent with the constitutional requirements of the Contracts Clause and the "taking without just compensation" clauses of the Fourth Amendment where, inter alia, public interests in the legislation were adequate to justify impact of the Act

on...contractual agreements... Keystone Bituminous Coal Ass'n v. Benedictis, 107 S.Ct. 1232 (1987).

Does the Daily Volume Program Constitute Administrative Rulemaking in Violation of the Commonwealth Documents Law?

Administrative agencies may establish binding policy either through rulemaking or adjudications. DER v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982); Einsig v. Pa. Mines Corp., 69 Pa.Cmwlth. 351, 452 A.2d 558 (1982); Pa. Human Rel. Comm. v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977). The Commonwealth Court explained the two procedures and their legal effects in Einsig. If an agency chooses to establish binding policy through rulemaking, it must promulgate substantive rules in accordance with statutory procedures. But agencies may also establish binding policy through adjudications, such as issuance of orders. Einsig at 568; Butler County Mushroom Farm at 6, n.9. The difference between the two lies in whether they are subject to collateral attack. If regulations are adopted pursuant to proper procedures, are within the scope of the enabling legislation, and otherwise pass constitutional muster, they cannot be collaterally attacked. Einsig at 569. In comparison, an adjudication, or order, is binding and controlling until such time as an affected party, in a subsequent proceeding to determine the rasonableness of the adjudication, argues successfully that it was inaccurate or illegal. Id. Thus, the Department may establish a binding policy on waste volume intake through issuance of an order, as opposed to proceeding by rulemaking.

Pennsylvania courts have developed a line of cases which limit the weight that will be afforded an unpromulgated policy used by an agency in its adjudication. These cases hold that a policy which amounts to a "binding rule of Law" and which was not promulgated in accordance with the Commonwealth

Documents Law cannot be given the effect of a duly promulgated regulation. Lopata v. Pa. Unemp. Comp. Bd., 507 Pa. 570, 493 A.2d 657 (1985) (order based on a policy defining "credit week"); and Metro Transport Co. v. Pennsylvania Public Utility Comm., 525 A.2d 24 (Pa.Cmwlth.Ct. 1987) (adjudication based on a civil penalty policy).

We believe that the Department's 1987 guidance on implementation of permit amendment requirements is, in essence, an enforcement policy, and does not amount to a "binding rule of law" that requires promulgation under Lopata. Martin and Southern Alleghenies' solid waste permits limit the daily waste volumes that they may accept at their landfills. Section 610 of the Solid Waste Management Act makes it unlawful for any person to operate a solid waste disposal facility contrary to the terms or conditions of any permit, 35 P.S. 6018.610(2). In 1981, the Department published a guidance document that (1) restates the Solid Waste Management Act's requirement that solid waste operations be conducted pursuant to a permit and changes in operations require changes in a permit, and (2) explains what changes the Department would view as needing a permit modification. This policy neither limited nor expanded the prohibitions in §610 of the Solid Waste Management Act.

The 1987 policy before us in the daily volume program merely rearticulates the 1981 policy that a substantial change in daily waste volume intake would be viewed by the Department as a change requiring a permit modification. The new guidance document advised the Department's Regional Offices to determine the status of their solid waste facilities and, where necessary, establish the need for a permit modification as binding policy through case by case adjudications. As such, the guidance document relied on by the Department is no more than an enforcement policy through which the Department has expressed its intention to modify and compel compliance with

existing permit conditions. The Department has never asserted that members of the regulated community must comply with the guidance document as if it were a "binding rule of law." Rather, as in this case, the Department has chosen to make this policy binding on a case by case basis through administrative adjudications. Lopata does not mandate that this type of enforcement policy be subject to rulemaking procedures.[4] See also, Refiners Transport and Terminal Corp.v. DER, 1986 EHB 400.

---

[4] Even if we determined that the 1987 guidance document amounted to a regulation that should have been promulgated under the Commonwealth Documents Law, it would result only in the policy not being given the legal effect of a duly promulgated regulation. See, Lopata et al., supra. We would still proceed to determine whether the Department acted reasonably under the facts of that case, or, as stated in Lopata, "having determined that it (the policy) cannot be given the effect of a regulation, the decision remains whether the decision can be upheld as a valid exercise of an adjudicatory function. In light of the Department's authority under the Solid Waste Management Act, we believe its orders to Martin and Southern Alleghenies are a valid exercise of the adjudicatory function.

Estoppel and the Daily Volume Program

Martin and Southern Alleghenies urge us to hold that because the Department has not required permit amendments for periodic daily volume reports in excess of permit limits in the past, it is estopped from applying its daily volume program to their permits. The Department contends that the Solid Waste Management Act and its own 1981 policy as published at 11 Pa. B. 236 (Sept. 5, 1981) authorize it to set and enforce terms and limits as permit conditions.

The Department has broad power under §104(7) of the Solid Waste Management Act to

> (7) issue permits, licenses and orders, and specify the terms and conditions thereof, and conduct inspections and abate public nuisances to implement the purposes and provisions of this act and the rules, regulations and standards adopted pursuant to this act;

Correspondingly broad power is contained in §503 of the statute, which provides in pertinent part that:

> (a) Upon approval of the application, the department shall issue a permit for the operation of a solid waste storage, treatment, processing or disposal facility or area or a license for the transportation of hazardous wastes, as set forth in the application and further conditioned by the department.
>
> *****
>
> (e) Any permit or license granted by the department, as provided in this act, shall be revocable or subject to modification or suspension at any time the department determines that the solid waste storage, treatment, processing or disposal facility or area or transportation of solid waste:
>
> (1) is, or has been, conducted in violation of this act or the rules, regulations, adopted pursuant to the act;
> (2) is creating a public nuisance;
> (3) is creating a potential hazard to the public health, safety and welfare;

(4) adversely affects the environment;
(5) is being operated in violation of any terms or conditions of the permit; or
(6) was operated pursuant to a permit or license that was not granted in accordance with law.
(emphasis added)

Each permit issued to Chambers expressly incorporated as part of the permit the provisions of the permit applications containing maximum daily waste volume figures. (C.Ex.2-B and 2-C) These figures constituted legally enforceable limitations on daily intake.[5]

The Department's 1981 "Policy and Procedure for Amending Solid Waste Disposal and/or Processing Permits Municipal and Residual Solid Waste", 11 Pa.B. 236 (Sept. 5, 1981) also gives clear notice of its intent in this area. In relevant part, it states:

> A solid waste permit shall be amended at the discretion of the Department upon application for amendment by the solid waste permittee or upon the Department's determination that an amendment is required to insure compliance with the applicable environmental statutes and regulations.
>
> A solid waste permittee shall be required to make a complete and acceptable application for a permit amendment under the following conditions.
>
> A. when the permittee wishes to change, modify, add to, or delete from the approved operational and/or design plans of the facility, or
>
> B. when the permittee wishes to modify, add to, or delete from any term or condition of an existing solid waste permit.
>
> The Department, upon its own recommendation, shall amend a solid waste permit when it determines that any of the above conditions have occurred or are likely to occur or when such changes are required to protect the environment or the public health.

---

[5] The Martin permit was issued October 27, 1987 and the Southern Alleghenies permit on July 1, 1986. The Companies did not appeal the terms or conditions of either permit and are precluded from doing so now. Joseph Rostosky v. DER, 26 Pa. Comwlth. 478, 364 A.2d 761 (1978).

> Significant changes to an approved operational and/or design plan of a faciity which shall require a permit amendment shall include, but not be limited to the following:
>
> A. For municipal, residual, and demolition waste disposal facilities and flyash, bottom ash, and slag disposal facilities:
>
> 1. change in site volume (waste capacity)
> (emphasis added)

Changes in site volume are specifically noted as requiring permit amendments.

The Board has recognized the application of estoppel to prevent the Department from taking certain actions in extremely limited circumstances. Refiners Transport and Terminal Corp. v. DER, supra at 417-418. There we held that highly placed Commonwealth officials must have made affirmative representations knowing or having reason to know that an appellant would justifiably rely on those representations. Martin and Southern Alleghenies have failed to identify any highly placed Department official upon whose affirmative representations they justifiably relied in concluding that they are not subject to daily volume restrictions at their landfills. Neither lax enforcement nor acquiescence by unidentified DER representatives in exceedances of the daily volume limitations of Martin and Southern Alleghenies' permits rise to the level of affirmative representations upon which the companies could justifiably rely.

Rather, we believe that the circumstances presently before the Board are governed by the principle enunciated by the Commonwealth Court in Lackawanna Refuse Removal, Inc. v. DER, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982). There, the Court held that the Department was exercising a governmental function by enforcing hazardous waste dumping laws and its agent's mistaken indulgence or lax enforcement in the past could not now

prevent the Department from performing its duty and enforcing the statutes. See also High Sky, Inc. v. DER, 1980 EHB 19 wherein the Board held that the Department is not estopped from performing its regulatory duties by the improper acts of its employees. Accordingly, the Department's failure in the past to cite Martin and Southern Alleghenies for their exceedances of their permitted daily volume levels cannot now prevent it from enforcing its new and higher volume limit.

Failure to Adopt a Comprehensive Solid Waste Management Plan

Under §104(3) of the Solid Waste Management Act, the Department is empowered to develop a Statewide solid waste management plan in cooperation with local governments, the Department of Community Affairs, the Department of Commerce and the State Planning Board, with the emphasis to be on area-wide planning. We can find no language in the Solid Waste Management Act which constrains the Department in its administration and enforcement of the permit program as a result of any failure to prepare and adopt such a plan.

Generally, where other factors weigh heavily in favor of the grant of a supersedeas, a petitioner demonstrates likelihood of success on the merits if it makes a substantial case on the merits. Houtzdale Municipal Authority v. DER, supra. We do not believe that the other factors weigh heavily in favor of the grant of a supersedeas and we also do not believe that Chambers and Southern Alleghenies have made a substantlial showing of likely success on the merits.

INTERLOCUTORY APPEAL BY PERMISSION UNDER 42 Pa. C.S. §702(b)

A government unit such as the Board may certify an interlocutory order for appeal under 42 Pa. C.S. §702(b) if it is of the opinion that

such order involves a controlling question of law

> as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, ...

In response to Martin and Southern Alleghenies' motion, we indicated our willingness to certify whether the Department's daily volume program is unconstitutional and whether the Department's daily volume program constitutes rulemaking in violation of Pennsylvania administrative law. We do so for the following reasons.

It is clear that an immediate appeal relating to these two questions will materially advance the ultimate disposition of these appeals, as these are the primary issues upon which these appeals turn. Any other issues are inconsequential in comparison with these issues. Furthermore, like the matter before the Superior Court in Beasley v. Beasley, 359 Pa. Super. 20, 518 A.2d 545 (1986):

> already it has involved multitudes of proceedings and appeals and the parties have proceeded in a piecemeal fashion to have the rights of the parties adjudicated... it still has not progressed to the merits in the Court below, despite the extraordinary number of pleadings, filings, appeals and hearings which appear to carry the adversary nature of the proceedings to the ultimate degree...
>
> 518 A.2d at 549

Resolution of these issues is a matter of first impression within the Commonwealth and is, we believe, a proper matter for interlocutory appeal under the reasoning of Schuylkill Tp. v. Overstreet, 71 Pa. Cmwlth. 348, 454 A.2d 695, (1983).

And, we believe that the issues are of great public importance, given the public attention on the lack of adequate disposal capacity for intrastate wastes, as well as interstate wastes, and the inability of existing regulatory

tools to address it, as is evidenced by pending legislation such as S.B. 528. This, too, is proper grounds for certifying under Beasley v. Beasley, id at 545.

ORDER

AND NOW, this 16th day of February, 1988, affirming our earlier orders of December 11 and 17, 1987, it is ordered that:

1. The petitions for supersedeas of William H. Martin, Inc. and Southern Alleghenies Disposal Services, Inc. are denied; and

2. The following questions are certified under 42 Pa.C.S. §702(b) as involving controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal therefrom will materially advance the ultimate determination of this matter:

   A. Whether the Department's daily volume program violates the Commerce Clause of the United States Constitution?

   B. Whether the Department's daily volume program constitutes a valid and enforceable regulation under Pennsylvania law?

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 16, 1988

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ANTRIM MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 84-094-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 18, 1988

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

The Board grants partial summary judgment in the appeal of a compliance order for violations of effluent limitations incorporated in mine drainage, surface mining, and NPDES permits, since the appellant is challenging effluent limitations which it failed to appeal at the time of issuance of the permits.

OPINION

Antrim Mining, Inc. (Antrim) initiated this matter on March 9, 1984 with the filing of a notice of appeal seeking review of a compliance order (HRO 84-6) issued by the Department of Environmental Resources (Department). The compliance order, which was issued pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (the Surface Mining Act) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law), alleged that Antrim was discharging from

Sediment Ponds A and B on Mine Drainage Permit (MDP) No. 59820101 and Sediment Pond H on MDP No. 59820102 in violation of the effluent limits for pH, acidity, and total suspended solids at 25 Pa.Code §87.102. The area encompassed by MDP No. 59820101 is commonly referred to as the Antrim #1 Operation, while the area encompassed by MDP No. 59820102 is commonly referred to as the Rolling Run South Operation. Both operations are located in Duncan Township, Tioga County.

Antrim stated four objections to the Department's compliance order in its notice of appeal. It alleged that there was no basis in law or fact for the Department's claim that Antrim had violated the effluent limits for pH, acidity, and total suspended solids and contended that the Department's techniques for sampling these parameters were improper. Antrim also argued that the effluent limits for total suspended solids in 25 Pa.Code §87.102(a)(1) were arbitrary, capricious, inconsistent with the law, and not supported by substantial evidence and likewise alleged that the Department's interpretation of 25 Pa.Code §87.102(a)(1) as requiring alkalinity to exceed acidity was "arbitrary, capricious, inconsistent with law, a rule not duly promulgated by the Environmental Quality Board and not supported by substantial evidence."

On April 14, 1987, the Department filed a motion for partial summary judgment, arguing that because Antrim never appealed any of the effluent limits contained in Special Condition No. 49 of MDP Nos. 59820101 and 59820102, or the reissuance of Surface Mining Permit (SMP) Nos. 59820101 and 59820102, or NPDES Permit Nos. PA0609129 and PA0610429, Antrim is now precluded from collaterally attacking those permit conditions in this appeal from a compliance order regarding violations of the conditions of those permits. The Department asserts that the only issue remaining in this appeal

is the validity of the Department's testing procedures for acidity. The Board advised Antrim that any response to the Department's motion must be filed on or before May 11, 1987. Antrim did not respond to the Department's motion, so we will, pursuant to 25 Pa.Code §21.64(d), treat all relevant facts in the Department's motion as admitted by Antrim.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, Docket No. 82-303-M (Opinion and order issued March 19, 1987).

The material facts regarding the effluent limitations are as set forth in the Department's motion and have been deemed admitted by Antrim. On September 20, 1982, the Department issued MDP No. 59820101 for the Antrim #1 Operation. Special Condition 49 of the MDP provides:

> Discharges of water from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State Laws and regulations, and at a minimum, the following numerical effluent limitations:

EFFLUENT LIMITATIONS
IN MILLIGRAMS PER LITER, mg/l, EXCEPT FOR pH

Effluent Characteristics	Maximum Allowable	Average of Daily Values for 30 Consecutive Discharge Days
Iron, total	6.0	3.0
Manganese, total	4.0	2.0

[1] Although Antrim has asserted in its answers to interrogatories that the Department's methodology for testing iron concentrations is flawed, that claim is irrelevant here because the compliance order at issue in this appeal did not cite Antrim for any violations of effluent limitations of iron.

EFFLUENT LIMITATIONS
IN MILLIGRAMS PER LITER, mg/l, EXCEPT FOR pH

Effluent Characteristics	Maximum Allowable	Average of Daily Values for 30 Consecutive Discharge Days
Iron, total	6.0	3.0
Manganese, total	4.0	2.0
Total suspended solids	70.0	35.0
pH	within the range 6.0 to 9.0	

Antrim agreed to the special conditions of the MDP on that date.

On March 16, 1984, the Department reissued SMP No. 59820101 to Antrim. On the same day, the Department issued National Pollution Discharge Elimination System (NPDES) Permit No. PA0609129, authorizing Antrim to discharge from the outfalls at its mine drainage treatment facilities and six outfalls at erosion and sedimentation control facilities at its Antrim #1 Operation. The NPDES permit set the following limitations for all eight outfalls at the Antrim #1 Operation:

Discharge Parameter	Average Monthly	Maximum Daily
Iron	3.0	6.0
Manganese	2.0	4.0
Total suspended solids	35.0	70.0

pH - Not less than 6.0 standard units nor greater than 9.0 standard units at all times.

Alkalinity must exceed acidity at all times.

The Department issued MDP No. 59820102 to Antrim for the Rolling Run South Operation on February 2, 1983, and Antrim accepted the special

conditions for this permit on February 7, 1983. Special Condition 49 in this permit incorporated the same effluent limitations as required by Special Condition 49 in MDP No. 59820101.

The Department issued SMP No. 59820102 to Antrim on April 16, 1984 for the Rolling Run South Operation. On the same day, the Department issued NPDES Permit No. PA0610429 to Antrim, authorizing discharges from two outfalls at mine drainage treatment facilities and seven outfalls at erosion and sedimentation control facilities at its Rolling Run South Operation. The effluent limitations were the same as required by NPDES Permit No. PA0609129 at the Antrim #1 facility.

The relevant regulations governing discharges from areas disturbed by mining activities are found at 25 Pa.Code §87.102, which provides, in pertinent part, that:

> (a) At a minimum, the discharge of water from areas disturbed by mining activities, including areas disturbed by mineral preparation, processing, or handling facilities, shall comply with the following discharge limitation:
>
> (1) Acid. There shall be no discharge of water which is acid.
>
> * * * * *
>
> (4) Total suspended solids. There shall be no discharge of water containing more than seventy milligrams per liter of total suspended solids.
>
> (5) pH. The pH of discharges of water shall be maintained between 6.0 and 9.0...
>
> * * * * *
>
> (b) In addition to the requirements of subsection (a), the discharge of water from the areas disturbed by mining activities shall comply with the provisions of this title, including Chapter 91 (relating to general provisions), Chapter 92 (relating to national pollutant discharge elimination system),

> Chapter 93 (relating to water quality standards), Chapter 95 (relating to wastewater treatment requirements), Chapter 97 (relating to industrial wastes), Chapter 101 (relating to special water pollution regulations), and Chapter 102 (relating to erosion control).

Thus, the Department's interpretation of 25 Pa.Code §87.102 is contained in the effluent limitations incorporated in the mine drainage, surface mining, and NPDES permits issued to Antrim.

Antrim has never appealed the issuance of any of these permits. Rule 21.52(a) of the Board's rules of practice and procedure requires that an appeal be filed within 30 days of the permittee's receipt of the permit. Antrim admittedly did not appeal the issuance of any of the permits mentioned here and it cannot, in the guise of a challenge to a compliance order regarding violations of those permits, attack the Department's interpretation of 25 Pa.Code §87.102 in the provisions of those permits containing effluent limits. Toro Development Company v. Commonwealth, Department of Environmental Resources, 56 Pa.Cmwlth. 471, 425 A.2d 1163 (1981).

Since Antrim is precluded from challenging the underlying effluent limitations for pH, suspended solids, and acidity by reason of its failure to appeal those limits when Antrim's permits were issued, we must grant summary judgment in the Department's favor regarding the effluent limitations for these parameters. The only remaining issue for our disposition is contained in Antrim's response to the Department's Interrogatory No. 15. That interrogatory requested Antrim to explain the grounds for contesting the Department's interpretation of 25 Pa.Code §87.102(a)(1) as requiring alkalinity to exceed acidity, Antrim replied:

> There shall be no discharge of water which is acid is the effluent limit in §87.102. The analytical procedure for testing for acidity only measures the potential for acidity not actual

acidity. This is due to the heating and chemically breaking down of the sample to determine potential acidity, not its true acidity at the time.

It is apparent that Antrim is challenging the Department's testing procedures for acidity and this is the sole remaining issue for disposition in this matter.

O R D E R

AND NOW, this 18thday of February, 1988, it is ordered that the Department of Environmental Resources' Motion for Partial Summary Judgment is granted and the appeal of Antrim Mining, Inc. is dismissed as to all issues except the validity of the Department's testing procedure for acidity.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

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DATED: February 18, 1988

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DANIEL PETRICCA	:	
	:	
v.	:	**EHB Docket No. 86-360-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 18, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss as moot is denied where the Department of Environmental Resources' (DER) denial of a permit application was not superseded by DER's reversal of position of only some of the reasons for denial and where no permit has been issued.

OPINION

This action was commenced by the July 21, 1986 filing of an appeal by Daniel Petricca (Petricca) from the June 18, 1986 Department of Environmental Resources (DER) return of his surface mining permit application (No. 63850107) pertaining to a mine site in Smith Township, Washington County. DER returned the application due to, inter alia, Petricca's alleged failure to provide adequate information. In addition, DER advised Petricca that it considered his application as being a transfer of an existing permit as well as a new application and that it could not process his application unless he agreed to accept certain responsibilities and liabilities.

On December 9, 1987, DER filed a motion to dismiss Petricca's appeal, asserting that, subsequent to the filing of this appeal, DER had collected certain forfeited bonds on the site in question and had informed Petricca of its willingness to accept an application for a new permit, rather than insisting on a permit transfer. DER contends that this later action renders its prior action null and void and that, therefore, this appeal should be dismissed as moot.

To date, and though advised by the Board of the motion, Petricca has neither answered the motion nor filed objections. Accordingly, pursuant to 25 Pa.Code §21.64(d), all relevant statements of fact in DER's motion are deemed as admitted.

It is established, through Petricca's deemed admission, that DER no longer insists on a permit transfer and will accept Petricca's application for a new permit for any part of the site. In order to determine whether this change of position supersedes, and hence moots, the appealed-from action, we must examine the nature of DER's June 18, 1986 action and the relief sought by Petricca.

In toto, the June 18, 1986 DER letter to Petricca reads as follows:

> Enclosed is the above referenced application you have previously filed with the Department. This application is being returned due to your failure to provide adequate information. Three (3) extensions of time, for submitting the information required by the Department, were granted to you.
>
> In response to your letter of May 28, 1986, the subject application was considered a transfer of permit in addition to a new application. Because the proposed site has existing bonds, a transfer of the permit must have occurred in which the new permittee agrees to all responsibilities and liabilities under the existing permit. All of the permitting requirements were extensively reviewed with you on April 28, 1986. If you have withdrawn your letter of April 10, 1985, accepting all responsibilities, we are further held from processing this application.

> Please note that if you desire to propose mining within the area covered by surface mining permit no. 63850107, a new surface mining and transfer application must be submitted.
>
> If you have further questions concerning this matter, please call me at the above telephone number.

The import of DER's letter is unmistakeably clear--Petricca's application for a surface mining permit was denied, notwithstanding the use of phraseology such as "[t]his application is returned..." or "...we are further held from processing this application." DER denied Petricca's authorization to mine because, it stated, 1) the application contained inadequate information, 2) the site was already covered by existing bonds and an existing permit and 3) failure to accept certain responsibilities. In his notice of appeal, Petricca clearly states that he is appealing the "[r]eturn and denial of [his] application of mining permit" (emphasis added). Clearly, the relief being sought by Petricca is a determination by this Board that he was entitled to a permit.

The only action DER could have taken which would have rendered its June 18, 1986 letter null and void and which would have afforded Petricca the relief he sought would have been to issue the permit. Its action of informing Petricca that a new application would be considered in no way negates the earlier permit denial.[1] Indeed, when an applicant for a permit appeals a DER denial of his application, one can presume that he is seeking a permit, not the right to submit another application. Yet, DER's action is simply telling Petricca that he may now reapply, something he would be

---

[1]DER's motion provides no information as to how it informed Petricca of its change in position. For example, we are uncertain as to whether a DER employee telephoned, visited in person or wrote to Petricca. However, discernment of the particulars of the "action" is unnecessary to our disposition of the motion.

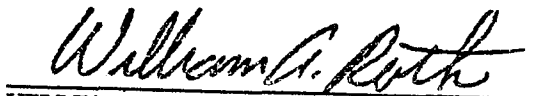
entitled to do in any event.

Though it appears that DER has reversed its position on at least some of the reasons for its earlier denial, Petricca is no closer to having a permit than when his appeal was filed. Thus, Petricca is entitled to challenge DER's other permit denial reasons. Since the earlier permit denial has not been mooted, we will deny DER's motion.

O R D E R

AND NOW, this 18th day of February, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is denied. DER shall file its pre-hearing memorandum on or before March 9, 1988.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: February 18, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Western Region
For Appellant:
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Coraopolis, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN J. KARLAVAGE, M.D.	:	
v.	:	**EHB Docket No. 87-215-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 18, 1988
and	:	
READING ANTHRACITE COMPANY, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeal is dismissed as a sanction for failure to prosecute.

OPINION

Since the history of this matter is set forth in detail in the Board's October 30, 1987 opinion and order denying Permittee Reading Anthracite's (Reading) motion to dismiss the appeal as untimely filed, we will not recount it here. The Board's October 30, 1987 opinion and order required John J. Karlavage, M.D. (Karlavage) to file his pre-hearing memorandum on or before November 16, 1987.

Karlavage failed to file his pre-hearing memorandum by the required date, and the Board, by letters dated November 19 and December 9, 1987, notified Karlavage of his default and advised him of the sanctions which could potentially be imposed as a result of his failure to comply with the Board's order. The Board's December 9, 1987 default letter required Karlavage to file

his pre-hearing memorandum on or before December 19, 1987. As of the date of this opinion and order, Karlavage has yet to file his pre-hearing memorandum or request an extension.

In the meantime, Reading, on November 10, 1987, filed another motion to dismiss Karlavage's appeal. Reading argued that Karlavage's appeal should be dismissed as untimely because it was filed more than 30 days after issuance of Reading's plan approval. Reading also contended that Karlavage's appeal should be dismissed as a sanction for Karlavage's failure to properly perfect his appeal, failure to timely file his pre-hearing memorandum, and failure to respond to Reading's various motions. The Board, by letter dated November 19, 1987, advised Karlavage that any response to Reading's motion must be filed on or before December 9, 1987. Karlavage did not file a response to Reading's motion.

The Board, the Department of Environmental Resources, Reading, and other permittees in the companion appeals[1] to this appeal have devoted a great deal of resources to these matters. The Board, because of Karlavage's status as a pro se appellant, has taken particular pains to guarantee Karlavage due process of law. But, Karlavage has given us no indication that this is anything but a frivolous appeal. He has failed to properly perfect his appeal, he has failed to respond to any of Reading's motions, and he has

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[1] John J. Karlavage, M.D. v. DER and Signal Frackville Corporation, EHB Docket No. 87-213-W (Opinion and order issued February 2, 1988); John J. Karlavage, M.D. v. DER and CRS-Sirrine Corporation, EHB Docket No. 87-214-W (Opinion and order issued February 2, 1988); John J. Karlavage, M.D. v. DER and Gilberton Power Company, EHB Docket No. 87-216-W; and John J. Karlavage, M.D. v. DER and the Reading Company, EHB Docket No. 87-180-W (Opinion and order issued November 3, 1987).

failed to file his pre-hearing memorandum. It is more than evident that he has no intention of prosecuting his appeal and, therefore, the sanction of dismissal is appropriate.

O R D E R

AND NOW, this 18th day of February, 1988, it is ordered that Reading Anthracite Company's motion to dismiss is granted and the appeal of John J. Karlavage, M.D. is dismissed as a sanction for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 18, 1988

cc: **Bureau of Litigation**
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For Appellant:
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For Permittee:
Edward E. Kopko, Esq.
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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN J. KARLAVAGE, M.D.	:	
v.	:	**EHB Docket No. 87-216-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 18, 1988
and	:	
GILBERTON POWER COMPANY, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeal is dismissed as a sanction for lack of prosecution.

OPINION

Since the procedural history of this matter is set forth in detail in the Board's October 30, 1987 opinion and order denying Permittee Gilberton Power Company's (Gilberton) August 17, 1987 motion to dismiss, we will not repeat it here. The Board's October 30, 1987 opinion and order required John J. Karlavage, M.D. (Karlavage) to file his pre-hearing memorandum on or before November 16, 1987.

Karlavage did not file his pre-hearing memorandum as required by the Board's order, and the Board, by letter dated November 19, 1987, advised Karlavage that he was in default of the Board's October 30, 1987 order and that he must file his pre-hearing memorandum on or before November 30, 1987 in order to avoid potential sanctions. Meanwhile, Gilberton, by motion dated November 30, 1987, again requested the Board to dismiss Karlavage's appeal as a sanction for failure to file his pre-hearing memorandum and for lack of

standing. Karlavage was advised by the Board in a letter dated December 10, 1987, that he must file a response to Gilberton's motion no later than December 30, 1987. Karlavage did not respond to Gilberton's motion, nor has he filed his pre-hearing memorandum.

The Board, the Department of Environmental Resources, Gilberton, and other permittees in the companion appeals[1] to this appeal have devoted a great deal of resources to these matters. The Board, because of Karlavage's status as a pro se appellant, has taken particular pains to guarantee Karlavage due process of law. But, Karlavage has given us no indication that this is anything but a frivolous appeal. He has failed to properly perfect his appeal, he has failed to respond to either of Gilberton's motions to dismiss, and he has failed to file his pre-hearing memorandum. It is more than evident that he has no intention of prosecuting his appeal and, therefore, the sanction of dismissal is appropriate.

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[1] John J. Karlavage, M.D. v. DER and Signal Frackville Corporation, EHB Docket No. 87-213-W (Opinion and order issued February 2, 1988); John J. Karlavage, M.D. v. DER and CRS-Sirrine Corporation, EHB Docket No. 87-214-W (Opinion and order issued February 2, 1988); John J. Karlavage, M.D. v. DER and Reading Anthracite Company, EHB Docket No. 87-215-W; and John J. Karlavage, M.D. v. DER and the Reading Company, EHB Docket No. 87-180-W (Opinion and order issued November 3, 1987).

O R D E R

AND NOW, this 18th day of February, 1988, it is ordered that Gilberton Power Company's motion to dismiss is granted and the appeal of John J. Karlavage, M.D. is dismissed as a sanction for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 18, 1988

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

HATFIELD TOWNSHIP MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 85-555-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 23, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS REMAINING ISSUES

Synopsis

A motion to dismiss remaining issues is granted and an appeal is dismissed where the Board lacks jurisdiction. When an appeal is not filed timely from the reissuance of an NPDES permit but is filed timely only with respect to an amendment thereto, only those provisions which are changed or modified by the amendment may be challenged. Reissuance of an NPDES permit moots issues raised in appeals of the superseded permit. The Board's jurisdiction is conferred by the Administrative Agency Law, the Administrative Code and the Board's rules; jurisdiction can never be conferred by mere agreement of the parties, even if the Board approves.

O P I N I O N

The critical issue before the Board at this stage of proceedings in the above captioned matter is jurisdiction. This appeal is the latest in a

series of appeals, all of which relate to the Hatfield Township Municipal Authority's (Hatfield) NPDES permit.

On May 6, 1980, the Department of Environmental Resources (DER) issued Hatfield's original NPDES permit, which permit authorized a discharge from Hatfield's sewage treatment plant to the West Branch of Neshaminy Creek, in Hatfield Township, Montgomery County. In 1984, Hatfield filed five appeals from various DER actions related to the original NPDES permit. Three of these appeals were subsequently withdrawn but two remained before the Board.

Hatfield's appeal at EHB Docket No. 84-025-W was taken from a DER letter dated December 28, 1983. That letter generally dealt with an expansion project at Hatfield's sewage treatment plant but, in particular, Hatfield asserted that the letter imposed a new phosphorus limitation on and required dechlorination of its discharge. Hatfield's appeal originally filed at EHB Docket No. 84-254-M was taken from DER's publication of proposed effluent limits for Hatfield's discharge at Outfall 001, which appeared in the July 7, 1984 issue of the Pennsylvania Bulletin. This appeal was consolidated with the appeal at EHB Docket No. 84-025-W.

On September 27, 1985, DER issued a renewal of Hatfield's NPDES permit and, on November 29, 1985, DER issued an amendment thereto, so-called Amendment 1. On December 26, 1985, Hatfield filed the above captioned appeal, specifically challenging the phosphorus removal requirements and effluent limitations regarding selected toxic pollutants.

On June 16, 1986, the parties stipulated that the two appeals consolidated at EHB Docket No. 84-025-W would be withdrawn by Hatfield with prejudice, and that the issues in the instant appeal would be limited to matters concerning effluent limitations for silver, cadmium and chlorinated organics. This stipulation was approved by the Board.

On April 29, 1987, DER moved to dismiss the remaining issues in this appeal, i.e. those specified in the stipulation, for lack of jurisdiction. DER alleges that, since Hatfield did not appeal the September 27, 1985 renewal of its NPDES permit, all provisions therein became final. DER asserts that Hatfield may challenge only the November 29, 1985 amendment, which dealt only with limitations for BOD-5 and ammonia-, nitrate- and nitrite-nitrogen and changed nothing with respect to limitations for silver, cadmium and chlorinated organics. Since stipulated issues do not include the limitations altered by Amendment 1, DER submits that the Board has no jurisdiction to hear this appeal.

In its answer, filed May 22, 1987, Hatfield contends that DER is estopped from raising the jurisdiction issue by the doctrine of laches, arguing that had the issue been raised in a timely manner, Hatfield could have filed a petition to appeal nunc pro tunc the September 27, 1987 renewal of the permit, and, further, would never have withdrawn the appeals consolidated at No. 84-025-W. Hatfield also claims that a statement in DER's pre-hearing memorandum that the instant appeal covers both the renewed NPDES permit and the amendment is an admission that estops DER from raising the jurisdiction question. Finally, Hatfield asserts that DER is estopped from raising jurisdictional questions by virtue of the Board approved stipulation.

Our consideration of DER's motion begins with a review of the requirements for jurisdiction by this Board. It is well established that the Board only has jurisdiction to hear appeals of final DER actions which are filed within 30 days of the appellants receipt of notice of such actions. 25 Pa.Code § 21.52(a); Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2nd 761 (1976). Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law,

2 Pa.C.S.A §101 or "actions" under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa.Code §21.2(a). We have consistently interpreted these statutes to confer jurisdiction on the Board to review any DER decision which affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. Springettsbury Township Sewer Authority v. DER, 1985 EHB 492.

When the renewed NPDES permit was issued on September 27, 1985, Hatfield had 30 days from its receipt of written notice of issuance in which to appeal. If it failed to do so, the renewed NPDES permit, including conditions respecting silver, cadmium and chlorinated organics, would become final and unassailable, since Amendment 1 would affect Hatfield's rights, privileges, immunities, duties, liabilities and obligations only with respect to BOD-5, nitrate and nitrite nitrogen. Hatfield's appeal filed December 26, 1985, clearly was untimely with respect to the renewed permit and was effective to invoke the Board's jurisdiction only with respect to those conditions altered by Amendment 1. To allow Hatfield to challenge any other aspect of the renewed permit would be to condone an impermissible collateral attack on a final DER order. McGal Coal Company, Inc. v. DER, EHB Docket No. 86-116-R, (Opinion and order issued December 16, 1987).

The fact that a stipulation was entered into providing for litigation of the silver, cadmium and chlorinated organics requirements herein does not alter this conclusion. First, and most important, an agreement among parties to an appeal -- or even Board approval of such an agreement -- can never operate to confer jurisdiction. As discussed above, the Board's jurisdiction is limited to those situations defined in the Administrative Agency Law, the Administrative Code and the Board's rules of practice and procedure. The

Board is powerless to extend its jurisdiction, such as by ignoring time limits for appeal, a principle which the Board communicated to Hatfield early in 1986.

Second, even if the disputed issues respecting silver, cadmium and chlorinated organics were properly raised in the consolidated appeals at EHB Docket No. 84-025-W, they became moot. When the renewed permit was issued the disputed issues could be kept alive only by the timely filing of another appeal, New Jersey Zinc Company v. DER, 1986 EHB 1199, and not by stipulation.

Hatfield's challenge to DER's ability to raise the jurisdiction question is without merit. Even if the facts underlying its arguments are correct, it is well established that the issue of jurisdiction -- a fundamental prerequisite to any appeal -- may be raised by any party at any time in the course of proceedings. Thomas Fitzsimmons v. DER, 1986 EHB 1190.

It should be noted that Hatfield does not seek to avoid the terms of the stipulation by claiming a mistake of fact or law. If it had raised the issue and if the Board resolved it in Hatfield's favor, the effect would be to permit the appeal to stand, limited to the issues of BOD-5, ammonia, nitrate and nitrite nitrogen. Since Hatfield apparently does not dispute these issues, allowing the appeal to stand would be of no significance.

O R D E R

AND NOW, this 23rd day of February, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss remaining issues is granted and the appeal of the Hatfield Township Municipal Authority is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: February 23, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
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For Appellant:
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D & M CONSTRUCTION	:	
	:	
v.	:	**EHB Docket No. 87-288-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 23, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The appeal of a civil penalty assessment is dismissed where appellant failed to post the required appeal bond or to prepay the penalty within 30 days of its receipt of the assessment.

O P I N I O N

On July 22, 1987, D & M Construction ("D & M") filed an appeal with the Board from the Department of Environmental Resources'("DER") June 22, 1987 assessment of a $2,750 civil penalty against D & M for its failure to reclaim its surface mining site in Madison Township, Clarion County in accordance with its approved reclamation plan. The assessment was issued pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.("Surface Mining Act"), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law").

On June 15, 1987, DER filed a motion to dismiss D & M's appeal, contending that the Board was without jurisdiction to hear D & M's appeal because it had not perfected its appeal by posting an appeal bond or by prepaying the penalty, as required by Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b). D & M failed to respond to DER's motion and, pursuant to 25 Pa.Code §21.64(d), the Board will deem all relevant facts in DER's motion as admitted by D & M.

It is well settled that, pursuant to §18.4 of the Surface Mining Act, 52 P.S. §1396.22, and §605(b) of the Clean Streams Law, 35 P.S. §691.605(b), the Board has no jurisdiction over cases where an appellant has failed to perfect its appeal by prepaying the proposed penalty or forwarding an appeal bond within the thirty day appeal period. Boyle Land and Fuel Company v. Commonwealth of Pennsylvania, EHB, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984), Aff'd 507 Pa. 135, 488 A.2d 1109 (1985) and 3 L Coal Company v. DER, EHB Docket No. 87-321-W (Opinion and order issued January 19, 1988). Therefore, we have no choice but to dismiss this appeal for lack of jurisdiction.

O R D E R

AND NOW, this 23rd day of February, 1988, it is ordered that the Department of Environmental Resources motion to dismiss is granted and the appeal of D & M Construction is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 23, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
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For Appellant:
Larry L. Kifer, Esq.
ALEXANDER, GARBARINO,
KIFER & SPEER
Clarion, PA

rm

DAVIS COAL	:	
	:	
v.	:	**EHB Docket No. 87-388-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 25, 1988

OPINION AND ORDER
SUR
MOTION TO QUASH

Synopsis

A motion to quash an appeal from a civil penalty assessment is granted where the Appellant failed to post an appeal bond or prepay the amount of the assessment.

O P I N I O N

This matter was initiated by the September 11, 1987 filing by Davis Coal (Davis) of an appeal from a May 27, 1987 Department of Environmental Resources (DER) compliance order, which cited Davis for failing to have operable safety equipment at its Burkett surface mining site in Burrell and Plumcreek Townships, Armstrong County. In addition, Davis was cited for failing to confirm that the proper erosion and sedimentation controls had been installed. Although the notice of appeal form did not indicate that Davis was seeking review of a civil penalty assessment, a copy of a $1400 civil penalty assessment issued by DER on August 11, 1987 was attached to

it. The compliance order and civil penalty assessment were issued by DER pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL).

On January 11, 1988, DER filed a motion to quash this appeal, alleging that the appeal was untimely, since the May 27, 1987 compliance order Davis specified in its notice of appeal was received by Davis on June 8, 1987, 65 days before Davis filed its appeal. In the alternative, DER argues that if this is actually an appeal of the August 11, 1987 civil penalty assessment, the Board lacks jurisdiction because Davis failed to pre-pay the civil penalty assessment within 30 days after receiving the assessment.

In response to DER's motion, Davis states, contrary to its notice of appeal, that it is appealing "the fines" and, therefore, its appeal is timely. Davis does not dispute DER's assertion that it did not prepay the civil penalty, but asserts that it was financially unable to pre-pay the assessment and that its right to due process will be denied if this appeal is quashed due to its failure to prepay the civil penalty. Finally, Davis alleges that it was never notified that pre-payment of the civil penalty was a requirement for perfection of its appeal.

In light of Davis' answer to DER's motion, we need not rule on the motion as it pertains to the compliance order. As Davis submits, this is an appeal from the civil penalty assessment. Davis, by its own admission, did not prepay the civil penalty assessment, either by filing a properly executed appeal bond or by forwarding the amount of the civil penalty assessment. It is well settled that, under §18.4 of SMCRA, 52 P.S. §1396.22 and §605 of the CSL, 35 P.S. §691.605, prepayment of a civil penalty assessment is required

and that failure to prepay within the 30 day appeal period deprives the Board of jurisdiction over an appeal of such assessment. 3 L Coal Company v. DER, EHB Docket No. 87-321-W (Opinion and order issued January 19, 1988). Davis's due process argument is without merit since the constitutionality of the prepayment requirement has been examined and upheld. Boyle Land and Fuel Company v. Comm., EHB, 82 Pa.Cmwlth. 452, 475 A. 2d 928 (1984), aff'd 507 Pa. 135, 488 A.2d 1109 (1985). Pre-payment of the civil penalty is a jurisdictional requirement and applies even where an appellant is financially unable to comply. Anthracite Processsing, Inc. v. DER, 1986 EHB 1173. Finally, Davis' argument that it was not notified of the appeal requirements is meritless. §18.4 of SMCRA, 52 P.S. §1396.22 and §605 of the CSL, 35 P.S. §691.605, provide explicit procedures for the appeal of civil penalty assessments. Davis is presumed to have knowledge of these applicable statutes, regardless of what other notifications it may have received -- or not received.

In light of the foregoing, we conclude that the Board lacks jurisdiction to hear this appeal and, accordingly, we will grant DER's motion.

O R D E R

AND NOW, this 25th day of February, 1988, it is ordered that the Department of Environmental Resources' motion to quash is granted and the appeal of Davis Coal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 25, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

ROHM AND HAAS DELAWARE VALLEY, INC.	:	
	:	
v.	:	**EHB Docket No. 86-608-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 26, 1988

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Synopsis

A Petition to Intervene will be granted when it is filed timely and essentially satisfies the requirements of 25 Pa. Code §21.62. However, participation will be confined to challenging any further temporary or permanent relaxation of Permit limitations when it is apparent that the proposed intervenor objects only to that aspect of the case.

OPINION

On October 30, 1986, Rohm and Haas Delaware Valley, Inc. ("Permittee") filed a Notice of Appeal from DER's issuance on September 30, 1986, of NPDES Permit No. PA0012769 to Permittee. Along with the Notice of Appeal, Permittee filed a Petition for Supersedeas, seeking a relaxation of certain Permit limitations during the pendency of the Appeal. The Petition for Supersedeas was resolved by a stipulation, entered into between the Permittee and DER and approved by the Board on May 1, 1987, relaxing certain

Permit limitations until November 2, 1987. Amendment No. 1 to this stipulation was approved by the Board on August 10, 1987. Amendment No. 2, requesting that the Permit limitations continue to be relaxed until August 2, 1988, was approved by the Board on November 6, 1987.

On December 16, 1987, Raymond Profitt ("Petitioner") filed a Notice of Appeal at docket number 87-515-M, challenging the Permit issuance and the stipulations. Along with the Notice of Appeal, he filed a Petition to Intervene in this proceeding and a Motion to Consolidate the two cases. On December 24, 1987, Permittee filed a Motion to Quash the Appeal at 87-515-M and Objectiions to the Petition to Intervene and the Motion to Consolidate.

In a separate Opinion and Order issued simultaneously herewith, we have dismissed the Appeal at 87-515-M and denied the Motion to Consolidate as moot. The Petition to Intervene is dealt with herein.

The Board's rules and regulations governing intervention are set forth at 25 Pa. Code §21.62. Essentially, they require a petition to be filed before any hearings are held, setting forth specific grounds for intervention, the interest of the petitioner in the proceeding and a statement why that interest may be inadequately represented by existing parties. Intervention is discretionary with the Board but is not to be denied simply because the petitioner does not have a proprietary interest affected by the action appealed.

Although the Petition to Intervene involved in the present case was not filed until more than a year after the Appeal was filed, it still is timely because no hearings have commenced as yet. Nonetheless, the Permittee opposes the Petition on the ground that Petitioner has not satisfied the

Intervention rules. The Petition to Intervene is combined with the Motion to Consolidate and derives its basis from the reasons specified in the Notice of Appeal.

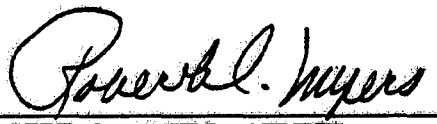
According to that pleading, Petitioner uses the Delaware River for his use and enjoyment and has an interest in eliminating pollution from it. He confines his objections to Outfall 009 and challenges the Permit provisions with respect to BOD-5, suspended solids, pH, mercury, zinc, methylene chloride, cyanide, phenol, chemical oxygen demand, sulfate, monitoring, sampling and evaporation. He alleges that the stipulations relax the standards even more than the Permit and objects to the delays in meaningful treatment of the discharge.

While the Petition does not conform precisely with the form in 25 Pa. Code §21.62(d), enough essentials appear to satisfy the requirements. However, it is apparent from the history of the case that Petitioner really objects only to the stipulations temporarily relaxing the Permit limitations with respect to Outfall 009 and not to the limitations themselves. Accordingly, intervention will be allowed, but Petitioner's participation will be confined to challenging any further temporary or permanent relaxation of Permit limitations applicable to Outfall 009. DER's previous consent to stipulations allowing such relaxation is sufficient to show that Petitioner's interest may not be adequately represented in that respect.

ORDER

AND NOW, this 26th day of February, 1988, the Petition to Intervene filed by Raymond Profitt is granted with the condition that Raymond Profitt's participation shall be confined to challenging any further temporary or permanent relaxation of the limitations contained in NPDES Permit No. PA0012769 with respect to Outfall 009.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: February 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Vincent M. Pompo, Esq.
Eastern Region
For Appellant:
Robert L. Collings, Esq.
Philadelphia, PA
For Petitioning Intervenor:
Randall J. Brubaker, Esq.
Philadelphia, PA

mjf

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SUGAR HILL LIMESTONE COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-336-R**
	:	(Issued February 26, 1988)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal of a civil penalty assessment is dismissed where the appellant failed to file its appeal with the Board within thirty days of the date that it received notice of the assessment and where the appellant failed to prepay the assessment.

O P I N I O N

This matter was initiated on August 10, 1987 by Sugar Hill Limestone Company's (Sugar Hill) filing of an appeal from a July 6, 1987 $6,000 civil penalty assessment issued by the Department of Environmental Resources (DER). The assessment was imposed as a result of the failure of Sugar Hill to comply with a March 25, 1985 DER cease and desist order, as well as Sugar Hill's failure to comply with various provisions of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act

of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL). The assessment pertained to Surface Mining Permit No. 33773132 for the Holmes site in Washington Township, Jefferson County.

DER, on January 25, 1988, filed a motion to dismiss, alleging that the Board lacked jurisdiction to hear the appeal because Sugar Hill had filed its appeal more than thirty days after its July 8, 1987 receipt of the civil penalty assessment and because Sugar Hill failed to prepay the assessment by filing a surety bond or by forwarding the amount of the assessment when it filed its appeal with the Board, as required by §18.4 of SMCRA and §605 of the Clean Streams Law. In its February 8, 1988 response, Sugar Hill claims that its appeal should have been received by the Board by August 7, 1987 and that either postal system delays or shortened hours of Board operation resulted in untimeliness. With respect to the prepayment of civil penalties, Sugar Hill claims both the inability to place $6,000 in escrow and a lack of awareness that it could have filed an appeal bond as an alternative to escrowing the funds.

It is well settled that the Board's jurisdiction attaches only to appeals which are filed within 30 days after the appellant has received written notice of a final DER action. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A. 2d 761 (1976). The Board should have received Sugar Hill's notice of appeal no later than August 7, 1987 for it to be timely. Because the Board received the appeal on August 10, 1987, it was untimely filed.

Sugar Hill's statement that it mailed its appeal on August 6, 1987 and its assertion that it should have been received by the Board the next day, i.e., August 7, 1987, is insufficient to alter our conclusion. The Board has addressed the question of breakdown in the postal system as grounds for

appeal nunc pro tunc and has held that mere allegations of the sort made by Sugar Hill cannot operate to allow such an appeal. Charles A. Kayal v. DER, EHB Docket No. 87-223-W (Opinion and order issued October 21, 1987.) Moreover, Sugar Hill's suggestion that, since August 7, 1987, fell on a Friday, the Board may "... have taken a short day and not opened [its] mail until Monday," hardly supports a contention that a breakdown in the Board's procedures occurred which might support an appeal nunc pro tunc.

Even if Sugar Hill's appeal were timely filed, we would still lack jurisdiction since, by its own admission, Sugar Hill did not prepay the civil penalty. It is well settled that, under §18.4 of SMCRA, 52 P.S. §1396.22 and §605 of the CSL, 35 P.S. §691.605, prepayment of a civil penalty assessment is required and that failure to prepay within the 30 day period deprives the Board of jurisdiction over an appeal of such an assessment. 3 L Coal Company v. DER, EHB Docket No.87-321-W (Opinion and order issued January 19, 1988). Prepayment of the civil penalty is a jurisdictional requirement and applies even where an appellant is financially unable to comply. Anthracite Processing, Inc. v. DER, 1986 EHB 1173. Finally, Sugar Hill's allegation that it was not notified that it could post a bond rather than pay cash is insufficient to overcome this requirement. §18.4 Of SMCRA, 52 P.S. §1396.22 and §605 of the CSL, 35 P.S. §691.605, provide explicit procedures for the appeal of civil penalty assessments and Sugar Hill is presumed to have knowledge of these applicable statutes, regardless of any other notification.

O R D E R

AND NOW, this 26th day of February, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Sugar Hill Limestone Co. at Docket No. 87-336-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 26, 1988

cc: **Bureau of Litigation**
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For Appellant:
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Sugar Hill Limsestone Co.
Reynoldsville, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMOND PROFFITT	:	
	:	
v.	:	**EHB Docket No. 87-515-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 26, 1988
and ROHM & HAAS DELAWARE VALLEY, INC.,	:	
Permittee	:	

OPINION AND ORDER
SUR
MOTION TO QUASH APPEAL

Synopsis

An appeal is dismissed when it constitutes an untimely challenge to a Permit issuance and seeks to litigate stipulations which are not "actions" of DER within the definition contained in 25 Pa. Code §21.2(a).

OPINION

On December 16, 1987, Raymond Proffitt ("Appellant") filed a Notice of Appeal from NPDES Permit No. PA0012769, issued to Rohm and Haas Delaware Valley, Inc. ("Permittee") on September 30, 1986; and from stipulations approved in a related proceeding at docket number 86-608-M, which relaxed temporarily certain limitations contained in the Permit. The related proceeding is an appeal by the Permittee, contesting the terms of the Permit. A Petition for Supersedeas in that proceeding was resolved by a stipulation, entered into between the Permittee and DER and approved by the Board on May 1, 1987, relaxing certain Permit limitations until November 2, 1987. Amendment

No. 1 to this stipulation was approved by the Board on August 10, 1987. Amendment No. 2, requesting that the Permit limitations continue to be relaxed until August 2, 1988, was approved by the Board on November 6, 1987. Appellant alleges that he received notice of this latest approval on November 17, 1987.

Along with the Notice of Appeal filed in the present case, Appellant filed a Petition to Intervene in the proceeding at 86-608-M and a Motion to Consolidate the two cases. On December 24, 1987, Permittee filed a Motion to Quash the Appeal in the present case and Objections to Appellant's requests for intervention and consolidation at 86-608-M. The Petition to Intervene is dealt with in a separate Opinion and Order issued simultaneously herewith. All other matters are disposed of herein.

Permittee asserts that this Appeal should be quashed for two reasons: (1) it is an untimely appeal from the Permit issuance, and (2) it challenges stipulations which are not "actions" of DER as defined in 25 Pa. Code §21.2(a). The Permit was issued on September 30, 1986, and notice of the issuance was published in the Pennsylvania Bulletin on November 29, 1986. According to 25 Pa. Code §21.52(a), an appeal from this Permit issuance would have to be filed at least within 30 days after this latter date in order for the Board to have jurisdiction. Since the Appeal was not actually filed until nearly a year afterwards, it failed to invoke the Board's jurisdiction.

Appellant maintains that the Appeal was filed in a timely manner after the Board approved amendment No. 2 to the stipulation. As noted above, the approval was given on November 6, 1987. Appellant alleges that he received a copy of it on November 17, 1987, and filed his Notice of Appeal 29 days later on December 16, 1987. The Appeal is timely, assuming the correctness of Appellant's allegations, if amendment No. 2 of the stipulation

is an "action" of DER. The Board's Rules of Practice and Procedure define "action" in 25 Pa. Code §21.2(a) as any "order, decree decision, determination or ruling by the Department [DER] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person...."

It is obvious that amendment No. 2 of the stipulation does not rise to this level. It is not decisional or determinative and, by itself, has no effect whatsoever. It impinges on the legal status of the parties only when animated by an order of the Board; but it is that order, and not the stipulation, that affects the legal status. The Board's order in this case, in effect, grants a partial supersedeas. Such an order is not appealable to the Board, of course; and, being interlocutory, is not appealable even to Commonwealth Court: Borough of Baldwin v. DER, 16 Cmwlth.Ct. 545, 330 A.2d 589 (1974).

Since the Appeal must be dismissed, Appellant's Motion to Consolidate it with the proceeding pending at docket number 86-608-M is moot.

ORDER

AND NOW, this 26th day of February, 1988, the Motion to Quash Appeal filed by Rohm and Haas Delaware Valley, Inc. is granted and the Appeal of Raymond Proffitt is dismissed. Raymond Proffitt's Motion to Consolidate his Appeal with the proceeding pending at docket number 86-608-M is denied as moot.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Vincent M. Pompo, Esq.
Eastern Region
For Appellant:
Randall J. Brubaker, Esq.
Philadelphia, PA
For Permittee:
Robert L. Collings, Esq.
Philadelphia, PA

Chairman Woelfling did not participate in this decision by reason of a conflict created by her former position with the Department of Environmental Resources.

SAVE OUR LEHIGH VALLEY ENVIRONMENT	:	
v.	:	**EHB Docket No. 86-542-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CHRIN BROTHERS SANITARY LANDFILL, Permittee	:	
and	:	**Issued:** March 2, 1988
EASTON AREA JOINT SEWER AUTHORITY, Intervenor	:	

OPINION AND ORDER
SUR MOTION TO COMPEL

Synopsis

A motion to compel discovery is granted where the information sought is relevant to the subject matter of the pending appeal. Information regarding whether a Department employee responsible for supervising landfill inspections ever received anything from a permittee whose operation he inspected is relevant to the issue of the Department's evaluation of the landfill operator's compliance history.

OPINION

This matter was initiated with the September 22, 1986 filing of an appeal by a citizens group entitled Save Our Lehigh Valley Environment, or "SOLVE," contending that the Department of Environmental Resources abused its discretion and/or committed an error of law in granting an expansion permit pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), to Chrin Brothers Sanitary Landfill (Chrin) in Williams Township, Northampton County.

The instant matter arises out of a discovery dispute between SOLVE and Chrin regarding the deposition of Mr. Joseph Pomponi, a Bureau of Waste Management Field Supervisor with the Department responsible for inspection of the Chrin landfill. SOLVE issued a Notice of Taking Deposition of Mr. Pomponi on July 29, 1987. During the deposition of Mr. Pomponi, SOLVE inquired whether Mr. Pomponi had ever accepted anything of value, including goods, services or equipment, from Charles Chrin or anyone acting on his behalf. Mr. Pomponi refused to answer for the period prior to July 15, 1982, maintaining that this information would be irrelevant, since it concerns a period of time prior to the date when Mr. Pomponi began working for the Bureau of Waste Management. Mr. Pomponi was not represented by counsel at the deposition although he had been advised, by the Department's counsel, to retain his own personal counsel prior to the deposition (Pomponi deposition, p.87). Mr. Pomponi refused to answer solely on the basis of relevancy.

Mr. Pomponi began working for the Pennsylvania Department of Health in 1955 as a field sanitarian (Pomponi deposition, p.8) and remained in that position until June, 1982. Although the Department of Health was abolished in 1970 and the Department of Environmental Resources was created, Mr. Pomponi's job duties remained the same (Pomponi deposition, p.9). Mr. Pomponi was not responsible for landfill inspections during 1955 to 1982. During this time, members of his staff did inspect a restaurant owned by Charles Chrin (Pomponi deposition, pp.148-149).

On July 15, 1982, Mr. Pomponi began working as a field supervisor in the Bureau of Waste Management's Bethlehem office responsible for supervising four solid waste specialists who inspect the municipal, residual and hazardous waste facilities in three counties, including Northampton County where Chrin is located. Mr. Pomponi reviews these inspection reports and periodically

inspects the major sites, including Chrin, to be sure regulations have been enforced (Pomponi deposition pp.10, 17-18).

At the July 29, 1987 deposition, Mr. Pomponi was confronted with the series of questions regarding whether or not he had ever received anything of value from the Chrins. Mr. Pomponi replied, "I never received anything from the Chrins at any time even prior to July 15, 1982" (Pomponi deposition, p.82). Mr. Pomponi later stated, "I have not received anything from the Chrins ever; any financial or personal gain ever. Never was I offered any. Never did I request any. Never did he ask me to do any favors for him. Never did I ever ask him if he needed a favor call me" (Pomponi deposition, p.83). But, when asked, "Other than garbage collection, did you ever receive any services or equipment or materials from Mr. Chrin or anyone acting on his behalf for which you paid?", Mr. Pomponi inquired, "You're talking about something before July 15, 1982?" and ultimately answered, "I will not answer that question" (Pomponi deposition, p.84).

On November 6, 1987, SOLVE filed a motion to compel Joseph Pomponi to appear and answer questions posed at a deposition upon oral examination. SOLVE argues that its appeal is based, in part, on the contention that the Department abused its discretion and/or committed an error in law in issuing the expansion permit in light of the compliance history of the Chrin Brothers. Further, SOLVE contends that the issue of whether or not Mr. Pomponi has ever taken anything of value from the operators of the Chrin landfill, the inspection of which he supervises, is both relevant and material. Finally, SOLVE requests that its attorneys be awarded all fees, costs and expenses and that the Board issue a subpoena and an order directing Mr. Pomponi to answer its questions.

On December 9, 1987, Chrin filed a memorandum of law in opposition to SOLVE's motion to compel, averring that the questions posed to Mr. Pomponi are not relevant, constitute a "fishing expedition" and have already been answered.

The municipal intervenors in this action, Easton Area Joint Sewer Authority, City of Easton, Palmer Township, Forks Township, Borough of Wilson, and Borough of West Easton, filed a memorandum of law in reply to Chrin's opposition to SOLVE's motion to compel on January 4, 1988, joining in the arguments asserted by Chrin.

On December 14, 1987, SOLVE filed a memorandum of law in reply to Chrin's opposition to the motion to compel arguing that Mr. Pomponi did not answer the question of what he received and paid for from Chrin and refused to submit to further questioning about the circumstances surrounding this exchange. SOLVE claims it is entitled to know what Chrin gave to Pomponi, why it was given, when it was given, what Pomponi gave to Chrin in exchange, who witnessed such events, and what documents reflect such transactions.

Rule 4003.1 of the Pennsylvania Rules of Civil Procedure permits discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Relevancy has been broadly and liberally construed. Goodrich-Amram, 2d, §4003.1:F, p. 64. If there is any conceivable basis for relevancy, the discovery should be permitted. Goodrich-Amram, 2d, §4003.1:F, pp. 66-7. Evidence is relevant if it tends to make a fact at issue more or less probable. Rota v. Luzerne Twp., 70 Pa. D&C 51 (1975).

The issue of whether a Department supervisor, with responsibility for the inspection of the Chrin landfill, has ever received anything of value from

the operators of the Chrin landfill is relevant to SOLVEW's appeal. The exchange, if any, may have had bearing on Mr. Pomponi's examination of the site or the evaluation of Chrin's compliance history and, ultimately, the decision to grant the permit expansion. The language of the SWMA is instructive here. Sections 503(c) and (d) of the SWMA explain when a poor past compliance history entitles or requires the Department to deny a permit as follows:

> (c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P.L. 2119 No. 787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. In the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act.
>
> (d) Any person or municipality which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected. Independent contrac-

> tors and agents who are to operate under any permit shall be subject to the provisions of this act. Such independent contractors, agents and the permittee shall be jointly and severally liable, without regard to fault, for violations of this act which occur during the contractor's or agent's involvement in the course of operations.

It is this section of the SWMA that must govern decisions to grant or deny permits on the basis of an applicant's compliance history.

At deposition, Mr. Pomponi refused to answer questions regarding any such exchange prior to July 15, 1982, insisting the questions were irrelevant and would not indicate if the objection was based on Fifth Amendment protections. Rule 4011 of the Pennsylvania Rules of Civil Procedure governs the limitation of the scope of discovery and deposition. While the rule protects against discovery of privileged matter, the objector has the burden of showing the court that Rule 4011 is applicable under the circumstances. Goodrich-Amram 2d, §4011:2, p. 283. Mr. Pomponi must supply substantial justification for his failure to respond or supply a responsive answer. Thus far, he has failed to assert a constitutionally protected privilege.

We do not find SOLVE's questions to be pure "fishing expeditions." The questions at issue are neither too broad nor are they without proper specification. SOLVE has stated with particularity that its inquiry will deal with what Chrin gave to Mr. Pomponi and the circumstances surrounding this exchange.

Finally, Mr. Pomponi has not answered the questions surrounding this exchange which took place prior to July 15, 1982, despite Chrin's insistence that he has, other than to say that he did receive something in the way of services, equipment, or materials from Mr. Chrin and that he paid for it. (Pomponi deposition, p. 84). To the extent this exchange took place after September 5, 1980, the effective date of the SWMA, details of this exchange

are relevant to the determination of whether or not fair value was received in this exchange between a Department supervisor and a member of the class of landfill operators he regulates.

We will decline to award attorney's fees at this time. The witness may seek the advice of counsel and either provide substantial justification for his objections to these questions in accordance with Pa.R.C.P. 4019(g)(2), concretely assert a constitutionally protected privilege, or provide full and complete responses. A party which is completely nonresponsive to discovery requests is subject to sanctions. See, Magnum Minerals v. DER, 1984 EHB 627. If a motion for sanctions should arise, we will rule on the issue of attorney's fees at that time.

O R D E R

AND NOW, this 2nd day of March, 1988, it is ordered that: 1) SOLVE's Motion to Compel Discovery in this matter is granted; 2) Joseph Pomponi shall comply with SOLVE's discovery request in accordance with the terms set forth above; and 3) the Board shall issue a subpoena to Mr. Pomponi upon request of SOLVE when a date and time for the deposition have been arranged.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED:

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Eastern Region
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KITTRIDGE, KAUFFMAN & DONLEY
Philadelphia, PA
For Permittee:
William Eastburn, Esq.
EASTBURN & GRAY
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For Intervenor:
Nicholas Noel III, Esq.
TEEL, STEETZ, SHIMER & DiGIACOMO
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HARRISBURG, PENNSYLVANIA 17101
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DWIGHT L. MOYER, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 85-389-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
HORSHAM TOWNSHIP, Permittee	:	Issued March 4, 1988

OPINION AND ORDER
- SUR
MOTION TO DISMISS

Synopsis

Where an appealed-from action has been superseded during the pendency of an appeal, there is no longer any relief the Board can grant and the appeal must be dismissed as moot.

O P I N I O N

This matter was initiated on September 19, 1985 by Dwight L. Moyer, Elizabeth Steele, and Francis Lagan (collectively, Moyer) with the filing of a notice of appeal from the August 20, 1985 Department of Environmental Resources (DER) approval of a revision to the official sewage facilities plan (official plan) for Horsham Township (Horsham), Montgomery County. The revision provided for the location of a proposed publicly owned treatment works on Keith Valley Road in Horsham Township, with a discharge to Park Creek.

On December 14, 1987, Horsham filed a motion to dismiss this appeal

as moot. Horsham asserts that, on October 24, 1986, DER approved a subsequent revision to Horsham's official plan, which changed the location of the proposed publicly owned treatment works along Park Creek. This subsequent revision was appealed by Moyer at EHB Docket No. 86-641-W. Horsham contends that the earlier revision has been superseded and, therefore, this appeal is now moot. DER concurs with the motion.

In response to the motion, Moyer does not dispute Horsham's assertion that the earlier revision has been superseded. Rather, Moyer argues the Board's dismissal would, in effect, give approval to the earlier plan revision. Moyer contends that because the earlier revision has been superseded, the appeal at Docket No. 85-389-R should be sustained and DER's approval should be reversed.

It is well settled that when, during the course of an appeal, an event occurs that renders it impossible for this Board to grant any relief, the appeal must be dismissed as moot. Glenworth Coal Company v. DER, 1986 EHB 1348, citing Silver Spring Township v. DER, 28 Pa.Cmwlth. 302, 368 A.2d 866 (1977). The earlier revision, having been superseded, no longer has legal effect. Thus, the Board is no longer in a position to grant any relief as to the earlier revision and, accordingly, must dismiss the appeal as moot.

O R D E R

AND NOW, this 4th day of March, 1988, it is ordered that Horsham Township's motion to dismiss is granted and the appeal of Dwight L. Moyer, et al. at EHB Docket No. 85-389-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 4, 1988

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Eastern Region
For Appellants:
Philip R. Detwiler, Esq.
Blue Bell, PA
For Permittee:
J. Scott Maxwell, Esq.
Lansdale, PA

rm

DEL-AWARE, UNLIMITED, INC. et al.	:	
	:	
v.	:	**EHB Docket No. 83-054-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NESHAMINY WATER RESOURCES	:	
AUTHORITY, Permittee	:	Issued March 7, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss will be denied where the movant is not party to an appeal.

OPINION

On March 21, 1983, Del-AWARE Unlimited, Inc. and five individuals[1] (hereinafter Del-AWARE) filed an appeal from a September 30, 1982 Section 401 certification letter from the Department of Environmental Resources (DER) to the Neshaminy Water Resources Authority (NWRA) regarding the realignment of the North Branch Neshaminy Creek and Pine Run.[2] Section 401 refers to that

[1]James Greenwood, Doylestown; Colleen Wells, Pipersville; Richard Meyers, Furlong; Val Sigstedt; Point Pleasant; and Marion Maslano, Salford Township.

[2]Del-AWARE states that notice of the action was not received from DER until February 23, 1983.

section of the Federal Water Pollution Control Act, 33 U.S.C. §1341, under which DER certified that there would be no violation of water quality standards for the Delaware River during the realignments of North Branch Neshaminy Creek and Pine Run, which realignments are elements of the so-called Point Pleasant Project.

On April 8, 1987, the Philadelphia Electric Company (PECO) filed a motion to dismiss this appeal for failure to prosecute. PECO asserts that this appeal has not been active since it was filed in 1983. PECO alleges that Del-AWARE is attempting to relitigate issues which have been decided in the Board adjudication of Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178 (Del-AWARE I), as affirmed in all respects by the Commonwealth Court in Del-AWARE Unlimited, Inc. v. DER et al., ___ Pa.Cmwlth. ___, 508 A.2d 334 (1986).

Del-AWARE, by its April 15, 1987 response, opposes DER's motion, asserting that this appeal was rendered inactive by the Board's order of July 13, 1983. Del-AWARE also denies that the issues raised herein were ever litigated. As new matter, Del-AWARE argues that the Board should deny the motion since, it alleges, PECO is not a party to this appeal. Further, Del-AWARE asserts that the realignments of North Branch Neshaminy Creek and Pine Run were not dealt with in Del-AWARE I.

The Board finds that it must deny PECO's motion. Notwithstanding that PECO is shown on the Board Docket as being a permittee, an examination of the appealed-from action and a review of the Board's docket indicate that PECO is not a party to this appeal. The DER certification letter is addressed to NWRA, with copies indicated as being directed to the DER Bureau of Dams and Waterway Management, DER's counsel, Louise Thompson, Del-AWARE's counsel, Robert J. Sugarman, and NWRA's counsel, Hershel Richman. Nothing in

the letter would indicate that PECO is involved in any way.

Since PECO was not the recipient of this certification, it is not a party-appellee subject to Board jurisdiction by virtue of 25 Pa. Code §21.51(g). Thus, the only other way PECO could have become a party to this action would have been by leave of the Board to intervene, pursuant to 25 Pa. Code §21.62. However, the Board's docket shows that no petition for leave to intervene in this matter was filed by PECO. The Board's error in listing PECO as a permittee on its docket and in its correspondence cannot operate to join PECO as a party since neither the General Rules of Administrative Practice and Procedure, Pa. Code §31.1 et seq., and not the Board's own rules, 25 Pa. Code §21.1 et seq. provide for joinder of parties. Berwind Natural Resources v. DER 1985 EHB 365.

Even if PECO were a party, we would still deny its motion. Motions to dismiss must be viewed in a light most favorable to the non-moving party. Herskovitz v. Vespicco, 238 Pa. Super. 529, 362 A.2d 394 (1976). There is more than reasonable doubt that the merits of DER's certification of the realignments of North Branch Neshaminy Creek were considered in Del-AWARE I. In its introductory statement, the Board stated that, in addition to certain permits, under appeal in that matter was ". . . DER's issuance of a Water Quality Certification to NWRA, by letter dated September 2, 1982, pursuant to the requirements of Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341." (emphasis added) Del-AWARE I, at 180. The Board also stated that "[i]n due course, all these appeals have been consolidated under the two docket numbers in the above captions." Del-AWARE I, id. Additionally, paragraph 3 of the Board's July 14, 1983 order states, in relevant part, "this matter is continued indefinitely, pending further resolution of the obviously closely related appeals at Docket Nos. 82-177-H and 82-219-H [Del-AWARE I]."

The instant appealed-from letter was dated September 30, 1982. The language in Del-AWARE I, cited supra, and the Board's July 14, 1983 order, make it clear that this matter was not included in Del-AWARE I. Accordingly, Del-AWARE may challenge DER's decision. In so ruling, however, it should be obvious that we have not considered the meirts of PECO's contention that the issues raised herein have already been litigated.

The Board notes that many of the issues appear to have been squarely dealt with in Del-AWARE I and may be subject to preclusion in this appeal. As the Board wrote in Del-AWARE Unlimited, Inc. v. DER, et al., EHB Docket No. 86-028-R (Opinion and order issued May 27, 1987) (Del-AWARE III), ". . . it appears to us to be inappropriate to give Del-AWARE any more opportunities to rehash its already twice or thrice rehashed melange of issues." Del-AWARE III, at 35. The reasons listed in this instant notice of appeal appear to be the same broadside challenges as were considered in Del-AWARE I. However, no case has been so made. Moreover, pre-hearing memoranda, which are intended to focus and narrow the parties' factual and legal postions, remain to be developed. Accordingly, it is appropriate at this point to reactivate this appeal. Due to this appeal's long inactivity, we will reset the clock, so to speak, with regard to Pre-Hearing Orders Nos. 1 and 2, such that the time frame for the parties' compliance with the provisions thereof will begin as of this order's date.

The petition to intervene filed by the North Penn and North Wales Water Authorities (NP/NW) is granted. NP/NW's motion to dismiss is denied for the same reasons as we denied PECO's motion, i.e., that this matter was not included in Del-AWARE I.

ORDER

AND NOW, this 7th day of March, 1988, it is ordered that:

1. The motion to dismiss filed by Philadelphia Electric Company is denied as having been filed by a non-party to this appeal.

2. The petition to intervene filed by the North Penn and North Wales Water Authorities is granted and their motion to dismiss is denied.

3. Appellants shall comply with the requirements of Paragraph 2 of Pre-Hearing Order No. 1 on or before May 23, 1988 and that, as to all parties, the time allowance in Pre-Hearing Order No. 2 shall commence as of the date of this order.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: March 7, 1988

cc: **Bureau of Litigation**
Harrisburg, PA

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RESCUE, et al.	:	
	:	
v.	:	**EHB Docket No. 87-347-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	**Issued:** March 7, 1988
	:	
SOLID WASTE INDUSTRIES, INC., Permittee	:	

OPINION AND ORDER SUR MOTIONS TO DISMISS, TO PERMIT ENTRY, FOR PROTECTIVE ORDER AND FOR SANCTIONS

Synopsis

The Board will not grant a motion to dismiss for untimeliness where the question of the time of notice is a fact which cannot be resolved on the basis of the pleadings and supporting documentation. The Board must look at such a motion in the light most favorable to the non-moving party. The Board will grant a motion for a protective order in order to avoid unreasonable annoyance and burden to a party. The Board will deny a motion for sanctions where a party has had inadequate time to respond to a discovery request and has indicated its willingness to comply with the discovery request.

OPINION

This matter involves an appeal from the Department of Environmental Resources' (Department) authorization to Solid Waste Industries, Inc. (SWI) to construct fords across tributaries of Apalachin Creek in Apalacon Township, Susquehanna County, under BDWM-GP-8, a general permit adopted pursuant to

Section 7 of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (Dam Safety Act) and the rules and regulations promulgated thereunder at 25 Pa.Code §105.441-449. The fords are to be utilized to reach drill sites used to gather data for applications for the development of a landfill and quarry operation on the site. A citizens group entitled Return Susquehanna County Under Ecology, "RESCUE," the Susquehanna County Board of Commissioners (County), Apalacon Township Board of Supervisors, and Little Meadows Borough (collectively referred to as RESCUE) filed an appeal from the Department's action on August 17, 1987, requesting that the Department require site specific encroachment permits, rather than a general permit.

On October 1, 1987, SWI requested this Board to dismiss the appeal of RESCUE and the County for untimeliness. The Department initially joined in SWI's motion, but subsequently, without explanation, withdrew its support. In support of its motion, SWI avers that on May 5, 1987, it provided 30 day written notice to the County and the Apalacon Township Board of Supervisors of its intention to construct fords across tributaries of the Apalachin Creek as required by §1905-A(b)(1) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-5, commonly known as Act 14. On July 16, 1987, the Department authorized SWI to begin construction of the fords in accordance with General Permit BDWM-GP-8. SWI maintains that the County, Township and Borough received this Act 14 notice by May 7, 1987. Since RESCUE and the County filed their appeal on August 17, 1987, SWI claims RESCUE and the County failed to file their appeal within 30 days of receipt of notice of the Department's action, as required by 25 Pa.Code §21.52(a).

On October 19, 1987, RESCUE and the County filed an Answer and Brief in Opposition to SWI's Motion to Dismiss, or in the Alterntive, Leave to File

Appeal Nunc Pro Tunc, arguing that SWI's letter of May 5, 1987 referred to the construction of a dam, not fords, and that the letter notifying the County, Township and Borough of the construction of fords was ot sent until July 21, 1987. RESCUE also argues that neither of these notices was sent to the RESCUE group directly and that it did not receive a copy of the July 16, 1987 authorization letter from the Department until August 10, 1987, despite repeated requests for copies of all correspondence in this matter.

The May 5, 1987 letter on which SWI predicates its motion is not germane to the issue of whether RESCUE's appeal was timely, since the letter did not even refer to the temporary fords referenced in RESCUE's notice of appeal. As RESCUE correctly points out, the May 5, 1987 letter refers to the construction of a dam. As a result, RESCUE's appeal period can hardly be held to have run 30 days after notification of SWI's intent to construct an entirely different type of water obstruction.

Furthermore, under normal circumstances[1] we do not believe that Act 14 notification substitutes for actual or constructive notice of final Department action. Act 14 was intended to afford municipalities greater opportunity to participate in the permit process by giving them sufficient notification of applications pending before the Department. The statute was not intended to restrict a municipality's right to appeal a final Department decision on a permit application. Indeed, if we were to construe Act 14 as

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[1] We say "normal circumstances" because the general permit scheme under the Dam Safety Act is unlike other permitting programs administered by the Department. The conditions of the Department's July 16, 1987 authorization to SWI seem to indicate that Act 14 notification occurs after the authorization to proceed under the general permit but prior to actual construction, an anomaly given the purpose of Act 14. There also appear to be inconsistencies between the Department's July 16, 1987 letter and the requirements of 25 Pa.Code §105.441 et seq., but since neither party has raised them and the Department has chosen not to illuminate the matter with its interpretation of the general permit scheme, we will not delve into it at this point.

SWI urges us to do here, a municipality's appeal period may be tolled before the Department has even made a final decision on a permit application.

The question of when RESCUE and the County received notice of the authorization to proceed under the general permit is unclear. RESCUE and the County allege they did not receive a copy of the Department's authorization letter of July 16, 1987 until August 10, 1987. We note that the Department did make reference to its discretionary decision not to require a site specific permit in favor of a general permit in a letter to the attorney for both RESCUE and the County on July 22, 1987. This arguably could be actual notice to both RESCUE and the County. In any case, notice from either the receipt of the Department's authorization letter on August 10, 1987 or the July 22, 1987 correspondence with Appellants' attorney would render the August 17, 1987 notice of appeal timely. SWI has failed to prove that it, or the Department, notified RESCUE directly of the authorization to proceed under the general permit, nor has it shown that notice of the authorization to proceed under the general permit was published in the Pennsylvania Bulletin, which would serve as notice to all parties pursuant to 25 Pa.Code §21.52(a).[2] The issue of actual notice to RESCUE and the County remains an issue of fact which cannot be resolved on the basis of the pleadings and the supporting documentation. And, since the Board must view the motion in the light most favorable to the non-moving party, William R. Bennett Coal Company and American States Insurance Company v. DER, EHB Docket No. 86-091-W (Opinion and order issued April 3, 1987), the Board must deny SWI's motion to dismiss.

We turn now to several pending discovery-related motions.

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[2] The Department does publish notification of authorization to proceed under general permits in the Pennsylvania Bulletin. We were unable to discover notification of authorization to SWI and, in any event, that burden is not ours.

On August 20, 1987, RESCUE filed a request to permit entry onto the Ashcroft site on August 27, 1987 to inspect, sample, test and photograph in preparation for hearing. SWI objected to the request stating that it failed, as required by Pa.R.C.P. 4009(b)(1), to specify a reasonable time, place and manner, the number of people and their identities and the site areas to be inspected. Further, SWI argued that seven days notice was insufficient time to adequately prepare the site for the safety of the visitors and to ensure the continued operation of the site. SWI invited RESCUE to arrange another date for the entry.

On September 16, 1987, RESCUE filed a motion for sanctions pursuant to Pa.R.C.P. 4019(a) for SWI's failure to permit entry or to schedule depositions and requested the Board to extend the period of discovery due to SWI's delays. On October 1, 1987, SWI responded with a memorandum in opposition to Appellant's motion for sanctions, emphasizing its willingness to arrange a mutually convenient time for the inspection and its right to have 45 days to respond from the date of original service of a request to permit entry under Pa.R.C.P. 4009(b)(2). SWI explained that its motion for a protective order to delay depositions and inspections pending the outcome of its motion to dismiss was pre-empted by RESCUE's motion for sanctions. SWI finds RESCUE's motion for sanctions is not substantially justified pursuant to Pa.R.C.P. 4009(b)(2) and argues SWI is entitled to all costs and attorney fees incurred in answering this motion. SWI did file its motion for a protective order on October 3, 1987, seeking to limit RESCUE's proposed list of 19 representatives for a site view to one representative for each appellant and to delay depositions pending the outcome of its motion to dismiss.

In accordance with Pa.R.C.P. 4009(a)(2), RESCUE does have a right to enter SWI's site for the purpose of inspecting, sampling, testing and photographing.

Due to the delay encountered by the parties pending deposition of the motion to dismiss, discovery will be extended to facilitate the completion of not only the inspections, but also the depositions of SWI's personnel. We will impose no sanctions at this time, nor will we award SWI any costs or fees incurred in the preparation of its answer to the motion for sanctions. We reserve the right to impose those sanctions in the future in the event the parties are unable to arrange a mutually convenient schedule.

Pa.R.C.P. 4011(b) provides that no discovery or deposition shall be permitted which would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party. Accordingly, it is reasonable to limit the areas to be inspected to those areas affected by the Department's July 16, 1987 general permit. Further, in recognition of SWI's liability concerns, as well as its interest in the continued operation of the site, it is entirely reasonable to limit the number of people that can attend the inspection. We will, therefore, limit Appellants to one representative each from RESCUE, the Susquehanna County Board of Commissioners, the Apalacon Township Board of Supervisors and Little Meadows Borough, in addition to their counsel.

O R D E R

AND NOW, this 7th day of March, 1988, it is ordered that:

1) SWI's motion to dismiss is denied;

2) SWI's motion for protective order is granted and at any inspection of SWI's premises which is the subject of this appeal Appellants shall be limited to one representative each and their

counsel and shall be limited to the areas of the temporary fords;

3) RESCUE's motion for sanctions is denied;

4) The period during which discovery may be conducted in this matter is extended to April 4, 1988; and

5) RESCUE shall file its pre-hearing memorandum on or before April 19, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 7, 1988

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DALE R. MACKEY and GRACE MACKEY et al.	:	
v.	:	**EHB Docket No. 86-078-G**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CARLSON MINING, Permittee	:	**Issued:** March 10, 1988

A D J U D I C A T I O N

By the Board

This adjudication is issued by the Board after its review and modification of a draft adjudication prepared by former Board Member Edward Gerjuoy, now serving the Board as a hearing examiner. This appeal was assigned to Mr. Gerjuoy when he was on the Board, and he conducted the hearings on which this adjudication is based.

Synopsis

Under the provisions of the Surface Mining Conservation and Reclamation Act ("SMCRA"), a replacement drinking water supply for a residential spring is adequate in quality if the replacement supply will be within acceptable drinking water limits, unless the resident can show he has special health problems which will be threatened by the replacement supply. In this appeal the Appellants did not meet their burden of showing that a proposed replacement well, whose water would contain 85 milligrams/liter ("mg/l") of sodium, sufficiently threatened the health of an 83-year-old resident on a low salt diet to make the well inadequate in quality under

§1396.4b(f) as a replacement for a spring containing 10 mg/l of sodium. SMCRA does not require DER to hold a second public hearing on a permit application if the permit application is revised in response to objections raised at the public hearing, and if those revisions will not increase the adverse environmental impacts (if any) of the proposed mining. Under the SMCRA DER may issue a surface mining permit covering, e.g., 104.9, acres even though not all the landowners of these 104.9 acres have given their consent to mining, provided the permit conditions do not allow mining to actually begin on any parcel in the 104.9 acres without the written consent of that parcel's landowner.

FINDINGS OF FACT

1. The Appellants are 26 residents of Slippery Rock Township, Lawrence County, Pennsylvania; Dale R. Mackey and his wife Grace Mackey are two of these appellants; Dale's father Roy Mackey, and Roy's wife (henceforth "the Mackeys") also are appellants.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA").

3. The Permittee is Carlson Mining ("Carlson"), P.O. Box 483, R.D. #6, New Castle, Pennsylvania 16101.

4. On January 21, 1986 DER issued Surface Mining Permit No. 37830105 to Carlson.

5. Appellants timely appealed the issuance of this permit.

6. The permit allows the mining of bituminous coal by the stripping and auger method on 104.9 acres in Slippery Rock Township, Lawrence County.

7. Despite Finding of Fact 6, mining cannot actually begin on any portion of the permitted area until DER grants so-called incremental phase approval for mining on that portion.

8. The initial "Phase I" incremental phase approval for mining under Permit No. 37830105 includes only 3.8 acres (App. Ex. B).[1]

9. Before incremental phase approval is granted for any parcel on the permitted area, the landowner(s) of that parcel must give DER a so-called "Supplemental C" granting written approval of mining on that parcel (App. Ex. C, letters from Douglas A. Stewart to landowners, February 4, 1986).

10. Carlson's mining activities under Phase I of the permit are likely to affect six wells used by residents in the vicinity (Tr I 70-71, 152-153).[2]

11. Carlson's mining activities under Phase I of the permit also are likely to affect the spring used by the Mackeys ("the Mackey spring") for their entire drinking and household water supply.

12. Indeed, it is probable that Carlson's Phase I mining activities will cause the Mackey spring to be completely "lost", i.e., its flow will completely cease.

13. Roy Mackey ("Mackey") was about 83 years old on May 7, 1986 (Tr. I 273, 288).

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[1]Denotes Appellants' Exhibit B. DER, Carlson and Board exhibits will be denoted by DER, Car. and Bd., respectively.

[2]Of the hearings made part of the record on the merits (see the Introduction to our Discussion section, infra), the transcripts for March 19, 1986 and June 9, 1986 were paginated consecutively; references to these transcripts will be designated by the Roman numeral I, i.e., this footnote cites pp. 70-71 and 152-153 of the March 19 and June 9, 1986 transcripts. The transcripts for October 16, 1986, November 10, 1987 and December 10, 1987 were separately paginated. References to these transcripts will be designated by the Roman numerals II, III and IV respectively.

14. In 1975 Mackey underwent surgery to replace an aortic valve (Tr. I 289).

15. In 1981 a heart pacemaker was implanted in Mackey's chest (Tr. I 289).

16. Mackey also has been treated for a cerebral episode, either a cerebral hemorrhage or a stroke (Tr. I 282).

17. When last seen (in 1983) by Dr. A. V. Whittaker, who testified for the Appellants as an expert medical witness, Mackey had a heart murmur and an enlarged heart (Tr. I 287-288).

18. Mackey's enlarged heart signifies that his heart is under some strain, because it is not working in the same fashion as an ordinary heart would (Tr. I 287).

19. When last seen by Dr. Whittaker in May 1983, Mackey had just experienced an episode of syncope, i.e., of fainting (Tr. I 288-289).

20. Mackey requires a wheel chair (Tr. II 103)

21. Mackey lives in his own home, about 800 feet from his son Dale's home (Tr. II 49).

22. Carol Peffer, a certified nurse's aid, is employed weekdays from 9:00 AM to 4:00 PM in Mackey's home. She helps Mackey from his bed to his wheel chair, prepares and serves his breakfast and lunch, and provides other needed personal care (Tr. II 103-104).

23. Mackey's son and daughter personally take care of Mackey on evenings and weekends (Tr. II 56).

24. The Mackey spring contains less than 10 parts per million of sodium (Tr. I 86).

25. One milligram equals .001 gms; a liter of water has a mass of one kilogram; a kilogram has a mass of 1000 grams. [Definitions in Webster's New

Twentieth Century Dictionary Unabridged (1976), of which we may take judicial notice, 25 Pa.Code §21.109(a).]

26. The well which Carlson proposes to drill as a replacement for the Mackey spring will have a sodium content of approximately 85 milligrams per liter ("mg/l"). (Bd. Ex. 1; Tr. I 87; Tr. II 33).

27. Dr. Whittaker testified that Mackey's history of cardiac problems required his adherence to a low sodium diet (Tr. I 279, 284-286, 299-301).

28. Dr. Whittaker also opined that "to a reasonable degree of medical certainty, any increase in sodium intake by Mr. Mackey would result in a deterioration of his condition." (Tr. I 286, 288).

29. The water furnished by the proposed replacement well will be within acceptable drinking water limits (Bd. Ex. 1).

30. The Appellants have not challenged the adequacy of the quantity of water (i.e., the rate of water delivery) the replacement well will furnish the Mackeys.

31. The Appellants have not challenged the concentration of any constituent of the proposed replacement supply other than its sodium concentration.

32. Carlson is willing to supplement the proposed replacement well with a supply of bottled distilled water sufficient to satisfy Mr. Mackey's drinking water needs (Carlson post-hearing brief, p. 6; Tr. I 335-336).

33. Ms. Peffer testified that the only instruction she had received concerning Mackey's salt ingestion was the oral instruction not to add salt to his food (Tr. II 106).

34. Mackey's family physician, Jack Brooks, M.D., gave Peffer a low cholesterol, low fat diet to follow when preparing Mackey's meals (Tr. II 70, 104-106; Car. Ex. 3; Bd. Ex. 1).

35. Before approving the permit, DER contacted Dr. Brooks to inquire whether the proposed replacement supply's sodium level was acceptable for Mackey's specific health concerns (Bd. Ex. 1).

36. At the time, Dr. Brooks was the only physician associated with Mackey's care of whom DER was aware (Bd. Ex. 1).

37. There was no evidence that Dr. Brooks had any special training in internal medicine or cardiology, i.e., there was no evidence that Dr. Brooks was specially knowledgeable about the treatment of patients with heart conditions.

38. Dr. Brooks' diet for Mackey permitted Mackey to eat ham and listed "salt" as allowable; Mackey eats ham about once every two weeks (Car. Ex. 3; Tr. II 107).

39. Peffer does not make any special attempts to prepare low salt meals for Mackey (Tr. II 108).

40. Peffer does not monitor Mackey's salt intake (Tr. II 108-109).

41. Peffer does not weigh or measure the quantity of food Mackey ingests (Tr. II 109).

42. Dr. Whittaker is a Fellow of the American College of Cardiology and personally installed Mackey's pacemaker. (Transcript accompanying Dr. Whittaker's video deposition, pp. 4-6, admitted into evidence, Tr I 275-278).

43. There is no monitoring of Mackey's sodium intake (Tr. II 78, 82).

44. Dr. Whittaker did not know how much sodium per day on the average Mackey presently was ingesting from his present drinking water supply (Tr. I 293).

45. Dr. Whittaker's recommendation to Mackey to adopt a low sodium diet made no assumptions about the sodium content of the water Mackey was drinking (Tr. I 299).

46. Dr. Whittaker does not know the normal range of sodium content in the water that his patients drink (Tr. I 299-300).

47. Dr. Whittaker does not advise his low sodium diet patients to use distilled water, unless they have water softeners (Tr. I 300).

48. When Dr. Whittaker instructed Mackey to remain on a low sodium diet, he did not give Mackey any specific instructions regarding the permitted sodium concentration level in Mackey's drinking water (Tr. 300-301).

49. Dr. Whittaker mistakenly thought that 1000 milligrams equals one tenth of a gram (Tr. I 294).

50. Dale Mackey lives about a half mile from mining operations presently being conducted by Carlson, and a little over a mile from another such site (Tr. II 50-51).

51. Dale Mackey intermittently is able to hear the mining operations at these sites, during the day and by night (Tr. II 53-54).

52. On three or four occasions during the past three to six months, Dale Mackey's house was shaken by blasting operations at the sites mentioned in Finding of Fact 50 (Tr. II 54, 57).

53. At times truck noise on the road near Dale Mackey's house overwhelms the mining noises (Tr. II 60).

54. No other (than in Findings of Fact 50-53) pertinent evidence about disturbances caused by mining operations noise or blasting was presented by any party.

55. There was no evidence that DER had failed to consider the disturbances--from noise or blasting--the mining operation would cause before issuing the permit.

56. Carlson first filed its permit application in June, 1983 (Tr. I 25).

57. In December, 1984, a public hearing on the proposed mining permit application was held by DER (Tr. I 32).

58. As a result of the public hearing, the permit application was revised (Tr. I 54-55).

59. The Appellants have conceded that these revisions caused the deletion of over 100 acres from the area originally included in the application (Tr. I 10).

60. The Appellants have conceded that these revisions have deleted the names of certain persons whose names originally were included in the application (Tr. I 10).

61. Despite repeated requests from the Board hearing examiner, Appellants' counsel could not identify any revisions of the original permit application which could be said to have increased the adverse environmental impact of the proposed mining operation (Tr. I 59-68, 94-96).

62. The Appellants' post-hearing brief, which lacks proposed Findings of Fact, does not call the Board's attention to any revisions of the original permit application which could be said to have increased the adverse environmental impact of the proposed mining operation.

63. There was no evidence that a new public hearing would elicit previously unheard substantive objections to the proposed permit, from which it might be inferred that the permit would have previously overlooked adverse impacts.

64. Not all the landowners of the land included in the 104.9 acres of the permit have given their consent to mining on the land they own.

DISCUSSION

A. Introduction

This matter has had the following procedural history. The Notice of Appeal was accompanied by a Petition for Supersedeas of the permit issuance. On March 19, 1986, the Board held a hearing on the Petition. On March 20, 1986 the Board issued an Order denying the Petition, but allowing the Appellants to renew the Petition if, inter alia, they believed they could show that Mackey's health would be endangered by the water supply Carlson intended to furnish Mackey as replacement for the spring Mackey had been using for drinking and household water purposes.

On June 9, 1986, after Appellants' appropriate renewed Petition for Supersedeas, the Board held another hearing on this matter. At this hearing the Appellants presented, and the Board accepted for the record, a videotape of a deposition by Dr. A. V. Whittaker, who previously had performed heart surgery on Mackey. The videotape included all Dr. Whittaker's testimony, under cross examination as well as direct; was accompanied by a transcript as required by Pa.R.C.P. 4017.1(a)(2); and was admitted into evidence pursuant to Pa.R.C.P. 4017(g). Dr. Whittaker was the only witness offered at the June 9, 1986 hearing; neither DER nor Carlson called any witnesses, although they were given the opportunity to do so.

On June 10, 1986, the Board again denied Appellants' supersedeas petition, in an Order which, in toto, reads as follows.

> AND NOW, this 10th day of June, 1986, after a hearing on Mackey's renewed petition for supersedeas, wherein the only testimony offered was the testimony of Mr. Mackey's cardiologist, the petition for supersedeas is denied for failure to meet the requirements of 25 Pa.Code §21.78, subject to the following conditions:
>
> 1. Before mining begins, the permittee shall propose to DER a plan for assuring Mr. Mackey has an adequate supply of drinking water having sodium concentration less than or equal to the concentration in his present supply, should his present supply fail as a result of the permittee's mining activities.
>
> 2. Before mining begins, this plan must be approved by DER, as meeting the requirements of 52 P.S. §1396.4b(f), at least insofar as Mackey's drinking water is concerned.
>
> 3. Before mining begins, the permittee must state in writing that this plan, once approved by DER, has been accepted by the permittee as part of the permittee's mining permit, as a special condition thereof.
>
> 4. Once the conditions in paragraphs 1-3 supra are satisfied, mining may begin but not otherwise; in other words, although Mackey's petition for supersedeas has been denied, the Board regards paragraphs 1-3 supra as conditions precedent for commencing mining activities.
>
> 5. Mackey should inform the Board at once--and may renew his petition for supersedeas--if mining begins before paragraphs 1-3 supra have been complied with.
>
> 6. Assuming paragraphs 1-3 supra are complied with, the Board does not intend to hear any additional testimony on the subject of Mackey's supersedeas petition; the Board is willing to be convinced otherwise, however, by any party who can show there is good cause to once again reopen the supersedeas hearing.
>
> 7. Any additional testimony by Mackey on the subject of the threat to his health from sodium in his water supply, or any testimony by DER or the permittee to rebut the already offered testimony by Mackey's cardiologist, can wait till the hearing on the merits of this matter, presently scheduled for October 16-17, 1986.
>
> 8. The Board proposes to make Mackey's cardiologist's testimony (heard in the reopened supersedeas hearing) part of the record in the hearing on the merits; parties objecting to this proposal will have the opportunity to do so at the start of the hearing on the merits.

The hearing on the merits was held on October 16, 1986. At the

start of this hearing all parties agreed that the record made at the supersedeas hearings on March 20 and June 9, 1986, including all exhibits and Dr. Whittaker's testimony, would be made part of the record on the merits of the appeal. All parties offered witnesses and closed their direct testimony on October 16, 1986. In particular, Carlson presented the testimony of Carol Peffer, a certified nurse's aid, who helps Mackey get up in the morning, helps prepare and serve Mackey's meals, etc. Other than through Ms. Peffer, however, Carlson made no attempt to rebut Dr. Whittaker's earlier testimony.

At the close of the October 16, 1986 hearing on the merits the Board issued an order relating to the submission of post-hearing briefs. Mr. Gerjuoy resigned from the Board prior to the submission of the parties post-hearing briefs. The Board contracted for Mr. Gerjuoy's services as a hearing examiner and pursuant to 25 Pa.Code §21.86(a) assigned to him the preparation of a draft adjudication in this matter. But just as preparation of the adjudication was getting under way, another Petition for Supersedeas was filed by the Appellants, on the alleged grounds that Carlson had begun mining in violation of conditions 1-3 of the Board's June 10, 1986 order. On November 10, 1987 Mr. Gerjuoy held a hearing on this last petition. At this hearing and in a confirming order dated November 30, 1987, Mr. Gerjuoy denied this third supersedeas petition, on the grounds that the brush removal and other activities which had occurred at the site were not mining activities in violation of conditions 1-3 of the June 10, 1986 order, since these conditions of the June 10, 1986 order obviously were not intended to exclude mining activities which in no way threatened to adversely affect Mackey's present water supply (Tr. III 8, 11, 49-50).

In so ruling, Mr. Gerjuoy refused to permit Carlson to reopen the record for the purpose of presenting the testimony of an expert witness, Dr.

Raymond Townsend, to rebut Dr. Whittaker's testimony (Tr. III 13-15). Shortly thereafter, Carlson filed a Motion to Amend the June 10, 1986 Order, as well as to reopen the record on the merits, again for the purpose of taking Dr. Townsend's testimony; this motion was accompanied by a Memorandum of Law and an affidavit by Dr. Townsend, attesting to his opinion that Carlson's proposed replacement water supply poses no health threat to Mackey. On December 10, 1987, Mr. Gerjuoy held a hearing on Carlson's Motion to Amend the June 10, 1986 Order, but once again refused to reopen the record on the merits, on the grounds that the requirements for such reopening specified in 1 Pa.Code §35.231(a) had not been met. Accordingly, Dr. Townsend's affidavit has not been admitted into evidence. On December 10, 1987, however, Mr. Gerjuoy amended the Board's June 10, 1986 order by removing the three conditions contained in the order denying the supersedeas.

Before getting to the merits, we note that only Carlson's brief contained proposed Findings of Fact and Conclusions of Law, as required by our rules. 25 Pa.Code §21.116(b). Nevertheless, the Board has accepted the Appellants' and DER's post-hearing briefs.

B. The Merits

Our adjudication of this matter is to determine whether the permit grant to Carlson was an abuse of DER's discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975); Ohio Farmers Insurance Co. v. DER, 1981 EHB 384, aff'd 73 Pa.Cmwlth. 18, 457 A.2d 1004 (1983). In the context of the present appeal an arbitrary exercise by DER of its duties or functions would be an abuse of its discretion as well, so that--following well-established Board precedent--we may and will use the phrase "abuse of discretion" to denote our complete scope of review. Commonwealth of Pa. Game Commission v. DER, 1985

EHB 1 at 8; Old Home Manor v. DER, 1986 EHB 1248 at 1280; Big "B" Mining v. DER, Docket No. 83-215-G (Adjudication issued October 26, 1987). The burden of showing that the permit grant was an abuse of discretion falls on the Appellants. 25 Pa.Code §21.101(c)(3).

In their filings and in the various hearings pertaining to this matter, the Appellants raised a very wide variety of issues. Appellants' post-hearing brief is confined to three issues:

1. Whether Carlson has met the requirements of the SMCRA regarding replacement of private water supplies affected by mining operations?
2. Whether issuance of the permit would cause a public nuisance?
3. Whether the public hearings conducted by DER in connection with the permit issuance violated due process?

All other issues previously raised by the Appellants are deemed waived. Equipment Finance, Inc. v. Toth, 476 A.2d 1366, 328 Pa.Super 255 (1984); Robert Kwalwasser v. DER, 1986 EHB 24 at 39.

1. Replacement of Private Water Supplies Requirement

The testimony indicates that Carlson's mining activities under Phase I of the permit are likely to affect six wells used by residents in the vicinity, plus the Mackey spring; indeed the Mackey spring is expected to disappear (Findings of Fact 10-12). This expectation triggers application of Section 4b(f) of SMCRA, 52 P.S. §1396.4b(f), which reads:

> "Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to assure compliance."

The key issue before us, in this subsection of this adjudication, is the proper application of §1396.4b(f) to the Mackey spring. In particular, we are being asked to decide whether the replacement well proposed by Carlson

is "adequate in . . . quality for the purposes served by the supply" now used by Mackey. In so asserting, we assuredly are not denigrating the importance of replacing (as and if necessary) the other six wells which also may be affected by this first phase of Carlson's mining activities. For reasons which will be apparent, however, replacing the Mackey spring involves such unusual difficulties that it seems evident Carlson will be able to meet the §1396.4b(f) requirement for any affected water wells if Carlson can meet the §1396.4b(f) requirement for the Mackey spring. The parties, including the Appellants, have more or less tacitly agreed with this last assertion. In particular, the Appellants' post-hearing brief only discusses the application of §1396.4b(f) to the Mackey spring. Therefore, as explained supra, we deem waived any issues involving application of §1396.4b(f) to any existing water supplies other than the Mackey spring; our subsequent discussion of the implications of §1396.4b(f) will refer to the Mackey spring only.

a. Roy Mackey's Need for a Low Sodium Diet

At the time of the hearing on the merits, Roy Mackey was about 83 years old. For some time he had been in poor health, and--although he continues to live in his own home and is not bedridden--presently requires a wheelchair and assistance with his personal needs. In fact, a "home health aid" is employed to get Mackey from his bed to his wheel chair, to prepare his meals, etc.; when the home health aid leaves, her place is taken by Mackey's children. Moreover, Mackey has had various heart problems, which have caused him to undergo surgical procedures on two occasions--to replace an aortic valve and to implant a pacemaker. When last seen by Dr. Whittaker in 1983, Mackey had a heart murmur and an enlarged heart; the enlarged heart is a symptom of cardiac dysfunction (Findings of Fact 14-18).

According to Dr. Whittaker, Mackey's medical history, especially his history of cardiac problems, requires that he be placed on a low sodium diet. Indeed, Dr. Whittaker asserted that "any increase in sodium intake by Mr. Mackey would result in a deterioration of his condition." (Tr. I 286) As it happens, Mackey's spring presently furnishes him with drinking water containing less than 10 parts per million of sodium, i.e., less than 10 milligrams of sodium per liter (Findings of Fact 24 and 25), which is a comparatively sodium-free natural drinking water source. By way of contrast, the water well which Carlson presently proposes, and which DER has approved as a replacement for the Mackey spring--whose loss as a result of Carlson's mining is expected (Finding of Fact 12), will contain approximately 85 mg/l of sodium.

These differing sodium contents, of the spring and the replacement well, are the crux of the instant dispute about the adequacy of the replacement well. All the parties agree that the proposed replacement well will be within acceptable drinking water limits, which are set with the needs of the average person in mind, not the needs of someone who may require a specially low sodium intake. The Appellants have not challenged any aspect of the replacement water supply's quality other than the sodium concentration, nor have the Appellants challenged the adequacy of the quantity of water the replacement well will furnish; these issues are deemed waived, therefore, as explained supra. In sum, the parties agree that if there were no concerns about Mackey's sodium ingestion, the proposed replacement well surely would be consistent with 52 P.S. §1396.4b(f), and the Board concurs with this conclusion.

The evidence in favor of Mackey's need for a low sodium diet could be more compelling. Carol Peffer, a certified nurse's aid who works in

Mackey's household as a "home health aid", testified that the only instruction she had received concerning Mackey's salt ingestion was not to add salt to his food. The diet Peffer is supposed to follow when preparing Mackey's meals is a low cholesterol, low fat diet, not a low salt diet; indeed the diet explicitly permits ham and salt (Finding of Fact 38). Peffer makes no special attempts to prepare low salt meals for Mackey, and does not monitor Mackey's salt intake.

On the other hand, this diet was prescribed for Mackey by his family physician, Dr. Jack Brooks. Dr. Brooks was contacted by DER before DER approved the permit, and at the time gave DER no indication that the proposed replacement supply's sodium level might be detrimental to Mackey's health. But there was no evidence that Dr. Brooks was specially knowledgeable about the treatment of patients with heart conditions. Dr. Whittaker is a Fellow of the American College of Cardiology, who personally performs heart surgery (Finding of Fact 42). For these reasons, Peffer's testimony and Dr. Brooks' prescribed diet are not sufficient to rebut Dr. Whittaker's expert opinion that Mackey's history of cardiac problems require his adherence to a low sodium diet.

We conclude that on the record before us, the Appellants have met their burden of showing that Mackey requires a low sodium diet. The evidence in support of this conclusion could be stronger, however, as we have indicated. In particular, we recognize that the rejected proffered testimony by Dr. Townsend (see supra) might have been sufficient to rebut Dr. Whittaker's opinion. But Dr. Townsend's proffered testimony is not before us. Indeed, we have reviewed Carlson's arguments for admitting Dr.

Townsend's testimony (Tr. III 13-17, 37; Carlson motion to reopen the record and memorandum of law in support thereof) and herewith formally affirm Mr. Gerjuoy's ruling that the requirements for reopening the record specified in 1 Pa.Code §35.231(a) had not been met.

b. Will the Replacement Well be Hazardous to Mackey's Health?

Although we have adopted Dr. Whittaker's opinion that Mackey requires a low sodium diet, it does not necessarily follow that we must adopt his inference therefrom that any increase in sodium intake by Mr. Mackey would result in a deterioration of his condition (Finding of Fact 28). Since zero increase in sodium intake would not affect Mackey's condition, it is not believable that any increase above zero, no matter how small that increase, would be deleterious. Obviously there exist increases in sodium intake whose effects on Mackey's condition will be de minimis. The real issue before us is whether an increase in sodium concentration from 10 mg/l to 85 mg/l in Mackey's drinking water has a sufficient likelihood of causing Mackey more than de minimis adverse health effects to warrant the inference that DER's approval of the permit despite this likelihood was an abuse of discretion.

It is the Appellants' burden to convince us that DER abused its discretion, i.e., it was the Appellants' burden to convince us that the sufficient likelihood described in the preceding sentence was attained by the proposed 75 mg/l increase in Mackey's drinking water sodium concentration. The Appellants did not meet this burden. In so ruling, we stress that the Appellants did not have to show that adverse effects on Mackey's health were certain to occur, or even were highly probable. As we wrote in Coolspring Township v. DER, 1983 EHB 151 at 173:

> To meet his burden of showing DER has abused its discretion, an appellant need not show that the undesired and undesirable effects discussed in the preceding para-

> graph are certain to occur, or even very probably will occur. Requiring such a showing often would be inconsistent with the basic objectives of protecting the public's health, safety and welfare. If the effects, once they have occurred, are sufficiently calamitous, then even a small probability of occurrence may be intolerable; a nuclear power plant meltdown is a compelling, though extreme, illustration. But in any given fact situation, whatever the tolerable probability of occurrence of unwonted effects may be, it is the appellant's burden to show convincingly that this probability will be exceeded. The mere speculative possibility of undesirable effects, without the additional showing just described, cannot overcome the presumption of validity attached to duly promulgated regulations of the EQB. (emphasis in original)

(See also Township of Indiana v. DER, 1984 EHB 1 at 29-31).

We agree that any significantly adverse health effects on a man of Mackey's age and physical condition could be calamitous, but we still must insist that the Appellants show more than the mere speculative possibility that a 75 mg/l drinking water sodium concentration increase will be damaging. Neither the Appellants nor Dr. Whittaker have any idea how much sodium Mackey presently ingests per day on the average, or how much this average daily sodium ingestion would be increased (in absolute amount or percentagewise) by the 75 mg/l drinking water sodium concentration increase (Findings of Fact 39-41, 43-46). Thus, Dr. Whittaker could not even know, for example, whether Mackey might be able to offset the increased sodium ingestion resulting from his replacement drinking water by foregoing the biweekly servings of ham he presently receives or otherwise reducing his sodium intake. Confidence in Dr. Whittaker's understanding of how much additional sodium intake legitimately could be characterized as de minimis was not advanced by his obvious confusion about the conversion factor between grams and milligrams (Finding of Fact 49). Moreover, it was evident from Dr. Whittaker's testimony that, at the time Mackey was his patient, he advised Mackey to adopt a low sodium diet, but attached no particular importance to the sodium concentration in Mackey's

drinking water, provided the water was not reaching the tap through a water softener (Findings of Fact 44-48).

In sum, we hold that, on the evidence, while Mackey has shown that he needs a low sodium diet, he has not shown that an increase of 75 mg/l of sodium in his drinking water would adversely affect his health. Accordingly, he has not shown that Carlson's proposed replacement well is inconsistent with 52 P.S. §1394.4b(f). Therefore, DER's approval of the proposed replacement well for Mackey's spring was not an abuse of DER's discretion.

Implicit in the ruling just stated is a construction of 52 P.S. §1396.4b(f), namely, that when there has been no finding that a replacement water supply for a private residence will threaten the health of any resident, the replacement supply will be adequate in quality for drinking water purposes under §1396.4b(f) if the replacement supply will be within acceptable drinking water limits, as Mackey's replacement supply will be, (Finding of Fact 29). We herewith hold that this construction of §1396.4b(f) is correct.

2. Public Nuisance Objection

The Appellants assert that the noise and blasting from the mining operations will constitute a public nuisance. The Appellants therefore argue, citing Kwalwasser, supra, that DER abused its discretion in granting the permit. This argument can be dismissed with little discussion. As DER and Carlson's post-hearing briefs point out, the Appellants have presented no evidence from which the Board conceivably could conclude that disturbances caused by Carlson's mining activities will constitute a public nuisance; Findings of Fact 50-54, which summarize the only pertinent evidence concerning such disturbances, are quite insufficient for such a conclusion. Moreover, as DER and Carlson also point out, the Appellants' reliance here on

Kwalwasser is inapposite. In Kwalwasser we held that DER's grant of the surface mining permit was an abuse of discretion because DER--before granting the permit--had not given any consideration to the possibility that the noise generated by the mining operation might rise to the level of a public nuisance. Kwalwasser did not attempt to decide--solely from Mr. Kwalwasser's testimony that he already could hear the mining operations though those operations still were a mile and a half from his home--that the mining noise would constitute a public nuisance. In the instant Mackey appeal there has been no evidence, as there was in Kwalwasser, that DER did not give consideration to noise generation before issuing the permit (Finding of Fact 55). It was up to Mackey to produce such evidence; we will not subsume it. And, as in Kwalwasser, we will not jump to the conclusion that there will be a public nuisance from the mere facts that Dale Mackey can hear the mining operation from a distance of one-half mile to a mile and has felt blasting shocks. This public nuisance objection of the Appellants is rejected.

3. Due Process Objection

We also reject, as quite without merit, the Appellants' objection that DER's conduct of the public hearing on Carlson's mining permit application violated due process. Before issuing Carlson's mining permit, DER advertised the permit hearing and a public hearing was held, all quite in accordance with the pertinent regulations. As the result of objections raised at the public hearing, DER deleted from the finally issued permit some of the land included in Carlson's original permit application; the names of some landowners originally listed in the application also were deleted. The Appellants contend that DER's failure to hold a second public hearing after these deletions but before the issuance of the permit, "violated due process."

During the various hearings on this matter, the Board hearing examiner Mr. Gerjuoy made numerous attempts to elicit from Appellants' counsel the reasons for his belief that the deletions violated due process or otherwise represented an abuse of DER's discretion. The only reason offered by Appellants during the hearings is the same as offered in their post-hearing brief, namely that the SMCRA and its implementing regulations require a public hearing before the very final form of the permit is issued; according to the Appellants, a public hearing on <u>any</u> non-final version of the permit application does not satisfy the requirements of the SMCRA.

Mr. Gerjuoy stated during the hearing, and we herewith affirm, that the SMCRA does not require a new public hearing after <u>any</u> revisions in the application subsequent to the first public hearing. The purpose of the public hearing is to give the public the opportunity to voice its concerns about the proposed mining permit. If, after the public hearing, DER revises the application to meet those concerns, a new public hearing is pointlessly time-wasteful and expensive, unless there is reason to believe that the revisions have introduced previously absent environmentally adverse consequences. The Appellants have not pointed to any such revisions of the application (Findings of Fact 61 and 62). The deletions of acreage and landowners' names from the area proposed in the permit application were made in response to objections voiced at the public hearing; there is no reason whatsoever to think that the adverse environmental impact (if any) of Carlson's mining operation would be increased by those deletions. What earthly purpose, then, would be served by requiring DER to hold another public hearing after such deletions? Certainly there was no evidence, or even argument by the Appellants, that a new public hearing would elicit previously unheard objections to the permit from which it might be inferred

that the permit would have previously overlooked adverse impacts (Finding of Fact 63).

The Appellants also argue that the permit issuance was invalid and an abuse of DER's discretion because all the landowners whose lands are included in the permit have not executed written landowner consents, commonly known as Supplemental Cs, to mining on their properties. This contention has been thoroughly discussed, and rejected, in Kwalwasser, supra. Since DER will not grant the incremental phase approval required for mining any property until its owner completes the Supplemental C, mining of a property without the owner's consent cannot occur. As we stated in Kwalwasser at 45, we see nothing in the SMCRA or the regulations "which prohibits DER from issuing a surface mining permit for the entire area proposed to be mined but granting "incremental phase" approval for present mining activity to only those areas for which a bond, and landowners consent to entry, have been furnished." The only authority cited by the Appellants in support of their thesis that the permit was an abuse of DER's discretion because landowner's consent to mining on all 104.9 acres of the permit had not been received is Reese Brothers Coal and Coke v. DER, 54 Pa.Cmwlth. 201, 420 A.2d 780 (1980). Reese actually holds, however, that under its facts the landowner's written consent was not required; Reese is quite inapposite, therefore. This landowners consent objection of the Appellants also must be rejected.

CONCLUSIONS OF LAW

1. The burden of showing that the permit grant was an abuse of DER's discretion falls on the Appellants. 25 Pa.Code §21.101(c)(3).

2. All issues previously raised by the Appellants but not examined in the Appellants' post-hearing brief are deemed waived.

3. In particular, issues involving application of 52 P.S. §1396.4b(f) to any existing water supplies other than the Mackey spring are deemed waived.

4. As to the adequacy of the proposed well as a replacement for the Mackey spring, the only issue pertinent to this adjudication is whether the 85 mg/l sodium concentration in the replacement well prevents the replacement well from meeting the requirements of §1396.4b(f); issues concerning the quantity of water furnished by the replacement well, and any challenges to the concentrations of other replacement well constituents, are deemed waived.

5. Were there no concerns about Mackey's sodium ingestion, the proposed replacement well surely would be consistent with the requirements of §1396.4b(f).

6. The Appellants met their burden of showing that Mackey requires a low sodium diet.

7. The hearing examiner's refusal to reopen the record, so that the testimony of Carlson's medical expert Dr. Townsend could be placed on the record, is affirmed.

8. The Appellants did not meet their burden of showing that an increase in sodium concentration from 10 mg/l to 85 mg/l in Mackey's drinking water had a sufficient likelihood of causing Mackey more than de minimis adverse health effects to warrant the inference that DER's approval of the permit, despite this likelihood, was an abuse of DER's discretion.

9. When there has been no finding that a replacement water supply for a private residence will threaten the health of any resident, the replacement supply will be adequate in quality for drinking water purposes under §1396.4b(f) if the replacement supply will be within acceptable drinking water limits.

10. The Appellants have presented no evidence from which the Board conceivably could conclude that disturbances caused by Carlson's mining activities will constitute a public nuisance.

11. The Appellants' objection that DER's conduct of the public hearing connected with the permit issuance violated due process is without merit.

12. The SMCRA does not require that--after a public hearing on a permit application--there be a new public hearing on any revisions of the application subsequent to the first public hearing, unless those revisions may aggravate the adverse environmental impacts (if any) of the proposed mining.

13. Provided mining cannot actually begin on any parcel of land until the landowner of that parcel has given written permission for the mining, the SMCRA allows DER to grant Carlson a surface mining permit covering 104.9 acres although not all the landowners included in the 104.9 acres have given their approval of mining on their land.

O R D E R

WHEREFORE, this 10th day of March, 1988, it is ordered that the appeal of Dale R. Mackey and Grace Mackey et al. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: March 10, 1988

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Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

M & R COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-246-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 14, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal from a civil penalty assessment is granted where an Appellant failed to post an appeal bond or prepay the amount of the assessment.

O P I N I O N

This matter was initiated on June 22 1987 by M & R Coal Company's (M & R) filing of an appeal from a May 20, 1987 civil penalty assessment issued by the Department of Environmental Resources(DER). The assessment was based on DER's allegation that M & R had conducted coal mining activities without a permit, in violation of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.(SMCRA) at its underground mines in Zerbe Township, Northumberland County.

On October 15, 1987, DER filed a motion to dismiss, arguing that the Board lacked jurisdiction to hear the appeal because M & R had filed its appeal more than thirty days after its receipt of the civil penalty assessment

and because M & R failed to perfect its appeal by prepaying the assessment In its response, M & R stated that its appeal was timely filed since the date on which the 30 day appeal period expired fell on Saturday, June 20, 1987 and, thus, its appeal was timely filed the following Monday, June 22, 1987. With respect to the perfection of its appeal, M & R argued that the assessment appeal procedure was unconstitutional and that M & R was financially unable to comply with the assessment appeal procedure. In support of its consitution-based argument, M & R cites Tull v. U.S.,___ U.S.___, 107 S.Ct. 1831 (1987) which it asserts stands for the proposition that any civil penalty scheme which does not provide an opportunity for a jury trial is per se unconstitutional as it violates the Seventh Amendment to the United States Constitution. DER responded that Tull was inapplicable to the instant matter.

The Board finds that M & R's appeal was timely filed due to the fact that the appeal period ended on a weekend. However, the Board lacks jurisdiction to hear this appeal. It is well settled that, under §18.4 of SMCRA, 52 P.S. §1396.22, prepayment of a civil penalty assessment is required. M & R's admitted failure to prepay the penalty within the 30 day appeal period deprives the Board of jurisdiction over an appeal of such an assessment. Davis Coal v. DER, EHB Docket No. 87-388-R (Opinion and order issued February 25, 1988). We need not consider M & R's challenge to the constitutionality of the statutory provision, since the constitutionality of statutes is beyond the purview of the Board. Philadelphia Life Insurance Company v. Commonwealth, 410 Pa. 571, 190 A. 2d 111 (1963); St. Joe Minerals Corporation v. Goddard, 14 Pa. Cmwlth. 624, 324 A. 2d 800 (1974).

In light of the foregoing, we conclude that the Board lacks jurisdiction to hear this appeal and accordingly, we will grant DER's motion.

O R D E R

AND NOW, this 14th day of March, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of M & R Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: March 14, 1988
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kimberly Smith, Esq./ Central Region
For Appellant:
Eugene Dice, Esq.
Harrisburg, PA

CHAMBERS DEVELOPMENT COMPANY, et al.	:	
	:	
v.	:	**EHB Docket No. 87-228-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A letter from the Department of Environmental Resources (Department) advising permittee of the Department's interpretation of permitting requirements under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (the Solid Waste Management Act), is not a final action or adjudication of the Department and is, therefore, not reviewable by the Board.

OPINION

This matter was initiated on June 17, 1987 with the filing of notices of appeal by the Chambers Development Company (Chambers), William H. Martin, Inc. (Martin), and Southern Alleghenies Disposal Services, Inc. (Southern Alleghenies), seeking review of a May 15, 1987 letter from Charles A. Duritsa, the Pittsburgh Regional Manager of the Department's Bureau of Waste Management, to the three companies.

In the meantime, Chambers, Martin, and Southern Alleghenies filed a petition for review in the Commonwealth Court at No. 1757 C.D. 1987. The three companies sought a preliminary injunction to enjoin the Department from implementing the daily volume restrictions described in the May 15, 1987 letters. A preliminary injunction was granted by Senior Judge Wilson Bucher on July 31, 1987, and the Department appealed the grant of that preliminary injunction to the Pennsylvania Supreme Court.

The Department, on August 31, 1987, filed a motion to dismiss the three appeals, contending that the May 15, 1987 letter was not a final action of the Department and, therefore, non-appealable. In addition, the Department argued that, to the extent the three companies were seeking review of a May 11, 1987 letter directed to each of them and attached to the May 15, 1987 letter, the appeals were untimely.

On September 9, 1987, Chambers, Martin, and Southern Alleghenies filed a motion to consolidate the three appeals and to stay the proceedings. Among other things, the three companies alleged that a stay of proceedings was appropriate because the related proceedings in the Commonwealth Court were likely to be resolved before the companies' appeals had been disposed of by the Board.

The Department, by response filed September 14, 1987, concurred in the motion to consolidate, but opposed the motion to stay, arguing that the issues in the Commonwealth Court proceeding had no bearing on the appeals before the Board, since the former involved the adequacy of the remedy, while the latter involved jurisdiction. The Board, by order dated October 13, 1987, consolidated the three appeals at Chambers Development Company, Inc., et al. v. DER, EHB Docket No. 87-228-W, and stayed the proceedings pending disposition of the motions to stay and to dismiss.

The Commonwealth Court heard arguments and sustained the Department's preliminary objections to the three companies' petition for review at No. 1757 C.D. 1987 on October 26, 1987, holding that the companies had failed to exhaust their statutory remedy before the Board and dissolving the preliminary injunction. In response to the Commonwealth Court's opinion, Chambers, Martin, and Southern Alleghenies filed a petition for supersedeas on November 2, 1987. But, two days after the filing of the petition for supersedeas, the three companies filed notices of appeal and petitions for supersedeas in response to orders issued by the Department on November 2, 1987, specifically imposing daily volume restrictions. These appeals were docketed at Docket Nos. 87-464-W (Chambers), 87-465-W (Martin), and 87-466-W (Southern Alleghenies) and consolidated at Docket No. 87-464-W by order dated November 5, 1987.

The Board conducted a pre-hearing telephone conference call with the parties on Friday, November 6, 1987, to discuss scheduling of the supersedeas hearings, as well as disposition of the pending matters at Docket No. 87-228-W, in light of the Department's November 2 orders. Counsel for the three companies indicated that their appeals consolidated at Docket No. 87-228-W would probably be withdrawn as moot.

The Board, by order dated December 11, 1987, and confirming opinion dated February 16, 1988, denied the petitions for supersedeas at Docket No. 87-464-W. The Board also, by order dated December 17, 1987, and confirming opinion dated February 16, 1988, certified two questions for interlocutory appeal pursuant to 42 Pa.C.S.A. §702(b). The three companies filed a petition for review with the Commonwealth Court at 392 Misc. Dkt. No. 4 on December 14, 1987.

Thereafter, the three companies, in response to the Board's request for the status of the appeals docketed at 87-228-W, renewed their request to stay these appeals pending the outcome of the related proceedings in the Commonwealth Court. The Department, by response filed February 11, 1988, opposed the companies' request, essentially reiterating the objections in its September 14, 1987 response to the companies' initial request for a stay.

While a stay would serve the interests of judicial economy by deferring disposition of matters on the Board's very crowded docket, no useful purpose is served by retaining matters over which we have no jurisdiction. We believe that the May 15, 1987 letters are non-appealable actions and we, therefore, have no jurisdiction over the three companies' appeals at Docket No. 87-228-W.

The May 15, 1987 letter at issue in these appeals stated in its entirety:

> Recent correspondence from the Department outlined the bonding and permitting requirements for proposals to increase daily waste volume intake at permitted facilities. I would like to provide you with additional information which will be helpful as a background for completing such proposals.
>
> Some areas of Pennsylvania are experiencing a severe shortage of permitted landfill disposal capacity. This shortage is a result of several factors including the closure of many landfills, the lack of adequate planning for replacements, the importation of out-of-state wastes, and increased enforcement effort by the Department.
>
> Your landfill operates under a permit issued by the Department. Your permit may contain special conditions which limit the daily volume of wastes you can legally accept for disposal. Your permit is also based on the data contained in your permit application which specified the maximum volume of wastes you are to accept, and on an operational plan which details the methods you would use to safely and adequately handle this maximum volume of wastes.

Many operators now wish to increase the daily volume of waste to be disposed. Any significant increase in the daily volume of waste which changes the conditions used in developing your operational plan requires that you file an application with the Department for a permit modification. (Please reference the Department's correspondence of May 11, 1987). Major permit modifications require the Department to furnish the host municipality and the county government with a copy of the permit modification application. The Solid Waste Management Act, Act 97, requires the Department to wait up to sixty (60) days for comment from the local governments before action can be taken to modify the permit. Act 14 also requires advance notification of local governments.

The purpose of this letter is to remind you of these requirements. You may not exceed the daily volume restrictions of your operating permit. If you are considering applying for a permit modification you should contact the host municipality and the county government and seek their support. They will probably be interested in the origin of the new waste streams since they have a legitimate concern for the continued availability of your site for the disposal of locally generated municipal wastes.

Once again, I wish to remind you of your obligation to meet all of the terms and conditions of your permit which includes the information contained in your application. If you are in doubt about the maximum volume of wastes you can legally receive, or if you require any additional information, please contact this office.

Sincerely,
/s/
Charles A. Duritsa
Regional Manager
Bureau of Waste Management
Southwestern Region

We find that Duritsa's letter was similar to the letter considered in Sandy Creek Forest v. Com., Dept. of Envir. Resources, 95 Pa.Cmwlth. 457, 505 A.2d 1091 (1986). There, the Commonwealth Court, citing Kerr v. Department of State, 35 Pa.Cmwlth. 330, 385 A.2d 1038 (1978), held that a Department letter advising a developer of the information required under the Pennsylvania Sewage

Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. and the regulations adopted thereunder, to determine whether a revision to a municipality's official plan for sewage facilities was necessary was not an adjudication or final action and was not appealable. Here, the May 15, 1987 letters advise the companies of the Department's general interpretation of daily volume limits in solid waste permits and inform them of the requirements for seeking a permit modification to increase volume limits. They, like the Sandy Creek Forest letters, are not appealable actions.

With respect to the May 11, 1987 letters attached to the notices of appeal, we note that the three companies did not specify these letters as the Department action which they were appealing. The May 11, 1987 letters were merely alluded to as "related correspondence" to the May 15, 1987 letters. Even if we were to regard the May 11, 1987 letter as encompassed by these appeals, their appeal would be untimely, as the date of receipt on all three letters is indicated as May 13, 1987, 35 days prior to the Board's receipt of these appeals. And, even if the May 11, 1987 letters were timely appealed, they are also non-appealable in that they merely advise the three companies of informational requirements relating to permit modifications for increased waste volumes.

Our dismissal of these appeals does not deprive the companies of their opportunity to contest the Department's interpretation of daily volume limits. The appeals consolidated at Docket No. 87-464-W challenge that interpretation as applied to the actual permits held by these companies.

O R D E R

AND NOW, this 15th day of March, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeals of Chambers Development Company, William H. Martin, Inc., and Southern Alleghenies Disposal Services, Inc. are dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 15, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Kenneth Bowman, Esq.
For Appellants:
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

TWELVE VEIN COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-247-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal from a civil penalty assessment is granted where an Appellant failed to post an appeal bond or prepay the amount of the assessment.

O P I N I O N

This matter was initiated on June 22, 1987, by Twelve Vein Coal Company's (Twelve Vein) filing of an appeal from a June 25, 1987 civil penalty assessment issued by the Department of Environmental Resources (DER) to Twelve Vein. The assessment was based on DER's allegation that Twelve Vein had conducted coal mining activities without a permit, in violation of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), at its underground mine in Zerbe Township, Northumberland County.

On October 15, 1987, DER filed a motion to dismiss, arguing that the

Board lacked jurisdiction to hear this appeal because Twelve Vein failed to perfect its appeal by prepaying the assessment when it filed its appeal. Twelve Vein, in its response, contended that the assessment procedure was unconstitutional and that Twelve Vein was financially unable to comply with the assessment appeal procedures. In support of it's consitution-based argument, Twelve Vein cites Tull v. U.S., ____U.S.___, 107 S. Ct. 1831 (1987) which it asserts stands for the proposition that any civil penalty scheme which does not provide an opportunity for a jury trial is per se unconstitutional as it violates the Seventh Amendment to the United States Constitution. DER responded that Tull was inapplicable to the instant matter.

It is well settled that, under §18.4 of SMCRA, 52 P.S. §1396.22, prepayment of a civil penalty assessment is required. Twelve Vein's admitted failure to prepay the penalty within the 30 day appeal period deprives the Board of jurisdiction over an appeal of such an assessment. Davis Coal v. DER, EHB Docket No. 87-388-R (Opinion and order issued February 25, 1988) 1988). We need not consider Twelve Vein's challenge to the constitutionality of the statutory provision, since the constitutionality of statutes is beyond the purview of the Board. Philadelphia Life Insurance Company v. Commonwealth, 410 Pa. 571, 190 A. 2d 111 (1963); St. Joe Minerals Corporation v. Goddard, 14 Pa. Cmwlth. 624, 324 A. 2d 800 (1974).

In light of the foregoing, we conclude that the Board lacks jurisdiction to hear this appeal and accordingly, we grant DER's motion.

O R D E R

AND NOW, this 15th day of March, 1988, it is ordered that the Department of Environmental Resources' Motion to dismiss is granted and the appeal of Twelve Vein Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: March 15, 1988

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

POST COAL COMPANY NO. 2	:	
	:	
v.	:	**EHB Docket No. 87-322-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal from a civil penalty assessment is granted where an appeal was untimely filed.

O P I N I O N

This matter was initiated on July 30, 1987, by Post Coal Company's (Post Coal) filing of an appeal from a June 25, 1987 civil penalty assessment issued by the Department of Environmental Resources (DER) to Post Coal. The assessment was based on DER's allegation that Post Coal had conducted coal mining activities without a permit, in violation of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), at its underground mine in Conyngham Township, Columbia county.

On October 15, 1987, DER filed a motion to dismiss, arguing that the Board lacked jurisdiction to hear the appeal because Post Coal had filed its

appeal more than thirty days after its receipt of the civil penalty assessment and because Post Coal failed to perfect its appeal by prepaying the assessment when it filed its appeal. Post Coal admitted in its response that the certified mail signature card acknowledging receipt of the civil penalty assessment was signed on June 27, 1987, a Saturday, but contended that the thirty day appeal period did not begin until the next business day which was the following Monday, June 29, 1987.

Given the above admission made by Post Coal as to the date of the signature on the return receipt card, the Board lacks jurisdiction over this appeal because it was, in fact, untimely filed. Even if the thirty day appeal period began on June 29, 1987, as Post Coal argues, its appeal was filed on July 30, 1987, at least one day late. The Board has no jurisdiction to hear appeals filed more than thirty days after the receipt of an appealable DER action. 25 Pa.Code §21.52(a); Rostosky v. DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976). As a result, the Board need not reach the question of lack of jurisdiction due to Post Coal's failure to prepay civil penalties.

O R D E R

AND NOW, this 15th day of March, 1988, it is ordered that the Department of Environmental Resources' Motion to dismiss is granted and the appeal of Post Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: March 15, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

P.G.W. ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 86-635-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
ANGERMAN ASSOCIATES, Permittee	:	**Issued:** March 16, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A permittee's motion for summary judgment is granted. Under the provisions of the Oil and Gas Act, the Department of Environmental Resources, in issuing a well permit, must impose a 200 feet setback from a building which is defined as an occupied structure with roof and walls. Because it was undisputed that no building existed when the well permit was issued, the permittee is entitled to summary judgment.

O P I N I O N

On November 19, 1986, P.G.W. Associates (PGW) filed an appeal from the Department of Environmental Resources' (DER) November 7, 1986 issuance of Well Permit No. 37-129-22923-00 (well permit) to Angerman Associates, Inc. (Angerman). The well permit, which was issued pursuant to the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 et

seq. (Oil and Gas Act), authorized Angerman to install Well No. 1 on the Lago de Vita well farm (the well), located in Unity Township, Westmoreland County. PGW is the surface landowner. In its notice of appeal, PGW states that it objects to the issuance of the well permit because the well is located within 100 feet of a proposed home site for which building permits and on-site sewage system permits have been granted.

On August 10, 1987, Angerman filed a motion for summary judgment. PGW was advised that its response to the motion should be filed no later than September 1, 1987, but did not respond until March 1, 1988. By letter dated August 21, 1987, DER advised the Board that it had no objections to the motion.

Angerman asserts that PGW's only objection to the well permit issuance is its contention that the well is within 100 feet of a proposed home site for which certain permits have been issued. Angerman alleges that PGW has admitted that, as of the date of the well permit issuance, no building with walls and a roof existed on the site and that no person occupied any such building. Angerman argues that since Section 205(a) of the Oil and Gas Act pertains only to existing and occupied buildings, DER's issuance of the well permit was proper and Angerman is entitled to judgment as a matter of law. PGW contends that DER's approval of the sewage facilities plan for the property in question has the legal effect of a building being completed on the site.

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, Docket No. 82-303-M (Opinion and order issued March 19, 1987).

Well location restrictions with regard to buildings are contained

in §205(a) of the Oil and Gas Act, which states, in relevant part, as follows:

> "Wells may not be drilled within 200 feet measured horizontally from any existing building . . . without the written consent of the owner thereof . . ."

§103 of the Oil and Gas Act, defines "building" as: "An occupied structure with walls and roof within which persons live or customarily work."

It is undisputed that on November 7, 1986, the date of the permit issuance, no building with walls and a roof existed on PGW's land. However, PGW argues that its installation of footers and its receipt of building and on-site sewage system permits trigger the application of the 200 feet set back requirement in §205(a). We find no language in either the Oil and Gas Act or the Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535 (1965), as amended, 35 P.S. §750.1 et seq., which lends support to this argument. Since there was no building, much less an occupied building, which would have triggered the 200 feet set back requirement of §205(a) of the Oil and Gas Act, DER's issuance of the permit was proper and Angerman is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 16th day of March, 1988, it is ordered that Angerman Associates, Inc.'s motion for summary judgment is granted and the appeal of P.G.W. Associates is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 16, 1988

cc: **Bureau of Litigation**
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NORTH PENN WATER AUTHORITY	:	
NORTH WALES WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 87-120-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 17, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal is granted where the appealed-from action does not affect the Appellants' rights, privileges, immunities, duties, liabilities or obligations. DER's rescission of a draft NPDES permit did nothing to alter the Appellants' last legal status quo and, hence, was not a final and appealable action.

O P I N I O N

On March 30, 1987, The North Penn and North Wales Water Authorities (collectively, NP/NW) initiated this appeal from the Department of Environmental Resources (DER) rescission of a public notice concerning their proposed NPDES permit. DER's rescission appeared in the February 28, 1987 issue of the Pennsylvania Bulletin, 17 Pa.B. 901, and pertained to proposed permit conditions published in an earlier issue.

On August 24, 1987, DER filed a motion to dismiss this appeal for

lack of jurisdiction. DER contended that this appeal has been taken from a non-appealable action, arguing that since its publication of draft permit conditions was a determination which did not affect the personal or property rights, privileges, immunities, duties, liabilities of NP/NW, its withdrawal of that draft permit did nothing to affect NP/NW's legal status quo.

In its September 22, 1987 response, NP/NW argues that their rights and obligations after the rescission were altered dramatically. NP/NW asserts that DER's publication of their draft permit constituted its tentative approval of their discharge and that they were well on their way to procuring a final permit. According to NP/NW, DER's publication of the draft permit commenced a 30-day public comment period, after which a final permit would be issued. Because of the rescission, however, the process has been indefinitely interrupted. NP/NW, as duly constituted water authorities, are obligated to provide drinking water to their customers. DER's rescission is preventing NP/NW from obtaining the NPDES permit necessary to obtain a supplemental supply of water and, hence, is hindering the performance of their legal obligations.

Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101 or "actions" under §19211-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa.Code §21.2(a). We have consistently interpreted these statutes to confer jurisdiction on the Board to review any DER decision which affects the personal or property rights, privileges, immunities, duties, liabilities or obligation of a person. Springettsbury Township Sewer Authority v. DER, 1985 EHB 492.

With respect to draft NPDES permits, the Board has held that they are not final DER actions and, hence, not appealable. Franklin Township

Municipal Sanitary Authority v. DER, EHB Docket No. 87-222-R (Opinion and order issued January 21, 1988). The question posed here, however, is whether DER's rescission of a non-appealable action can itself be an appealable action. Our resolution of this question will be dictated by whether NP/NW's rights, privilege, immunities, duties, liabilities or obligations have been affected in any way by DER's rescission action. We conclude that there has been no alteration of NP/NW's legal status quo.

We are not persuaded by NP/NW's arguments regarding the legal status of DER's tentative determination. Were we to accept these arguments, we would hold, in effect, that DER's publication of a tentative determination to issue an NPDES permit creates a vested right and is tantamount to the issuance of a final permit, with the public comment period and subsequent actual issuance being mere formalities. Taken to its conclusion, NP/NW's reasoning would have us hold that DER's rescission of the tentative determination was equivalent to a permit revocation. The Board finds no merit in NP/NW's arguments.

The act of publishing a tentative permit determination has no relationship to the substance of DER's review, the merits of an application, or DER's decision thereon but, rather, satisfies a legal requirement for public participation in the permit process. As required by §92.56 of DER's rules and regulations, 25 Pa. Code §92.56, DER must publish a notice of every complete application, organize its tentative determination into a draft NPDES permit, and afford a 30-day comment period for interested persons. These public notice and participation procedures hardly serve to devolve to NP/NW any NPDES permit authorizations or, for that matter, even any assurance of or right to a later permit issuance.

NP/NW's arguments relating to the hindrance of its obligation to provide a supply of water are absurd since, taken to a logical extreme, DER

would have only one course of action in the case of applicants who may require NPDES permits as part of the fulfillment of their legal obligations, namely, to issue a permit. Under Section 307 of the Clean Streams Law, The Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., as well as DER's rules on regulations, see 25 Pa. Code §92.1 et seq., any person wishing to discharge into a water of the Commonwealth must obtain a permit, which may not be issued unless certain specific requirements are met. Neither the Clean Streams Law nor the regulations carve out exceptions for utilities like NP/NW.

The resolution of this matter is straightforward--NP/NW has suffered no alteration of its legal status quo. Throughout this matter, DER has taken no action which has affected NP/NW's rights, privileges, immunities, duties, liabilities or obligations. Since DER has neither issued nor denied NP/NW's permit, there has been no appealable action and, accordingly, we grant DER's motion to dismiss.

O R D E R

AND NOW, this 17th day of March, 1988, it is ordered that the Department of Environmental Resources motion to dismiss the appeal of the North Penn and North Wales Water Authorities at Docket No. 87-120-R is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in this disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: March 17, 1988

cc: **Bureau of Litigation**
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BETHAYRES RECLAMATION CORPORATION	:	
v.	:	**EHB Docket No. 83-227-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 18, 1988
and	:	
LOWER MORELAND TOWNSHIP	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS AS MOOT

Synopsis

The Department of Environmental Resources moved to dismiss an appeal of a consent order and agreement by a third party as moot where the consent order provided that the terms and conditions of a yet-to-be issued amended permit would ultimately govern gas collection and destruction at a landfill and the amended permit was issued by the Department. The Board denied the motion, since the conditions of the permit authorized the continuation of the existing gas collection system alleged to be inadequate in the appeal of the consent order and agreement.

OPINION

This matter has a lengthy history which began with the October 6, 1983 filing of a notice of appeal by the Bethayres Reclamation Corporation (Bethayres). Bethayres, which operates a demolition waste landfill at the site of a former quarry in Lower Moreland Township, Montgomery County, was the recipient of a September 29, 1983 order from the Department of Environmental Resources (Department) directing Bethayres to take various measures to abate

air and water quality problems stemming from Bethayres' alleged failure to collect, treat, and dispose of leachate at the landfill. Bethayres also filed a petition for supersedeas of the Department's order, and the Board granted a supersedeas on the record of the October 6, 1983 hearing on the petition. The Board's supersedeas order was modified on November 17, 1983.

On October 21, 1983, Lower Moreland Township (Lower Moreland) also filed a notice of appeal from the Department's order to Bethayres, contending that the Department's order was not adequate to address the environmental problems at the Bethayres landfill. The Lower Moreland appeal was docketed at 83-238-M and consolidated with the Bethayres appeal at Docket No. 83-227-M on February 3, 1984.

The Department issued another order to Bethayres on February 23, 1984, alleging that Bethayres had violated the Department's Septmber 29, 1983 order, as well as the Board's October 6 and November 17, 1983 supersedeas orders. Bethayres appealed this order on February 28, 1984 at Docket No. 84-082-M and also filed a petition for supersedeas. The Board conducted five days of hearings on the supersedeas petition and, by order dated April 4, 1984, superseded and modified certain portions of the Department's order, permitting Bethayres to continue disposing of demolition waste.

Although there were discussions among the parties, particularly Bethayres and the Department, the two appeals were dormant until late 1986. The Department and Bethayres executed a consent order and agreement on October 23, 1986, and Lower Moreland appealed the consent order to the Board on November 20, 1986. The newest appeal was docketed at 86-636-W, and the Board, by order dated January 14, 1987, consolidated it with Docket No. 83-227-W at the earlier docket number. On February 24, 1987, Docket No. 84-082-M was consolidated with Docket No. 83-227-W at the earlier docket number. A view of

the premises was conducted on April 3, 1987, and hearings on the merits commenced on April 7, 1987.

During the course of the April 10, 1987 hearing on the merits, the parties stipulated that the consent order which was the subject of the appeal originally docketed at 86-636-W was intended to be an interim document and that Bethayres' permit amendment application which was then pending before the Department would be the Department's final disposition of issues relating to gas collection and destruction at the Bethayres site (N.T. 583-587). The Board thereafter, at the parties' request, delayed scheduling additional days of hearings so that the Department could complete review and take final action on Bethayres' permit amendment application.

Finally, on December 8, 1987, the Department amended Bethayres' solid waste management permit. Bethayres appealed the permit amendment to the Board on January 7, 1988 and that appeal was docketed at 88-005-W. Lower Moreland appealed the issuance of Bethayres' amended permit to the Board on January 8, 1988, and its appeal was docketed at 88-006-W. The Board consolidated the newest appeals at Docket No. 88-005-W by order dated January 13, 1988. The Board conducted a telephonic pre-hearing conference on January 25, 1988 to discuss the further handling of Docket No. 83-227-W in light of the new appeals at Docket No. 88-005-W. During the course of the conference call the Department made a motion to dismiss Docket No. 83-227-W as moot; the Board directed the Department of file a written motion.

In response to the Board's directive, the Department, on January 28, 1988, filed a written motion to dismiss Docket No. 83-227-W as moot, since the amended permit issued to Bethayres "vitiated" the consent order at issue in Docket No. 83-227-W. Bethayres joined in the Department's motion on February 8, 1988.

Lower Moreland opposed the motion to dismiss, contending that the issue of the Department's failure to mandate an active gas collection system at the Bethayres site was one which was repetitive in nature and had great public importance and, therefore, Docket No. 83-227-W was not moot. Lower Moreland also urged the Board to complete hearings on Docket No. 83-227-W in order to narrow the issues at Docket No. 87-005-W.

The findings of the consent order state, in pertinent part, that:

* * * * *

3. On October 4, 1979, Bethayres was issued a Solid Waste Management Permit Number 101168 by the Department which authorized operation of a Landfill for the disposal of Class I, II and III demolition waste, which are "residual waste" and "solid waste" as defined in the Pennsylvania Solid Waste Management Act, 35 P.S. Section 6018.101 et seq.

* * * * *

5. The Landfill has generated, is generating, and for some indefinite period in the future will produce leachate, a contaminated liquid generated by a mixture of decomposing solid waste in the Landfill with surface water and groundwater entering the Landfill.

* * * * *

7. The leachate in the Landfill has accumulated to the extent that, in the past, it has risen above the surface of the Landfill and accumulated in ponds, resulting in the release of odors and gases in violation of Sections 302, 502(d) and 610(2, 4 and 9) of the Pennsylvania Solid Waste Management Act, 35 P.S. Section 6018.302, 6018.502(d) and 6018.610 (2, 4 and 9).

8. The leachate in the Landfill can currently be kept below the surface of the ground only by its continual removal.

9. Bethayres has constructed and is presently operating an emergency leachate removal, collection and treatment facility and is providing for disposal of said emergency facility at a Department approved location. Said emer-

gency facility is treating approximately 120,00 gallons per day of leachate. ???

10. A method to provide for the removal, collection, treatment and disposal of leachate from the Landfill and a method to provide for the collection and destruction of gas from the Landfill are not a part of the approved plans for the Landfill which served as the basis for issuance of Solid Waste Permit Number 101168.

11. On September 29, 1983 the Department issued an Order to Bethayres which was modified by the Environmental Hearing Board ("EHB") Orders issued October 6, 1983 and November 17, 1983 at Docket No. 83-227-M. On February 23, 1984 the Department issued another Order to Bethayres and its corporate officers. On April 4, 1984 the EHB issued an Order at Docket No. 84-042-M modifying the Department's February 23, 1984 Order.

12. The Orders specified in paragraph 11 above required Bethayres to, among other things, maintain the emergency leachate facility, to install a gas venting and destruction system, and to submit a permit amendment application for a permanent leachate collection and disposal system.

13. Bethayres installed a gas collection and destruction system at the Landfill. However, Department inspection of the landfill on January 17, 1986, January 23, 1986, January 26, 1986, January 30, 1986, February 3, 1986, February 4, 1986, March 6, 1986, March 10, 1986, March 11, 1986, March 12, 1986, March 28, 1986, March 31, 1986, April 22, 1986, May 1, 1986, and May 4, 1986 found that odors had emitted from the Landfill in such a manner as to cause odor detectable beyond Bethayres' property line. The Department has determined that these odors are malodors prohibited by 25 Pa.Code 123.31(b), therefore in violation of Section 4008 of the Air Pollution Control Act, 35 P.S. Section 4008, and also unlawful pursuant to Sections 502(d) and 610(4) of the Solid Waste Management Act, 35 P.S. Section 6018.502(d) and 6018.610(4).

14. On June 23, 1986 Bethayres submitted to the Department a closure plan and an application to amend Permit Number 101168. The applica-

> tion provides for a permanent leachate collection and treatment system and a permanent gas collection and destruction system.
>
> (Emphasis added)

The order and agreement portion of the consent order provide, in relevant part, that:

> A. Upon Department approval of the application specified in paragraph 14 above, and issuance of an amended permit, Bethayres shall comply with the terms and conditions of the amended permit. Bethayres shall construct, operate, and maintain the permanent leachate collection, treatment and disposal, and the gas collection and destruction systems as approved by the Department. Bethayres shall complete construction of this permanent leachate treatment system within 60 days of the availability of access to the township sewer line.
>
> * * * * *
>
> D. Bethayres shall operate and maintain the existing gas collection and destruction system as necessary to control odors from the landfill and to prevent the unlawful emission of odors from the landfill in violation of 25 Pa.Code Section 123.31(b); Section 1917A of the Administrative Code of 1929, 71 P.S. Section 510-17; the Air Pollution Control Act, 35 P.S. Section 4001 et seq. or the Solid Waste Management Act, 35 P.S. Section 6001 et seq.
>
> * * * * *
>
> P. Nothing herein contained shall be construed to relieve or limit Bethayres from complying with the terms and conditions of any plan approval or permit existing, or hereafter issued to the Company by the Department, or of any applicable Federal, State or Local Law.

Reading the plain language of the consent order, it was an interim document which, in essence, formed a bridge between the Department's earlier ex parte orders and the terms and conditions of the amended permit. The amended permit, in turn, contains the following provisions relating to gas collection

and destruction:

> 7. The methane gas collection system at this landfill site may remain a passive system with flaring with modifications made at the Department's written request. A landfill gas monitoring migration program to test for subsurface migration of landfill gases leaving the site must be put in place within 30 days after Department approval. Plans for this program are to be submitted to the Department within 60 days after permit issuance. If off site gas migration is detected then plans may have to be submitted for the installation of an active system.
>
> (Emphasis added)

It remains for us to determine the practical effect of this condition in the amended permit.

On the face, the amended permit does, in fact, supersede the consent order's provisions when interpreted in light of Paragraphs A and P of the consent order, which are quoted above. However, we believe the argument of the Department and Bethayres to be rather disingenuous, since Condition No. 7 of the amended permit, in general, authorizes the continuation of the existing gas collection and destruction system at the site, the very system Lower Moreland has all along contended to be inadequate. Thus, the cases cited by the Department, Glenworth Coal Co. v. DER, 1986 EHB 1348 and Delta Excavating & Trucking Co. v. DER, EHB Docket No. 86-266-W (Opinion and Order issued May 11, 1987), are inappropriate because they dealt with matters which were entirely superseded by subsequent Department actions. Since the amended permit does not, in reality, address the gas collection differently than the consent order, we cannot dismiss Docket No. 83-227-W as moot.

We will not, however, schedule separate hearings at Docket No. 83-227-W, since that would not be a productive use of the Board's time.

Rather, in an effort to finally resolve these matters, we will consolidate Docket No. 83-227-W with Docket No. 87-005-W and hold hearings on the consolidated appeals.

O R D E R

AND NOW, this 18th day of March, 1988, it is ordered that:

1) The Department of Environmental Resources' motion to dismiss, which is joined in by Bethayres Reclamation Corporation, is denied; and

2) Docket No. 83-227-W is consolidated with Docket No. 87-005-W at Docket No. 83-227-W.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 18, 1988

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COHEN, SHAPIRO, POLISHER,
SHEIKMAN & COHEN
Philadelphia, PA

bl

JOSEPH D. HILL, et al.	:	
	:	
v.	:	**EHB Docket No. 85-356-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
HORSHAM TOWNSHIP, Permittee	:	**Issued:** March 22, 1988

ADJUDICATION

By William A. Roth, Member

Synopsis

An appeal is dismissed where the appellant fails in its burden to show that issuance of an amendment to an NPDES permit was contrary to an applicable sewage facilities plan. A federal environmental impact statement which does not include or affect the facility for which the NPDES permit was issued is irrelevant to DER's issuance of the permit amendment. Uncorroborated lay testimony is insufficient to shift the burden of proof under 25 Pa.Code §21.101(d)(2) to the Department of Environmental Resources or the permittee.

INTRODUCTION

On August 26, 1985, Joseph D. Hill, Dennis M. Morrissy, and Elizabeth H. Steele (Appellants) filed a notice of appeal from the Department of Environmental Resources' approval of Amendment 1 to NPDES Permit No. Pa. 0050253 (hereinafter Amendment 1). The permit authorized the operation of a

sewage treatment plant by then-permittee Wichard Sewer Company in Horsham Township, Montgomery County. Horsham Township (Township) petitioned for and was granted intervention in this matter on November 20, 1985. By order dated March 6, 1987, the Township was substituted for Wichard Sewer Company as permittee, as control and operation of the plant was turned over to the Township.

This appeal had been consolidated with an appeal at Docket No. 85-389-R filed by Dwight L. Moyer, Jr., Elizabeth H. Steele and Francis L. Lagan (the Moyer appeal) from an August 20, 1985 DER approval of a revision to the Township's official sewage facilities plan. By an opinion and order dated March 4, 1988, the Board dismissed that appeal as being moot.

A hearing on the merits in this matter was held before Board Member William A. Roth on June 11, 1987 at DER's Norristown, Pennsylvania regional office. Neither DER nor the Township presented any evidence to the Board and DER did not file a post hearing brief.

Immediately prior to the hearing, Board Chairman Maxine Woelfling recused herself from this matter because of her involvement in the preparation of an opinion relating to the role of the Delaware River Basin Commission in the NPDES permit review process; the opinion was appended to the Appellant's pre-hearing memorandum. The appeal was then reassigned to Member Roth. Because the Appellants withdrew this issue, the reason for her recusal no longer exists and, accordingly, with the knowledge of the parties, Chairman Woelfling is participating in this adjudication.

FINDINGS OF FACT

1. Appellants are Joseph D. Hill, Dennis M. Morrissy and Elizabeth H. Steele (Appellants), residents of Horsham Township, Montgomery County.

2. The Department of Environmental Resources (DER) is the agency of the Commonwealth of Pennsylvania which is empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) and the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1, et seq. (SFA).

3. The permittee is Horsham Township (Township), a municipality within Montgomery County, and operator of the Wichard sewage treatment plant (WSTP).

4. The WSTP serves an area of the Township known as Country Springs. (Ex. A-4)[1]

5. On July 25, 1985, DER issued Amendment 1 to NPDES Permit No. PA 0050253 (Amendment 1), pursuant to the provisions of the CSL. (Ex. A-1)

6. Amendment 1 authorized, inter alia, a discharge of up to 327,000 gallons per day (gpd) from the WSTP to Park Creek. (Ex. A-1)

7. Amendment 1 represents an increase of 100,000 gpd in the maximum permitted capacity of the WSTP. (Ex. A-1)

8. Glenn K. Stinson is DER's regional sewage facilities consultant, and, since 1980, has been the DER employee with oversight responsibility for the Township's official sewage facilities plan (official plan). (N.T. 15-16)

9. An official plan, which is required by §5 of the SFA, delineates the means and facilities by which a municipality will manage its sewage waste.

10. On July 25, 1985, the Township's official plan, as approved by DER, provided for the WSTP to have a capacity of 327,000 gpd. (N.T. 20, 27; Ex. P-1)

11. The Township owns and operates the WSTP.

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[1] Appellants' exhibits are designated by the prefix "A-"; Permittee's by the prefix "P-". References to the hearing transcript are denoted "N.T."

12. The United States Environmental Protection Agency (EPA) prepared a final environmental impact statement (FEIS) in connection with applications by, inter alia, the Horsham Township Sewer Authority (Sewer Authority) for construction grant funding under Title II of the Clean Water Act, 33 U.S.C. §1251 et seq. (Ex. A-3, Pg. 1)

13. The purpose of the FEIS was to evaluate the various alternative wastewater management systems and make recommendations for construction grant funding by EPA. (Ex. A-3, pg. 1)

14. The FEIS evaluated the funding eligibility of six alternative wastewater management systems for the planning area. (Ex. A-3, pg. 1)

15. The FEIS also contained guidance relating to sewage service needs in areas bordering the planning area referred to as "option areas." (Ex. A-3, pg. 1)

16. The WSTP and the Country Springs development are located in an option area. (Ex. A-3, pg. 51)

17. EPA stated in the FEIS that the sewage service needs of the Country Springs development should be accommodated by the WSTP independently of the other service needs of the Township. (Ex. A-3, pg. 51)

DISCUSSION

This appeal is the latest in a series of challenges to sewage-related decisions involving the WSTP. In 1979, E. Arthur Thompson, Albert M. Comly and Elizabeth H. Steele appealed DER's approval of a revision to the Township's official plan by which flows from the Country Springs development would be directed to the WSTP. By its adjudication in E. Arthur Thompson, et al. v. DER, et al., 1980 EHB 224, the Board upheld DER's action.

In 1980, Albert M. Comly and Elizabeth H. Steele appealed DER's

original issuance of NPDES Permit No. 0050253, which authorized the discharge of 227,000 gpd of treated sewage wastes from the WSTP to Park Creek. DER's issuance of the NPDES permit was upheld by the Board in Albert M. Comly and Elizabeth H. Steele v. DER, et al., 1981 EHB 446.

In August, 1984, Francis L. Lagan, Andrew C. Kurtz, Dorothy B. Kermick and Elizabeth H. Steele appealed DER's approval of yet another revision to the Township's official plan. Under that revision, 100,000 gpd of treatment capacity at the WSTP would be reserved for the Sewer Authority as an interim means of treating wastes from several developments and areas of the Township apart from the Country Springs development. The Board fully upheld DER's approval of the official plan revision in Francis Lagan, et al. v. DER, et al., 1985 EHB 139.

With this background in mind, we now proceed to the instant appeal. Our adjudication of this matter is to determine whether DER's issuance of Amendment 1 was an abuse of its discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975); Ohio Farmers Insurance Co. v. DER, 73 Pa.Cmwlth. 18, 457 A.2d 1004 (1983). Because this is a third party appeal of a permit issuance, Appellants bear the burden of proof. 25 Pa.Code §21.101(c)(3).

While Appellants advanced a variety of arguments in challenging the propriety of DER's issuance of Amendment No. 1 when they filed their appeal, only two issues now remain for the Board's consideration. As stated in the Appellants' brief, and slightly rephrased by us, these are as follows:

> (a) Whether the Township's official plan provided for a 327,000 gpd discharge from the WSTP, as was authorized by Amendment 1, and
>
> (b) Whether DER's approval of Amendment 1 was required to be consistent with the FEIS.

Appellants first contend that DER's issuance of Amendment 1, which authorized a 327,000 gpd discharge, was improper because the Township's official plan only provides for a 227,000 gpd discharge. Because an NPDES permit is a Department permit for the purposes of §202 of the CSL, it is required by 25 Pa.Code §91.31 to conform to a municipality's official plan adopted under §5 of the SFA. Lower Providence Township v. DER, et al., 1986 EHB 832.

Appellants presented testimony from two witnesses on this issue. DER's Glenn Stinson, who was subpoenaed to testify on behalf of Appellants, unequivocally stated that the flow rate authorized in the Township's official plan was 327,000 gpd. This testimony was corroborated by a sentence in Exhibit P-1, DER's internal permit review and recommendation form, which reads "Act 537 [the SFA] approval for the increase in plant capacity to 327,000 gpd has been granted by our Department." The form bears the signatures of various DER officials and review and action dates of July 19 and July 25, 1985.

Appellants also presented the testimony of Elizabeth Steele on this issue. She testified that, for several years, she reviewed files of both the Department and the Township but, during that time, was never aware of any approval for a change in flow higher than 227,000 gpd. Mrs. Steele is not the custodian of public records for either the Township or DER. She is a lay witness with no demonstrated expertise in reviewing sewage facility plans or sewage discharge permit applications. Her testimony was uncorroborated. Indeed, the Appellants neglected to introduce the one document that might have substantiated their claim, namely, the Township's official plan. Since the only credible evidence is that the official plan does provide for 327,000 gpd, and the presumption of validity attaches to actions by DER, Anthony J.

Agosta, et al. v. DER, 1977 EHB 88, Appellants have failed to satisfy their burden of proof on this issue.

Appellants next contend that issuance of Amendment 1 was improper because DER failed to give any consideration to the EPA's FEIS. (See Findings of Fact Nos. 12-17.) The only evidence relating to this issue is stipulated Exhibit A-3, which is a copy of the FEIS. We need not reach the issue of whether DER was, in any way bound by the FEIS, since the FEIS related only to the funding eligibility of various wastewater treatment alternatives for a "planning area" which did not include the areas of the Township served by the WSTP.

In view of the foregoing, we can only conclude that Appellants have not sustained their burden of proof in this appeal. Appellants argue, on the basis of Mrs. Steele's testimony, that the burden of going forward with the evidence shifted to DER and/or the Township. To support this assertion they cite Marcon, Inc. v. Commonwealth, DER, 76 Pa.Cmwlth. 56, 462 A.2d 969 (1983). In Marcon, the appellants, who were also contesting issuance of an NPDES permit, presented substantial and credible expert testimony which tended to support their allegations, thus justifying a shifting of the burden of going forward to DER and the permittee. In this case, however, uncorroborated testimony by a lay witness is hardly the credible evidence needed to shift the burden.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this appeal.

2. Appellants have the burden of proof in this appeal.

3. Uncorroborated testimony by a lay witness is not sufficient to

shift the burden of going forward with the evidence under 25 Pa.Code §21.101(d)(2).

4. Appellants failed to demonstrate that Amendment 1 was inconsistent with the Township's official plan.

5. DER did not abuse its discretion by failing to consider a federal environmental impact statement which was prepared for the purpose of evaluating various alternatives for construction grant funding under Title II of the Clean Water Act, 33 U.S.C. §1251, and did not even evaluate the facility authorized by the Township's NPDES permit.

O R D E R

AND NOW, this 22nd day of March , 1988, it is ordered that the appeal of Joseph D. Hill, Dennis M. Morrissy, and Elizabeth H. Steele at Docket No. 85-356-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 22, 1988

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BOROUGH OF TAYLOR	:	
v.	:	**EHB Docket No. 83-153-M**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
AMITY SANITARY LANDFILL, Permittee	:	**Issued:** March 24, 1988

A D J U D I C A T I O N

By the Board

Synopsis

An appeal is dismissed where appellant fails in its burden of proof to show that the Department of Environmental Resources abused its discretion in issuing an amendment to a solid waste permit. Issuance of a permit amendment authorizing solid waste disposal operations in an area not zoned for such activity is not an abuse of discretion, since neither the Solid Waste Management Act nor any permit issued thereunder preempt local zoning ordinances; an operator is not relieved of the duty to comply with such ordinances simply because DER has issued a permit. The Department complied with the requirements of §504 of the Solid Waste Management Act regarding local review and comment when it evaluated the comments of the county and host municipality and published its "override justification" in the Pennsylvania Bulletin. Section 504 does not give host municipalities the power to veto the issuance of permits. The mere existence of off-site conditions is insufficient to establish violations of the Solid Waste Management Act and the regulations

adopted thereunder where the appellant fails to present any evidence establishing a nexus between the off-site conditions and operating practices at the landfill.

INTRODUCTION

This appeal arises out of objections by the borough of Taylor (Taylor) to the June 27, 1983 issuance of an addendum to Solid Waste Management Permit No. 100932 (permit) which was issued to Joseph R. Amity and authorized the operation of the Amity Sanitary Landfill (hereinafter referred to as Amity) in the borough of Taylor, Lackawanna County. The permit, which was originally issued by the Department of Environmental Resources (DER) in August, 1973, authorized sanitary landfill operations on approximately 93 of the 158 acres of the site; the addendum allows sanitary landfill operations on the remaining 65 acres of the site.

Hearings on the merits of this appeal were held on November 19-20 and December 4, 1985 by former Board Member Anthony J. Mazullo, Jr., who resigned from the Board on January 31, 1986, prior to the submission of the parties' post-hearing briefs.As a result, the Board must adjudicate this matter on the basis of a cold record, as we have done in numerous other cases; e.g. Louis J. Novak et al. v. DER, EHB Docket No. 84-425-M (Adjudication issued August 13, 1987). With this in mind, we make the following Findings of Fact.

FINDINGS OF FACT

1. Appellant is the borough of Taylor (Taylor), a municipality in Lackawanna County.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), which has the responsibility of administering

the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §§4001 et seq. and the regulations adopted thereunder; the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), and the regulations promulgated thereunder; and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

3. Permittee is Joseph R. Amity (Amity), t/d/b/a Amity Sanitary Landfill, the owner and operator of the Amity Sanitary Landfill (site). (N.T. 340, Ex.S-4; Ex.S-6)[1]

4. Amity lives at 509 Center Street, Taylor, and has been a resident of Taylor since 1941. (N.T. 340)

5. The site, which has an area of 158.65 acres, was acquired by Amity in November, 1969. (N.T. 201 and 341; Ex.S-3)

6. The site is bounded by Union Street to the north, Powell Street to the southeast, and the Pennsylvania Turnpike to the southwest and west. (Ex. S-1 and Ex.A-2)

7. The site is located entirely within Taylor. (Ex.S-3)

8. On or about August 14, 1972, Amity submitted an application for a solid waste management permit to operate a sanitary landfill on the site. (N.T. 203-204; Ex.S-3)

9. In 1972, prior to or concurrent with the submission of Amity's permit application to DER, he requested approval by Taylor's Council to conduct sanitary landfill operations on the site. (N.T. 334-337 and 344)

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[1] Reference to the transcript of the November 19-20 and December 4, 1985 hearing will be denoted by N.T.; stipulated exhibits are denoted by Ex.S; Appellant's exhibits are denoted by Ex.A; Permittee's exhibits are denoted by Ex.P; and the Pennsylvania Bulletin exhibit is denoted by Ex.B-1.

10. In 1972, Taylor's Council gave approval for Amity to conduct sanitary landfill operations on the site. (N.T. 337 and 340)

11. On or about August 17, 1973, DER issued Solid Waste Management Permit No. 100932 (permit) to Amity which, inter alia, limited operation "to Pit No. 1 only (adjacent to the Union Street side of the project)," an area of approximately 93 acres. (N.T. 280 and Ex.S-1 and S-4)

12. The permit authorized the disposal of residential household, commercial, industrial, argricultural and institutional refuse at the site. (Ex.S-3)

13. Sanitary landfilling commenced at the site in September, 1973. (N.T. 211 and 346)

14. On or about August 9, 1979, Amity filed an application for an addendum to the permit to authorize sanitary landfill operations on the remaining 65 acres of the site. (Ex.S-5)

15. The addendum application indicated that the expansion was in areas zoned "S-1" and "R-1." (Ex.S-1 and S-5)

16. A public meeting to receive public comments regarding the addendum application was held by Taylor's Council on October 19, 1981. (N.T. 169)

17. Notice of the meeting was published in The Scranton Times on October 18, 1981, and letters announcing the meeting were sent to residents of the area immediately adjacent to the site. (N.T. 183-184 and 190; Ex.A-4)

18. About 100 persons attended the meeting, and the consensus was opposition to the addendum application. (N.T. 171)

19. In a letter to DER dated October 28, 1981, Taylor's Council expressed its opposition to the issuance of the addendum, citing as its

reasons resident objections, rat and snake problems, and violations of Taylor's zoning ordinance. (Ex.S-11)

20. Taylor sent a second letter, dated June 7, 1982, to DER and reiterated its objections to the issuance of the addendum. (Ex.S-13)

21. By letter dated November 16, 1981, the Lackawanna County Regional Planning Commission informed DER that, in its opinion, the landfill was a nonconforming use under Taylor's zoning ordinance and was not eligible to expand into an R-1 zone. (Ex.S-12).

22. On June 27, 1983, DER issued the addendum authorizing sanitary landfill operations on the remaining 65 acres of the site. (Ex.S-6)

23. DER published its justification for overriding the objections of Taylor and the county planning commission at 13 Pa.B. 2370 (July 30, 1983). (Ex.B-1)

24. DER justified its override by stating that it had no authority to disapprove an application because of the proposed use's non-conformance with local zoning requirements. It further justified its issuance by noting a condition, No. 8, which declared that the addendum did not relieve Amity of the requirement to comply with other applicable laws, regulations and ordinances. (Ex.B-1 and S-6)

25. James Cherundolo has resided at 905 Union Street in Taylor since 1976. (N.T. 28)

26. Cherundolo's residence is located approximately 1000 feet east of the site. (Ex.S-1)

27. Cherundolo has smelled offensive odors outside his residence since he began living there. (N.T. 32)

28. The only rodent problem Cherundolo ever experienced was from field mice. (N.T. 32)

29. Dust and white powder from truck traffic going to and from the site has settled on and about the Cherundolo residence. (N.T. 43)

30. Cherundolo has had difficulty driving on Union Street in the vicinity of the site entrance because of excessive mud and dirt. (N.T. 41-42)

31. Stanley Zabielski has resided at 821 West Taylor Street in Taylor since 1962. (N.T. 72)

32. Betty Powell has resided at 426 Powell Street in Taylor for 20 years. (N.T. 119)

33. Vince Puchalski has resided at 418 Powell Street for 15 years. (N.T. 138)

34. Zabielski, Powell and Puchalski (Powell Street residents) live in the same general area of Taylor in residences which are at least 1000 feet southeast from the southeastern boundary of Amity. (N.T. 89, 125, and 147 and Ex.S-1)

35. The Powell Street residents have experienced offensive odors about their residences at various times. (N.T. 74-75, 122-123, and 139-140)

36. Zabielski has seen rats in or around his residence since landfill operations commenced at Amity. (N.T. 86)

37. Powell has seen rats about her residence for at least five years. (N.T. 121)

38. Puchalski began having rat problems on his property on July 2, 1985. (N.T. 142-146)

39. Zabielski observed dust and white powder coming from the direction of the site and settling about his residence. (N.T. 74)

40. Waste from Celotex is disposed of at the site; Celotex waste is a dry powder. (N.T. 351-352)

41. Charles Hart, at the times relevant hereto, was the supervisor of the Lackawanna County vector control program. (N.T. 228)

42. Hart and his staff conducted a vector survey in the 400 and 500 blocks of Powell Street in 1982, finding piles of lumber, fireplace logs, outdoor dog-feeding areas, and piles of grass cuttings, all potential nesting and harboring areas for rats. (N.T. 229-230)

43. Rats need food, water and a place to nest in order to have suitable habitat and will travel only 200-250 feet for such habitat. (N.T. 230 and 234)

44. Hart's opinion was that Taylor's rat problems were no greater than other places in the area. (N.T. 233-234)

45. Hart believes that the site could not be the source of rats observed by the Powell Street residents because of the distance from the operations area and the application of daily soil cover over deposited solid waste. (N.T. 234-235)

46. Cherundolo, Zabielski and Powell complained at various times to DER's Bureau of Air Quality Control about the presence of offensive odors. (N.T. 62, 115-116, and 131-132)

47. The Bureau of Air Quality Control's inspection and complaint reports for the period July 22, 1982 through June 9, 1983 showed only one instance of off-site objectionable odor, that being on July 22, 1982. (Ex.S-7)

48. In 1982, Amity contracted with Airwick Professional Products to install apparatus to spray a deodorizing substance into the air to counteract offensive odors. (N.T. 424 and Ex.P-Z)

49. A sewage pumping station which has, on occasion, malfunctioned, is located to the northwest of Cherundolo's residence. (N.T. 55-57 and 364)

50. Amity, with the permission of the owner of the Empire Tractor property, which is northeast of the site along Union Street, eliminated a swampy area on Empire's property which contained stagnant and odorous water situated on Empire's property. (N.T. 48 and 362-363 and Ex.S-1)

51. From the adoption of Taylor's zoning ordinance on February 10, 1965 until the time of granting of the permit addendum, that portion of Taylor in which the site is situated has always been zoned "S-1" and "R-1," both residential. The portion of the site authorized for sanitary landfill operation by the permit lies entirely within the "S-1" zone. The portion of the site authorized for sanitary landfill operation by the addendum to the permit lies in both the "S-1" and "R-1" zones. (N.T. 327-328, Ex.S-1, A-1, A-2, A-6, A-7 and A-8)

DISCUSSION

Taylor has put forth three arguments in its challenge to DER's issuance of the addendum. First, Taylor contends that DER abused its discretion and erred as a matter of law by disregarding its objections to the issuance of the addendum. Second, Taylor maintains that DER abused its discretion by granting an addendum which authorizes sanitary landfill operations in an area zoned residential, thus superseding and violating its zoning ordinance. Third, Taylor asserts that DER's action is violative of 25 Pa.Code §§75.21(f), 75.21(h), 75.21(p), 75.26(g), 75.28, 75.29(a) and 75.29(b), and, therefore, authorizes the continuance of a public nuisance. In addition to countering Taylor's arguments, Amity contests Taylor's standing to bring this appeal.

A. Standing

Amity refers the Board to Strasburg Associates v. Newlin Township, 52 Pa.Cmwlth. 514, 415 A.2d 1014 (1980), and Susquehanna County v. Commonwealth

of Pennsylvania, DER, 58 Pa.Cmwlth. 381, 427 A.2d 1266 (1981), as support for its contention that Taylor lacks standing because it has failed to establish that the issuance of the addendum has an adverse affect on it and that its interest was substantial, direct and immediate. While Taylor argues that it has standing as a result of the holding in Franklin Twp. v. Commonwealth of Pennsylvania, DER, 500 Pa. 1, 452 A.2d 718 (1982), Amity urges a contrary result from the application of the holdings in Franklin Township and a later case, Bedminster Township v. Commonwealth of Pennsylvania, DER, 87 Pa.Cmwlth. 148, 486 A.2d 570 (1985), because these cases involved toxic waste.

We are hesitant to interpret Franklin Township in the restrictive manner suggested by Amity. The Supreme Court decided Franklin Township under the SWMA's predecessor statute, the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 et seq. The Supreme Court and the Commonwealth Court in Bedminster Township referred to the wastes in question--sewage sludge--as "toxic wastes." But neither the 1968 nor the 1980 statute make any reference to toxic wastes. The 1968 statute simply refers to "solid wastes," while the 1980 statute distinguished among "municipal," "residual," and "hazardous" wastes. Given Justice Larsen's reasoning in support of the Court's holding that Franklin Township had standing, we believe the Supreme Court intended to broadly confer standing on municipalities, especially in light of its emphasis on DER cooperation with municipalities in administering the SWMA permit program and its concern that municipalities would be the first governmental entity to respond to any problems or emergencies resulting from improper disposal of solid wastes. We find no reason here to believe that Taylor's interests were any less immediate, substantial, and direct than those of Franklin Township, since Amity's site is totally within Taylor's boundaries.

B. Burden of Proof

Since Taylor, a third party, is contesting the issuance of the permit addendum to Amity, it bears the burden of proof under 25 Pa.Code §21.101(c)(3) to demonstrate by a preponderance of the evidence that DER abused its discretion in granting the addendum. Township of Indiana et al v. DER and Duquesne Light Company, Permittee, 1984 EHB 1.

C. Disregard of Taylor's Objections

Taylor contends that DER abused its discretion and erred as a matter of law in disregarding its objections to the addendum which were expressed in an October 28, 1981 letter to DER (Finding of Fact 19). Taylor's objections were based on alleged nuisance conditions at the site, as well as alleged violations of Taylor's zoning ordinance.

Section 504 of the SWMA provides that

> Applications for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and they may recommend to the department [DER] conditions upon, revisions to, or disapproval of the permit only if specific cause is identified. In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the County's recommendations. If the department does not receive comments within 60 days, the County shall be deemed to have waived its right to review.
>
> (emphasis added)

Both Taylor and the county planning commission commented adversely on Amity's application. However, DER is not obligated by §504 of the SWMA to accept these recommendations. If it declines to accept the recommendations, it must publish its justification as it did in this case. Furthermore, the record in this proceeding establishes that DER carefully reviewed the recommendations of Taylor and the county planning commission. No evidence was brought forth by Taylor establishing violations of DER's regulations, much

less indicating that DER failed to consider Amity's record of compliance. Regarding the zoning issue, the evidence establishes that DER was aware of the issue and disposed of it through a permit condition. In light of this, we hold that the Department properly discharged its responsibilities under §504 of the SWMA.

D. The Zoning Issue

Taylor contends that DER's issuance of the addendum was an abuse of discretion because it superseded Taylor's zoning ordinance and authorized sanitary landfill operations in an area zoned as a single-family residential district. The issue of the relationship of the SWMA to municipal zoning has been considered on several occasions, most recently in Plymouth Tp. v. Montgomery County, ___ Pa.Cmwlth ___, 531 A.2d 49 (1987), wherein Commonwealth Court emphatically ruled that the SWMA does not pre-empt[2] lawful zoning ordinances concerning the location of facilities for solid waste management and disposal. Thus, Taylor may regulate the location of the facility through its zoning ordinances, while DER has the authority to regulate the design and operation of the facility. The exercise by either entity of its lawful authority in the field does not supersede or violate the other entity's requirements.

Taylor correctly argues at pages 4-5 of its post-hearing brief that "the issuance of a permit by DER for the operation of a landfill does not and should not excuse a landowner from complying with existing municipal zoning regulations." But, we cannot take the next step urged by Taylor--to hold that DER is prohibited from issuing a solid waste permit where the land use may not

---

[2] Except with respect to a hazardous waste treatment or disposal facility where a certificate of public necessity has been issued by the Environmental Quality Board under §105(h) of the SWMA.

in compliance with local zoning ordinances. There is no requirement in the SWMA that DER's permit decisions must be in compliance with local zoning ordinances, nor does DER have any responsibility or authority to implement local zoning ordinances in its permitting decisions. It is Amity's responsibility to satisfy Taylor's zoning requirements. The condition in Amity's permit advising it of its responsibility to comply with other relevant requirements is a correct, though gratuitous restatement of the holding in Plymouth Township and hardly an abuse of discretion.

E. The Nuisances Issues

Taylor contends that DER abused its discretion in issuing the addendum because of odors and debris in and about the landfill; dust, soot and noise emanating from the landfill; and the frequent appearance of rodents, rats and snakes on neighboring properties. More specifically, Taylor alleges that in issuing the addendum, DER has violated 25 Pa.Code §§75.21(f),75.21(h) and 75.21(p), 75.26(g), 75.28, 75.29(a) and 75.29(b). Taylor concludes that the issuance of the addendum condones the continuation of a public nuisance and health hazard.

While Taylor has not phrased this argument in terms of §503 of the SWMA, we interpret it as contending that DER violated this provision of the SWMA in issuing the addendum when violations of the solid waste regulations existed on the Amity site. Section 503 of the SWMA, 35 P.S. §6018.503 states, in relevant part, that:

> (c) In carrying out the provisions of this act, the department may deny...any permit...if it finds that the applicant...has failed or continues to fail to comply with any provision of this act...or any other state or Federal statute relating to environmental protection or to the protection of public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of

> any permit or license issued by the department; or if the department finds that the applicant... has shown a lack of ability or intention to comply with any provision of this act...or any rule or regulation of the department or order of the department or any condition of any permit...issued by the department as indicated by past or continuing violations...

Thus, to establish that DER's issuance of the addendum was contrary to §503 of the SWMA, Taylor would have to present evidence of violations of the SWMA or the rules and regulations promulgated thereunder. Taylor has failed to satisfy its burden of proof on this issue.

Section 75.21(f) provides that:

> The Department, upon its own recommendation or the recommendation of the Solid Waste Management Advisory Committee shall adopt and revise and conduct periodic reviews of such standards as it deems necessary to prevent nuisances and pollution of the air, land or waters of the Commonwealth. Such standards and revisions shall include, but not be limited to, procedures to insure suitability of the site and the proper operation for the transfer station, sanitary landfill, incinerator, compost plant, solid waste salvage operation or other solid waste processing or disposal operation.

This section is merely a hortatory statement setting forth the general purpose of the solid waste management regulations and DER's on-going responsibility to review and revise those regulations, as appropriate. Section 75.21(f) imposes no obligations on operators of solid waste management facilities, so Amity could not have violated the regulation.

The remainder of the regulations cited by Taylor do impose obligations on Amity, either in the permitting or operational phases of the landfill. General standards for landfills are contained in §75.21(h):

> All areas or solid waste management systems, including all processing and disposal facilities, shall be operated in such manner as to prevent health hazards and environmental degradation.

and §75.29(a):

> Compliance.
> Solid waste shall be collected and transported so as to prevent public health hazards, safety hazards and nuisances.

Sections 75.21(p) and 75.29(b) specifically relate to vector control and provide, respectively:

> Vector Control.
> Vector control procedures shall be carried out when necessary to prevent health hazards or nuisances. The applicant shall submit a control program for the approval of the Department, including, when applicable, the contractual arrangement for services with an exterminator.

and

> Collection and transportation equipment.
> The waste shall be suitably enclosed or covered so as to prevent roadside littering, attraction of vectors or creation of other nuisances.

Section 75.26(g) relates to dust control and states that "Provisions shall be made to prevent dust from hampering landfill operations or from causing health or safety hazards and nuisances." And, finally, §75.28 contains overall standards for the storage of solid waste. Subsections (a)-(d) and (g), although not specifically cited by Taylor, are the portions of §75.28 most applicable to Taylor's contentions.

> (a) The storage of all solid waste shall be practiced so as to prevent the attraction, harborage or breeding of insects or rodents and to eliminate conditions harmful to public health or which create safety hazards, odors, unsightliness and public nuisances.
>
> (b) A sufficient number of containers shall be provided to contain all waste materials generated during periods between regularly scheduled collections.
>
> (c) Individual containers or bulk containers utilized for the storage of solid waste shall have the following physical characteristics:

(1) Constructed in such manner as to be easily handled for collection.

(2) Constructed of rust and corrosion resistant materials.

(3) Equipped with tight-fitting lids.

(4) Constructed in such manner as to be watertight, leak-proof, weather-proof, insect-proof and rodent-proof.

(d) Individual containers shall be used and maintained so as to prevent public nuisances.

* * * * *

(g) Bulky items such as furniture, junk automobiles, machinery, appliances and tires shall be stored so that the collection of water and harborage of rodents and safety and fire hazards are prevented.

* * * * *

There was ample testimony from residents in the area that the noise, dust, odors, rodents and snakes were observed or otherwise sensed about their respective properties, all of which were about 1,000 feet from the area of landfill operations. The evidence regarding odors is the most substantial. Exhibit S-7, a stipulated exhibit, contains the results of inspections by DER's Bureau of Air Quality Control, which were prompted by resident complaints. A brief summary of Exhibit S-7, for the period July 22, 1982 through July 1, 1983, reveals:

Date	Inspection Results
July 22, 1982	Moderate but objectionable garbage odor--violation.
August 2, 1982	No problems detected.
August 3, 1982	No odor.
August 4, 1982	Odor on Union Street.
August 5, 1982	No odor.
August 31, 1982	No problem.
May 24, 1983	Light trace garbage odor on Powell Street, not a malodor, but detectable.
May 27, 1983	Intermittent trace odors.

June 6, 1983	Weak garbage or skunk type odor. No downwind odors.
June 7, 1983	No downwind odors.
June 9, 1983	Strong garbage odor detected for one minute.
Week of June 13, 1983	No complaints.
June 21, 1983	No odors detected.
As of July 1, 1983	No further complaints.

Only one inspection, the first, on July 22, 1982, produced a violation, and the record is devoid of any evidence relating to DER's subsequent action regarding this violation. We cannot hold that this violation alone was sufficient reason to warrant denial of the addendum under 25 Pa.Code §§ 75.21(h) or 75.28(a).

With respect to mice, rats and "garden snakes", we find, based on the evidence presented, the site is not their likely source. Amity's expert witness, Charles Hart, conclusively testified that not only was the active site too distant, i.e., 1,000 feet, to be the source of the rats, but that there were harborages for rats about the residences on Powell Street. Furthermore, the application of daily cover to the refuse at the site with soil will prevent rat problems at the site by continually disrupting potential nesting places. Consequently, we cannot find a violation of 25 Pa.Code §§75.21(h), 75.21(p), 75.28, 75.29(a), or 75.29(b).

There was additional testimony presented concerning dust, noise and road conditions. The Board does not doubt the observations of the residents, but cannot conclude that the SWMA or regulations were violated simply on the basis of these observations, since Taylor made no attempt to correlate the off-site conditions with Amity's on-site operations conditions and practices. Furthermore, Taylor offered no evidence which indicated that the levels of noise and dust constituted a nuisance or a health or safety hazard. With respect to road conditions, there were mud and slippery conditions

attributable to the site on Union Street. However, Amity knew of the conditions and maintained and operated equipment in an effort to remove mud from Union Street.

We also note that Taylor did not call any witnesses to testify on either DER's evaluation of the addendum application or DER's inspections and enforcement activities relating to Amity. Nor did it offer into evidence any notices of violations, summary citations, or inspection reports, except for Exhibit S-7. We cannot conclude, based on the evidence presented, that DER abused its discretion in issuing the addendum.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this proceeding.

2. Taylor has standing to challenge the issuance of the addendum to Amity's permit.

3. Taylor has the burden of demonstrating that DER's action approving Amity's addendum was an abuse of discretion. 25 Pa.Code §21.101(c)(3).

4. Solid waste permits and any addenda or revisions do not supersede or otherwise preempt valid municipal zoning ordinances. Plymouth Tp. v. Montgomery County, ___ Pa.Cmwlth. ___, 531 A.2d 49 (1987).

5. DER did not abuse its discretion by approving an addendum which authorized solid waste disposal operations in an area not zoned for such operations, since neither the SWMA nor the regulations adopted thereunder prohibit the issuance of a permit where a proposed solid waste operation is not in compliance with local zoning requirements.

6. Solid waste permittees have an independent obligation to satisfy valid local zoning restrictions.

7. DER satisfied the requirements of §504 of the SWMA by considering the objections and recommendations of Taylor and the Lackawanna Planning Commission and by publishing its override justification in the Pennsylvania Bulletin.

8. Section 504 of the SWMA does not compel DER to accede to the objections and recommendations of the host municipality.

9. Taylor failed to meet its burden of proof of demonstrating that DER's issuance of the addendum to Amity was contrary to the SWMA and the rules and regulations adodpted thereunder or would result in the creation of a public nuisance.

10. DER's issuance of the addendum to Amity was not a violation of the SWMA or otherwise an abuse of discretion.

O R D E R

AND NOW, this 24th day of March, 1988, it is ordered that the appeal of the Borough of Taylor is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 24, 1988

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Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

FORTUNE ASSURANCE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 85-496-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 24, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Even where the Department of Environmental Resources has the burden of proof in an appeal, an appeal will be dismissed for lack of prosecution where the appellant fails to demonstrate its willingness to pursue the appeal and ignores Board orders.

O P I N I O N

This matter was initiated by the November 8, 1985 filing by Fortune Assurance Company (Fortune) of a notice of appeal from an October 7, 1985 letter from the Department of Environmental Resources (DER) to F. Thomas Zeglin forfeiting bonds supplied to Zeglin for his mine site in Penn Township, Westmoreland County. Fortune is the surety on the bonds. DER's action was taken pursuant to §4(h) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S.§1396.4(h). Earlier, on October 30, 1985, Zeglin also filed an appeal from the same

forfeiture letter. Fortune's appeal was consolidated with Zeglin's at Docket No. 85-476-R. However, these appeals were later unconsolidated.

The Board granted Fortune three extensions to file its pre-hearing memorandum, the third of which threatened sanctions if Fortune did not comply by June 9, 1986. On July 3, 1986, the Board precluded Fortune from presenting its case in chief due to its failure to file the required pre-hearing memorandum. However, on the basis of Fortune's representations that it intended to have the mine site reclaimed, thus probably settling this matter, the Board continued this appeal until January 5, 1987. Subsequently, the continuance was extended to July 31, 1987.

On November 12, 1987, DER filed a motion to dismiss, alleging that Fortune has made it plain that it has no intention of complying with Board orders. DER asserts that, on July 21, 1987, Fortune Assurance Company was liquidated. The Commonwealth Court's order dissolving Fortune, at Docket No. 861 C.D. 1987, stated that:

> " 4. [Fortune], its directors, officers, agents, employees, attorneys, accountants, brokers, policyholders, and creditors are enjoined from... (6) the institution or further prosecution of any actions in law or equity..."

Accordingly, DER contends that Fortune would be prohibited from prosecuting its appeal. DER further alleges that, through all of these extensions and continuances, it never received any plan for reclamation of the mine site.

Fortune failed to respond to DER's motion, despite the Board's notification of its pendency. Therefore, pursuant to 25 Pa.Code §21.64(d), the Board will deem all relevant facts as admitted by Fortune.

Because of its failure to respond to the allegations made in DER's

motion, Fortune has admitted that it has no intention of prosecuting its appeal, a fact amply confirmed by the procedural history of this matter. Furthermore, the order of dissolution entered by the Commonwealth Court makes it impossible for Fortune to pursue this appeal. Although the Board is reluctant to dismiss an appeal where the appellant does not bear the initial burden of proof, in this case we will grant DER's motion and dismiss this appeal. Franklin Lyons v. DER, 1984 EHB 859.

O R D E R

AND NOW, this 24th day of March, 1988, the Department of Environmental Resources' motion to dismiss is granted and the appeal of Fortune Assurance Company at Docket No. 85-496-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 24, 1988
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Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF LOWER MOUNT BETHEL	:	
	:	
v.	:	**EHB Docket No. 83-082-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 25, 1988
and SOIL RICH SYSTEMS, Permittee	:	

A D J U D I C A T I O N

By the Board

Synopsis

An appeal challenging the issuance by DER of a Solid Waste Permit for the agricultural utilization of municipal sludge and septage will be dismissed when the Appellant Municipality fails to prove its contentions that the operation is being allowed on an unsuitable site with excessive quantities, contaminates nearby wells, creates odor and insect nuisances and is unrelated to agriculture.

INTRODUCTION

Procedural history

On April 28, 1983, the Township of Lower Mount Bethel, Northampton County, Pennsylvania (the "Township") filed a Notice of Appeal from the issuance by the Department of Environmental Resources ("DER") of Solid Waste Permit No. 602359 (the "Permit") to Soil Rich Systems ("Soil Rich") for the agricultural utilization, land reclamation and/or land disposal of sewage sludge on Tracts 1 and 3 of Willowbrook Farms in the Township. The Notice of

Appeal alleged that the Permit was dated March 25, 1983, and that a copy was received by the Township on or about March 28, 1983. The reasons assigned for the Appeal were (1) recent and reoccurring violations of the Permit, including but not limited to, boundary, odor and weather conditions; (2) failure to properly verify load contents and supervise application of same, causing run-off and vector problems; and (3) causing a health hazard to the environment and citizenry of the Township.

Soil Rich filed a Petition to Intervene on July 14, 1983, and the Board issued an Order granting intervention on July 25, 1983. The case was assigned to Anthony J. Mazullo, Jr., who was then a member of the Board. Mr. Mazullo presided over a pre-hearing conference on January 14, 1985, and scheduled hearings to commence on May 14, 1985, in Norristown, Pennsylvania. At the outset of the hearing, both parties requested that the record in the case of Lower Mount Bethel Township v. Arling Kiefer and Frances Kiefer, his wife, and Action Septic Service, Inc., pending in the Court of Common Pleas of Northampton County, Pennsylvania, at docket number 1984-CE-5682, be used as the record in this Appeal. Under questioning by Mr. Mazullo, both parties waived objections to having the Appeal considered solely on the basis of a written record without opportunity to observe the witnesses. Mr. Mazullo then agreed to the request.

The record in the Northampton County Court case was filed with the Board on October 15, 1985. Both parties filed briefs, requests for findings of fact and requests for conclusions of law. Mr. Mazullo resigned his position on the Board before preparing an Adjudication. The Board, in similar circumstances, has upheld the propriety of preparing and issuing an Adjudication on the basis of a "cold record": Penn Maryland Coals, Inc. v. DER, 1986 EHB 758; DER v. Lucky Strike Coal Company and Beltrami, EHB Docket

No. 80-211-CP-W (Adjudication issued April 22, 1987). Since the parties to the Appeal already had waived objection to proceeding upon a record that was cold, no question of propriety can arise.

Issues

There is some confusion over the issues that are to be resolved in this Appeal. In its brief, the Township discusses three issues: (1) whether the Board has jurisdiction to enjoin waste dumping under a DER permit when the operation constitutes a nuisance; (2) whether Soil Rich's operation constitutes a public nuisance; and (3) whether Soil Rich's activities are protected by the Agricultrual Area Security Law. In its brief, Soil Rich accuses the Township of ignoring the issues stipulated at the pre-hearing conference, i.e. (1) whether DER erred in granting the permit; and (2) whether DER's operational rules have been violated to the extent that sanctions or revocation are appropriate.

We have carefully reviewed the transcript of the May 14, 1985, hearing and all other documents in the Board's files pertaining to this docket; but have found no reference to stipulated issues. The Notice of Appeal, therefore, governs the situation. That pleading seems to be directed primarily to the character of Soil Rich's operations and only inferentially to the propriety of issuing the permit. Most of the evidence presented at the trial in Northampton County falls into a similar pattern.

The Board's jurisdiction is invoked only when an appeal is filed from an "action" of DER. As defined in 25 Pa. Code §21.2(2) this includes an order, decree, decision, determination or ruling. The only action appealed in the present case is the Permit issued to Soil Rich on March 25, 1983. Since that appeal makes no reference to any action of DER concerning nuisance abatement, permit revocation or other sanctions, those issues are not before

us. Similarly, the Permit modification approved by DER on December 1, 1983, which authorized the agricultural utilization of sewage sludge on tracts 5 and 6 of Willowbrook Farm, is not before us since no appeal was filed from that action of DER.

The only question we can resolve in this Appeal is whether DER acted properly in issuing the Permit on March 25, 1983. Resolving that question requires that we consider the suitability of tracts 1 and 3 and determine whether the agricultural utilization of sewage sludge, in the manner authorized by the Permit, was likely to create a public nuisance.

FINDINGS OF FACT

1. The Township is a municipality of the Commonwealth of Pennsylvania, located in Northampton County. (Notice of Appeal, Paragraph 1)

2. Soil Rich is a division of Action Septic Service, Inc., a New Jersey business corporation registered to do business in Pennsylvania as Soil Rich Systems. Its office is located at P. O. Box 181, Hope, New Jersey 07844. (Notice of Appeal, Paragraph 2; Petition to Intervene, Paragraph 1)

3. Arling Kiefer and Frances Kiefer, husband and wife ("Kiefers"), are adult individuals residing at R. D. #4, P. O. Box 4074, Bangor, Pennsylvania 18013, and own real estate located in the Township and known as Willowbrook Farm. (N.T. I, p. 3) [1]

4. On October 12, 1982, Soil Rich filed an application with DER for the agricultural utilization of sewage sludge from the Mount Pocono and Belvedere sewage treatment plants and of septic tank pumpings ("septage"), on three tracts of Willowbrook Farm. (Defendant's--Soil Rich's--Ex. "A")

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[1] The transcript is not consecutively paginated. Consequently, references to the various days of hearing will be as follows: October 29, 1984 - I; January 24 and 25, 1985 - II; March 19, 1985 - III; March 20, 1985 - IV; March 21, 1985 - V; and March 22, 1985 - VI.

5. On March 25, 1983, DER issued the Permit to Soil Rich, authorizing the application of municipal sludge to tract 1 and the application of septage to tract 3 of Willowbrook Farm, subject to 19 specific conditions. No authorization was given for tract 2. (Defendant's--Soil Rich's--Ex. "A")

6. Before issuing the Permit to Soil Rich, DER evaluated the application and gave the Township and Northampton County an opportunity to review the data. (N.T. III, pp. 159-162; IV, pp. 31, 126-128; V, pp. 128-129)

7. DER's soil scientist went to the site and performed test borings with a hand auger, but dug no test pits. (N.T. I, pp. 27-28; V, pp. 128-129, 143)

8. According to the Soil Survey of Northampton County (the "Soil Survey") prepared by the Soil Conservation Service, tract 1 contains primarily Conotton soils while tract 3 contains Conotton, Washington, Duffield, Berks and Bedington soils. The Soil Survey only gives a generalized description; the actual soils may differ somewhat from what is indicated in the Soil Survey. (N.T. I, pp. 13-17)

9. The test borings performed with a hand auger by DER's soil scientist indicated the presence of Ryder soils on tracts 1 and 3. (N.T. I, pp. 29-30)

10. The Conotton soil series is a gravelly silt loam. According to the Soil Survey, it consists of deep, well-drained, nearly level to steep soils. It may have a high water table and may be susceptible to sinkhole development. (N.T. I, pp. 19-20, 71-72)

11. The Washington soil series is a silt loam, indicative of underlying bedrock limestone. It is highly susceptible to sinkhole development. (N.T. I, pp. 20-22)

12. The Berks-Bedington soil association is shaley with a shallowness to bedrock. It forms on gentle to steep slopes. (N.T. I, pp. 17-18)

13. The Duffield-Clarksburg-Ryder soil association is shaley with a thickness less than three feet. (N.T. I, p. 21)

14. The predominant bedrock in the Township is Beekmantown limestone but Martinsburg shales underlie the hilly areas. Between the two is a thin veneer of Jacksonburg limestone which probably underlies the Ryder soils. (N.T. I, pp. 30, 35-36)

15. Beekmantown limestone is very susceptible to solutionization, but is less so in the Township because it is dolomitic. (N.T. I, p. 36; V, p. 167)

16. The absence of surface streams and the strength of wells indicate that subsurface water flows through the limestone bedrock of the Township in heavy volume. This, in turn, indicates that the limestone bedrock contains many solution cavities. (N.T. I, pp. 42-44; VI, pp. 39-40)

17. Thin soils and soils with a shallow depth to bedrock present a potential for ground water contamination when the bedrock is of the nature of that in the Township. (N.T. I, p. 43)

18. According to the Soil Survey, ground water contamination is a potential hazard in Conotton, Washington, Duffield and Ryder soils, and Washington soils commonly have sinkholes or closed depressions. (N.T. I, pp. 94-95; VI, pp. 36-38)

19. The best soils for agriculture and the agricultural utilization of sewage sludge are the deep soils that also may be prone to sinkhole development. (N.T. IV, pp. 33-34, 55-57)

20. Tracts 1 and 3 show no rock outcroppings, soil mottling or any other surface indications of sinkhole development. The only sinkhole

specifically mentioned in the testimony was one-quarter mile away from any application sites. (N.T. III, p. 19; IV, p. 34; V, pp. 129-130, 167-171; VI, pp. 45-49)

21. Municipal sludge and septage have been analyzed by state and federal agencies and have been found to contain coliform bacteria, heavy metals, organic matter and nutrients within certain ranges of concentrations. (N.T. VI, pp. 23-24)

22. Tests performed on the municipal sludge and septage being applied to tracts 1 and 3 during 1983 and 1984 showed cyanide, heavy metals and volatile organics, but within the range of concentrations expected in material of this nature. (N.T. I, pp. 105-107, 115; IV, pp. 150-152, 175-176; VI, p. 86)

23. Tests performed on water from a drainage swale on tract 3 during 1983 showed the presence of fecal coliform and fecal strep bacteria. (N.T. IV, pp. 144, 146, 149)

24. Tests performed on soils from tracts 1 and 3 during 1983 and 1984 showed the presence of cyanide and heavy metals, within acceptable concentrations, but no volatile organics. (N.T. I, pp. 119-123; IV, pp. 153-154)

25. The wells at the W. Swope and J. Swope residences are in the direction of ground water flow from tract 1. Tests performed on water from the J. Swope well showed coliform bacteria, in concentrations ranging from potable to non-potable, but no fecal coliform or fecal strep. Cyanide was found in concentrations ranging from 0 parts per million to 9 parts per million, all within an acceptable range. Cadmium, mercury and volatile

compounds also were within acceptable ranges. Tests performed on water from the W. Swope well showed no bacteria. (N.T. I, pp. 108-109, 115, 123-124; V, pp. 201-204; VI, pp. 7-15)

26. The wells at the Moffett, Butz and George Kiefer residences are in the direction of ground water flow from tract 3. Tests performed on water from the Moffett well showed only coliform bacteria, on one occasion, and only fecal strep, on another occasion. Cyanide was found in concentrations ranging from 3 parts per million to 11 parts per million, the latter exceeding the acceptable limit of 10 parts per million. Cadmium, mercury and volatile compounds were within acceptable limits. The Butz well has no bacterial pollution or detectable cyanide. The George Kiefer well has no detectable cyanide. (N.T. I, pp. 85, 95, 111, 115-117, 123-125; V, pp. 205-208; VI, pp. 7-15)

27. Tests performed on water from the Garis well, upgradient from tracts 1 and 3, showed cyanide in the concentration of 7 parts per million. (N.T. I, p. 123; VI, pp. 8-9)

28. The source of the bacterial contamination in the J. Swope and Moffett wells is unknown. (N.T. I, pp. 91-92, 96, 154; IV, p. 134; V, pp. 197-208)

29. The source of the cyanide concentrations in the J. Swope and Moffett wells is unknown. (N.T. I, pp. 126-127; VI, pp. 13-16)

30. Some pooling of liquids in wheel tracks left by the spreading vehicle has occurred on tracts 1 and 3. (N.T. II, pp. 15-16; III, pp. 19-25; IV, pp. 131, 147; V, pp. 36-37, 81-82, 181-194; VI, p. 81)

31. On several occasions after the Permit was issued pH was measured below 6.5 on tracts 1 and 3. (N.T. IV, pp. 160-165, 177-178; V, pp. 21-23, 45-47, 52-53; VI, pp. 25-26)

32. The agricultural utilization of municipal sludge and septage on tracts 1 and 3, in the manner stipulated in the Permit, creates an odor that, depending on the individual, may or may not be as offensive as the odor of animal manures utilized in the Township. (N.T. I, pp. 6, 9, 11, 16-17, 56-57, 65-67, 99-100, 122-123, 160-161; III, pp. 8-9, 14-18, 26-27, 48-50, 56-57, 166-167; IV, pp. 2-3, 5, 8, 10-11, 14-16, 57-59, 99-101, 104, 107, 114-123, 130; V, pp. 35-36, 60-64, 81-82, 96, 121-122, 136-137, 151-152, 177-181; VI, pp. 16-17)

33. The agricultural utilization of municipal sludge and septage on tracts 1 and 3, in the manner stipulated in the Permit, creates a poorer environment for the breeding of flies than normal farming operations using animal manures. (N.T. IV, pp. 24-26, 75-77; V, pp. 75, 82, 121-122, 178-179)

34. At the time the Permit was issued, tracts 1 and 3 were devoted to agriculture. Tract 3 was not farmed from June 1983 until the fall of 1984. (N.T. IV, pp. 34-35, 80-81, 113-114; V, pp. 9-10, 45-52, 117, 160)

DISCUSSION

When a third party appeals from the issuance of a permit, our task is to determine whether the issuance of the permit was an abuse of DER's discrection or an arbitrary exercise of its duties or functions. Wisniewski, et al. v. DER, et al., 1986 EHB 111. Since DER regulations permit the agricultural utilization of municipal sludge and septage under certain conditions, 25 Pa. Code §75.32(c), DER was legally justified in issuing the Permit to Soil Rich unless one or more of these conditions were not satisfied. The Township has the burden of proving that such was the case: 25 Pa. Code §21.101(c)(3).

25 Pa. Code §75.32(c) sets forth ten conditions. Nearly all of them appear to deal with operations rather than eligibility; only number (6) places

limitations on site selection. All the conditions are pertinent to our consideration, however; for, if the Township can show that the Permit abrogated one of the operational conditions or that some characteristic of tracts 1 and 3 make it impossible for Soil Rich to conform to the operational conditions, the issuance of the Permit could be an abuse of DER's discretion.

Since much of the evidence dealt with the suitability of the application sites, it is appropriate to begin with that topic. 25 Pa. Code §75.32(c)(6) requires suitable soils with a well developed solum and a minimum depth to bedrock of 20 inches. The minimum depth to the seasonal high water table must be 20 inches and to the permanent ground water table must be 4 feet. Slopes must not exceed 12% and no closed depressions may exist on the site. Soil pH must be 6.5 or greater.

According to the evidence, the Soil Survey indicates that tract 1 has Conotton as its predominant soil and that tract 3 is composed of Conotton, Washington, Duffield, Berks and Bedington soils. The test borings made by DER also showed the presence of Ryder soils on both tracts. All of these soils are within the USDA Textural Classes of silt loam and silty clay loam, satisfying the initial requirement of soil suitability in 25 Pa. Code §75.32(c)(6). Moreover, they were specifically approved by DER after an on-site investigation, fulfilling the other requisite of item (i).

DER measured the depth to ground water and the Township has presented no evidence to show that these measurements failed to satisfy the requirements of items (iii) and (vii) of 25 Pa. Code §75.32(c)(6). Nor has the Township challenged DER's determinations with respect to slopes, item (iv), and depth to bedrock, item (ii). Much testimony was presented on the subject of sinkholes, item (v), but none of the evidence goes beyond speculation that closed depressions might exist and that sinkholes might develop. Contrasted

to these conjectures was firm testimony that sinkholes do not exist on tracts 1 and 3 and there are no surface indications that any are developing. No evidence was presented to show the soil pH, item (vi), at the time the Permit was issued. We must presume that it was 6.5 or greater.

The Township did not expend its resources to do the extensive site analysis required to prove unsuitability. Instead, it had its experts review the data already available. That data raised general concerns about groundwater contamination but failed to establish that there are significant limiting factors specific to tracts 1 and 3. As a result, the Township's experts could do no more than express their concern and suggest the need for more extensive site investigation. Such evidence is inadequate to carry the Township's burden of proof on this point.

To overcome this deficiency, the Township focused more specifically on groundwater contamination. The relevant evidence showed that two wells in a position to be affected by groundwater flows from tracts 1 and 3 were contaminated with bacteria and cyanide. These contaminants also were detected in the municipal sludge and septage being applied to tracts 1 and 3 and in the soils from these tracts. The Township's experts could not make the causal connection, however. While they speculated on such a connection, they had to admit that the source of the contamination is unknown. Complicating the problem are additional realities: (1) only two of the wells are polluted while others are pure; (2) there are at least three potential sources of bacterial contamination, and (3) a well located upgradient of tracts 1 and 3 also showed cyanide contamination.

Weighing all of this evidence, it is clear that the source of pollution is unknown, as the Township's experts concede; but it is also

apparent that the finger of suspicion does not even clearly point to the materials being applied to tracts 1 and 3. Instead of reinforcing the Township's arguments that the sites are unsuitable, the evidence on groundwater contamination seems to suggest that the soils on tracts 1 and 3 are adequately performing a filtering function.

As already noted, the other nine conditions in 25 Pa. Code §75.32(c) are basically operational in nature. The Township presented a great deal of evidence on Soil Rich's operations, much of which is unrelated to whether or not the Permit should have been granted. Since some of this evidence could be interpreted as relating to site suitability, however, we will consider it for that purpose.

Evidence was presented to show that ponding occurs on tracts 1 and 3 and that odors and flies are offensive to the point of creating a public nuisance. This evidence may suggest that the characteristics of the site are such that municipal sludge and septage cannot properly be applied in the quantities allowed by the Permit. Those quantities, it should be noted, are consistent with DER's guidelines. (See Defendant's--Soil Rich's--Ex. "A" and Plaintiff's--Township's--Ex. 5)

The ponding occurs in the wheel tracks left by the vehicle that does the spreading. There is no evidence that ponding occurs at other places on the site. Since this limited amount of ponding obviously occurs because of soil compaction caused by repeated use of access roads, there is nothing in this evidence to prove that tracts 1 and 3 are incapable of receiving the quantities allowed in the Permit.

Considerable testimony was presented on the presence of odors and flies. Most of the non-farmer residents of the area blamed the odors and

flies on the utilization of municipal sludge and septage on Willowbrook Farm. They found the odors pervasive, more obnoxious than animal manures and completely disruptive of outdoor activities. They spoke of flies so numerous that they were caked on the window screens in the morning. Neighboring farmers and some other long-time residents of the Township disagreed. They maintained that the odors were no more offensive than animal manures and that flies are no more numerous now than before Soil Rich began its operations. Significantly, odors and flies were hardly a problem on those days when DER and other governmental representatives were on the site, a point conceded even by Soil Rich's most outspoken opponents.

There can be no doubt about the fact that municipal sludge and septage have a disagreeable odor that is bound to escape into the atmosphere when the material is transported and spread on farm fields. The requirement to inject the material or plow it under within 24 hours is intended to minimize the pungency, but there is no reasonable way to eliminate it altogether. Nor can there be any doubt about the fact that persons of similar sensibilities often reach different conclusions about how disagreeable this odor really is.

The critical issue, for purposes of this Adjudication, is whether the odor problem was magnified to the point of public nuisance by the quantities allowed to be utilized under the Permit. (See 25 Pa. Code §75.32(c)(8)). There was no evidence to make this connection. While there was testimony to the effect that Soil Rich was not always careful to cover the material as completely and as efficiently as desirable, there was nothing to suggest that these shortcomings were the result of oversaturated soil. In fact, the undisputed testimony of Soil Rich's expert is that the soil is not saturated. On the basis of the evidence presented, we conclude that the utilization of

municipal sludge and septage on tracts 1 and 3, in the quantities allowed by the Permit, does not create a public nuisance even though disagreeable odors are associated with it.

The most credible evidence indicates that flies are less likely to breed in municipal sludge and septage than in barnyard manures. When the material is injected or plowed into the ground, the conditions are even less favorable for these insects. We do not doubt that flies are an annoyance to many residents in the vicinity of Willowbrook Farm, but there is no evidence to show that the quantities of municipal sludge and septage allowed to be utilized on tracts 1 and 3 necessarily cause the annoyance. Many other agricultural operations are conducted on Willowbrook Farm and other farms in the vicinity, providing a more ideal environment for the breeding of flies than the utilization of municipal sludge and septage.

DER witnesses testified that, on at least two occasions after the Permit was issued, soil pH was measured at less than 6.5. While this condition amounted to a technical violation of the Permit and DER regulations, it was not treated as a serious deficiency by DER. Soil pH can be adjusted by the application or withholding of certain materials and normally fluctuates, to an extent, on cultivated fields. As a result, this evidence falls far short of establishing that tracts 1 and 3 cannot be maintained at 6.5 or above. In fact, another DER measurement was above 6.5.

The Township attempts to capitalize on the stipulated fact that tract 3 was not farmed from June 1983 until the fall of 1984. While there is nothing in the Permit or DER regulations mandating cultivation, the term "agricultural utilization" of municipal sludge and septage is presumed to require that the land be actively involved in farming. Otherwise, the operation is deemed to be "land disposal" subject to a wholly different set of

conditions: 25 Pa. Code §75.32(d) and (e). The evidence shows conclusively that, except for a period during 1983-1984 when tract 3 was in a set-aside program, the land covered by the Permit was actively farmed. The exception, which undoubtedly resulted from a misunderstanding on the part of the Kiefers that has since been clarified, is not sufficient to show that the Permit should not have been issued. After carefully weighing all of the relevant evidence in this voluminous record, we must conclude that the Township has failed to establish that DER erred in issuing the Permit.

CONCLUSIONS OF LAW

1. The soil and other physical characteristics of tracts 1 and 3 make them suitable for the agricultural utilization of municipal sludge and septage. (25 Pa. Code §75.32(c))

2. The municipal sludge and septage being applied to tracts 1 and 3 are utilized for agricultural purposes.

3. Of the several potential sources of bacterial and cyanide contamination in some of the wells adjacent to tracts 1 and 3, the agricultural utilization of municipal sludge and septage on those tracts is not even the most likely source.

4. The fact that some ponding of liquids occurs in wheel tracks left by the spreading vehicle does not prove that tracts 1 and 3 are incapable of receiving the quantities of municipal sludge and septage allowed by the Permit.

5. The odors associated with the agricultural utilization of municipal sludge and septage on tracts 1 and 3, in quantities allowed by the Permit, does not create a public nuisance even though the odors are disagreeable.

6. The Township has not presented sufficient evidence to show that tracts 1 and 3 are incapable of meeting the other operational requirements of the Permit and of 25 Pa. Code §75.32(c).

7. DER did not err in issuing the Permit.

ORDER

AND NOW, this 25th day of March, 1988, the Appeal of the Township of Lower Mount Bethel from the issuance by DER of Solid Waste Permit No. 602359 to Soil Rich Systems is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 25, 1988

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mjf

LOWER PROVIDENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 81-078-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 29, 1988
and ALTERNATE ENERGY STORE, INC.,	:	
Permittee	:	

A D J U D I C A T I O N

By the Board

Synopsis

A Township's Appeal from the issuance of a Mine Drainage Permit is dismissed when the Township fails to show (1) that the information contained in the Application is misleading, (2) that the diversion of drainage from an adjacent landfill will increase the environmental danger, (3) that the direction of ground water flow is a critical factor in a case where excavation will be confined primarily to the area above the water table, (4) that the information furnished on the location of public and private water supplies is inadequate, and (5) that the issuance of the Permits violated due process.

When it is discovered, subsequent to the issuance of the Mine Drainage Permit, that an unanticipated condition exists on the site with potential harm to the environment, the permit will be suspended and the matter will be remanded to DER for the purpose of reviewing the Mine Drainage Permit and issuing an amendment, if deemed necessary.

When a Mining Permit (non-coal) has expired by its own terms prior to the preparation of an Adjudication in an Appeal challenging the issuance of said Permit, that portion of the Appeal will be dismissed as moot.

Procedural History

On June 3, 1981, Lower Providence Township, Montgomery County, Pennsylvania ("Township") filed a Notice of Appeal from the issuance by the Pennsylvania Department of Environmental Resources ("DER") to Alternate Energy Store, Inc. ("AES") of Mine Drainage Permit No. 46800301, dated May 4, 1981, and Mining Permit No. 302093-46800301-01-0, dated May 4, 1981 ("Permits"). The Permits authorized AES to operate a borrow pit on 48.5 acres of land in the Township owned by Providence Builders, Inc. ("Providence").

The case was assigned to Anthony J. Mazullo, Jr., then a member of the Board, who denied AES' Motion to Quash Appeal on February 10, 1982. After discovery, hearings were held on five days during January and February, 1983. Additional hearings were held on April 26, 1984, May 21, 1984, and June 14, 1984. On this last day of hearings, the Township filed a Motion to Declare Issuance of Mine Drainage Permit Improper. On July 10, 1984, Mr. Mazullo issued an Order deferring a ruling on the Township's Motion to the final Adjudication.

The Township and AES both filed briefs, but on November 29, 1984, AES filed a Petition to Supplement Record with the results of tests conducted during May and June, 1984, on wells in the vicinity of the land covered by the Permits. AES alleged that it did not become aware of these tests until after the close of hearings. This Petition was opposed by the Township and was denied by Mr. Mazullo in an Order dated January 9, 1985.

AES filed a Petition to Reopen on February 27, 1985, seeking to introduce the same evidence rejected in its Petition to Supplement Record.

The Township opposed the Petition. While a ruling was pending, DER informed AES by letter dated April 4, 1985, that its Mining Permit had expired on or about May 4, 1983, because mining had not commenced by that date and because no request for an extension of time had been filed by that date.

This letter became the subject of the Township's Petition to Reopen filed on July 8, 1985, and opposed by AES. In the meantime, on May 6, 1985, AES filed a Notice of Appeal at docket number 85-188-M, challenging DER's determination that the Mining Permit had expired. DER filed a Motion to Dismiss that Appeal and the Board granted the Motion in an Opinion and Order dated October 23, 1985. AES appealed the Board's opinion to the Commonwealth Court, and the Commonwealth Court sustained the Board's opinion. Alternate Energy Store v. DER, ____ Pa. Cmwlth. _____, 527 A.2d 1077 (1987).

Mr. Mazullo resigned from the Board on January 31, 1986, without having ruled on the pending Petitions to Reopen and without having prepared an Adjudication. On May 5, 1986, Chairman Maxine Woelfling and Board Member Edward Gerjuoy issued an Opinion and Order denying AES' Petition to Reopen and declaring the record closed. No specific reference to the Township's Petition appears in the Opinion and Order and, apparently, it was never the subject of a specific ruling. However, since the evidence sought to be introduced by the Township is clearly set forth in the proceeding at docket number 85-188-M, it is properly before us by judicial notice. Since AES' Appeal to Commonwealth Court was dismissed on June 24, 1987, the expiration of its Mining Permit is now final and unassailable. All questions pertaining to its initial issuance are moot and will not be discussed in this Adjudication, except insofar as necessary to resolve the controversy surrounding the issuance of the Mine Drainage Permit.

FINDINGS OF FACT

1. AES is a Pennsylvania corporation incorporated October 12, 1979. From that date until October 15, 1982, the sole shareholder was Mark W. Thomas, an owner/operator of tractor trailers used in the hauling business. Mr. Thomas caused AES to be incorporated with the intention of mining and hauling stone from the Troop Farm. (N.T. III, pp. 5-10; Ex. A-16)[1]

2. The Troop Farm is a 131.5 acre tract of land in the Township, owned by Providence in the fall of 1980. (Ex. A-22)

3. On August 18, 1980, officials of AES were authorized by the corporation to enter into negotiations to obtain quarrying rights on the Troop Farm. (N.T. III, p. 86)

4. Subsequent to that date, Donald Neilson, president of Providence, orally authorized AES to file applications with DER for approval of a quarry on Troop Farm. (N.T. III, p. 92)

5. On October 28, 1980, AES filed with DER's Pottsville office a joint application for a Mining Permit and for a Mine Drainage Permit ("Application"). The Application was on forms prepared by DER and was accompanied by appendices A through J, numerous maps and a surety bond in the amount of $48,500. (Ex. B-1; B-2)

6. The Application disclosed, inter alia:

> (a) that AES intended to operate a borrow pit to extract soil and rippable weathered shale, sandstone and limestone from the Troop Farm, initially confined to a 51.6 acre section in the western part of the tract.

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[1] The transcript is not consecutively paginated. Consequently, references to the various days of hearing will be as follows: January 12, 1983 - I; January 13, 1983 - II; January 21, 1983 - III; February 3, 1983 - IV; February 24, 1983 - V; April 26, 1984 - VI; and June 14, 1984 - VII.

The yield was expected to equal 1,000 tons per day, 50,000 tons per year. (Ex. B-1)

(b) that excavations already existed on portions of the Troop Farm included in the Application. These excavations apparently had been done by Moyers Landfill, Inc. ("Moyers"), with the knowledge of DER, in order to obtain soil cover for its landfill operation on an adjoining site. (Ex. B-1; A-12; A-13)

(c) that surface drainage from the Troop Farm flows south and southeast toward an unnamed tributary of Skippack Creek just north of its confluence with Perkiomen Creek. AES proposed to direct the surface water to two retention basins to be constructed in the lower portion of the borrow pit, capable of providing 24 hours of retention time in order to keep sediment from draining off the site. (Ex. B-1)

(d) that AES intended to confine its operation primarily to the area above the water table. As a result, a minimum amount of ground water was expected to be encountered. Since the material to be excavated was expected to be non-acid, AES proposed to discharge the ground water toward the unnamed tributary of Skippack Creek without any treatment other than that provided by the retention basins. (Ex. B-1)

(e) that the proposed borrow pit was bordered on the northwest by the landfill operated by Moyers ("Landfill"). Surface runoff from the Landfill onto the Troop Farm was

proposed to be diverted from the borrow pit by a diversion berm. (Ex. B-1)

(f) that ground water beneath the surface of the Troop Farm was expected to have a strong component of flow to the west-southwest, along the strike of the bedding planes and the strike of the dominant joint set. Concentrated flow also was expected to the south and south-southeast, along the lineament-fractured zones running in those directions. (Ex. B-1)

(g) that AES proposed to reclaim the site as open space, regrading the irregular floor of the pit with soil and weathered rock and revegetating the area with ground cover and trees. The total cost was estimated to be $70,000. (Ex. B-1)

7. As part of the Application, AES submitted the following, among other items:

(a) a Consent of Landowner, executed by Donald J. Neilson, president of Providence.

(b) a contour map showing the approximate boundaries of all properties bordering the Troop Farm or within 1,000 feet of the perimeter of the Troop Farm. The approximate location of all structures within 1,000 feet of the perimeter of the Troop Farm also was shown. Each property shown on the map was assigned a lot number. A list of the 60 owners of record was keyed to this numbering system. The information on which the map and owners' list were based was obtained on behalf of

AES from Montgomery County tax maps and land records. (N.T. IV, pp. 33-34; Ex. B-1; R-3; and R-4)

(c) A water supply location map showing, in accordance with unwritten DER policy, the approximate location of all private water supplies actually located within 1,000 feet of the perimeter of the Troop Farm. Each private water supply shown on the map was assigned a number. A list of the 49 owners of such private water supplies was keyed to this numbering system. One of the private water supplies was designated to be a spring; the others were all stated to be wells. The information on which the map and owners' list were based was obtained on behalf of AES from Montgomery County tax maps and land records and from door-to-door interviews with residents. (N.T. IV, pp. 45, 144-159; V, pp. 14-25; Ex. B-1)

(d) the fact that a public water supply intake for Philadelphia Suburban Water Company was located on Perkiomen Creek, about 2.7 miles downstream from the proposed borrow pit on Troop Farm. No other public water supply intake was listed, in accordance with unwritten DER policy, because no others were located within 10 stream miles downstream from the proposed borrow pit. This information was obtained on behalf of AES from DER's records. (N.T. IV, pp. 19-25; Ex. B-1; R-1; and R-2)

(e) The fact that no public well, reservoir or impoundment was located within one-half mile of the

proposed borrow pit, according to a field investigation made on behalf of AES. The one-half mile limit corresponded with unwritten DER policy. (N.T. IV, pp. 18-19, 26; Ex. B-1; R-1; and R-2)

8. Upon receipt of the Application, officials of DER reviewed the data and notified AES of certain necessary revisions. Subsequently, DER officials visited the site, observed the Landfill, observed the existing excavation and took water samples, above and below the site, of private water supplies and stream flows. The Application also was reviewed on behalf of the Montgomery County Conservation District. (Ex. A-9; A-11; A-23)

9. Public notice of the filing of the Application was given by publication in the Times Herald, a newspaper in Norristown, Pennsylvania, on September 18, 1980, September 25, 1980, October 2, 1980, and October 9, 1980. Said publication stated, inter alia, that the Application would be available for inspection on or about October 24, 1980, at DER's office in Pottsville, Pennsylvania, and at 800 East Main Street, Lansdale, Pennsylvania. (N.T. III, pp. 69-70; Ex. A-18)

10. The Application was not available at the Lansdale address on September 24, 1980, but was available subsequent to that date. Several persons examined it there. (N.T. III, pp. 101, 102, 106)

11. On February 27, 1981, Providence and Moyers executed a Real Estate Installment Sales Agreement, whereby Moyers agreed to purchase the Troop Farm. On the same date, Moyers granted to AES the option of having Moyers' rights under the Agreement assigned to AES; and Providence granted to AES the option of purchasing the Troop Farm under the same terms and conditions stated in the Agreement with Moyers. (Ex. A-19; A-20; A-21)

12. On April 7, 1981, Richard T. Brown and Mary S. Ralston sent a letter to DER requesting a hearing on AES's Application. (N.T. II, pp. 80-81; Ex. A-15)

13. On May 4, 1981, DER issued to AES Mining Permit No. 302093-46800301-01-0 and Mine Drainage Permit No. 46800301. Both Permits contained a number of special conditions which AES accepted on June 4, 1981. (Ex. B-1; B-2)

14. Among the special conditions contained in the Mine Drainage Permit were the following:

(a) a requirement that mining operations cease if AES pollutes or degrades the water quality in the unnamed tributary to Skippack Creek. (Ex. B-1)

(b) a requirement that the mining plan be changed in order to prevent pollution if geologic conditions are found to warrant such action. (Ex. B-1)

(c) a prohibition against any quarry dewatering operations unless an amended Permit is obtained. (Ex. B-1)

(d) a requirement that water discharged from mining areas meet certain minimum limitations. (Ex. B-1)

(e) a prohibition against any shallow water impoundments after final reclamation. (Ex. B-1)

(f) a prohibition against linking reclamation to any landfilling operation on the site. (Ex. B-1)

(g) a requirement that all surface water be diverted from entering the mining area. (Ex. B-1)

(h) a requirement that any leachate from the Landfill be diverted from the mining area and treated within the solid waste disposal permit area. (Ex. B-1)

(i) a prohibition against blasting. (Ex. B-1)

(j) a requirement that all drainage be conveyed to a natural water course.

(k) a requirement that retention basins be cleaned out so as to maintain 5,000 cubic feet per acre capacity at all times. (Ex. B-1)

15. Meanwhile, on April 3, 1981, DER had suspended Moyers' solid waste disposal permit for the Landfill because of environmental concerns. (Ex. A-27, p. 2-9)

16. The Landfill had been the object of increasing scrutiny by DER and the United States Environmental Protection Agency ("EPA") since 1979 when it was entered on EPA's Potential Hazardous Waste Site Log. (Ex. A-27, p. A-2)

17. Analyses of leachate samplings from the Landfill, beginning in 1980, revealed the presence of metals and organics in concentrations detrimental to the environment. (Ex. A-27, pp. 5-1 to 5-16)

18. Analyses of ground water samplings in the vicinity of the Landfill, beginning in 1980, also showed the presence of some metals and organics but not in sufficient concentrations to show a direct relationship with the leachate from the Landfill. (Ex. A-27, pp. 6-1 to 6-3)

19. Analyses of surface water samplings in the vicinity of the Landfill, beginning in 1980, showed the presence of some metals and organics but did not establish a clear pattern of significant levels of contamination. (Ex. A-27, p. 6-15)

20. During a September 1980 visit to the Landfill, officials of the Township and officials of DER observed leachate from the Landfill being sprayed on the Troop Farm as a dust control measure. (N.T. II, pp. 66-68, 73-76, 80-81)

21. One June 9, 1981, Judge Pollack of the United States District Court for the Eastern District of Pennsylvania issued an Opinion and Order in O'Leary v. Moyer's Landfill, Inc., et al., Civil Action No. 80-3849. While refusing to order the Landfill closed, Judge Pollock permanently enjoined Moyers from allowing leachate to escape the boundaries of the Landfill. (Ex. A-8)

22. According to an investigation performed for EPA:

(a) the Landfill site is located on top of a west-southwest trending ridge composed of the Lockatong Formation, a geologic sub-group characterized by dense, interbedded argillite and shales. The beds of the Lockatong Formation strike toward the northeast with dips averaging 10^{o} - 20^{o} northwest. Joint sets run parallel to strike, parallel to dip and obliquely trending N 48^{o} E. (Ex. A-27, p. 3-2)

(b) Because of the density of the Lockatong Formation, two ground water systems are thought to

exist in the vicinity of the Landfill -- a shallow system in the weathered bedrock near the surface and a deeper system below the relatively impermeable bedrock that characterizes the Lockatong Formation. Ground water flow in the shallow system is believed to follow bedrock topography. Ground water flow in the deeper system is believed to follow bedrock dip toward the northwest. The two systems probably are somewhat hydraulically connected. (Ex. A-27, pp. 3-2 to 3-5)

(c) Surface drainage from the Landfill site flows generally westward into Skippack Creek through direct runoff and via small streams located north, south and southwest of the site. (Ex. A-27, p. 3-1)

23. Meiser and Earl, ("M&E") consulting hydrogeologists, were retained by Moyers in 1980 to study the ground water in the vicinity of the Landfill. They drilled two test wells, TW#1 and TW#2, on the Troop Farm as part of the project. Water samples taken from TW#1 on March 2 and March 11, 1981, and water samples taken from TW#2 on March 11, 1981, were analyzed and found to be potable. They were not tested for metals, but no organics were detected. (N.T. IV, pp. 55-56; VI, pp. 92-95; VII, pp. 9-10; Ex. A-27, pp. 6-4, 6-8, 6-11 and 6-13; Ex. R-5 and R-6)

24. M&E were retained by AES in February, 1983, to assess the effect of the Landfill on the Troop Farm. This project was undertaken as part of a

study by AES of the possibility of establishing a landfill on the Troop Farm. (N.T. VI, pp. 93-94)

25. In the course of performing their duties, M&E drilled seven additional test wells on the Troop Farm, within 350 feet of the Landfill. TW#6, about 120 feet from the Landfill, encountered trash within three feet of the surface and was abandoned. Multiple level piezometers were installed in the remaining six wells in order to obtain water samples at various depths. (N.T. VI, pp. 103-106; Ex. R-7)

26. A physical analysis of the water levels and bedrock zones in these six wells and in TW#1 and TW#2 revealed that ground water in the border area between the Landfill and the Troop Farm follows the bedding planes toward the northwest. (N.T. VI, pp. 117-119; Ex. R-8 and R-9)

27. Water samples from the test wells referred to in finding of fact 25 were taken by M&E and by DER on May 5, 1983, and analyzed separately. Only TW#7, located at the extreme northwest corner of the Troop Farm, showed any contamination from the Landfill. No organics were detected in the other wells and no metals, other than some slight elevations of iron and manganese expectable in this type of bedrock. (N.T. VI, pp. 124-126, 131-132, 133-136; 137-141; VII, p. 100; Ex. R-10 and R-11)

28. Surface water at the locations of TW#6 and TW#7 follows a natural drainage course and flows off the Troop Farm toward the southwest. (N.T. VII, pp. 28-29, 100-101; Ex. R-7)

29. TW#6 and TW#7 are within the area proposed to be excavated by AES pursuant to its Mining Permit. (N.T. VII, pp. 100-101; Ex. B-1 and R-7)

30. AES' Mining Permit has expired. (EHB docket number 85-188-M)

DISCUSSION

The Mine Drainage Permit was issued under Section 315 of the Clean Streams Law ("CSL"), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315. Our task is to determine whether DER abused its discretion or arbitarily exercised its functions in issuing the Permit. Wisniewski, et al. v. DER, et al., 1986 EHB 111. The Township has the burden of proving that such was the case: 25 Pa. Code §21.101(c)(3).

The Township assails the Permits issued to AES on a broad front. Discounting the attack on the Mining Permit, since it has expired, it is clear that the main thrust of the Township's effort to overturn the Mine Drainage Permit focuses on the alleged failure of AES to disclose the true conditions on and adjacent to the Troop Farm. This concealment, according to the Township, misled DER into granting the Mine Drainage Permit. While the Township does not state it specifically, this argument necessarily implies that DER would not have granted the Permit if it possessed the information AES is alleged to have concealed. Secondarily, the Township takes an oblique jab at DER for being lax in its application procedures and issuing the Permit without conducting a public hearing.

The most serious charge made by the Township is that AES failed to disclose the proximity and hazardous nature of the Landfill. The Township chastizes AES for not identifying the "existing landfill" as Moyers, for not pointing out that the top of the Landfill is 100 feet higher than the Troop Farm and for not mentioning the toxics, carcinogens and other pollutants found in the leachate from the Landfill.

The presence of a landfill is reflected on the maps filed by AES with its Application. It also is mentioned in numerous places in the body of the

Application. It is not specifically identified as Moyers in any of the above instances, but is so identified on the list of adjacent property owners. The exact height of the Landfill is not given, but Supplemental "B-1," Appendix C and the Erosion and Sedimentation Control map all mention upslope runoff from the Landfill onto Troop Farm. Clearly, this indicates that the Landfill area is higher than the Troop Farm.

The Township does not explain how AES could have been expected to insert into its October 28, 1980, Application data on the contaminants present in the Landfill leachate. EPA's report which details these contaminants was not issued until September, 1983. Judge Pollack's Opinion and Order in the O'Leary case was not issued until June 9, 1981. The Township has neither alleged nor shown that this data was released to the public prior to October 28, 1980, or that it came into the hands of AES through some other means. Obviously, AES cannot be critized for failing to include information that it did not possess.

The Township's suggestion that we cannot presume that DER was aware of the fact that the Troop Farm was adjacent to this notorious Landfill is hard to accept. Even if the Mine Drainage Permit was processed by a DER office different from the one involved with the Landfill (and there is no evidence to prove this), we cannot reach the conclusion urged upon us. To do so, we would have to presume without proof that DER offices do not share information. The record contains abundant evidence that DER was informed of the proximity of the Landfill and that DER personnel observed the Landfill when visiting the Troop Farm. Such evidence supports only one conclusion -- that DER was aware, prior to issuing the Mine Drainage Permit on May 4, 1981, that the Troop Farm bordered the very Landfill that DER had ordered closed on April 3, 1981.

If DER had such information, the Township goes on, it is unbelievable that it would "participate in a plan to divert untold gallons of runoff leachate onto the property of a third person, knowing that the leachate contained notorious carcinogens, toxics and other pollutants." The reference is to the upslope diversion berm, proposed by AES to satisfy the requirements of 25 Pa. Code §99.37 (now rescinded) and approved by DER, to keep Landfill drainage from entering the Troop Farm at the northwest corner. The diverted drainage would remain on the Landfill or drain toward the Leonard property which is used as a camp for children.

The Township overlooks one important fact in denouncing DER's approval of the diversion berm. A natural drainage course about 150 feet inside the Troop Farm flows in a southwest direction onto the Leonard property. (Ex. R-7) Consequently, drainage flowing from the Landfill onto Troop Farm has followed this drainage course onto the Leonard property long before any Application was filed by AES. The proposed diversion berm would do no more than intercept this drainage at the Landfill/Troop Farm border, some 150 feet northwest of the natural drainage course, and direct it onto the same property which already receives it. The Leonard property was not being subjected to any greater environmental danger from the drainage than already existed.

AES also is accused of withholding from DER the fact that TW#6 encountered Landfill trash about 100 feet inside the Troop Farm, that TW#7 (near the northwest corner of the Troop Farm) contained contaminated water from the Landfill and that ground water and surface water interconnect on the Troop Farm. Since these test wells were not drilled until March, 1983, it is difficult to understand how AES could have reported its findings 2 1/2 years earlier. There is no evidence that AES knew that Landfill trash was on the

Troop Farm at the time the Application was filed. Nor is there any evidence that DER was aware of this fact at the time the Permit was granted.

The interconnection of ground water and surface water was apparent, however, from the Application. Supplemental "B-1" and Appendix B clearly call attention to the existence of ponded ground water at several low areas of the site and state that ground water encountered during excavation will be permitted to reinfiltrate down the slope. It is obvious that DER was aware of the interconnection and was concerned about cross-contamination. Special conditions attached to the Permit required surface water to be diverted from the excavation; required leachate from the Landfill to be intercepted before entering the excavation; and required water discharged from excavated areas to meet certain effluent limitations.

The Township argues that the Application is inaccurate or, at best, confusing on the direction of ground water flow. Both Supplemental "B-1" and Appendix B state that ground water is expected to follow the strike of the bedding planes toward thw west-southwest and the lineament-fractured zones toward the south and south-southeast, eventually discharging into the small streams to the south and west. As a result of the investigation and analysis of test wells drilled in 1983, Mr. Meiser concluded that ground water in the border area between the Troop Farm and the Landfill follows the dip of the bedding planes toward the northwest.

Meiser's conclusion obviously contradicts the statement in the Application insofar as the border area is concerned, but he was very careful to confine his observations to that area. He readily acknowledged that the direction of ground water flow beneath other parts of the Troop Farm could be

as stated in the Application. Since there is no suggestion that AES knew of this contradictory information in October 1980, it is apparent that AES cannot be criticized for misrepresentation.

Moreover, the Township fails to explain how this information would have brought about a different result if DER had been in possession of it when it was processing AES' Application. If we assume that DER accepted AES' statements on ground water flow, we must conclude that DER issued the Permit under the belief that leachate from the Landfill would be flowing beneath the Troop Farm toward the south-southwest, south and south-southeast.

Mr. Meiser's investigation and analysis convinced him that the leachate in the border area goes in a completely different direction away from the Troop Farm. If anything, this information would have reinforced DER's decision, not reversed it. The direction of ground water flow was not the determining factor in DER's decision, because AES did not intend to intercept ground water except in a limited portion of the excavation. Special conditions attached to the Permit covered the situation, and the Township has failed to demonstrate that they were inadequate.

There are a number of other items, according to the Township, about which AES was silent. While most of them are very minor and insignificant, two of them merit some discussion. The Application allegedly did not disclose that an excavation already existed on the site. A review of the submitted material proves that the allegation cannot be supported. Appendix B and the various maps call attention to the existing excavation. Besides, DER knew about the excavation on its own (Ex. A-12 and A-13) and sent its personnel to examine the Troop Farm prior to issuance of the Permits. The Township alleges that the fact that leachate from the Landfill was being sprayed on the excavation as a dust control measure also was concealed. Since the witnesses

who observed the spraying were all in the company of DER officials (including a deputy secretary) at the time, it is hard to understand what was concealed from DER's knowledge. Besides, there is absolutely no evidence that AES was involved in the spraying or even knew about it.

Turning its attention away from AES, the Township asserts that DER accepted inadequate data on the location of public and private water supplies. Supplemental "G-1" of the Application form requests a listing of all "public water supplies within ten (10) miles of the closest discharge point of the proposed mining operation." AES maintains, and DER agrees, that this wording is somewhat ambiguous. What DER wanted is a listing of (1) any public water supply intake within ten (10) miles downstream from the proposed discharge point, and (2) any spring, well, reservoir or impoundment associated with a public water supply and which is located within 1/2 mile of the boundaries of the proposed operation (Ex. R-1). In view of the unwritten DER policy, AES listed only the intake of Philadelphia Suburban Water Co. at Wetherills Dam on Perkiomen Creek. Admittedly, there are other public water supplies within a ten (10) mile radius of the Troop Farm, but they are all beyond the parameters set by the DER policy.

A similar situation exists with respect to the listing of private water supplies. Supplemental "G-1" calls for a listing of all "individual sources of water supply on and adjacent to area of mining." The names of the owners or users are to be keyed to the property map submitted as part of the Application. AES maintains, and DER agrees, that DER's unwritten policy was to require a listing of every private water supply that is actually located within 1,000 feet of the perimeter of the proposed area of operations (statement of John Wilmer, assistant counsel of DER, in transcript of May 21, 1984). In accordance with this policy, AES submitted a map showing the

approximate location of all private water supplies found within 1,000 feet of the perimeter of the Troop Farm. The names and addresses of the owners or users of these water supplies were given on a separate listing with numbers keyed to the map.

DER explained that these policies are designed to elicit the most pertinent data relevant to the Application. If that is considered insufficient, additional data is requested. The Township does not claim that these policies violate any specific statutory or regulatory provision. It argues, instead, that they place too much discretion in the hands of DER personnel with all the potential for favoritism that a situation like that affords.

However that may be, the Township is hard pressed to come up with any evidence of favoritism or abuse of discretion in this specific case. The information on public and private water supplies set forth in the Application covers those water supplies that are closest to the Troop Farm and most likely to be affected by the proposed operations. If DER was of the opinion that these water supplies were not going to be impacted adversely (and we must assume that DER held that opinion since it issued the Permit), it is hardly likely that DER would have denied the Permit on the basis of data from more remote water sources. The Township fails to point to any information or revelation that would have come to light, if these remote water sources had been included, that was not already available in the data submitted by AES. To the extent that DER accepted data narrower in scope than that called for in the Application form (and we are not convinced that such is the case), it caused no harm.

The Township charges DER with violating the requirements of due process by issuing the Permit without a public hearing and without giving the

required public notice. The evidence on which the Township bases its argument about public notice is skimpy, to say the least. Mr. McGuigan, a consulting engineer representing the Township, was asked whether notice was given to adjacent landowners and he replied: "To my knowledge, no sir." He was not probed about the extent of his investigation or whether he even had conducted one. Mr. Peffer, who prepared the Application for AES, was asked whether he posted notice of the Application on the property. He replied, "I didn't, no," and acknowledged that no one under his supervision had done so either. Since AES had the duty of posting the notice, 25 Pa. Code §92.61(a), and since Mr. Peffer acted only as a consultant to AES on engineering and ground water geology, he probably would not have been involved in the actual posting of the notice. He was not asked whether someone else had done the work or whether he had ever seen the notice near the entrance to the premises. While such testimony raises questions about public notice, it falls far short of proving that no such notice was given. In a matter such as this where the proof or lack of proof can so easily be determined by discovery, we are unwilling to consider such inconclusive evidence as sufficient to carry the Township's burden.

The evidence concerning a public hearing is equally infirm. It consists solely of a letter, dated April 7, 1981, from Richard T. Brown and Mary S. Ralston to DER's Director of Environmental Planning, requesting a hearing on AES' Application. Mr. Brown testified that DER never granted a hearing or responded to the letter. Since DER is a party to this Appeal and since DER opened its files and permitted copies of documents to be entered into evidence, it is manifest that the Township could have provided conclusive

evidence as to whether the letter was received by DER and as to whether any public hearing was held. The failure to present such evidence casts a cloud of doubt over the weight to be accorded the evidence actually presented.

Aside from that, however, we seriously doubt that the hearing request was filed on time. 25 Pa. Code §92.61(a), part of the DER regulations dealing with NPDES permits, provides that public notice will be given of applications filed with DER. The public notice must state a 30-day period during which public comments may be expressed and requests for a public hearing filed. The holding of a hearing is not mandatory, even if requests are filed. DER must determine whether sufficient public interest has been shown.

AES' Application was filed October 28, 1980 and the Permit was issued May 4, 1981. Other than the fact that the notice required by Section 307 (b) of the CSL, 35 P.S. §691.307(b), and Section 4 of the Surface Mining Conservation and Reclamation Act, Act of 1945, P.L. 1198, as amended, 52 P.S.§1396.4, was published in a Norristown newspaper, no evidence was presented concerning public notice and the timing of the 30-day period for filing requests for a public hearing pursuant to 25 Pa. Code §92.61(a). As noted above, such evidence certainly was available to the Township. In any event, since Mr. Brown and Ms. Ralston did not send in their request until April 7, 1981, it is highly likely that the 30-day period already had expired. Even if we assume that the request for a hearing was filed on time, there is no evidence to show that similar requests were made by others. In the absence of such evidence, we are unwilling to conclude that DER abused its discretion in not holding a public hearing, if, indeed, no hearing was held.

Finally, the Township insists that the Permit should not have been issued because the proposed operation will aggravate a serious environmental

hazard created by the Landfill. Dr. Varma, testifying on behalf of the Township, maintained that the removal of soil and weathered bedrock from the Troop Farm will accelerate the flow of contaminated leachate from the Landfill. Mr. Meiser, testifying for AES, disputed this assessment.

Certainly, the proximity of the Landfill is a critical factor in evaluating any proposed activity on the Troop Farm. We are sensitive to the legitimate concerns of nearby residents and of the Township that the contaminants in the leachate not find their way into the surface water and ground water flowing off the site. But we also must be careful not to prohibit a legitimate use of the Troop Farm that does not materially aggravate the existing situation.

We have reviewed all of the evidence DER had before it with these considerations in mind. We agree with DER's judgment that the excavation of top soil and weathered bedrock on the Troop Farm, in the manner authorized by the Permits, will not create or materially aggravate an environmental hazard if restricted to the area above the water table. While we are not quite so confident about the result if the excavation extends into the water table, as it proposes to do on about 20% of the site, we are satisfied that the diversion requirements, effluent limitations and blasting prohibitions attached to the Permit are an adequate means of preventing contaminants from entering the ground water. Therefore, we conclude that DER was justified in issuing the Permit.

The only information not available to DER at the time the Permit was issued that, in our view, might warrant further consideration, is the actual presence of Landfill trash on that portion of the Troop Farm proposed to be excavated. According to the test well-drilling logs, TW#6 and TW#6A found trash to exist from 3 feet to 15 feet below ground surface. The lateral

extent of the trash has not been determined, but the depth of the refuse at TW#6 (about 100 feet into Troop Farm) suggests that it might cover a substantial part of the border area. Since the excavation proposes to include much of this area, it is apparent that the material to be excavated will not be as benign as previously thought. Likewise, the water to be encountered in this part of the excavation may be quite different from what was anticipated by DER. We can properly consider this information since our review is de novo. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

For these reasons, we believe that is is desirable to have DER review the Mine Drainage Permit in light of this later revelation, and to issue an amendment, if that is deemed appropriate.

CONCLUSIONS OF LAW

1. The Application filed by AES was not misleading.

2. The diversion of Landfill drainage from the Troop Farm onto the Leonard property, as approved by the Permit, does not subject the Leonard property to any greater environmental danger than existed previously.

3. Since AES proposes to confine its excavation to the area above the water table, except on about 20% of the site, the direction of ground water flow beneath the Troop Farm is not a critical factor in determining whether the Permit should have been issued.

4. The information furnished by AES on the location of public and private water supplies, in accordance with DER's unwritten policies, provided DER with sufficient data to assess the impact of AES' proposed operations on those water supplies most likely to be affected.

5. The Township has presented insufficient evidence to show that DER violated the requirements of due process in issuing the Permit.

6. DER was justified in issuing the Permit on the basis of the information available to it.

7. The post-Permit issuance discovery of Landfill trash on that portion of the Troop Farm intended to be excavated represents a change in conditions sufficient to warrant a further review by DER and the possible issuance of an amendment to the Permit.

ORDER

AND NOW, this 29th day of March, 1988, it is ordered as follows:

1. The Appeal is sustained with regard to the issue of Landfill trash being present on that portion of the Troop Farm included within the scope of the Mine Drainage Permit. Said Permit is suspended and remanded to DER for action consistent with the foregoing Opinion.

2. The Appeal is dismissed with regard to all other issues regarding the Mine Drainage Permit.

3. The Appeal is dismissed as moot with regard to the issuance of the Mining Permit.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: March 29, 1988

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Richard C. Sheehan, Esq.
Audubon, PA
For Permittee:
Marc D. Jonas, Esq.
Norristown, PA

mjf

DELTA MINING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 87-274-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 29, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted. Appellant is precluded from challenging the factual or legal basis of a civil penalty assessment where it failed to appeal the underlying compliance order. In this appeal, appellant may challenge only the amount of the assessment.

O P I N I O N

On July 13, 1987, Delta Mining, Inc. (Delta) filed this appeal from a $1,560 civil penalty assessment imposed by the Department of Environmental Resources (DER) as a result of Delta's failure to comply with an October 30, 1986 DER compliance order (CO). The CO cited Delta for reaffecting previously mined and backfilled areas in order to remove the clay seam, in violation of Condition No. 21 of its Surface Mining Permit (SMP) and §18.6 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P. S. §1396.24, and ordered Delta to cease these activities.

Both the CO and the assessment pertained to SMP 56803014 at the Delta Bashore Mine in Somerset County.

On December 14, 1987, DER filed a motion to limit issues. DER argues that because Delta failed to timely appeal the underlying October 30, 1986 CO, it is collaterally estopped/barred under principles of administrative finality from challenging the factual or legal basis for DER's issuance of the civil penalty assessment. DER submits that the findings in the unappealed CO are res judicata as to Delta in this appeal of the assessment. Accordingly, DER argues that Delta should be confined to challenging the reasonableness of the amount of the civil penalty.

In its January 4, 1988 response to DER's motion, Delta argues that without the ability to raise the underlying facts and circumstances surrounding the assessment, there is no background against which to decide the appropriateness of the assessment amount. Accordingly, Delta contends that its constitutional rights in challenging the amount of the assessment would be impaired if DER's motion were granted.

This Board has consistently held that unappealed compliance orders become final DER orders, the basis of which cannot be challenged in later appeals. Kirila Contractors, Inc. V. DER, EHB Docket No. 87-282-R (Opinion and order issued February 9, 1988). In the instant appeal, Delta failed to avail itself of the opportunity to timely appeal the CO. Consequently, the findings of the CO became final and may not be challenged in this appeal. Therefore DER's motion is granted and the only issue Delta may challenge in this appeal is the amount of the civil penalty assessment. Ingram Coal Company v. DER, EHB Docket No. 87-256-R (Opinion and order issued February 3, 1988).

O R D E R

AND NOW, this 29th day of March, 1988, it is ordered that the Department of Environmental Resources motion to limit issues granted. It is further ordered that DER's pre-hearing memorandum will be due on or before April 13, 1988.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 29, 1988

Bureau of Litigation
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq./Western Region
For the Appellant:
Carolann Young, Esq.
William Kimmel, P.C.
Somerset, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

KERRY COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-390-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 30, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted. Appellant is precluded from challenging the factual or legal basis of a civil penalty assessment where it failed to appeal the underlying compliance order. In this appeal, appellant may challenge only the amount of the assessment.

OPINION

On September 14, 1987, Kerry Coal Company (Kerry) filed this appeal from a $525 civil penalty assessment imposed by the Department of Environmental Resources (DER) pursuant to 25 Pa.Code §209.53 and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The assessment was issued in connection with surface mining activities at Kerry's McKee mine in Big Beaver Township, Beaver County.

On January 15, 1988, DER filed a motion to limit issues in this appeal solely to the amount of the assessment. DER alleges that, on or about

March 26, 1987, DER issued a compliance order (CO) citing Kerry for failing to cease all work within a fifty foot radius of a blast area when explosives were being loaded into drill holes in preparation for a shot. DER asserts this activity was in violation of 25 Pa.Code §209.53. DER alleges that, Kerry failed to timely appeal the CO and that the current challenge to the underlying legal and factual bases for the assessment amounts to a collateral attack against a final DER order. DER argues that Kerry is estopped from challenging the underlying factual and legal basis of the March 26, 1987 CO by the principles of administrative finality. DER moves that Kerry be precluded from challenging the basis for the order and be restricted to challenging only the amount of the assessment. Kerry failed to respond to DER's motion and pursuant to 25 Pa. Code §21.64 (d), the Board will deem all relevant facts in DER's motion as admitted by Kerry.

This Board has consistently held that unappealed compliance orders become final DER orders, the bases of which cannot be challenged in later appeals. Kirila Contractors, Inc. v. DER, EHB Docket No. 87-282-R (Opinion and order issued February 9, 1988). In the instant appeal, Kerry failed to avail itself of the opportunity to timely appeal the CO. Consequently the findings in the CO became final and may not be challenged in this appeal. Therefore, DER's motion is granted and the only issue Kerry may appeal is the amount of the civil penalty assessment. Delta Mining Company, Inc. v. DER, EHB Docket No. 87-274-R (Opinion and order issued March 29, 1988).

ORDER

AND NOW, this 30th day of March, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted. It is further ordered that DER's pre-hearing memorandum will be due on or before April 14, 1988.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 30, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq./ Western Region
For Appellant:
Bruno Muscatello, Esq.
Butler, PA

JAMES L. SPOONER	:	
	:	
v.	:	**EHB Docket No. 87-260-W**
	:	**87-261-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 31, 1988

OPINION AND ORDER

Synopsis

Appeals of a permit denial and permit suspension are dismissed as moot where the suspension has expired and the permit has subsequently been issued. The Board regards the Department of Environmental Resources' objections to the dismissals as a request to render declaratory relief which the Board has no authority to do.

O P I N I O N

These appeals stem from an enforcement order and permit denial issued by the Department of Environmental Resources (Department) to James L. Spooner pursuant to the Public Bathing Law, the Act of June 23, 1931, P.L. 899, as amended, 35 P.S. §672 et seq. Docket No. 87-260-W relates to a June 4, 1987 order to Spooner suspending his permit to operate an indoor pool at the Bentley Club in Harrisburg for 60 days, while Docket No. 87-261-W relates to the Department's June 15, 1987 order denying Spooner a permit to operate an outdoor pool at the same facility.

The Department, in response to the Board's August 19, 1987 order requiring the filing of a status report, informed the Board, on September 2, 1987, that the suspension order which was the subject of the appeal at Docket No. 87-260-W had expired by its own terms and that the Department had issued a permit to Spooner for the operation of the outdoor pool which was the subject of the permit denial appeal at Docket No. 87-261-W. The Department indicated that it was in the process of preparing a motion to dismiss Docket No. 87-261-W as moot.

When no motion was forthcoming, the Board, in an effort to clear its docket, issued, on October 13, 1987, rules upon Spooner to show cause why both appeals should not be dismissed as moot. Spooner responded to both rules on October 21, 1987, admitting that both his appeals should be dismissed as moot.

On the other hand, the Department responded to the rule on October 29, 1987, indicating that although it would not oppose Spooner's voluntary withdrawal of the two appeals, it did not believe that dismissal of the appeals as moot was appropriate. As the reasons for its opposition, the Department argued that these appeals represented Spooner's only opportunity to challenge the findings of fact in the two orders, findings which the Department intended to utilize in compiling a compliance history for Spooner to be utilized in future Department actions.

We are particularly at a loss in comprehending the Department's opposition to dismissal of the permit denial order as moot. Whether or not the findings in the Department's permit denial order are adjudicated, there is no effective relief which can be afforded to Spooner, since the Department has already given it to him in the issuance of his permit. Similarly, with respect to the suspension order, there is no relief we can effectuate, since it has expired.

In essence, the Department, not Spooner, is requesting the Board to maintain these appeals on our docket so that we can issue an opinion in the nature of a declaratory judgment regarding the Department's authority to take actions under the Public Bathing Law based on a permittee's record in complying with that statute. We do not believe that we have the authority to do so. Eva E. Varos et al. v. DER, 1985 EHB 892.

O R D E R

AND NOW, this 31st day of March, 1988, it is ordered that the Board's October 13, 1987 rule is made absolute and the appeals of James L. Spooner at Docket Nos. 87-260-W and 87-261-W are dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Martha Truschel, Esq.
Central Region
For Appellant:
Michael A. Dillon, Esq.
BALABAN & BALABAN
Harrisburg, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

CECILIA SHULLER, et al.,	:	
	:	
v.	:	**EHB Docket No. 87-268-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 31, 1988

OPINION AND ORDER

Synopsis

An appeal is dismissed for lack of prosecution where the appellant has failed to comply with Board orders requiring the submission of a pre-hearing memorandum.

O P I N I O N

This matter was initiated on July 6, 1987 by Cecilia Shuller and various employees and members of the Bentley Club (Shuller). Captioned as a "Class Action Appeal," the appeal, in essence, challenged the Board's June 24, 1987 approval of a consent order and adjudication executed by the Department of Environmental Resources and the Bentley Club.

After the appeal was perfected, the Board, on July 22, 1987, issued Pre-Hearing Order No. 1 requiring Shuller to file her pre-hearing memorandum on or before October 5, 1987. Shuller failed to file her pre-hearing memorandum, and the Board informed her by letter dated November 12, 1987 that her pre-hearing memorandum must be filed by November 23, 1987 in order to avoid the possible imposition of sanctions. When Shuller again failed to file her pre-hearing memorandum, the Board, by letter dated December 1, 1987,

warned her that the Board would apply sanctions if the pre-hearing memorandum were not filed by December 11, 1987.

After Shuller failed to file the pre-hearing memorandum by December 11, 1987, the Board, on December 28, 1987, issued a rule upon Shuller to show cause why the appeal should not be dismissed for lack of prosecution. The rule was returnable on January 19, 1988, and Shuller responded by indicating that her appeal should be dismissed as moot because the orders which were at issue, like those in a related case, James L. Spooner v. DER, EHB Docket No. 87-260-W, had become moot.

By opinion and order of this date we have dismissed Spooner's appeals at Docket Nos. 87-260-W and 87-261-W as moot and, in light of those dismissals we believe dismissal of Shuller's appeal as moot is also appropriate. However, dismissal of Shuller's appeal for lack of prosecution is equally appropriate because Shuller made no attempts to prosecute this appeal. Accordingly, we enter the following order.

O R D E R

AND NOW, this 31st day of March, 1988, it is ordered that the appeal of Cecilia Shuller et al. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 31, 1988

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Mary Martha Truschel, Esq.
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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SUGAR HILL LIMESTONE COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-286-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 31, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal of a civil penalty is dismissed where the appellant failed to prepay the assessment within the thirty day appeal period.

O P I N I O N

This matter was initiated on August 7, 1987 by Sugar Hill Limestone Company's (Sugar Hill) filing of an appeal from a June 18, 1987 civil penalty assessment issued by the Department of Environmental Resources (DER). The $1,750 assessment was imposed as a result of Sugar Hill's failure to comply with a March 26, 1987 DER order citing it for an unauthorized discharge of mine drainage, as well as Sugar Hill's violations of various provisions of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.(SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. at its Holmes Site in Washington Township, Jefferson County.

DER, on February 3, 1988, filed a motion to dismiss, alleging that the Board lacked jurisdiction to hear the appeal because Sugar Hill failed to prepay the assessment by filing an appeal bond or by forwarding the amount of the assessment when it filed its appeal with the Board, as required by §18.4 of SMCRA and §605 of the Clean Streams Law.

Sugar Hill failed to respond to DER's motion. Therefore pursuant to 25 Pa. Code §21.64(d), the Board will deem all relevant facts in DER's motion as admitted by Sugar Hill.

It is well settled that, under §18.4 of SMCRA, 52 P.S. §1396.22 and §605 of the Clean Streams Law, 35 P.S. §691.605, pre-payment of a civil penalty assessment is required and that failure to prepay within the 30 day appeal period deprives the Board of jurisdiction over an appeal of such an assessment. 3 L Coal Company v. DER, EHB Docket No. 87-321-W (Opinion and order issued January 19, 1988). Accordingly, DER's motion is granted and Sugar Hill's appeal is dismissed.

O R D E R

AND NOW, this 31st day of March, 1988, it is ordered that the Department of Environmental Resources' (DER) motion is granted and the appeal of Sugar Hill Limestone at Docket No. 87-286-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Russell A. Smith, Partner
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Reynoldsville, PA

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BENJAMIN COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-332-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 31, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where appellant failed to file its pre-hearing memorandum despite two default notices from the Board and failed to respond to a rule to show cause why its appeal should not be dismissed for lack of prosecution.

OPINION

This matter was initiated by Benjamin Coal Company (Benjamin) with the August 3, 1987 filing of a notice of appeal seeking review of the Department of Environmental Resources' (Department) July 1, 1987 letter refusing to release bonds related to Benjamin's operation in Brady Township, Clearfield County, authorized by Mine Drainage Permit No. 45765M2.

On August 11, 1987, the Board issued its Pre-Hearing Order No. 1 which required Benjamin to file its pre-hearing memorandum on or before October 24, 1987. When Benjamin failed to file its pre-hearing memorandum, the Board, by letter dated November 3, 1987, informed Benjamin of its default and advised it that unless the pre-hearing memorandum were filed by November

13, 1987, the Board could impose sanctions on it. When Benjamin again failed to file its pre-hearing memorandum by the required date, the Board, by letter dated November 19, 1987, informed Benjamin of its default and warned it that the Board would impose sanctions under 25 Pa.Code §21.124 if its pre-hearing memorandum were not filed by November 30, 1987.

Benjamin again failed to file its pre-hearing memorandum by the mandated deadline, so the Board, on December 28, 1987, issued a rule to show cause why Benjamin's appeal should not be dismissed for lack of prosecution. The rule was returnable to the Board on or before January 19, 1988. Benjamin did not respond to the rule by that date and has not responded as of the date of this opinion and order.

We have repeatedly stated that appellants have the obligation of pursuing their appeals and that the Board will not tolerate either maintaining inactive appeals on its docket for extended periods of time or utilizing its limited resources to constantly prod appellants into compliance with their obligations under the Board's rules. Here, Benjamin has ignored the Board's orders and has not exhibited any intention of prosecuting its appeal. Under the circumstances, we have no choice but to dismiss the appeal. John J. Karlavage, M.D. v. DER and Reading Anthracite Company, EHB Docket No. 87-215-W (Opinion and order issued February 18, 1988).

O R D E R

AND NOW, this 31st day of March, 1988, it is ordered that the Board's December 28, 1987 rule to show cause is made absolute and the appeal of Benjamin Coal Company is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: March 31, 1988

cc: **Bureau of Litigation**
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Central Region
For Appellant:
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BASKIN FLAHERTY ELLIOTT & MANNINO
Philadelphia, PA

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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

NORMAN P. STRAUB	:	
	:	
v.	:	**EHB Docket No. 88-039-**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 31, 1988**

OPINION AND ORDER

Synopsis

The Board is without jurisdiction to hear an appeal filed more than 30 days after the appellant received notice of the action he was appealing.

O P I N I O N

This matter was initiated by Norman P. Straub on February 16, 1988 with the filing of a notice of appeal seeking review of an October 26, 1987 letter from the Department of Environmental Resources (Department) to Straub denying his application to modify a wetland area along Barmore Run in Pine Township, Mercer County. Because Straub's notice of appeal indicated that he received a copy of the Department's denial letter on November 2, 1987, the Board, on February 23, 1988, issued a rule upon Straub to show cause why his appeal should not be dismissed as untimely filed.

Straub responded to the rule on March 2, 1988, stating that "The untimely filing of this appeal occurred due to an oversight in this office.

Copies of the appeal were mailed to the Bureau of Litigation and DER office that denied the permit." The remainder of Straub's answer to the Board's rule was devoted to substantive allegations regarding the merits of his appeal.

Section 21.51(a) of our rules of practice and procedure provides that appeals must be filed with the Board within 30 days after an appellant has received written notice of the Department's action. Mailing a notice of appeal to the Department does not substitute for timely filing with the Board. Stephen Luhrs et al v. DER and Energy Resources, Ltd., 1983 EHB 251. Since Straub's appeal was filed with the Board more than 30 days after his receiving notice of the Department action he appealed and he has advanced no grounds for the Board to consider his appeal nunc pro tunc, we have no jurisdiction over this appeal and must dismiss it. Lebanon County Sewage Council v. Commonwealth of Pennsylvania, Department of Environmental Resources, 34 Pa. Cmwlth. 574, f383 A.2d 1320 (1978).

O R D E R

AND NOW, this 31st day of March, 1988, it is ordered that the Board's February 23, 1988 rule is made absolute and the appeal of Norman P. Straub is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Western Region
For Appellant:
Norman P. Straub
Grove City, PA

nb

BENJAMIN COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-234-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 11, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where appellant has failed to file its pre-hearing memorandum in accordance with the Board's orders and has failed to respond to a rule to show cause why its appeal should not be dismissed.

O P I N I O N

This matter was initiated by Benjamin Coal Company (Benjamin) on June 17, 1987 with the filing of a notice of appeal seeking review of the Department of Environmental Resources' denial of three surface coal mining permit applications for proposed operations in Penn Township, Clearfield County.

The Board, on June 23, 1987, issued its customary Pre-Hearing Order No. 1, requiring Benjamin to file its pre-hearing memorandum on or before September 8, 1987. Benjamin failed to either request an extension or file its pre-hearing memorandum by that date, and the Board, on November 12, 1987, by

certified mail, return receipt requested, informed Benjamin of its default and advised it that unless its pre-hearing memorandum were filed by November 23, 1987, the Board could apply sanctions.

Benjamin received the Board's letter and again failed to either request an extension or file its pre-hearing memorandum. The Board then, by certified mail, return receipt requested, advised Benjamin of its second default on December 1, 1987, and informed it that sanctions would be applied if Benjamin's pre-hearing memorandum were not received by December 11, 1987.

Benjamin received the Board's second default letter, but again failed to file its pre-hearing memorandum or request an extension. The Board then, on December 28, 1987, issued a rule upon Benjamin to show cause why its appeal should not be dismissed for lack of prosecution. The rule was returnable, in writing, on or before January 19, 1988.

No response to the Board's rule has been filed by Benjamin. As Benjamin bears the burden of proof in this permit denial appeal under 25 Pa. Code §21.101(c)(1) and has exhibited no intention of prosecuting its appeal, the sanction of dismissal is appropriate.

O R D E R

AND NOW, this 11th day of April, 1988, it is ordered that the Board's December 28, 1987 rule is made absolute and the appeal of Benjamin Coal Company is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: April 11, 1988

cc: **Bureau of Litigation**
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TOWNSHIP OF WASHINGTON	:	
	:	
v.	:	**EHB Docket No. 87-267-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 12, 1988
and NEAL R. TOMS, Permittee	:	

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

The Board will grant a motion to dismiss where appellant has failed to state a claim for which the Board could grant relief. This appeal is based on the contention that the Department of Environmental Resources may not issue solid waste permits for facilities not in compliance with local zoning ordinances. Under the Solid Waste Management Act, Municipalities retain their power to regulate the location of solid waste facilities and the Department is not precluded from issuing a permit where a facility may not be in compliance with local zoning requirements.

O P I N I O N

This matter was initiated on July 6, 1987, with the filing of an appeal by the Township of Washington (Township) from the Department of Environmental Resources' (Department) June 2, 1987 issuance of Permit No. 101446 to Neal R. Toms (Toms) pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P. L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA). The permit authorized the operation of a municipal waste transfer station in

Washington Township, Berks County. The Township contended that local zoning regulations classify the land on which the waste transfer station is located as a Rural Conservation District (R-1) and its permitted uses do not include a waste transfer station.

On July 20, 1987, Toms filed preliminary objections to the appeal of the Township. The Board treated this pleading as a motion to dismiss for failure to state a claim on which the Board could grant relief. The pleading averred that the Township's basis for the appeal presented an issue not justiciable by this Board, since the Department's decision to issue or deny a permit is not conditioned upon a permittee's compliance with local zoning ordinances. Also, Toms explained that he had filed a curative amendment application with the Township which was denied and the denial was appealed to the Court of Common Pleas of Berks County.

The Township was advised that the Board was treating Toms' preliminary objections as a motion to dismiss and that the Township had an opportunity to answer the motion, but the Township has filed no response to the pleading. The Township did file its pre-hearing memorandum on September 30, 1987 in which it argued that Toms failed to adhere to restrictions relating to zoning in Paragraph 2 of the Permit and to Township Zoning Ordinance No. 1984 which he continues to violate by his operation of a non-permitted use in that zoning district. Further, the Township alleged that Toms has also violated the SWMA by operating a facility in violation of its zoning ordinance.

Toms filed an answer to the pre-hearing memorandum, stating that he is still pursuing an appeal of the denial of his curative amendment application in the Court of Common Pleas of Berks County, that his business of trash collection and hauling was conducted long before these proceedings, and

that the Township Supervisors have neither objected to nor excercised any penalty procedure to enforce any violation of the zoning code against him. In addition, Toms contends the actions of the Township in filing this suit are vexatious, harrassing, and intended only to force him to incur substantial litigation costs and induce him to withdraw his permit request. He, therefore, requests the award of attorney fees in this matter.

Paragraph 2 on page 2 of the permit provides as follows:

> Nothing in this permit shall be construed to supersede, amend, or authorize violation of, the provisions of any valid and applicable local law, ordinance, or regulation, provided that said local law, ordinance, or regulation is not pre-empted by the Pennsylvania Solid Waste Management Act, the Act of July 7, 1980, Act 97, 35 P.S. 6018.101, et seq.

The case law in this area supports the finding that valid, local zoning regulation is not preempted by the SWMA. Although the case of Municipality of Monroeville v. Chambers Development Corporation, 88 Pa. Cmwlth. 603, 491 A. 2d 307 (1985) confirmed state preemption of waste disposal operational regulations, the Court distinguished its treatment of local zoning ordinances concluding that since the passage of the current SWMA,[1] "this court has continued to hold that, with respect to the location of landfill sites, the new Act does not preempt local zoning regulations." 491 A.2d at 310. See also, Plymouth Tp v. Montgomery County, _____ Pa. Cmwlth. ____ , 531 A. 2d 49 (1987). The Board has recently, in Borough of Taylor v. DER and Amity Sanitary Landfill, EHB Docket No. 83-153-M (Adjudication issued March 24, 1988), held that a permit condition identical to that at issue here was not an abuse of discretion, since the Department was not required by the SWMA to assure that local zoning ordinances were complied with prior to the issuance

[1] The former act was the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001.6017.

of a solid waste management permit. Because local zoning regulation was not pre-empted by the SWMA, municipalities could still compel separately compliance with their zoning ordinances.

Since the Township's only objection is that Toms is not in compliance with its zoning ordinances, we can grant no relief. Toms has an independent obligation to comply with the Township's zoning requirements, and we are without jurisdiction to adjudicate zoning disputes.

We can not award attorney fees in this case, as we are unaware of any authority under either the SWMA, our rules, or the general rules of administrative practice and procedure which would authorize an award.

O R D E R

AND NOW, this 12th day of April, 1988, it is ordered that the motion to dismiss of Neal R. Toms is granted and the appeal of the Township of Washington is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: April 12, 1988

cc: **Bureau of Litigation**
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For Permittee:
Paul A. Prince, Esq.
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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SWATARA TOWNSHIP AND THE SWATARA TOWNSHIP AUTHORITY AND COMMONWEALTH NATIONAL BANK	:	
v.	:	**EHB Docket No. 87-275-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and HARRISBURG SEWERAGE AUTHORITY, Intervenor	:	**Issued:** April 12, 1988

OPINION AND ORDER

Synopsis

When during the pendency of an appeal the Department of Environmental Resources reverses the action leading to an appeal and appellants receive the relief they are requesting from the Board, there is no further relief the Board can grant, and the appeal will be dismissed as moot.

O P I N I O N

This matter was initiated by the July 14, 1987 filing of a notice of appeal by Swatara Township and The Swatara Township Authority (hereinafter referred to jointly as the "Township") seeking review of the Department of Environmental Resources' (Department) June 24, 1987 letter rejecting a Planning Module for Land Development for Commonwealth National Bank (Bank) because the Bank proposed to tap into the sewer system at a point which would contribute flow to the Harrisburg Sewerage Authority's Spring Creek Interceptor at Manhole No. 205, which the Department claims is overloaded. The Bank also filed an appeal of the planning module denial, and its appeal was docketed at 87-294-W. By an order dated October 30, 1987, the

Board consolidated these appeals at Docket No. 87-275-W and granted the Harrisburg Sewerage Authority leave to intervene.

The Department filed a motion to dismiss the appeal as moot on November 23, 1987, and due to a filing error, filed an amended motion to dismiss on December 9, 1987. The Department avers that the appeal has been rendered moot since, as a result of the Harrisburg Sewerage Authority's submission of a plan and schedule for relieving the overloaded conditions in the Spring Creek Interceptor, the Department approved the planning module for the Bank on November 2, 1987. None of the parties filed a response to the Department's motion.

In determining whether a case is moot, one part of the appropriate inquiry is whether the court (or agency) will be able to grant effective relief. Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A. 2d 1000 (1980). An appeal becomes moot when an event occurs during the pendency of the appeal which deprives the court (or agency) of the ability to provide effective relief. Atlantic Island, Inc. v. Township of Bensalem, 39 Pa. Cmwlth. 180, 182, 394 A. 2d 1335, 1337 (1978).

Since the Department has now approved the Bank's Planning Module, the controversy which prompted this appeal no longer exists, and there is no further relief the Board can grant to the Appellants.

O R D E R

AND NOW, this 12th day of April, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted, and the appeals of Swatara Township, The Swatara Township Authority and Commonwealth National Bank are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: April 12, 1988

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SWATARA TOWNSHIP AND THE SWATARA TOWNSHIP AUTHORITY and N N & S ASSOCIATES	:	
v.	:	**EHB Docket No. 87-276-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and HARRISBURG SEWERAGE AUTHORITY, Intervenor	:	**Issued:** April 12, 1988

OPINION AND ORDER

Synopsis

When during the pendency of an appeal the Department of Environmental Resources reverses the action leading to an appeal and appellants receive the relief they are requesting from the Board, there is no further relief the Board can grant, and the appeal will be dismissed as moot.

O R D E R

This matter was initiated by the July 14, 1987 filing of a notice of appeal by Swatara Township and The Swatara Township Authority (hereinafter referred to jointly as the "Township") seeking review of the Department of Environmental Resources' (Department) June 24, 1987 letter rejecting a Planning Module for Land Development for the CIR Commercial and Industrial Center (CIR) because CIR proposed to tap into the Township sewer system at a point which would contribute flow to the Harrisburg Sewerage Authority's Spring Creek Interceptor at Manhole No. 205, an area which the Department claims is overloaded. N N &S Associates, the owners and developers of the CIR Commercial and Industrial Center, also filed an

appeal of the planning module denial and its appeal was docketed at 87-298-W. By an order dated October 30, 1987, the Board consolidated these appeals at Docket No. 87-276-W and granted the Harrisburg Sewerage Authority leave to intervene.

The Department filed a motion to dismiss the appeals as moot on November 23, 1987, and due to a filing error, filed an amended motion to dismiss on December 9, 1987. The Department avers that the appeal has been rendered moot, since, as a result of the Harrisburg Sewerage Authority's submission of a plan and schedule for relieving the overloaded conditions in the Spring Creek Interceptor, the Department approved the CIR planning module on November 2, 1987. None of the parties filed a response to the Department's motion.

In determining whether a case is moot, one part of the appropriate inquiry is whether the court (or agency) will be able to grant effective relief. Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A. 2d 1000 (1980). An appeal becomes moot when an event occurs during the pendency of the appeal which deprives the court (or agency) of the ability to provide effective relief. Atlantic Island, Inc. v. Township of Bensalem, 39 Pa. Cmwlth. 180, 182, 394 A. 2d 1335, 1337 (1978).

Since the Department has now approved CIR's Planning Module, the controversy which prompted this appeal no longer exists and there is no further relief the Board can grant to the appellants.

ORDER

AND NOW, this 12th day of April, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeals of Swatara Township, the Swatara Township Authority and N N & S Associates are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: April 12, 1988

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SWATARA TOWNSHIP AND THE SWATARA TOWNSHIP AUTHORITY et al.	:	
v.	:	**EHB Docket No. 87-404-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and HARRISBURG SEWERAGE AUTHORITY, Intervenor	:	**Issued:** April 12, 1988

OPINION AND ORDER

Synopsis

When during the pendency of an appeal the Department of Environmental Resources reverses the action leading to an appeal and appellants receive the relief they are requesting from the Board, there is no further relief the Board can grant, and the appeal will be dismissed as moot.

O P I N I O N

This matter was initiated by the September 22, 1987 filing of a notice of appeal by Swatara Township and The Swatara Township Authority (hereinafter referred to jointly as the "Township") seeking review of the Department of Environmental Resources' (Department) August 24, 1987 letter rejecting a Planning Module for Land Development for Mini-Maid of Harrisburg (Mini-Maid) because Mini-Maid proposed to tap into the sewer system at a point which would contribute flow to the Harrisburg Sewerage Authority's Spring Creek Interceptor at Manhole No. 205, which the Department claims is overloaded. Russell D. and Jacquelyn K. Miller, the owners of Mini-Maid, also filed an appeal of the planning module denial, and their appeal was

docketed at 87-405-W. By an order dated October 13, 1987, the Board consolidated these appeals at Docket No. 87-404-W. The Board also granted the Harrisburg Sewerage Authority leave to intervene by an order dated November 27, 1987.

The Department filed a motion to dismiss the appeals as moot on November 23, 1987, and due to a filing error, filed an amended motion to dismiss on December 9, 1987. The Department avers that the appeal has been rendered moot, since, as a result of the Harrisburg Sewerage Authority's submission of a plan and schedule for relieving the overloaded conditions in the Spring Creek Interceptor, the Department approved the Mini-Maid planning module on November 2, 1987. None of the parties filed a response to the Department's motion.

In determining whether a case is moot, one part of the appropriate inquiry is whether the court (or agency) will be able to grant effective relief. Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A. 2d 1000 (1980). An appeal becomes moot when an event occurs during the pendency of the appeal which deprives the court (or agency) of the ability to provide effective relief. Atlantic Island, Inc. v. Township of Bensalem, 39 Pa. Cmwlth. 180, 182, 394 A. 2d 1335, 1337 (1978).

Since the Department has now approved Mini-Maid's Planning Module, the controversy which prompted this appeal no longer exists and there is no further relief the Board can grant to the appellants.

O R D E R

AND NOW, this 12th day of April, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeals of Swatara Township, the Swatara Township Authority and Russell D. and Jacquelyn K. Miller are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: April 12, 1988

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WILLIAM J. McINTIRE COAL COMPANY, INC., et al.	:	
v.	:	**EHB Docket No. 87-433-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 15, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal of a Department of Environmental Resources' civil penalty assessment will be dismissed where the appellant fails to post the required appeal bond or to prepay the penalty as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, and the Clean Streams Law, 35 P.S. §691.605(b).

OPINION

On October 9, 1987, the William J. McIntire Coal Co., William J. McIntire, and Ronald G. McIntire (hereinafter referred to collectively as "McIntire") filed an appeal and request to proceed in forma pauperis with this Board from the September 15, 1987 assessment of a civil penalty in the amount of $130,710 by the Department of Environmental Resources (Department). The penalty was assessed for McIntire's failure to comply with provisions of a Department order issued pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S.

§1396.1 et seq. (the Surface Mining Act), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq (the Clean Streams Law). Specifically, the order directed McIntire to collect and treat discharges of acid mine drainage, to stabilize rills and gullies greater than nine inches deep, and to identify the mine with an adequate identification placard. The notice of assessment directed McIntire to pay the assessment, or, if it wished to appeal the assessment, to forward the amount of the assessment to the Secretary of the Department for placement in an escrow account or post an appeal bond with the Secretary for the amount of the assessment. The assessment letter reiterated the procedures for appealing the assessment as set forth in Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), and warned that unless these procedures were followed, the right to appeal the civil penalty assessment would be waived.

On January 25, 1988, the Department filed a motion to dismiss the appeal on the grounds that this Board lacks jurisdiction to hear an appeal that McIntire has not yet perfected by filing either a properly executed appeal bond or cash equal to the full amount of the assessment with the Board.

McIntire has filed no response to the Department's motion to dismiss. In its notice of appeal, McIntire claimed that it had corrected all violations cited by the Department and called the civil penalty assessment excessive, unreasonable, and an abuse of discretion. McIntire further asserted that it was impossible to meet the Department's proposed treatment standards and abatement requirements. Finally, McIntire asserted it was unable to comply with the Department's order because it has insufficient assets to post the required bond and that requiring the posting of bond in advance of the hearing was unconstitutional.

Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, clearly dictates that a person post an appeal bond or forward the same amount of money to an escrow account if he wishes to contest a civil penalty assessment before the Board. That section specifically states:

> Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Section 605(b) of the Clean Streams Law contains an analogous provision and regulations implementing these requirements have been promulgated at 25 Pa.Code §86.202(c), which provides that:

> No appeal from a penalty assessment shall be deemed to be perfected unless a proper ly executed appeal bond or cash equal to the full amount of the assessed penalty is received by the Environmental Hearing Board within 30 days of appellant's receipt of the assessment.

The constitutionality of these requirements was upheld by the Commonwealth Court in Boyle Land and Fuel Company v. Com., Environmental Hearing Board, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984). The Court held that the bond requirement is a reasonable condition on the right to appeal an assessment despite the appellant's contention that the bond requirement was a violation of the right of appeal under Article V, Section 9 of the Pennsylvania Constitution and violative of due process rights under the Pennsylvania and United States Constitution.

The Board has consistently held the prepayment requirement for appeals of civil penalties assessments under §18.4 of the Surface Mining Act and §605(b) of the Clean Streams Law to be a jurisdictional prerequisite. Thomas Fitzsimmons v. DER, 1986 EHB 1190. If an appellant fails to prepay the civil penalty, or to post a bond in that amount with the Department, his

rights are not preserved by the appeal and the Board lacks authority to hear the appeal. See Stahl v. DER, 1984 EHB 825.

A case directly on point is Anthracite Processing Co., Inc. v. DER, 1986 EHB 1173. There, Anthracite opposed a similar motion to dismiss an appeal from a civil penalty assessment based on constitutional grounds and the financial inability of the operator to comply with the prepayment requirements. Citing supportive dicta from the Boyle case, as well as federal cases upholding the constitutionality of the prepayment of civil penalties under 30 U.S.C. §1268(c), we concluded that we had no power to determine the constitutionality of the statutory provisions mandating prepayment of civil penalties assessments and would have to presume their constitutionality in ruling on the Department's motion to dismiss. Similarly here, we must reach the same result and dismiss this appeal.

Since McIntire has failed to perfect its appeal by prepaying the assessed penalty or forwarding an appeal bond within the 30 day appeal period required by Section 18.4 of the Surface Mining Act and Section 605 of the Clean Streams Law, the Board has no jurisdiction over this appeal. Phillip R. Jamison v. DER, EHB Docket No. 87-083-W (Opinion and order issued November 10, 1987). Therefore, the Department's motion to dismiss is granted.

In light of our dismissal of this appeal for lack of jurisdiction, it is unnecessary for us to address McIntire's request to proceed in forma pauperis.

O R D E R

AND NOW, this 15th day of April, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and the appeal of McIntire Coal Co., William J. McIntire, and Ronald G. McIntire at EHB Docket No. 87-433-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: April 15, 1988

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 87-037-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NESHAMINY WATER RESOURCES AUTHORITY,	:	
Permittee	:	
and	:	
PHILADELPHIA ELECTRIC COMPANY,	:	
Permittee-Intervenor	:	
and	:	
NORTH PENN/NORTH WALES WATER AUTHORITIES,	:	
Intervenors	:	**Issued:** April 21, 1988

OPINION AND ORDER

Synopsis

Motions to require production of documents and for sanctions are denied where the only basis for the motions is Appellant's mere belief that not all discoverable documents have been provided.

OPINION

This opinion deals with a discovery motion in one of several appeals challenging the so-called Point Pleasant Project. For background on and a history of the project, the reader is referred to the Board's adjudication of Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178 (Del-AWARE I) and its opinions and orders in this matter dated May 27, 1987 and July 17, 1987.

On September 25, 1987, Del-AWARE filed a motion to require

production of documents by North Penn/North Wales Water Authorities and for sanctions. The thrust of its motion was that NP/NW has withheld discoverable documents relating to the need for the Point Pleasant Project, specifically, documents concerning NP/NW's water supply and demand.

A review of the context of Del-AWARE's motion is in order. As this matter pertains to NP/NW, Del-AWARE is challenging DER's amendment and extension of encroachment permit ENC 09-81 which authorized, inter alia, the construction of the outfall on the North Branch Neshaminy Creek. (North Branch). In Del-AWARE I, DER's issuance of ENC 09-81 was upheld except for, as pertains to the instant motion, the issue of the need for the Point Pleasant versus the impacts of erosion in the North Branch when its velocities exceed 2.0 feet per second (fps).

In the form of the instant appealed-from action, DER has given its decision on this remanded issue. In our Order of May 27, 1987, we ruled that "[t]he appeal of Permit No. ENC 09-81 at Docket No. 87-037-R remains before the Board with respect to whether DER properly comported with the Board's order in Del-AWARE I with regard to the issues of . . . velocity/stream erosion control in North Branch Neshaminy Creek . . ." In our Order of July 17, 1987, we ruled that Del-AWARE may inquire into the need for the Point Pleasant Project since, under Del-AWARE I, DER was to balance the need for the project versus the impacts of any stream velocities over 2.0 fps. As it pertains to NP/NW, that need relates to the water supply portion of the project. Hence, since we broadly construe relevancy during discovery, Chernicky Coal v. DER, 1985 EHB 360, it is entirely appropriate for Del-AWARE to inquire into NP/NW's supply and demand data and information.

After reviewing NP/NW's response and supplemental response to Del-AWARE's motion, however, we find no support for Del-AWARE's contention

that NP/NW has failed to produce or that it has withheld discoverable supply and demand documents. The only support we can discern for Del-AWARE's allegation is Del-AWARE's belief that there are no documents available other than those provided by NP/NW. This belief hardly can support a finding by this Board that NP/NW has withheld documents. Accordingly, we will deny Del-AWARE's motion and not impose sanctions.

We note that, as this opinion was being finalized, Del-AWARE filed a reply memorandum to NP/NW's answer to the instant motion. Del-AWARE's argument seems to be that NP/NW has only provided publicly available documents and, therefore, has withheld internal backup or background documents. We still fail to see support for the contention that discoverable documents have been withheld. While we will not grant Del-AWARE's motions, we nonetheless remind NP/NW that the Board can, pursuant to Pa.R.C.P. 4019, bar its use at hearing of any discoverable documents not provided to Del-AWARE during the discovery stage of these proceedings.

We note that no pre-hearing memoranda have yet been filed. These, of course, will be the vehicles by which the parties narrow and focus their factual assertions and legal contentions, as well as outline the evidence they intend to rely upon. The Board notes that there is yet another Del-AWARE discovery motion outstanding concerning additional deposition discovery. According, the Board will defer establishing a new pre-hearing schedule until that motion is disposed of.

As a final matter, we note that NP/NW sent to the Board, for its in camera review, certain documents relating to erosion. Since these documents did not pertain to the focus of Del-AWARE's motion, namely the NP/NW supply and demand issue, we are returning them to NP/NW.

ORDER

AND NOW, this 21st day of April, 1988, it is ordered that Del-AWARE Unlimited, Inc.'s motions to require production of documents and for sanctions are denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: April 21, 1988

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BELTRAMI ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 84-322-G**
	:	**84-323-G**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 25, 1988**

A D J U D I C A T I O N

By the Board

Synopsis

Two civil penalty assessments by the Department of Environmental Resources (DER) are upheld where the bulk of the assessments are mandated by regulation. An undeveloped contention that the regulations are invalid does not overcome the presumption of validity attaching to duly promulgated regulations. Furthermore, the argument that the assessments are barred by the two year statute of limitations in the Judicial Code is dismissed because both the Clean Streams Law and the Surface Mining Conservation and Reclamation Act expressly provide for a five year statute of limitations in cases brought under those statutes. Finally, the amounts assessed by DER above the mandatory minimum penalties are upheld due to the willfulness of the violations and to deter future misconduct.

INTRODUCTION

This adjudication involves two appeals filed on September 7, 1984 by Beltrami Enterprises, Inc. (Beltrami) contesting two civil penalty assessments

by DER for Beltrami's alleged violations of the "Clean Streams Law" (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. and the "Surface Mining Conservation and Reclamation Act" (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. The appeal at docket number 84-322-G arose from Beltrami's surface mining operation in Foster Township, Luzerne County. The appeal at docket number 84-323-G arose from Beltrami's operation in East Union Township, Schuylkill County.

Beltrami and DER filed Stipulations of Fact in both appeals; therefore, hearings were unnecessary.[1] On June 11, 1986, Board Member Edward Gerjuoy granted a Motion for Sanctions filed by DER and barred Beltrami from filing a Brief due to Beltrami's repeated failure to file its Brief in accordance with schedules established by the Board.[2] On July 14, 1986, Mr. Gerjuoy denied Beltrami's Motion for Reconsideration of the June 11, 1986 Order. DER filed a Brief on July 7, 1986.

FINDINGS OF FACT

1. The Appellant in this matter is Beltrami Enterprises, Inc., a Pennsylvania corporation with a mailing address of P. O. Box 458,

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[1] The parties filed separate stipulations at each docket number. In the Findings of Fact and Discussion sections of this Adjudication, we will address each docket separately, which should eliminate confusion regarding which set of stipulations we are referring to.

[2] This case had originally been assigned to Board Member Anthony J. Mazullo, but was reassigned to Mr. Gerjuoy on February 20, 1986 due to Mr. Mazullo's resignation. Since that time, Mr. Gerjuoy has also resigned from the Board without issuing an adjudication. The Board has previously ruled that it may issue adjudications based upon a "cold record" (where the person who presided over the hearings cannot participate in the adjudication because he is no longer employed by the Board). See e.g. Penn Maryland Coals, Inc. v. DER, 1986 EHB 758. Moreover, any concern about the Board's ability to determine the credibility of witnesses does not apply to this case since the facts were stipulated.

Hazleton, Pennsylvania 18201. (Stipulation 1, Docket Nos. 84-322-G, 84-323-G).

2. The Appellee in this matter is the Department of Environmental Resources, the executive agency of the Commonwealth of Pennsylvania vested with the authority and duty to administer and enforce The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.; and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. (Stip. 2, Docket Nos. 84-322-G, 84-323-G).

Docket No. 84-322-G

3. Beltrami is engaged in the mining of coal by the surface mining method at its operation in Foster Township, Luzerne County, Pennsylvania. (Stip. 3)

4. Beltrami was conducting its surface mining operation in Foster Township under Surface Mining Operators License No. 816, Mine Drainage Permit ("MDP") No. 6472SM1, Mining Permit ("MP") No. 816-3 and amendments, Mine Drainage Permit ("MDP")No. 6475SM7, and Mining Permit ("MP") No. 816-9 and amendments. (Stip. 4)

5. In the course of its mining activities in Foster Township, Beltrami deposited coal silt slurry from the Eckley Breaker on land regulated under MDP No. 6472SM1 (MP No. 816-3 and amendments). (Stip. 5)

6. On or about June 1, 1982, Mine Conservation Specialist George W. Lokitis conducted an inspection of MDP No. 6472SM1. (Stip. 6)

7. During the course of this inspection, Mr. Lokitis observed that coal silt slurry from the Eckley Breaker had exceeded the boundaries of MDP

No. 6472SM1 and was being deposited on approximately ten (10) acres of land which was not under required permit or bond. (Stip. 7)

8. Inspector Lokitis advised Beltrami of this situation and noted that the situation interfered with the Eckley Sewage Treatment Plant effluent discharge. (Stip. 8)

9. On June 8, 1982, Mr. Lokitis met at the Foster Township site with Beltrami officials. At this time, Beltrami agreed to submit plans for corrective action on the deposit of coal silt slurry to the Pottsville District Office of DER by July 15, 1982. (Stip. 9)

10. On August 13, 1982, Mr. Lokitis observed that the coal silt slurry from the Eckley Breaker remained on land that was not under a permit or bond. He extended to September 1, 1982 the deadline for Beltrami's submission of a corrective action plan to the Pottsville District Office with the stipulation that construction to correct the problem be completed by October 15, 1982. (Stip. 10)

11. On September 15, 1982, Mr. Lokitis observed that Beltrami had done nothing to the affected ten (10) acres of off-permit land. (Stip. 11)

12. In addition, Mr. Lokitis issued a Cease and Desist Order on September 15, 1982 to discontinue discharging breaker silt slurry on MDP No. 6472SM1 and issued a Notice of Violation for affecting acreage beyond the permit boundary. (Stip. 12)

13. On September 22, 1982, an administrative conference was held by DER officials with Beltrami officials on the mining without a permit violations. (Stip. 13)

14. Beltrami and DER officials arrived at a Consent Order and Agreement through negotiations at this administrative conference. (Stip. 14)

15. Paragraph 6a of said Consent Order and Agreement provides as follows:

> The following conditions which constitute violations of the laws of the Commonwealth of Pennsylvania were found and determined to exist on the dates indicated.
>
> a) September 15, 1982 - MDP No. 6472SM1 (MP No. 816-3 and amendments) - Disposal of coal silt from the Eckley Breaker without having filed a permit application, without a permit, and without having a bond for a 10 acre area, which is a violation of Section 4 of the Surface Mining Act, 52 P.S. §1396.4. (Stip. 15)

16. Standard Condition No. 15 of MDP No. 6475SM7 (MP No. 816-9 and amendments) requires backfilling and reclamation concurrent with mining operations under the permit. (Stip. 16)

17. On December 4, 1981, Mr. Lokitis observed that backfilling was not concurrent with mining under MDP No. 6475SM7 and advised Beltrami of the situation. (Stip. 17)

18. On May 25, 1982, Mr. Lokitis observed that an open pit located within the area of Amendment 4 of MP No. 816-9 was only semi-backfilled. He cautioned Beltrami that all of the land under MP No. 816-9 and amendments was to be graded and under seed before the fall planting season. (Stip. 18)

19. On July 16, 1982, Mr. Lokitis again warned Beltrami on the need to backfill the open pit located in the area controlled by Amendment 4, MP No. 816-9 (Stip. 19)

20. On September 20, 1982, Mr. Lokitis observed that backfilling was not concurrent. He issued a violation to Beltrami for backfilling and reclamation that was not concurrent with mining progress. He also noted that no mining had occurred at the site since June, 1981. (Stip. 20)

21. On September 22, 1982, an administrative conference was held by DER officials with Beltrami officials on the nonconcurrent backfilling violations. (Stip. 21)

22. Beltrami and DER officials arrived at a Consent Order and Agreement through negotiations at the administrative conference. (Stip. 22)

23. Paragraph 6b of said Consent Order and Agreement provides as follows:

> The following conditions which constitute violations of the laws of the Commonwealth of Pennsylvania were found and determined to exist on the dates indicated.
>
> b) September 20, 1982 - MDP No. 6475SM7 (MP No. 816-9 and amendments) - Backfilling and reclamation was not concurrent with mining, which is a violation of Standard Condition No. 15 of the Mine Drainage Permit and Section 611 of The Clean Streams Law, 35 P.S. §691.611. (Stip. 23)

24. On August 8, 1984, DER issued to Beltrami a Civil Penalty Assessment of twelve thousand seven hundred fifty ($12,750) dollars based on violations described in Findings of Fact 15 and 23, supra. (Stip. 24)

Docket No. 84-323-G

25. Beltrami is engaged in the mining of coal by the surface mining method at its operation in East Union Township, Schuylkill County, Pennsylvania. (Stip. 3, Docket No. 84-323-G)

26. In the subject case, Beltrami was conducting its surface mining operation under Surface Mining Operators License No. 200816, Mine Drainage Permit ("MDP") No. 7274SM11, Mining Permit ("MP") No. 816-11 and amendments. (Stip. 4)

27. On or about October 24, 1983, Mine Conservation Specialist George W. Lokitis conducted an inspection of MDP No. 7274SM11 (MP No. 816-11 and amendments). (Stip. 5)

28. Through his inspection, Mr. Lokitis observed mining activity, drill sets and drill holes, on approximately one (1) acre of land which was not under bond. (Stip. 6)

29. Through his inspection, Mr. Lokitis also observed mining support activity, including a haul road, on approximately three (3) acres of land which were not under bond. (Stip. 7)

30. The activities described in Findings of Fact 28 and 29, supra, constitute the mining of lands beyond the boundary of MP No. 816-11 and amendments, which is a violation of Section 4(a) of the Surface Mining Act, 52 P.S. §1396.4(a), and Section 315 of The Clean Streams Law, 35 P.S. §691.315 and 25 Pa. Code §§86.11 and 86.13, and in violation of Standard Condition No. 1 in MDP No. 7274SM11. (Stip. 8)

31. On October 24, 1983, Mr. Lokitis issued a Cease and Desist Order to Beltrami based on the violation described in Finding of Fact 30, supra. The Order prevented any mining under MDP No. 7274SM11 except for backfilling, reclamation, and corrective work. (Stip. 9)

32. On October 24, 1983, Mr. Lokitis also issued a Compliance Order to Beltrami concerning the violation described in Finding of Fact 30, supra. (Stip. 10)

33. On December 20, 1983, a Civil Penalty Assessment Conference was held by DER officials with Beltrami officials in regard to the proposed civil penalty relating to the October 24, 1983 Compliance Order. (Stip. 11)

34. DER and Beltrami could not reach agreement at the conference and DER advised Beltrami that it would issue a formal civil penalty assessment in the future. (Stip. 12)

35. On August 8, 1984, DER issued to Beltrami a Civil Penalty Assessment of five thousand seven hundred fifty ($5,750) dollars based on the violation described in Finding of Fact 30, supra. (Stip. 13)

DISCUSSION

DER has assessed civil penalties of $12,750 at Docket No. 84-322-G and $5,750 at Docket No. 84-323-G upon Beltrami for violations of the CSL and SMCRA. Beltrami has admitted that its actions constitute violations of these laws (see stipulations 15 and 23 at Docket No. 84-322-G and stipulation 8 at Docket No. 84-323-G); therefore, the chief issue to be addressed is whether the amount of the penalties was reasonable. DER bears the burden of proving that the penalties assessed do not constitute an abuse of discretion. Western Hickory Coal Co. v. DER, 1983 EHB 89, 94, affirmed, 86 Pa. Commonwealth Ct. 562, 485 A.2d 877 (1984).

Before delving into the reasonableness of the amount of the penalties, however, we will address two legal issues which Beltrami has raised in its Notice of Appeal and Pre-Hearing Memorandum. We will address these arguments even though we could consider them waived pursuant to our Order imposing sanctions and barring Beltrami from filing a Brief. See 25 Pa. Code §21.124. First, Beltrami asserted in paragraph 21 of its Notice of Appeal at Docket No. 84-322-G, and paragraph 17 of its Notice of Appeal at Docket No. 84-323-G, that the assessment of civil penalties is barred by the two year statute of limitations set forth in the Judicial Code, 42 Pa. CS §5524. This assertion is unpersuasive for two reasons. First, the argument is deemed waived because Beltrami did not repeat it in the Pre-Hearing Memorandum. See Pre-Hearing Order No. 1, paragraph 4, see also Western Hickory Coal Co .v. DER, 1983 EHB 89, 96, affirmed, 86 Pa. Commonwealth Ct. 562, 485 A.2d 877 (1984). Second, both the CSL and SMCRA expressly

provide for a five year statute of limitations in civil penalty proceedings brought under those statutes. See Section 605(c) of the CSL, 35 P.S. §691.605(c), Section 18.4 of the SMCRA, 52 P.S. §1396.22.

The second legal argument raised by Beltrami is that "the laws and regulations allegedly violated by Beltrami were enacted and promulgated in violation of the Surface Mining Conservation and Reclamation Act and the Clean Streams Law and are therefore unlawful and unenforceable." (Beltrami Pre-Hearing Memorandum, p. 2). In support of this contention, Beltrami cites Arsenal Coal Co. v. Commonwealth, DER, 505 Pa. 198, 477 A.2d 1333 (1984).[3] In Arsenal, the Supreme Court of Pennsylvania ruled that anthracite coal companies were entitled to pre-enforcement review of the regulations promulgated by the Environmental Quality Board (EQB) at 25 Pa. Code Chapters 86 and 88. The Supreme Court, however, did not conduct this review; instead, it remanded the case to the Commonwealth Court, which dismissed the case on March 28, 1988 for lack of prosecution. The substantive legal question in Arsenal was whether the regulations contravened a state law which limited the EQB's authority to alter the requirements applicable to anthracite mining.

Since the Arsenal case was dismissed by Commonwealth Court on procedural grounds, there has not been a judicial determination that the regulations at 25 Pa. Code Chapters 86 and 88 are invalid. Nor can we make such a determination based upon Beltrami's naked assertions. Beltrami has not explained why the specific regulations involved in this case (25 Pa. Code §§86.193 and 86.194) exceeded the EQB's authority, nor has Beltrami supplied a coherent argument why the rulemaking proceeding in which Chapters 86 and 88

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[3] In an Order dated February 20, 1986, Board Chairman Maxine Woelfling informed the parties that she would not participate in this adjudication due to her participation as counsel of record for DER in the Commonwealth Court proceedings in Arsenal.

were adopted is invalid in its entirety. Since Beltrami has not supported its contentions, we will presume for the purposes of this appeal that the regulations are valid. See Commonwealth, DER v. Pennsylvania Power Co., 490 Pa. 399, 416 A.2d 995 (1980), Commonwealth, DER v. Locust Point Quarries, Inc., 483 Pa. 350, 396 A.2d 1205 (1979).

The final issue presented in this appeal is whether the amount of the assessments were reasonable. Beltrami asserts that the amounts assessed were "arbitrary, capricious and unreasonable" and that the assessments violated section 18.4 of the SMCRA, 52 P.S.§1396.22. Beltrami Pre-Hearing Memorandum, Contention of Law No. 2. Section 18.4 of the SMCRA states in relevant part:

> In determining the amount of the civil penalty the department shall consider the wilfulness (sic) of the violation, damage or injury to the lands or to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors.

52 P.S. §1396.22[4] DER argues that the assessments were reasonable because, for each assessment, virtually the entire amount was a mandatory assessment under the regulations at 25 Pa. Code §§86.193 and 86.194. DER Brief p. 2.

We shall address separately the penalties assessed at the two docket numbers.

Docket No. 84-322-G

This appeal involves Beltrami's activities at its surface mining operation in Foster Township, Luzerne County. These activities were covered by Mine Discharge Permit (MDP) Nos. 6472SM1 and 6475SM7 (Stip. 3, 4). Inspections of the site covered by MDP 6472SM1 by DER Inspector George W.

[4] This language is virtually identical to language in Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b). The only difference is that the CSL refers only to injury to the waters (not the land) of the Commonwealth.

Lokitis on June 1, June 8, August 13, and September 15 (all in 1982) revealed that coal silt slurry from the Eckley Breaker had exceeded the boundaries of the permit and was being deposited on approximately ten (10) acres of land which was not under permit or bond (Stip. 6-11). Mr. Lokitis advised Beltrami officials of this situation on June 1, and met with Beltrami officials at the site on June 8 (Stip. 8, 9). At the latter meeting, Beltrami agreed to submit plans to correct this situation to DER's Pottsville District Office by July 15, 1982 (Stip. 9). On August 13, 1982, Mr. Lokitis observed that this situation had not been corrected and granted Beltrami an extension to September 1, 1982 to submit a plan for corrective action, with an understanding that construction to correct the problem would be completed by October 15, 1982 (Stip. 10). On September 15, Mr. Lokitis observed that Beltrami had done nothing to the affected ten (10) acres of land; as a result, he issued a Cease and Desist Order to discontinue discharging breaker silt slurry on MDP 6472SM1 and issued a Notice of Violation for affecting acreage beyond the permit boundary (Stip. 11, 12). On September 22, 1982, DER officials and Beltrami agreed to a Consent Order whereby Beltrami admitted that its disposal of coal silt from the Eckley Breaker without a permit and without having a bond for a ten (10) acre area violated the SMCRA, 52 P.S. §1396.4 (Stip. 15).

The second violation for which Beltrami was assessed a penalty under this docket number involved Beltrami's failure to keep backfilling and reclamation concurrent with mining operations as required by Standard Condition No. 15 of MDP 6475SM7 (MP No. 816-9 and amendments) (Stip. 16). On December 4, 1981, Mr. Lokitis observed, and advised Mr. Beltrami, that backfilling was not concurrent with mining under MDP 6475SM7 (Stip. 17). On May 25, 1982, Mr. Lokitis observed that an open pit located within the area of

Amendment 4 of MP No. 816-9 was only semi-backfilled, and he cautioned Beltrami that all of the land under MP No. 816-9 and amendments was to be graded and under seed before the fall planting season (Stip. 18). On July 16, 1982, Mr. Lokitis again warned Beltrami to backfill this pit (Stip. 19). On September 20, 1982, Mr. Lokitis observed that backfilling was not concurrent and he issued a violation to Beltrami for backfilling and reclamation that was not concurrent with mining progress (Stip. 20). DER officials and Beltrami agreed to a Consent Order on September 22, 1982 whereby Beltrami admitted that it did not keep backfilling and reclamation concurrent with mining, in violation of Standard Condition No. 15 of the Mining Drainage Permit and section 611 of the CSL, 35 P.S. §691.611 (Stip. 21-23).

As a result of these violations--depositing coal silt slurry on ten (10) acres without a permit or bond and failing to keep backfilling and reclamation concurrent with mining--DER issued to Beltrami a Civil Penalty Assessment of $12,750 (Stip. 24).

The amount of the civil penalty assessment for these violations is clearly reasonable. The depositing of coal silt slurry on ten acres of land beyond permit boundaries mandates at least a $10,000 fine under 25 Pa. Code §86.193(f), which requires a minimum civil penalty of $1,000 per acre for conducting surface mining activities without a permit. DER's exercise of discretion in imposing a $750 penalty above the mandatory minimum penalty is unassailable in light of Beltrami's failure to correct the situation despite repeated warnings (Stip. 6-11). Finally, the failure to keep backfilling and reclamation concurrent with mining was a willful violation which required a minimum penalty of $2,000 under 25 Pa. Code §86.194(b)(2), which provides in relevant part: "If the violation was willful or the result of reckless conduct . . . . a penalty of up to the statutory maximum, but at least

$2,000, shall be assessed." The willfulness of this violation is apparent from Beltrami's ignoring warnings to correct the backfilling problem (Stip. 17-19). In summary, the $12,750 civil penalty assessment for these violations was very close to the mandatory minimum penalty under the regulations and was not an abuse of DER's discretion.

Beltrami's argument that the assessment is invalid because it does not comport with the statutory language, quoted earlier in this adjudication, in the CSL (35 P.S. §691.605) and the SMCRA (52 P.S. §1396.22) is unpersuasive. While it is true that both the CSL and SMCRA state that in determining the amount of the penalty DER shall consider injury to the lands or waters of the Commonwealth and other factors, it must be remembered that the penalties imposed by DER in this case were virtually the minimum amounts required under the regulations. We stated earlier in this adjudication that these regulations are valid; therefore, we are bound to follow them. Moreover, a penalty may be imposed to discourage willful violations and to deter future violations, even though there has been no harm to the environment. Western Hickory Coal Co. v. DER, 1983 EHB 89, affirmed 86 Pa. Commonwealth Court 562, 485 A.2d 877 (1984), DER v. Trevorton Anthracite Co., 1978 EHB 8, affirmed 42 Pa. Commonwealth Court 84, 400 A.2d 240 (1979).

Docket No. 84-323-G

This appeal involves Beltrami's surface mining operation in East Union Township, Schuylkill County, which was conducted pursuant to Surface Mining Operators License No. 200816, Mine Drainage Permit (MDP) No. 7274SM11, Mining Permit No. 816-11 and amendments (Stip. 3, 4). On or about October 24, 1983, Mr. Lokitis inspected the site covered by MDP 7274SM11 (MP No. 816-11 and amendments) and observed mining activity (drill sets and drill holes) on approximately one acre of land which was beyond the permit boundaries and not

under bond, and mining support activity, including a haul road, on approximately three acres of land which were beyond the permit boundaries and not under bond (Stip. 5-8). In response to this activity, Mr. Lokitis issued both a Compliance Order and a Cease and Desist Order on October 24, 1983 (Stip. 9, 10). Beltrami and DER have stipulated that these activities violate section 4(a) of the SMCRA, 52 P.S. §1396.4(a), section 315 of the CSL, 35 P.S. §691.315, 25 Pa. Code §§86.11 and 86.13, and Standard Condition No. 1 in MDP No. 7274SM11 (Stip. 8). A civil penalty assessment conference between DER officials and Beltrami was held on December 20, 1983, but the parties could not agree on the amount of the penalty (Stip. 11, 12). On August 8, 1984, DER issued a civil penalty assessment of $5,750 to Beltrami (Stip. 13).

The $5,750 civil penalty imposed by DER was not an abuse of discretion. Beltrami's mining activities on one acre of land which was beyond the permit boundaries and not under bond required a minimum penalty of $2000 under the regulations. 25 Pa. Code §86.193(e). Beltrami's mining support activities on three acres of land beyond permit boundaries and not under bond required a minimum penalty of $1000 per acre, or a total penalty of $3000. 25 Pa. Code §86.193(f).

The $750 penalty imposed above the minimum amounts required by the regulations presents a closer question, but is justifiable. The $750 penalty could legitimately be designed as an additional deterrent (above the minimum amount) to future illegal conduct. See DER v. Trevorton Anthracite Co., 1978 EHB 8, affirmed, 42 Pa. Commonwealth Ct. 84, 400 A.2d 240. Moreover, we must keep in mind that our task is not to determine what penalty we would impose in this situation, but only to determine whether DER abused its discretion in setting the assessment. While the regulations at 25 Pa. Code §§86.193 and 86.194 establish some criteria for assessing civil

penalties, these assessments still require judgment and cannot be reduced to a mere mathematical exercise. Under the circumstances, we cannot conclude that DER abused its discretion in assessing a relatively nominal amount--$750--above the minimum penalty.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this proceeding.

2. The Board's standard of review in cases where DER has assessed a civil penalty and the appellant contests the amount of the assessment is to determine whether DER abused its discretion.

3. Beltrami's depositing of coal silt slurry on ten acres of land which were not permitted or bonded constitutes a violation of Section 4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4.

4. Beltrami's failure to keep backfilling and reclamation concurrent with mining operations conducted under Mining Discharge Permit (MDP) No. 6475SM7 (Mining Permit No. 816-9 and amendments) constitutes a violation of Section 611 of the Clean Streams Law, 35 P.S. §691.611, and Standard Condition No. 15 of MDP No. 6475SM7.

5. Beltrami's conducting of mining activities on one acre of land and mining support activities on three acres of land beyond the boundary of Mining Permit No. 816-11 constitute violations of Section 4(a) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1394.4(a), Section 315 of the Clean Streams Law, 35 P.S. §691.315, and Standard Condition No. 1 in MDP No. 7274SM11.

6. The civil penalties assessed against Beltrami by DER at docket numbers 84-322-G and 84-323-G for the violations listed in Conclusions

of Law No. 3-5 were legitimate exercises of DER's discretion and were consistent with Section 18.4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.22, Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), and the regulations at 25 Pa. Code §§86.193(e) & (f); and 86.194.

ORDER

AND NOW, this 25th day of April, 1988, it is ordered that the appeals of Beltrami Enterprises, Inc. at docket numbers 84-322-G and 84-323-G are dismissed. [5]

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

ROBERT D. MYERS, MEMBER

DATED: April 25, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Donald Brown, Esq.
Central Region
For Appellant:
Edward E. Kopko, Esq.
Pottsville, PA

[5] Board Chairman Maxine Woelfling did not participate in this Adjudication.

SILVERBROOK ANTHRACITE INC.	:	
	:	
v.	:	**EHB Docket No. 88-086-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 25, 1988

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A petition for Supersedeas will be granted, in part, where the evidence shows that a mining operation can be conducted up to 140 feet from the centerline of a railroad track if a revised blasting plan is utilized. An economic loss compensable by monetary damages will be considered irreparable if there is no adequate remedy available to recover them.

OPINION

On March 14, 1988, Silverbrook Anthracite, Inc. (Silverbrook) filed a Notice of Appeal from a Compliance Order issued by the Department of Environmental Resources (DER) on February 16, 1988. The Compliance Order pertained to Mining Permit #35813002 which authorized Silverbrook to conduct surface mining operations in the City of Scranton and the Borough of Taylor, both situated in Lackawanna County. Asserting that Silverbrook's operations have caused damage and structural problems to the facilities of the Delaware and Hudson Railway Company (D&H), in violation of section 4.2(a) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945,

P.L. 1198, as amended, 52 P.S. 1396.4b(a), the Compliance Order required Silverbrook to cease mining immediately within 200 feet from the centerline of the D&H tracks, and by March 22, 1988, to backfill the sloughing area up to 200 feet from the centerline of the D&H tracks, to submit a revised slope stability plan and to submit a revised mining and reclamation plan.

With its Notice of Appeal, Silverbrook filed a Petition for Expedited Hearing, alleging that its mining operations will have to be terminated by April 30, 1988, unless its Appeal is resolved prior to that time. On March 29, 1988, Silverbrook filed a Petition for Supersedeas, alleging, inter alia, that DER had threatened to assess penalties against Silverbrook for failure to meet the March 22, 1988, deadline set in the Compliance Order.

DER responded to Silverbrook's Petitions on April 5, 1988, and hearings on the Petition for Supersedeas commenced on April 7, 1988, in Harrisburg. D&H filed a Petition to Intervene on that date, and D&H's legal counsel was permitted to participate in the hearings even though a ruling on the Petition to Intervene had not yet been made. The hearings continued on April 8 and were concluded on April 12. Although D&H's legal counsel was invited to participate on all three days of hearings, he declined to appear on the latter two days.

Silverbrook and DER filed memoranda of law in support of their respective positions. On April 18, 1988, an Order was issued by the undersigned Board Member, permitting Silverbrook to mine up to within 140 feet of the centerline of D&H's tracks upon securing DER approval of a revised blasting plan that would be adequate to protect D&H's facilities from subsidence. This Opinion is issued to set forth the basis of said Order.

The area covered by Silverbrook's Mining Permit #35813002 runs to the south of, and parallel to, D&H's tracks. The permitted area and the areas

adjacent to it, including the area occupied by D&H's tracks, have been extensively deep mined in the past and are honeycombed by abandoned mine shafts. Silverbrook's surface mining operation has involved the removal of about 50 feet of soil and bedrock in order to expose the Big Vein, a stratum of anthracite coal ranging from 10 feet to 18 feet in thickness. Below the Big Vein, at varying depths, are the New County Vein and the Clark Vein; but they are not involved in Silverbrook's surface mining operation. All of these veins dip toward the northwest at 10 to 15 degrees and run beneath D&H's tracks. The Rock Vein, which lies above the Big Vein, outcrops on the south side of D&H's tracks. This vein, which also was deep mined, runs beneath the tracks but does not extend into Silverbrook's surface mining area.

Silverbrook began its surface mining operation in 1981, starting at the western limit of its permit area and progressing in an easterly direction. For the most part, Silverbrook has mined the area in 200 foot-wide segments, beginning at the south limit of the permit area and moving toward the D&H tracks on the north. The soil and bedrock, after being loosened by blasting, are removed and used as backfill in areas already mined. The exposed coal is then mined and hauled to Silverbrook's processing plant.

Silverbrook's permit area in 1981 came as close as 50 feet to the centerline of D&H's tracks which, at that time, were not in use. In 1986, after D&H had begun using the tracks, cracks appeared in the earth in an area south of the tracks and running parallel to them at a time when Silverbrook's surface mining operation was being conducted in the vicinity. Convinced that the surface mining operation was a contributing cause to the development of the cracks, DER requested (and Silverbrook consented) that no mining be done in the rest of the permit area any closer than 100 feet to the centerline of the D&H tracks.

On December 27, 1987, D&H discovered that its tracks had subsided at a point directly opposite Silverbrook's active pit, which at that time was located about 125 feet from the centerline of the tracks with a highwall of approximately 60 feet. DER surface mining inspectors who examined the subsidence area in January and February 1988 concluded that Silverbrook's highwall was intact and that Silverbrook's mining operations had not caused the subsidence. DER's geologists disagreed, however, and recommended that mining operations be moved back to a distance 170 feet or 200 feet from the centerline of the tracks. The Compliance Order issued February 16, 1988, incorporated the 200 foot setback.

Silverbrook withdrew immediately to the new setback line and backfilled the area vacated. By letter dated March 25, 1988, it notified DER of these actions and submitted revised plans.

The evidence produced at the hearings reveals great uncertainties about the conditions underlying the D&H tracks and the setback area. These uncertainties make it impossible to name, at this point in the proceedings, the precise causes contributing to the subsidence under D&H's tracks. The proximity and condition of the highwall in Silverbrook's pit and the blasting previously done by Silverbrook may be causative; but so may the abandoned mine shafts that lie no more than 20 feet or so below the tracks. Another relevant factor may be the two 10,000 ton trains rolling over the tracks twice a day, powered by 5 diesel units in the front and 2 in the rear.

Because of the threat to public safety that a train derailment represents, intensified by the possible escape of hazardous materials, DER was justified in attempting to remove the potential contributions to the problem which Silverbrook's mining operations may entail. To the extent that the Compliance Order of February 16, 1988, serves that purpose it is valid and

unassailable. To the extent that it exceeds what is reasonably necessary, under the circumstances, it is an abuse of discretion.

The evidence is clear that the area yet to be mined under Silverbrook's permit does not come closer than 140 feet to the centerline of D&H's tracks. At that point the highwall will be 75 feet, and if vertical, will represent a 1.87 to 1 slope. DER's geologists have recommended a 2 to 1 slope; but the consistency of the material in the highwall, though not monolithic, is obviously of greater stability than sand and soil. Something less than a 2 to 1 slope is appropriate, under the circumstances existing here, and a 1.87 to 1 slope clearly falls within the ambit of reasonableness.

DER's geologists opted for a 200 foot setback, primarily, to minimize the effects of blasting. Cutting the setback to 140 feet, while justified on the basis of slope stability, may involve an unacceptable element of risk that Silverbrook's blasting will damage the rock structure beneath D&H's tracks. Keith Laslow, one of the DER geologists, stated unequivocally, however, that a blasting plan could be devised that would be economical to Silverbrook and still enable it to mine safely up to the 140 foot line. If Silverbrook submits a blasting plan that satisfies DER in this respect, there is no reason why Silverbrook should not be allowed to mine as close as 140 feet to the centerline of D&H's tracks.

In disposing of a Petiton for Supersedeas, the Board is required by 25 Pa. Code §21.78 to consider (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. Where injury to the public exists or is threatened, no supersedeas can be issued.

Based on the evidence before me, I conclude that no threat of injury to the public will exist or be threatened if Silverbrook is allowed to mine up

to the 140 foot mark pursuant to a blasting plan that will eliminate the danger of injuring the rock support beneath D&H's tracks. I conclude further that there is a great likelihood that Silverbrook will prevail on the merits to this extent. Finally, I conclude that Silverbrook will suffer irreparable harm if it is not allowed to mine up to 140 feet from the centerline of the D&H's tracks.

DER maintains that Silverbrook's only loss will be economic and, therefore, not of a nature to justify the issuance of a supersedeas where a DER Compliance Order is involved. Silverbrook presented evidence to show that about 2000 tons of coal lie in the unmined area extending from 140 feet to 200 feet away from the centerline of the tracks. The retail value of the coal is from $80 to $83 per ton. While the costs of extraction and processing have not been placed in evidence, making it impossible to determine Silverbrook's potential profit, there is enough data to show that Silverbrook has more at stake than a de minimus amount. In addition, the evidence shows that Silverbrook has nearly completed its mining operations on this permit area. If the 200 foot setback remains in effect, Silverbrook will have to terminate its operations within the next two months (long before this case can be heard on the merits). It will not be economically feasible to reopen the pit sometime later just for the 2000 tons remaining.

A loss compensable by money damages is not, as a rule, regarded as irreparable. Three County Services v. Philadelphia Inquirer, 337 Pa. Super. Ct. 241, 486 A.2d 997 (1985). When a remedy for money damages is not adequate, however, the loss is considered irreparable. AFSCME v. Commonwealth, 77 Pa. Cmwlth. 37, 465 A.2d 62 (1983). Silverbrook's loss, while compensable by money damages, is irreparable because Silverbrook has no adequate remedy to recover those damages from DER or any other person or

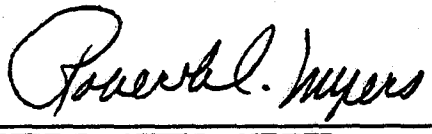
entity. Considering all relevant factors and balancing the interests of the parties and the public, as endorsed by the Supreme Court in Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), I conclude that a partial supersedeas is warranted.

One other aspect of this case requires comment. DER represented to the Board that the potential for a train derailment caused by subsidence of D&H's tracks was a grave threat to public safety, in light of the hazardous materials sometimes hauled on the trains and the proximity of the site to populated areas. The opinion of DER's geologists, however, makes it clear that Silverbrook's mining operation is only one of several possible causes for the subsidence of the tracks. DER has taken steps to abate that cause but presented no evidence that it has taken any steps whatever to eliminate the other potential causes. It may be that DER has no jurisdiction to act beyond the scope of what it already has done, but that does not excuse a failure to notify other governmental agencies that do have jurisdiction. DER's assertion of a threat to public safety, in situations of this sort, begins to lose validity in the absence of evidence to show that DER has taken steps to abate all causes contributing to an alleged hazard.

ORDER

It is ordered that Silverbrook Anthracite, Inc. shall be permitted to mine in that part of its bonded increment under Mining Permit #35813002 extending from 140 feet to 200 feet away from the centerline of the tracks of the Delaware and Hudson Railway Company (the Contested Area) if, prior to commencement of such mining, Silverbrook has submitted to DER, and has secured approval from DER, of a blasting plan which, in the judgment of DER officials, will be as economical as possible and still enable Silverbrook to mine in the Contested Area without causing subsidence to occur beneath the tracks of the Delaware and Hudson Railway Company.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: April 25, 1988

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YORK COUNTY SOLID WASTE & REFUSE AUTHORITY	:	
v.	:	EHB Docket No. 87-019-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
	:	Issued: April 27, 1988
MODERN TRASH REMOVAL OF YORK, INC., Permittee	:	

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

Synopsis

A motion for reconsideration is denied where the reasons put forth for such reconsideration are neither compelling and persuasive nor within the grounds stated in 25 Pa.Code §21.122.

OPINION

This matter began with the York County Solid Waste and Refuse Authority's (Authority) January 12, 1987 challenge of the Department of Environmental Resources' (Department) issuance of a permit modification to Modern Trash Removal of York, Inc. (Modern). The modification provided for a design upgrade of a 21 acre unused portion of Modern's landfill in Windsor and Lower Windsor Townships, York County. On March 23, 1987, Modern filed a motion to dismiss and/or for summary judgment, which the Department joined. On September 8, 1987, this Board granted the motion of Modern and the

Department, holding that there is no requirement that a permit for a private landfill be consistent with a proposed county solid waste plan and that the Department acted within the bounds of its authority and discretion in approving the landfill permit modification at issue.

On September 25, 1987, the Authority, pursuant to 25 Pa.Code §21.122, filed a request for reconsideration of the Board's September 8, 1987 opinion and order. The Authority contends that the Board's decision failed to address the issue of the Department's alleged failure to comply with its duty under Article I, Section 27 of the Pennsylvania Constitution to weigh the environmental and social implications of the permit modification and misstated numerous facts. In addition, the Authority's motion repeated its request to have the permit include a condition prohibiting Modern from accepting municipal waste from municipalities committed to using the Authority's resource recovery facility and reasserted its demand that the Board enforce, or in the alternative, remand to the Department for enforcement of this condition.

The Board provisionally granted the Authority's motion on October 1, 1987, in order to toll the period for filing a petition for review with the Commonwealth Court. Both Modern and the Department have filed responses to the Authority's motion for reconsideration.

The Board's rules state at 25 Pa.Code §21.122 that the Board may review and reconsider its decisions only for compelling and persuasive reasons. Section 21.122 also generally limits this authority to instances where:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

The Authority has failed to offer any explanation of how its arguments meet the standards of Section 21.122(1) and (2), nor has it offered any compelling and persuasive reasons for reconsideration. Although the Authority has offered a variety of arguments to substantiate its request, the arguments, in large part, reiterate the responses to Modern's motion for summary judgment.

First, the Authority avers that the Board did not address its argument that the Department failed to weigh the environmental and economic implications of the permit modification as it is required to do by Article I, §27 of the Pennsylvania Constitution. The Authority made this argument in its Answer to the Permittee's Motion to Dismiss and/or for Summary Judgment. (See Answer of Appellant pp. 2, 8-15). We note that, despite its assertion to the contrary, the Authority did not specify this issue as a reason for objecting to the Department's approval of the permit modification when it filed its notice of appeal. Under 25 Pa.Code §21.51(e) any objection not raised in a notice of appeal is deemed waived unless the Board agrees to hear the objection upon good cause shown by the appellant. Good cause includes "the necessity for determining through discovery the basis of the action from which the appeal is take." The Authority did not make such a demonstration here. In fact, the Authority raised this issue for the first time in its answer to Modern's motion for summary judgment. Modern wrote an extensive response to this argument in its Reply Brief in Support of Motion to Dismiss and/or for

Summary Judgment. (See Reply Brief, pp. 6-10). In its answer, the Authority alleges that the Department has ignored its constitutional duty under Article I, §27 of the Pennsylvania Constitution as interpreted in Payne v. Kassab, 11 Pa.Cmwlth. 14, 29-30, 312 A.2d 86, 94 (1973), aff'd 468 Pa. 226, 361 A.2d 263 (1976). Payne v. Kassab established a three part inquiry for weighing the environmental impact of an activity against the social benefits of that activity as follows:

> (1) Was there compliance with all applicable statutes and regulations relevant to protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the activity to be permitted so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

The Authority contends that the Department failed to satisfy the second and third prongs of this test because it failed to make a thorough study of environmental and economic impacts of its proposed action; gave no consideration to the adverse environmental effects of expanding the landfill in comparison to the county approved method of disposal by resource recovery; and improperly adopted a hands-off policy with regard to resource recovery, preventing it from thoroughly weighing the harms against the benefits of its actions.

In its reply brief, Modern refers to the Authority's "new Article I, Section 27 argument" and claims that ultimately it restates the Authority's earlier contention that issuance of the permit and the operation of Modern's landfill is inconsistent with resource recovery as called for in the county's

draft plan. Furthermore, Modern asserts that all requirements of balancing under Article I, §27 were met by the Department's Module 9 questionnaire, the preparation of the draft plan in accordance with the statutory structure of the SWMA, and finally, the fact that the landfill permit and expansion are consistent with the draft plan and, in fact, are relied upon in the draft plan to provide disposal capacity during the development of the incinerator and for residue and bypass after development of the incinerator.

The Board interpreted the Department's evaluation of the permit modification and the recently finalized county solid waste management plan to be evidence of its attempt to achieve the balance of interests outlined by the test in Payne v. Kassab. The Department considered the county plan and the target dates for its completion and viewed the use of the landfill as a critical and necessary interim phase in the county's waste disposal scheme pending completion of the resource recovery facility. The county plan relies on the existence of the upgraded portion of the landfill. The resource recovery facility is not due to be completed until 1990, and meanwhile, the upgraded 21 acre portion of Modern's landfill is an integral part of the county's disposal scheme. The very purpose of the permit modification was to upgrade the liner system of the landfill and, thereby, reduce any environmental incursion to a minimum.

Finally, the Board is not bound to expressly address each and every argument raised by an appellant.

The Authority's remaining contention that the Department failed to consider alternate forms of waste disposal is spurious. There is ample Board precedent holding that the Department is not obligated to consider alternative forms of waste disposal. In Coolspring Township v. DER, 1983 EHB 151, this Board held that the Department had no affirmative duty to seek out alternative

sites every time it receives a permit application since this "would put an almost impossibly heavy burden on DER." (p. 197) The Board expounded this holding in Township of Indiana v. DER, 1984 EHB 1, stating that Payne v. Kassab does not impose on the Department the affirmative duty to seek out alternatives to a proposed waste disposal facility, absent a showing that the proposed site is likely to result in significant environmental harm. See also, Concerned Citizens of Breakneck Valley v. DER, 1979 EHB 201, 221.

In its motion for reconsideration, the Authority avers that numerous facts were misstated in the Board's opinion. However, the Authority only cites two such misstatements, neither of which is a critical fact in the Board's order. First, the Authority points to the Board's references to the "Authority's solid waste plan" and points out that it is responsible for implementing the plan, not developing it. The issue of whether the Authority is responsible for developing or implementing the York County Solid Waste Plan is not a critical fact in the Board's opinion, since it does not affect the solution of the propriety of the Department's issuance of the permit. Secondly, the Authority cites references in the Board's opinion to the plan not yet being final and states that the plan has since become final. According to all pleadings before the Board at the time the order was issued, the plan was not final. Neither party filed supplemental pleadings advising the Board of this change in the plan's status. Moreover, the question of the finality of the plan is not relevant, as admitted by the Authority in its motion for reconsideration. (See Motion for Reconsideration, p. 5, fn. 3)

The Authority does not challenge the fact that it did not appeal the September 20, 1984 Consent Order and Agreement between Modern and the Department requiring modifications to Modern's original permit, nor does it challenge the fact that use of Modern's upgraded 21 acre landfill expansion is

an integral part of the county solid waste plan. These contentions regarding misread facts are not sufficient, compelling or persuasive within the meaning of Section 21.122(a)(2) to warrant a reversal of the order.

The Authority requests reconsideration of our holding regarding the Department's failure to condition Modern's permit to prohibit it from accepting waste from a municipality which is committed to using the York County resource recovery facility. We noted the existence of just such a condition in Modern's permit in our original Opinion and stated that if and when violations of that permit condition occurred, the Department could avail itself of various remedies under the Solid Waste Management Act. The Authority does not dispute our finding regarding the permit condition, but again, as a result of what it terms "poaching" by Modern, requests us to direct the Department to take enforcement action against Modern for violation of a permit condition. Not only are these arguments outside the Board's limits on what it may reconsider pursuant to 25 Pa.Code §21.122, but they also request the Board to exercise powers which it does not possess. Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, grants us jurisdiction to hear appeals from final actions of the Department and to determine if the Department committed an error of law or acted arbitrarily, capriciously or unreasonably in taking its action. We are not a court of general jurisdiction. Our power to adjudicate stems from discrete Department actions; we cannot direct the Department to remedy an ill which is not before us or is not properly before us. This issue was thoroughly addressed by the parties and the Board, and there are no compelling or persuasive reasons to reconsider it. Accordingly, we must dismiss the Authority's motion for reconsideration.

O R D E R

AND NOW, this 27th day of April, 1988, the York County Solid Waste and Refuse Authority's Motion for Reconsideration is denied and the Board's September 8, 1987 opinion and order in this matter is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: April 27, 1988

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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN W. FEDORCHIK	:	
	:	
v.	:	**EHB Docket No. 80-123-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 28, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where appellant has taken no affirmative action to prosecute its appeal since its filing in 1980.

OPINION

This matter was initiated by John W. Fedorchik with the July 28, 1980 filing of a notice of appeal seeking the Board's review of a June 27, 1980 order issued by the Department of Environmental Resources (Department) pursuant to the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 et seq. (now repealed), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The order required Fedorchik to cease dumping used battery components on his property in Upper Saucon Township, Lehigh County, and to submit a plan for proper disposal of the battery components and removal of any contaminated soil.

On August 6, 1980, the Board issued an order requiring the parties to file their pre-hearing memoranda on or before September 8, 1980. Counsel for

the parties stipulated to the issuance of a supersedeas of the Department's order on August 21, 1980.

Neither party filed its pre-hearing memorandum, and the Board, on March 25, 1981, requested the parties to provide a status report on or before April 6, 1981. By letter dated March 27, 1981, Fedorchik's counsel indicated that his appeal should be continued indefinitely. The Board, however, did not issue an order granting a continuance.

The Board, on February 8, 1983, requested Fedorchik to inform it by February 23, 1983 of his intentions to pursue the appeal. The Department, by letter dated February 14, 1983, indicated that the parties were attempting to negotiate an amicable resolution and requested, with Fedorchik's consent, a general continuance. The Board again did not issue an order granting the continuance.

By letter dated November 30, 1983, the Board requested a status report from the parties. Counsel of record for Fedorchik informed the Board in a December 12, 1983 letter that he no longer represented Mr. Fedorchik. On September 11, 1984, the Board requested a status report directly from Fedorchik. Fedorchik failed to respond to the Board's request, despite two default notices.

The Board then attempted to learn the status of the matter from the Department by means of a March 25, 1985 request for status. The Department responded in an April 22, 1985 letter that the Board should request a status report from Fedorchik. The Board did so in a request dated May 9, 1985, and, on July 19, 1985, received a letter from an attorney contacted by Fedorchik who requested additional time to review Fedorchik's file and make a determination as to whether he would represent Fedorchik.

The Board, by letters dated September 23, November 4, and December 31, 1985, requested status reports from the attorney contacted by Fedorchik in July. No response was forthcoming until January 9, 1986, when counsel entered an appearance on behalf of Fedorchik, indicated that Fedorchik wished to pursue his appeal, and requested that it be continued generally pending an EPA Superfund investigation of the site.

The Board then granted Fedorchik an extension until June 2, 1986 to file his pre-hearing memorandum. Fedorchik, in a letter dated May 30, 1986, requested an extension of 120 days to complete discovery and file his pre-hearing memorandum. The Board granted an extension to July 31, 1986.

Inevitably, the pre-hearing memorandum was not filed and the Board then received a withdrawal of appearance from Fedorchik's counsel on August 11, 1986. A default notice was then issued directly to Fedorchik on August 13, 1986, requesting a response on or before September 3, 1986.

By letter dated August 15, 1986, a third attorney, who represented Fedorchik in other matters, requested additional time to allow Fedorchik to obtain counsel experienced in environmental matters. The Board, by order dated September 3, 1986, allowed Fedorchik until October 31, 1986 to obtain counsel and file his pre-hearing memorandum.

The Board learned that Fedorchik was hospitalized and undergoing rehabilitation in Florida, and, by order dated December 12, 1986, granted him an extension to June 1, 1987 to file his pre-hearing memorandum. Again, by letter dated May 29, 1987, the last attorney contacted by Fedorchik requested an extension for Fedorchik to obtain counsel and file his pre-hearing memorandum. On June 4, 1987, the Board granted an extension to July 22, 1987. Yet another counsel entered his appearance on behalf of Fedorchik on July 24, 1987, and requested an extension to file his pre-hearing memorandum.

The Board generously granted an extension to September 30, 1987, requiring the filing of a status report on that date. Fedorchik, predictably, failed to file the status report and failed to respond to a December 9, 1987 default notice. The Board then, on March 8, 1988, issued a rule upon Fedorchik to show cause why his appeal should not be dismissed for lack of prosecution. The rule, which was sent via certified mail to Fedorchik's attorney at the address included in his notice of appearance (the same address registered with the Supreme Court), was returnable on or before March 29, 1988. The rule was returned to the Board as unclaimed on March 27, 1988.

The Board has been extremely solicitous of Fedorchik's difficulties. Indeed, we have done everything to protect Fedorchik's rights short of prosecuting his appeal for him. We can no longer devote our strained resources to attempts to perpetuate an appeal where the appellant hasn't shown any inclination to pursue it himself.

O R D E R

AND NOW, this 28th day of April, 1988, it is ordered that the appeal of John W. Fedorchik is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: April 28, 1988

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bl

TOWNSHIP OF ABINGTON	:	
	:	
v.	:	**EHB Docket No. 85-087-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 28, 1988**

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

Grantee's motion for summary judgment in an appeal of the Department of Environmental Resources' refusal to approve the entire amount of two federal sewage construction grant change orders is denied where grantee has failed to identify the applicable law and, as a result, the Board cannot determine whether there are material issues of fact in dispute, much less whether the grantee is entitled to judgment as a matter of law.

O P I N I O N

This matter was initiated on March 28, 1985, with the filing of a notice of appeal by Abington Township (Abington), Montgomery County. Abington is seeking the Board's review of two February 28, 1985 letters from the Department of Environmental Resources (Department) relating to federal construction grant funding for the upgrade of Abington's Sandy Run sewage treatment plant. More specifically, the two letters related to change orders submitted to the Department for construction grant funding approval as a result of lump sum settlements negotiated by Abington with REMSCO, its general

contractor, and ARACO, its heating, ventilation, and air conditioning (HVAC) contractor.

The change orders were submitted to the Department pursuant to 25 Pa. Code §103.14 as a result of the Board's opinion and order in Abington Township v. DER, 1984 EHB 933. They were necessitated by additional time required and additional costs incurred as a result of various conditions arising during the construction of the treatment plant. The dollar amounts submitted in each change order represented lump sum settlements negotiated between Abington and the contractors under §11.C.1.a of their contracts; in the case of REMSCO, the claimed additional costs and expenses were audited by Price-Waterhouse.

One of the Department's letters related to Change Order No. 2 of Contract 5L, the REMSCO contract (REMSCO change order). Abington sought Department approval for a time extension of 309 days and $560,000 in additional costs. The Department approved the entire time extension sought, but disapproved $138,608 of the amount claimed for grant participation. The $138,608 was broken down into two categories, $124,619 for office overhead and $13,989 for bond and insurance premiums. The Department contended that under §11.2.B of the general conditions in the REMSCO/Abington contract, office overhead was not an allowable cost and that under §11.2.B.4, the cost of the premiums for bonds and insurance was impermissible.

The other Department letter related to Change Order No. 2 of Contract 7B, the ARACO contract (ARACO change order). Abington sought approval of a 318 day time extension and $36,894.27 in additional grant monies. The Department approved the entire time extension and $35,081.94 of the additional costs. The $1,812.33 disallowed for grant participation fell into two categories, interest on retainage and bonding and insurance premiums. The Department claimed again that under §11.2.B.4 of the general conditions of the

contract between ARACO and Abington, the bond and insurance premiums were ineligible. The letter went on to state that interest on retainage was not eligible for grant participation.

Abington contends that the Department misinterpreted the language in the contracts between Abington and its two contractors and acted inconsistently with the Board's prior 1984 order.

The parties duly filed their pre-hearing memoranda, and a hearing on the merits was scheduled on March 17, 1986, before former Member Mazullo. As a result of Mazullo's January 31, 1986, resignation, the hearing was canceled, and the matter was reassigned to Chairman Woelfling. During a pre-hearing conference call on March 7, 1986, Abington expressed its intent to file a motion for partial summary judgment, and it filed the motion on March 14, 1986. The Department responded to the motion, and both parties filed briefs in support of their respective positions.

Abington contends that the Department is bound to administer construction grants in accordance with the contracts executed by the grantee and its contractors; that Articles 10 and 11 of Contracts 5-L and 7-B governed the change orders in this instance; that all costs incurred and payable through duly issued change orders are grant eligible; and that the Department erroneously interpreted the language of the contracts as prohibiting payment for interest on retainage, premiums for bonds and insurance, and overhead.

The Department, on the other hand, argues that its evaluation of change orders must be guided both by the language of the relevant contracts and the applicable federal grant regulations. The Department also disputes that any costs related to a duly issued change order are grant eligible and that the contracts permit the contractor to change central office, as opposed to project site, overhead. The Department also denied that all costs

associated with bond and insurance premiums are ineligible, and alleges that Abington failed to submit any documentation relating to when the bond and insurance premium costs were incurred.

We are empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Antrim Mining v. DER, EHB Docket No. 84-094-M (Opinion and order issued February 18, 1988). We must, of course, view the motion in the light most favorable to the non-moving party. Warrington Township Municipal Authority v. DER, EHB Docket No. 86-203-W (Opinion and order issued November 17, 1987).

Here, we must deny the motion for summary judgment because Abington, the moving party, has utterly failed to demonstrate to us why it is entitled to judgment as a matter of law. In fact, there is not a single citation to any law or regulation in Abington's motion and brief, nor is there any discussion of why Abington is entitled to judgment as a matter of law. Since there has been no identification of the relevant law, we can hardly determine what facts are material, much less whether they are at issue. Furthermore, it is not our responsibility to make Abington's case for it.

While we are mindful that this matter has languished before the Board for a lengthy time, we cannot use that as an excuse to dispose of the appeal where the moving party has failed to satisfy its burden. Accordingly, we will enter the following order.

O R D E R

AND NOW, this 28th day of April, 1988, it is ordered that Abington Township's motion for partial summary judgment is denied. A hearing on the merits of this matter shall be scheduled expeditiously.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 28, 1988

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WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

THROOP PROPERTY OWNERS ASSOCIATION	:	
	:	
v.	:	EHB Docket No. 87-185-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	
KEYSTONE LANDFILL, INC., Permittee	:	Issued: April 28, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The Department's entry into a consent order and agreement is subject to review by the Board.

An appeal contesting a consent order and agreement will not be dismissed for failure to perfect the appeal by notifying the permittee where the language of the Board rules does not specify that the other party to the agreement must be notified by the appellant.

An appeal will not be dismissed for lack of standing where the facts alleged are sufficient to establish the potential for direct, immediate and substantial harm to the appellants.

A motion to limit issues and preclude the raising of the permittee's failure to appeal an order of the Department of Environmental Resources which was both enjoined and superseded by the Commonwealth Court is granted.

OPINION

On May 14, 1987, the Throop Property Owners Association (Throop) and three of its members filed an appeal from a Consent Order and Agreement (COA) between the Department of Environmental Resources (Department) and Louis DeNaples t/d/b/a Keystone Landfill (collectively Keystone) involving abatement of violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL). The COA superseded most of the provisions of the Department's March 31, 1987 order to Keystone closing its Logan landfill and suspending Keystone's operating permits for its three sites located in Dunmore Borough, Lackawanna County. The Keystone landfill includes the areas covered by SWMA Permit Nos. 100174 (Dunmore site), 100803 (Keystone site), and 101247 (Logan site). Throop objects to the COA because it supersedes the earlier imposed closure of the Logan site and allows the continued operation of the site. In its notice of appeal, Throop enumerates alleged illegalities committed by Keystone in its operation of the sites and concludes these violations indicate a lack of intent to comply with the SWMA and the CSL, and violate Throop's rights under the Pennsylvania Constitution, Article I, Section 27, to clean air, pure water, and the preservation of the environment, therefore, rendering the COA unlawful, inadequate, unsatisfactory, and inappropriate because it fails to resolve the problems posed by Keystone's operations.

On June 25, 1987, Keystone filed three separate motions to dismiss; two are entitled "Motion to Dismiss" and one is entitled "Motion to Dismiss Appeal for Lack of Standing to Contest Enforcement Order." Contemporaneous

with the filing of these various motions, Keystone filed a motion to stay proceedings pending the Board's disposition of the these motions. The Board granted the motion to stay proceedings in an order dated June 29, 1987.

The first motion to dismiss alleges that Throop never sent a copy of its notice of appeal to Keystone, the permittee and, therefore, Throop never perfected its appeal. The Department had no objections to Keystone's motion to dismiss. Throop responds by claiming that the Board's rules do not specify the permittee as a "necessary party" in an appeal of a COA. In the alternative, Throop asserts that the Board served a copy of Throop's May 14, 1987 notice of appeal upon Throop's attorney on May 29, 1987, thereby constructively notifying Throop within 30 days of the April 29, 1987 COA action being appealed in accordance with 25 Pa.Code §21.52(a) and, further, within a reasonable time as required by the Board's holding in Czambel v. DER, 1980 EHB 508.

The Board has jurisdiction over an appeal if it is filed within 30 days of the party appellant's receiving notice of the Department's action and the appeal is perfected in accordance with the requirements of Rule 21.52(b), which states that:

> (b) No appeal from the granting of a permit, license, approval or certification may be deemed to be perfected unless and until the recipient of the permit, license, approval or certification is served with a notice of appeal in §21.51 (relating to commencement, form and content).

Section 21.51(f)(3) of the Rules requires an appellant to serve a copy of its notice of appeal on the permittee within 10 days after filing its appeal. Given that §21.52(b) does not specifically impose a notification requirement in an appeal of an action such as this, we may hardly dismiss Throop's appeal

for its failure to serve a copy on Keystone.[1]

Keystone's second motion to dismiss alleges that none of the named appellants has standing to appeal the COA, since all reside in Throop Borough and the COA relates solely to activities of Keystone in Dunmore Borough. Since appellants are all residents of a municipality adjacent to that where the facility is located, Keystone alleges that the appellants must show that the Department's action is likely to cause them an injury which is substantial, immediate and direct, William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), amd that Throop has standing to represent its members in an appeal only if some of its members themselves would have standing to appeal. Del-Aware Unlimited, Inc. v. DER, 1984 EHB 178, 265. The Department joins in Keystone's motion to dismiss.

In its answer to the motion to dismiss, Throop indicates under the category "New Matter," that its named appellants are all members of the Throop Property Owners Association, all three reside within 2800 to 8700 feet of the landfill, and all are detrimentally affected and aggrieved by the COA, due to the possible health effects of materials deposited at the landfill and odors, dirt and leachate emanating from the landfill, all of which constitute a nuisance and an interference with use and enjoyment of their community's property. On July 24, 1987, Throop filed a motion to supplement and amend its appeal to include this new matter. The facts alleged by Throop in its supplementary material are sufficient to establish the potential for direct,

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[1] We decline to adopt Throop's argument that the Board satisfied this requirement by sending a copy of Throop's appeal to Keystone. The Board is not responsible for service of parties' pleadings, correspondence, and briefs.

immediate and substantial harm to appellants under the test of William Penn Parking Garage, supra, and, therefore, we find that Throop does have standing to pursue this appeal.

Keystone, citing Gerald C. Grimaud v. DER, 1986 EHB 1156, filed a motion to dismiss for lack of standing to contest an enforcement order, claiming that the COA is a discretionary enforcement action by the Department and is, therefore, not reviewable by the Board. The Department joined in Keystone's motion, asserting that Sections 503(c) and (e) of the SWMA grant the Department discretionary authority in determining whether or not to deny a license or permit.

Throop counters that the Department cannot be allowed to escape scrutiny of its COAs by characterizing them as discretionary enforcement actions. Throop admits that the Department has discretion to decide whether or not to take action with respect to a particular facility, site, or company, but once it does decide to act, its actions are subject to appeal and review by the Board.

We believe the Grimaud opinion, which held that the Department's refusal to suspend a water quality management permit upon the request of a third party was an exercise of enforcement discretion and, therefore, not reviewable by the Board, is distinguishable from Throop's appeal. The Grimaud decision relied on the earlier Board decision in George Eremic v. DER, 1976 EHB 249, aff'd 1976 EHB 324, which held that the Department's refusal to revoke a solid waste permit upon request of a third party, an adjacent landowner, was not an appealable action. Reasoning that the Department's action was not a final action or adjudication as defined by the Administrative Agency Law, the Board, in Eremic, explained that in order for an exercise of administrative discretion to be adjudicatory, it must affect personal and

property rights. The Board then determined that the Department's refusal to revoke the permits, which was challenged in Eremic's appeal, had no substantial impact on his rights.

Applying the reasoning employed in Eremic to the instant case, we find that the Department's bringing Keystone into compliance with the law using a COA is a final order, decree, decision, determination or ruling affecting the personal or property rights of Throop in accordance with Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.2(a)(1). Although the Department had discretion to select the COA as a means of enforcement against Keystone, the COA itself, as Throop points out, is a final action of the Department affecting the personal and property rights of the members of the Throop Association and, as such, is subject to challenge by those affected and review by the Board.

Finally, Keystone, on June 25, 1987, filed a motion for partial summary judgment to have that portion of Throop's appeal which relies on the administrative finality of the Department's unappealed March 31, 1987 order to Keystone declared a legally insufficient basis for this appeal. Keystone maintains it did not appeal the March 31, 1987 order because that order was superseded by the ensuing COA. Prior to the issuance of the COA, Keystone was pursuing a separate appeal in the Commonwealth Court seeking temporary and permanent injunctive relief from the Department's March 31 order. Keystone Landfill, Inc. et al. v. DER, No. 764 C.D. 1987. Keystone states that the taking of jurisdiction by the Commonwealth Court and its issuance of a special injunction enjoining the Department from enforcing its March 31, 1987 order precluded any appeal of that order to the Board and also deprived the Board of jurisdiction. The Department joined in Keystone's motion for partial summary

judgment, but only on the grounds that the COA superseded the March 31, 1987 order. Throop responds that because the March 31, 1987 order was not appealed, it became final as to Keystone Landfill in all respects to which it was not lawfully withdrawn or superseded.

While we do not address Keystone's argument that the Board was deprived of jurisdiction by the Commonwealth Court proceedings, we do believe that Judge Collins' April 13, 1987 issuance of a special injunction, coupled with the COA, make the issue of Keystone's compliance with the March 31, 1987 order irrelevant. Judge Collins' order states, in relevant part, that the Department is

> restrained and enjoined from issuing or enforcing any closure, cessation, compliance, or other orders relating to the enforcement of an order issued by the Department on March 31, 1987,...
>
> It is the intention of the Court, by the issuance of this Order, to return the Petitioners to the Status Quo Ante as it existed prior to the issuance of the aforesaid order of March 31, 1987.
>
> (emphasis added)

Furthermore, Paragraph 30 of the COA states that:

> This Consent Order and Agreement supersedes the Department order dated March 31, 1987 issued to Louis DeNaples t/d/b/a Keystone Landfill Incorporated, except for the denial of Keystone's application for an amendment to Permit No. 100174, which remains in full force and effect. Keystone hereby waives its right to appeal from the denial of the application for an amendment to Permit No. 100174.

Since the March, 1987 order was both enjoined by the Commonwealth Court and subsequently superseded by the COA, it is irrelevant. We will treat

Keystone's motion as a motion to limit issues and preclude Throop from challenging the COA on the basis of Keystone's failure to appeal and comply with the March 31, 1987 order.

O R D E R

AND NOW, this 28th day of April, 1988, it is ordered that:

1) Keystone's motions to dismiss for failure to perfect, lack of standing, and lack of standing to contest an enforcement order are denied;

2) Keystone's motion for partial summary judgment shall be treated as a motion to limit issues and is granted. Throop is precluded from raising any issues relating to Keystone's failure to appeal the Department's March 31, 1987 order or its alleged non-compliance with that order;

3) Throop is given leave to amend and supplement its notice of appeal as set forth in its motion to amend and supplement its appeal;

4) All discovery in this matter shall be completed on or before June 10, 1988;

5) Throop shall file its pre-hearing memorandum on or before June 24, 1988; and

6) Keystone and the Commonwealth shall file their pre-hearing memoranda on or before July 13, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 28, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Randall J. Brubaker, Esq.
Philadelphia, PA
For Permittee:
William P. Conaboy, Esq.
ABRAHAMSEN, MORAN, CONNOLLY
& CONABOY
Scranton, PA

bl

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

DALE A. TORBERT and BARBARA TORBERT	:	
	:	
v.	:	**EHB Docket No. 86-217-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 29, 1988

OPINION AND ORDER
SUR
MOTION TO QUASH ORDER

Synopsis

A Motion to Quash an Order of the Department of Environmental Resources (DER), treated as a Petition for Supersedeas or a Motion for Summary Judgment, is denied, since the automatic stay provisions of the Bankruptcy Reform Act of 1978 do not affect state action to enforce its police and regulatory powers, and since no specific order staying DER's action has been entered by the Bankruptcy Court.

OPINION

On March 20, 1986, DER, acting pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations promulgated thereunder, entered an Order against Dale A. Torbert and Barbara Torbert (Appellants) requiring the prevention of manure discharges into the waters of the Commonwealth and the submission of plans for correction thereof within specified periods, as a

result of the operation of a swine feeder by Appellants on property owned by them in Fawn Township, York County.

On April 21, 1986, Appellants filed a Notice of Appeal with the Board, seeking review of DER's Order. With the Notice of Appeal, Appellants filed a Motion to Quash DER's Order, alleging that they are in bankruptcy and are protected by the automatic stay provisions in the Bankruptcy Reform Act of 1978, 11 U.S.C. §362(a). DER filed a Response to the Motion to Quash on May 19, 1986. While the Response does not specifically admit or deny the allegations contained in the Motion (in apparent violation of 25 Pa. Code §21.64(e)), it asserts that the automatic stay provisions do not prohibit state action to enforce compliance with environmental laws.

The Board's Rules of Practice and Procedure (25 Pa. Code §21.1 et seq.) do not countenance a motion to quash a DER Order which is the subject of an appeal. The substance of the Motion before us most closely resembles a Petition for Supersedeas or a Motion for Summary Judgment; and we will treat it as such for purposes of disposition.

Since the facts alleged in the Motion are not supported by affidavits (See Pa. R.C.P. 1035 and 25 Pa. Code §21.77), we could deny the Motion without further consideration. However, since DER did not dispute the allegation that Appellants are in bankruptcy, we will treat that fact as having been admitted by DER.

The filing of a bankruptcy petition generally operates as an automatic stay of pending actions and of the commencement of new actions. Bankruptcy Reform Act of 1978, 11 U.S.C. §362(a). The stay provision, however, has been held not to apply to actions to enforce a state's police power or regulatory power. 11 U.S.C. §362(b)(4); Penn Terra Limited v. Department of Environmental Resources, 733 F.2d 627 (3rd Cir. 1984). That

case sustained the power of DER to seek enforcement, inter alia, of the Clean Streams Law as an exercise of its police and regulatory powers.

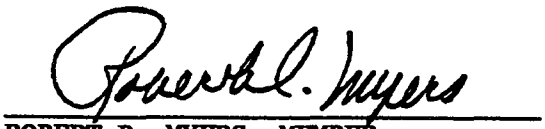
In the present case, DER's Order seeks to bring about compliance with the provisions of the Clean Streams Law and the rules and regulations promulgated thereunder. It does not seek a "money judgment," although compliance with the Order may require the expenditure of money. Consequently, the Order is not affected by the automatic stay provisions of the Bankruptcy Reform Act of 1978, supra. See Ohio v. Kovac, 469 U.S. 274, 105 S. Ct. 705 (1985), and Brock v. Monysville Body Works, Inc., 829 F.2nd 383 (3d. Cir., 1987).

Moreover, it is the Bankruptcy Court, and not the Board, that has the power to enforce the automatic stay provisions. Appellants have not alleged that the Bankruptcy Court has issued an order staying DER's action, and the Board has no independent knowledge of any such order. Accordingly, we must assume that no such order has been issued.

ORDER

AND NOW, this 29th day of April, 1988, it is ordered that the Motion to Quash Order as filed by Dale A. Torbert and Barbara Torbert at Docket No. 86-217-M is hereby denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: April 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Amy L. Putnam, Esq.
Central Region
For Appellant:
John W. Thompson, Jr., Esq.
York, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

VAUGHN TORBERT, et al.	:	
	:	
v.	:	**EHB Docket No. 86-218-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 29, 1988

OPINION AND ORDER
SUR
MOTION TO QUASH ORDER

Synopsis

A Motion to Quash an Order of the Department of Environmental Resources (DER), treated as a Petition for Supersedeas or a Motion for Summary Judgment, is denied, since the automatic stay provisions of the Bankruptcy Reform Act of 1978 do not affect state action to enforce its police and regulatory powers, and since no specific order staying DER's action has been entered by the Bankruptcy Court.

A Motion to Quash DER's Order, treated as above, also will be denied when the parties for whom the relief is requested, have not joined in the Motion.

OPINION

On March 20, 1986, DER, acting pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations promulgated thereunder, entered

an Order against Vaughn Torbert, Jack Koontz, Dale A. Torbert, Barbara Torbert, Joseph P. Deller and Norma J. Deller (Appellants) requiring the prevention of manure discharges into the waters of the Commonwealth and the submission of plans for correction thereof within specified periods, as a result of the operation of a swine feeder, allegedly by the Torberts and Koontz, on property owned by the Dellers in Lower Chanceford Township, York County.

On April 21, 1986, Appellants filed a Notice of Appeal with the Board, seeking review of DER's Order. With the Notice of Appeal, Appellants Dale A. Torbert and Barbara Torbert filed a Motion to Quash DER's Order, alleging that (1) they are in bankruptcy and are protected by the automatic stay provisions in the Bankruptcy Reform Act of 1978, 11 U.S.C. §362(a), and that (2) Appellants Vaughn Torbert and Jack Koontz were improperly included in the Order. DER filed a Response to the Motion to Quash on May 19, 1986. While the Response does not specifically admit or deny the allegations contained in the Motion (in apparent violation of 25 Pa. Code §21.64(e)), it asserts that (1) the automatic stay provisions do not prohibit state action to enforce compliance with environmental laws, and that (2) Vaughn Torbert and Jack Koontz will have an opportunity to contest their liability in hearings before the Board.

The Board's Rules of Practice and Procedure (25 Pa. Code §21.1 et seq.) do not countenance a motion to quash a DER Order which is the subject of an appeal. The substance of the Motion before us most closely resembles a Petition for Supersedeas or a Motion for Summary Judgment; and we will treat it as such for purposes of disposition.

Since the facts alleged in the Motion are not supported by affidavits (See Pa. R.C.P. 1035 and 25 Pa. Code §21.77), we could deny the Motion without

further consideration. However, since DER did not dispute the allegation that Dale A. Torbert and Barbara Torbert are in bankruptcy, we will treat that fact as having been admitted by DER.

The filing of a bankruptcy petition generally operates as an automatic stay of pending actions and of the commencement of new actions. Bankruptcy Reform Act of 1978, 11 U.S.C. §362(a). The stay provision, however, has been held not to apply to actions to enforce a state's police power or regulatory power. 11 U.S.C. §362(b)(4); Penn Terra Limited v. Department of Environmental Resources, 733 F.2d 627 (3rd Cir. 1984). That case sustained the power of DER to seek enforcement, inter alia, of the Clean Streams Law as an exercise of its police and regulatory powers.

In the present case, DER's Order seeks to bring about compliance with the provisions of the Clean Streams Law and the rules and regulations promulgated thereunder. It does not seek a "money judgment," although compliance with the Order may require the expenditure of money. Consequently, the Order is not affected by the automatic stay provisions of the Bankruptcy Reform Act of 1978, supra. See Ohio v. Kovac, 469 U.S. 274, 105 S. Ct. 705 (1985), and Brock v. Monysville Body Works, Inc., 829 F.2nd 383 (3d. Cir., 1987).

Moreover, it is the Bankruptcy Court, and not the Board, that has the power to enforce the automatic stay provisions. Dale A. Torbert and Barbara Torbert have not alleged that the Bankruptcy Court has issued an order staying DER's action, and the Board has no independent knowledge of any such order. Accordingly, we must assume that no such order has been issued.

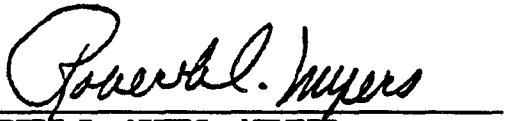
With respect to Vaughn Torbert and Jack Koontz, we note that the only factual assertion concerning their status is the unsworn allegation of Dale A.

Torbert and Barbara Torbert. In the absence of an admission, an unsworn allegation is not a sufficient basis for granting a supersedeas or summary judgment. While DER's failure to specifically deny the allegation could be construed as an admission, the Motion is still defective. Vaughn Torbert and Jack Koontz, the two parties who are alleged to have been improperly included in DER's Order, have not joined in the Motion. They have not sought any relief, and Dale A. Torbert and Barbara Torbert have not established any authorization to act on their behalf.

ORDER

AND NOW, this 29th day of April, 1988, it is ordered that the Motion to Quash Order as filed by Dale A. Torbert and Barbara Torbert at Docket No. 86-218-M is hereby denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: April 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Amy L. Putnam, Esq.
Central Region
For Appellant:
John W. Thompson, Jr., Esq.
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mjf

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF DEEP MINE SAFETY, Plaintiff	:	
v.	:	
MICHAEL HANCHER, Defendant	:	Docket No. 84-330-F
CLARK McELHOES, Defendant	:	Docket No. 84-331-F
WILBUR GUILE, Defendant	:	Docket No. 84-332-F
ANGELO SWANHART, Defendant	:	Docket No. 84-333-F
FRANCIS DWYER, Defendant	:	Docket No. 84-334-F
JAMES MILLIGAN, Defendant	:	Docket No. 84-335-F
JOSEPH DUNN, Defendant	:	Docket No. 84-336-F
		Issued: May 12, 1988

OPINION AND ORDER SUR
MOTION TO CONSOLIDATE FOR HEARING

Synopsis

Seven separate complaint proceedings arising from the same mining accident are consolidated into two groups for hearings. The decision whether to consolidate cases for hearing is discretionary. The consolidation of complaint cases into two groups for hearings is ordered where this

consolidation will serve administrative economy while also protecting the rights of the Defendants and aiding the Board in managing the proceedings.

OPINION

These seven cases were initiated by separate complaints filed by the Department of Environmental Resources (DER) on September 11, 1984. All of the Complaints arose from the circumstances surrounding an accident in which a miner was killed at the Helen Mining Company Mine in Homer City, Indiana County, Pennsylvania on July 3, 1983. Defendants Guile, Swanhart, Dwyer, and Milligan were all assistant mine foremen at the mine. Defendant Clark McElhoes was mine foreman at the mine; Defendant Joseph Dunn was acting mine foreman. Defendant Michael Hancher was the Superintendent of the Helen Mine. DER's complaints allege that the Defendants breached, in varying degrees, their certificates of qualification which authorize the Defendants to engage in their respective mining occupations. DER is seeking a one year suspension of the certificates of Hancher, McElhoes, Dunn, Milligan, and Dwyer--and an absolute revocation of the certificates of Swanhart and Guile.

On April 21, 1988, DER filed a Motion to Consolidate for Hearing the proceedings against each of the seven Defendants. Defendants Hancher, McElhoes, and Dunn filed a response to this Motion on May 5, 1988. Defendants Milligan, Guile, Swanhart, and Dwyer filed an Answer to the Motion on the same date. Both of these groups of Defendants opposed consolidation of the cases.

In support of its Motion, DER contends that consolidation is appropriate under 25 Pa. Code §21.80[1] because the cases involve common

---

[1] This regulation provides in relevant part: "The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings." 25 Pa. Code §21.80(a)

questions of fact and law. The common facts are the procedures and events at the mine leading up to the explosion on July 3, 1983. The common legal issues involve the standards for suspending or revoking the certificates issued to the Defendants. In addition, DER asserts that consolidation will serve judicial economy as DER intends to rely on the same panel of witnesses for all the cases.

Defendants Hancher, McElhoes, and Dunn oppose consolidation because they claim that they will be prejudiced by the evidence introduced by the Commonwealth against the other four Defendants, presumably because the Board will lump all of the evidence together in an indiscriminate manner. These Defendants cite precedents from criminal cases in support of the argument that consolidation is inappropriate when numerous defendants are charged with various offenses growing out of the same incident because some of the defendants may not be charged with all of the offenses. See e.g. Commonwealth v. Belgrave, 445 Pa. 311, 285 A.2d 448 (1971). Hancher, McElhoes, and Dunn contend that in cases such as this the defendants' rights to due process and a fair trial outweigh considerations of judicial economy.

Defendants Guile, Swanhart, Dwyer, and Milligan oppose consolidation because of the differences in the factual allegations against each Defendant, and the danger of confusing the evidence against the various Defendants. These Defendants--all of whom were assistant foremen at the mine--argue that this danger will be heightened if their four cases are consolidated with the cases of their superiors at the mine--Defendants Hancher, McElhoes, and Dunn. The assistant foremen argue that if the hearings of these two groups are held together, the witnesses will have to be cross-examined twice (presumably because the interests of these two groups may be antagonistic to each other), which will unduly prolong the hearing. Finally, these Defendants argue that

if all of the cases are consolidated, all of the Defendants will be compelled to be present for each day of a multi-week hearing--which will result in extensive time away from work for the Defendants.

In the area of criminal law, the Supreme Court of Pennsylvania has held that the decision whether to consolidate cases is committed to the discretion of the trial judge, and that his decision in such matters will only be reversed for a manifest abuse of discretion. Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954), cert. denied 348 U.S. 875, 75 S.Ct. 112, 99 L.Ed. 688 (1954), Commonwealth v. Belgrave, 445 Pa. 311, 285 A.2d 448 (1971). This principle is consistent with the regulation governing consolidation of cases before the Board, which states that the Board "may order proceedings involving a common question of fact or law to be consolidated for hearing . . ." 25 Pa. Code §21.80(a) (emphasis supplied).

In these cases, it is appropriate to consolidate the complaints against the four assistant foremen (Guile, Swanhart, Milligan, and Dwyer) in one hearing, and the complaints against the other three Defendants (Hancher, McElhoes, and Dunn) in another hearing. This consolidation will save time and resources, since there are many common questions of fact and law within each of these groups of complaints. The Defendants will not be prejudiced by the consolidation because the Board will provide a written decision with separate findings of fact relating to each Defendant; this will guard against the danger of intermingling the evidence against the Defendants.

Consolidation of all seven complaints in one hearing is inappropriate for two reasons. First, the interests of the two groups of Defendants may be

antagonistic[2]; thus, there is the possibility that the testimony of certain witnesses will not only justify the behavior of one Defendant, but also will implicate another Defendant. This is undesirable because it could lead to confusion regarding the purpose of that testimony. Even if this danger were remedied by allowing two cross-examinations of each witness, this could prolong the hearing unduly, and could be an undue imposition on the Defendants in that they will feel compelled to be present for the entire course of the hearing. Second, in light of the number of Defendants, the difference in the duties of the two groups of Defendants, and the amount of evidence which is expected to be submitted, this matter will be more manageable if the proceedings are consolidated into two hearings instead of one.

In summary, the consolidation of these complaints into two groups for hearings will serve administrative economy while also protecting the rights of the Defendants and aiding the Board in managing these proceedings.

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[2] The Defendants' responses to DER's Motion to Consolidate do not indicate that the interests of the members within each group are antagonistic. Furthermore, we presume that there is no such antagonism from the fact that each group is represented by one counsel--this would appear to be a conflict of interest if the interests of the group members were opposed.

O R D E R

AND NOW, this 12th day of May, 1988, it is ordered that:

1. DER's Motion to Consolidate for Hearing is granted in part and denied in part.
2. The complaints against Defendants Michael Hancher at 84-330-F, Clark McElhoes at 84-331-F, and Joseph Dunn at 84-336-F are hereby consolidated for hearing.
3. The complaints against Defendants Wilbur Guile at 84-332-F, Angelo Swanhart at 84-333-F, Francis Dwyer at 84-334-F, and James Milligan at 84-335-F are hereby consolidated for hereby consolidated for hearing.
4. The hearings in these two consolidated proceedings shall be scheduled expeditiously.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK,
Hearing Examiner

DATED: May 12, 1988

cc: **For the Commonwealth, DER:**
Gail B. Phelps, Esq.
Central Region
For Defendants:
R. Henry Moore, Esq.
Ronald S. Cusano, Esq.

nb

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Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT A. AND FLORENCE PORTER	:	
	:	
v.	:	EHB Docket No. 84-240-R
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	: : : :	Issued: May 13, 1988

OPINION AND ORDER
SUR
MOTION TO INTERVENE

Synopsis

A motion to intervene in an appeal is denied where the petitioner fails to state its interest, how that interest is or may be inadequately represented, and what evidence the prospective intervenor may present.

OPINION

This matter is an appeal by Robert A. and Florence Porter (together, Porter) from the Department of Environmental Resources' (DER) issuance of Subsidence Control Permit No. 3048301 and Coal Mining Activity Permit No. 3084301 to Consol Pennsylvania Coal Company (Consol PA). The permits involve Consol PA's Purseglove Mine No. 15 located in Perry Township, Greene County.

This appeal is currently scheduled for hearing on May 23-24, 1988. The instant matter involves a motion to intervene filed by Joseph George, Catherine George and George Enterprises (collectively, George). George states that he is the owner of three tracts of land overlying the Purseglove mine.

They aver that they join in each and every allegation contained in the Porter's notice of appeal and supplement thereto. In addition, the Georges assert that the appealed-from permits deprive them of protections afforded them by various state and federal statutes. The Georges assert that they have interests which are or may be adversely affected by the issuance of the instant permits.

Intervention is discretionary with the Board and is subject to those terms and conditions which the Board may prescribe. 25 Pa.Code §21.62(b). The factors which the Board considers in ruling upon a petition to intervene include but are not limited to (1) the prospective intervenor's relevant interest; (2) the adequacy of representation provided by the existing parties; and (3) the ability of the prospective intervenor to present relevant evidence. Franklin Twp. v. DER, 1985 EHB 853. See also BethEnergy Mines, Inc. v. DER, EHB Docket No. 86-624-R (Opinion and order issued October 27, 1987).

George's motion is totally deficient as to the factors to be considered. First, the nature of the interest in this matter has not been identified. Second, George has not stated why the Porters are or may be inadequately representing its purported interest in this matter. Finally, George has given no inkling as to the nature of the evidence it will put on. In view of the foregoing, the Board enters the following order.

ORDER

AND NOW, this 13 th day of May, 1988, it is ordered that the motion of Joseph George, Catherine George and George Enterprises to intervene in this matter is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: May 13, 1988

cc: **Bureau of Litigation**
Harrisburg, PA

For the Commonwealth, DER:
Marc Roda, Esq.
Central Region

For Appellant:
Patrick M. McGinley, Esq.
Morgantown, WV

For Permittee:
Daniel Rogers, Esq.
Pittsburgh, PA

For Intervenor:
Robert Shostak, Esq.
Athens, Ohio

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Harrisburg, PA 17101
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M. DIANE SMITH
SECRETARY TO THE BOARD

THOMAS FAHSBENDER	:	
	:	
v.	:	EHB Docket No. 87-514-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 18, 1988

OPINION AND ORDER

Synopsis

The Board is without jurisdiction to hear an appeal from the Tioga County Sanitation Committee's affirmance of the denial of an on-lot sewage disposal system permit under §7 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7. Rather than dismiss the appeal, the Board, pursuant to 42 Pa.C.S.A. §5103(a), transfers it to the Tioga County Court of Common Pleas, which properly has jurisdiction under 42 Pa.C.S.A. §933(a)(2).

OPINION

This matter was initiated by Thomas Fahsbender (Fahsbender) on December 16, 1987 with the filing of a notice of appeal seeking the Board's review of the Tioga County Sanitation Committee's (Committee) November 19, 1987 letter affirming the denial of Fahsbender's application for an on-lot sewage disposal permit under §7 of the Pennsylvania Sewage Facilities Act, the

Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7 (Sewage Facilities Act). The Committee had, on October 26, 1987, held a hearing concerning the denial of Fahsbender's permit application.

Because it appeared that Fahsbender's appeal was not from an action of the Department of Environmental Resources and, therefore, the Board would be without jurisdiction to hear it, the Board, on March 8, 1988, issued a rule upon Fahsbender to show cause why his appeal should not be dismissed for lack of jurisdiction. Fahsbender timely replied to the rule on April 4, 1988, alleging (we believe) that the Board had jurisdiction by virtue of its issuance of a pre-hearing order and the rule.

Under §8 of the Sewage Facilities Act local agencies such as the Tioga County Sanitation Committee are empowered to administer and enforce the permitting program for on-lot sewage disposal systems in §7 of the statute. Section 16(a) of the Sewage Facilities Act provides in pertinent part that:

> Any person aggrieved by an action of a sewage enforcement officer in granting or denying a permit under this act shall have the right within thirty days after receipt of notice of the action to request a hearing before the local agency... Hearings under this subsection and any subsequent appeal shall be conducted pursuant to the Act of December 2, 1968 (P.L. 1133, No. 353), known as the 'Local Agency Law'...

The letter which Fahsbender appealed to the Board is the Tioga County Sanitation Committee's decision relating to the §16(a) hearing on Fahsbender's permit denial. As a result, we are without jurisdiction to entertain an appeal from the Committee's letter. Kenneth G. and Pauline E. Grumbine v. DER, 1980 EHB 336 and David A. Swinehart v. DER, 1981 EHB 601. Jurisdiction over

Fahsbender's appeal properly lies in the Tioga County Court of Common Pleas pursuant to the Local Agency Law, 2 Pa.C.S.A., Ch. 7B, and 42 Pa.C.S.A. §933(a)(2).

Rather than dismiss Fahsbender's appeal for lack of jurisdiction, we are required by 42 Pa.C.S.A. §5103(a) to transfer this appeal to the Tioga County Court of Common Pleas. That section of the Judicial Code provides in relevant part that:

> ...A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

"Tribunal" is defined in 42 Pa.C.S.A. §5103(d) as including any

> judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

Because the Board is such a tribunal, transfer of this matter is both appropriate and required.

O R D E R

AND NOW, this 18th day of May, 1988, it is ordered that:

1) The Board's March 8, 1988 rule is discharged; and

2) The appeal of Thomas A. Fahsbender is, pursuant to 42 Pa.C.S.A. §5103(a), 42 Pa.C.S.A. §933(a)(2), the Local Agency Law, 2 Pa.C.S.A. Chapter 7B, and §16(a) of the Sewage Facilities Act, transferred to the Tioga County Court of Common Pleas.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: May 18, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Central Region
For Appellant:
Thomas Fahsbender
R. D. 1, Box 513
Mansfield, PA 16933

bl

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(717) 787-3483

May 18, 1988

Harold L. Clark, Prothonotary
Tioga County Courthouse
116 Main Street
Wellsboro, PA 16901

RE: Thomas Fahsbender v. Commonwealth of Pennsylvania, Department of Environmental Resources
EHB Docket No. 87-514-W

Dear Mr. Clark:

Pursuant to 42 Pa. C.S.A. §5103(a), the Environmental Hearing Board is transferring Thomas A. Fahsbender's appeal of the Tioga County Sanitation Committee's denial of his on-lot sewage system permit application to the Tioga County Court of Common Pleas. The Board is without jurisdiction to hear the appeal.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling
Chairman

cc: Thomas A. Fahsbender
Norman G. Matlock, Esq.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

THEODORE GENOVESE II	:	
	:	
v.	:	EHB Docket No. 87-165-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 23, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment in an appeal of a compliance order is granted where there is no dispute that Appellant has failed to implement the erosion and sedimentation plan approved as part of his permit application and where DER has authority to issue an order requiring Appellant to comply with the condition of his permit. Erosion and sedimentation control requirements in a surface mining permit which were not appealed are final and may not be collaterally attached in an appeal of a compliance order directing their implementation. An appellant may not raise the issue of impossibility as a defence to an order directing implementation of an erosion plan approved as part of its permit.

O P I N I O N

This matter was initiated by Theodore Genovese II's (Genovese) April 24, 1987 filing of a notice of appeal from a March 25, 1987 Department

of Environmental Resources (DER) compliance order (CO) concerning Genovese's failure to install sedimentation and erosion control measures at his Black Nugget II surface mine in Springhill Township, Fayette County. DER alleged that Genovese had failed to build Sedimentation Pond B (hereinafter, Pond B) and associated ditches, in violation of 25 Pa.Code §87.106 and Special Condition No.1 of Genovese's surface mining permit. Genovese was directed to immediately install the required measures. DER issued its order pursuant to the provisions of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL).

On December 21, 1987, DER filed a motion for summary judgment. DER asserts that, in anticipation of mining, Genovese submitted an application for a surface mining permit (SMP) for the Black Nugget II site. DER alleges that the application included plans for erosion and sedimentation (E & S) controls which, in part, called for the construction of Pond B in an old spoil area several hundred feet west of the existing hollow on the extreme southern perimeter of the permit, prior to Genovese's mining on the Phase II area of the permit. Because Genovese did not timely appeal any of the permit conditions, DER argues that Genovese is collaterally estopped and/or barred under principles of administrative finality from challenging DER's factual or legal basis for issuing the March 24, 1987 CO. DER concludes that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law.

In his response of January 15, 1988, Genovese does not dispute DER's assertions of fact. Rather, he argues that compliance with the approved erosion and sedimentation control plan is impossible, that it would result in

adverse environmental harm, and that he unsuccessfully attempted to develop an alternative plan in cooperation with DER. As to DER's administrative finality argument, Genovese argues, without any support, that plans in a permit application are not to be construed as orders of DER.

The Board has the authority to grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320, 1322 (1978).

DER's authority to require permits for surface mining operations is set forth in §4(a) of SMCRA, 52 P.S. §1396.4(a) and §315(a) of the CSL, 35 P.S. §691.315(a). Additionally, the rules and regulations pertaining to surface mining permits and permit applications specifically provide at 25 Pa.Code §86.41(a) that:

> "[e]xcept to the extent that the Department otherwise directs in the permit that specific actions be taken, the permittee shall conduct all coal mining activities as described in the approved application."

When DER issued Genovese's surface mining permit, he had 30 days from when he received written notice of its issuance in which to appeal any of its conditions, including those pertaining to erosion and sedimentation control. Having failed to do so, Genovese no longer could challenge the efficacy of the plan approved in his permit application. The only avenue open to him was to file an application for amendment to his permit, a route he chose not to take. To allow a challenge to the erosion and sedimentation control requirement of Genovese's permit in this appeal of the CO would be to condone an impermissible collateral attack on a final DER action. McGal Coal Company, Inc. v. DER, EHB Docket No. 86-116-R (Opinion and order issued December 16, 1987). Therefore, we hold that the erosion and sedimentation

requirements in Genovese's permit are final and he may not collaterally attack them in this appeal of an order directing him to implement those controls.

Operators are required to conduct their surface mining operations in compliance with SMCRA and the rules and regulations adopted thereunder. 52 P.S. §1396.4b; 25 Pa.Code §86.41(a). DER has broad power to issue such orders as are necessary to aid in the enforcement of SMCRA. 52 P.S. §1396.4c. Thus, if Genovese failed to implement his approved erosion and sedimentation control plan, as required by 52 P.S. §1396.4b and 25 Pa.Code §86.41(a), DER's issuance of the compliance order was not an abuse of discretion. Hence, the material facts necessary to our resolution of DER's motion involve whether Genovese installed the required erosion and sedimentation control features. We find no dispute here. Indeed, Genovese has admitted that he began, but did not complete, the required installation of erosion and sedimentation control measures. See Genovese's Objection to Motion for Summary Judgment, Paragraph 12.

Genovese's argument that implementation of the required erosion and sedimentation control measures is technically impossible is irrelevant to this appeal, as our task is only to determine the validity of DER's order. See Mt. Thor Minerals,Inc. v. DER, 1986 EHB 128, quoting Ramey Borough v. DER, 466 Pa. 45, 351 A.2d 613 (1975). Such a defense might be raised in a proceeding to enforce the order.

Because there are no disputed issues of material fact and DER is entitled to judgment as a matter of law, we will grant DER's motion for summary judgment.

ORDER

AND NOW, this 23rd day of May, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of Theodore Genovese II is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: May 23, 1988

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

PYRRA MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 87-411-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
TUNNELTON MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 87-421-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
FLORENCE MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 87-422-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 23, 1988

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

Synopsis

A motion for reconsideration is granted and three appeals are reinstated.

O P I N I O N

On April 11, 1988, the Board dismissed the appeals of Pyrra Mining Company (Docket No. 87-411-R), Tunnelton Mining Company (Docket No. 87-421-R), and Florence Mining Company (Docket No. 87-422-R) (Appellants) from the

Department of Environmental Resources' (DER) issuance of coal mining activities permits for failure to prosecute after the Appellants each failed to respond to two notices regarding the obligation to file pre-hearing memoranda, and rules to show cause why the appeals should not be dismissed for failure to prosecute. The Board has, on numerous occasions, dismissed appeals under these circumstances, e.g., Benjamin Coal Company v. DER, EHB Docket No. 87-234-W (Opinion and order issued April 11, 1988).

On April 22, 1988, the Appellants timely filed identical petitions for reconsideration of the Board's dismissal order. They assert that many of the issues raised in these appeals are identical to those raised at Docket No. 85-213-R and that, on March 8, 1988, they wrote to the Board and requested that these appeals either be continued pending disposition of Docket No. 85-213-R or that they be consolidated with Docket No. 85-213-R. Appellants complain that although the Board informed them that they should file requests to consolidate these appeals with Docket No. 85-213-R, the Board entered its dismissal orders before they file consolidation requests. Appellants also contend that they were diligently prosecuting these appeals in that, inter alia, they were actively conducting discovery and were drafting a comprehensive pre-hearing memorandum.

The Board did indeed receive a letter dated March 8, 1988 from counsel for the Appellants, but the letter was captioned "Rushton Mining v. DER EHB 85-213-R" and requested that certain cases listed on an attachment, including these three appeals, either be continued or consolidated with those at Docket No. 85-213-R. The Board, in an order at Docket No. 85-213-R dated March 10, 1988 directed that a proper motion be filed should stay or consolidation be desired.

Appellant's failure to adhere to the Board's rules was the reason for

the dismissal of these appeals and Appellants have not adequately explained that failure in their request for reconsideration. We do not excuse that failure, but believe that perhaps our oversight in reviewing Appellants' lengthy and inartfully phrased March 8, 1988 letter may have led to a hasty dismissal. For this reason and because DER will not be prejudiced as these are but three of many related appeals, we have reconsidered and reversed our earlier dismissals.

O R D E R

AND NOW, this 23rd day of May, 1988, it is ordered that the motions for reconsideration filed by Pyrra Mining Company, Tunnelton Mining Company and Florence Mining Company at Docket Nos. 87-411-R, 87-421-R and 87-422-R are granted and the appeals are reinstated.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: May 23, 1988

cc: **Bureau of Litigation**
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