Environmental Hearing Board

Adjudications and Opinions

2005

VOLUME I

COMMONWEALTH OF PENNSYLVANIA

Michael L. Krancer, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2005

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2005.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources (now the Department of Environmental Protection) by the Act of December 3, 1970, P.L. 834, No. 275, which amended the Administrative Code, the Act of April 9, 1929, P.L. 177. The Board was empowered "to hold hearings and issue adjudications...on orders, permits, licenses or decisions" of the Department. While the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, upgraded the status of the Board to an independent, quasi-judicial agency, and expanded the size of the Board from three to five Members, the jurisdiction of the Board remains unchanged.

ADJUDICATIONS

OPINIONS

2005

ENVIRONMENTAL HEARING BOARD INDEX

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY	:	**Issued: January 3, 2005**

OPINION AND ORDER DENYING DEPARTMENT'S MOTION TO EXTEND DISCOVERY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies the Department's Motion to Extend Discovery. The Department offers no valid excuse as to why it did not depose during discovery two witnesses identified months ago. The Board has an obligation to enforce the deadlines set forth in its Orders to maintain the integrity of the legal process.

OPINION

Presently before the Board is the Pennsylvania Department of Environmental Protection's Motion to Extend Deadlines to Complete Non-Expert Discovery. The Department's Motion was actually filed on December 30, 2004. Following receipt of the

Motion, the Board held a telephone conference with counsel discussing the Motion and the respective positions of the parties.

The Department initiated this action by filing a Complaint for Civil Penalties against Neville Chemical Company on November 3, 2003. The Board has extended the discovery deadlines and amended the hearing schedule over the past year. In fact, on July 29, 2004, we granted the parties Joint Proposed Case Management Order, which extended the deadlines for taking non-expert depositions until October 29, 2004.

The Department seeks yet another extension of the non-expert discovery deadlines so that it can depose two non-expert employees of a consulting firm employed by Neville Chemical. According to the Department's Motion, "both [individuals] have extensive factual information about site activities and site conditions at Neville Chemical since 1997." One of the individuals was a Senior Project Manager until late 2000 while the other "has been identified as Project Manager and Site Project Manager." The Department contends that it "will be severely prejudiced if it is unable to depose these key factual witnesses ... who had direct responsibility for work at the Neville Chemical facility and for reports submitted to the Department."

Neville Chemical opposes the granting of the Department's Motion ostensibly because the period for non-expert discovery has expired. Neville Chemical points out that on June

30, 2004 it identified these two individuals as having knowledge of matters listed in its responses to the Department's first written discovery requests. It further argues that the Department had one or more discussions with these individuals in the year preceding the filing of the Complaint. In Neville Chemical's view, the Motion should be denied because the witnesses were well known by the Department during the entire litigation period (if not before), the discovery deadlines had been extended earlier, and the Department did not attempt to depose these individuals until December 2004 — far after the expiration of the discovery deadline for non-expert depositions. Finally, as a practical matter, since the two witnesses are employees of Neville Chemical's consultant, Neville Chemical claims it would be prejudiced by having to pay their hourly rates while they were being deposed.

Discovery before the Environmental Hearing Board is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. 25 Pa. Code Section 1021.102(a). The purpose of discovery is so both sides can gather information and evidence, plan trial strategy, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super 2002). The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *Stern v. Vic Snyder, Inc.*, 473 A.2d

139 (Pa. Super. 1984). As part of this responsibility, The Board sets discovery deadlines almost immediately by its issuance of Pre-Hearing Order No.1. Frequently, and in the vast majority of cases, including this one, the Board will extend these discovery deadlines.

Nevertheless, it is important to the integrity of the process that these deadlines are viewed as meaningful and important. Rather than elevating form over substance as the Department argued in the conference call, by not once again extending a discovery deadline we are upholding the integrity of the process. Parties have a right to rely on our Orders and the deadlines they impose. This is especially true here when our Order adopted verbatim a joint proposed case management order.

As Chief Judge Krancer so aptly stated in *Petchulis v. DEP*, 2001 EHB 673, where he granted the Department's Motion to Compel while at the same time highlighted the responsibility of the Board to uphold litigation deadlines:

> As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process.

2001 EHB at 678. Likewise, this sentiment was echoed by Judge Labuskes in *Kleissler v. DEP and Pennsylvania General Energy Corporation*, 2002 EHB 617: "The Board has an independent interest in maintaining the integrity of the litigation process and respect for the Board by enforcing compliance with its orders and rules." 2002 EHB at 619.

Our decision not to grant the Department's Motion is also supported by the fact that these witnesses are not "surprise witnesses." The Department has known about them since even *before* this litigation began. They have had meetings with these witnesses. Their names appear in numerous written documents produced in discovery. They were also formally identified in answers to discovery requests in June, 2004. The Department has not advanced a single reason adequately explaining why it did not even attempt to depose these individuals before late December 2004 — more than one and a half months after the close of yet another discovery extension.

We also emphasize that our decision to uphold the deadline set forth in our Order of July 29, 2004 is not based on any alleged prejudice to Neville Chemical. During the telephone conference call, Neville Chemical argued that it would be prejudiced because although as non-experts the Department was not required to pay anything but the nominal witness fee of five dollars plus seven cents a mile in travel costs, Neville Chemical would have to pay the regular consulting fees of these employees. This fact has been given no weight in reaching our decision to deny the Motion.

We also disagree as a reason for extending the discovery deadline the Department's reliance on the fact that the parties engaged in mediation which was unsuccessful. The actual mediation did not take place until November — after the close of discovery. In any event,

the Department had months prior to the time it started preparing for the mediation conference to schedule the depositions of these witnesses. It chose not to do so.

The fact that we are denying the Department's Motion to further extend the discovery deadlines does not prevent it from calling these witnesses at trial. There is certainly nothing in our Rules or the Pennsylvania Rules of Civil Procedure which prohibits a party from calling a witness at trial who was not deposed in discovery.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

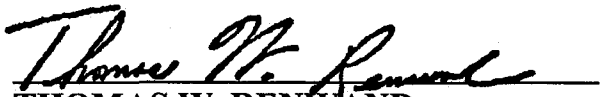
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	
	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY	:	

ORDER

AND NOW, this 3rd day of January, 2005, after review of the Department of Environmental Protection's Motion to Extend Deadlines to Complete Non-Expert Discovery (Motion) and following a telephone conference with counsel, it is ordered as follows:

1) The Department's Motion is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 3, 2005

EHB Docket No. 2003-297-CP-R

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SECRETARY TO THE BOARD

EAST PENN MANUFACTURING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 2003-169-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 3, 2005**

OPINION AND ORDER DENYING
THE DEPARTMENT'S MOTION IN LIMINE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

The Department's Motion In Limine seeking to bar expert testimony regarding the propriety of conditions in previous unappealed air permits regarding sulfur dioxide is denied. The Appellant requested the Department to revise the emission limitations for sulfur dioxide in the Appellant's federal Clean Air Act Title V Operating Permit which same emissions limitations had existed in prior unappealed Plan Approvals and Operating Permits. The Department's assertion that a Title V Operating Permit review process, by law, excludes the consideration specific emissions limitations is not supported by the law or the regulations. Also, administrative finality does not bar the testimony as the Title V Operating Permit is a new permitting action pursuant to different statutory basis and, in addition, the Department in this case was specifically requested to alter the sulfur dioxide limitation from prior permits, considered that request, and denied it.

Procedural and Factual Background

Currently before the Board is the Department of Environmental Protection's (DEP

or Department) pre-trial Motion in Limine (Motion) seeking to preclude certain expert testimony to be offered by Appellant East Penn Manufacturing Co, Inc. (East Penn).[1] The Department seeks to preclude any expert testimony on the subject of the prior permitting actions of the Department as they relate to the sulphur dioxide (SO_2) emissions limitations contained in East Penn's Clean Air Act Title V Operating Permit (TVOP) which is under appeal in this case.

East Penn filed this appeal outlining 70 separate challenges to TVOP issued by the Department to East Penn on June 24, 2003. The TVOP covers East Penn's secondary lead smelter operations located in Berks County, Pennsylvania. The secondary lead smelter operations are part of the lead acid battery manufacturing plant owned and operated by East Penn. Currently, the secondary lead smelter operations include a blast furnace and a reverberator furnace (collectively, Furnaces). *Stipulation of Facts Between East Penn Manufacturing Company, Inc. and The Commonwealth of Pennsylvania, Department of Environmental Protection* ¶ 5 (*Stipulation*).

To the great credit of the parties, they have whittled down the 70 issues in the Notice of Appeal to just three. One of those three remaining issues, and what appears to be the most difficult for the parties, is the SO_2 condition in the TVOP. The Department placed <u>both</u> a concentration-volumetric limitation <u>and</u> a percent removal efficiency requirement for SO_2, while East Penn had requested that the TVOP contain only a percent removal efficiency requirement. The crux of the Department's Motion in Limine, and

[1] Trial in this matter is scheduled to commence on Tuesday, January 11, 2005. Both parties have filed their Pre-Hearing Memoranda and their Stipulation of Facts in preparation for the trial. The Department's Motion and Memorandum of Law in support thereof incorporate the Department's Pre-Hearing Memorandum. Thus, in addition to the Motion, we are relying on both the parties' Stipulation and the parties' respective Pre-Hearing Memoranda in our discussion of the background of the Motion and the disposition thereof.

apparently its case-in-chief in this litigation on the SO_2 condition, is the doctrine of administrative finality. Before this appealed permitting action, the Furnaces had been the subject of a number of unappealed permitting actions since 1988 in which the unappealed permits contained both a concentration-volumetric limitation and a percent removal efficiency requirement for SO_2. The Furnaces were the subject of a 1987 Plan Approval Application submitted by East Penn and Plan Approval 06-319-075 issued by DEP. *Stipulation* ¶¶ 6 & 8. The application proposed a SO_2 emissions limitation of 120 parts per million (ppm). *Prehearing Memorandum of East Penn Manufacturing Co.* ¶ 17 (*East Penn Pre-Hearing Memorandum).* On December 30, 1988 the Department issued Plan Approval 06-319-075 which did not contain any limit for SO_2 on the face of the document but it incorporated by reference the Plan Approval Application. *Stipulation* ¶ 8. In May 1990, East Penn submitted a revised Plan Approval Application, which set forth SO_2 limits of not to exceed 200 ppm, and a 92% removal efficiency. *Stipulation* ¶ 12. The same SO_2 emission limit and removal efficiency, *i.e.*, 200 ppm and 92% removal efficiency, were contained in a January 1991 revision to the revised Plan Approval Application. *Stipulation* ¶ 13. DEP issued Plan Approval 06-319-075A on July 1, 1991 that contained the same dual SO_2 emissions limitations. *Stipulation* ¶ 14. On July 19, 1993 DEP issued Operating Permit No. 06-319-75A to East Penn for the operation of the Furnaces which included SO_2 emissions limitation as set forth in the prior Plan Approval as clarified by a July, 1991 DEP communication with East Penn, to wit, 200 ppm (wet) as a one-hour average, and an hourly SO_2 removal efficiency of 92%. *Stipulation* ¶ 16. East Penn did not appeal any of the Department's aforementioned permitting actions. *Stipulation* ¶¶ 15 & 17.

In March 2001, East Penn submitted its TVOP Application for its smelter operation. Stipulation ¶ 18. In that application, East Penn requested a change to the SO_2 limitations for the reverberator furnace which had existed in prior permits. *East Penn Pre-Hearing Memorandum* ¶ 75. Specifically, East Penn had requested in its TVOP application that the hourly concentration-volumetric limit be changed to the state default requirement of 500 ppmv as set forth in 25 Pa. Code § 123.21(b). *Id.* The reason behind East Penn's request was its contention that the Best Available Technology ("BAT") for the source, which both parties seem to agree must be applied, both then in the prior permits and now in the TVOP, does not consist of <u>both</u> a concentration-volumetric limitation <u>and</u> a percent removal efficiency requirement for SO_2. Instead, BAT is <u>only</u> a percent removal efficiency requirement. East Penn contends that the dual limitation for SO_2 found its way into the prior Plan Approval and Operating Permit because the concentration-volumetric limitation component was not a BAT matter but, instead, related to the separate Prevention of Significant Deterioration ("PSD") regulatory program.

On March 13, 2002 DEP issued a draft TVOP that contained SO_2 emissions limitations of 225 ppm (dry) hourly average, a 90 ppmv (dry) 12-month rolling average and maintained the 92% removal efficiency. *Stipulation* ¶ 19. The Department contends that the dual SO_2 permit limitations (concentration-volumetric <u>and</u> percent removal) are BAT for the source, both historically and now. East Penn responded to the first draft TVOP with a comment letter dated April 26, 2002 in which, among other things, it restated its request that the TVOP change the SO_2 limitation as East Penn had previously requested. *East Penn Pre-Hearing Memorandum* ¶ 79. The Department's response to

East Penn, outlined in a letter dated October 17, 2002, stated that the Department "found no reason to change the emission limits." *Stipulation* ¶ 20. Despite continued requests to change the SO_2 limits from East Penn, the second and third draft TVOPs issued by DEP contained the same SO_2 limits as in the first draft TVOP. *Stipulation* ¶ 20. The TVOP issued by DEP that is the subject of this appeal contained the same dual SO_2 limits as in the draft TVOPs.

Discussion

The Department's Motion rests upon two separate but, perhaps, related theories. First, the Department says that a TVOP is not the place or the forum to entertain a request to change permit emissions limits. The Department summarily states in its Pre-Hearing Memorandum that it "does not reconsider emission limits at the TVOP stage." *DEP Pre-Hearing Memorandum* ¶ A. 44. The only thing the Department does at the TVOP stage is to determine whether emissions limitations, in this case the SO_2 limitations, were erroneous or obsolete and it determined upon review that they were neither. Absent an erroneous or obsolete permit condition, the Department at the TVOP stage "merely incorporates exiting permits, regulations, and requirements into the facility-wide permit." *DEP Pre-Hearing Memorandum Memo* ¶ B.11. According to the Department, the proper format to request an emissions limitations change is the submission of a Plan Approval application. The Department extends this argument to say that because East Penn has not submitted the supposedly required Plan Approval application embodying its request to change the SO_2 limitation, East Penn has failed to exhaust its administrative remedies. Second, the Department claims that the SO_2 limits in the TVOP are insulated from any challenge now because of the doctrine of administrative finality. The Department argues

that inasmuch as East Penn did not appeal any of the Department's permitting actions in the 1980s or 1990s, and per its theory of the role and function of a TVOP, the Department merely incorporated exiting permits, regulations, and requirements into a facility-wide permit and the SO_2 limits in the 2003 TVOP are insulated from challenge in this action. Also, East Penn is foreclosed from collaterally challenging in this action the BAT determinations made in the prior unappealed permitting actions which have now become administratively final.

The Department's Motion must be denied on a host of grounds. The Department cites no legal authority whatsoever in support of its assertions about either the role and function of a TVOP or the boundaries of appropriate review under the TVOP process. We have been unable to uncover in the law or the regulations any such limitations on the TVOP as the Department has suggested. It may well be so that a separate plan approval application is one vehicle for a permittee to request a change in permit emissions limitations but there is nothing that has been presented to us by DEP or that we have independently found in the law which either: (1) mandates that to be the exclusive method of doing so; or (2) prohibits the TVOP from being a forum or an opportunity for doing so.

So to say, as the Department does, that "the Department does not reconsider emission limits at the TVOP stage" is more a description of its attitude or disposition on the topic than a grounded recitation of the law. In this case, the permittee asked for a change to the emission limitations for SO_2 and there is nothing in the law which DEP has pointed us to or that we have found independently which requires or even allows the

Department to treat that request as nullity or as being supposedly outside the legal scope of a TVOP.

Even the Department's own guidance on the TVOP process does not support its narrow and exclusive view of the role and functions of the TVOP. A proposed East Penn trial exhibit is a DEP paper "Implementation of EPA'a White Paper for Pennsylvania DEP Title V Permit Applications" (DEP Paper). The DEP Paper says:

> *The DEP will be reviewing, as part of the Title V permit building process, whether it is appropriate to incorporate prior permitting requirements into the permit.*
>
> Although Title V facilities are not required to reconsider prior NSR and PSD applicability decisions, an opportunity will exist to appropriately revise erroneous or obsolete permit conditions. Pennsylvania has always taken this position and has advised facilities that the Title V operating permit is analogous to a cooperative agreement which clearly identifies all applicable requirements for the permitted facility. Therefore, the DEP will not incorporate prior permitting requirements that are no longer appropriate to a facility's current operations.

East Penn Pre-Hearing Memorandum, Proposed Exhibit 46, at § 7. This guidance does not exclude from the TVOP process a request for a change in an emissions limitation. Indeed, quite the contrary. The consideration of "whether to incorporate prior permitting requirements into the [TVOP] permit" would seem to include consideration of whether a particular emissions limitation should be included *in toto*, included in altered form or deleted altogether.

Along the same lines, even if the Department's statement of the nature of a TVOP and what is and is not fair game in the TVOP review process did in some way comport with the law on the subject, we would still have a very open question of whether the SO_2 permit condition in the TVOP, which condition was imported from previous permits, was erroneous or obsolete at the time the TVOP was being formulated. Even the Department

says that these are questions that are open for its review in a TVOP review process. Indeed, that would seem to be precisely East Penn's argument in this case; that imposing both a concentration-volumetric limitation and a percent removal efficiency requirement for SO_2 as being BAT is erroneous because BAT in this case would involve only a percent removal efficiency. Whether the SO_2 condition here, which East Penn specifically asked to be changed from previous permits, could be erroneous or obsolete or both will be within the subject matter of the upcoming trial. In order to determine whether it may be either or both, testimony from East Penn about the history of the creation of the condition, which was copied from prior permits into this one, would be both part of and essential to that question.

The administrative finality claim is without merit. We have recently dealt with this question in this or similar contexts in *Hankin v. DEP,* EHB Docket No. 2003-186-K (Opinion issued July 9, 2004*); Pennsylvania Fish and Boat Comm'n v. DEP,* Docket No. 2004-053-R (Consolidated with 2004-054-R and 2004-055-R)(Opinion issued June 17, 2004); and *Wheatland Tube Co. v. DEP,* EHB Docket No. 2003-221-L (Opinion issued March 16, 2004). As we observed in *Wheatland*, "the doctrine of administrative finality was never intended to insulate a permit from any changes or review of those changes for all of time." *Wheatland, slip op.* at 3. *See also Pennsylvania Fish and Boat Comm'n, slip op.* at 6 (quoting *Wheatland* on that point). That would especially be the case where, as here, the permittee specifically requested that the permit condition be changed in the new permitting process. As we said in *Hankin,*

> As Judge Labuskes correctly and insightfully pointed out in the recent case of *Wheatland Tube Company v. DEP,* Docket No. 2003-221-L (Opinion issued March 16, 2004), in addressing administrative finality in the context of a permitting action, 'the key question is not whether [certain

> proposed changes to a permit] were approved, it is whether they were considered and acted upon. *Id., slip op.* at 7 (emphasis added). Here, it is clear that the Department considered the proximity question in its consideration and action on this Part II/WQM Permit.

Hankin, slip op. at 7. The Department here had a specific request, indeed a number of requests, by East Penn to change the SO_2 limitations in the TVOP that had been in prior permits. Here, as in *Hankin*, it is clear that the Department did consider the requests and it did act upon them. *Wheatland Tube Co., slip op.* at 7.

We also note that a TVOP is not the renewal of an existing permit. The TVOP appears to be an entirely different permit than the prior plan approvals and operating permits. This is a new permitting action, apparently pursuant to a different statutory and regulatory basis from the prior actions. In this regard we observe that the TVOP, by its very name, is a creature of Title V of the federal Clean Air Act. It does not appear that the prior permitting actions were pursuant to Title V of the federal Clean Air Act. The TVOP permitting action resulted in the issuance of a new permit, a TVOP, which appears to be a new and different genre of permit than the earlier plan approvals and operating permit. As such, whatever the reach may be of administrative finality attaching to the prior permits which have been discussed, that reach does not encompass the TVOP.

Based on the foregoing, the Board enters the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAST PENN MANUFACTURING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 2003-169-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 3rd day of January 2005 it is hereby **ORDERED THAT** the Commonwealth of Pennsylvania, Department of Environmental Protection's Motion in Limine is **DENIED,**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: January 3, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: January 6, 2005**

OPINION AND ORDER ON
MOTION TO STRIKE ANSWER
AND MOTION TO STRIKE EXPERT REPORTS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a motion to strike supplemental expert reports filed in accordance with Pre-Hearing Order No. 1. The prejudice to Permittee does not outweigh the injustice of striking the reports. The Permittee and the Department have ample time prior to the hearing to file supplemental reports.

OPINION

Presently before the Board is the Permittee's Motion to Strike Appellants' Expert Reports. Permittee also has filed a Motion to Strike Appellants' Answer to Permitee's

Motion to Strike (Motion to Strike Appellants' Answer) because it was not timely filed. We will first address the Motion to Strike Appellants' Answer. Although we normally are lenient in not striking late filings to Motions, in this instance we will grant Permittee's Motion to Strike Appellants' Answer.

A Motion to Strike Expert Reports is considered a "miscellaneous motion." 25 Pa. Code Section 1021.95. "Responses to miscellaneous motions shall be filed within 15 days of the date of service of the motion ...." 25 Pa. Code Section 1021.95(e). In this case, Permittee's Motion to Strike Expert Reports was filed on October 21, 2004. The Department filed its response to the Motion on November 5, 2004. Appellants' counsel contends she was not aware of the Motion until recently. Thus, her response was not filed until December 6, 2004. Appellants' counsel should have been aware of Permittees' Motion when she received the Department's Response. Therefore, we will grant Permittee's Motion to Strike Answer.

Appellants filed their initial expert reports on July 16, 2004 even though the reports were not required to be served by Pre-Hearing Order No. 1 until September 27, 2004. Subsequently, the Permittee and the Department served their expert reports within 30 days of receipt of Appellants' expert reports. Following the filing of these reports, on September 27, 2004, the Appellants filed additional expert reports prepared by entirely new experts.

The Permittee objects to these new reports citing the opinion of Chief Judge Krancer

in *Township of Paradise v. DEP*, 2002 EHB 68, wherein the Board found prejudice to the Appellee from the supplemental filing of additional expert reports. After carefully studying the facts of both cases we see a difference here in that the Appellants did file their supplemental reports in accordance with the Pre-Hearing Order No. 1 original deadline. In *Township of Paradise*, the supplemental expert reports were filed without Board permission and far after the time set forth in the Board's Order. Moreover, Chief Judge Krancer found "manifest prejudice" by the late filing of the two supplemental expert reports in *Township of Paradise*, 2002 EHB at 71. Although the Permittee and the Department may have to prepare additional reports in response to Appellants' new expert reports these reports were served in accordance with Pre-Hearing Order No.1. In this instance the supplemental reports were timely served on September 27, 2004. This is over 5 months prior to the scheduled hearing. Certainly, the Department and Permitee are not prejudiced by this supplemental production of additional expert reports as they have ample time to prepare rebuttal reports. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	

ORDER

AND NOW, this 6th day of January, 2005, it is ordered as follows:

1) Permitee's Motion to Strike Appellants' Answer to Permittee's Motion to Strike Expert Reports is ***granted.***

2) Permittee's Motion to Strike Appellants; Expert Reports is ***denied.***

3) Permittee and the Department may file *additional expert reports* on or before ***Monday, February 7, 2005.***

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 6, 2005

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DON NOLL AND STEPHANIE CLARK	:	
	:	
v.	:	**EHB Docket No. 2003-131-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SCOTT TOWNSHIP BOARD OF SUPERVISORS	:	**Issued: January 10, 2005**

OPINION AND ORDER DENYING APPELLANTS' PETITION TO REOPEN RECORD PRIOR TO ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellants' Petition to Reopen Record Prior to Adjudication is denied because Appellants have not made the showing required under Rule 1021.133(b). There is no showing that any of the proposed additional evidence would conclusively establish a material fact or contradict an established material fact or assumption, is recently discovered and could not have been discovered earlier with the exercise of due diligence or is not cumulative. The record will not be reopened to admit proposed additional evidence of a fact that is stipulated to or to admit evidence that is already in the record. The rules do not allow for the reopening of the record because a party became distracted or flustered during the trial.

I. Factual and Procedural Background.

Currently before the Board is a Petition to Reopen Record Prior to Adjudication (Petition) filed by Don Noll and Stephanie Clark (Appellants) on December 15, 2004. The

Department of Environmental Protection (Department or DEP) opposes the Petition through its Response to Petition to Reopen Record Prior to Adjudication (Response) and accompanying Memorandum of Law in Support of its Response filed on December 27, 2004. The Township has not filed a response to the Petition.

We will not engage in a lengthy description of factual background of this litigation here. We have described this case in some detail in our Opinion and Order on the Appellees' Motion For Partial Summary Judgment issued on September 1, 2004. *Noll and Clark v. DEP*, EHB Docket No. 2003-131-K (Opinion issued September 1, 2004). Very briefly, this appeal presents a challenge to the Department's approval of a 2002 revision of the comprehensive sewage facilities plan (2002 Revision) developed by the Township pursuant to Act 537 of the Pennsylvania Sewage Facilities Act which the Department approved on April 24, 2003.[1]

The crux of and the starting point of the Petition is the request to introduce supposedly new evidence on one supposed question: when did the public comment period on the proposed 2002 Revision end? The Appellants are adamant that the comment period ended on September 5, 2002. That is only the beginning though. From there, the Petition also seeks to reopen the record to allow "rebuttal" testimony by Ms. Clark on a host of different other topics.

One will note that we used the adjective "supposed" to qualify the word "question" just above. That was intentional. The Department stipulates in its Response that the public comment period ended on September 5, 2002. That observation alone would lead most observers to predict right here that this Petition is going to be denied and such predictions would be correct.

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[1] The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 – 750.20(a), "assigns every Pennsylvania municipality the responsibility for developing and implementing a current and comprehensive sewage facilities plan in conformance with the requirements enumerated at Section 5(d), 35 P.S. § 750.5(d)." *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425, 429.

In any event, we will describe in more detail the "on-the-ground" facts behind the Petition and our reasons for having to deny it.

First, the broad outline of the trial. Within a few days before the start of trial, Appellants, who had been proceeding *pro se*, secured very able counsel, Mr. Robert Sugarman, a well-known and well respected practitioner, to try their case. Mr. Sugarman tried his clients' case before the undersigned in our Norristown, Montgomery County courtroom on October 26, 27 and 29, 2004. Appellants presented their case for almost the entirety of the three trial days, resting their case on the afternoon of the third day. Tr. 966.[2] The Department's case consisted of two witnesses. One was presented out of order on the second day of trial in the midst of Appellants' case. Tr. 542-596. The other, who was presented after the close of Appellants' case, was examined on direct for about 5 or 10 minutes. Tr. 986-995. Appellants posed three cross-examination questions. Tr. 993-994.[3] The Township presented no case of its own. Tr. 1003. At that point the trial judge observed, "I suppose we have reached the end of the testimony." Tr. 1003. Appellants' counsel did not indicate any desire or intention to present any rebuttal testimony at that time. *Id.* Appellants' counsel then proceeded with his closing argument.

Next we focus in on the specific events at the trial which seem to have generated the Petition. Appellant Clark testified on the first day of trial that the public comment period for the 2002 Revision ended on September 5, 2002. Tr. 76. Her point was that there had been a public meeting the night before, *i.e.*, September 4, 2002, at which supposedly new information was revealed about the 2002 Revision and she had to unduly rush to complete her written comments

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[2] Citations to the trial transcript will be designated as "Tr." and exhibits admitted at the trial will be cited as "Ex."

[3] The Department also had secured testimony from many witnesses, including DEP employees, through cross-examination during the Appellants' case. *See* Tr. 985-86.

without full benefit of being able to digest and respond to the supposedly new information. Tr. 76-77; Petition ¶ 6. By describing this point we are not in any way commenting or passing upon whether it is valid or not or whether it has any impact on any issue to be decided in the Adjudication which will eventually be issued. We merely describe the point in order to deal with the Petition which is in front of us.

On the second day of trial, during Appellants' examination of Mr. Devitt, a Department employee, Mr. Devitt testified that he did not recall the exact date when the newspaper publication of the start of the public comment period had been. He said that it had been sometime in August 2002. Tr. 643. In reaction to that testimony, Appellants' counsel, in referring to one of Appellants' own Exhibits, Ex. A-2, which is the 2002 Revision, suggested that a document within the 2002 Revision showed that the newspaper publication of notice of the opportunity for comment was on August 29, 2002. Therefore, the public comment period ended 30 days thereafter, on September 28, 2002, not September 5, 2002. Tr. 644. The document in question is a printed receipt from the newspaper showing payment for the advertisement overlain by a copy of the advertisement itself otherwise known as a "Proof of Publication." On the Department's own follow-up examination on this point, Mr. Devitt agreed that Proof of Publication reflected that the public comment notice was published on August 29, 2002 and that the comment period thus ended on September 28, 2002. Tr. 669-670. There was some confusion at trial regarding this document and another one like it because there were two newspaper publications, and two Proofs of Publication. Both were close in time to each other with one relating to the publication of notice of the 30-day comment period on the 2002 Revision and the other applicable notice of the aforementioned September 4, 2002 public meeting on the

2002 Revision. At that time, neither party had a copy of the actual newspaper itself which would have laid the questions to rest once and for all.

After a one day break in the trial, on the third and final day of the trial, Appellants' counsel addressed re-direct questions to Mr. Devitt on the subject of the newspaper publication. By then Appellants' counsel had obtained, through his clients, a copy of the actual newspaper which contained the published notice of the start of the public comment period on the 2002 Revision. Tr. 794-814. Appellants' counsel introduced Exhibit A-27 which is a copy of the actual newspaper publication in question which bears the date "Tuesday, August 6, 2002." Tr. 809-13; Ex. A-27. This document laid to rest any doubts or confusion created on the previous trial day by the two Proofs of Publication and Mr. Devitt's testimony on examination by the Department's counsel, and confirmed that the public comment period did in fact end on September 5, 2002 and not on September 28, 2002. Mr. Devitt admitted, based on what had been shown to him, that the comment period ended on September 5, 2002. Tr. 813.[4]

After the trial was over, the Board was notified by letter dated December 13, 2004 that "from this day forward, Appellants will represent themselves" once again. The reason for the return to *pro se* status is "insurmountable differences of opinion as to how to proceed with substantive issues of the appeal." Although the letter says that Attorney Sugarman will submit his withdrawal of appearance by the close of business, Monday, December 13, 2004, no such

[4] As anyone who has tried a case knows, this sort of fluidity and unpredictability is typical in the midst of trial. In fact, rarely is there a trial in which some curveball does not come one's way. The only thing that is predictable about trial is that it is unpredictable, or, as we have noted on another occasion, "[i]n this sense, litigation is like what is said about war: 'no plan survives contact with the enemy." *Tanknology-NDE Int'l, Inc. v. DEP*, 2000 EHB 638, 648 (*quoting* Count Helmuth von Moltke, 1800-1891).

withdrawal has been filed. We will nevertheless take the Appellants' word that Mr. Sugarman is no longer their attorney and we will proceed to decide their Petition.[5]

The Petition alleges that there is new evidence regarding the newspaper publication date of notice of the commencement of the 30-day public comment period on the 2002 Revision. The new evidence is two Proofs of Publication: one for the August 6, 2002 publication of the start of the public comment period and the other the August 29, 2002 publication of notice of the public meeting. Petition Exhibits A & B. So Appellants wish to introduce "new" evidence that the close of the public comment period was indeed September 5, 2002 as Ms. Clark had so testified on the first day of trial. The Petition does not stop there, however. Appellants go so far as to say that the Proof of Publication regarding the public comment period notice which became the subject of scrutiny on the second day of trial was deliberately altered and that a fraud upon the court has occurred. Petition ¶¶ 14-16. Ms. Clark says that;

> It is an understatement to say the effect of this document was devastating. My credibility was being attacked. My ability to truthfully remember important facts was directly challenged. My own attorney, Mr. Sugarman questioned my recall on a substantial matter raised by me. I was made to feel that I had perpetrated a fraud on DEP, the Township and the EHB.

Affidavit of Stephanie Clark, at p. 2. Moreover, Ms. Clark says, that she became so distracted and upset by the supposedly false document or documents and testimony about the end of the public comment period that she was unable to prepare and present rebuttal testimony which she otherwise would have done. This situation could not be described any better than by Ms. Clark herself from her affidavit in support of the Petition, in which she states as follows:

> I became obsessed with finding any documentation that would prove the comment period ended on September 5. I was paralyzed. I lost track of assisting Attorney Sugarman in the hearing, searching all files for the notice showing September 5 to be the deadline as I testified. Frankly, I stopped paying attention

[5] We will maintain Mr. Sugarman's name on the service list for the time being, however.

> to making notes for appropriate Rebuttal testimony, upset that I might have made a major mistake about this significant issue.

Id.

Thus, the Appellants seek to add "rebuttal evidence" on a host of subjects, other than the publication date/end of public comment period matter, raised by other witnesses besides Mr. Devitt including: (1) true estimates of additional costs to homeowners beyond the $2,500 hook up fee and $633 annual fee; (2) the Township and DEP consideration and action upon public comments and cost of the project; and (3) what 2002 Revision was available for public review in August of 2002, what 2002 Revision was approved by the Township in October of 2002, and what 2002 Revision was approved by DEP on April 23, 2003 and to what 2002 Revision Appellants filed their Notice of Appeal before the EHB. Petition ¶¶ 18 & 23.

II. Discussion

We begin by saying that we totally reject any notion that Appellees' counsels, their clients, or both, engaged in any shenanigans, fraud upon the tribunal or purposeful fabrication as the Appellants assert. The document in question was Appellants' exhibit and the initial oral assertion about the comment period ending on September 28, 2002 was uttered by their attorney, not the witness. Tr. 644. These documents, their interpretation and their import generated confusion at trial, for all participants. Indeed, the undersigned was struggling with these documents while the events we have described from the trial were unfolding. We had both documents sitting on the Bench for quite a while as we carefully inspected each while listening to the testimony regarding them. As Appellants' counsel aptly stated on the second day in the midst of this unfolding situation, "[s]o obviously, there is a discrepancy, and the Board will have to resolve it." Tr. 646. To go from there to accusing counsels for Appellees of having engaged in fraudulent conduct is very unfair, baseless, ridiculous and outrageous. After having dealt with

both the Department's and the Township's counsels over the course of this case, this Board has absolute confidence in the professional honesty, integrity and trustworthiness of both of those fine members of our Bar toward the tribunal and it was our honor and privilege to have both of them practice before us.

Turning now to the rules governing our analysis, the standards that govern our review of a pre-adjudication request to reopen a closed record are set forth in 25 Pa. Code § 1021.133(b). The Board may reopen the record when all of the following circumstances are present:

> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which has been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b).[6]

Obviously, not all of the above circumstances are present here. The issue of when the notice of the public comment period took place and when the public comment period ended are established. Those facts were established on the third day of trail when the copy of the actual newspaper notice was provided and introduced into the record and the DEP witness conceded that the comment period ended on September 5, 2002. Even besides Trial Exhibit A-27 and Mr. Devitt's testimony on the third day of trial, the Department stipulates in its Response that the end of the time period was September 5, 2002. To reopen a closed record to add "new" evidence to establish a point which is already established and that the opposition has conceded and stipulated to would be pointless.[7] The Petition is superfluous and, in essence, moot on its main point.

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[6] The record may also be opened to consider evidence that became material after the close of the record due to a change in legal authority. 25 Pa. Code § 1021.133(c). This provision is not implicated in the current situation.

[7] Of course we are not in any way in the context of this opinion passing upon or determining or even commenting upon whether the now conceded and established fact that the public comment period ended on

The Petition's associated request to reopen the record to add other "rebuttal" evidence not related to the public comment time question is quite out of the question. We do not discount Appellant Clark's claim that she was distracted and flustered by events that transpired during the trial. We sympathize with Ms. Clark because we recognize that being a party in a trial can be an upsetting experience, especially to lay people who are not accustomed to seeing trials let alone being parties in them. But, legally, the "I became obsessed, paralyzed, stopped paying attention, got upset and made a major mistake" theory does not and cannot exist as a viable ground to support reopening a closed trial record. A moment's reflection will permit the reason for that to become clear. As we noted above in footnote 4, virtually all trials unfold in unpredictable ways. That is reason enough to show why surprise and upset could not be grounds on their own to reopen a closed record.

Moreover, Appellants had every opportunity to present any rebuttal evidence that they felt would be appropriate at trial. Appellants rested their case and made no move to present any rebuttal evidence, or even request a recess, passing then on the opportunity to present rebuttal testimony. At this time, that window of opportunity is, quite fairly, closed. The Board recently made that point in *Exeter Citizens' Action Comm., Inc. v. DEP*, EHB Docket No. 2002-156-MG (Opinion issued April 6, 2004). In that case, Judge Miller, very aptly observed the following:

> The Appellant...evidently wishes to submit evidence that its prior counsel perhaps had in his possession but for unspecified reasons chose not to introduce at the hearing. Our rules do not allow the reopening of the record to permit a party to remediate a perceived error in trial strategy. To do so would do nothing more than allow the Appellant two bites at the proverbial apple, which necessarily prejudices the other parties in this matter.

Id. slip op. at 3.

September 5, 2002 has any relevance in the ultimate determination of the merits of this case.

We offer two observations from which we hope Ms. Clark can take repose. First is the fact that she has won her point on the question; the end of the public comment period has been established and conceded to be September 5, 2002, just as she had testified on the first day of trial. Second, she need not, even for a moment, fear that she was perceived at any time as "perpetrating a fraud" on anyone. In part because of what we have said about the inherent unpredictability of trials, but also, because of our experience with Ms. Clark both in pre-trial proceedings and at trial, such a thought never entered the realm of consideration with the tribunal.

Based on the foregoing, the Board enters the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DON NOLL AND STEPHANIE CLARK	:	
	:	
v.	:	**EHB Docket No. 2003-131-K**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SCOTT TOWNSHIP	:	
BOARD OF SUPERVISORS	:	

ORDER

AND NOW this 10th day of January 2005 it is hereby **ORDERED THAT** Appellants' Petition to Reopen Record Prior to Adjudication is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: January 10, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF ROARING SPRING and ROARING SPRING MUNICIPAL AUTHORITY; APPLETON PAPERS, INC.; and ROARING SPRING AREA CITIZENS COALITION	:	**EHB Docket No. 2003-106-C (Consolidated with EHB Dkt. No. 2003-111-C and EHB Dkt. No. 2003-121-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME COMPANY, INC., Permittee	:	**Issued: January 18, 2005**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT BY APPELLANT ROARING SPRING AREA CITIZENS COALITION

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

In a consolidated appeal of a noncoal surface mining permit amendment which allows the permittee to mine a section of its limestone and dolomite quarry to a lower depth, the appellant Roaring Spring Area Citizens Coalition moved for summary judgment. The appellant contends the Department violated water quality regulations when assessing potential impacts from the quarry operation on the water quality of two nearby streams and in devising measures intended to prevent harm to the streams' uses. The Department and permittee have shown the existence of genuine issues of material fact with respect to the stream-related objections raised by this appellant and the motion is therefore denied.

BACKGROUND

This case involves a revision to Noncoal Surface Mining Permit No. 4274SM11 and its incorporated National Pollutant Discharge Elimination System (NPDES) Permit No. PA212512 issued by the Department of Environmental Protection (DEP) to New Enterprise Stone & Lime

Company, Inc. (New Enterprise) in April 2003. The permittee operates a limestone and dolomite quarry in Blair County, Pennsylvania, and these consolidated appeals challenge DEP's approval of New Enterprise's application to mine a section of the quarry down to an elevation of 950 feet mean sea level. The Board has issued two prior opinions in this matter: the first denying the appellants' petitions for a supersedeas, see *Borough of Roaring Spring v. DEP*, 2003 EHB 825; and the second denying New Enterprise's motion for partial summary judgment against appellant Roaring Spring Area Citizens Coalition (RSACC), see *Borough of Roaring Spring v. DEP*, Dkt. No. 2003-106-C (EHB, Dec. 21, 2004). General factual background is set forth in those opinions so I need not rehearse it here. Before me is a motion by RSACC for summary judgment asking the Board to sustain its appeal of the April 2003 permit revision.

Among other objections, RSACC's notice of appeal alleges that the permit revision does not sufficiently protect area water resources from pollution resulting from the mining operation. Leaving aside other area water resources, RSACC's motion focuses on two streams which flow near the boundaries of the quarry—Plum Creek and Halter Creek. RSACC argues that DEP's review of the permit revision application was deficient by omission, *i.e.*, that the review process was inadequate for meeting the requirements of water quality regulations applicable to these two surface waters. The association also contends that the limitations and requirements ultimately imposed by DEP in the April 2003 permit revision are not sufficient to protect the streams' uses by assuring that instream water quality criteria associated with those uses are satisfied.[1] DEP and New Enterprise duly filed opposition to the motion,[2] and RSACC timely filed a reply brief.

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[1] The motion is supported by copies of the permit revision and relevant permit documents; DEP's answers to interrogatories; deposition transcripts of three DEP officials involved in the permit review process, Timothy Kania, John Conrad and Steven Faish; deposition transcripts and supersedeas hearing testimony of three representatives of the organization (Paul Claar, Jeryl Green and John Biddle); and, supersedeas hearing testimony by James Kilburg, Ph.D., an expert who testified on behalf of appellants at the hearing.

[2] The opposition papers also included copies of the permit revision and relevant permit documents concerning the

Careful examination of the papers submitted by the parties reveals the existence of numerous genuine issues of material fact and, accordingly, I will deny the motion.

DISCUSSION

A grant of summary judgment by the Environmental Hearing Board "is proper where 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 that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Services, Inc. v. Dept. of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also County of Adams v. Dept. of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party; all doubts as to the existence of a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal den.*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

The NPDES permit authorizes New Enterprise to discharge at several listed outfalls into the receiving waters, Halter Creek and Plum Creek, from the quarry's mine drainage treatment facilities and erosion and sediment control facilities. Effluent limitations on these point source discharges, as well as other related requirements, are set forth in the NPDES permit. Moreover, hydrological analyses submitted with New Enterprise's permit revision application predicted potential decreases in the flow of Halter and Plum Creeks from deepening the quarry to 950 feet msl. To remedy this potential capture of stream flow by the quarry, DEP required New Enterprise to devise measures for redistributing quarry-captured groundwater into the creeks in

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scheme for replenishing loss of flow in the streams; the same deposition transcripts proffered by RSACC with its motion; a Technical Report by hydrogeology experts for New Enterprise; and an expert report by Dean Arnold, Ph.D., a consulting aquatic ecologist for the permittee.

the event a quarry-related diminishment of flow occurs in the streams. If certain specified conditions arise, the permittee is required to implement its water redistribution plan, which primarily involves taking groundwater captured by the quarry sump and introducing that water into the streams in a controlled manner via a set of equalization ponds.

RSACC attacks DEP's issuance of the permit revision from several angles. The appellant first points to the requirement that both existing and designated surface water uses must be protected under the water quality standards regulations. Section 96.3 (titled "Water quality protection requirements") expressly states that: "Existing and designated surface water uses shall be protected." 25 Pa. Code § 96.3(a). Moreover, the "[a]ntidegradation requirements in §§ 93.4a—93.4d . . . shall apply to surface waters," *see* 25 Pa. Code § 96. 3(b), meaning that if a surface water has attained a higher level of water quality than its designated use implies, DEP must assure that the water's existing quality is not degraded by permitted discharges.

Both Halter and Plum Creeks are designated as warm water fisheries (WWF), *see* 25 Pa. Code § 93.9n, but RSACC alleges that the *existing use* of the two streams is different from their designated use; it contends that the existing use of the streams should be classified as either trout stocking fishery (TSF) or cold water fishery (CWF).[3] If the appellant's contention is true, then the streams' existing use (whether TSF or CWF) would have to be protected by maintaining the necessary level of water quality associated with that use. *See* 25 Pa. Code § 93.4a(b) ("Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.").

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[3] Section 93.3 defines surface water uses which shall be protected and upon which the development of instream water quality criteria shall be based. The streams' designated use (WWF) is defined as: "*Warm Water Fishes*—Maintenance and propagation of fish species and additional flora and fauna which are indigenous to a warm water habitat"; the possible existing uses proffered by RSACC are also defined, TSF as "*Trout Stocking*—Maintenance of stocked trout from February 15 to July 31 and maintenance and propagation of fish species and additional flora and fauna which are indigenous to a warm water habitat"; and CWF as: "*Cold Water Fishes*—Maintenance or propagation, or both, of fish species including the family Salmonidae and additional flora and fauna which are indigenous to a cold water habitat." 25 Pa. Code § 93.3.

RSACC asserts that DEP disregarded evidence that the existing use of the streams is actually TSF or CWF. The appellant insists DEP officials were aware that trout live in the two streams, that the streams are periodically stocked with trout, or, at least, that trout fishing is a typical use made of the streams. The alleged awareness of the fact that the streams can allegedly support the trout species in some fashion, according to RSACC, should have compelled DEP to perform (or have the Pennsylvania Fish and Boat Commission perform) an existing-use survey of the two streams as part of DEP's review of the permit revision application. *See* 25 Pa. Code § 93.4c(a)(1)(i) ("Existing use protection shall be provided when the Department's evaluation of information (including . . . data considered in the context of a Department permit or approval action) indicates that a surface water attains or has attained an existing use.").

Because DEP did not properly evaluate the existing use of the streams, RSACC argues, DEP's review of the permit revision application was deficient in that the agency failed to examine the quarry discharges or the replenishment-scheme water with the intention of protecting the TSF or CWF existing uses. For example, DEP allegedly did not ascertain the lowest tolerable flow level of the streams, and did not adequately analyze the temperature of the replenishment-scheme water, with the goal of protecting these existing uses; DEP also did not impose certain effluent limits or include other protective measures in the permit which RSACC believes are necessary to assure that the instream water quality criteria associated with the TSF or CWF existing uses will be satisfied.

Second, RSACC attacks the content of the permit by alleging that it does not include water quality based effluent limitations, or other protective measures, which will assure that the requisite water quality criteria are achieved (and the streams' designated uses thereby protected). Section 96.3 states:

> To protect existing and designated surface water uses, the water quality criteria described in Chapter 93 (relating to water quality standards), including the criteria in §§ 93.7 and 93.8a(b) (relating to specific water quality criteria; and toxic substances) shall be achieved in all surface waters at least 99% of the time, unless otherwise specified in this title. The general water quality criteria in § 93.6 (relating to general water quality criteria) shall be achieved in surface waters at all times at design conditions.

25 Pa. Code § 96.3(c). RSACC asserts that DEP failed to determine whether the specific water quality criteria associated with the streams' designated use as a WWF (particularly limitations on dissolved oxygen and temperature), *see* 25 Pa. Code § 93.7, would be met "at least 99% of the time" in Plum and Halter Creeks despite the permitted quarry discharges or the introduction of the replenishment-scheme water into the streams. The appellant also similarly questions whether the general water quality criteria will be met in those streams "at all times at design conditions" as required by § 96.3(c).[4] Finally, RSACC contends that DEP's review process was not adequate in its determination of whether the quarry discharges or replenishment-scheme water will contain toxic substances. *See* 25 Pa. Code § 93.8a ("The waters of this Commonwealth may not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts that are inimicable to the water uses to be protected.").

DEP and New Enterprise contest the stream-related objections raised by RSACC, and they have shown the existence of genuine issues of material fact with respect to each of the challenges raised in the motion, thereby precluding summary judgment. There is clearly a genuine controversy concerning the existing use of the two streams. There is testimony by DEP officials responsible for reviewing the permit revision application that they do not consider the streams' existing use to be different from their designated use as warm water fisheries. *See, e.g.*, Deposition Transcript of Timothy Kania, dated March 22, 2004, at pp. 104-06. DEP also

[4] According to § 93.6 (relating to general water quality criteria): "Water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life." 25 Pa. Code § 93.6(a).

maintains that the relevant evidence considered during the permit review process did not indicate a need for the performance of an existing-use survey on the streams. Although RSACC provided testimony by RSACC members that they fish for and have caught trout in the two creeks, and that the streams have previously been stocked at some point with trout, the record is scant with respect to the question whether DEP should have performed an existing-use survey as part of its permit revision review. RSACC has not submitted expert testimony controverting DEP's determination that the designated and existing uses of the two streams are the same, but has relied on the testimony of RSACC members who have fished the two streams. DEP officials have defended their conclusion on existing use in the testimony submitted with the motion papers. Thus, resolving the issue of DEP's obligation to perform an existing-use survey on the streams as part of their permit revision review process will require an evaluation at hearing of substantive conflicting evidence—in light of the applicable regulatory requirements.

Moreover, DEP permitting officials testified that, in their view, the requirements they imposed in the permit revision are sufficient to protect the streams' existing uses and the aquatic life found in the streams. They contend that due consideration was given throughout the permit review process to adequately protecting the streams' uses from harm resulting from the quarry operations and the effects of deepening the quarry. In its opposition papers, New Enterprise submitted expert reports supporting DEP's conclusion that the quarry operations permitted in this most recent permit revision will not be inimical or harmful to the water uses to be protected or to the aquatic life in the two streams. Again, resolution of this genuine issue of whether the quarry discharges or the replenishment-scheme water will either harm the aquatic life in the streams or have some other negative impact on the streams' uses will necessitate a hearing.

Similarly, there is a genuine issue as to whether the limitations and other protective

measures imposed in the permit are sufficient to assure that the specific water quality criteria associated with the streams' designated uses will be achieved in accordance with the requirements of 25 Pa. Code § 96.3(c). RSACC's motion does not include testimony from an aquatic biologist or other appropriate expert who analyzed the constituents of the quarry discharges and the replenishment-scheme water, who performed an assessment of the water quality and nature of aquatic life in Halter and Plum Creeks, and then provided evidence concerning negative impacts from the permitted quarry discharges on the specific water quality criteria associated with the streams' designated uses. While RSACC has alleged a violation of the regulatory requirements in § 96.3(c) to assure that the general and specific water quality criteria are achieved in the two streams in spite of the permitted quarry discharges or the introduction of replenishment-scheme water, the appellant has not provided adequate expert testimony in its motion papers to support this assertion.

In any event, testimony by DEP officials indicates that they made a determination that the permit requirements and limitations which were imposed in the April 2003 permit revision are sufficient to assure satisfaction of the instream water quality criteria and thereby protect the streams' uses; the permittee has provided expert reports which tend to support that determination. Thus, the fundamental issue of whether the water quality of the streams will be negatively impacted by the quarry discharges or replenishment-scheme water is genuinely disputed based on the record evidence before me.

It is clear that the existence of genuine issues of material fact preclude the grant of summary judgment; accordingly I will enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ROARING SPRING and ROARING SPRING MUNICIPAL AUTHORITY; APPLETON PAPERS, INC.; and ROARING SPRING AREA CITIZENS COALITION	:	**EHB Docket No. 2003-106-C (Consolidated with EHB Dkt. No. 2003-111-C and EHB Dkt. No. 2003-121-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME COMPANY, INC., Permittee	:	

ORDER

And now this 18th day of January 2005, it is hereby ordered that the Motion for Summary Judgment filed by Appellant Roaring Spring Area Citizens Coalition is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: January 18, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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Southcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	**Issued: January 26, 2005**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board dismisses those portions of an appeal that are brought from an NPDES Permit and a Water Quality Management Permit because the appeal was filed many months after notices of issuance of the permits were published in the *Pennsylvania Bulletin*. The Board does not dismiss that portion of the appeal that relates to the Department's approval of an Official Plan Revision because it is not alleged that the approval was noticed in the *Pennsylvania Bulletin*, and the appeal was filed within 30 days of the aggrieved person's actual notice.

OPINION

Michael H. Clabbatz ("Clabbatz"), appearing before the Board *pro se*, filed this appeal on October 5, 2004. The Board's Notice-of-Appeal form requires a party to identify the "Action of the Department for which review is sought (*a copy must be attached*)." Clabbatz in that section of the form identified the action as: "Sewage treatment facility permit issued with runoff directly

on to my property with no permission." Clabbatz did not attach a copy of the Department action as required. We ordered Clabbatz to perfect his appeal by attaching a copy of the Department action. When Clabbatz did not respond, we issued a rule to show cause threatening dismissal of his appeal absent compliance with the Board's Order. Clabbatz thereafter sent the Board copies of three Department actions: (1) a letter from the Department of Environmental Protection (the "Department") dated March 31, 2003 issued to Greenfield Township, Erie County, approving an Official Plan Revision for a single residence sewage treatment plant to be operated by Ronald Vargo ("Vargo"); (2) an NPDES Permit for the Vargo plant issued on December 19, 2003; and (3) a Water Quality Management Permit for the Vargo plant also issued on December 19, 2003. Thus, it would appear that Clabbatz's appeal is taken from all three Department actions.

Vargo and the Department have moved to dismiss this appeal as untimely. They point out that notices of the issuance of the NPDES and Water Quality Management Permits were published in the *Pennsylvania Bulletin* on January 17, 2004, many months prior to Clabbatz's appeal. Clabbatz in a series of letters to the Board contends that his appeal should be allowed to move forward because he filed the appeal on the same day that he discovered that "a permit" had been issued. He asserts that "the laws now clearly state that neighboring property [owners] must be notified for comment," and that he never received such notice. He at one point states that the permit was issued in a "deceitful way," but later states that issuance of the permit was "an honest mistake." He adds that it is unrealistic and unfair to expect ordinary citizens to read the *Pennsylvania Bulletin* to learn about permitting actions that affect them.

The jurisdiction of the Board does not attach unless an appeal is filed within 30 days after notice of the Department's action is received. *Rostosky v. Department of Environmental Protection*, 364 A.2d 761 (Pa. Cmwlth. 1976); *Pedler v. DEP*, EHB Docket No. 2004-191-R

(December 15, 2004); *Simons v. DEP*, 1998 EHB 1131, 1133. Specifically, the Board's rules provide that any person aggrieved by an action of the Department, other than a person to whom the Department action is directed or issued, must file an appeal within one of the following timeframes:

1. Thirty days after notice of the action is published in the *Pennsylvania Bulletin;* or
2. Thirty days after actual notice of the action if notice of the action is not published in the *Pennsylvania Bulletin.*

25 Pa. Code Section 1021.52(a)(1&2).

Clabbatz appealed from the two Vargo permits long after notices of the permit issuances were published in the *Pennsylvania Bulletin*, and well outside the 30-day appeal period. Clabbatz does not deny that fact, but Clabbatz complains that he was entitled to personal notice and he received no such notice until the day before he filed his appeal.

It is true that official notice in the *Pennsylvania Bulletin* may be insufficient to begin the 30-day appeal period where the interested person was entitled to personal notice by law. *Stoystown Water Borough Authority v. DEP*, 1997 EHB 1089, 1090-91; *Fontaine v. DEP*, 1996 EHB 1333, 1347. Although Clabbatz complains that he should have received actual notice, he has not referred us to any legal provision that entitled him to receive personal notice of the permit *issuances*. We are not independently aware of any such legal provision. In fact, "[n]umerous opinions of the Commonwealth Court and this Board have held that publication of the issuance of a permit in the *Pennsylvania Bulletin* is adequate to afford due process notice from which the 30 day time to appeal begins to run." *Stevens v. DEP*, 1996 EHB 430, 431-32.

See also Grimaud v. DER, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Reading Anthracite Co. v. DEP*, 1998 EHB 602, 607.[1]

Clabbatz's charge that it is unfair to require ordinary citizens to read the *Pennsylvania Bulletin* was put to rest in *Grimaud*, 638 A.2d at 302. Clabbatz's claim of "deceit" does not seem to go beyond or add anything to his complaint regarding the lack of personal notice. Accordingly, we conclude that the portions of Clabbatz's appeal that relate to the two Vargo permits are untimely.

As previously noted, however, Clabbatz also appears to be appealing from the Department's approval of the Official Plan Revision for the Vargo treatment plant.[2] Clabbatz filed a copy of that approval letter in direct response to our orders requiring him to attach copies of the Department actions being appealed to his notice of appeal. Vargo and the Department's joint motion to dismiss does not address the Plan Revision approval. In a follow-up letter, Vargo does contend in passing that this appeal is not taken from the Official Plan Revision approval, but the fact that Clabbatz supplied a copy of that approval letter in response to our order that he file copies of the "action of the Department for which review is sought" suggests otherwise. In a case such as this where the record is not entirely clear and we are ruling upon a motion to dismiss, we must err on the side of Clabbatz, the nonmoving party. *See Smith v. DEP*, 2002 EHB 531, 533.

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[1] Although Clabbatz's complaint that he received no personal notice of the permit *issuance* might at first blush seem to raise some concern regarding the fairness of the regulatory process, it is worth noting that public notice of an NPDES Permit *application* must, among other things, be "posted by the applicant near the entrance to the premises of the applicant and in nearby places." 25 Pa. Code § 92.61(a). *See generally Grimaud*, 638 A.2d at 301-03 (holding that the notice provisions for NPDES permits are reasonable). Here, as in *Grimaud* (638 A.2d at 302), Clabbatz never averred that Vargo or the Department failed to follow proper notice procedures (e.g. proper posting) regarding the Vargo permit *applications*.

[2] The movants have not contended that a party is precluded from challenging multiple Department actions in one appeal.

Vargo and the Department have not alleged, and it does not independently appear to us, that notice of the Plan Revision approval was published in the *Pennsylvania Bulletin*. Therefore, the appeal period from *that* action only began to run upon actual notice to the allegedly aggrieved person. 25 Pa. Code § 1021.52(a)(1). *See generally* 35 P.S. § 7514(c) (no action adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal); *Fontaine*, 1996 EHB at 1347. There is no dispute at this point that Clabbatz did not receive actual notice of the Revision approval until the day before he filed this appeal. Therefore, the appeal from the Revision appears to be timely.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	

ORDER

AND NOW, this 26th day of January, 2005, the joint motion to dismiss this appeal as untimely is granted in part and denied in part, as follows:

1. Those portions of the appeal that are taken from Vargo's NPDES and Water Quality Management Permits are dismissed as untimely;

2. The motion to dismiss is denied with respect to that portion of the appeal that is taken from the Department's March 31, 2003 approval of Greenfield Township's Plan Revision for the Vargo treatment plant; and

3. Vargo may retain his status as a party in this appeal from the Department's approval of Greenfield Township's Plan Revision.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 26, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SRI VENKATESWARA TEMPLE	:	
	:	
v.	:	**EHB Docket No. 2003-385-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 2, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Sanctions, including dismissal of an appeal, may be imposed against an appellant for failure to comply with an order of the Board or the Board's rules of practice and procedure. The Board grants the Department's motion to dismiss where the Appellant has failed to file its pre-hearing memorandum in accordance with Pre-Hearing Order No. 2 and has demonstrated an unwillingness to prosecute this appeal.

OPINION

This matter involves an appeal filed by Sri Venkateswara Temple (Appellant) challenging a compliance order issued by the Department of Environmental Protection (Department). The compliance order charges the Appellant with causing earth disturbance without a National Pollutant Discharge Elimination System (NPDES) permit or erosion and

sediment control plan in place. The order requires the Appellant to implement various remediation measures. The Appellant appealed the order, stating that it did not oppose implementing remediation measures and had applied for an erosion and sedimentation control plan and permit, but wanted to correct certain inaccuracies it believed were set forth in the order.

The Board issued Pre-Hearing Order No. 2, scheduling a hearing in this matter for the first week in January 2005 and establishing deadlines for the parties to file pre-hearing memoranda and other pre-trial documents. The order required the Appellant to file its pre-hearing memorandum on or before November 1, 2004. No pre-hearing memorandum was filed by the Appellant. Based on the failure of the Appellant to file a pre-hearing memorandum as required by Pre-Hearing Order No. 2, the Department moved to dismiss the appeal. After waiting the requisite number of days for the Appellant to respond to the motion, and receiving no response, the Board cancelled the hearing pending a ruling on the Department's motion. That motion is the subject of this opinion.

Discussion

The Board evaluates motions to dismiss in the light most favorable to the non-moving party. A motion to dismiss will be granted if there are no factual disputes and the moving party is entitled to judgment as a matter of law. *Barra v. DEP*, EHB Docket No. 2003-038-C (Opinion and Order issued April 16, 2004), *slip op.* at 6; *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion and Order issued July 16, 2004), *slip op.* at 5; *Smedley v. DEP*, 1998 EHB 1281, 1282.

According to the motion to dismiss, which the Appellant has not refuted, the Appellant conducted no discovery directed to the Department and has failed to join in the filing of two joint status reports required by previous Board orders. Most recently, as noted above, the Appellant failed to file its pre-hearing memorandum in accordance with Pre-Hearing Order No. 2. The

Department moves that the appeal be dismissed pursuant to 25 Pa. Code § 1021.161, which authorizes the Board to impose sanctions on a party for failure to comply with a Board order or rule of practice and procedure. As noted, the Appellant has not responded to the motion to dismiss.

Rule 1021.161 of the Board's rules of practice and procedure states in relevant part as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal....

25 Pa. Code § 1021.161.

The Appellant has failed to file a pre-hearing memorandum in accordance with the Board's Pre-Hearing Order No. 2 and has provided no explanation for its failure to do so. Based on this failure, dismissal of the appeal is appropriate pursuant to Rule 1021.161. *Hollobaugh v. DEP*, 2003 EHB 958, 961; *Potts Contracting Co., Inc. v. DEP*, 1999 EHB 985; *Yourshaw v. DEP*, 1998 EHB 1063, 1067; *Hapchuk v. DER*, 1990 EHB 1189. The Appellant has further failed to take part in the filing of joint status reports required by orders of the Board and has elected not to respond to the Department's motion to dismiss its appeal. These actions – or inactions – in conjunction with the failure to file a pre-hearing memorandum, demonstrate a complete lack of interest in prosecuting this appeal. We have previously held that an unwillingness to prosecute one's appeal may be grounds for dismissal. *Brian E. Steinman Hauling v. DEP*, EHB Docket No. 2003-170-R (Opinion and Order issued December 14, 2004), *slip op.* at 3-4; *Pirolli v. DEP*, 2003 EHB 514, 517-18.

We, therefore, enter the following order dismissing this appeal:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SRI VENKATESWARA TEMPLE	:	
	:	
v.	:	**EHB Docket No. 2003-385-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of February, 2005, the Department's motion to dismiss is *granted* and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

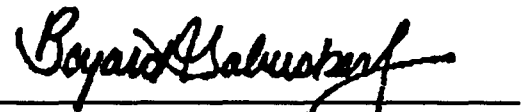
MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-385-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **February 2, 2005**

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WHEELING-PITTSBURGH STEEL COMPANY and WHEELING-PITTSBURGH CORPORATION	:	
v.	:	**EHB Docket No. 2002-133-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 10, 2005**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS FOR MOOTNESS AND APPELLANTS' MOTION TO VACATE AND/OR RESCIND ADMINISTRATIVE ORDER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where an appeal involves a Department administrative order that has been issued to two related but separate entities, and the Department and one of the entities negotiate a settlement that is subsequently entered by the Commonwealth Court as a Consent Decree, we cannot dismiss the appeal on the basis of mootness since genuine issues of material fact exist. First, a question remains as to whether the administrative order still applies to the other entity that was not a party to the Consent Decree. Second, even if we were to

accept the Department's argument that the Consent Decree supersedes the administrative order, questions of fact remain as to whether the administrative order may serve as a basis for future penalties or compliance reviews. Conversely, because these questions remain, we also decline to grant the Appellants' motion to vacate and/or rescind the administrative order.

OPINION

On May 3, 2002, the Department of Environmental Protection (Department) issued to Wheeling Pittsburgh Corporation and Wheeling Pittsburgh Steel Corporation (Wheeling Pittsburgh Steel) (sometimes collectively referred to as the Appellants) an administrative order requiring both entities to address discharges of oil and acid to the Monongahela River by taking certain actions set forth in the order. The companies appealed the order to the Environmental Hearing Board (Board).

Additionally, the Department filed a petition to enforce the order in Commonwealth Court. The parties entered into negotiations regarding the petition to enforce and submitted a proposed Consent Decree to the Commonwealth Court. The court entered the Consent Decree on August 30, 2004. Paragraph 9 of the Consent Decree states that it "shall supercede [sic] the Administrative Order issued by the Department on May 3, 2002 to Wheeling-Pittsburgh."[1] Thereafter, Wheeling Pittsburgh Corporation and Wheeling Pittsburgh Steel filed with the Board a Motion to Vacate and/or Rescind the Department's administrative order in light of the Consent Decree. The Department filed a response opposing the motion and countered with its own Motion to Dismiss the appeal on

the basis of mootness. After several conference calls with the parties, it appears that, while the merits of the underlying appeal have been resolved by the Consent Decree, the parties are unable to resolve the issue of how this appeal should be terminated – that is, whether the Department's order should be vacated or rescinded or whether the appeal should be dismissed for mootness.

The Department argues that the Consent Decree replaces the administrative order and, therefore, the administrative order has no continuing legal effect upon the Appellants. On that basis, the Department asserts, the appeal is moot. In response, the Appellants point out that Wheeling Pittsburgh Corporation was not a party to the Commonwealth Court action, was not a signatory to the Consent Decree and is not mentioned either in the caption or within the body of the document. The Appellants state that, while it is their understanding that the Consent Decree nullified and replaced the administrative order, given that Wheeling Pittsburgh Corporation is not a party to the Consent Decree and the Department has not agreed to withdraw the order, the question of whether the order has any continuing legal effect remains unresolved. The Appellants argue that in order to effect the parties' agreed-upon settlement and unambiguously negate any further need for this appeal, it is necessary for the Department to withdraw the order.

In further support of their argument, the Appellants point out that on September 28, 2004, prior to filing its Motion to Dismiss with the Board, the Department had filed an Application to Clarify Consent Decree with the Commonwealth Court which stated that paragraph 9 of the Consent Decree "creates an ambiguity because the 2002 Order was also

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[1] Exhibit A to Appellants'motion.

issued to Wheeling Pittsburgh Corporation. Thus, the language in Paragraph 9 leaves open the effect of the Consent Decree on Wheeling Pittsburgh Corporation."[2] According to the Appellants' response, the Department withdrew the application prior to the court ruling on it. The Department did not file a reply to the Appellants' response addressing this matter. In its Motion to Dismiss, the Department refers to the Appellants collectively as "Wheeling-Pittsburgh."

Department's Motion to Dismiss for Mootness

We will first address the Department's motion to dismiss the appeal on the basis of mootness. The Board may grant a motion to dismiss when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Broad Top Township v. DEP*, EHB Docket No. 2004-012-C (Opinion and Order issued June 21, 2004), p. 4, n. 11. Motions to dismiss must be evaluated in the light most favorable to the non-moving party. *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion and Order issued July 16, 2004), p. 5.

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived of a necessary stake in the outcome. *Horsehead Resource Development Co., Inc. v. DEP*; 780 A.2d 856, 858 (Pa. Cmwlth. 2001); *Broad Top, supra* at 5; *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion and Order issued January 16, 2004), p. 6-7.

The Department argues as follows in its motion:

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[2] Exhibit 1 to Appellants' Combined Motion in Response to Motion to Dismiss for Mootness and Reply in Support of Motion to Vacate and/or Rescind Administrative Order.

> By agreeing to supersede the 2002 Order, the parties agreed that a new order, the Consent Decree, replaces the 2002 Order. Simply and legally, that means the 2002 Order has no continuing effect upon Wheeling-Pittsburgh. This case before the Board is moot. The Appellant has been deprived of a stake in the outcome. . . ."[3]

The Appellants argue that the appeal is not moot for the following reasons. First, because the Consent Decree was agreed to only by Wheeling Pittsburgh Steel, and not Wheeling Pittsburgh Corporation, and names only Wheeling Pittsburgh Steel, and not Wheeling Pittsburgh Corporation, as a party, the question of the administrative order's continuing impact on Wheeling Pittsburgh Corporation has not been addressed. Second, the Appellants argue that the Department's refusal to withdraw the order indicates it has continuing legal effect. Third, the Appellants argue that there is indeed meaningful relief that the Board can grant since it can vacate or rescind the order. Finally, the Appellants note that most of the statutes under which the administrative order was issued contain provisions dealing with compliance review or penalty escalation that could be impacted by an outstanding order, and therefore the Appellants do in fact have a stake in the outcome of this appeal as to whether the order is withdrawn or not.

Chief Judge Krancer addressed a similar issue in *Eighty-Four Mining Co. v. DEP*, EHB Docket No. 2003-181-K (Consolidated)(Opinion and Order issued March 17, 2004), in which the Department had sought to dismiss an appeal of several compliance and/or cessation orders issued to Eighty-Four Mining Company after a fire had occurred along a conveyor belt in one of its mines. The Department asserted that the appeal was

[3] Motion to Dismiss, para. 9.

moot since the orders had already been complied with and no tangential penalties could be assessed or permits denied based on the orders. Additionally, the Department considered the orders to be "terminated."

Following oral argument in Pittsburgh, Judge Krancer declined to dismiss the appeal as moot, finding "[t]here certainly is effective relief that the Board can grant. It can rescind or vacate the orders if Appellant proves its case, a step the Department has declined to undertake itself." *Id.* at 5. In reaching this decision, he posed the question "if [the orders] are moot, why has the Department either refused or declined to rescind them?" *Id.* Finding that the notion of "terminating" an order was borrowed from the concept of "lifting" an order in the surface mining program, Judge Krancer contrasted the notion of "terminating" an order with the notion of "revoking or rescinding" one, by quoting from the Board's decision in *Goetz v. DEP*, 2001 EHB 1127:

> Where DEP has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758. A revoked compliance order no longer exists, and thus the Board cannot provide any meaningful relief with regard to it; moreover a vacated compliance order cannot serve as the basis for any future civil penalties, or be considered in permit or license reviews. *West* [*v. DEP*], 2000 EHB [462] at 463; *Kilmer* [*v. DEP*], 1999 EHB [846] at 848.
>
> A different situation is presented where DEP issues a compliance order, the order is appealed, the appellant complies with the order, and DEP then "lifts" the order because it has been satisfied. See *Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985); *Harriman Coal Corporation v. DEP*, 2000 EHB 954. When a compliance order has been lifted due to satisfaction of its terms, the compliance order retains its validity and can continue to have a tangential impact on the recipient.

Goetz, 2001 EHB at 1132-33.

In the present case, the order has not been lifted or terminated; nor has it been revoked or rescinded. According to the Department the order has been superseded. The Board has dealt with the question of mootness in other cases where an order has been superseded: *Farmer v. DER*, 1993 EHB 1842; *Avery Coal Co. v. DER*, 1991 EHB 146; *Glenworth Coal Co. v. DER*, 1986 EHB 1348. In these cases, the Board held that where an order of the Department is superseded by a subsequent order, an appeal of the first order is moot. *Cf. Kilmer v. DEP*, 1999 EHB 846 (Appeal from a compliance order that is vacated by the Department and replaced with a subsequent order is dismissed as moot). Each of these cases, however, deals with an order of the Department that has been replaced by a subsequent Department order. None deals with an appeal of a Department order that is subsequently resolved by means of a Consent Decree.

In *Throop Property Owners Assn. v. DER*, 1988 EHB 391, a group of property owners appealed from a Consent Order and Agreement that had been entered into between the Department and the owner of a landfill following the issuance of a closure order to the landfill by the Department. The Consent Order and Agreement allowed the landfill to continue operating. In addition to the Consent Order and Agreement, the Commonwealth Court also entered an injunctive order preventing closure of the landfill. One of the allegations made by the appellants centered on the landfill's failure to appeal the Department's original closure order. The Board dismissed this objection on the basis that the closure order had been superseded by the order of the Commonwealth Court and

the Consent Order and Agreement. In reaching this conclusion, the Board focused on the following language in the court's order:

> 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 [closure] order. . . .

Id. at 397.

We see the issue here as being whether the administrative order issued to Wheeling Pittsburgh Steel and Wheeling Pittsburgh Corporation still carries some legal significance. If it does, and the Board can grant some relief with respect to the order, then it is not moot despite the existence of the Consent Decree. Certainly, the first question is whether the Consent Decree applies to Wheeling Pittsburgh Corporation. In *City of Chester v. PUC*, 773 A.2d 1280 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 788 A.2d 379 (Pa. 2001), the Commonwealth Court considered a consent decree that was entered following a settlement reached between the PUC and a transportation authority. The court held that a consent decree cannot be binding on anyone who is not a party to the proceeding because it would violate the due process rights of anyone not a party to the settlement.

Here, Wheeling Pittsburgh Corporation was neither a party to the Commonwealth Court action nor to the Consent Decree. Given that Wheeling Pittsburgh Corporation was not a party to the Consent Decree, a question remains as to whether the Consent Decree, in fact, supersedes the Department's order with regard to Wheeling Pittsburgh Corporation.

Secondly, the Appellants have raised the issue of whether they are subject to

penalty escalation provisions and compliance review provisions of the statutes under which the Department issued the order. If that is the case, questions remain as to whether the appeal of the order is, in fact, moot.

Because there are genuine issues of material fact, the motion to dismiss must be denied.

Appellants' Motion to Vacate and/or Rescind Administrative Order

In order to establish unambiguously that the Department's administrative order no longer has any legal effect, the Appellants ask us to vacate or rescind the order. In response the Department argues that even though the Consent Decree has superseded the administrative order, the administrative order does not then become erased but remains the basis for the Commonwealth Court's jurisdiction. The Department also questions whether the Board has jurisdiction to rescind or vacate an order that has been superseded by a Commonwealth Court consent decree.

We reject the Department's contention that the Board may have lost jurisdiction in this appeal due to the issuance of the Consent Decree. That argument was rejected by the Commonwealth Court in the enforcement action brought by the Department in this case. The court stated as follows:

> [W]e note that any decision this Court makes regarding the enforceability of the Administrative Order in no way interferes with the authority of the EHB to make a decision regarding the merits of the Administrative Order. As such, in the event that Wheeling-Pittsburgh prevails in its appeal before the EHB in whole or in part, any decision this Court would make regarding the enforceability of the Administrative Order in that regard may become moot.

DEP v. Wheeling-Pittsburgh Steel Corp., No. 301 M.D. 2004 (July 7, 2004 (unreported).[4] The court noted that the Department's ability to institute enforcement proceedings on its orders before the Commonwealth Court does not affect the Board's jurisdiction to adjudicate the merits of the order (citing *DEP v. Bethlehem Steel*, 367 A.2d 222 (Pa. 1976); *DER v. Norwesco Development Corp.*, 531 A.2d 94 (Pa. Cmwlth. 1987)).

However, simply because we have the authority to vacate the Department's order does not mean we should necessarily do so in this case. We noted earlier that the order was not moot because it may have some continuing legal effect on Wheeling Pittsburgh Corporation, which was not a party to the Consent Decree. Because the Consent Decree sets forth no obligations with regard to Wheeling Pittsburgh Corporation and because we have not adjudicated the merits of the administrative order as to Wheeling Pittsburgh Corporation, we find that it would not be appropriate to vacate or rescind the order.

Therefore, we shall request the parties to file a joint status report with the Board advising us as to whether the parties intend to litigate this matter with respect to Wheeling Pittsburgh Corporation or whether they intend to enter a settlement applying the terms of the Consent Decree to Wheeling Pittsburgh Corporation. As part of their joint status report, they shall include a joint proposed case management order.

[4] Exhibit 2 to Appellants' Brief in Response.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELING-PITTSBURGH STEEL COMPANY and WHEELING-PITTSBURGH CORPORATION	:	
v.	:	**EHB Docket No. 2002-133-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of February, 2005, both the Department's Motion to Dismiss and the Appellants' Motion to Vacate and/or Rescind Administrative Order are ***denied***. The parties shall file a *joint status report* with the Board on or before **February 25, 2005**, advising the Board whether they intend to litigate this appeal with respect to Wheeling Pittsburgh Corporation or whether they intend to enter a settlement agreement applying the terms of the Consent Decree to Wheeling Pittsburgh Corporation. As part of their joint status report, the parties shall include a joint proposed case management order.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: February 10, 2005

EHB Docket No. 2002-133-R

c: **DEP Bureau of Litigation:**
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SECRETARY TO THE BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 14, 2005**

OPINION AND ORDER ON APPELLANT'S MOTION TO COMPEL IN CAMERA INSPECTION OF DOCUMENTS CLAIMED TO BE PRIVILEGED UNDER THE DELIBERATIVE PROCESS PRIVILEGE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board grants a motion by Appellant, over the objection of the Department, to order in camera review of three e-mails which the Department has claimed are protected from disclosure in discovery by the deliberative process privilege. We grant for present purposes that there is a deliberative process privilege in the Commonwealth of Pennsylvania. Then, upon Appellant's prima facie or creditable threshold showing that the privilege either does not apply to some or all of the contents of the documents at issue, or it would be entitled to disclosure under the balancing test, or both, the Board concludes that in camera review is appropriate.

Factual Background

Before us is the Appellant's Motion to Compel (Motion) filed on February 2, 2005. The Motion seeks an order requiring the Department to submit to the Board for in camera inspection

three e-mails which the Department has refused to produce in discovery on the basis of a claim of deliberative process privilege. The purpose of the in camera inspection, of course, would be to have the Judge evaluate the e-mails to determine whether the documents should be protected from disclosure by the privilege. The Department has opposed even in camera review.

Both parties have requested an expedited trial on this matter. The case is set for trial starting on March 14, 2005. The case is an appeal by Waste Management Disposal Services of Pennsylvania, Inc. (WMI) of the Department's denial of its application for a major permit modification seeking a vertical expansion of WMI's Pottstown Landfill located in Pottstown, Montgomery County. The denial, via letter dated October 13, 2004, emanated from the Department's Southeast Regional Office in whose jurisdiction the Pottstown Landfill is located. The sole reason for the Department's denial of WMI's application is its conclusion that WMI had failed to demonstrate compliance with the so-called "Runway Flight Path Exclusionary Criteria" outlined in 25 Pa. Code § 273(a)(16)(i). That section provides that a landfill may not be operated,

> (16) Airport-navigable airspace. The following relate to airports:
>
> (i) Conical Area. For areas permitted prior to December 23, 2000, within the conical area at 14 CFR Part 77 (relating to objects affecting navigable airspace) for runway flight paths that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit.

25 Pa. Code § 273(a)(16)(i).

The Department produced a privilege log which reflects skeleton information about the three e-mails. Motion, Ex. E. The sole basis for withholding the three e-mails is indicted in the log as the deliberative process privilege. The log indicates that each e-mail is from Ron Furlan, Southeast Regional Office Waste Manager, to either Joseph Feola, Southeast Regional Director, or Eric Conrad, the Department's representative on the Pottstown Landfill Closure Committee,

with a carbon copy to Joseph Feola.[1] The third e-mail was accompanied by an attachment. The dates of the e-mails were March 14, 2003, June 11, 2003 and October 8, 2003. Finally, the "re" column of the log is the description for each: "Pottstown Vertical Expansion Application".

As we have already noted, both parties requested an expedited trial in this case. Thus, we truncated the usual response time for discovery motions and by Order dated February 4, 2005, we ordered that the Department and the Township file any response to the Motion by on or before Friday, February 11, 2005. Furthermore, we ordered a status conference call among the parties be held on Monday, February 14, 2005. By Order dated February 9, 2005, after consulting with counsel, we changed the status conference call to an in-person conference in our Norristown Court facility. Intervenor, West Pottsgrove Township, joined in WMI's Motion by a response filed on February 10, 2005. The Department filed its response on February 11, 2005. We held an in-person conference on this matter in the Norristown Courtroom on February 14, 2005.

The Department opposes even in camera review of the three e-mails. Its response, in essence, tells us that it has determined that the deliberative process privilege applies and, therefore, review in camera is "unnecessary." That assertion is provided in the affidavit of Michael D. Sherman, Deputy Secretary for Field Operations, Department of Environmental Protection. Mr. Sherman refers to the genre of the three e-mails as being "briefing memos." Sherman Affidavit, ¶ 4. Briefing memos, generically and apparently these in particular, describe the proposed action, matters of law and policy, outline areas of disagreement both within and outside the Agency and make recommendations on the decision the Agency must make. *Id.* ¶ 4. The idea behind briefing memos is to maximize the quality and consistency of Departmental

[1] At the conference on this Motion, counsel for the Department informed us that Mr. Conrad was, at the time the e-mail was written, was Deputy Secretary for Field Operations.

decisions. *Id.* ¶ 3. These types of e-mails are usually sent initially to the head of the field office in which the action is proposed and ultimately to Mr. Sherman. *Id.* Mr. Sherman says this type of briefing memo is relied upon by the Department to allow frank and open discussion of the options before it and that they are treated as confidential. *Id.* ¶ 5.

Mr. Sherman has read the 3 e-mails in question here. He describes them as having been "prepared with regard to the action proposed by the staff of the Southeast Region Waste Management Program with regard to the permit application for the Pottstown Landfill Eastern Area Vertical Expansion." *Id.* ¶ 8. In other words, the three e-mails deal directly and specifically with the Department's particular decision in this case which is now under appeal. He describes their contents as follows: (1) a statement of the Department's interpretation of the runway flight path exclusionary criteria regulation; (2) a statement of the alternative interpretation of that regulation by Appellant; (3) an evaluation of the relative strengths and weaknesses of those interpretations, and recommendations with regard to those interpretations; and (4) a statement of the comments received during the permit application process and the recommended resolution of the issues raised by those comments. *Id.* ¶ 9. Mr. Sherman says that the three e-mails, "represent an integral part of the deliberative process engaged in by the Department with regard to the action taken with regard to the pending permit application for the Pottstown Landfill Eastern Area Vertical Expansion." *Id.* ¶ 10. Mr. Sherman contends that the precedent of requiring disclosure here would greatly hamper the free exchange of ideas and opinions within the Department and would impair the quality and consistency of Department decisions. *Id.* ¶¶ 13, 14.

Relative Roles and Our Function Here Today

It is useful to remember here that our task today is not to decide if the privilege applies or

does not apply to the disputed e-mails. We are tasked today only with deciding whether to order an in camera review of the documents to determine whether the privilege applies to the three e-mails. We have been asked by the Appellant and Intervenor to undertake the in camera review and by the Department to not do so. This is apparently a question of first impression in the Commonwealth.

As the foundational framework and starting point for our analysis, we rehearse the following statement of our Commonwealth Court in the case of *North American Refractories, Inc. v. DEP*, 791 A. 2d 461 (Pa. Cmwlth. 2002)(*NARCO*):

> The EHB and the Department are two branches of the tripartite administrative structure that governs environmental regulation in Pennsylvania. The third branch of that structure is the Environmental Quality Board (EQB). The Department is the executive branch, assigned various duties to implement and enforce environmental statutes and regulations. *See, e.g.*, Section 4 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended, 35 P.S. § 4004*. The EHB is the judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, *35 P.S. § 7514*. Section 3(a) of the EHB Act, *35 P.S. § 7513(a)*, describes the EHB as "an independent quasi-judicial agency.

NARCO, 791 A.2d at 462. Thus, we are the judicial branch reviewing a claim of privilege of the executive branch.

The Department's response and its memorandum of law is devoid of any legal citation whatsoever on the question of what standards should be applied by the judicial branch in reviewing the question whether it should order an in camera review of documents claimed to be privileged by the executive branch. Apparently, the Department's position is that it has demonstrated *via* the affidavit of Mr. Sherman that such review is not necessary because it, the executive branch, has determined that the privilege applies. The Department has provided no case which provides authority for this approach, the logic of which seems quite circular. One

would have thought that such a view of relations between branches of government was effectively refuted by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803) and by Chief Justice Berger in *United States v. Nixon*, 418 U.S. 683 (1974). We have been left, then, to do our own homework, which we have done. Before we describe our investigation and conclusions in that regard, however, we will take a detour to discuss another threshold issue important to the remainder of our discussion here and most likely in further proceedings regarding these three e-mails. We will discuss the deliberative process privilege itself and its current status in the Commonwealth of Pennsylvania.

History And Status Of The "Deliberative Process Privilege" In Pennsylvania

The deliberative process privilege has been much written about and much talked about in the past few years in the Commonwealth of Pennsylvania. Opinions have been written on or about the subject by us, the Commonwealth Court and the Supreme Court. *Tribune-Review Publishing Company v. Department of Community and Economic Development*, 859 A.2d 1261 (Pa. 2004); *Lavalle v. Office of General Counsel for the Commonwealth*, 769 A.2d 449 (2001); *Commonwealth ex rel. Unified Judicial System v. Vartan*, 733 A.2d 1258 (Pa. 1999); *Tribune-Review Publishing Company v. Department of Community and Economic Development*, 814 A.2d 1261 (Pa. Cmwlth. 2003), *aff'd on other grounds; Tribune-Review Publishing Company v. Department of Community and Economic Development*, 859 A.2d 1261 (Pa. 2004); *Brunner v. DEP*, EHB Docket No. 2002-304-L (Opinion issued April 6, 2004)(*Brunner II*); *Brunner v. DEP*, EHB Docket No. 2002-304-L (Opinion issued January 8, 2004)(*Brunner I*); *New Jersey Department of Environmental Protection v. DEP*, 2003 EHB 220 (*NJDEP*); *Lower Paxton Township v. DEP*, 2001 EHB 256. In addition, the Third Circuit Court of Appeals has dealt with the privilege in a case which arose from the United States District Court for the Middle District

of Pennsylvania. *Redland Soccer Club v. Department of the Army*, 55 F.3d 827 (3rd Cir. 1995).

Judge Coleman provided a very comprehensive discussion on the Pennsylvania case law on the deliberative process privilege in her *NJDEP* opinion written in February 2003. *NJDEP*, *supra* at 223-26, 228-29. We refer the reader to that discussion as we rely on it for the history discussed at length therein but do not wish to burden this Opinion with full replication thereof.

Judge Coleman, in *NJDEP*, takes us up through the Commonwealth Court's pronouncement in *Tribune-Review* that it is adopting the deliberative process privilege as the law of Pennsylvania, apparently on the basis of *Vartan* and *Lavalle*. *Tribune-Review*, 814 A.2d at 1263-64. Since then the major development has been the Supreme Court's *Tribune-Review* opinion which declined to adopt the privilege but upheld the Commonwealth Court's *Tribune-Review* decision on the basis of the definition of "public record" under the Right To Know Act. *Tribune-Review*, 859 A.2d 1261 (Pa. 2004). The Supreme Court did not deal squarely with the deliberative process privilege but Madame Justice Newman, in the majority opinion, wrote that "this Court has twice previously addressed the deliberative process privilege, <u>but we never adopted it</u>." *Id.* at 1266 n.2 (emphasis added). Significantly, Justice Newman wrote the *Vartan* plurality opinion which has been cited with some regularity as standing for the proposition that there is a deliberative process privilege in Pennsylvania. Indeed, as we just noted, the Commonwealth Court apparently relied at least in part on Justice Newman's plurality opinion in *Vartan* for its adoption of the deliberative process privilege in its *Tribune-Review* decision. The other opinion relied upon by the Commonwealth Court in its *Tribune-Review* decision, *Lavalle*, stated that the Court has not adopted the deliberative process privilege. *Lavalle*, 769 A.2d at 457 ("This Court has not definitively adopted the deliberative process privilege[.]"). In sum, the last two Supreme Court opinions which have touched on the deliberative process privilege, *Tribune-*

Review and *Lavalle*, the first after the Commonwealth Court's adoption of the privilege and the second one after, have both stated that the Court has not adopted the privilege.

Last year, in the interregnum between the Commonwealth Court's *Tribune-Review* decision and the Supreme Court's *Tribune-Review* decision, Judge Labuskes, said this in his *Brunner I* decision,

> [p]rotracted discussion regarding [whether Pennsylvania has adopted the deliberative process privilege] is not warranted here because it appears that the matter is under active consideration by the Pennsylvania Supreme Court [citing the appeal then pending of the Commonwealth Court's *Tribune-Review* decision].
>
> Pending further guidance from the Pennsylvania Supreme Court, we hold that the Department is entitled to assert a deliberative process privilege in Board proceedings.

Brunner I, slip op. at 3. It might seem that the "further guidance" which Judge Labuskes hoped would come from the Supreme Court in its *Tribune-Review* decision is in fact not further guidance but deeper question. The Supreme Court's *Tribune-Review* decision has proverbially raised more questions than it has answered about whether the privilege really exists in Pennsylvania. One could say that the "further guidance" has now come and it has confirmed that there is no deliberative process to assert in the Commonwealth of Pennsylvania. Therefore, the Department's claim of deliberative process privilege should be rejected out of hand as a legal matter on the grounds that the privilege being claimed does not exist. After all, of the two Supreme Court opinions relied upon by the Commonwealth Court in adopting the privilege in its *Tribune-Review* decision, one was a plurality opinion of just two Justices (*Vartan*), the other specifically said that the privilege has not been adopted in Pennsylvania (*Lavalle*) and now, the author of the *Vartan* in the opinion up from the Commonwealth Court which adopted the privilege (*Tribune-Review*), has specifically stated that the Court has twice addressed the privilege "but we have never adopted it" (*Tribune-Review*, Supreme Court).

On the other hand, the Supreme Court's *Tribune-Review* case did not directly deal with the deliberative process privilege as such and the Court did not deny its existence or preclude its application. The Court merely said it had not adopted it. It has not yet had occasion to do so. Justices Newman, Cappy and Castille are on record as saying that the privilege ought to be adopted. *Lavalle*, 769 A.2d at 461 (Cappy, J., concurring); *Vartan*, 733 A.2d at 1266.

The undersigned agrees with Justices Newman, Castille and Cappy that there are strong policy reasons favoring the recognition of a deliberative process privilege. Those reasons were well stated by Justice Newman in *Vartan* and Judge Labuskes in *Brunner I.* Also, the Commonwealth Court obviously agrees with Justices Newman, Cappy and Castille that there ought to be a deliberative process privilege as it so held in its *Tribune-Review* decision. Its *Tribune-Review* decision was not reversed by the Supreme Court nor did the high Court rebuke the Commonwealth Court for stating that it was adopting the privilege. Justice Newman merely stated that since the case was being decided on the basis of the Right To Know Act that the Commonwealth Court's adoption of the deliberative process privilege was "superfluous." *Tribune-Review*, 859 A.2d at 1269. She also said, not surprisingly perhaps, that she agreed with the principles outlined about the deliberative process privilege in her *Vartan* opinion. *Id.*

So, one could say that, in the Commonwealth Court at least, there is a deliberative process privilege to assert. The Commonwealth Court, of course, is the appellate court immediately above us so it follows that if there is a deliberative process privilege to assert there, there must be one to assert here too. Furthermore, Appellant does not seriously contend that there is no deliberative process privilege. The focus of its argument is that there is a serious question whether such privilege applies here and they have asked on that basis for in camera review.

Based on all those factors, we will side-step the ontological question regarding the privilege and do as Judge Labuskes did in *Brunner I* and *Brunner II*. We will proceed on the basis of the convention that the "Department is entitled to assert a deliberative process privilege claim in Board proceedings." *Brunner I, slip op.* at 3.

Of course the deliberative process privilege has been written about in other states as well. A brilliant, scholarly and monumentally well researched discussion of the history and background of the deliberative process privilege was provided by Justice Martinez of the Colorado Supreme Court in *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998), a case in which the Colorado Supreme Court definitively adopted the deliberative process privilege in the State of Colorado. Justice Martinez's discussion is very helpful because he provides an historical background of the privilege, a description of it, a list of state court decisions adopting it, and a discussion of how a court goes about dealing with a request to review in camera documents which the executive branch claims are covered by the privilege. That later question is the one in front of us today and we owe a large debt to Justice Martinez, and the courts he cites who have analyzed the question, in guiding us in dealing with it. *City of Colorado Springs*, 967 P.2d at 1053-54. *See also Killington, Ltd. v. Lash*, 572 A.2d 1368, 1375-76 (Vt. 1990); *State ex rel. Attorney General v. First Judicial District Court*, 629 P.2d 330, 334 (N.M. 1981); *Hamilton v. Verdow*, 414 A.2d 914, 926-27 (Md. 1980).[2]

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[2] Justice Martinez in *City of Colorado* tells us that the deliberative process privilege is unique to the government. *City of Colorado Springs*, 967 P.2d at 1046. The privilege originated in the eighteenth and nineteenth centuries within the concept of the English "crown privilege". *Id. citing* Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 283 (1989). The privilege has been termed the "executive privilege." *City of Colorado Springs*, 967 P.2d at 1046. As such, it has two sources: constitutional and common law. The constitutional component relates to state secrets or presidential communications and is based on the notion of separation of powers. *Id. citing e.g., United States v. Nixon*, 418 U.S. 683. (other citation omitted). The common law component of the privilege is based on the concept that "Government cannot operate in a fish bowl." *Id. citing Vaughn v. Rosen*, 523 F.2d 1136, 1146. In other words, the protection of the confidentiality of decision-making processes of government agencies is distinct from the constitutionally based executive privilege dealt with in *United States v. Nixon*. In this case, of course, we are dealing not with state secrets or presidential or gubernatorial

Elements of and Nature of the Deliberative Process Privilege

The elements which make communications subject to the deliberative process privilege have been set forth many times in the cases we referred to earlier and others as well. We think Judge Labuskes did a very nice job in *Brunner I* setting forth those criteria as stated in the case law and we will follow his lead in that regard. Briefly, the privilege will apply to communications which are: (1) intended to be confidential; (2) constitute deliberations in that the communication was made in the context of devising an institutional decision; and (3) relate to legal or policy matters. *Brunner I, slip op.* at 4. For dilation on these thumbnails we refer the reader to the *Brunner I* opinion because it contains an excellent elaboration on each of these criteria. *Id.* at 4-5.

As has been pointed out many times, the burden is on the party asserting the privilege to establish that the predicate elements thereof exist and that, accordingly, the privilege attaches. *Brunner I, slip op.* at 4 *citing Lower Paxton*, 2001 EHB at 261. Also, the privilege is not absolute, it is a qualified privilege. Even if the privilege applies, disclosure of the communications will be appropriate where the opposing party's interest in disclosure outweighs the government's interest in non-disclosure. *Redland Soccer Club v. Department of the Army*, 55 F.3d 827, 854 (3rd Cir. 1995); *Brunner I, slip op.* at 6; *Lower Paxton*, 2001 EHB at 261. Also, as the *Redland Soccer* Court noted:

> In considering the United States' assertion of privilege, the district court should keep in mind the fact that Federal Rule of Civil Procedure 26 authorizes broad discovery into "any matter, not privileged, which is relevant to the subject matter involved in the pending action, [see Federal Rule of Civil Procedure 26(b)(1)] but the deliberative process privilege, like other executive privileges, should be narrowly construed." *See Coastal States Gas Corp. v. Dep't of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 868 (D.C. Cir. 1980); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 716 (E.D. Pa. 1968)(collecting cases).

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communications so we are dealing with the common law deliberative process privilege.

Redland Soccer, 55 F.3d at 856. Those principles would be equally applicable here where we are dealing with the Pennsylvania Rules of Civil Procedure regarding discovery.

The Department's Claim of Deliberative Process Privilege In This Case

The scope of the deliberative process privilege being claimed by the Department here is breathtaking and is certainly unprecedented. It is one thing to say that there ought to be a deliberative process privilege, but it is another to say that it ought to be all encompassing as the Department has contended here. The Department, of course, contends that the privilege covers the substance of the supposedly covered communication. We do not see even WMI disputing that since such a formulation is virtually definitional. However, beyond that, the Department claims the privilege covers the following information as well: (1) the identity of who participated in supposedly privileged discussions; and (2) when such discussions took place. These parameters of the privilege are set forth in the transcripts of the depositions of Mr. Pounds and Mr. Socach in the form of counsel for DEP's objections to Appellant's counsel's deposition questions and accompanying instructions not to answer. Appellant's Motion Ex. D pp. 47-48, 67; Ex. E pp. 92-93 (who was involved in the communication); Ex. E, p. 30 (when the communication took place). The scope of the privilege as it covers the substance of the communication being claimed by the Department is likewise beyond any heretofore construction of the privilege. The Department claims that the privilege covers not only broad general policy application, *i.e.*, regulatory matters, it also covers communications on the subject of the particular specific Department action under review at the Board, *i.e.*, the adjudicative matters. Appellant's Motion Ex. E, p. 104.

The irony of this unprecedented view of the breadth of the deliberative process privilege coming just on the heels of the Supreme Court's very recent reminder that it has never adopted

the privilege cannot escape notice.

In Camera Review--Standard

It seems virtually a matter of a priori logic that in camera review is not an inappropriate method to test the government's claim to deliberative process privilege. As Judge Labuskes observed in *Brunner I*, "[a]t the risk of stating the obvious, our analysis will usually begin by examining the content of the communication." *Brunner I, slip op.* at 7. As we noted before, this method has been used before and is endorsed by the Supreme Court of the United States. *Kerr v. United States District Court*, 96 S. Ct. 2119 (1976)(in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege); *Brunner II*; *Brunner I.* In the *Brunner* cases, it was taken as a given that Judge Labuskes would review the documents in camera and he did. As Judge Labuskes said there, "[i]n most cases, this determination will require an in camera inspection of the evidence in question. *Brunner I, slip op.* at 4, *citing Kerr.* Thus to the extent that in camera review is not the a priori result of a challenge to a privilege claim, it has certainly been a posteriori established as normative and routine.

A Judge's in camera inspection of allegedly privileged documents to review the merit of the deliberative process privilege claim has been employed before and is the preferred method for evaluating claims of governmental privilege. *Kerr* (in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege); *Brunner II, Brunner I.*

Of course, in *Brunner* and *Kerr* the government did not object to in camera inspection. In *Kerr*, in fact, the government was the proponent of in camera review. Here, the government opposes in camera review. While at first blush it would seem incongruous for the judiciary to simply accept the executive's assertion of privilege, it is equally or perhaps more perverse to simply accept the challenger's demand that the documents be turned over to the court for its

review.

Our review of the case law tells us that in camera inspection does not and should not follow automatically from the challenger's request. Indeed, more than one court has observed that even an in camera review is an intrusion, albeit a limited one, upon the privilege. *Hamilton v. Verdow*, 414 A.2d at 926.

Thus, an in camera inspection is not mandatory just because it has been asked for by the party challenging the government's claim of privilege. A court should proceed with caution. Although the various courts formulate the approach somewhat differently we discern the following basic analysis to apply to this question. Although the ultimate burden is on the government to establish that the privilege applies, a court is not to take the executive's claim lightly. Indeed, for the purposes of determining whether an in camera review is to be ordered, the court should grant that the executive's claim is may be valid. It is then up to the challenger to show some prima facie or creditable claim that the documents are either not subject to the privilege and/or that its need to have the information outweighs the government's need to keep the information secret. *City of Colorado Springs*, 967 P.2d at 1053-54; *Killington, Ltd. v. Lash*, 572 A.2d at 1375-76; *State ex rel. Attorney General v. First Judicial District Court*, 629 P.2d at 334; *Hamilton v. Verdow*, 414 A.2d at 926-27.

Maryland's highest court, the Court of Appeals of Maryland, put it this way:

> As pointed out by some of these courts, the *in camera* inspection itself is an intrusion upon the privilege. Thus, when a formal claim of executive privilege is made, with an affidavit stating that the demanded materials are of a type that fall within the scope of the privilege, they are presumptively privileged even from *in camera* inspection. The burden is on the party seeking production to make a preliminary showing that the communications or documents may not be privileged or, in those cases where a weighing approach is appropriate, that there is some necessity for production. *United States v. Nixon, supra, 418 U.S. at 713--714; Senate Select Committee On Pres. Cam. Act. v. Nixon, supra, 498 F.2d at 730; Committee For Nuclear Responsibility, Inc. v. Seaborg,supra, 463 F.2d at*

792; Zeiss, supra, 40 F.R.D. at 331. Mr. Justice Reed explained for the Court in the *Kaiser Aluminum* case, *supra, 157 F. Supp. at 947:*

> It seems equally obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even unilaterally. When the head of an agency claims privilege from discovery on the ground of public interest, which is recognized as a basis for the claim, it seems to us a judicial examination of the sought-for evidence itself should not be required without a much more definite showing of necessity than appears here.

[*Kaiser Aluminum & Chemical Corporation v. United States*, 157 F. Supp. 939, 947 (U.S. Court of Claims 1958)]

Consequently, absent such a preliminary showing by the party demanding disclosure, the claim of executive privilege should be honored without requiring an *in camera* inspection.

On the other hand, where a sufficient showing is made to overcome the presumption, the court should order an *in camera* inspection. Depending upon the issues and circumstances, the *in camera* inspection may be utilized to determine whether the material is privileged, to sever privileged from non--privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production.

Hamilton v. Verdow, 414 A.2d at 926-27.[3]

The determination of whether to conduct an in camera review is, ultimately, a matter that is within the discretion of the trial court which in this case is the Board. *City of Colorado Springs v. White*, 967 P.2d at 1054. The exercise of our discretion, though, is guided by the principles and the approach just outlined. While court's have used the word "presumption" in that the documents are "presumptively privileged", we have not used that word. We stress that we are not in any way trumping the principle that the proponent of the privilege has the burden of establishing it. This analysis could be called the "benefit of the doubt" analysis and it applies

[3] Mr. Justice Reed, who is quoted by the Court of Appeals of Maryland here from the *Kaiser Aluminum* case, was sitting by designation on the United States Court of Appeals in the *Kaiser Aluminum* case. *Hamilton v. Verdow*, 414 A.2d at 923.

only to a contested issue of whether there should be in camera review. Other judges could call the analysis something else. Our approach here is merely our way of mediating the polar positions of granting in camera review automatically upon the demander's request or denying it automatically upon the government's request. Our approach takes that unilateral power to have or not have an in camera review out of the respective parties' hands, where it does not belong, and places the decision where it does belong; within the court's discretion governed by some tangible standard.[4].

Has Appellant Raised A Prima Facie Or Creditable
Claim That The Privilege Does Not Apply To The Three E-mails

We think there is no question that Appellant has presented a prima facie or creditable claim that parts or all of the three documents may not be privileged thus making us comfortable ordering that the documents be produced in camera for further review and evaluation of the claim of privilege.

It appears from the privilege log which sets forth the claim of the privilege that all three e-mails relate to the decision in this specific case. The Department's privilege log describes the e-mails as being about "Pottstown Vertical Expansion Application". Also, Mr. Sherman's affidavit is replete with references to the e-mails as being related to or generated in the context of the specific permitting decision under appeal here. Sherman Affidavit ¶ 8 (memos "were prepared with regard to the action proposed by the staff of the Southeast Region Waste Management Program with regard to the permit application for the Pottstown Landfill Eastern Area Vertical Expansion"); ¶ 10 (memos were prepared "with regard to the action to be taken

[4] Counsel for WMI at the case conference pointed out that Judge Labuskes used a "credible need" analysis in his *Brunner II* opinion. It was suggested that this standard should be applicable here to determining the contested motion for in camera review. We note, though, that Judge Labuskes's "credible need" analysis came not in a contested motion requesting in camera review but, instead, in his application of the substantive balancing test after in camera review to determine whether the Appellant's need for the information outweighed the government's need

with regard to the pending permit application for the Pottstown Landfill Eastern Area Vertical Expansion").

Thus, these communications, as described by the Department itself, relate not to a matter of general application, i.e., a regulatory matter, but, instead, to this particular and specific permit decision which is under appeal, i.e., the adjudicative matter. As we noted in *Lower Paxton* when the subject of the communication at issue relates specifically to the Department's action which is under appeal "it is hard to imagine a setting which is more antithetical to application of the deliberative process privilege". *Lower Paxton*, 2001 EHB at 261. Judge Labuskes conveyed the same thought in *Brunner I* when he observed that "in our mind, the phrase [legal or policy] normally connotes a matter of general application not to a particular party's circumstances. It is program oriented; more regulatory than adjudicative". *Brunner I, slip op.* at 5.

Such analysis is particularly applicable to Environmental Hearing Board litigation for several important reasons. Under Section 7514(c) of the Environmental Hearing Board Act, when a matter is properly before the Board in litigation, as this one is, the "decision" of the Department is not final until the Board has fully adjudicated the case. 35 P.S. § 7514(c). Thus, when we are dealing with the particular matter under appeal at the Board, there is no final decision to which any deliberative process privilege can attach. Also, as we noted in *Lower Paxton*,

> No blanket deliberative process privilege can be applied to Deputy Secretary Tropea here. Lower Paxton alleges that Deputy Secretary Tropea was personally, directly and persistently involved in the decision to deny Lower Paxton's proposed Plan. It is this very decision which is now under review before the Board. Under the EHB Act, the Appellant has a right to a full *de novo* hearing on that decision before it becomes final. Correspondingly, the EHB is the quasi-judicial body whose statutory role is to determine, based on a full record and via *de novo* review, whether the action of the Department is appropriate and lawful and whether it should or should not become final. *Smedley v. DEP*, Docket No.

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to keep the information secret. *Brunner II*, slip op. at 3-7.

> 97-253-K, *slip op.* at 25-30 (Adjudication issued February 8, 2001). It is illogical to maintain that the core information about how and on what bases the Department arrived at its decision under review is to be locked away. Indeed, it is hard to imagine a setting which is more antithetical to application of a deliberative process privilege. The review of and scrutiny of the Department's deliberative process with respect to the action under appeal is a part of the very essence of the Appellant's right and the Board's function and duties. Application of the privilege to make that information inaccessible would render nugatory Appellant's rights and the Board's responsibilities.

Lower Paxton, 2001 EHB at 260-61. Based on the foregoing analysis, we see that there is a creditable claim that part or all of the communications being claimed privileged do not satisfy the "legal or policy matters" predicate for application thereof.

The Department posits that memoranda such as these which admittedly relate to specific cases are subject to the deliberative process privilege, even in the context of an Environmental Hearing Board litigation where the specific decision is under review. We do not accept in a vacuum without seeing the documents that maximalistic view of the "legal or policy matters" predicate of the privilege. Such a view is especially ill-fitting in the context of Environmental Hearing Board litigation for the reasons we just discussed. The Environmental Hearing Board Act gives an appellant, in this case WMI, the right to a due process trial of the Department's specific decision on its specific matter. The privilege, if it does exist in Pennsylvania, is a common law qualified privilege and it must be construed in light of the Environmental Hearing Board Act. *See* Footnote No. 1, *supra* (the deliberative process privilege at issue here is a creature of common law). The "legal or policy matters" predicate cannot be read, as apparently the Department reads it here, to be so expanded so as to include what is the very subject of the due process trial. If it did, then there would be no due process and the rights granted under the Environmental Hearing Board Act would be gone.

It could very well be that material which is of general application is interspersed with

specific discussion of the permit denial under review now at the Board. It may be the case, therefore, that one or more of the e-mails contain both non-privileged and privileged material. In such a case, of course, the privileged material would have to be redacted from any production of non-privileged material. This, of course, underscores the appropriateness of an in camera review in this case. As the Court of Appeals of Maryland noted in *Hamilton*,

> [w]here a sufficient showing is made to overcome the presumption, the court should order an *in camera* inspection. Depending upon the issues and circumstances, the *in camera* inspection may be utilized to determine whether the material is privileged, to sever privileged from non--privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production.

Hamilton v. Verdow, 414 A.2d at 927 (emphasis added).

We note here that Mr. Sherman's affidavit describes the three e-mails as containing four components as follows: (1) a statement of the Department's interpretation of the regulation at issue in this case; (2) a statement of the alternative interpretation of that regulation proposed by Appellant; (3) an evaluation of the relative strengths and weaknesses of those interpretations, and recommendations with regard to those interpretations; and (4) a statement of the comments received during the permitting process and the recommended resolution of the issues raised by those comments. That being so, then partial redaction could be called for here. The first two items would not be within any privilege under any conceivable view of the privilege. The third and fourth, however, may potentially be wholly or partially within the deliberative process privilege. From Mr. Sherman's description, it could be the case here that we have general legal and policy matters discussed within a communication dealing with a specific permitting decision. For example, item no. 3 may contain broad policy discussions regarding the airport flight path exclusionary criteria that transcend the specific Pottstown Landfill decision. That material could be subject to the privilege. As to item no. 4, it would seem that the mere repeating of the

public's comments may not be subject to the privilege but, maybe, the author's recommended resolutions could be if such communications fit the qualitative criteria we have discussed. Accordingly, different parts of the communication may stand on different footing with respect to privilege analysis. Again, however, we will need in camera inspection of the e-mails to perform that evaluation.

In addition, to the extent that the communications in this case could possibly, in whole or in part, be brought within the "legal or policy matters" predicate, despite the Department's own description to the contrary, there is a creditable claim that the Department never intended such communication to be confidential. Although Mr. Sherman claims that the three e-mails were intended to be confidential communications, Mr. Pounds, a Department witness, testified at deposition as follows regarding discussions about the runway flight path exclusion criteria which were in the form of general policy, "I think that's something that's not confidential". Mr. Pounds testified that it is only when the discussions relate to a specific site or a unique set of facts that he believes the communications to be confidential. Appellant's Motion, Ex. D, p. 49-50.

Appellant has also raised a creditable claim that even if the communications satisfied the predicates for application of the privilege that they should nevertheless be disclosed because its interest in obtaining them outweighs the Department's interest in maintaining their secrecy. It appears that the communications deal with the interpretation of the runway flight path exclusionary criteria regulation. The main issue in this case is the proper interpretation of that regulation. Thus, the Department's interpretation of that regulation, even in the context of general applicability and interpretation removed from any particular case constitutes highly relevant evidence in the case. Judge Labuskes was faced with precisely the same situation in

Brunner II and he concluded, after review of the documents in camera and application of the balancing test, that the documents must be disclosed. *Brunner II, slip op.* 9-11. Judge Labuskes had this to say,

> That leaves us to balance Brunner's interest in disclosure of the content of the deliberations against the Department's interest in keeping the deliberations confidential. We will take these in reverse order because the Department's interest is relatively straightforward. The Department's interest is that individuals such as Pounds and Socash should be able to freely exchange thoughts and ideas regarding the state-wide implementation of new statutes without undue fear that the discussions will become a matter of public record. Although it does not appear to us that the discussions at issue here were particularly sensitive or revealing, we nevertheless agree with the Department that the purpose of the privilege would be served by protecting the discussions from disclosure.
>
> We disagree with the Department's contention, however, that the contents of the discussions have no probative value in Brunner's appeal. This case will turn on the meaning of a statute. Our one and only function in such a case is to divine the Legislature's intent. 1 Pa.C.S.A. § 1921(a). It may be that the Legislature's intent is so abundantly clear from the face of Act 90 that we need go no further. *Eagle Environmental v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2003) (where a statute is clear, there is no need to engage in interpretation). *See, e.g., RAG Cumberland Resources v. DEP,* EHB Docket No. 2003-067-L (Opinion and Order January 27, 2004) (mining statute unambiguously requires preshift examinations).
>
> On the other hand, although we have not even begun to consider the question here, it may be that Act 90 may have some ambiguity. In that event, we will be tossed into the heady maelstrom of statutory interpretation. If we find ourselves afloat in such rough waters, one of the factors that we will need to consider is the Department's institutional interpretation. 1 Pa.C.S.A. § 1921(c)(8). In other words, that interpretation, once proven, is *evidence*. What counsel discourses in a brief is argument; what the Department as a whole has adopted as its official position is probative evidence of what an ambiguous statute actually means.
>
> Once we acknowledge that the Departmental interpretation is itself evidence, it follows that Brunner has an interest in its disclosure. And as with any other evidence that has the potential to become part of the record, Brunner is not compelled to accept the evidence at face value, particularly at the discovery stage. Brunner is not required to say, "Well, this is what the Department says, so it must be true." Rather, Brunner is generally entitled to explore all pertinent aspects of the evidence. It is also entitled to discover information that may be used for impeachment purposes. Background information regarding the formulation and basis of the Department's programmatic choices on how it plans to implement an

> assertedly ambiguous statute might at least conceivably have an impact on the weight that this Board gives to the interpretation. We are not able to conclude as much now, but we are also not willing to categorically rule out such possibilities at this juncture of the case. Furthermore, determining whether the Department's interpretation is reasonable, if we are required to get into that, might very well involve consideration of precisely the sort of matters that Brunner is asking about. In short, Brunner is clearly in a legitimate search for potentially probative information.
>
> Thus, Pounds and Socash's discussions are of the kind that are contemplated by the privilege, but the information is also of the sort that is generally probative. We have struggled with our balancing analysis because, perhaps ironically given all of the attention this one discovery issue is receiving, the communications at issue are rather innocuous. In that sense, disclosure is not particularly destined to chill future internal debate, but neither do we see disclosure as likely to have dramatic value in Brunner's case. On balance, we conclude that the evidence's potential probative value outweighs the Commonwealth's need to shield it from disclosure. Among the other factors that we have considered as discussed above, we are concerned that redacting the information would cast a pale over the proceedings by giving the inaccurate but understandable impression that important information existed but was being covered up. As always, we strive for the most informed adjudication possible founded upon a complete record. The largely theoretical societal interest that might be marginally served by limiting Brunner's discovery of the discussions at issue is insufficient to compel us to deviate from that primary goal in this appeal.

Brunner II, *slip op.* at 4-7.

If, as we have heard the Department tell us, it will be relying substantially on *NARCO* in this case in that it will be positing what it says is its reasonable interpretation of the runway flight path exclusionary criteria, to which we will then have to defer in its favor, then there is no question that any evidence about what that interpretation is will be probative evidence. Indeed, as Judge Labuskes pointed out, the *NARCO* analysis that the Department will ask us to employ makes evidence about the Department's interpretation of the regulation probative in the extreme. As he said, "it would seem that the more weight the Department's position is entitled to, the greater its probative value." *Brunner II*, slip op. at 5 n.2. In other words, the more work the Department wants *NARCO* to do in terms of providing weight or deference to its interpretation of

the regulation, the more probative evidence about the Department's interpretation of the regulation becomes.

Also, we note that Judge Labuskes came to this conclusion that the Appellant's interest in the evidence outweighed the government's in keeping it secret where the communications in that case were of the general, programmatic, regulatory type. Here the communications relate to the specific case at issue here in this litigation and is, thus, of the particular or adjudicative type. Thus, the communications here stand on shakier ground for application of the privilege than did the communications in *Brunner* which Judge Labuskes held, after in camera review, must be disclosed. In other words, in this case, at least on the basis of the information we have seen, these communications look like better candidates for requiring disclosure than the ones Judge Labuskes ordered disclosed in *Brunner II.*

The Department and Mr. Sherman's affidavit spend much effort explaining how disclosure would be detrimental to the Department in that it would inhibit the free exchange of ideas within the Department. Mr. Sherman says that these briefing memoranda provide frank and open assessment of the options before the Department and that the effectiveness of such free communication would be undermined by disclosure. He also says that it would be a bad precedent to have this sort of communication opened to view. We are not ready to deal with these assertions now. At this stage all we are talking about is in camera review. Even if what Mr. Sherman is saying may possibly be true with respect to ultimate disclosure is another question for another day. Even if we were to agree with Mr. Sherman we could, if we decided that the documents should be disclosed to WMI, provide certain safeguards that would dispense with Mr. Sherman's concerns. For example, we could order disclosure and use of the documents pursuant to a strict confidentiality order. In any event, we do not feel that in camera review by a

judge would undermine any free flow of communication within the Department. *See Dispennet v. Cook*, 2002 U.S. Dist. LEXIS 25523 *D.* Ore.)(in camera review does not constitute disclosure).

Obviously, we are not deciding the ultimate outcome of the balancing test here and now but we are able to conclude based on the foregoing analysis that that Appellant has raised a creditable claim that they would prevail in the balancing test under the deliberative process privilege. Of course, unless the "legal or policy matter" predicate applies to these e-mails, this balancing of interests would not be necessary as the privilege would not apply to the e-mails in the first place. In either case, WMI has established a prima facie case that the documents ought to be turned over to it.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 14th day of February, 2005, upon consideration of the Appellant's Motion to Compel, the Township's Response and the Department's Response, and the in-person conference on the Motion to Compel in which all counsel and the undersigned participated on Monday, February 14, 2005, it is hereby ordered that the Department shall produce to the undersigned under seal for in camera review the three e-mails (one with attachment) described in its privilege log. The documents shall be hand delivered to the Board's Norristown Office for review in Chambers by the undersigned on Tuesday, February 15, 2005. The documents so delivered shall be contained in a separate sealed envelope marked, "E-mails" and shall be reviewed by Judge Krancer and his Assistant Counsel, Ms. Wilson, only.

IT IS FURTHER ORDERED that by Thursday, February 17, 2005, the parties shall, if they so desire, provide the Board with further briefing on the subject of whether the documents themselves should or should not be subject to the deliberative process privilege. In addition, the parties are ordered to advise the Board by that date what, if any, further proceedings should be undertaken, besides in camera review of the documents, with respect to the Board's determination

of whether the privilege applies.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: February 14, 2005

c: DEP Bureau of Litigation
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WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 14, 2005 (Corrected Copy Issued February 15, 2005)**

OPINION AND ORDER ON APPELLANT'S MOTION TO COMPEL IN CAMERA INSPECTION OF DOCUMENTS CLAIMED TO BE PRIVILEGED UNDER THE DELIBERATIVE PROCESS PRIVILEGE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board grants a motion by Appellant, over the objection of the Department, to order in camera review of three e-mails which the Department has claimed are protected from disclosure in discovery by the deliberative process privilege. We grant for present purposes that there is a deliberative process privilege in the Commonwealth of Pennsylvania. Then, upon Appellant's prima facie or creditable threshold showing that the privilege either does not apply to some or all of the contents of the documents at issue, or it would be entitled to disclosure under the balancing test, or both, the Board concludes that in camera review is appropriate.

Factual Background

Before us is the Appellant's Motion to Compel (Motion) filed on February 2, 2005. The Motion seeks an order requiring the Department to submit to the Board for in camera inspection

three e-mails which the Department has refused to produce in discovery on the basis of a claim of deliberative process privilege. The purpose of the in camera inspection, of course, would be to have the Judge evaluate the e-mails to determine whether the documents should be protected from disclosure by the privilege. The Department has opposed even in camera review.

Both parties have requested an expedited trial on this matter. The case is set for trial starting on March 14, 2005. The case is an appeal by Waste Management Disposal Services of Pennsylvania, Inc. (WMI) of the Department's denial of its application for a major permit modification seeking a vertical expansion of WMI's Pottstown Landfill located in Pottstown, Montgomery County. The denial, via letter dated October 13, 2004, emanated from the Department's Southeast Regional Office in whose jurisdiction the Pottstown Landfill is located. The sole reason for the Department's denial of WMI's application is its conclusion that WMI had failed to demonstrate compliance with the so-called "Runway Flight Path Exclusionary Criteria" outlined in 25 Pa. Code § 273(a)(16)(i). That section provides that a landfill may not be operated,

> (16) Airport-navigable airspace. The following relate to airports:
>
> (i) Conical Area. For areas permitted prior to December 23, 2000, within the conical area at 14 CFR Part 77 (relating to objects affecting navigable airspace) for runway flight paths that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit.

25 Pa. Code § 273(a)(16)(i).

The Department produced a privilege log which reflects skeleton information about the three e-mails. Motion, Ex. E. The sole basis for withholding the three e-mails is indicted in the log as the deliberative process privilege. The log indicates that each e-mail is from Ron Furlan, Southeast Regional Office Waste Manager, to either Joseph Feola, Southeast Regional Director, or Eric Conrad, the Department's representative on the Pottstown Landfill Closure Committee,

with a carbon copy to Joseph Feola.[1] The third e-mail was accompanied by an attachment. The dates of the e-mails were March 14, 2003, June 11, 2003 and October 8, 2003. Finally, the "re" column of the log is the description for each: "Pottstown Vertical Expansion Application".

As we have already noted, both parties requested an expedited trial in this case. Thus, we truncated the usual response time for discovery motions and by Order dated February 4, 2005, we ordered that the Department and the Township file any response to the Motion by on or before Friday, February 11, 2005. Furthermore, we ordered a status conference call among the parties be held on Monday, February 14, 2005. By Order dated February 9, 2005, after consulting with counsel, we changed the status conference call to an in-person conference in our Norristown Court facility. Intervenor, West Pottsgrove Township, joined in WMI's Motion by a response filed on February 10, 2005. The Department filed its response on February 11, 2005. We held an in-person conference on this matter in the Norristown Courtroom on February 14, 2005.

The Department opposes even in camera review of the three e-mails. Its response, in essence, tells us that it has determined that the deliberative process privilege applies and, therefore, review in camera is "unnecessary." That assertion is provided in the affidavit of Michael D. Sherman, Deputy Secretary for Field Operations, Department of Environmental Protection. Mr. Sherman refers to the genre of the three e-mails as being "briefing memos." Sherman Affidavit, ¶ 4. Briefing memos, generically and apparently these in particular, describe the proposed action, matters of law and policy, outline areas of disagreement both within and outside the Agency and make recommendations on the decision the Agency must make. *Id.* ¶ 4. The idea behind briefing memos is to maximize the quality and consistency of Departmental

[1] At the conference on this Motion, counsel for the Department informed us that Mr. Conrad was, at the time the e-mail was written, was Deputy Secretary for Field Operations.

decisions. *Id.* ¶ 3. These types of e-mails are usually sent initially to the head of the field office in which the action is proposed and ultimately to Mr. Sherman. *Id.* Mr. Sherman says this type of briefing memo is relied upon by the Department to allow frank and open discussion of the options before it and that they are treated as confidential. *Id.* ¶ 5.

Mr. Sherman has read the 3 e-mails in question here. He describes them as having been "prepared with regard to the action proposed by the staff of the Southeast Region Waste Management Program with regard to the permit application for the Pottstown Landfill Eastern Area Vertical Expansion." *Id.* ¶ 8. In other words, the three e-mails deal directly and specifically with the Department's particular decision in this case which is now under appeal. He describes their contents as follows: (1) a statement of the Department's interpretation of the runway flight path exclusionary criteria regulation; (2) a statement of the alternative interpretation of that regulation by Appellant; (3) an evaluation of the relative strengths and weaknesses of those interpretations, and recommendations with regard to those interpretations; and (4) a statement of the comments received during the permit application process and the recommended resolution of the issues raised by those comments. *Id.* ¶ 9. Mr. Sherman says that the three e-mails, "represent an integral part of the deliberative process engaged in by the Department with regard to the action taken with regard to the pending permit application for the Pottstown Landfill Eastern Area Vertical Expansion." *Id.* ¶ 10. Mr. Sherman contends that the precedent of requiring disclosure here would greatly hamper the free exchange of ideas and opinions within the Department and would impair the quality and consistency of Department decisions. *Id.* ¶¶ 13, 14.

Relative Roles and Our Function Here Today

It is useful to remember here that our task today is not to decide if the privilege applies or

does not apply to the disputed e-mails. We are tasked today only with deciding whether to order an in camera review of the documents to determine whether the privilege applies to the three e-mails. We have been asked by the Appellant and Intervenor to undertake the in camera review and by the Department to not do so. This is apparently a question of first impression in the Commonwealth.

As the foundational framework and starting point for our analysis, we rehearse the following statement of our Commonwealth Court in the case of *North American Refractories, Inc. v. DEP*, 791 A. 2d 461 (Pa. Cmwlth. 2002)(*NARCO*):

> The EHB and the Department are two branches of the tripartite administrative structure that governs environmental regulation in Pennsylvania. The third branch of that structure is the Environmental Quality Board (EQB). The Department is the executive branch, assigned various duties to implement and enforce environmental statutes and regulations. *See, e.g.*, Section 4 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended, 35 P.S. § 4004*. The EHB is the judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, *35 P.S. § 7514*. Section 3(a) of the EHB Act, *35 P.S. § 7513(a)*, describes the EHB as "an independent quasi-judicial agency.

NARCO, 791 A.2d at 462. Thus, we are the judicial branch reviewing a claim of privilege of the executive branch.

The Department's response and its memorandum of law is devoid of any legal citation whatsoever on the question of what standards should be applied by the judicial branch in reviewing the question whether it should order an in camera review of documents claimed to be privileged by the executive branch. Apparently, the Department's position is that it has demonstrated *via* the affidavit of Mr. Sherman that such review is not necessary because it, the executive branch, has determined that the privilege applies. The Department has provided no case which provides authority for this approach, the logic of which seems quite circular. One

would have thought that such a view of relations between branches of government was effectively refuted by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803) and by Chief Justice Berger in *United States v. Nixon*, 418 U.S. 683 (1974). We have been left, then, to do our own homework, which we have done. Before we describe our investigation and conclusions in that regard, however, we will take a detour to discuss another threshold issue important to the remainder of our discussion here and most likely in further proceedings regarding these three e-mails. We will discuss the deliberative process privilege itself and its current status in the Commonwealth of Pennsylvania.

History And Status Of The "Deliberative Process Privilege" In Pennsylvania

The deliberative process privilege has been much written about and much talked about in the past few years in the Commonwealth of Pennsylvania. Opinions have been written on or about the subject by us, the Commonwealth Court and the Supreme Court. *Tribune-Review Publishing Company v. Department of Community and Economic Development*, 859 A.2d 1261 (Pa. 2004); *Lavalle v. Office of General Counsel for the Commonwealth*, 769 A.2d 449 (2001); *Commonwealth ex rel. Unified Judicial System v. Vartan*, 733 A.2d 1258 (Pa. 1999); *Tribune-Review Publishing Company v. Department of Community and Economic Development*, 814 A.2d 1261 (Pa. Cmwlth. 2003), *aff'd on other grounds; Tribune-Review Publishing Company v. Department of Community and Economic Development*, 859 A.2d 1261 (Pa. 2004); *Brunner v. DEP*, EHB Docket No. 2002-304-L (Opinion issued April 6, 2004)(*Brunner II*); *Brunner v. DEP*, EHB Docket No. 2002-304-L (Opinion issued January 8, 2004)(*Brunner I*); *New Jersey Department of Environmental Protection v. DEP*, 2003 EHB 220 (*NJDEP*); *Lower Paxton Township v. DEP*, 2001 EHB 256. In addition, the Third Circuit Court of Appeals has dealt with the privilege in a case which arose from the United States District Court for the Middle District

of Pennsylvania. *Redland Soccer Club v. Department of the Army*, 55 F.3d 827 (3rd Cir. 1995).

Judge Coleman provided a very comprehensive discussion on the Pennsylvania case law on the deliberative process privilege in her *NJDEP* opinion written in February 2003. *NJDEP*, *supra* at 223-26, 228-29. We refer the reader to that discussion as we rely on it for the history discussed at length therein but do not wish to burden this Opinion with full replication thereof.

Judge Coleman, in *NJDEP*, takes us up through the Commonwealth Court's pronouncement in *Tribune-Review* that it is adopting the deliberative process privilege as the law of Pennsylvania, apparently on the basis of *Vartan* and *Lavalle*. *Tribune-Review*, 814 A.2d at 1263-64. Since then the major development has been the Supreme Court's *Tribune-Review* opinion which declined to adopt the privilege but upheld the Commonwealth Court's *Tribune-Review* decision on the basis of the definition of "public record" under the Right To Know Act. *Tribune-Review*, 859 A.2d 1261 (Pa. 2004). The Supreme Court did not deal squarely with the deliberative process privilege but Madame Justice Newman, in the majority opinion, wrote that "this Court has twice previously addressed the deliberative process privilege, <u>but we never adopted it</u>." *Id.* at 1266 n.2 (emphasis added). Significantly, Justice Newman wrote the *Vartan* plurality opinion which has been cited with some regularity as standing for the proposition that there is a deliberative process privilege in Pennsylvania. Indeed, as we just noted, the Commonwealth Court apparently relied at least in part on Justice Newman's plurality opinion in *Vartan* for its adoption of the deliberative process privilege in its *Tribune-Review* decision. The other opinion relied upon by the Commonwealth Court in its *Tribune-Review* decision, *Lavalle*, stated that the Court has not adopted the deliberative process privilege. *Lavalle*, 769 A.2d at 457 ("This Court has not definitively adopted the deliberative process privilege[.]"). In sum, the last two Supreme Court opinions which have touched on the deliberative process privilege, *Tribune-*

Review and *Lavalle*, the first after the Commonwealth Court's adoption of the privilege and the second one after, have both stated that the Court has not adopted the privilege.

Last year, in the interregnum between the Commonwealth Court's *Tribune-Review* decision and the Supreme Court's *Tribune-Review* decision, Judge Labuskes, said this in his *Brunner I* decision,

> [p]rotracted discussion regarding [whether Pennsylvania has adopted the deliberative process privilege] is not warranted here because it appears that the matter is under active consideration by the Pennsylvania Supreme Court [citing the appeal then pending of the Commonwealth Court's *Tribune-Review* decision].
>
> Pending further guidance from the Pennsylvania Supreme Court, we hold that the Department is entitled to assert a deliberative process privilege in Board proceedings.

Brunner I, *slip op.* at 3. It might seem that the "further guidance" which Judge Labuskes hoped would come from the Supreme Court in its *Tribune-Review* decision is in fact not further guidance but deeper question. The Supreme Court's *Tribune-Review* decision has proverbially raised more questions than it has answered about whether the privilege really exists in Pennsylvania. One could say that the "further guidance" has now come and it has confirmed that there is no deliberative process to assert in the Commonwealth of Pennsylvania. Therefore, the Department's claim of deliberative process privilege should be rejected out of hand as a legal matter on the grounds that the privilege being claimed does not exist. After all, of the two Supreme Court opinions relied upon by the Commonwealth Court in adopting the privilege in its *Tribune-Review* decision, one was a plurality opinion of just two Justices (*Vartan*), the other specifically said that the privilege has not been adopted in Pennsylvania (*Lavalle*) and now, the author of the *Vartan* in the opinion up from the Commonwealth Court which adopted the privilege (*Tribune-Review*), has specifically stated that the Court has twice addressed the privilege "but we have never adopted it" (*Tribune-Review*, Supreme Court).

On the other hand, the Supreme Court's *Tribune-Review* case did not directly deal with the deliberative process privilege as such and the Court did not deny its existence or preclude its application. The Court merely said it had not adopted it. It has not yet had occasion to do so. Justices Newman, Cappy and Castille are on record as saying that the privilege ought to be adopted. *Lavalle*, 769 A.2d at 461 (Cappy, J., concurring); *Vartan*, 733 A.2d at 1266.

The undersigned agrees with Justices Newman, Castille and Cappy that there are strong policy reasons favoring the recognition of a deliberative process privilege. Those reasons were well stated by Justice Newman in *Vartan* and Judge Labuskes in *Brunner I.* Also, the Commonwealth Court obviously agrees with Justices Newman, Cappy and Castille that there ought to be a deliberative process privilege as it so held in its *Tribune-Review* decision. Its *Tribune-Review* decision was not reversed by the Supreme Court nor did the high Court rebuke the Commonwealth Court for stating that it was adopting the privilege. Justice Newman merely stated that since the case was being decided on the basis of the Right To Know Act that the Commonwealth Court's adoption of the deliberative process privilege was "superfluous." *Tribune-Review*, 859 A.2d at 1269. She also said, not surprisingly perhaps, that she agreed with the principles outlined about the deliberative process privilege in her *Vartan* opinion. *Id.*

So, one could say that, in the Commonwealth Court at least, there is a deliberative process privilege to assert. The Commonwealth Court, of course, is the appellate court immediately above us so it follows that if there is a deliberative process privilege to assert there, there must be one to assert here too. Furthermore, Appellant does not seriously contend that there is no deliberative process privilege. The focus of its argument is that there is a serious question whether such privilege applies here and they have asked on that basis for in camera review.

Based on all those factors, we will side-step the ontological question regarding the privilege and do as Judge Labuskes did in *Brunner I* and *Brunner II*. We will proceed on the basis of the convention that the "Department is entitled to assert a deliberative process privilege claim in Board proceedings." *Brunner I, slip op.* at 3.

Of course the deliberative process privilege has been written about in other states as well. A brilliant, scholarly and monumentally well researched discussion of the history and background of the deliberative process privilege was provided by Justice Martinez of the Colorado Supreme Court in *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998), a case in which the Colorado Supreme Court definitively adopted the deliberative process privilege in the State of Colorado. Justice Martinez's discussion is very helpful because he provides an historical background of the privilege, a description of it, a list of state court decisions adopting it, and a discussion of how a court goes about dealing with a request to review in camera documents which the executive branch claims are covered by the privilege. That later question is the one in front of us today and we owe a large debt to Justice Martinez, and the courts he cites who have analyzed the question, in guiding us in dealing with it. *City of Colorado Springs*, 967 P.2d at 1053-54. *See also Killington, Ltd. v. Lash*, 572 A.2d 1368, 1375-76 (Vt. 1990); *State ex rel. Attorney General v. First Judicial District Court*, 629 P.2d 330, 334 (N.M. 1981); *Hamilton v. Verdow*, 414 A.2d 914, 926-27 (Md. 1980).[2]

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[2] Justice Martinez in *City of Colorado* tells us that the deliberative process privilege is unique to the government. *City of Colorado Springs*, 967 P.2d at 1046. The privilege originated in the eighteenth and nineteenth centuries within the concept of the English "crown privilege". *Id. citing* Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 283 (1989). The privilege has been termed the "executive privilege." *City of Colorado Springs*, 967 P.2d at 1046. As such, it has two sources: constitutional and common law. The constitutional component relates to state secrets or presidential communications and is based on the notion of separation of powers. *Id. citing e.g., United States v. Nixon*, 418 U.S. 683. (other citation omitted). The common law component of the privilege is based on the concept that "Government cannot operate in a fish bowl." *Id. citing Vaughn v. Rosen*, 523 F.2d 1136, 1146. In other words, the protection of the confidentiality of decision-making processes of government agencies is distinct from the constitutionally based executive privilege dealt with in *United States v. Nixon*. In this case, of course, we are dealing not with state secrets or presidential or gubernatorial

Elements of and Nature of the Deliberative Process Privilege

The elements which make communications subject to the deliberative process privilege have been set forth many times in the cases we referred to earlier and others as well. We think Judge Labuskes did a very nice job in *Brunner I* setting forth those criteria as stated in the case law and we will follow his lead in that regard. Briefly, the privilege will apply to communications which are: (1) intended to be confidential; (2) constitute deliberations in that the communication was made in the context of devising an institutional decision; and (3) relate to legal or policy matters. *Brunner I, slip op.* at 4. For dilation on these thumbnails we refer the reader to the *Brunner I* opinion because it contains an excellent elaboration on each of these criteria. *Id.* at 4-5.

As has been pointed out many times, the burden is on the party asserting the privilege to establish that the predicate elements thereof exist and that, accordingly, the privilege attaches. *Brunner I, slip op.* at 4 *citing Lower Paxton*, 2001 EHB at 261. Also, the privilege is not absolute, it is a qualified privilege. Even if the privilege applies, disclosure of the communications will be appropriate where the opposing party's interest in disclosure outweighs the government's interest in non-disclosure. *Redland Soccer Club v. Department of the Army*, 55 F.3d 827, 854 (3rd Cir. 1995); *Brunner I, slip op.* at 6; *Lower Paxton*, 2001 EHB at 261. Also, as the *Redland Soccer* Court noted:

> In considering the United States' assertion of privilege, the district court should keep in mind the fact that Federal Rule of Civil Procedure 26 authorizes broad discovery into "any matter, not privileged, which is relevant to the subject matter involved in the pending action, [see Federal Rule of Civil Procedure 26(b)(1)] but the deliberative process privilege, like other executive privileges, should be narrowly construed." *See Coastal States Gas Corp. v. Dep't of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 868 (D.C. Cir. 1980); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 716 (E.D. Pa. 1968)(collecting cases).

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communications so we are dealing with the common law deliberative process privilege.

Redland Soccer, 55 F.3d at 856. Those principles would be equally applicable here where we are dealing with the Pennsylvania Rules of Civil Procedure regarding discovery.

The Department's Claim of Deliberative Process Privilege In This Case

The scope of the deliberative process privilege being claimed by the Department here is breathtaking and is certainly unprecedented. It is one thing to say that there ought to be a deliberative process privilege, but it is another to say that it ought to be all encompassing as the Department has contended here. The Department, of course, contends that the privilege covers the substance of the supposedly covered communication. We do not see even WMI disputing that since such a formulation is virtually definitional. However, beyond that, the Department claims the privilege covers the following information as well: (1) the identity of who participated in supposedly privileged discussions; and (2) when such discussions took place. These parameters of the privilege are set forth in the transcripts of the depositions of Mr. Pounds and Mr. Socach in the form of counsel for DEP's objections to Appellant's counsel's deposition questions and accompanying instructions not to answer. Appellant's Motion Ex. D pp. 47-48, 67; Ex. E pp. 92-93 (who was involved in the communication); Ex. E, p. 30 (when the communication took place). The scope of the privilege as it covers the substance of the communication being claimed by the Department is likewise beyond any heretofore construction of the privilege. The Department claims that the privilege covers not only broad general policy application, *i.e.*, regulatory matters, it also covers communications on the subject of the particular specific Department action under review at the Board, *i.e.*, the adjudicative matters. Appellant's Motion Ex. E, p. 104.

The irony of this unprecedented view of the breadth of the deliberative process privilege coming just on the heels of the Supreme Court's very recent reminder that it has never adopted

the privilege cannot escape notice.

In Camera Review--Standard

It seems virtually a matter of a priori logic that in camera review is not an inappropriate method to test the government's claim to deliberative process privilege. As Judge Labuskes observed in *Brunner I*, "[a]t the risk of stating the obvious, our analysis will usually begin by examining the content of the communication." *Brunner I, slip op.* at 7. As we noted before, this method has been used before and is endorsed by the Supreme Court of the United States. *Kerr v. United States District Court*, 96 S. Ct. 2119 (1976)(in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege); *Brunner II*; *Brunner I.* In the *Brunner* cases, it was taken as a given that Judge Labuskes would review the documents in camera and he did. As Judge Labuskes said there, "[i]n most cases, this determination will require an in camera inspection of the evidence in question. *Brunner I, slip op.* at 4, *citing Kerr.* Thus to the extent that in camera review is not the a priori result of a challenge to a privilege claim, it has certainly been a posteriori established as normative and routine.

A Judge's in camera inspection of allegedly privileged documents to review the merit of the deliberative process privilege claim has been employed before and is the preferred method for evaluating claims of governmental privilege. *Kerr* (in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege); *Brunner II, Brunner I.*

Of course, in *Brunner* and *Kerr* the government did not object to in camera inspection. In *Kerr*, in fact, the government was the proponent of in camera review. Here, the government opposes in camera review. While at first blush it would seem incongruous for the judiciary to simply accept the executive's assertion of privilege, it is equally or perhaps more perverse to simply accept the challenger's demand that the documents be turned over to the court for its

review.

Our review of the case law tells us that in camera inspection does not and should not follow automatically from the challenger's request. Indeed, more than one court has observed that even an in camera review is an intrusion, albeit a limited one, upon the privilege. *Hamilton v. Verdow*, 414 A.2d at 926.

Thus, an in camera inspection is not mandatory just because it has been asked for by the party challenging the government's claim of privilege. A court should proceed with caution. Although the various courts formulate the approach somewhat differently we discern the following basic analysis to apply to this question. Although the ultimate burden is on the government to establish that the privilege applies, a court is not to take the executive's claim lightly. Indeed, for the purposes of determining whether an in camera review is to be ordered, the court should grant that the executive's claim may be valid. It is then up to the challenger to show some prima facie or creditable claim that the documents are either not subject to the privilege and/or that its need to have the information outweighs the government's need to keep the information secret. *City of Colorado Springs*, 967 P.2d at 1053-54; *Killington, Ltd. v. Lash*, 572 A.2d at 1375-76; *State ex rel. Attorney General v. First Judicial District Court*, 629 P.2d at 334; *Hamilton v. Verdow*, 414 A.2d at 926-27.

Maryland's highest court, the Court of Appeals of Maryland, put it this way:

> As pointed out by some of these courts, the *in camera* inspection itself is an intrusion upon the privilege. Thus, when a formal claim of executive privilege is made, with an affidavit stating that the demanded materials are of a type that fall within the scope of the privilege, they are presumptively privileged even from *in camera* inspection. The burden is on the party seeking production to make a preliminary showing that the communications or documents may not be privileged or, in those cases where a weighing approach is appropriate, that there is some necessity for production. *United States v. Nixon, supra, 418 U.S. at 713--714; Senate Select Committee On Pres. Cam. Act. v. Nixon, supra, 498 F.2d at 730; Committee For Nuclear Responsibility, Inc. v. Seaborg,supra, 463 F.2d at*

792; Zeiss, supra, 40 F.R.D. at 331. Mr. Justice Reed explained for the Court in the *Kaiser Aluminum* case, *supra, 157 F. Supp. at 947:*

> It seems equally obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even unilaterally. When the head of an agency claims privilege from discovery on the ground of public interest, which is recognized as a basis for the claim, it seems to us a judicial examination of the sought-for evidence itself should not be required without a much more definite showing of necessity than appears here.

[*Kaiser Aluminum & Chemical Corporation v. United States*, 157 F. Supp. 939, 947 (U.S. Court of Claims 1958)]

Consequently, absent such a preliminary showing by the party demanding disclosure, the claim of executive privilege should be honored without requiring an *in camera* inspection.

On the other hand, where a sufficient showing is made to overcome the presumption, the court should order an *in camera* inspection. Depending upon the issues and circumstances, the *in camera* inspection may be utilized to determine whether the material is privileged, to sever privileged from non--privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production.

Hamilton v. Verdow, 414 A.2d at 926-27.[3]

The determination of whether to conduct an in camera review is, ultimately, a matter that is within the discretion of the trial court which in this case is the Board. *City of Colorado Springs v. White*, 967 P.2d at 1054. The exercise of our discretion, though, is guided by the principles and the approach just outlined. While courts have used the word "presumption" in that the documents are "presumptively privileged", we have not used that word. We stress that we are not in any way trumping the principle that the proponent of the privilege has the burden of establishing it. This analysis could be called the "benefit of the doubt" analysis and it applies

[3] Mr. Justice Reed, who is quoted by the Court of Appeals of Maryland here from the *Kaiser Aluminum* case, was sitting by designation on the United States Court of Claims in the *Kaiser Aluminum* case. *Hamilton v. Verdow*, 414 A.2d at 923.

only to a contested issue of whether there should be in camera review. Other judges could call the analysis something else. Our approach here is merely our way of mediating the polar positions of granting in camera review automatically upon the demander's request or denying it automatically upon the government's request. Our approach takes that unilateral power to have or not have an in camera review out of the respective parties' hands, where it does not belong, and places the decision where it does belong; within the court's discretion governed by some tangible standard.[4]

Has Appellant Raised A Prima Facie Or Creditable Claim That The Privilege Does Not Apply To The Three E-mails

We think there is no question that Appellant has presented a prima facie or creditable claim that parts or all of the three documents may not be privileged thus making us comfortable ordering that the documents be produced in camera for further review and evaluation of the claim of privilege.

It appears from the privilege log which sets forth the claim of the privilege that all three e-mails relate to the decision in this specific case. The Department's privilege log describes the e-mails as being about "Pottstown Vertical Expansion Application". Also, Mr. Sherman's affidavit is replete with references to the e-mails as being related to or generated in the context of the specific permitting decision under appeal here. Sherman Affidavit ¶ 8 (memos "were prepared with regard to the action proposed by the staff of the Southeast Region Waste Management Program with regard to the permit application for the Pottstown Landfill Eastern Area Vertical Expansion"); ¶ 10 (memos were prepared "with regard to the action to be taken

[4] Counsel for WMI at the case conference pointed out that Judge Labuskes used a "credible need" analysis in his *Brunner II* opinion. It was suggested that this standard should be applicable here to determining the contested motion for in camera review. We note, though, that Judge Labuskes's "credible need" analysis came not in a contested motion requesting in camera review but, instead, in his application of the substantive balancing test after in camera review to determine whether the Appellant's need for the information outweighed the government's need

with regard to the pending permit application for the Pottstown Landfill Eastern Area Vertical Expansion").

Thus, these communications, as described by the Department itself, relate not to a matter of general application, i.e., a regulatory matter, but, instead, to this particular and specific permit decision which is under appeal, i.e., the adjudicative matter. As we noted in *Lower Paxton* when the subject of the communication at issue relates specifically to the Department's action which is under appeal "it is hard to imagine a setting which is more antithetical to application of the deliberative process privilege". *Lower Paxton*, 2001 EHB at 261. Judge Labuskes conveyed the same thought in *Brunner I* when he observed that "in our mind, the phrase [legal or policy] normally connotes a matter of general application not to a particular party's circumstances. It is program oriented; more regulatory than adjudicative". *Brunner I, slip op.* at 5.

Such analysis is particularly applicable to Environmental Hearing Board litigation for several important reasons. Under Section 7514(c) of the Environmental Hearing Board Act, when a matter is properly before the Board in litigation, as this one is, the "decision" of the Department is not final until the Board has fully adjudicated the case. 35 P.S. § 7514(c). Thus, when we are dealing with the particular matter under appeal at the Board, there is no final decision to which any deliberative process privilege can attach. Also, as we noted in *Lower Paxton*,

> No blanket deliberative process privilege can be applied to Deputy Secretary Tropea here. Lower Paxton alleges that Deputy Secretary Tropea was personally, directly and persistently involved in the decision to deny Lower Paxton's proposed Plan. It is this very decision which is now under review before the Board. Under the EHB Act, the Appellant has a right to a full *de novo* hearing on that decision before it becomes final. Correspondingly, the EHB is the quasi-judicial body whose statutory role is to determine, based on a full record and via *de novo* review, whether the action of the Department is appropriate and lawful and whether it should or should not become final. *Smedley v. DEP*, Docket No.

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to keep the information secret. *Brunner II*, slip op. at 3-7.

> 97-253-K, *slip op.* at 25-30 (Adjudication issued February 8, 2001). It is illogical to maintain that the core information about how and on what bases the Department arrived at its decision under review is to be locked away. Indeed, it is hard to imagine a setting which is more antithetical to application of a deliberative process privilege. The review of and scrutiny of the Department's deliberative process with respect to the action under appeal is a part of the very essence of the Appellant's right and the Board's function and duties. Application of the privilege to make that information inaccessible would render nugatory Appellant's rights and the Board's responsibilities.

Lower Paxton, 2001 EHB at 260-61. Based on the foregoing analysis, we see that there is a creditable claim that part or all of the communications being claimed privileged do not satisfy the "legal or policy matters" predicate for application thereof.

The Department posits that memoranda such as these which admittedly relate to specific cases are subject to the deliberative process privilege, even in the context of an Environmental Hearing Board litigation where the specific decision is under review. We do not accept in a vacuum without seeing the documents that maximalistic view of the "legal or policy matters" predicate of the privilege. Such a view is especially ill-fitting in the context of Environmental Hearing Board litigation for the reasons we just discussed. The Environmental Hearing Board Act gives an appellant, in this case WMI, the right to a due process trial of the Department's specific decision on its specific matter. The privilege, if it does exist in Pennsylvania, is a common law qualified privilege and it must be construed in light of the Environmental Hearing Board Act. *See* Footnote No. 2, *supra* (the deliberative process privilege at issue here is a creature of common law). The "legal or policy matters" predicate cannot be read, as apparently the Department reads it here, to be so expanded so as to include what is the very subject of the due process trial. If it did, then there would be no due process and the rights granted under the Environmental Hearing Board Act would be gone.

It could very well be that material which is of general application is interspersed with

specific discussion of the permit denial under review now at the Board. It may be the case, therefore, that one or more of the e-mails contain both non-privileged and privileged material. In such a case, of course, the privileged material would have to be redacted from any production of non-privileged material. This, of course, underscores the appropriateness of an in camera review in this case. As the Court of Appeals of Maryland noted in *Hamilton*,

> [w]here a sufficient showing is made to overcome the presumption, the court should order an *in camera* inspection. Depending upon the issues and circumstances, the *in camera* inspection may be utilized to determine whether the material is privileged, to sever privileged from non--privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production.

Hamilton v. Verdow, 414 A.2d at 927 (emphasis added).

We note here that Mr. Sherman's affidavit describes the three e-mails as containing four components as follows: (1) a statement of the Department's interpretation of the regulation at issue in this case; (2) a statement of the alternative interpretation of that regulation proposed by Appellant; (3) an evaluation of the relative strengths and weaknesses of those interpretations, and recommendations with regard to those interpretations; and (4) a statement of the comments received during the permitting process and the recommended resolution of the issues raised by those comments. That being so, then partial redaction could be called for here. The first two items would not be within any privilege under any conceivable view of the privilege. The third and fourth, however, may potentially be wholly or partially within the deliberative process privilege. From Mr. Sherman's description, it could be the case here that we have general legal and policy matters discussed within a communication dealing with a specific permitting decision. For example, item no. 3 may contain broad policy discussions regarding the airport flight path exclusionary criteria that transcend the specific Pottstown Landfill decision. That material could be subject to the privilege. As to item no. 4, it would seem that the mere repeating of the

public's comments may not be subject to the privilege but, maybe, the author's recommended resolutions could be if such communications fit the qualitative criteria we have discussed. Accordingly, different parts of the communication may stand on different footing with respect to privilege analysis. Again, however, we will need in camera inspection of the e-mails to perform that evaluation.

In addition, to the extent that the communications in this case could possibly, in whole or in part, be brought within the "legal or policy matters" predicate, despite the Department's own description to the contrary, there is a creditable claim that the Department never intended such communication to be confidential. Although Mr. Sherman claims that the three e-mails were intended to be confidential communications, Mr. Pounds, a Department witness, testified at deposition as follows regarding discussions about the runway flight path exclusion criteria which were in the form of general policy, "I think that's something that's not confidential". Mr. Pounds testified that it is only when the discussions relate to a specific site or a unique set of facts that he believes the communications to be confidential. Appellant's Motion, Ex. D, p. 49-50.

Appellant has also raised a creditable claim that even if the communications satisfied the predicates for application of the privilege that they should nevertheless be disclosed because its interest in obtaining them outweighs the Department's interest in maintaining their secrecy. It appears that the communications deal with the interpretation of the runway flight path exclusionary criteria regulation. The main issue in this case is the proper interpretation of that regulation. Thus, the Department's interpretation of that regulation, even in the context of general applicability and interpretation removed from any particular case constitutes highly relevant evidence in the case. Judge Labuskes was faced with precisely the same situation in

Brunner II and he concluded, after review of the documents in camera and application of the balancing test, that the documents must be disclosed. *Brunner II, slip op.* 9-11. Judge Labuskes had this to say,

> That leaves us to balance Brunner's interest in disclosure of the content of the deliberations against the Department's interest in keeping the deliberations confidential. We will take these in reverse order because the Department's interest is relatively straightforward. The Department's interest is that individuals such as Pounds and Socash should be able to freely exchange thoughts and ideas regarding the state-wide implementation of new statutes without undue fear that the discussions will become a matter of public record. Although it does not appear to us that the discussions at issue here were particularly sensitive or revealing, we nevertheless agree with the Department that the purpose of the privilege would be served by protecting the discussions from disclosure.
>
> We disagree with the Department's contention, however, that the contents of the discussions have no probative value in Brunner's appeal. This case will turn on the meaning of a statute. Our one and only function in such a case is to divine the Legislature's intent. 1 Pa.C.S.A. § 1921(a). It may be that the Legislature's intent is so abundantly clear from the face of Act 90 that we need go no further. *Eagle Environmental v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2003) (where a statute is clear, there is no need to engage in interpretation). *See, e.g., RAG Cumberland Resources v. DEP,* EHB Docket No. 2003-067-L (Opinion and Order January 27, 2004) (mining statute unambiguously requires preshift examinations).
>
> On the other hand, although we have not even begun to consider the question here, it may be that Act 90 may have some ambiguity. In that event, we will be tossed into the heady maelstrom of statutory interpretation. If we find ourselves afloat in such rough waters, one of the factors that we will need to consider is the Department's institutional interpretation. 1 Pa.C.S.A. § 1921(c)(8). In other words, that interpretation, once proven, is *evidence*. What counsel discourses in a brief is argument; what the Department as a whole has adopted as its official position is probative evidence of what an ambiguous statute actually means.
>
> Once we acknowledge that the Departmental interpretation is itself evidence, it follows that Brunner has an interest in its disclosure. And as with any other evidence that has the potential to become part of the record, Brunner is not compelled to accept the evidence at face value, particularly at the discovery stage. Brunner is not required to say, "Well, this is what the Department says, so it must be true." Rather, Brunner is generally entitled to explore all pertinent aspects of the evidence. It is also entitled to discover information that may be used for impeachment purposes. Background information regarding the formulation and basis of the Department's programmatic choices on how it plans to implement an

> assertedly ambiguous statute might at least conceivably have an impact on the weight that this Board gives to the interpretation. We are not able to conclude as much now, but we are also not willing to categorically rule out such possibilities at this juncture of the case. Furthermore, determining whether the Department's interpretation is reasonable, if we are required to get into that, might very well involve consideration of precisely the sort of matters that Brunner is asking about. In short, Brunner is clearly in a legitimate search for potentially probative information.
>
> Thus, Pounds and Socash's discussions are of the kind that are contemplated by the privilege, but the information is also of the sort that is generally probative. We have struggled with our balancing analysis because, perhaps ironically given all of the attention this one discovery issue is receiving, the communications at issue are rather innocuous. In that sense, disclosure is not particularly destined to chill future internal debate, but neither do we see disclosure as likely to have dramatic value in Brunner's case. On balance, we conclude that the evidence's potential probative value outweighs the Commonwealth's need to shield it from disclosure. Among the other factors that we have considered as discussed above, we are concerned that redacting the information would cast a pale over the proceedings by giving the inaccurate but understandable impression that important information existed but was being covered up. As always, we strive for the most informed adjudication possible founded upon a complete record. The largely theoretical societal interest that might be marginally served by limiting Brunner's discovery of the discussions at issue is insufficient to compel us to deviate from that primary goal in this appeal.

Brunner II, *slip op.* at 4-7.

If, as we have heard the Department tell us, it will be relying substantially on *NARCO* in this case in that it will be positing what it says is its reasonable interpretation of the runway flight path exclusionary criteria, to which we will then have to defer in its favor, then there is no question that any evidence about what that interpretation is will be probative evidence. Indeed, as Judge Labuskes pointed out, the *NARCO* analysis that the Department will ask us to employ makes evidence about the Department's interpretation of the regulation probative in the extreme. As he said, "it would seem that the more weight the Department's position is entitled to, the greater its probative value." *Brunner II*, slip op. at 5 n.2. In other words, the more work the Department wants *NARCO* to do in terms of providing weight or deference to its interpretation of

the regulation, the more probative evidence about the Department's interpretation of the regulation becomes.

Also, we note that Judge Labuskes came to this conclusion that the Appellant's interest in the evidence outweighed the government's in keeping it secret where the communications in that case were of the general, programmatic, regulatory type. Here the communications relate to the specific case at issue here in this litigation and is, thus, of the particular or adjudicative type. Thus, the communications here stand on shakier ground for application of the privilege than did the communications in *Brunner* which Judge Labuskes held, after in camera review, must be disclosed. In other words, in this case, at least on the basis of the information we have seen, these communications look like better candidates for requiring disclosure than the ones Judge Labuskes ordered disclosed in *Brunner II.*

The Department and Mr. Sherman's affidavit spend much effort explaining how disclosure would be detrimental to the Department in that it would inhibit the free exchange of ideas within the Department. Mr. Sherman says that these briefing memoranda provide frank and open assessment of the options before the Department and that the effectiveness of such free communication would be undermined by disclosure. He also says that it would be a bad precedent to have this sort of communication opened to view. We are not ready to deal with these assertions now. At this stage all we are talking about is in camera review. Even if what Mr. Sherman is saying may possibly be true with respect to ultimate disclosure is another question for another day. Even if we were to agree with Mr. Sherman we could, if we decided that the documents should be disclosed to WMI, provide certain safeguards that would dispense with Mr. Sherman's concerns. For example, we could order disclosure and use of the documents pursuant to a strict confidentiality order. In any event, we do not feel that in camera review by a

judge would undermine any free flow of communication within the Department. *See Dispennet v. Cook*, 2002 U.S. Dist. LEXIS 25523 *D.* Ore.)(in camera review does not constitute disclosure).

Obviously, we are not deciding the ultimate outcome of the balancing test here and now but we are able to conclude based on the foregoing analysis that that Appellant has raised a creditable claim that they would prevail in the balancing test under the deliberative process privilege. Of course, unless the "legal or policy matter" predicate applies to these e-mails, this balancing of interests would not be necessary as the privilege would not apply to the e-mails in the first place. In either case, WMI has established a creditable claim that the documents may, either in part or in whole, not be protected. Thus, we conclude that in camera review of them is appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 14th day of February, 2005, upon consideration of the Appellant's Motion to Compel, the Township's Response and the Department's Response, and the in-person conference on the Motion to Compel in which all counsel and the undersigned participated on Monday, February 14, 2005, it is hereby ordered that the Department shall produce to the undersigned under seal for in camera review the three e-mails (one with attachment) described in its privilege log. The documents shall be hand delivered to the Board's Norristown Office for review in Chambers by the undersigned on Tuesday, February 15, 2005. The documents so delivered shall be contained in a separate sealed envelope marked, "E-mails" and shall be reviewed by Judge Krancer and his Assistant Counsel, Ms. Wilson, only.

IT IS FURTHER ORDERED that by Thursday, February 17, 2005, the parties shall, if they so desire, provide the Board with further briefing on the subject of whether the documents themselves should or should not be subject to the deliberative process privilege. In addition, the parties are ordered to advise the Board by that date what, if any, further proceedings should be undertaken, besides in camera review of the documents, with respect to the Board's determination

of whether the privilege applies.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: February 14, 2005

c: DEP Bureau of Litigation
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WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 22, 2005**

OPINION AND ORDER RESULTANT FROM IN CAMERA REVIEW OF DOCUMENTS CLAIMED TO BE PROTECTED FROM DISCLOSURE BY THE DELIBERATIVE PROCESS PRIVILEGE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

After in camera review of three documents claimed by the Department of Environmental Protection (Department or DEP) to be subject to the deliberative process privilege, the Board finds that the documents are not covered by the privilege in that they fail to satisfy the "legal or policy matters" predicate thereof. Even had they been covered by the privilege, the Board further concludes that the Appellant is entitled to disclosure pursuant to the balancing test called for by the deliberative process privilege.

Factual Background

This decision is a follow-up to and should be read along with our decision in *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 14, 2005) (Corrected Opinion issued February 15,

2005) (*WMI I*).[1] In *WMI I* we held that in camera review of three e-mails being withheld by the Department on a claim of deliberative process privilege is appropriate and we ordered those documents to be delivered to the undersigned.[2] The Department delivered the documents on February 15, 2005 as ordered. The Department delivered the documents in pairs; one version of each e-mail is redacted and one is not redacted. As explained by the Department in its cover letter, the redactions are not related to the privilege issue but, instead, obliterate material which is not related to the Department's interpretation of the airport runway exclusionary criteria regulation. The Department explains further that counsel for Appellant, Waste Management Disposal Services of Pennsylvania, Inc. (WMI), has agreed that the material in the e-mails which does not relate to the Department's interpretation of the regulation is not responsive to WMI's

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[1] We filed a "Corrected Opinion" on February 15, 2005 which corrected some grammatical and internal referential items. Our citations to the *WMI I* case will be to the Corrected Opinion.

[2] In *WMI I* we discussed therein and derivatively through Judge Coleman's opinion in *New Jersey Dep't of Envtl. Protection v. DEP*, 2003 EHB 220, the history of appellate treatment of the deliberative process privilege in Pennsylvania as well as in some other states. One additional Pennsylvania Supreme Court case touching on the deliberative process privilege has come to our attention which we should have mentioned in *WMI I*. The case, *Kennedy v. Upper Milford Township Zoning Hearing Bd.*, 834 A.2d 1104 (Pa. 2003), actually pre-dates the Supreme Court's *Tribune-Review* decision. The Court there was dealing with a Sunshine Act issue relating to a local Zoning Hearing Board. However, in footnote 28 the Court discusses, in a digression, the deliberative process privilege. *Id.* at 1118 n.28. Justice Lamb, writing for the Court in an opinion in which Justices Newman, Saylor and Eakin joined, noted that the Court had not adopted the deliberative process privilege in *Vartan* or *Lavalle. Id.* However, Justice Lamb wrote that there would be no reason that the deliberative process privilege which Justice Newman wrote about in *Vartan* would not extend to quasi-judicial bodies as well as judicial ones. *Id.*

Another case we neglected to mention but should have in our *WMI I* opinion is the seminal case of *Birkett v. City of Chicago,* 705 N.E.2d 48 (Ill. 1998), from the Illinois Supreme Court. *Birkett* shows us the other side of the deliberative process privilege issue, at least with respect to courts "recognizing" such an evidentiary privilege. In that case, then Chief Justice Freeman, writing the opinion of the Court, recognized that privileges inherently operate to exclude relevant evidence and thus work against the truthseeking function of legal proceedings. *Id.* at 51. The Court went on to explicitly decline to judicially recognize the deliberative process privilege based on the rationale that the creation of a broad based evidentiary privilege of that nature involved such complex policy issues that it ought to be the Legislature, not a court, which gives genesis to such a privilege. The Court's stated, "[w]e conclude that in light of the range of competing policies underlying the deliberative process privilege, its adoption should be left to the General Assembly. *Id.* at 53.

discovery request and, therefore, the Department need not produce such material even if its claim to privilege were rejected.

In our February 14, 2005 Order requiring in camera inspection we offered the parties an opportunity, by February 17, 2005, to submit further briefs addressing why the materials are or are not covered by the deliberative process privilege. We also offered to the parties in that Order an opportunity to request whatever other proceedings they might wish, other than the in camera review, with respect to the Board's determination of whether the privilege applies. WMI has notified us by letter that they neither wish to submit a further brief nor do they request an evidentiary hearing. The Department submitted a Supplemental Brief on February 17, 2005. It has not asked for any other proceedings so the matter is now ripe for decision on the ultimate question of whether the three e-mails are protected from disclosure by the deliberative process privilege.[3]

We have carefully reviewed the three e-mails and the Department's Supplemental Brief and we conclude that they are either not subject to the deliberative process privilege or that, even if they are, WMI's interest in having them disclosed far outweighs the government's interest in keeping them secret.

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[3] Again we note the time constraints that we feel that we owe the parties to be cognizant of in resolving this discovery matter. Well before this discovery motion was filed, both parties had requested an expedited trial in this matter. The consensual Joint Case Management Order and Trial Scheduling Order was entered in this case on January 21, 2005. It calls for mutual filing of pre-trial memoranda on March 4, 2005, the pre-trial conference on March 11, 2005 and trial to start on March 14, 2005. The initial Motion to Compel was filed on February 2, 2005. We truncated time for response to the Motion. The Department opposed even in camera review and so stated in its response filed on February 11, 2005. We held an in-person conference on February 14, 2005 and issued our opinion on the in camera review question in *WMI I* later that day. We received the documents on Tuesday, February 15, 2005 and the Department's Supplemental Brief on Thursday, February 17, 2005. Monday, February 21, 2005 was a national holiday, i.e., Presidents' Day. Thus, we have done our best to bring this matter to a conclusion without letting pass too much of the precious short time before the trial starts. In that regard, we thank counsel, especially counsel for the Department who, quite frankly, has had to work harder and under more time pressure with respect to this particular matter than his counterpart, for the attention and quality of their submissions.

Standard of Review and Burden of Proof

We touched to some degree in *WMI I* on the question of how a court is to go about determining whether the documents claimed to be secreted from disclosure on the basis of the deliberative process privilege are or are not fair game for the other side to see. Every court which has engaged in this analysis, or has required that it be undertaken, views it essentially the same way. First, the court determines whether the predicates for the privilege are present. If they are, then the court undertakes a balancing test to determine whether the interest of the party seeking the information outweighs the government's interest in keeping it secret. As the Third Circuit noted in *Redland Soccer Club*, "[t]hus, a party's assertion of the deliberative process privilege requires a two-step review in the district court. First, it must decide whether the communications are in fact privileged. Second, the court must balance the parties' interests." *Redland Soccer Club v. Department of the Army*, 55 F.3d 827, 854 (3rd Cir. 1995). In *Brunner II*, Judge Labuskes said:

> *Brunner I* sets up a two-part analysis. First, we must determine whether the communications at issue satisfy the prerequisites for application of the deliberative process privilege. That essentially involves an analysis of whether the communications were (1) confidential (2) deliberations of (3) law or policy. If the prerequisites are met, we are left to assess whether the appellant's interest in disclosure outweighs the Department's interest in shielding the communications from disclosure. If the appellant's interest outweighs the Department's interest, the communications will not be protected pursuant to the deliberative process privilege.

Brunner v. DEP, EHB Docket No. 2002-304-L (Opinion issued April 6, 2004) *slip op.* at 3-4 *(Brunner II).*

Also, it is a given that the burden of establishing that the privilege applies and that the information should be secret is on the party asserting the privilege, i.e., the

government. *Redland Soccer Club*, 55 F.3d at 854 ("The initial burden of showing privilege applies is on the government."); *City of Colorado Springs v. White*, 967 P.2d 1042, 1053 (Colo. 1998) ("The initial burden of proof falls upon the government entity asserting the deliberative process privilege."); *Joe v. Prison Health Service, Inc.*, 782 A.2d 24, 33 (Pa. Cmwlth. 2001) ("The initial burden of showing privilege applies is on the government."); *WMI I*, *slip op.* at 11 ("As has been pointed out many times, the burden is on the party asserting the privilege to establish that the predicate elements thereof exist and that, accordingly, the privilege attaches."); *Brunner v. DEP*, EHB Docket No. 2002-304-L (Issued January 8, 2004), *slip op.* at 4 *(Brunner I)* ("First, the Department will be required to demonstrate to the Board that the communication qualifies for the deliberative process privilege."); *New Jersey Dep't of Entl. Protection v. DEP*, 2003 EHB 220, 234-35 ("The initial burden falls on NJDEP to show that the documents it seeks to shield are both pre-decisional and deliberative in nature."); *Lower Paxton Township v. DEP*, 2001 EHB 256, 261 ("the burden is on the proponent of the privilege to establish that its elements are present").

We also proceed with the direction of the Commonwealth Court, which has recognized the deliberative process privilege, that the privilege "should be narrowly construed." *Joe*, 782 A.2d at 33. Indeed, in the *Joe* case, the Commonwealth Court rejected what it called "defendant's broad interpretation of the deliberative process privilege." *Id.* at 34. That direction is even more weighty because, as we noted in *WMI I*, the Supreme Court of Pennsylvania has not only not adopted the deliberative process privilege in the first place but has noted at least twice specifically that it has not done so.[4]

[4] Whether our Supreme Court's reluctance to embrace the deliberative process privilege, despite repeated opportunities to do so, is on the same basis as that of the Illinois Supreme Court in *Birkett* in

The three e-mails contain a detailed recitation of the legal position of the Department with respect to the interpretation of the airport runway exclusionary criteria with reference to WMI's permit application. They outline Mr. Furlan's recommendation that the WMI permit application should be denied because the site falls within the runway flight path exclusionary criteria regulation and a defense of that conclusion. In many respects, the e-mails comport with Mr. Sherman's description we mentioned in *WMI I*; i.e., a statement of the Department's interpretation of the runway flight path exclusionary criteria regulation and a statement of the alternative interpretation of that regulation by Appellant. *WMI I, slip op.* at 4; Sherman Affidavit ¶ 9. Mr. Furlan undertakes a detailed legal discussion providing a foundation for the Department's reading of the regulation in this case and the reason that the Department will not accept the alternative approach suggested by WMI. In many ways, the three e-mails look like a legal opinion letter which outlines the foundation of and the basis for the Department's legal and factual position and its eventual denial of WMI's permit application which, of course, is the subject matter of this appeal. They are not dialogical but monological. They are not a "give and take" between Mr. Furlan and someone else developing an interpretation of the airport runway exclusionary criteria regulation. They contain Mr. Furlan's recitation of the application of the airport runway exclusionary criteria regulation to this landfill application. These e-mails are works of apology (apology in its classic meaning, i.e., defense of, or reasoned statement or argument of, not meaning contrition for) of an interpretation, not the development of an interpretation. The three e-mails are completely

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declining to adopt it can only be a matter of speculation. *Birkett v. City of Chicago*, 705 N.E.2d at 48-49, 53 (holding that due to the complex and competing public policy issues surrounding an evidentiary deliberative process privilege, adoption thereof is best left to the legislature).

specific in that they were written in the context of and with reference only to the interpretation of the regulation in this case for this permit application.

Confidential Predicate

We conclude that the Department has carried, but just barely, its burden on the confidentiality predicate. We do not see that the presence or absence of a "confidential" label on the communication has to be dispositive on the issue of whether the communication fits the confidentiality predicate of the privilege, but it is a place to start. Only the June 11, 2003 e-mail, which is the middle one in time, bears a separate heading under the subject heading which reads: "Sensitivity: Confidential." Neither of the other two e-mails bear any label indicating that they are confidential. Beyond labels, Mr. Furlan does not say in the body of the narrative that his discussion is meant to be confidential.

Mr. Sherman's testimony on this subject is not convincing. First of all, he has been Deputy Secretary for Field Operations only since June of 2004. It is our understanding from the in-person conference the other day that Mr. Sherman is the successor Deputy Secretary for Field Operations to Mr. Conrad who is the carbon copy recipient on the June 11, 2003 e-mail. Mr. Sherman's accession to Deputy Secretary for Field Operations came eight months after the last in this series of e-mails was written and 15 months after the first one. Mr. Sherman was not involved in this set of communications as either a recipient, a carbon copy recipient or in his capacity as Deputy Secretary.

In his affidavit, Mr. Sherman first testifies only generically about this type of communication, which he calls a briefing memo, and he says that <u>these types</u> of

memoranda are treated as confidential. Sherman Affidavit ¶ 5. It is not appropriate to apply typical or generic analysis to whether the predicates apply. That determination is not a typical or a categorical analysis, it is a very specific one based on the particular documents. As Justice Martinez noted in *City of Colorado Springs*, "[b]ecause the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process, the precedents in this area are of limited assistance in determining whether the privilege should apply in a particular instance." *City of Colorado Springs*, 967 P.2d at 1054 n.12 (citing *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 867 (D.C. Cir. 1980)). By the same token, deliberative process privilege analysis itself can only be brought to bear on particular documents, not types or categories of documents.

When Mr. Sherman addresses these specific three e-mails he says that he has read them and that they were treated as confidential and shared only with those who needed to be involved in the decision making process. Sherman Affidavit ¶ 8. However, that assertion is obviously not on the basis of personal knowledge and we have no way of ascertaining the source of Mr. Sherman's information on whether these particular e-mails, at the time they were generated, were meant by Mr. Furlan to be confidential, whether the recipients treated them as confidential and whether their circulation was, in fact, kept to only those who needed to be involved in the decision making process.

Of course we recognize that the list of recipients of each memorandum is very limited. That, however, is not the end, but only the beginning of the inquiry. There has been no testimony, through affidavit or otherwise, from the actual author of the e-mails, Mr. Furlan, or the actual recipients of them, Mr. Conrad or Mr. Feola. It has not been

shown whether and to what extent each recipient, in fact, treated the memoranda as confidential.

On the other side of the coin, as we said, the June 11, 2003 e-mail is marked "Sensitivity: Confidential." The three e-mails are related to each other in substance and seem to be a related series. Thus, the marking of one as confidential shows that there was an intent that it be confidential and, based on the close relationship of all three in the series, this showing carries over to the series in its entirety. Also, the subject matter treated in the e-mails and how it was treated indicates to us that these memoranda were not intended for broad publication at the time they were written. In addition, as we observed in *WMI I*, although we have no idea whether Mr. Pounds was referring to these specific e-mails, he did testify in deposition that communications which relate to a specific site or a unique set of facts he believes are confidential. *WMI I*, *slip op.* at 20 (citing Appellant's Motion, Ex. D, p. 49-50). As we have already mentioned, and as we will be discussing again in more detail in connection with the "legal or policy matters" predicate of the privilege, each of these three e-mails is completely and exclusively related to one specific site and one unique set of facts. Finally, although we will not get into detail, there is textual evidence internal to the June 11, 2003 e-mail which indicates to us that the March 14, 2003 e-mail was in fact kept confidential, at least confidential as to WMI. *See* p. 4, first full paragraph, second and third sentences.[5]

[5] This entire paragraph has been redacted in the redacted version of this e-mail which, when it is produced, would be the version produced to WMI. The paragraph in question does not deal with the interpretation of the airport runway exclusionary criteria as such.

Deliberative or Deliberations Predicate

We do conclude that the three e-mails fit this predicate of the privilege. Deliberate is defined as follows:

> "*adj.* 1. Done with or marked by full consciousness of the nature and effects; intentional: *mistook the oversight for a deliberate insult.* 2. Arising from or marked by careful consideration: *a deliberate decision.* See synonyms at voluntary. 3. Unhurried in action, movement, or manner, as if trying to avoid error: *moved at a deliberate pace.* See synonyms at slow. *v. int.* 1. To think carefully and often slowly, as about a choice to be made. 2. To consult with another or others in a process of reaching a decision. *v. tr.,* to consider (a matter) carefully and often slowly, as by weighing alternatives.

The American Heritage Dictionary of the English Language. (4th ed. 2004), *available at* www.answers.com/topic/deliberate. The term is derived from the Latin *dēlīberātus*, past participle of *dēlīberāre*, meaning to consider, weigh : dē-, de- + lībrāre, to balance (from lībra, a balance, scales). *Id.*

Here, Mr. Furlan's communications fit virtually every formulation of "deliberate" or "deliberative." The three e-mails reflect his full consciousness of the nature and effects of his action. He showed careful consideration of the issue before him, which was certainly unhurried in that the three e-mails stretch over almost 7 months. Mr. Furlan's writings also show that he was trying to avoid error in that there is careful and detailed logical discussion of whether WMI's situation was covered or not by the airport runway exclusionary criteria. Also, the writings reflect careful thought about the choice to be made. We will have more to say on this subject in the next section but the choice being faced by Mr. Furlan here was focused and singular, i.e., whether to grant this permit or deny it with reference to the airport runway exclusionary criteria regulation. In other

words, does this site come within the exclusion or not. These communications do reflect consultations with others, both inside and outside the Department, in Mr. Furlan's process of arriving at this decision. He received input from the Bureau's Division of Municipal and Residual Waste and PennDOT's Bureau of Aviation.

A very important post-script discussion needs to be added here. It is important to focus on what is it that these e-mails show deliberation. In other words, on what question do they deliberate. We have answered that question to some degree already, but this is an important point to stress. These e-mails deliberate on the specific question of whether the airport runway exclusionary criteria regulation applies in this particular case. The Department in its Supplemental Brief has it wrong when it says that the e-mails involve the "deliberative process by which <u>that interpretation</u> [i.e., the Department's interpretation of the airport runway exclusionary criteria] was arrived at..." DEP Supplemental Brief at 8-9 (emphasis added). It is incorrect to refer to "that interpretation" as being the interpretation of the airport runway exclusionary criteria. As we have noted, the e-mails are works of apology of an interpretation, not development of an interpretation. This conclusion of fact on our part is confirmed by Mr. Pounds who testified at his deposition that it was he and Mr. Socash who developed "the interpretation of the [airport runway exclusionary criteria]." WMI Motion, Ex. D, p. 67. Neither Mr. Pounds nor Mr. Socash is a recipient of the e-mails or copied thereon. Mr. Furlan refers to his view having been concurred with by the Bureau's Division of Municipal and Residual Waste, which may include Mr. Pounds and/or Mr. Socash, we do not know. In any event, the question being deliberated upon in these three e-mails is not the

interpretation of the regulation as such, or arriving at an interpretation of it, but its application "on the ground" to this particular landfill application.

Legal and Policy Matters Predicate

We do not think that the three e-mails we have reviewed satisfy the "legal and policy matters" predicate for application of the privilege.

From what we saw from the Department in *WMI I*, we declined to agree with what we saw as the Department's maximalistic view of the legal and policy matters predicate in a vacuum without first seeing the documents. By maximalistic we meant what we saw as DEP's view that the legal and policy matters predicate provides a broad blanket coverage to the category of communications relating to the particular Department decision in the context of Environmental Hearing Board litigation regarding that particular decision. Now that we have seen the documents, and without taking any maximalistic or minimalistic view ourselves of the legal or policy matters predicate, we are comfortable concluding that these particular e-mails are so site specific and so particular to this very case which is now under litigation that they do not in fairness come within the legal and policy matters predicate of the privilege.

As we noted in *WMI I*, before we actually saw the e-mails, it appeared that they related specifically to this particular decision on this particular case. We noted there that,

> It appears from the privilege log which sets forth the claim of the privilege that all three e-mails relate to the decision in this specific case. The Department's privilege log describes the e-mails as being about "Pottstown Vertical Expansion Application". Also, Mr. Sherman's affidavit is replete with references to the e-mails as being related to or generated in the context of the specific permitting decision under appeal here. Sherman Affidavit ¶ 8 (memos "were prepared with regard to the action proposed by the staff of the Southeast Region Waste Management Program with regard to the permit application for the Pottstown Landfill Eastern Area Vertical Expansion"); ¶ 10 (memos were prepared "with

> regard to the action to be taken with regard to the pending permit application for the Pottstown Landfill Eastern Area Vertical Expansion").

WMI I, *slip op.* at 16-17. All of that, of course, is still true. Our review of the documents confirms that they relate solely, specifically and exclusively to this case.

There is substantial qualitative difference between the communications in *Brunner*, which Judge Labuskes concluded satisfied this predicate and the ones here, which do not. The *Brunner* communications involved dialogical discussion between Mr. Pounds and Mr. Socach about the meaning, in the broad general sense, of a new statute in question, Act 90, without reference to any particular application of Act 90 in any pending matter. The persons involved were high level policy-makers responsible for determining or setting DEP's institutional interpretation of the new law. As Judge Labuskes noted, "the discussion did not relate to any one site or a unique set of facts." The communications involved "state-wide implementation" of a new statute on a programmatic basis, not with respect to a particular matter. The communications in *Brunner* were not with reference to or in the context of any particular party's rights or interests.

Here, the communications are the opposite. In *WMI I*, we imagined the possibility that broad, general policy and legal discussions may be interspersed within a discussion of this particular case. What we see is nothing of that sort. In fact, the e-mails are striking in that their substance deals one-hundred percent with this very case without any thought whatsoever beyond the confines of this case. Mr. Furlan is not involved in a dialogical give and take discussion about how DEP should, institutionally, as a general matter, interpret the airport runway exclusionary criteria. Mr. Furlan, faced with the specific permit application of WMI, sets forth his interpretation of the exclusion and how,

specifically, it applies in this case with respect to this permit application. In other words, he talks about whether the regulation applies to this site or not and that is all he talks about. There is no part of the communications which are of general applicability at all and there is not a hint of any intent that the communications deal with anything other than this particular permit application. These communications are directly and completely in the context of and with reference to one party's rights and interests; rights and interests which are now, because of WMI's duly filed appeal, the essence of this litigation which we are tasked to decide.

In holding here that the "legal or policy matters" predicate does not apply to these three e-mails, we reiterate here what we said in *WMI I*:

> Thus, these communications, as described by the Department itself, relate not to a matter of general application, i.e., a regulatory matter, but, instead, to this particular and specific permit decision which is under appeal, i.e., the adjudicative matter. As we noted in *Lower Paxton* when the subject of the communication at issue relates specifically to the Department's action which is under appeal "it is hard to imagine a setting which is more antithetical to application of the deliberative process privilege". *Lower Paxton*, 2001 EHB at 261. Judge Labuskes conveyed the same thought in *Brunner I* when he observed that "in our mind, the phrase [legal or policy] normally connotes a matter of general application not to a particular party's circumstances. It is program oriented; more regulatory than adjudicative". *Brunner I, slip op.* at 5.
>
> Such analysis is particularly applicable to Environmental Hearing Board litigation for several important reasons. Under Section 7514(c) of the Environmental Hearing Board Act, when a matter is properly before the Board in litigation, as this one is, the "decision" of the Department is not final until the Board has fully adjudicated the case. 35 P.S. § 7514(c). Thus, when we are dealing with the particular matter under appeal at the Board, there is no final decision to which any deliberative process privilege can attach. Also, as we noted in *Lower Paxton*,
>
>> No blanket deliberative process privilege can be applied to Deputy Secretary Tropea here. Lower Paxton alleges that Deputy Secretary Tropea was personally, directly and persistently involved in the decision to deny

> Lower Paxton's proposed Plan. It is this very decision which is now under review before the Board. Under the EHB Act, the Appellant has a right to a full *de novo* hearing on that decision before it becomes final. Correspondingly, the EHB is the quasi-judicial body whose statutory role is to determine, based on a full record and via *de novo* review, whether the action of the Department is appropriate and lawful and whether it should or should not become final. *Smedley v. DEP*, Docket No. 97-253-K, *slip op.* at 25-30 (Adjudication issued February 8, 2001). It is illogical to maintain that the core information about how and on what bases the Department arrived at its decision under review is to be locked away. Indeed, it is hard to imagine a setting which is more antithetical to application of a deliberative process privilege. The review of and scrutiny of the Department's deliberative process with respect to the action under appeal is a part of the very essence of the Appellant's right and the Board's function and duties. Application of the privilege to make that information inaccessible would render nugatory Appellant's rights and the Board's responsibilities. *Lower Paxton*, 2001 EHB at 260-61.

WMI I, *slip op.* at 17-18. As we went on to say in *WMI I*:

> Such a view [that the privilege provides blanket coverage to deliberations on the very decision which is under appeal to the Board] is especially ill-fitting in the context of Environmental Hearing Board litigation for the reasons we just discussed. The Environmental Hearing Board Act gives an appellant, in this case WMI, the right to a due process trial of the Department's specific decision on its specific matter. The privilege, if it does exist in Pennsylvania, is a common law qualified privilege and it must be construed in light of the Environmental Hearing Board Act. *See* Footnote No. 2, *supra* (the deliberative process privilege at issue here is a creature of common law). The "legal or policy matters" predicate cannot be read, as apparently the Department reads it here, to be so expanded so as to include what is the very subject of the due process trial. If it did, then there would be no due process and the rights granted under the Environmental Hearing Board Act would be gone.

Id. at 18.

With all due respect to the Department, we think *Rupert v. United States, 225 F.R.D. 154* (M.D. Pa. 2004), to which the Department refers us in its Supplemental

Brief, is beside the point for which the Department cites it. Actually, *Rupert*, provides strong support for the conclusion we come to today. The holding of the case was not dependent upon the adjudicative versus general nature of the communication. The sole basis for the court's ruling that the privilege applied there was that the government's memorandum outlined a recommended decision on a matter which was not yet final before the litigation had been filed. In *Rupert*, the executor of an estate had filed suit against the IRS seeking a tax refund. Even before the IRS had decided whether to grant the refund, the executor brought suit in court. The executor sought disclosure of a memorandum prepared by an IRS Appeals Officer. The court held as follows:

> Upon an *in camera* inspection of the redacted portion of the IRS memorandum, it is clear that the deliberative process privilege protects the redacted portion. The redacted portion outlines the recommendations of the IRS Appeals Officer, and it is clear that no final decision had been made concerning Plaintiffs' IRS appeal. Since no decision had been made before the filing of the current litigation, the recommendations of the Appeals Officer cannot be said to be the adopted policy of the IRS. *Coastal States, 617 F.2d at 866* (noting that a pre-decisional document can lose that status if it is formally or informally adopted by the agency). Furthermore, the Appeals Officer's analysis and recommendations reflect his personal opinion of the Plaintiffs' IRS appeal and as such are clearly deliberative. *Id.* Therefore, the deliberative process privilege can be claimed by the government.

Id. at 156.

The privilege applied in *Rupert* because the IRS, the executive agency in that case, had not even made a decision on the matter before the litigation was filed and the motion to compel came along. In other words, the communication was pre-decisional as to the Agency making the initial decision. Not only was the communication itself pre-decisional, but the litigation and the discovery request both came before the IRS had made its decision on whether the tax refund should be granted or denied. We do not have

that situation here. DEP's decision on this permit has been rendered and it is that decision which is now subject to trial at the Environmental Hearing Board. In fact, DEP in critiquing a part of our *WMI I* decision, says that, "[i]n this case, there was clearly an action taken by the Department, which is the subject of the instant appeal. From the point of view of the Department, which is invoking the privilege, the decision or decisions that resulted in that action have been made." DEP Supplemental Brief at 5. The argument of the Department's Supplemental Brief shows even further more fundamental disagreement with the core holding of *Rupert*. The Department's Supplemental Brief spends much time arguing that there need not even be a final action for the privilege to apply. It says that, "[t]he presence or absence of a 'final' action, in the strictly legal sense, is simply not relevant to an inquiry into whether the privilege applies." DEP Supplemental Brief at 5-6. If that had been the IRS's position in *Rupert*, the court would have not held the privilege to apply in its favor.

Rupert deals virtually exclusively, then, with the requirement that the communication, in order to be privileged must be "pre-decisional." Most courts treat that element as a *sine qua non* for application of the privilege. As Judge Calwell put in *Rupert*, "[i]n order for the privilege to apply, the government must show that the memorandum is pre-decisional and deliberative." *Rupert*, 225 F.R.D. at 156. The Third Circuit in *Redland Soccer Club* said, "[i]n addition, [the deliberative process privilege] does not protect 'communications made subsequent to an agency decision.'" *Redland Soccer Club*, 55 F.3d at 854 (citing *United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993))*. There is no question but that this element is a *sine qua non* to application of the

deliberative process privilege in Pennsylvania, to the extent there is such a privilege here. In *Vartan*, Madame Justice Newman said:

> For the deliberative process privilege to apply, certain requirements must be met. See generally, Russell L. Weaver & James T.R. Jones, The Deliberative Process Privilege, *54 Mo.L.Rev. 279 (1989).* First, the communication must have been made before the deliberative process was completed. *Senate of Puerto Rico v. United States Department of Justice, 262 U.S. App. D.C. 166, 823 F.2d 574 (D.C. Cir. 1987).*

Commonwealth ex rel. Unified Judicial System v. Vartan, 733 A.2d 1258, 1264 (Pa. 1999). In the *Tribune-Review* case, in which our Commonwealth Court recognized the privilege, the Commonwealth Court pointed to Justice Saylor's recitation of the privilege from *Lavalle v. Office of Gen. Counsel, 769 A.2d 449 (Pa 2001)*, and held that "the deliberative process privilege applies to pre-decisional communications." *Tribune-Review Publishing Co. v. Dep't of Comty. and Econ. Dev.*, 814 A.2d 1261, 1264 (Pa. Cmwlth. 2003), *aff'd on other grounds, Tribune-Review Publishing Co. v. Dep't of Comty. and Econ. Dev.*, 859 A.2d 1261 (Pa. 2004).

The pre-decisional, post-decisional demarcation has not been a major focus here. This is, perhaps, because the parties have taken as a given that the three e-mails came before the Department's decision to deny the WMI permit application. The e-mails here were clearly pre-decisional. They were written on March 14, 2003, June 11, 2003 and October 8, 2003 respectively and the Department's denial letter was dated October 13, 2003. Our discussion in *WMI I* that, under the Environmental Hearing Board Act, a Department decision is, technically, not final until an aggrieved party who has appealed has an opportunity for a *de novo*, due process trial at the Environmental Hearing Board was not meant to place these three e-mails in the "pre-decisional" category. *WMI I, slip op.* at 17. That observation was provided as one reason why the privilege should not be

read in the context of litigation under the Environmental Hearing Board Act to apply to communications, such as the ones here turned out to be, which are specifically and exclusively on the very matter which is subject to review pursuant to the Environmental Hearing Board Act. There are a host of other reasons as well which we explained in *WMI I* and reiterate in this decision. *Id.* at 17-18. To that list should be added the Commonwealth Court's dual injunction from the *Joe* case that: (1) the privilege "should be narrowly construed;" and (2) courts should not embrace proffered broad interpretations of it. *Joe*, 782 A.2d at 33-34.

The Department also directs our attention to the case of *Commonwealth of Pennsylvania v. Pub. Util. Comm'*, 331 A.2d 598 (Pa. Cmwlth. 1975) (*Pa. PUC*).[6] That case, which was a telephone rate case, is inapposite for the reasons we have been discussing and for others. First, that case had nothing to do with the deliberative process privilege and the Court did not even mention it. Second, the Public Utilities Commission (PUC) setting is not at all the same as the tri-partite system of environmental regulation established in part by the Environmental Hearing Board Act and which the Commonwealth Court recognized in its *NARCO* case as follows:

> The EHB and the Department are two branches of the tripartite administrative structure that governs environmental regulation in Pennsylvania. The third branch of that structure is the Environmental Quality Board (EQB). The Department is the executive branch, assigned various duties to implement and enforce environmental statutes and regulations. *See, e.g.*, Section 4 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. § 4004. The EHB is the judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, 35 P.S. § 7514. Section 3(a) of the EHB Act, 35 P.S. § 7513(a), describes the EHB as "an independent quasi-judicial agency."

[6] The Department erroneously cites this as a 1984 case. It was actually decided in 1975.

Dep't Envtl. Protection v. North American Refractories, Inc., 791 A. 2d 461, 462 (Pa. Cmwlth. 2002) (*NARCO*). In our tri-partite system, the Department is the executive branch which makes a decision and, when an appeal is filed, we are the separate and independent judicial branch which is open to review that decision with all the due process guarantees.

The PUC arena is not comparable to the EHB arena. The PUC acts as regulator and quasi-judicial trier of fact in the rate-making arena. Now former, but then Chairman of the PUC, and former Environmental Hearing Board Judge, Terrance J. Fitzpatrick, who obviously is in a unique position to know, discusses this and the basic difference between the PUC setting and the EHB setting in his article, *The Tension Between Policy and Principle In The Adjudications of the Pennsylvania Public Utilities Commission*", Symposium: When A Lawyer Stood Tall: Sharing And Understanding Stories Of Lawyer Heroes, 13 Widener L.J. 101 (2003). He explains that, "[t]he PUC is an independent agency, and in carrying out its duties it performs both quasi-judicial and quasi-legislative (i.e., policymaking) functions." *Id.* at 102. The PUC, thus, operates as executive, regulator and quasi-judicial tribunal in its rate review or rate-making function. In concert with this role and function of the PUC, the Commonwealth Court has noted that, "[t]he setting of rates is an administrative function of the PUC and our scope of review in complaint proceedings is restricted to a determination of whether constitutional rights were violated, errors of law committed, or necessary findings of fact made without the support of substantial evidence." *Strunk v. Pub. Util. Comm'n,*, 531 A.2d 881, 882

(Pa. Cmwlth. 1987), *appeal denied*, *Strunk v. Pub. Util. Comm'n*, 542 A.2d 1373 (Pa. 1988).[7]

In contrast, the Environmental Hearing Board sits as the independent quasi-judicial branch which reviews decisions of the Department of Environmental Protection which have been brought before us. 35 P.S. § 7513(a) (EHB is established as an independent quasi-judicial agency). Our scope of review of Department actions is *de novo*. *See e.g.*, *Pennsylvania Trout v. Dep't Envtl. Protection,* 863 A.2d 93, 106 (Pa. Cmwlth. 2004) (EHB is not an appellate body with a limited scope of review). Hence, as between the DEP and Environmental Hearing Board, we have the executive branch, judicial branch demarcation recognized by the *NARCO* Court. There is no such demarcation and no such coordinate branches structure with the PUC.

In that light, we would regard the PUC staff technical reports at issue in *Strunk* to be comparable to case memoranda from judges' law clerks to their judges. *Cf. Kennedy v. Upper Milford Township Zoning Hearing Bd.*, 834 A.2d 1104, 1118 n.28 (Pa. 2003) (although the Court has not adopted the deliberative process privilege, there is no reason that the deliberative process privilege would not extend to quasi-judicial bodies as well as judicial ones).

Based on the foregoing, we hold that the legal and policy matters predicate is not satisfied in this case as to these particular e-mails.

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[7] Indeed, that description from *Strunk* of the Commonwealth Court's scope of review from PUC cases is the same as the Commonwealth Court's recitation of its scope of review of decisions which come up to it from the Environmental Hearing Board. *See e.g.*, *Leatherwood, Inc. v. DEP*, 819 A.2d 604, 610 n. 3 (Pa. Cmwlth. 2003).

Balancing Test

Even though we have concluded that the Department has not proven the "legal and policy matters" predicate, and, thus, the privilege does not apply, we will proceed with the balancing test as it is possible that this matter may end up in the appellate courts and we would not want to have skipped this step on the way up.

Various courts have described the balancing test in a variety of ways along with the criteria to be applied to the balance. Justice Martinez in *City of Colorado Springs* put it this way:

> [T]he deliberative process privilege is a qualified privilege. It may be overcome upon a showing that the discoverant's interests in disclosure of the materials is greater than the government's interests in their confidentiality. *See, e.g., Martinelli, 199 Colo. at 170, 612 P.2d at 1088.* The determination of need must be made flexibly on a case-by-case, ad hoc basis. *See In re Sealed Case, 121 F.3d at 737.* Factors relevant to this balancing include: the relevance of the evidence, whether there is reason to believe the documents may shed light on government misconduct, whether the information sought is available from other sources and can be obtained without compromising the government's deliberative processes, and the importance of the material to the discoverant's case. See *In re Sealed Case, 121 F.3d at 737-38; Martinelli, 199 Colo. at 171, 612 P.2d at 1089;* Walker & Jones, The Deliberative Process Privilege, at 318-20. n12.

City of Colorado Springs, 967 P.2d at 1054. The Third Circuit put it this way:

> The privilege, once determined to be applicable, is not absolute. *First Eastern Corp., 21 F.3d at 468 n.5; Farley, 11 F.3d at 1389.* After the government makes a sufficient showing of entitlement to the privilege, the district court should balance the competing interests of the parties. The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest. This Court has previously stated that "the party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case . . . or by making a prima facie showing of misconduct." *In re Grand Jury, 821 F.2d at 959* (internal citations omitted). The United States Court of Appeals for the District of Columbia,

> recently determined that a district court, in balancing the interests, should consider at least the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *First Eastern Corp., 21 F.3d at 468 n.5.*

Redland Soccer Club, 55 F.3d at 854.

We think that there is no question that WMI has shown that its interest in obtaining this material greatly outweighs the government's interest in keeping these particular e-mails secret. As we noted before, borrowing from Justice Martinez of the Colorado Supreme Court, this analysis is inherently specific to these documents, with respect to their specific content in relation to this particular litigation. Accordingly, we doubt whether the balancing analysis we perform here would be direct precedent for future cases.

That the communications here are relevant there can be no doubt. The very essence of this litigation is the correct interpretation of the runway flight path exclusionary criteria regulation in the context of this particular landfill application. This case is all about the interpretation of that particular regulation with respect to this particular landfill. In fact, not only is it all about that; that is all it is about. That is the precise and the exclusive subject matter of the material which is under seal. In that regard, the communications here are the "perfect storm" of relevancy. Without getting into the details of the e-mails, they discuss exactly what the parties identified to us in our case conference of November 18, 2004 as the potential interpretive issues of the airport runway exclusionary criteria regulation with respect to this landfill.

These communications not only rate one-hundred percent on the relevancy scale, they also rate one-hundred percent on the importance scale. We reiterate here what we said in *WMI I* that Judge Labuskes said in *Brunner II* because the principle is applicable here,

> We disagree with the Department's contention, however, that the contents of the discussions have no probative value in Brunner's appeal. This case will turn on the meaning of a statute. Our one and only function in such a case is to divine the Legislature's intent. 1 Pa.C.S.A. § 1921(a). It may be that the Legislature's intent is so abundantly clear from the face of Act 90 that we need go no further. *Eagle Environmental v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2003) (where a statute is clear, there is no need to engage in interpretation). *See, e.g., RAG Cumberland Resources v. DEP,* EHB Docket No. 2003-067-L (Opinion and Order January 27, 2004) (mining statute unambiguously requires preshift examinations).
>
> On the other hand, although we have not even begun to consider the question here, it may be that Act 90 may have some ambiguity. In that event, we will be tossed into the heady maelstrom of statutory interpretation. If we find ourselves afloat in such rough waters, one of the factors that we will need to consider is the Department's institutional interpretation. 1 Pa.C.S.A. § 1921(c)(8). In other words, that interpretation, once proven, is *evidence*. What counsel discourses in a brief is argument; what the Department as a whole has adopted as its official position is probative evidence of what an ambiguous statute actually means.
>
> Once we acknowledge that the Departmental interpretation is itself evidence, it follows that Brunner has an interest in its disclosure. And as with any other evidence that has the potential to become part of the record, Brunner is not compelled to accept the evidence at face value, particularly at the discovery stage. Brunner is not required to say, "Well, this is what the Department says, so it must be true." Rather, Brunner is generally entitled to explore all pertinent aspects of the evidence. It is also entitled to discover information that may be used for impeachment purposes. Background information regarding the formulation and basis of the Department's programmatic choices on how it plans to implement an assertedly ambiguous statute might at least conceivably have an impact on the weight that this Board gives to the interpretation. We are not able to conclude as much now, but we are also not willing to categorically rule out such possibilities at this juncture of the case. Furthermore, determining whether the Department's interpretation is reasonable, if we are required to get into that, might very well involve consideration of precisely the sort

> of matters that Brunner is asking about. In short, Brunner is clearly in a legitimate search for potentially probative information.
>
> Thus, Pounds and Socash's discussions are of the kind that are contemplated by the privilege, but the information is also of the sort that is generally probative. We have struggled with our balancing analysis because, perhaps ironically given all of the attention this one discovery issue is receiving, the communications at issue are rather innocuous. In that sense, disclosure is not particularly destined to chill future internal debate, but neither do we see disclosure as likely to have dramatic value in Brunner's case. On balance, we conclude that the evidence's potential probative value outweighs the Commonwealth's need to shield it from disclosure. Among the other factors that we have considered as discussed above, we are concerned that redacting the information would cast a pale over the proceedings by giving the inaccurate but understandable impression that important information existed but was being covered up. As always, we strive for the most informed adjudication possible founded upon a complete record. The largely theoretical societal interest that might be marginally served by limiting Brunner's discovery of the discussions at issue is insufficient to compel us to deviate from that primary goal in this appeal.

Brunner II, *slip op.* at 5-7 (footnote omitted). As we went on from there to say in *WMI I*,

> If, as we have heard the Department tell us, it will be relying substantially on *NARCO* in this case in that it will be positing what it says is its reasonable interpretation of the runway flight path exclusionary criteria, to which we will then have to defer in its favor, then there is no question that any evidence about what that interpretation is will be probative evidence. Indeed, as Judge Labuskes pointed out, the *NARCO* analysis that the Department will ask us to employ makes evidence about the Department's interpretation of the regulation probative in the extreme. As he said, "it would seem that the more weight the Department's position is entitled to, the greater its probative value." *Brunner II*, slip op. at 5 n.2. In other words, the more work the Department wants *NARCO* to do in terms of providing weight or deference to its interpretation of the regulation, the more probative evidence about the Department's interpretation of the regulation becomes.

WMI I, slip op. at 22-23. Furthermore, as it has now become clear that the communications here are completely dedicated to this one particular landfill application which is under review here, our further observation in *WMI I* becomes applicable,

> Also, we note that Judge Labuskes came to this conclusion that the Appellant's interest in the evidence outweighed the government's in keeping it secret where the communications in that case were of the general, programmatic, regulatory type. Here the communications relate to the specific case at issue here in this litigation and is, thus, of the particular or adjudicative type. Thus, the communications here stand on shakier ground for application of the privilege than did the communications in *Brunner* which Judge Labuskes held, after in camera review, must be disclosed. In other words, in this case, at least on the basis of the information we have seen, these communications look like better candidates for requiring disclosure than the ones Judge Labuskes ordered disclosed in *Brunner II*.

Id. slip op. at 23.

Fairness and justice requires that WMI have access to this evidence which is as relevant and important in its own right as this. In addition, because of *NARCO*, the evidence becomes so extremely highly relevant and so extremely highly important. If the Department were not going to use the principle of *NARCO* deference here and leave the interpretive question up to the Board, then things might be different. But that is not and will not be the case. For the Department to use *NARCO* and then be able to hide evidence of DEP's interpretation of the regulation creates a very unfair set of circumstances. In short, WMI, the Board and the people of this Commonwealth are being told, "heads I win, tails you lose."

NARCO left unanswered the question of what exactly constitutes DEP's interpretation of a regulation whose interpretation is the focus of a dispute between it and a member of the regulated community or interested citizens' group or other litigant before us. Here, there is no question from our review that the Furlan e-mails constitute evidence of DEP's interpretation of the airport runway exclusionary criteria regulation. Mr. Furlan is Southeast Regional Office Waste Manager. Under any view of *NARCO*,

his interpretation of the regulation must constitute potentially relevant evidence of DEP's interpretation of the regulation.

The Department seems to agree that evidence of the Department's interpretation of the regulation at issue in this case is relevant probative evidence. But, it says "evidence of the deliberative process by which that interpretation was arrived at is not [relevant]." DEP Supplemental Brief at 9. We have already discussed how the Department has it wrong on its reference to what "that interpretation" refers to. *See supra* at 11. As a factual matter, these e-mails set forth an interpretation and an application, period. They do not memorialize a journey in which there is an "arrival at an interpretation" of the airport runway exclusionary criteria regulation. They are not a give and take of differing views of the regulation which culminate in a final "position" of what the regulation means. These e-mails set forth the Regional Waste Manager's interpretation of the regulation in the context of its application to this permit application. As such, they are highly relevant and probative evidence on the subject of DEP's interpretation of the regulation at issue in this case.

The Department also misses the point when it tells us that,

> An interpretation advanced by the Department that is reasonable on its face is not going to be rendered unreasonable by evidence concerning the deliberative process that led up to the formulation of that regulation. Nor would evidence that one or more Department officials support a different interpretation than that ultimately adopted by the Department prove fatal, so long as the interpretation is reasonable on its face.

DEP Supplemental Brief at 9. Again, the discovery and evidentiary question is: what is the interpretation? These e-mails are evidence of "the interpretation." Of course, questions remain about what is the status of the evidence and what weight it might be

entitled to, if any. Thus, we would agree that there would be nothing necessarily "fatal" about any such piece of evidence. Again, we wonder fatal to what? There has been nothing established yet to which these e-mails could be fatal. That is the point. These e-mails are evidence of the interpretation. The questions DEP raises in its "fatal" comment are questions not of admissibility, and certainly not ones of discoverability, but of weight and/or credibility. If the interpretation is a renegade, unauthorized one, then that factor could be presented to the trier of fact to take into consideration. If the interpretation is old and no longer valid, that also could be presented to the trier of fact to take into consideration. On the other hand, if DEP contends that the interpretation is consistent over time and it does reflect the Department's interpretation, then that also could be presented to the trier of fact. In any case, the Appellant has a right to access to that evidence.

We also find that there are no other viable sources to WMI for this evidence. The e-mails are unique in that a particular person wrote them, at particular times and contain particular narrative. Thus, each has its own particular evidentiary fingerprints. How each might or might not fit into the patchwork of what will be evidence in the trial which reveals the mystery we must uncover in this case is impossible to determine now. It is enough that each of these pieces of evidence has sufficient individuality so as to be not available through other means or media. As Judge Labuskes noted in *Brunner II*:

> Brunner is not compelled to accept the evidence [of the Department's interpretation of the regulation in question] at face value, particularly at the discovery stage. Brunner is not required to say, "Well, this is what the Department says, so it must be true." Rather, Brunner is generally entitled to explore all pertinent aspects of the evidence. It is also entitled to discover information that may be used for impeachment purposes. Background information regarding the formulation and basis of the

> Department's programmatic choices on how it plans to implement an assertedly ambiguous statute might at least conceivably have an impact on the weight that this Board gives to the interpretation.

Brunner II, *slip op.* at 6.

Based on the foregoing we conclude that WMI has shown a very high need for the material, that the material is very important to the question at hand and is certainly discoverable, and that WMI has no viable other means or media to obtain this evidence.

On the other side of the equation we find and conclude that disclosure here would not hamper the government's ability and liberty to deliberate frankly about pending permit decisions, engender future timidity of expression by Department employees, or otherwise impinge upon a government interest.

A major theme of Mr. Sherman's affidavit is that these types of memos—again, not these memos in particular, but these types of memos generally—are important for the quality and consistency of Department decisions. By consistency we take him to mean that different Department major actions, i.e., permitting actions, from different DEP field offices, i.e., Regions, should be consistent throughout the Commonwealth. Sherman Affidavit ¶ 3. Consistency in and of itself is not necessarily a good thing. Consistently making the incorrect decision is bad. We, of course, are in no way saying now that the Department made a wrong decision in this case, but WMI certainly is saying so. That is what we are here in this trial to find out. Again, this evidence is directly on point and relevant to that question.

Also, these particular e-mails have nothing to do with consistency of decisions. They relate to this case and this case only and there is no reference at all to any other cases from field offices in which the Department has applied the airport runway

exclusionary criteria nor is there any request for information about how the Department has applied this regulation in other cases.

In addition, there does not have to be secrecy in order to have consistency. We cannot accept the theory that mass secrecy in the form of confidential memoranda with very limited circulation enhances consistency in major actions by field offices. Indeed, it would seem that the opposite would be true. Transparency and consistency seem so interrelated as to go hand in hand and they have been treated that way in other related contexts. *See e.g.*, Office of Inspector General Special Review, Consistency and Transparency in Determinations of EPA's Anticipated Ozone Designations, Report No. 2002-S-0016, August 15, 2002, *available at* www.epa.gov/oig/reports/2001/Mira.Final.08-15.pdf. Transparency and publicity would be greater assurances of consistency than would secrecy. Consistency can be accomplished by making sure that there is broad information exchange within the Department so that one field office knows what the others are doing and have done.

We find it not credible that the Department will be inhibited from frank discussion about future permit applications by disclosure here. First of all, as to individual permit decisions, there should be no expectation of or endorsement of a blanket application of secrecy. Permitting is a matter of great public interest and openness. The permitting process is often subject to intense public input and participation. Indeed, in the case of municipal waste landfills, which this one is, there are regulations which require extensive public notice and public involvement in the process. 25 Pa. Code §§ 271.141 – 271.144. The landfill permitting process is subject to a broad public harms versus public benefits analysis which the Commonwealth Court upheld in

its *en banc* decision of *Tri-County Indus., Inc. v. DEP*, 818 A.2d 574 (Pa. Cmwlth. 2003), *appeal granted*, 835 A.2d 707 (Pa. 2003) (involving 25 Pa. Code § 271.127, municipal waste landfill permit application "harms/benefits" analysis and 25 Pa. Code § 287.127, residual waste landfill permit application "harms/benefits" analysis). This landfill is a municipal waste landfill.

Beyond the openness of the permitting process itself, as Mr. Sherman says, "[a]ppeals to the Environmental Hearing Board are a possible consequence of virtually every major action taken by the Department." Sherman Affidavit ¶ 12. That is especially true with respect to permitting decisions. Thus, even the Department realizes that, to some extent, Environmental Hearing Board litigation is a fact of life for the Department. It is also for those whose rights are guaranteed and given life under the Environmental Hearing Board Act such as members of the regulated community, citizens' groups and other interested parties.

In the final analysis, review and decisions about pending permit applications is a major "raison d'etre" of the Department. That is what the Department does and that is its duty. We doubt that disclosure here will chill full and frank discussion within the Department in connection with the performance of those duties. We do not believe that the Department will be deterred from its duties going forward upon the requirement here that it disclose to a permit applicant, to which it has denied a permit, a discussion authored by the Regional Solid Waste Manager regarding the permit that he is denying. We do not think that Department employees are or will be so lacking in the courage of their convictions so as to across the board "turtle up" from now on because these three e-

mails, which are no doubt relevant to this litigation and so important to WMI's right to a fair trial, are disclosed.

There is nothing sensitive or personal in these e-mails. They contain a matter of fact, workmanlike analysis of the application of the runway flight path exclusionary criteria regulation to the particular facts of the WMI permit application. Thus, the material is not "so candid or personal in nature that public disclosure is likely, in the future, to stifle honest and frank communication within the agency." *City of Colorado Springs*, 967 P.2d at 1052 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Based on all these factors, we conclude that disclosure will not stifle candor or freedom of expression within the Department.

An order consistent with this opinion follows.

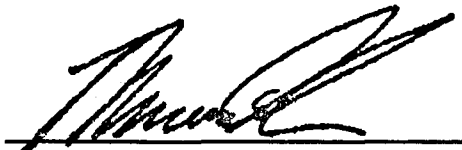
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of February 2005, upon consideration of the Appellant's Motion to Compel, the Township's Response and the Department's Response, and the in-person conference on the Motion to Compel in which all counsel and the undersigned participated on Monday, February 14, 2005, our in camera review of the three e-mails in question, and the Department's Supplemental Brief; IT IS HEREBY ORDERED that the Department shall produce the redacted version of each of the three e-mails to Appellant and Intervenor by on or before February 24, 2005.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: February 22, 2005
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	**Issued: February 25, 2005**

OPINION AND ORDER ON NEVILLE CHEMICAL COMPANY INC.'S MOTION TO COMPEL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

After performing an *in camera* review of five documents withheld by the Department, the Board denies Neville Chemical Company's Motion to Compel Discovery. The documents are protected from disclosure under the attorney-client privilege and/or are not relevant. Moreover, several of the documents contain the mental impressions of an attorney or a Department representative concerning strategy and/or tactics and are therefore not discoverable under the Pennsylvania Rules of Civil Procedure.

Discussion

Presently before the Environmental Hearing Board is the Motion to Compel the

Production of Documents filed by Defendant Neville Chemical Company. Originally the Motion to Compel sought to compel the Pennsylvania Department of Environmental Protection to produce 10 documents withheld on a claim of attorney-client privilege and 36 documents withheld under the deliberative process privilege.[1] Following the filing of the Motion to Compel, the Department, without conceding that the privileges do not apply, produced 9 of the 10 documents withheld based on the attorney-client privilege and 31 of the 36 documents withheld under the deliberative process privilege.[2]

In order to decide the issue, on February 15, 2005, the Board ordered the Department to produce under seal for in camera review by the Board the documents identified in its privilege log which it had not produced; specifically documents numbered 193, 27, 45, 52 and 53. These documents were immediately sent to the Board by the Department.

Judge Miller succinctly summarized the law of attorney-client privilege in both *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1219-2220, and *Morris Township Property Owners v. DEP and Robindale Energy Services, Inc.*, EHB Docket No. 2003-183-MG (Opinion and Order issued February 13, 2004) pages 2-3.

> The attorney-client privilege is not only a time-honored tradition in American jurisprudence, but is considered important enough to be codified in the Pennsylvania Judicial

[1] Chief Judge Krancer has recently issued two extensive opinions discussing the law and procedure applicable dealing with a claim raising the deliberative process privilege. *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 14, 2005) (Corrected Opinion issued February 15, 2005) (WM I); *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 22, 2005) (WM II).

[2] However, the Department also contends that the four documents not produced under the deliberative process privilege are also protected from disclosure by the attorney-client privilege.

Code:

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

42 Pa. C.S. § 5928. Although the privilege is in derogation of the truth-seeking function of a tribunal, the protection of the confidences between a client and his lawyer nevertheless serve a vital function in our judicial system:

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. The disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged ....

Slater v. Rimar, Inc., 338 A.2d 584, 589 (Pa. 1975) (quotation omitted). This privilege is important not only to individuals, but to government entities as well. Accordingly, it is well settled in Pennsylvania law that the attorney-client privilege applies to governmental agencies and their lawyers who are acting in their professional capacities. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243 (Pa. Cmwlth. 1994); *Okum v. Unemployment Board of Review*, 465 A.2d 1342 (Pa. Cmwlth. 1983). Specifically, government entities "may claim the privilege for communications between

> their attorney and their agents or employees who are authorized to act on behalf of the entities." *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000).
>
> Additionally, the Commonwealth Court has explained that privilege applies to Department attorneys as it does to their private counterparts, rejecting the perceived exception to the privilege for when a government lawyer participates in the "adjudicatory" process:
>
>> While it is true that when an attorney is the decision-maker, as opposed to legal counsel giving advice to the decision-maker, the attorney-client privilege does not apply. However, when the attorney merely gives legal advise to decision-makers, his advice can be rejected, so that it does not rise to the level of policy and retains its privileged nature. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243, 1245 (Pa. Cmwlth. 1994).

Following a careful and detailed review, we find that the documents are not discoverable based on the attorney-client privilege. In addition, several of the documents are not discoverable under Rule 4003.3. of the Pennsylvania Rules of Civil Procedure as they contain the "mental impressions...conclusions, opinions, [and] legal theories" of Department attorneys. In addition, several of the documents also are not discoverable because they contain the "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics" of a representative of the Department.

We hasten to add that most of these documents are also not relevant nor would they lead to the discovery of admissible evidence. Both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure foster a very open system of

Discovery. The theory is that if each party knows the strengths and weaknesses of their cases, then the trial will proceed more quickly. Moreover, the parties will be in a better position to resolve their differences amicably prior to a hearing. However, it is vitally important to protect the attorney-client privilege and the freedoms ensconced in this privilege. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

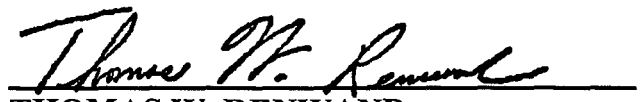
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	

ORDER

AND NOW, this 25th day of February, 2005, following an *in camera* review of documents withheld from production by the Department of Environmental Protection, it is ordered as follows:

1) The Board is returning the documents to the Department that were submitted for review.
2) The Board has made no copies of these documents.
3) Neville Chemical Company's Motion to Compel Discovery is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-297-CP-R

DATED: February 25, 2005

c: **DEP Bureau of Litigation**
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SECRETARY TO THE BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 25, 2005**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO STAY ORDER DATED FEBRUARY 22, 2005 ORDERING DISCLOUSRE OF DOCUMENTS CLAIMED TO BE PROTECTED FROM DISCOVERY BY THE DELIBERATIVE PROCESS PRIVILEGE

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department has requested that we stay our Order requiring disclosure of documents claimed to be covered by the deliberative process privilege pending the outcome of its Pennsylvania Rule of Appellate Procedure 313 Petition for interlocutory appeal. The Board concludes that the Department is not entitled to a stay pending appellate review. However, the Board will stay the Order briefly to allow the Department and the Appellant to have Commonwealth Court determine whether the Board's Order should be stayed pending potential Rule 313 appellate review of the underlying decisions of the Board.

Factual Background

The Department has requested by Motion filed at the end of the day on February 24, 2005, that we stay our Order dated February 22, 2005 (Disclosure Order) requiring it to disclose

by February 24, 2005, documents that it claims are covered by the deliberative process privilege. We have already covered, at length, in two written Opinions and Orders the dispute between the parties regarding these documents and our disposition of the claim of privilege. *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 22, 2005) (*WMI II*); *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 14, 2005) (Corrected Opinion issued February 15, 2005) (*WMI I*). The Department is seeking immediate appellate review of our Opinions and Orders, especially the Disclosure Order, under Pa. R. A. P. 313, and is asking that we stay the effectiveness of the Disclosure Order until the Commonwealth Court can hear and decide the Rule 313 Petition.

Our Disclosure Order took effect yesterday but the Department did file its Motion for a stay thereof yesterday as well. Given the time constraints, we deal briefly and quickly here with the pending motion and explain the rationale of our disposition thereof.

The Department tells us that it must meet these four criteria to obtain its requested stay: (1) the petitioner has made a strong showing that it is likely to prevail on the merits of the appeal; (2) the petitioner has shown that without the relief requested, it will suffer irreparable injury; (3) the issuance of the stay will not substantially harm other interested parties; and (4) the issuance of the stay will not adversely affect the public interest. *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). These criteria are to be measured together to come to a conclusion.

We do not have time now, nor is it our province, to go into a full treatment of Rule 313. It seems fair to say that it is completely up to the Commonwealth Court to determine whether immediate appeal under Rule 313 is available. There is no "certification" that is necessary here.

It appears that if the case fits the Rule 313 criteria, then the appellate court reviews the matter as an appeal as of right. The Commonwealth Court determines whether the Rule 313 criteria have been met and, thus, whether an appeal as of right lies. Quite basically, if the order to be reviewed is collateral to the essence of the matter being litigated, if the order involves a matter of public importance, and if the petitioner would suffer irreparable loss of the right involved without immediate review, the order is a likely candidate for Rule 313 review.

For an excellent and quite relevant discussion of Rule 313 we refer the reader to Kelly, *An Assessment of The Appealability of Interlocutory Discovery Orders Involving Claims of Privilege*, 74 Pa. Bar Ass'n Quarterly 18 (2003). That article covers the most recent two Supreme Court cases on Rule 313 as it relates in particular to the potential immediate appealability of discovery orders involving claims of privilege. *Ben v. Schwartz*, 729 A.2d 547 (Pa. 1999) and *Genivivia v. Fisk*, 725 A.2d 1209 (Pa. 1999).

The parties tell us that a Commonwealth Court decision on the Rule 313 Petition may not occur until May at the earliest. By then, of course, the trial would be over.

The Department fails on the *Process Gas* criteria for the stay. *WMI II* shows that we do not think that the Department has made a strong showing that it is likely to prevail on the merits. We are cognizant of the Supreme Court's admonition about this prong of the test where, as here, the Judge who wrote the opinion being challenged is asked to determine whether the appeal of his or her decision has a likelihood of being successful. *Process Gas*, 467 A.2d at 809 n.8. Our decision that the documents were not covered by the privilege was based on legal analysis and conclusions as well as factual and credibility determinations. Indeed, our balancing analysis was heavily laden with factual and credibility determinations. In addition, our determination was based on our factual conclusion that the Department had not met its burden of establishing the

privilege applied. We, of course, stand by our legal analysis and legal conclusions. As to our determinations on whether the Department carried its burden of proof and our factual and credibility determinations, the Commonwealth Court has said many times that factual and credibility determinations are not revisited there. As the Commonwealth Court recently stated:

> It is within the sole province of the EHB, as fact finder, to make all determinations regarding matters of credibility and evidentiary weight. *Birdsboro and Birdsboro Mun. Auth. v. Department of Environmental Protection*, 795 A.2d 444 (Pa. Cmwlth. 2002)

Sunoco, Inc. (R&M) v. Department of Environmental Protection, No. 991 CD 2004, slip op. at 16 (Pa. Cmwlth. filed Jan. 7, 2005) (footnote omitted). The Court put it another way in *Leatherwood Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth 2003), where it said, [w]e will not reevaluate the EHB's credibility determinations or reweigh th[e] evidence." *Id.* at 619.

Also, we note that we do not believe that the call we made in *WMI II* was all that close. On the confidential predicate of the privilege we found that the Department had just barely proved its case. We found that it failed to establish the "legal and policy matters" predicate. The balancing test, which, again, was based in large part on our factual and credibility determinations, came out heavily in favor of WMI and disclosure. Also, as we said in *WMI II*, the Commonwealth Court has itself noted that the privilege is to be narrowly construed and broad interpretations thereof are to be rejected. *WMI II, slip op.* at 5 *citing Joe v. Prison Health Service, Inc.*, 782 A.2d 24, 33 (Pa. Cmwlth. 2001).

We would grant that the Department would suffer irreparable loss of the right in question as to these documents as to WMI if the stay were not granted. The documents would be disclosed to WMI and there would be no way to un-pop that balloon. However, we do not see its right to the privilege at all here. Also, the issuance of the stay would certainly harm WMI and West Pottsgrove Township. Their right to a fair trial would be substantially harmed. The trial is

just around the corner. The parties' pre-trial memoranda are due on Monday, March 7, 2005. Trial is scheduled to start on March 14, 2005. The trial cannot be delayed because WMI's permit expires in October 2005. This matter under appeal here must be tried and an adjudicated by this tribunal by then for WMI to have <u>any</u> trial and adjudication of its appeal. It needs the documents in order to have a fair trial. If the right to a fair trial is lost, it is lost forever. Neither the public interest nor the government's interest would be harmed by disclosure of the documents for the reasons we discussed at length in *WMI II*. In fact, the public interest is greatly harmed when parties are not given a right to a fair trial.

After all we have written about this discovery issue in *WMI I* and *WMI II*, and given our conclusion that the Department has not met the *Process Gas* factors for us to stay the Disclosure Order, we think the best thing to do now is to deny the request for a stay but to allow and/or encourage the parties to take the issue of whether the Disclosure Order should be stayed to the Commonwealth Court pursuant to Pa. R. A. P. 1781(b). The Commonwealth Court already has the Rule 313 Petition in hand. To that end, we will institute a very short stay until Wednesday, March 2, 2005 for the sole purpose of allowing a Pa. R.A.P. 1781(b) appeal of our decision to not stay the Disclosure Order.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 25th day of February 2005, upon consideration of the Department's Motion to Stay the Disclosure Order dated February 22, 2005 pending appellate review pursuant to *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), the Motion is DENIED. IT IS FURTHER ORDERED HOWEVER, that the Disclosure Order is retroactively stayed effective 11:59 PM, February 24, 2005 to allow the parties to bring this question of whether the Disclosure Order should be stayed pending the course of the Department's Pa. R. A. P. 313 Petition before the Commonwealth Court pursuant to Pa. R. A. P. 1781(b). This stay shall expire at 5:00 PM on Wednesday, March 2, 2005.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: February 25, 2005
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ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS	:	
v.	:	**EHB Docket No. 2003-015-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN D. LEPRE, Permittee	:	**Issued: March 10, 2005**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

In this appeal of a noncoal surface mining permit which allows the Permittee to mine Bluestone at its quarry in New Milford Township, Susquehanna County, the Department moved for partial summary judgment against Appellants. The Department sought dismissal of several allegations and objections contained in the notice of appeal alleging that they were barred by the doctrine of administrative finality or that they were beyond the scope of this appeal. Allegations concerning other permitted mining operations are not barred by the doctrine of administrative finality where the allegations involve the cumulative environmental impacts on a watershed and do not challenge the underlying permits. In reference to the issue of the removal of stone walls, where questions of law and fact exist summary judgment cannot be granted. The motion is therefore denied.

BACKGROUND

This appeal concerns the Small Noncoal (Industrial Minerals) Surface Mining Permit No. 5735-58020807-01 (permit) issued by the Department of Environmental Protection (Department) to John D. Lepre (Lepre) on December 20, 2002. Lepre operates a mining operation known as

MTN-1 Quarry in New Milford Township, Susquehanna County (Site). Ilse Ehmann, Thomas Gordon, Jeanne Gordon, Richard Osborne, Elaine Osborne and Judy Dennis (Appellants) filed an appeal challenging the Department's December 2002 approval of the Permittee's application to conduct mining of Bluestone on three acres of the New Milford Site. The property surrounding the Site contains numerous seeps and springs, a perennial stream and wetlands all draining into a 30-acre lake known as Gillespie's pond. Appellants are property owners located either adjacent to or in close proximity to the Site. They share a common concern that the numerous seeps and springs, wetlands, perennial stream and Gillespie's pond, which constitute the headwaters of Meylert Creek, a tributary of Saltlick Creek, are being degraded. They assert that the cumulative effects of stone dust and sedimentation from existing surrounding mining operations are polluting the watershed. Specifically, they contend on appeal that the Department failed to consider the cumulative impacts of all of the mining operations in conjunction with those of the proposed Lepre operation when reviewing Permittee's application which resulted in the unlawful issuance of the Lepre permit.

Following the close of discovery, the Department filed a motion for partial summary judgment against Appellants in which the Department seeks dismissal of certain specific allegations and objections raised in Appellants' notice of appeal.[1] Permittee concurs with and joins in the motion for summary judgment and brief in support filed by the Department. Appellants' notice of appeal contains numerous allegations and objections to the Department's issuance of the permit which can be summarized as follows: (i) the Department failed to consider the cumulative impacts of existing mining operations on the watershed; (ii) the Department unlawfully issued the permit without consideration of the cumulative impacts on

[1] The Department's motion is titled "Motion for Summary Judgment", however, the Department has sought to dismiss only limited portions of Appellants' notice of appeal. Therefore, we shall treat the motion as a motion for partial summary judgment.

protected and unprotected flora and fauna; (iii) the Department unlawfully failed to require a permit for or to place conditions in the Lepre permit with regard to the "picking" or removal of stockpiled stonewalls; (iv) the Department unlawfully accepted approximations of site location; (v) Lepre provided incorrect and inadequate information in the permit application relating to site location and changes to the land; and, (vi) the dust control and sedimentation and erosion plans associated with the site are inadequate and threaten the health and safety of the public and the environment.

The Department's motion for partial summary judgment asks that we dismiss a number of Appellants' allegations and objections contained in the notice of appeal concerning: (i) operations at other permitted mining sites, Paragraphs 19-35, 37-39, 43, 79, 94, 100 and 104; (ii) the removal of stone walls (picking), Paragraphs 44-50; and (iii) an access road and stream crossing, Paragraphs 60-62 and 67-69. The Department's motion is supported by two Technical Guidance Documents from the Department's Bureau of Mining and Reclamation, Technical Guidance Document Nos. 563-2111-101, titled "Noncommercial Exemption from Requirements of the Noncoal SMCRA," and 563-2111-102, titled "Building Construction Exemption from Requirements of the Noncoal SMCRA." It is also supported by an Affidavit from Colleen Stutzman, Surface Mine Inspector Supervisor for the Department. A site-view was also conducted on August 31, 2004.

The Department asserts that the paragraphs dealing with other permitted mining operations and alleged deficiencies at those operations should be dismissed because they are collateral attacks barred by the doctrine of administrative finality. Each of the other sites is operated pursuant to permits issued by the Department. The Appellants never challenged the permits issued for the other sites, and those permits cannot be challenged in this appeal. The

Department also argues that compliance issues at other permitted sites are outside the scope of this appeal and that it retains enforcement discretion with regard to those permitted operations.

The Department further asserts that the objections and allegations concerning Lepre's removal of stone walls should be dismissed. The Department characterizes stone wall removal as construction activity which is exempt from the requirements of the noncoal surface mining regulations under 25 Pa. Code § 77.1. Thus, the removal of stone walls need not be permitted.

Lastly, the Department seeks dismissal of the allegations and objections associated with the Site access road and stream crossing. The Department contends that the access road and stream crossing are outside the Lepre permit. Specifically, they argue that the access road is a common use road located outside the permitted area; the Susquehanna County Conservation District issued the General permit registration for the stream crossing and maintains jurisdiction over the stream crossing as well as jurisdiction over the road in general.

In response to the motion, Appellants argue that the allegations and objections cited by the Department should not be dismissed. Appellants assert that the doctrine of administrative finality is inapplicable. Appellants specifically state that they are not attacking the numerous previously issued small noncoal mining permits issued in connection with quarries within the Salt Lick Creek watershed. Appellants argue that the paragraphs concerning other mining operations simply detail the environmental damage and health and safety consequences that should have been considered, but were not, in the Department's review of the Lepre application. These allegations and objections relate to the cumulative environmental impacts in the watershed, demonstrate the inadequacy of standards the Department has approved in issuance of the permit and contain findings which should have lead to rejection of the permit or placement of certain conditions therein.

The Appellants also argue that the paragraphs concerning picking of stockpiled stone from walls should not be dismissed because the Department erred in characterizing these actions as construction activity. Lepre is picking stone from stockpiled walls for removal and commercial sale which is a regulated mining activity and should have been treated as such by the Department.

Finally, with respect to the paragraphs concerning the access road and stream crossing, Appellants argue they should not be dismissed. They assert that the access road and stream crossing are contributing to degradation of the watershed. The lack of erosion and sedimentation controls contribute to the cumulative effects on the environment which should have been considered in review of the Lepre application. Appellants argue that when the record is viewed in the light most favorable to the nonmovant, Appellants have demonstrated that the paragraphs in question all have relevance to their argument that the cumulative impacts of numerous ongoing mining operations should have been considered in connection with issuance of the Lupre permit and the Department's motion should be denied.

DISCUSSION

A. Standard of Review

"A grant of summary judgment by the [Environmental Hearing Board] is proper where 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 that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Services, Inc. v. Dept. of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also County of Adams v. Dept. of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth.1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and all doubts as to the existence of

a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

The permit in question was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. (Noncoal Surface Mining Act). Section 3308 of the Noncoal Surface Mining Act provides that no permit shall be issued under the act unless the applicant affirmatively demonstrates that "the operation will not cause pollution to the waters of this Commonwealth." 52 P.S. § 3308(a)(3). One of the bases for Appellants' appeal is that the cumulative impacts of mining operations in the vicinity are polluting the watershed and these impacts were not considered in the Department's review of the Lepre permit application.

B. Objections Concerning Other Mining Operations

The Department has argued that Appellants' allegations concerning other mining operations in the watershed should be dismissed in light of the doctrine of administrative finality. I am unconvinced by this argument. The doctrine of administrative finality precludes a collateral attack where a party could have appealed an earlier administrative action but chose not to do so. *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977). In this appeal Appellants have indicated that they do not seek to attack the other mining permits issued by the Department in the watershed. They merely seek to introduce evidence that the cumulative impact of ongoing pollution caused by these operations is degrading the watershed. It is this information, they argue, that the Department was obligated to consider yet did not when it reviewed the Lepre permit. The doctrine of administrative finality does not prevent Appellants from making this argument. Whether Appellants will prevail on

these matters remains to be seen.

The Department in its brief also suggests that Appellants are barred from arguing the issue of cumulative impacts altogether. (*Department's Brief*, p.4). Although the Board has not considered the issue of cumulative impacts in reference to noncoal surface mining issues, we have considered it in other instances. In a matter involving NPDES permits and highway construction Judge Miller's opinion in *Valley Creek Coalition v. DEP*, 1999 EHB 935, stated:

> Similarly, where the Department has issued a series of similar permits which will allow similar discharges into the same watershed, it is logical to take those other permits into consideration in order to assure that water quality will not suffer. While one or two permits may not degrade the water quality of receiving streams, the addition of the discharges related to a third permit might. *Cf.* 25 Pa. Code § 92-81(a)(7)(a general permit may only be issued for a group of discharges which "individually and *cumulatively* do not have the potential to cause significant adverse environmental impact." (emphasis added)).

1999 EHB at 951. *See also Kleissler v. DEP,* 2002 EHB 737, 748; *Davailus v. DEP*, 1991 EHB 1191, 1196 (the cumulative impact of piecemeal habitat losses must be considered when reviewing environmental effects of a project). While it may have been appropriate for the Department to have considered the cumulative impacts of other mining operations in the vicinity in its review of the Lepre permit, there is no evidence that the Department did so. If the Department had done so, the outcome of the permit review might have been different. These are matters which need to be addressed in a full hearing on the merits and therefore preclude granting summary judgment.

C. Allegations Concerning Removal of Stone Walls

The Department's argument that the paragraphs concerning the removal of stone walls should be dismissed because those activities fall into the "Noncommercial" and/or "Building and Construction" exemptions of the Noncoal Surface Mining Act is equally unconvincing. Specifically, the Department asserted that the "demolition and removal of stone walls" is not a

regulated activity requiring a permit. Appellants responded that the activities taking place at the Lepre Site are in fact activities which require a permit and question the Department's reliance upon the Noncommercial and Construction Exemption Guidance Documents under the present circumstances. They argue that the extraction of minerals from waste or stockpiles constitutes noncoal surface mining activities under 25 Pa. Code § 77.1. They explain that the "construction exemption" applies only if the minerals removed are incidental to building construction excavation and (A) the excavator demonstrates that the extraction, handling, processing or storing are conducted concurrently with construction, (B) the area mined is limited to the area necessary to construction and (C) the construction is reasonably related to the use proposed for the site. 25 Pa. code § 77.1. Appellants contend that Lepre's activities are in no way "construction activities." The parties have raised mixed questions of law and fact regarding what type of activities are taking place at the Site and whether the nature of the activities are such that they should be exempted from regulation. At this juncture, I am unable to determine the precise nature of the stonewall removal activities and will not grant summary judgment with regard to these activities.

D. Allegations Concerning the Access Road and Stream Crossing

Finally, the Department argues that the paragraphs concerning the access road and stream crossing should be dismissed because the Department does not have jurisdiction over them. They indicate that it is the Susquehanna County Conservation District that authorized the stream crossing and has general jurisdiction over the road. The Appellants respond that the erosion and sedimentation caused by the access road and stream crossing are contributing to pollution in the watershed and are therefore relevant to this appeal. Furthermore, they assert that the access road should have been included in the permit area and subject to applicable bonding requirements. It

is unclear to what extent the Department has jurisdiction over the access road and stream crossing, and equally unclear whether the access road should have been made part of the permit. While better development of this argument is necessary, any erosion and sedimentation resulting from the road and stream crossing would properly be considered in an analysis of the cumulative impacts of the mining operations upon the watershed. Therefore, I will not dismiss the paragraphs regarding the access road and stream crossing.

Based upon the foregoing, summary judgment is precluded both as a matter of law and in light of the existence of genuine issues of material fact; accordingly I will enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS	:	
v.	:	**EHB Docket No. 2003-015-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN D. LEPRE, Permittee	:	

ORDER

AND NOW, this 10th day of March 2005, it is hereby ordered that the Motion for Partial Summary Judgment filed by the Department of Environmental Protection is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: March 10, 2005

c: **DEP Litigation, Library:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	**Issued: March 11, 2005**

OPINION AND ORDER ON NEVILLE CHEMICAL COMPANY INC.'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF FIVE UNRELATED SPILLS AND PIPELINE LEAKAGE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the Department alleges that evidence of five unrelated spills addresses points raised in Defendant's Pre-Hearing Memorandum the Board will deny a Motion in Limine to exclude such evidence.

OPINION

Presently before the Board is Neville Chemical Company's (Neville Chemical) Motion in Limine seeking to Exclude Evidence of Five Unrelated Spill Incidents. Neville Chemical contends the Pennsylvania Environmental Hearing Board should exclude any evidence concerning these five spills because they occurred after Neville Chemical shut down a well, WW-4, on December 20, 2001. Thus, Neville Chemical claims evidence concerning these releases is not relevant as to whether it used reasonable care in the shutdown of WW-4. Moreover, it argues evidence of these

events is barred by Pennsylvania Rule of Evidence 404(a) and 404(b):

> Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.
>
> (a) Character Evidence Generally.
> Evidence of a person's character or a trait of character is not admissible for the purpose of proving acts in conformity therewith on a particular occasion.
> (b) (1) Evidence of other ...wrongs ... is not admissible to prove the character of a person in order to show action in conformity therewith.

Neville summarizes the five spills in the following matter.

(1) February, 2003: The Neville Township Engineer notified Neville Chemical of unusual odor from the Townships' sanitary sewer system. Neville investigated and determined that contaminated water had entered the sanitary sewer system. Neville Chemical claims it fixed the problem.

(2) April 23, 2004: A sinkhole appeared at a railroad crossing directly above a process wastewater sewer line which Neville Chemical indicates it repaired.

(3) May 16, 2002: Thirty-five gallons of petroleum distillate was released following a leak at a valve flange connection.

(4) September 9, 2004: A leak was discovered from a contaminated sewer line. The line was abandoned, sealed off, and a sewer box was repaired.

(5) September 20, 2004: Water was discovered leaking from under the Equalization Tank. According to Neville Chemical, the tank was removed from service, emptied, and repaired.

The Pennsylvania Department of Environmental Protection counters that it is not seeking the admission of evidence regarding these five spills for the reasons set forth by Neville Chemical.

Instead, the Department claims it is offering this evidence to refute a statement made in Paragraph 4 of Neville Chemical's Pre-Hearing Memorandum:

> Since execution of the 1980 Consent Decree, chemical spills have contributed little if any to the underground NAPL contamination at the Neville Chemical sites.

The Department states that "to explain the dynamics of the cleanup operation that faces Neville Chemical, it is important to understand that there are significant ongoing spills/releases to the soils and groundwater. Because of the age of the facility and because old and likely deteriorated terra cotta lines are underground, Neville Chemical is faced with ongoing releases that may not manifest themselves until something dramatic occurs." In addition, the Department claims that the evidence is relevant to explain its concerns regarding Neville's utilization of Act 2 relief. Finally, the Department contends this evidence is important to allow it to defend the content and validity of its Administrative Order dated June 26, 2002.

Although we are not completely convinced that this information is relevant to the civil penalty issue in this matter, we are also not certain that the evidence should be excluded at this juncture. Therefore, we will deny the Motion in Limine. We trust that the issue will become much clearer once the hearing begins and testimony is taken. We further trust the introduction of this evidence will be brief.

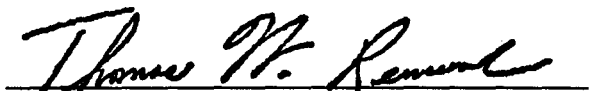
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	

ORDER

AND NOW, this 11th day of March, 2005, Neville Chemical Company's Motion in Limine to Exclude Evidence of Five Unrelated Spills and Pipeline Leakage, is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 11, 2005

See following page for service list

EHB Docket No. 2003-297-CP-R

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: March 11, 2005**

OPINION AND ORDER ON
JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Partial summary judgment is granted to the Department and the permittee on certain issues raised in an appeal of the Department's grant of a permit to operate a fluoridation facility. Where the issues were ripe for review at the time the construction permit was granted, any appeal of them at this stage of the permitting process is precluded by the doctrine of administrative finality. The appellant is permitted to make references to the Safe Drinking Water Act and its underlying regulations so long as his arguments pertain to the operation phase of the permit and not to issues approved at the construction phase. As to the appellant's allegations regarding current and past violations at the water treatment plant, because there are issues of material fact summary judgment may not be granted.

OPINION

This matter involves an appeal by James Potratz challenging a permit issued by the Department of Environmental Protection (the Department) to the Erie City Water Authority (the Authority) to operate a fluoridation facility at its water treatment plant.

Procedural History

The procedural history of this case is as follows. On April 4, 2003, this appeal was filed in the name of James B. Potratz and, at the direction of the Erie City Council, the City of Erie, averring that the Department of Environmental Protection (Department) had abused its discretion when it issued a water supply permit to the Erie City Water Authority for the fluoridation of Erie City water. The notice of appeal was amended as of right on April 23, 2003 pursuant to 25 Pa. Code § 1021.53(a). The city solicitor for the City of Erie filed a motion to withdraw the City as an appellant asserting that without the consent of the mayor or city solicitor, counsel for the appellants had no legal right to represent the City of Erie in the appeal. The Board granted the motion, amended the caption of the appeal to strike the City of Erie as an appellant and allowed the appeal to proceed in the name of Mr. Potratz.

The issue of whether the Erie City Council could maintain an action in the name of the City of Erie was appealed to the Commonwealth Court. During the pendancy of the appeal, the parties filed a joint motion for continuance, which the Board granted and continued discovery until resolution of the appeal. On February 25, 2004, the Commonwealth Court affirmed the Board.

Mr. Potratz filed a second motion for leave to amend his appeal, which was granted in an Opinion and Order issued by the Board on May 12, 2004.[1]

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[1] *Potratz v. DEP*, EHB Docket No. 2003-084-R (Opinion and Order issued on May 12, 2004).

Joint Motion for Summary Judgment

Prior to the issuance of the operation permit, the Authority had been granted a permit to construct the facility. Mr. Potratz did not appeal the construction permit. Based on this fact, the Authority and the Department have jointly filed a motion for partial summary judgment based on administrative finality. The Authority and the Department contend that, of the approximately fifty-four objections contained in Mr. Potratz's amended appeal, only two relate to the operation permit. They assert that the remaining objections relate to the construction permit and, therefore, are precluded under the doctrine of administrative finality.

We may grant summary judgment when the record, which consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits and certain expert reports, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.1; *Wheelabrator Falls, Inc. v. DEP*, 2002 EHB 514, 521. When evaluating a motion for summary judgment, the Board views the record in the light most favorable to the non-moving party; all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Borough of Roaring Springs v. DEP*, EHB Docket No. 2003-106-C (Opinion and Order issued December 21, 2004), p. 5.

Chapter 109 Permitting Process

The process of approving the construction or modification of a public water system, including the construction of a fluoridation facility, involves a two-step process set forth at 25 Pa. Code Chapter 109 of the regulations. First, the owner of the system must apply for and receive a *construction permit* from the Department. 25 Pa. Code § 109.503. The application for a construction permit must be submitted on "forms provided by the Department" and must be "accompanied by plans, specifications, an engineer's report, water quality analyses, and any

other data, information or documentation reasonably necessary to enable the Department to determine compliance with the [Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §§ 721.1 – 721.17] and [Chapter 109 of the regulations]." 25 Pa. Code § 109.503(a). Section 109.503, governing the issuance of construction permits by the Department, is quite detailed and spans approximately seven pages of text. Upon receipt of an application for a public water system construction permit, the Department is required to publish notice in the *Pennsylvania Bulletin* and provide 30 days for public comment. 25 Pa. Code § 109.503(d)(1).

The second step of the process involves obtaining an *operation permit*. Before the owner may begin to operate the facility, it must submit to the Department a certificate of construction stating that construction of the facility has been completed in accordance with the approved plans and specifications. *Id.* at § 109.504(a). The Department will issue an operation permit after it has approved construction of the facility. *Id.* at § 109.504(b)(1). No separate permit application dealing with the proposed operation of the facility is required.

According to the affidavit of Paul Vojtek, the Authority's Chief Executive Officer,[2] on April 16, 2002 the Authority filed a "Permit Application – General Information Form" with the Department.[3] In conjunction therewith, it filed a "Public Water Supply Permit Application" for construction of the fluoridation facility.[4] Together, these documents comprised the application for authorization to build a fluoridation facility as part of the Erie public water system (the permit application). The permit application and its attachments contained detailed information regarding the construction and operation of the proposed fluoridation facility. Notice of the Department's

[2] Mr. Vojtek's affidavit was submitted with the Authority's motion and supporting brief.
[3] The "Permit Application – General Information Form" is attached to the Notice of Appeal as Exhibit B.
[4] The "Public Water Supply Permit Application" for construction of the facility is a part of Exhibit B to the Notice of Appeal.

receipt of the application was published in the *Pennsylvania Bulletin* on May 11, 2002.[5]

On August 21, 2002, the Department issued a permit for construction of the facility (the construction permit).[6] Notice was again published in the *Pennsylvania Bulletin* when the construction permit was granted.[7] Mr. Potratz did not appeal the Department's issuance of the construction permit. Following completion of construction of the fluoridation facility, the Authority submitted a certificate of construction to the Department in January 2003.[8] Based on the certificate of construction and an on-site inspection, the Department issued an operation permit to the Authority on February 21, 2003.[9] Notice of the operation permit was published in the *Pennsylvania Bulletin.*[10] The issuance of the operation permit is the subject of this appeal by Mr. Potratz.

In their joint motion for partial summary judgment, the Authority and the Department contend that, of the approximately 54 objections set forth in Mr. Potratz's amended appeal, all but two relate to the construction permit. The Authority and the Department assert that any challenge to the construction permit is administratively final. They argue that the public notice procedure established in the regulations and followed by the Department in this case ensures that anyone affected by the issuance of a construction permit impacting a public water supply system has the opportunity to appeal the issuance of the permit before the construction of the project begins. They argue that to allow otherwise "inequitably place[s] the burden of the challenger's tardiness on the permittee."

The Authority and Department point out that after receiving approval of the construction

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[5] Exhibit 1 to Vojtek affidavit.
[6] Exhibit 2 to Vojtek affidavit.
[7] Exhibit 4 to Vojtek affidavit.
[8] The certificate of construction is attached to the notice of appeal as Exhibit E.
[9] Vojtek Affidavit, para. 14 and 15

permit and allowing the thirty-day appeal period to run, the Authority began construction of the fluoridation facility. The total investment in constructing the facility has been $285,498.78.[11]

In response, Mr. Potratz contends that all of his objections are timely because either 1) they relate to the operation of the facility and not to its construction, or 2) they were not ripe or he was not aggrieved until the operation permit was issued.

Objections

Mr. Potratz's objections which the Authority contends are administratively final can be grouped into the following categories:

1. Objections concerning the Authority's decision to fluoridate the water and its selection of hydrofluorosilicic acid as the means of fluoridation, including its effect upon public drinking water. (Paragraphs 19, 28a-f, 29a-g, 30a-j, 31)

2. Objections regarding the completeness or accuracy of documents submitted with the application package. (Paragraphs 20a-h, 21b-c)

3. General statements regarding the Authority's responsibility to comply with the Safe Drinking Water Act and regulations and to provide potable water to the citizens of Erie. (Paragraphs 22, 23)

4. Objections regarding alleged past and current violations in the operation of the Erie Water Plant. (Paragraphs 24a-f, 25a-b.vi, 26, 27)

Doctrine of Administrative Finality

Writing for the Board, Judge Miller summarized the doctrine of administrative finality in *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406, as follows: "The purpose of the doctrine of administrative finality is to preclude a collateral attack where a party could have appealed an

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[10] Exhibit 5 to Vojtek affidavit.

administrative action, but chose not to do so."[12] The policy behind the doctrine was set forth by the Commonwealth Court in *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977) as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law.

Thus, where a party fails to appeal a particular action of the Department, he or she cannot raise issues in a later appeal that could have and should have been raised in the appeal of the earlier action.

In his appeal, Mr. Potratz raises a number of constitutional arguments concerning the appropriateness of the Authority's decision to fluoridate the water supply. It is his contention that these issues were not ripe for consideration until issuance of the operation permit. Mr. Potratz states that the applicable rule of law in determining matters of constitutional ripeness is that when an adverse outcome is contingent on a future event that is uncertain to occur, then a tribunal's opinion on the matter would be patently advisory (citing *Ramey Borough v. DER*, 351 A.2d 613 (Pa. 1976) and *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979)).

Mr. Potratz claims that the uncertainties in this case are the following: 1) whether the project would be completed in a timely manner; 2) whether the certificate of construction would be properly executed and submitted; 3) whether the facility would pass on-site inspections; 4) whether sufficient workers could be retained by the Authority; 5) whether acceptable materials would be available on-site; and 6) whether the operating permit would be issued.

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[11] Vojtek affidavit, para. 12.
[12] Citing *DEP v. Peters Twp. Sanitary Authority*, 767 A.2d 601 (Pa. Cmwlth. 2001).

Mr. Potratz misinterprets the meaning of "a future event that is uncertain to occur." If we were to adopt Mr. Potratz's position, no issues concerning a project would be ripe until the project itself had been completed. Taking his position to an extreme, one could argue that the issues he has raised are not ripe now, even with the issuance of the operation permit, because of the uncertainty of the future: the Authority may not be able to obtain hydrofluorosilicic acid for fluoridation, the operators of the fluoridation facility may go on strike, the facility itself could be damaged or destroyed by some event. The list of future possibilities is endless.

In deciding whether an issue is ripe for review, the courts apply a two-part test and consider the following: 1) whether the issues are adequately developed for judicial review and 2) what hardship the parties will suffer if review is delayed. *Alaica v. Ridge*, 784 A.2d 837 (Pa. Cmwlth. 2001). In the present case, all of the details regarding the planning, construction and operation of the fluoridation facility were set forth in the original application for which the construction permit was issued. Once the facility was constructed, the only step remaining in order to begin operation was to certify that the facility had been constructed in accordance with the plan approved by the Department. Thus, all of the issues surrounding the decision to fluoridate the water supply and the manner in which it was to be done were developed at the time the construction permit was applied for and approved. Certainly, any issues concerning whether the facility was constructed in accordance with the approved plans could only be raised after the facility was built. However, Mr. Potratz's issues deal with the planning of the facility's construction and operation, and these were decided at the time the construction permit was applied for and approved. Therefore, the first part of the test set forth in *Alaica* is met.

The second part of the test is also met. The hardship suffered by delaying review of the issues until the issuance of the operation permit is that the facility has already been constructed at

a cost of $285,498.78 to the Authority. Any opposition Mr. Potratz has to the Authority's decision to fluoridate the Erie City public water supply and the Department's approval thereof should have been raised at the time the construction permit was issued, rather than waiting until the facility had been constructed.

The Board has dealt with questions of administrative finality in other situations involving a multi-tiered permitting system. In *Perkasie Borough Authority v. DEP*, 2002 EHB 764, the appellant sought to stop construction of a wastewater treatment plant. The appellant did not appeal the Department's approval of the permittee's Act 537 Plan update, nor did it appeal the Department's issuance of a NPDES/Part I permit application for the wastewater treatment facility. What was appealed was the Department's issuance of the Part II water quality management permit covering construction and operation of the facility. The permittee and Department moved for summary judgment on certain objections in the notice of appeal, contending they were precluded by the doctrine of administrative finality since they could have been raised in challenges to the Act 537 Plan update and the Part I permit issuance. The essence of the appellant's complaint was that the new wastewater treatment facility should not be built and that sewage should, instead, be directed to an existing facility. Judge, now Chief Judge Krancer, writing for the Board, found this complaint to be precluded by administrative finality, holding "This is an attack on the very premise of the underlying decision to build the [wastewater treatment facility] rather than utilizing the already existing...facility. To us this seems to be a quintessential planning decision and not part of the Part II permitting decision." *Id.* at 773.

Likewise, in the present case, the decision to fluoridate the City of Erie's public drinking water and to build the fluoridation facility were part of the original application process, i.e. the

application to construct the facility, which was filed with the Department in April 2002 and approved by the Department on August 21, 2002. These matters had already been decided and approved by the time the operation permit was issued. This is further evidenced by the fact that the only documentation required to be filed by the Authority to receive the operation permit was a single page form entitled "Certificate of Construction/Modification for Public Water Supplies" stating simply as follows:

> the public water supply facilities approved under Permit No. 2502503 issued 8/21/02 have been completed in accordance with the plans and specifications approved by the Department, adequate operation and maintenance information for the new/modified facilities is available on-site for use by the public water supply personnel, and that the public water supply personnel are certified under the Sewage Treatment Plant and Water Works Operator's Certification Act (63 P.S. §§ 1001-1015) and qualified by experience and education to operate and maintain the system's facilities.[13]

The operation permit also consists of a *single page* stating that the plans, specifications, reports and supporting documentation submitted as part of the permit application become part of the permit, and no deviations from those approved plans or specifications affecting the treatment process or quality of waters can be made without written authorization from the Department.[14] The plans and specifications regarding the treatment process and water quality were approved as part of the original application submitted in order to receive the construction permit.

This is not a situation like that in *Hankin v. DEP*, EHB Docket No. 2003-186-K (Opinion and Order issued July 9, 2004), where matters considered in an earlier stage of the permitting process were also considered later on. Like *Perkasie Borough, Hankin* involved an appeal of the third and final step in the Act 537 permitting process where no appeals had been filed from the

[13] Exhibit E to Notice of Appeal.
[14] Exhibit G to Notice of Appeal.

two earlier approvals. However, in *Hankin* it was determined that certain matters reviewed by the Department in an earlier stage of the Act 537 permitting process were again considered as part of the Part II/water quality management step of the process. Thus, they were not barred by the doctrine of administrative finality. In the present case, the Department's review of the permit application was final at the construction phase; there was no re-review of issues at the operation phase.

The question of what can and cannot be challenged in an appeal of a subsequent permitting action, when there was no appeal of the earlier action, was thoroughly examined by Judge Labuskes in *Wheatland Tube Co. v. DEP*, EHB Docket No. 2003-221-L (Opinion and Order issued March 16, 2004), which held as follows:

> In evaluating a claim of administrative finality, it is critically important to determine precisely what action is being appealed. Only issues that relate to *that action* may be raised. An appellant may not use the occasion of an action that takes the form of a change, renewal, or update to challenge whether the original permit should have been issued in the first place.

Id. at 4 (emphasis in original).

Wheatland involved the renewal of an NPDES permit in which the Department and permittee debated a change in the permit's effluent limits. During the review process, the permit changed hands and the new owner continued to pursue the change in effluent limits. After the Department approved the permit renewal, changing some of the effluent limits and retaining others, the new permittee appealed. The Department sought summary judgment on the basis that the appeal of the renewal action was barred by the doctrine of administrative finality since no appeal had been taken from the original 1996 permit, an earlier transfer of the permit, or the latest permit transfer. The Board rejected the Department's argument, holding as follows:

> [A] permittee is not forever precluded from challenging permit

> terms once a permit is issued. Procedures are available for modifying a permit. So long as proper procedures are followed . . . a permittee may seek changes and appeal from the Department's final decision regarding those changes. The doctrine of administrative finality was never intended to insulate a permit from any changes or review of those changes for all time.

Id. at 3.

However, Judge Labuskes emphasized that an appellant may not use an appeal of a current permitting action – whether it be a renewal, modification or update – to challenge *whether the original permit should have been issued in the first place*. *Id.* at 4. He noted, in particular, that this applies to multi-tiered permitting actions such as the one in the present case, stating as follows:

> Similarly, an appellant in a multilevel approval case may not use a later sequential step to challenge *decisions made and actions taken in an earlier step*.

Id. at n. 3 (citing *Perkasie Borough, supra*) (emphasis added).

The fact that Mr. Potratz's arguments were ripe at the construction stage is further evidenced by the regulations themselves, which require the Department to give notice in the Pennsylvania Bulletin when it receives an application for the construction of a public water supply and again when the application has been approved. 25 Pa. Code § 109.503(d)(1). It is at this stage of the process that the plan for fluoridating the water is detailed and approved.

Mr. Potratz's argument that he could not challenge the approval of the construction permit because there was no guarantee the facility would be constructed is without merit. This argument could be made with regard to any type of permit, i.e. that even though a permit is issued the permittee may choose not to act on it. It is a rare case, indeed, when a permittee goes through the time and expense of preparing a permit application for a permit it never intends to act upon. Moreover, even if this were the case, it is the *approval* to conduct the project in question that is

under appeal. That is the Department *action* being appealed, not necessarily the actual construction of the project. *See Wheatland Tube, supra, slip op.* at 4 ("In evaluating a claim of administrative finality, it is critically important to determine precisely what action is being appealed.")

We are also not persuaded by Mr. Potratz's argument that issuance of the construction permit does not guarantee that an operation permit will be issued. As noted earlier in this Opinion, the regulations governing approval of the construction permit consist of detailed instructions consuming seven pages, whereas the instructions for the issuance of an operation permit consist of less than one page and only one requirement: the permittee must simply produce a certificate of construction affirming the project has been constructed in accordance with its permit and the Department must be satisfied that all conditions have been met. No separate application is filed in order to receive an operation permit. Information regarding operation of the facility has already been provided at the construction phase. Moreover, as noted above, it is the *approval* to fluoridate the water supply that is being challenged. That approval was granted at the construction phase, not at the operation phase.

Mr. Potratz argues that the Board has already determined there would be no hardship to the Authority and the Department by allowing him to raise these issues at this time since the Board granted his motion for leave to amend his appeal to add these issues. However, in granting Mr. Potratz's motion to amend, we considered only whether the issues he was seeking to add to his appeal were new issues or an extension of those already raised in the original appeal. Since we determined they were simply an extension of issues raised in his appeal, we found no prejudice to the other parties on that basis. However, our ruling on that matter did not extend to whether those issues should be precluded on other legal grounds, such as

administrative finality.

Mr. Potratz also argues that he would not have had standing to raise his objections at the time the construction permit was issued. His basis for claiming he had no standing to appeal the construction permit consists of the following arguments: there was no guarantee the fluoridation facility would be constructed, issuance of the construction permit did not guarantee issuance of an operation permit, and it was the operation permit and not the construction permit that allowed the Authority to inject hydrofluorosilicic acid into the water. Although he labels this argument as one based on standing, this actually relates to his earlier argument that the issues were not ripe for review at the time the construction permit was approved. Because we have already considered and rejected the argument that these issues were not ripe for review, we need not address it further.[15]

Are the Appellant's objections precluded by administrative finality?

1. Objections regarding the completeness or accuracy of the permit application:

---

[15] However, we do wish to note that Mr. Potratz is incorrect in his assertions regarding standing. Mr. Potratz asserts that because no hydrofluorosilicic acid had actually been *injected* into the water at the construction approval phase, he had no standing to challenge the decision to fluoridate the water at that stage of the permitting process. We respectfully disagree. The concept of "standing" involves whether an appellant has been or *will be* aggrieved by an action. As the Authority and the Department point out in their reply brief, a party does not have to wait until he is injured to have standing. As stated in *Decker v. DEP*, 2002 EHB 108, in order to establish standing a party must prove "(1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way." *Id.* at 110 (citing *Giordano v. DEP*, 2000 EHB 1184, 1185-86). It is Mr. Potratz's assertion that he will be aggrieved by the fluoridation of the Erie public water supply. The decision to fluoridate the Erie public water supply was made and approved at the application stage for the construction permit. If we were to accept Mr. Potratz's interpretation of when standing attaches, one would always have to wait until after the construction of the project is complete and ready to become operational. Then, after a permittee has invested time and money in constructing a project that has been approved by the Department and not appealed, the project could be challenged for the very concept approved by the original permit.

Mr. Potratz raises a number of objections regarding the completeness or accuracy of the application for the construction permit and documents submitted in support thereof. These documents were reviewed and approved at the construction phase of the permitting process. They were not part of the operation permit approval. Thus, any objections pertaining to the original application and supporting documentation clearly could have and should have been raised in an appeal of the construction permit. On that basis, objections 20a-h and 21b-c are dismissed.

2. Objections concerning the decision to fluoridate the water supply:

Mr. Potratz raises a number of objections challenging the Authority's decision to fluoridate the water with the use of hydrofluorosilicic acid. As noted earlier, the approval to fluoridate the water with the use of hydrofluorosilicic acid was granted by the Department at the time the construction permit was issued. Waiting to appeal until after the construction permit was granted and the facility built defeats the purpose of administrative finality. Mr. Potratz could have and should have raised these issues at the time the construction permit was issued. Therefore, objections 19, 28a-f, 29a-g, 30a-j and 31 are dismissed.

3. Objections regarding alleged violations at the water treatment plant:

Mr. Potratz also raises objections relating to alleged current and past violations in the operation of the Erie City Water Treatment Plant. Specifically, objections 24 and 25 of the amended notice of appeal reference two letters penned by the Erie water treatment plant operators, one of which was sent to a sanitary engineer at the Department on November 21, 2002, and the other to the Board of the Authority on January 22, 2003, setting forth several health and safety concerns the operators had with regard to the operation of the water treatment plant. Mr. Potratz contends that these alleged violations demonstrate that the Authority has

failed to comply with the Safe Drinking Water Act and the underlying regulations and, therefore, should not have been issued an operation permit for the fluoridation facility.

Section 109.503 of the regulations requires an applicant for a *construction permit* to submit the following:

> [a]ssurances that the commitment needed for proper operation and management of the system will be carried out. These assurances can be given in the form of documentation of the credentials of management and operations personnel, cooperative agreements or service contracts.

Id. at § 109.503(a)(3)(ii)(C). Because this section deals with the application for a construction permit it is not part of this appeal.

The question of operation and management also comes into play under Section 109.504, dealing with an application for an *operation permit*, but in a much narrower scope. That section states in relevant part as follows:

> (b) The Department will not issue an operation permit or amended operation permit, unless the following conditions are satisfied:
>
> * * * * *
>
> (2) The water supplier has demonstrated to the Department that adequate operation and maintenance information for the new or modified facilities is available onsite for use by the public water system's personnel.
>
> (3) The water supplier has demonstrated to the Department that personnel required under § 109.704 (relating to operator certification) have been retained.

25 Pa. Code § 109.504(b)(2) and (3).

The question presented in Section 109.504 is not the broad question of whether the applicant has submitted assurance that the facility will be operated and maintained properly, but the much narrower question of whether the applicant has demonstrated that there are sufficient

personnel onsite and sufficient information for use by those personnel. The fact that alleged violations may have occurred or are ongoing at the water treatment plant may be evidence of whether the requirements of (b)(1) and (2) above have been adequately met. However, without further evidence in the record, we cannot answer these questions at this time. Since summary judgment may only be granted when there are no genuine issues of material fact, we deny granting summary judgment on objections 24a-f, 25a-b.vi, 26 and 27. We will address this matter at the hearing on the merits.

4. General statements regarding the Safe Drinking Water Act and regulations:

Finally, Mr. Potratz makes some general statements regarding the Authority's responsibility to comply with the Safe Drinking Water Act and the regulations and to provide potable drinking water to the citizens of Erie. Mr. Potratz is free to make references to the Safe Drinking Water Act and the underlying regulations so long as his arguments relate solely to the operation of the fluoridation facility and not to the planning process, the decision to fluoridate the water or any other matters approved solely at the construction phase. Therefore, we find that objections 22 and 23 in the amended notice of appeal are not barred by the doctrine of administrative finality.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 11th day of March , 2005, *partial summary judgment* is **granted** to the Authority and the Department on the following objections in Mr. Potratz's amended notice of appeal: 19, 20a-h, 21b-c, 28a-f, 29a-g, 30a-j, and 31.

ENVIRONMENTAL HEARING BOARD

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Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-084-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 11, 2005

Judges Miller and Labuskes filed separate concurring opinions which are attached.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

OPINION OF BERNARD A. LABUSKES, JR.
CONCURRING IN THE RESULT

By Bernard A. Labuskes, Jr., Administrative Law Judge

We commonly point to *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), as the seminal case regarding administrative finality. *Wheeling-Pittsburgh* involved a petition for enforcement of an administrative order brought by the Department. There was no question in the Court's mind that the recipient of the order was an aggrieved party. The Court held that the clearly aggrieved party had a right to attack neither the DER order nor the validity of the regulations upon which the order was predicated in the enforcement hearing. Somewhere along the way this basic holding seems to have been stretched well beyond the circumstances of that case. The Court did not say anything about the rights of parties who were not aggrieved by the original Department order, and it did not foreclose the recipient of the original order from challenging the subsequent Departmental action on grounds that relate to the subsequent Departmental action (as opposed to the original order).

Administrative finality does not work unless the party against whom it is being asserted was aggrieved by the original action. That is because of the constitutionally and statutorily driven principle that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to [this] board." 35 P.S. 7514(c).[16] Therein lies one of the difficulties associated with stretching the administrative finality doctrine to lengths that were never intended. This appeal illustrates that point.

The parties in this case wrestle with such concepts as the moment in time when standing arises and the rather nebulous notion of "ripeness." The ultimate objective seems to be to determine whether the appellant could have appealed the construction permit. Apparently, if Potratz could not have appealed that earlier action, then he probably was not aggrieved by that action, at least at the time it was taken, and he would not be barred by the doctrine of administrative finality. Although it is beside the point to me, it is not clear from my review of the record that Mr. Potratz lived in the city at the time of the original action. But my deeper concern is with the approach in general. Under this approach, would a person who moves into a municipality in 1999 be free to challenge a 537 plan adopted in 1982 because the person was not "aggrieved" until 1999? How can we say that someone is aggrieved by a planning decision taken years before that person moved into the area?

It is precisely because of these and other difficult questions that we did not apply the doctrine of administrative finality in *Winegardner v. DEP*, 2002 EHB 790. In *Winegardner*, we accepted the Department's argument that objections relating to an earlier planning decision were simply *not relevant* in an appeal from a later planning decision:

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[16] In some limited cases, we feel comfortable saying that a party (e.g. a permit transferee) steps into the shoes of another party (e.g. a permit transferor) and, therefore, was "aggrieved" by the original action as a matter of law. *See Jai Mai, Inc. v. DEP*, 2003 EHB 349.

> If we focus on fundamentals, as opposed to administrative finality, which can at times confuse rather than clarify the issue, prescribing the appropriate scope of this appeal is not all that complicated. Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action.* We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. *See Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994), *citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991) (a party's appeal of one permit does not allow it to raise issues related to permits for which it filed no appeals). It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry. *Accord, Perkasie Borough Authority*, slip op. at 18.
>
> Reviewing the propriety of the separate Departmental action is futile because we can only offer relief with respect to the Departmental action under appeal. We cannot, for example, reverse, revise, remand, or do anything regarding the Department's historical actions in approving or disapproving prior sewage plan updates or revisions in an appeal from the latest plan update. We can only take action with regard to that latest update.
>
> It is entirely possible that a planning update may overlap an earlier planning decision to such a degree that it is appropriate to, in effect, revisit that earlier decision in the context of the appeal from the most recent update. That situation, however, is not presented here. The 2001 Update in no way revisits, reevaluates, revises, reconsiders, or in any way affects the notion that portions of Dublin Township require public sewerage. Therefore, it cannot serve as a vehicle for us to reexamine that concept in this appeal. We emphasize that there are no categorical answers to the question of when prior determinations can be reopened. The result of each case "is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties." *Perkasie Borough Authority*, slip op. at 10.

Rather than get bogged down in standing and ripeness law, I respectively suggest that we should have taken that same approach here.

It is important not to confuse being *notified* with being *aggrieved.* A person may read about a Department action in the Pennsylvania Bulletin and, therefore, have notice, but if that person does not live, work, or have any other interest in the pertinent area, that person is not aggrieved. Here, the fact that notice of the construction permit was published means that everyone (at least in the Commonwealth) might arguably have been on notice, but it does not mean that everyone was aggrieved.

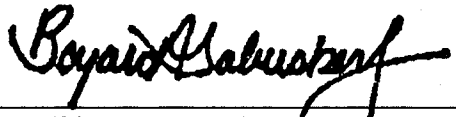
Those who do not regularly practice before the Board may not realize that this issue comes up all the time. I write separately in part because of my frustration that the Board is so frequently required to devote its attention to this question. Unfortunately, these trying and frequent debates are almost always unnecessary. Again, this appeal serves as a perfect example. As the Department correctly points out, the criteria in 25 Pa. Code § 109.504 circumscribed its review precedent to issuance of the operation permit. Under Section 109.504, the Department's issuance of the operation permit was based entirely upon a couple of very straightforward criteria.[17] Potratz has not pointed to any statutory or regulatory provisions other than those set forth in Section 504 that relate to the operation permit. Issues and objections that go beyond the operative regulatory criteria in this case are irrelevant. If they are irrelevant, they have no place in this appeal. We are only concerned with the operation permit in this appeal. We can take no action with respect to the construction permit. Even if the construction permit was issued as a result of egregious errors, there is nothing that we can do about it in this appeal, which is taken from an entirely different Department action. Therefore, any questions going strictly to the propriety of the construction permit are immaterial. It is as simple as that. There is no need to analyze what has been characterized as the administrative law equivalent of res judicata or

[17] The criteria are reminiscent of the review performed by a municipal zoning officer to field-

collateral estoppel. Those principles might apply to barr objections that would have otherwise been relevant, but we do not need to get to that point here.

In short, as we did in *Winegardner*, I would have avoided the doctrine of administrative finality in this appeal and simply concluded that the majority of the appellant's arguments, which go well beyond the relevant criteria set forth in Section 109.504, are simply irrelevant. The City's construction permit is not subject to attack in this appeal by *anyone*, not because of administrative finality, but because that permit is not before us. We ought to be focused on the operation permit and the facts and law pertinent to that permit, not on whether the appellants could have or should have appealed the construction permit. Because my approach gets me to exactly the same point as the majority, I concur in the result.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 11, 2005

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

OPINION OF GEORGE J. MILLER
CONCURRING IN THE RESULT

By George J. Miller, Administrative Law Judge

I concur in the result. I agree with Judge Labuskes that the majority wrestles unnecessarily with the doctrines of standing, ripeness and administrative finality in order to conclude that Mr. Potratz is foreclosed from challenging the construction permit in his appeal. However, I believe that the construction permit is final for an even more fundamental reason than Judge Labuskes. The permit is final according to the explicit provision of Section 4(c) of the Environmental Hearing Board Act,[18] which establishes our jurisdiction. That section provides:

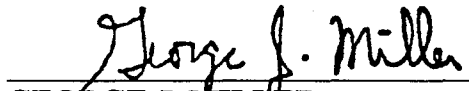
> The department may take an action initially without regard to 2 Pa. C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, *the department's action shall be final as to that person.*

35 P.S. § 7514(c)(Emphasis added.) Under the Board's rules, an adversely affected person

[18] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7514(c).

generally has thirty days to file some sort of appeal with the Board objecting to an action of the Department. Absent an appeal, the Department's action becomes final as to all persons whether adversely affected or not. It can not be challenged either directly or collaterally. There is no question that Mr. Potratz did not appeal the construction permit after notice was published in the *Pennsylvania Bulletin*. Accordingly, the construction permit is final and we have no authority to hear Mr. Potratz's objection to it now. It is as simple as that.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: March 11, 2005

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2003-297-CP-R**
v.	:	
	:	**Issued: March 15, 2005**
NEVILLE CHEMICAL COMPANY, INC.	:	

OPINION AND ORDER ON NEVILLE CHEMICAL COMPANY INC.'S MOTION IN LIMINE-SPOLIATION OF EVIDENCE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies the Defendant Neville Chemical Company's Motion in Limine-Spoliation of Evidence because the Defendant did not show that the destruction of meeting notes resulted in prejudice to it. Defendant Neville Chemical Company is not precluded from developing such a defense theory at the hearing.

OPINION

Presently before the Board is Defendant Neville Chemical Company's (Neville Chemical) Motion in Limine-Spoliation of Evidence. The Motion stems from the recently retired Regional Director of the Southwest Region of the Plaintiff Pennsylvania Department of Environmental Protection Mr. Charles Duritsa's decision to destroy all of his notes of meetings with Neville Chemical after the signing of the 2004 Consent Order and Agreement.

Neville Chemical claims that this is a nefarious act which prevented Neville Chemical from obtaining relevant evidence. It analogizes this situation to the destruction of the product in a products liability case which prevents the manufacturer from examining it. *See Walters ex rel. Walters v. General Motors Corporation,* 209 F. Supp. 2d 481, 490 (W.D. Pa. 2002); *Sebelin v. Yamaha Corporation USA,* 705 A.2d 904, 907-911 (Pa. Super. 1998); and *Brotech Corporation v. Delmarva Chemical, Inc.,* 831 A.2d 613 (Pa. Super. 2003). Neville Chemical argues passionately that the destruction of Mr. Duritsa's notes is outrageous and, according to Neville Chemical, a strong indication of the Department's bad faith. Neville Chemical further contends that the destruction of the notes should lead to the Pennsylvania Environmental Hearing Board drawing an inference that the Department of Environmental Protection 1) made a conscious decision not to take any action to prevent LNAPL from appearing in the Ohio River, and 2) the Department decided to take no action because if the LNAPL appeared in the Ohio River, the Department could then bring an enforcement action against Neville Chemical and coerce Neville Chemical into performing its December 2000 Conceptual Cleanup Plan as a mandatory abatement plan.

The Department of Environmental Protection argues that Neville Chemical's Motion in Limine should be denied. The Department contends that the Motion is an attempt to divert the Environmental Hearing Board's attention from Neville Chemical's alleged incompetence in shutting down a well without consulting its main technical consultant and without implementing its approved Conceptual Cleanup Plan. Although neither excusing nor condoning Mr. Duritsa's decision to destroy his notes, the Department contends that there was nothing sinister about Mr. Duritsa's actions in that he was merely cleaning out his office prior to retiring.

According to the Pennsylvania Supreme Court, the determination of an appropriate sanction

for spoliation of evidence depends on an analysis of three factors: 1) the degree of fault or willfulness involved in the spoliation; 2) the degree of prejudice to the party whose efforts to secure the evidence have been thwarted by the spoliation; and 3) whether some lesser sanction would suffice to both correct the unfairness suffered by the innocent party and sufficiently deter spoliation in future cases. *See Schroeder v. Commonwealth of Pennsylvania Department of Transportation,* 710 A.2d 23, 27 (Pa. 1998).

As we understand it, most of these notes were made at meetings attended by representatives of the Department of Environmental Protection and Neville Chemical Company. Many times these representatives included experienced attorneys with years of environmental experience. There is no indication that only Mr. Duritsa was taking notes or that any of the parties were relying on his notes to formalize agreements which were arrived at by the parties. Evidently the key points of these meetings were memorialized in subsequent correspondence---which we would expect.

Moreover, we are extremely hesitant of applying a body of case law that has developed based on the destruction of products in tort cases. Without the defective product, the defendant manufacturer is severely prejudiced as it cannot test the alleged defective product to prepare its defense. *Mt. Olivit Tabernacle Church v. Edwin L. Wiegand Div.,* 781 A.2d 1263 (Pa. Super. 2001), *affirmed*, 811 A.2d 565 (Pa. 2002). We fail to see such prejudice befalling Neville Chemical based on the facts it sets forth in its Motion in Limine. In fact, some of the documents drafted by Neville's expert consultant that it claims as protected by the attorney-client privilege, concerned these very same meetings. Although we refused to make Neville Chemical produce these documents we did so based mainly on relevancy. Assuming that the destroyed notes of Mr. Duritsa are the "smoking gun" supporting Neville Chemical's conspiracy defense does not seem to logically follow from the facts

set forth by Neville Chemical in its Motion in Limine. In applying the Pennsylvania Supreme Court's test enunciated in *Schroeder* we fail to detect a great degree of prejudice to Neville Chemical Company--at least based on the facts set forth in its Motion in Limine. Therefore, we refuse to grant the sweeping relief Neville Chemical requests in its Motion which would establish its defense by inference.

Of course, nothing in our decision on Neville Chemical Company's Motion in Limine regarding spoliation precludes it from pursuing such a defense theory at the hearing. Rather the establishment of such a defense must be based on the facts and the evidence developed at the hearing.

COMMONWEALTH OF PENNSYLVANIA

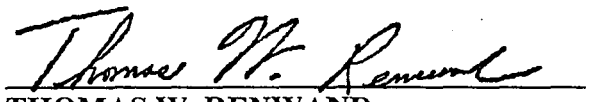
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	

ORDER

AND NOW, this 15th day of March, 2005, Neville Chemical Company's Motion in Limine-Spoliation, is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 15, 2005

Service list on following page

EHB Docket No. 2003-297-CP-R

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JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ERIE CITY WATER	:	
AUTHORITY, Permittee	:	**Issued: March 21, 2005**

OPINION AND ORDER ON MOTION TO COMPEL

By: Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a Motion to Compel because the information sought would be inadmissible at trial and does not appear reasonably calculated to lead to the discovery of admissible evidence.

OPINION

The Appellant, Mr. James Potratz, has filed an Appeal challenging a permit issued by the Pennsylvania Department of Environmental Protection to the Erie City Water Authority to operate a fluoridation facility at its Chestnut Street water treatment plant. Presently before the Board is Mr. Potratz's Motion to Compel Discovery seeking

information regarding an incident which occurred at the Authority's Sommerheim water treatment plant after the issuance of the permit under appeal.

Procedure History

The procedural history of this case is as follows. On April 4, 2003, this appeal was filed in the name of James B. Potratz and, at the direction of the Erie City Council, the City of Erie, averring that the Department of Environmental Protection (Department) had abused its discretion when it issued a water supply permit to the Erie City Water Authority for the fluoridation of Erie City water. The notice of appeal was amended as of right on April 23, 2003 pursuant to 25 Pa. Code § 1021.53(a). The city solicitor for the City of Erie filed a motion to withdraw the city as an appellant asserting that without the consent of the mayor or city solicitor, counsel for the Appellants had no legal right to represent the City of Erie in the appeal. The Board granted the motion, amended the caption of the appeal to strike the City of Erie as an appellant and allowed the appeal to proceed in the name of Mr. Potratz.

The issue of whether the Erie City Council could maintain an action in the name of the City of Erie was appealed to the Commonwealth Court. During the pendancy of the appeal, the parties file a joint motion for continuance, which the Board granted and continued discovery until resolution of the appeal. On February 25, 2004, the Commonwealth Court affirmed the Board.

Mr. Potratz filed a second motion for leave to amend his appeal, which was

granted in an Opinion and Order issued by the Board on May 12, 2004.[1] On March 11, 2005, the Board issued its Opinion with two judges concurring in result partially granting the Permittee's and Department's Motion for Partial Summary Judgment.[2]

Appellants Motion to Compel

Mr. Potratz's Motion to Compel Discovery seeks information concerning a May 2, 2003 incident involving the hydrofluorsilicic acid day tank at the Authority's Sommerheim water plant. In addition, the discovery seeks, *inter alia*, detailed information as to what the Authority believes caused the incident, any testing that was done, and the results of such tests. The Authority opposes the Motion to Compel arguing that the discovery seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Authority contends that the event in which discovery is sought occurred after the subject Operation Permit was issued. It also contends that the discovery is "fundamentally a challenge to the Department's exercise of its prosecutorial discretion" so is not discoverable. Furthermore, it contends that the incident occurred at another water plant which is a "facility separate and distinct" from the Operation Permit at the Chestnut Street water treatment plant.

Discussion

The Pennsylvania Rules of Civil Procedure together with the Board's Rules of Practice and Procedure set forth the framework for discovery in Appeals before the Board. See Pennsylvania Rules of Civil Procedure 4001 *et. seq.* and 25 Pa. Code Section

[1] *Potratz v. DEP*, EHB Docket No. 2003-084-R (Opinion and Order issued on May 12, 2004).
[2] *Potratz v. DEP*, EHB Docket No. 2003-084-R (Opinion and Order issued on March 11, 2005).

1021.102(a). *Pennsylvania Trout v. DEP and Orix-Woodmont Deer Creek Venture*, 2003 EHB 199, 202. A party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the action, whether it relates to the claim or defense of a party. Pa. R.C. P. 4003.1; *T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608. It is not grounds for objection that the information sought will be inadmissible at trial if the information requested appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1(b); *Hanson Aggregates v. DEP and Clean Water Action*, 2002 EHB 953, 955.

We now turn to the arguments of the parties and specifically the Authority's first contention that since the information requested follows the issuance of the permit under Appeal it is not relevant. In other words, the Authority contends that our review of the Department's action should not consider any evidence after the issuance of the permit. We disagree.

We are required as part of our review of Department actions to conduct a *de novo* hearing. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). This guiding principle of environmental jurisprudence was reaffirmed in a comprehension opinion by the Commonwealth Court in *Pennsylvania Trout v. Department of Environmental Protection and Orix-Woodment Deer Creek Venture*, 863 A.2d 93 (Pa. Cmwlth. 2004)

> The Environmental Hearing Board is not an appellate body with a limited scope of review attempting to determine if DEP's action can be supported by the evidence received at DEP's fact-finding hearing. Warren Sand & Gravel Co., Inc. Rather, the Environmental Hearing Board's duty is to

> determine if DEP's action can be sustained or supported by the evidence taken by the Environmental Hearing Board. *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002) (Environmental Hearing Board adjudicates matters in the first instance, it does not function as an appellate body).

863 A.2d at 106.

We also reject the Authority's contention that the discovery somehow is a challenge to the Department's exercise of its prosecutorial discretion. We fail to see how the discovery of this information would have any impact on prosecutorial discretion.

However, the Authority is correct in its argument that information about the incident at the other water plant is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. We will issue an Order accordingly.

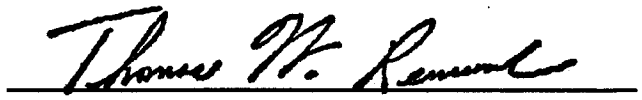
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 21st day of March, 2005, the Appellant's Motion to Compel is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 21, 2005

See service list on the following page

EHB Docket No. 2003-084-R

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	**Issued: March 22, 2005**

OPINION AND ORDER ON DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO STRIKE NEW MATTER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies the Department of Environmental Protection's Motion in Limine to Strike New Matter. The Board will strike the designation of "new matter" from Neville Chemical's Second Amended Answer but leave the 51 paragraphs set forth under this designation as they are affirmative defenses to the Department's Amended Complaint. 25 Pa. Code Section 4 requires that the Board's Rules of Practice and Procedure be liberally construed and that the Board at every stage of a proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

OPINION

Presently before the Board is the Pennsylvania Department of Environmental Protection's Motion in Limine to Strike New Matter. Neville Chemical Company's Second Amended Answer contains 51 paragraphs of "New Matter" including a request for costs and expenses. Neville Chemical opposes the Motion.

A wooden reading of our Rules of Practice and Procedure indicates that the Department's position is technically correct. 25 Pa. Code Section 1021.74 sets forth that:

> (b) Answers to Complaints shall set forth any legal objections as well as any denial of facts in a single pleading.
>
> (c) Answers shall be in writing and so drawn as to fully and completely advise the parties and the Board as to the nature of the defense, including affirmative defenses. Answers shall admit or deny specifically and in detail each material allegation of the complaint and state clearly and concisely the facts and matters of law relied upon.

Moreover, subsection (e) specifically prohibits the designation of any of these affirmative defenses as new matter.

> (d) No new matter or preliminary objections shall be filed.

The Board's Rule is thus a combination of aspects of state pleading as set forth in the Pennsylvania Rules of Civil Procedure in that it requires fact pleading. However, it also follows the federal practice of setting forth affirmative defenses in the Answer itself as opposed to a special designation of affirmative defenses under the heading of "new matter" as required by Pennsylvania Rule of Civil Procedure 1030.

We will strike the heading "New Matter" in Neville Chemical's Second Amended

Answer. We will not strike the 51 paragraphs of New Matter in Neville Chemical's Second Amended Answer. We see these paragraphs as setting forth Neville Chemical's affirmative defenses to the Department's Amended Complaint. We are also mindful of 25 Pa. Code Section 1021.4 which reminds us that our Rules of Practice and Procedure:

> shall be liberally construed to secure the just, speedy, and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

To dismiss Neville Chemical's New Matter because counsel used the wrong designation in listing affirmative defenses would be elevating form over substance and would result in a grave injustice. We hasten to add that our decision today in no way decides the viability of Neville Chemical's affirmative defenses. That decision will be made on another day after both parties exercise their full due process rights and the Board issues its adjudication.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY, INC.	:	

ORDER

AND NOW, this 22nd day of March, 2005, the Department's Motion in Limine to Strike New Matter is ***denied***. The 51 paragraphs incorrectly designated as New Matter will now be designated as "Affirmative Defenses." The designation "New Matter" is *deleted.*

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 22, 2005

EHB Docket No. 2003-297-CP-R

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF EDINBORO and MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-016-R (Consolidated with 2004-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 22, 2005**

OPINION AND ORDER ON APPELLANT'S MOTION IN LIMINE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The appellants' motion in limine to exclude from evidence conversations between Department personnel and the appellants' staff and council members is denied. Rule 4.2 of the Rules of Professional Conduct does not prohibit direct communications between parties, regardless of whether such communications have been authorized by their counsel.

OPINION

This appeal involves a civil penalty issued by the Department of Environmental Protection (Department) to the Borough of Edinboro and the Municipal Authority of the Borough of Edinboro (collectively Borough). The matter currently before the Board is a motion in limine[1]

[1] Motions in limine are authorized by the Board's rules at 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine.")

filed by the Borough seeking to exclude any reference to what the Borough considers to be "unauthorized meetings" between Department personnel and the Borough's staff or council members. The Department has filed a response opposing the motion.

The contact in question concerns communications between the Manager of the Department's Water Management Program and the Mayor of Edinboro and a meeting between the Department's Regional Director and the former Borough Manager. During depositions, both of the Department personnel stated that they had engaged in these communications even after being advised by their counsel that such communications were inappropriate.

Rule 4.2 of the Rules of Professional Conduct governs communications with persons represented by counsel and states as follows:

> In representing a client, a *lawyer* shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(Emphasis added)

Comment 4 to the rule specifically states that *"[p]arties* to a matter may communicate directly with each other. . . ." (Emphasis added)

The Borough has provided us with no basis for excluding the conversations between the Department and Borough personnel other than the fact that the conversations took place against the advice of counsel. The Borough cites no legal authority in support of this argument and we are aware of none. The fact that the conversations between the parties may have been unauthorized by their counsel does not provide a basis for excluding them.

Therefore, we enter the following order:

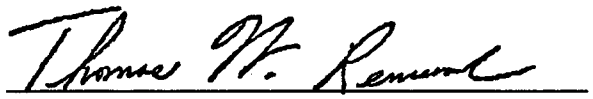
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF EDINBORO and MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-016-R (Consolidated with 2004-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of March, 2005, the Borough's *motion in limine* is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: March 22, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COUNTY OF BERKS	:
	: **EHB Docket No. 2002-155-MG**
v.	:
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	: **Issued:** March 31, 2005

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies the appeal of a county from a permit to expand an existing landfill. The appellant-county failed to prove that the Department abused its discretion by failing to properly analyze harms associated with property devaluation, odor and traffic in the context of a "harms/benefits" review required by the municipal waste regulations. The county also failed to prove that the Department improperly considered benefits resulting from fees paid and additional waste services provided by the landfill operator. The Board also finds that the Department's land use consistency review was appropriate and that the Department did not abuse its discretion by allowing the permittee to submit additional information in support of its application. Finally, the county failed to demonstrate that the Department's commencement of technical review before the completion of the harms/benefits analysis has any continuing relevance that would justify remand of the permit.

BACKGROUND

This matter was commenced on June 26, 2002, with the filing of a notice of appeal by the County of Berks, which challenged the Department of Environmental Protection's May 30, 2002 approval of a major permit modification for the expansion of the Pioneer Crossing Landfill located in Exeter Township, Berks County. Specifically, the County argues that several procedural irregularities in the manner in which the Department reviewed the application were inappropriate. That is, commencing the technical review before the completion of the "harms/benefits analysis," allowing the Permittee to submit further documentation, and failing to properly perform the land use consistency review under amendments to the Municipalities Planning Code,[1] referred to as Acts 67 and 68, constituted an abuse of discretion by the Department. Further the County charges that the Department improperly performed the "harms/benefits analysis" which requires an applicant for a major modification to demonstrate that the environmental harms associated with the modification are clearly outweighed by social, economic and environmental benefits.[2] Of course the Department and the Permittee disagree. In their view, the Department's review of the application was thorough and comprehensive and nothing in the analysis of the application merits reversal.

Nine days of hearing were held before the Honorable George J. Miller on August 3-6, August 11-13, and August 26-27, 2004, which resulted in a transcript of 1,779 pages and several volumes of exhibits. The parties also filed post-hearing memoranda which included proposed findings of fact and conclusions of law.[3] After full consideration of these materials, we make the

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[1] Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101-11107.

[2] 25 Pa. Code § 271.127(c).

[3] By order of the Chairman and Chief Administrative Law Judge this appeal was consolidated with a companion appeal, *Exeter Citizens' Action Committee v. DEP,* EHB Docket No. 2002-156-MG, on July 20, 2004. The Board has issued both adjudications at the same time.

following:

FINDINGS OF FACT[4]

1. The present matter involves an appeal by Berks County (County or Appellant), a third-class county, regarding the Department of Environmental Protection's (Department) issuance of a major modification to Solid Waste Permit No. 100346 (Solid Waste Permit), which approved a request for an increase in average and maximum daily volumes and an expansion of the existing operation at Pioneer Crossing Landfill. (Stip. ¶ 1)

2. The Department is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce, *inter alia*, the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, *as amended*, 35 P.S. §§ 6018.101 – 6018-1003 (Solid Waste Management Act); the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, *as amended*, 53 P.S. §§ 4000.101 – 4000.1904 (Act 101); and the rules and regulations promulgated thereunder, including the municipal waste regulations, 25 Pa. Code Chs. 271-285. (Stip. ¶ 2)

3. The Permittee in this matter is FR&S (Permittee or PCL). The Permittee owns and operates the Pioneer Crossing Landfill (Landfill). (Stip. ¶ 3)

4. The Landfill is located in Exeter Township, Berks County, Pennsylvania. It is a mile more or less from Birdsboro Borough and is close to Amity, Robeson and Union Townships. (Stip. ¶ 4; Mascaro,[5] Tr. 982-86; Ex. PCL-2)

---

[4] The parties entered into a substantial stipulation of facts which was admitted into the record and is designated as "Stip." The transcript is designated as "Tr. __"; Berks County's exhibits as "BC-___"; Pioneer Crossing's exhibits as "PCL-__." The Department did not independently introduce any exhibits.

[5] Pasquale N. Mascaro is the President and sole shareholder of Pioneer Crossing Landfill and FR&S, Inc. He purchased the landfill in 1985. It was closed at the time of purchase but he obtained a new permit and reopened the landfill for operation in 1990. (Tr. 928-31)

5. The Appellant, Berks County, is the host county for the Landfill. Berks County is a third-class county. (Stip. ¶¶ 1,4)

6. The Landfill is an existing municipal waste landfill. (Stip. ¶ 5)

7. Prior to the permit at issue in this appeal, the Landfill was permitted to accept an average daily volume of 1,000 tons per day and a maximum daily volume of 1,600 tons per day. As of early 2002, the Landfill was nearing full capacity and needed to expand to remain in operation. (Stip. ¶ 6; Mascaro, Tr. 934)

8. The harms/benefits analysis is an element of the environmental assessment portion of a landfill application. It is required by Section 271.127 of the Department's solid waste regulations:

> [T]he applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.[6]

9. The Department based its analysis on the harms and benefits generated by the additional 67 acres of the proposed expansion of Pioneer Crossing Landfill. (Exs. PCL-18 at 1; BC-41 at 1)

10. The Department first assessed the harms identified by the operation of the proposed facility and then considered the mitigation, if any, of those harms. Thereafter, the Department considered the benefits offered by the Landfill and balanced them against the mitigated harms in order to determine whether or not the benefits of the project clearly outweighed the harms. (PCL-18 at 1-3; BC-41 at 1-3)

11. Not only are harms which are identified by the applicant considered, but also harms that are brought to the Department's attention by public comment. (Newcomer,[7] Tr. 53-55; Korzeniewski,[8] Tr. 614)

12. The Department considers a "potential" harm to be less serious than a "known" harm. Therefore potential harms are accorded less weight than known harms when the Department balances harms and benefits. (Benvin,[9] Tr. 331; Korzeniewski, Tr. 1604-05; Exs. PCL-18 at 2; BC-18 at 2)

13. In performing the harms/benefits analysis, the Department does not necessarily put a dollar value on the benefits or the harms associated with a project. (Benvin, Tr. 183-84, 382-86)

14. The Department does not do a comparative analysis between one landfill and another, because each is considered unique, and such comparisons are generally not useful. (Newcomer, 27-28, 30)

THE HARMS/BENEFITS ASSESSMENT FOR THE PIONEER CROSSING LANDFILL

15. On July 13, 2000, the Department received a request from the Permittee for a major permit modification to expand the Pioneer Crossing Landfill. The expansion was to occur to the north and east of the existing Landfill, encompassing 67 acres, and the height of the existing

---

[6] 25 Pa. Code § 271.127(c).

[7] At the time of the PCL expansion application, Crystal Newcomer was employed by the Department's waste management program. She has worked for the Department in a variety of capacities since 1984.

[8] Donald Korzeniewski is an environmental specialist with the Department in the Southcentral Regional Office. His responsibilities include the completeness review of incoming solid waste permit applications and the organization of the initial municipal and public meetings. He was a member of the team that performed the harms/benefits analysis for the Pioneer Crossing expansion application. (Tr. 608-09)

[9] At the time of the permit review for the Pioneer Crossing Landfill, Robert G. Benvin served as the Regional Facilities Manager in the Department's Southcentral Region waste management program. He was in charge of supervising the technical staff reviewing solid waste permits, including engineers, hydrologists, chemists and soil scientists. (Tr. 96-97)

Landfill was to be increased by 89 feet. The expansion request also called for an increase in average daily volume to 1,550 tons per day, and the maximum daily volume to 1,975 tons per day. (Stip. ¶¶ 7, 8)[10]

16. The application was accompanied by an extensive environmental assessment in accordance with the requirements of the Department's regulations at 25 Pa. Code §§ 271.126 and 271.127. (Benvin, Tr. 1676; Ex. PCL-4)

17. On August 22, 2001, Act 67/68 became effective.

18. On September 14, 2000, the Department conducted a Local Municipalities Involvement Process (LMIP) meeting with representatives of PCL, the County, the local municipalities and the legislature. The meeting addressed, among other things, the major permit modification application. (Stip. ¶ 10)

19. On December 23, 2000, the Department's regulation at 25 Pa. Code § 271.127(c), became effective which for the first time required a harms/benefits analysis of a waste facility application.

20. The Department also held a public meeting to gather input on the proposed expansion from members of the community on February 13, 2001. (Newcomer, Tr. 41-43; Benvin, Tr. 305)

21. On August 8, 2001, the Department mailed a thirty-page Comment/Response document to, among others, all those who submitted testimony at the public hearing. This document summarized the testimony from each commenter, and included a response for each of these comments. (Stip. ¶ 12; *see* Exs. BC-22; PCL-11)

---

[10] At that time, the "harms/benefits" analysis was not in use as the Department's guidance document and had been invalidated by the Board in its decision *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, in April 2000, and the harms/benefits regulation was not promulgated until December, 2000. See 30 Pa. Bull. 6685 (2000). The PCL application was the first one reviewed after the regulation became effective. (Newcomer, Tr. 1472-74; *see also* Benvin, Tr. 284-85)

22. Between October 2001 and December 2001, PCL and the Department exchanged a series of correspondence pertaining to the PCL harms/benefits proposal. PCL's responses to the Department's questions and comments were prompt. (Stip. ¶¶ 13-16; Exs. PCL 12-14; BC-25, 26, 29; Benvin, Tr. 1672)

23. On January 24, 2002, after an environmental assessment analysis of the application for permit modification, the Department determined that based on the information provided, the benefits of the proposed project did not clearly outweigh the harms. (Stip. ¶¶ 17, 19; Exs. BC-35; PCL-16)

24. The harms evaluated by the Department at that point included:

a) Perception of property devaluation – the Department determined that the perception of reduced property values was a potential social/economic harm. This harm was only partially mitigated by the South Baumstown Road Property Protection Plan.

b) Traffic – Traffic, although a known environmental harm, was significantly mitigated by PCL's approved routing policy which precluded use of Township roads by landfill tractor trailers, the paving of the access road to reduce mud and dust, and the creation of a Citizens Advisory Board to aid in identifying problems from truck traffic.

c) Odors – Odors were considered a potential environmental harm due to several control measures that PCL had put in place, including daily perimeter surveys, working face practices, leachate collection system, improved gas management system and discontinued service to customers with odorous sludge.

d) Aesthetics – The visual impact of the expanded Landfill was considered a known

environmental harm because it would be the dominant focal point to Birdsboro, interrupting the natural horizon. Although the buffer properties around the Landfill and the sequencing of landfilling activity from south to north mitigated the harm to some people, it did not address the significant impact on Birdsboro.

e) Noise from back-up alarms – Noise from back-up alarms was considered a known environmental harm because as the elevation of the Landfill increases, the sound will carry even farther. The mitigation of the limited use of heavy equipment helps, but the buffer properties only protect a limited number of people.

f) Litter – Litter from the Landfill and trash trucks was considered a moderate, known environmental harm. Litter fences and truck inspections somewhat mitigate the harm, but the Department found that PCL had not addressed the litter harm posed by unloaded trucks that leave the site "untarped."

g) Gas emissions – The discharge of gas into the atmosphere was considered a known environmental harm. The proposed mitigation of the Ingenco project which would develop a process to beneficially use landfill gas was considered too speculative as of that time.

(Exs. PCL-16; BC-35)[11]

25. The benefits considered by the Department were:

a) Host Municipality Benefit fee to Exeter Township

b) Recycling fee paid to the Commonwealth

c) Environmental Stewardship fee paid to the Commonwealth

d) Employment

[11] Many of these issues are discussed in more detail below.

e) Purchase of local and regional goods

f) Contribution to the First Baptist Church

g) Income and sales taxes to the Commonwealth from PCL employees

h) Presentations to schools and tours for students

i) Charitable contributions of a minimum of $50,000 to local civic, social, athletic, educational, religious and community groups

j) Free township wide spring cleanup for Exeter Township

k) Free disposal of white goods for Exeter Township residents

l) Property tax revenues

m) On-site recycling drop-off

n) Eddie Smith Trailer Park and First Baptist Church cleanup

(Exs. PCL-16; BC-35)

26. As of January 2002, the Department concluded that PCL's expansion proposal of 67 additional acres and an increase in elevation of 89 feet, did not meet the requirement of Section 127.271(c), that the benefits of the project outweigh the harms. Accordingly, it offered PCL fourteen days as a "final opportunity to demonstrate that the benefits of the project clearly outweigh the harms." The Department then provided sixteen pages explaining its analysis of the project. (Exs. PCL-16; BC-35)

27. This letter was principally drafted by Crystal Newcomer. (Newcomer, Tr. 1443)

28. Witnesses for the Department testified that this "final opportunity" was provided because certain issues arose during the course of their analysis which the Permittee did not have an opportunity to address previously in the application process. Specifically, the issue concerning the visual impact on Birdsboro and the lack of significant benefit to that community came more

sharply into focus in a way that it had not before. As it was discussed among members of the team, the impact of the project on Birdsboro became a "key issue." (Benvin, Tr. 148, 1674; Korzeniewski, Tr. 629-30; Newcomer, Tr. 1636)

29. Further, among members of the team, the weighing process was considered a very close call, with some members believing that the project met the balancing test and others believing that it did not. (Newcomer, Tr. 1476, 1638; Benvin, Tr. 344-45)

30. Accordingly, the Department concluded that due process demanded that the Permittee have an opportunity to address the issues raised about Birdsboro. (Benvin, Tr. 1673-74; Newcomer, Tr. 1638)

31. Although Mr. Benvin testified that he didn't recall a similar letter being issued in other expansion applications, he felt that it was analogous to "intent to deny" letters that are frequently sent out by technical staff after their review of an application. (Tr. 395-96)

32. In its February 4, 2002 response, PCL reduced the proposed height of the Landfill such that the expansion would result in an increase of 15 feet over the present Landfill height (the original proposal was for an 89-foot increase in height.) (Exs. PCL-17A, 17B; BC-49)

33. PCL also proposed the following additional mitigation of identified harms:

a. elimination of back-up alarms on landfill equipment and replacing them with mounted rear-view cameras; also, reduction of the decibel level of waste trucks dumping at the Landfill to 87 decibels.

b. further odor mitigation measures, as well as collection and beneficial use of landfill gas; and

c. a series of progressively higher litter fences, culminating in a 50-foot high litter fence at the Landfill perimeter.

(Stip. ¶ 20; Exs. PCL-17A & B)

32. In its February 4, 2002 response, Pioneer Crossing also proposed or identified, among other things, the following new benefits:

d. a proximity impact fee, on a per-ton-of-waste basis, to be paid quarterly directly to Birdsboro Borough Council;

e. acceptance of white goods at the Landfill from Birdsboro residents, without charge;

f. free Spring and Fall cleanup for Birdsboro residents;

g. establishment of a drop-off recycling center in Birdsboro;

h. development of a 58-acre sports complex and recreational park at the expansion site for use by residents of Exeter, Robeson, and Union Townships, and the Borough of Birdsboro; and

i. restoration and enhancement of 1,250 feet of an unnamed tributary to the Schuylkill River.

(Stip. ¶ 21; Exs. PCL-17-A & B; BC-49)

33. In the Department's March 27, 2002 harms/benefits analysis, the Department concluded that Pioneer Crossing had demonstrated that the benefits associated with the expansion and increase in average and maximum daily volumes clearly outweighed the harms associated with the modification. The Department considered:

a) The reduction in elevation reduced the intensity of the aesthetic harm.

b) The harm from noise was fully mitigated due to the additional measures put in place by PCL.

c) Additional litter control measures reduced litter from a "moderate known

environmental harm" to a "small potential environmental harm."

d) Since further permit applications had been submitted in furtherance of the Ingenco project, gas emissions were also reduced from a moderate known environmental harm to a potential environmental harm.

(Stip. ¶ 22; Exs. BC-41; PCL-18)

34. After reviewing the additional information, the staff was unanimous that the benefits of the proposal outweighed the harms. (Benvin, Tr. 344-45)

35. This reversal of position was due in large part to PCL's effort to address the impact of the Landfill on Birdsboro by reducing the elevation increase from 89 feet to 15 feet and by paying the proximity impact fee to Birdsboro. (Benvin, Tr. 347-49; Newcomer, Tr. 1639; Korzeniewski, Tr. 1607)

36. Upon satisfactory completion of the Department's technical review of the expansion application, the Department, on May 30, 2002, issued to FR&S, Inc./Pioneer Crossing Landfill a major permit modification to Solid Waste Permit No. 100346, approving a Landfill expansion and an increase in average and maximum daily volumes. (Stip. ¶ 24; Exs. BC-46; PCL-1)

TIMING OF THE TECHNICAL REVIEW

37. The technical review of a solid waste permit application revolves around issues such as the design of the Landfill, liner construction, cell construction, groundwater monitoring, well installation, etc. (Benvin, Tr. 105)

38. Once the harms/benefits regulation became effective in December 2000, it was typical that the technical review should be performed after the completion of the harms/benefits analysis. (Benvin, Tr. 103, 106-07)

39. The technical review for the PCL application was primarily under the direction of

John Oren.[12] He testified that although technical review is typically done as "Phase 2" review, after the completion of the harms/benefits analysis, there are many issues that overlap. Therefore the two reviews are not completely separate. (Tr. 661-62; *see also* Benvin, Tr. 104-06)

40. Specifically, issues such as the height of a landfill or the collection of gas may create a harms/benefits issue, but are also inherently technical and require technical analysis. (Benvin, Tr. 105-06)

41. The harms/benefits review was not completed at the time the Department commenced its technical review. (Oren, Tr. 689-91)

42. Several harms and benefits associated with the PCL application were technical in nature such as the height of the Landfill, the efficacy of the gas collection system, the odor mitigation plans, and the project for the beneficial use of landfill gas and required engineering analysis for evaluation. (*See* Benvin, Tr. 105)

43. Upon completion of the environmental assessment in March 2002, the Department continued with its technical review of the application. (Stip. ¶ 23)

ACT 67/68 LAND USE CONSISTENCY AND ZONING REVIEW

44. The Acts 67 and 68 amendments to the Municipalities Planning Code, enacted on June 22, 2000, require the Department to consider local zoning and land use when reviewing permit applications: "State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." Section 3 of Act 67 of 2000, 53 P.S. § 11105(a)(2).[13]

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[12] John Oren currently holds the position of Permits Chief in the Waste Management Program in the Department's Southcentral Regional Office. His primary role in the Pioneer Crossing expansion application was the technical review. (Tr. 659-61)

[13] See also Section 19 of Act 68 of 2000, as amended by Act 127 of 2000, which permits the Commonwealth to rely upon joint municipal zoning ordinances for funding and permitting

45. At the time the Department received the initial expansion application from PCL, Act 67/68 was not in effect. (Benvin, Tr. 304-30)

46. There are currently no regulations implementing Act 67/68 at the Department. The Department relies on a policy document to guide their review. (Guerra, Tr. 200, 256; Ex. BC-73)

47. The team reviewing the Pioneer Crossing application referred the project to the Department's Policy Office, by submitting a Land Use Questionnaire completed by PCL to that office. (Benvin, Tr. 149-50, 342- 44; Ex. PCL-7)

48. Land Use Questionnaires were also submitted to area municipalities. (Ex. PCL-8)

49. The primary reviewer in the Policy Office was Louis Guerra, an executive policy specialist with the Department's office in Harrisburg. His responsibilities include the land use reviews for permit applications as required by Act 67/68. (Tr. 194-95)

50. Mr. Guerra explained that although the purpose of the Act 67/68 review is to avoid conflicts between local land use and permits issued by the Department, it is not the Department's role to resolve zoning conflicts. (Tr. 196-99)

51. His analysis of the Pioneer Crossing Landfill expansion application consisted of reviewing the Land Use Questionnaire submitted by the Permittee. He would have considered comments from local municipal officials had any been submitted. Although the local municipalities were informed of his review, neither Exeter Township nor Berks County responded to the Land Use Questionnaire. (Tr. 227-28, 240-42; Exs. BC-12; PCL-7; PCL-8)

52. Mr. Guerra did not specifically recall reviewing the Host Agreement as part of his review. He also did not review Exeter Township's zoning ordinance or any comprehensive land use planning documents from Exeter or Berks County. (Tr. 198, 200-01)

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decisions.

53. It is the Department's policy to rely on comments from the local municipalities. If there are no responses to the Land Use Questionnaires sent to affected municipalities, the Department does no independent review of land use other than reviewing the questionnaire submitted by the applicant. Absent municipal comment, the permitting process continues as usual. (Guerra, Tr. 246-47)

54. Had Mr. Guerra received comments from the local governments, he would have requested copies of the relevant zoning ordinance and land use documents and performed further analysis. (Guerra, Tr. 252)

55. Mr. Guerra was aware that there was some litigation involving zoning in Exeter Township, but did not request or review the pleadings in the case. (Guerra, Tr. 204-05)

56. In the Department's view, local governments are entitled to a level of deference in land use decisions and the Department will not interfere with those decisions. (Guerra, Tr. 248-49; Benvin, Tr. 1662-64)

57. Mr. Benvin testified that he and his staff also reviewed the Host Agreement and zoning maps which were included in the application materials. (Benvin, Tr. 154-56, 342-44; 1659-60)

58. One purpose of the Host Agreement was to resolve some potential legal issues related to the zoning of the Landfill expansion. (Mascaro, Tr. 947-50, 1017-19)

59. Mr. Benvin was aware of litigation challenging the Host Agreement in the Court of Common Pleas and saw pleadings from citizens in that case. (Benvin, Tr. 157-59)

60. Mr. Mascaro testified that nothing has happened in that case in four years. (Tr. 1084)

61. Berks County is an intervener in the suit. (Mascaro, Tr. 1187)

62. Mr. Benvin also reviewed the analysis of Exeter Township's environmental counsel

concerning the zoning issue and the Host Agreement. (Tr. 1659-60)

63. The Department did not concern itself with the legality of the Host Agreement. The team reviewing the permit application relied primarily upon the analysis of the Policy Office and on input from the municipalities. (Benvin, Tr. 149-50, 153; Korzeniewski, Tr. 1592-95)

64. Donald Korzeniewski testified that he believed that the expansion was consistent with local zoning by virtue of the Host Agreement. (Tr. 621, 1596)

BALANCING THE HARMS AND BENEFITS OF THE PROPOSED EXPANSION

Property Devaluation

65. The Department held a public meeting to gather input on the proposed expansion at the Pioneer Crossing Landfill on February 13, 2001. Several commenters expressed concern about property values. (Newcomer, Tr. 43, 1632-33; Korzeniewski, Tr. 1602)

66. The Department recognized that there are many factors that might affect property values. Accordingly, the Department identified a perception of property devaluation as a "potential" social/economic harm. A "potential" harm is one that, while possible, is unlikely to occur. (Benvin, Tr. 375-79; Korzeniewski, Tr. 633, 1604-05)

67. Crystal Newcomer testified that she had communication with the Central Office at the Department relative to the real estate issue. She was told that studies had been done concerning the impact of landfills on real estate values, but that the studies were inconclusive about whether or not there was a connection between the two. Some reports concluded that landfills improve property values, and others concluded that they do not. (Newcomer, Tr. 44-47, 1634)

68. Other than the general concerns raised at the public meeting, no one submitted any information to the Department that their property had been devalued because of proximity to the Pioneer Crossing Landfill, or any other specific data or credible evaluation. (Newcomer, Tr.

1470-71, 1633; Korzeniewski, Tr. 1602-05)

69. The Department did not consider property devaluation to be a significant issue because there was no indication that it was more than a public perception expressed by a few commenters and not a known harm. (Korzeniewski, Tr. 635-39, 1623-24)

70. The primary residential area in proximity to the Landfill was the Borough of Birdsboro. Birdsboro was only affected by the visual impact of being able to see the Landfill, but was too far away to experience odors or noise. Growth in Birdsboro appeared to be normal or above-normal. Accordingly, the Department did not believe it was necessary to perform an economic analysis of the property surrounding the Landfill. (Korzeniewski, Tr. 1603, 1617-18)

71. The Department did not attempt to quantify potential real estate devaluation because there was no real evidence that it would occur. (Korzeniewski, Tr. 1605-06)

72. When the PCL modified its proposal to increase the height of the Landfill by only 15 feet, not much of it would be visible from Birdsboro. (Korzeniewski, Tr. 657; *see generally*, testimony of William Tafuto, Tr. 1206-95)

73. The Department considered a property report submitted by J.P. Mascaro III, the Compliance Manager for PCL. (Newcomer, Tr. 1482-85, 1633)

74. The Department considered written comments about property values submitted by Dona Starr. (Newcomer, Tr. 1633, 1645-46)

75. The Department also weighed the South Baumstown Road Property Protection Program and the location of buffer properties owned by PCL. (Newcomer, Tr. 1470-71; Benvin, Tr. 376, 386)

76. The South Baumstown Road Property Protection Plan protects the value of 47 homes to the east of PCL. Under that Plan, if a homeowner desires to sell their property and is unable to

locate an acceptable buyer, PCL will purchase the property at its fair market value appraised as if the Landfill were not there. (Ex. PCL-3)

77. The Department was also aware that PCL owned the homes along Route 82 near the Landfill and the areas to the north and west of the Landfill were mostly undeveloped industrial land. (Benvin, Tr. 376)

78. No one on the Department's permit review team had any experience with real estate evaluation. (Benvin, Tr. 127-30)

79. At the hearing, Berks County presented the testimony of Dr. Richard Ready. Dr. Ready is an assistant professor of economics at Penn State University. He holds an undergraduate degree in natural resources and fishery science and a Ph.D in natural resource economics. His expertise is in the modeling of economic data using "hedonic pricing analysis." He has done studies and published papers using the hedonic pricing method to analyze the costs and benefits of environmental issues and environmental valuation. His current work involves valuing environmental goods, impacts from global climate change, including impacts associated with development, traffic and open space issues. His most recent project looked at the impacts of various agricultural practices on residential property values in Berks County, using the hedonic pricing method. He was accepted by the Board as an expert in environmental economics to testify regarding the economic impact of the expansion permit on the values of real estate and tax revenues. (Tr. 405-25, 452)

80. Hedonic pricing explains the price of a good based on a statistical analysis of the characteristics of that good. The technique is often used by regulatory agencies to gauge the amenity impacts or other costs associated with regulation. (Tr. 407-09)

81. Dr. Ready testified that hedonic pricing is superior to other methods of valuing real

estate, such as individual appraisals, because it is difficult for appraisers to find comparable property for an individual valuation. In contrast, hedonic pricing is not dependent on comparables, but is instead a statistical analysis based on "inputted" data. (Tr. 416-17, 440)

82. Dr. Ready's analysis included two stages. The first stage created a mathematical explanation of what factors increase the value of a house and what factors decrease the value of a house, such as proximity to Pioneer Crossing Landfill. Using the results of stage one, Dr. Ready performed a second analysis which determined the reach of the impact. (Tr. 456, 468)

83. Dr. Ready has no particular experience in the factors that make a house sell or in real estate markets. He has no experience in real estate appraisal. He selected home characteristics for his analysis based on a literature review and his personal experience as a buyer and seller of a home. (Tr. 442-46)

84. His method of analysis generates estimates. The results of the mathematical model are completely based upon the inputs for the formula. With different inputs you will get different results. (Tr. 445, 526-27)

85. Dr. Ready relied on data from the Berks County Office of Assessment databases. Those databases are used for the assessment of properties for tax purposes. (Tr. 505-07)

86. Dr. Ready used assessed values as his estimate of house values if the Landfill were not there. He assumed that assessed value was equal to market value, and assumed that the assessments were not discounted to account for the presence of the existing Landfill assessed values were the baseline house price used in his formula. (Tr. 555-60)

87. Despite his lack of real estate experience, Dr. Ready chose characteristics from that database such as structural characteristics, location, elevation, date of sale, distance from industrial use, distance from Pioneer Crossing, and others. Dr. Ready also selected information

from USGS digital elevation models and maps from the Department of Transportation for information on roads and municipal boundaries. In total Dr. Ready utilized 123 factors to establish his mathematical model. (Tr. 457-61, 505-06)

88. From these factors Dr. Ready performed a regression analysis to determine whether house prices vary with a particular factor, and quantified the relationship between the price and the factor. (Tr. 465-66)

89. Dr. Ready also determined the average impact of a house being located a certain distance from Pioneer Crossing Landfill. (Tr. 468)

90. Dr. Ready concluded that the impact of the expansion on housing prices extends to 3200 meters. On average, houses closer to the Landfill within that 3200 meter radius sell for less than those farther away. (Tr. 469-74)

91. Based on these results of the statistical regression analysis, Dr. Ready concluded that houses in proximity to PCL sell, on average, for 9.8% less than houses beyond the influence of PCL. The total loss in home values is $30 million. That translates into an $11 million loss of tax revenue over the 18 year lifespan of the expansion. (Tr. 481-83; *see also* Exs. BC-65; BC-86)

92. Much of the data in the assessment office database was compiled in 1992 and 1993, during the last comprehensive reassessment in Berks County. The database is updated with new properties that are built. (Tr. 507-08)

93. Dr. Ready did not verify the accuracy of the data in the database, but relied on information from a third party. (Tr. 507-09)

94. Dr. Ready assumed that the assessed value in the database accurately reflects the market value of a home. This was used as the baseline home value for his model. (Tr. 557)

95. Dr. Ready admitted that he has no training on how properties are assessed for tax

purposes or how they were assessed in Berks County. (Tr. 450)

96. Dr. Ready's analysis did not appear to accurately predict actual home sales for 2003. For example, Dr. Ready predicted that, on average, homes in Birdsboro would sell for 9.8% less than their assessed values if the expansion project moved forward. Yet, reviewing the sales prices for homes in Birdsboro, all but one actually sold for more than its assessed value. Similarly, in 2003, all but one house in Exeter Township sold for more than its assessed value even though Dr. Ready's analysis predicted that, on average, homes in Exeter would sell for less. Homes in Robeson, Union and Amity Township also sold for more than their assessed value. (Tr. 562-68)

97. Dr. Ready also predicted that because of the reduction in house values there would also be a negative impact on property tax revenues. Yet, he acknowledged that in order for there to be a reduction in property tax revenues, there would have to be reduction in the assessed values of the properties within the 3200 meter radius of the Landfill. He could not say whether any municipality had, in fact, lost tax revenue due to expansion of the Landfill. (Tr. 570-73)

98. Douglas Haring of Douglas Haring and Company Real Estate Advisors testified on behalf of Pioneer Crossing. He is in the business of providing real estate appraisal services, primarily in Berks County. He is a licensed real estate broker in the state of Pennsylvania. He is certified by the Appraisal Institute for both commercial and industrial appraising as well as residential real estate appraising. He has twenty-eight years of experience in real estate appraisal and valuation experience. He was accepted by the Board as an expert in real estate appraisal. (Tr. 708-20, 729)

99. The purpose of Mr. Haring's study was to determine what effect, if any, the Pioneer Crossing Landfill had on the local real estate market. In reaching his conclusion he considered

population projections, comparable markets in Berks County, multi-list information, existing new housing projects in the area, proposed new housing projects in the area, other information from PCL, Dr. Ready's study, and two other studies. (Tr. 735-37)

100. Mr. Haring assessed the neighborhoods in a two-mile radius surrounding PCL. The Borough of Birdsboro is completely within this radius. (Tr. 748-50)

101. Birdsboro is an older community with a large quantity of small, older, frame dwellings. There has been new construction within the last 15-20 years, and in the last five years two new subdivisions have been constructed. There are several industrial sites within Birdsboro, several of which are closer to homes than the Pioneer Crossing Landfill. (Tr. 757-64)

102. Mr. Haring also assessed new construction in Birdsboro. Two housing plans have been completed by the largest homebuilder in Berks County and a new project is proposed for the west of Birdsboro by the second largest homebuilder in Berks County. Neither of these builders altered their traditional pricing formulas to account for the presence of the Pioneer Crossing Landfill. Based on information from these builders, Mr. Haring concluded that the Landfill has no influence on the pricing, marketing or sales of the homes in these subdivisions. (Tr. 767-76)

103. Also within the two-mile radius are homes along Ada Drive to the northwest of the Landfill. These homes are older, lower price, poor quality single-family residences. (Tr. 753)

104. Mr. Haring also looked at other communities in Berks County that were somewhat similar to Exeter Township and Birdsboro in terms of size, age and housing stock except they were not in proximity to a landfill. There were no significant differences between the housing markets of the communities that were not close to a landfill and the Exeter and Birdsboro markets. (Tr. 780-85)

105. Mr. Haring also considered regional factors such as population increase, homeowner vacancy rate, average sales rates:

a. Generally the population growth of Birdsboro, Exeter, Amity, and Robeson Townships is greater than the average growth of Berks County as a whole. This suggests that those municipalities are considered a desirable place to live.

b. A high homeowner vacancy rate suggests that there is a declining demand for property. Mr. Haring found that the vacancy rates in Birdsboro and Exeter were lower than the County average.

c. The average sales price for home sales in Birdsboro from 1999 to 2003 rose more then the average sale price for the County. In Fleetwood Borough, a community comparable to Birdsboro, the average sales price was less than the County average. This is the opposite of what you would expect if the Landfill was negatively impacting home prices in Birdsboro.

(Tr. 785-91)

106. Mr. Haring also reviewed two private house sales on South Baumstown Road. Both homes sold in 10 days or less and for more than 30% more than they were purchased for in the 1990s, which is consistent with other areas of the County. Neither selling agent, when interviewed, felt that PCL had any impact on the transaction. (Tr. 799-803)

107. Overall, Mr. Haring's study indicated that there was no significant difference between the real estate market in the municipalities within a two-mile radius of the Landfill and other similar communities in Berks County. Accordingly, he concluded that Pioneer Crossing has no impact on the value or marketability of real estate. (Tr. 805-06; Ex. PCL-38)

108. Mr. Haring also reviewed Dr. Ready's report. He concluded that Dr. Ready's

statistical analysis is not consistent with factual market activity and that his conclusions were based on an unreliable and outdated database. (Ex. PCL-38)

109. In his experience, Mr. Haring testified that some of the factors used by Dr. Ready in his analysis are not characteristics that affect home prices. For example, the month in which a home sells and its physical elevation are not relevant factors in the marketability or sales price of a home. Similarly, school test scores are not universally important to the buying population. (Haring, Tr. 885-89)

110. Mr. Haring criticized Dr. Ready's approach because small changes in the data used in the calculation can result in large changes in the results of the calculation. In his view, statistical regression analysis does not do a good job of determining an appraisal of individual property. It is used most commonly for tax assessment purposes on large numbers of homes. (Tr. 907)

111. Mr. Haring also testified that in his view the County assessment data is an unreliable source, except for new homes built after 1991. He routinely finds mistakes in assessment data before that time. (Haring, Tr. 907-09)

Traffic

112. The focus of the Department's consideration of any harm generated by Landfill traffic in the form of large transfer trucks, on the haul route or "access road" as it is defined in the Department's regulations.[14] Truck traffic might cause noise, emissions and congestion. (Benvin, Tr. 107-10, 132-34)

113. The haul route for Pioneer Crossing is from U.S. Route 422, along State Route 82

[14] "*Access road*—A roadway or course providing access to a municipal waste processing or disposal facility, or areas within the facility, from a road that is under Federal, Commonwealth or local control." 25 Pa. Code § 271.1. This road is often referred to as the "haul route."

to the Landfill. It is less than one mile long. (Benvin, Tr. 359-62; Ex. PCL- 2)

114. In the public meetings, citizens were also concerned about the use of certain roads by landfill trucks, particularly in the vicinity of the Daniel Boone Homestead, and Tulpehocken Road, which has a very narrow bridge. (Benvin, Tr. 107-09; Newcomer, Tr. 1639-41)

115. Accordingly, the Department did field investigations of the roads that citizens said that landfill trucks were using that were a concern. (Benvin, Tr. 337)

116. PCL instituted a company policy which defined the specific roads that landfill trucks (other than collection vehicles) were allowed to use. For example, landfill trucks were precluded from using Daniel Boone Road and Tulpehocken Road. (Mascaro, Tr. 1035-40; Benvin, 363-67; Newcomer, Tr. 1641-42; Ex. PCL-13, Tab F)

117. The surrounding municipalities were also consulted by PCL concerning the approach routes and designated roads for landfill trucks. (Ex. PCL-13, Tab H)

118. The Host Agreement also contains a provision prohibiting landfill vehicles, other than collection trucks, from using township roads in Exeter Township. (Mascaro, Tr. 1017-19; Exs. PCL-3; BC-72)

119. The Department does not analyze harm generated by local collection trucks which must use many roads in the municipality in order to collect trash from locations throughout the Township because they would be used for trash collection regardless of whether the application is approved or not. (Benvin, Tr. 109, 363, 388)

120. "Long-haul" or "tractor-trailer" trucks on limited access highways or major routes such as Route 422 were not considered by the Department. (Benvin, Tr. 276-80)

121. A traffic study was commissioned by PCL and was reviewed by the Department of Transportation. The Department received no adverse comments from that agency.

(Korzeniewski, Tr. 650; Mascaro, Tr. 1003-06; Brown,[15] Tr. 1328-31)

122. There have been no reports of accidents involving landfill trucks on the designated approach routes. (Mascaro, Tr. 1009)

123. The Department has not received complaints concerning traffic at PCL. (Maiolie, Tr. 1521)

124. Although citizens raised comments about traffic congestion on Route 422, there were no comments attributing that problem specifically to landfill trucks. (Benvin, Tr. 1666; Korzeniewski, Tr. 1612)

Odors

125. The Department also considered the harm caused by odors generated at the Landfill. Those odors are generally caused by gas emissions, working face odors or odors caused by sewage sludge. (Benvin, Tr. 122-27)

126. In the past, PCL has had significant problems with odor, largely attributable to a failure to cap a portion of the Landfill and install a gas management system. The majority of these problems occurred and were resolved in the late-1990s. (Brown, Tr. 1310-13, 1361-62; Maiolie, Tr. 1502-03) [16]

127. Past odor violations are considered by the Department and projected into the future to determine the scope of harm. (Newcomer, Tr. 55-60)

128. As applied to PCL, working face odors were identified as a "potential" harm. The increase in average daily volume (ADV) from 1,000 tons per day to 1,550 tons per day increased

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[15] David Brown is the Director of Engineering for FR&S and the J.P. Mascaro and Sons related companies holding degrees in civil engineering. He oversees the permitting and management of the Pioneer Crossing Landfill. (Tr. 1297-1300)

[16] Pioneer Crossing paid a substantial civil penalty relating to its failure to install cap and gas management systems in a timely manner. *See FR&S, Inc. v. DEP*, 1999 EHB 241, *affirmed,*

this potential. (Benvin, Tr. 269-70)

129. Working face odors are controlled at the Landfill by keeping the face as compact as possible, spraying with sodium hypochlorite (a bleach solution) and separating odorous loads so that they can be covered as soon as possible. (Brown, Tr. 1322-23)

130. Sewage sludge odor was also identified as a potential harm because it was a problem in the past. PCL's original permit allowed it to accept 25% of its average daily volume as sewage sludge, or 250 tons per day. The expansion permit only permits PCL to accept 196 tons per day as sewage sludge. (Benvin, Tr. 271-74; Mascaro, Tr. 1121-22)

131. PCL will also reject sewage sludge customers whose loads are too odorous for the Landfill to efficiently control. (Mascaro, Tr. 1179; Brown, Tr. 1319, 1323)

132. Sewage sludge odor is also controlled by spraying sodium hypochlorite which neutralizes the odor. (Brown, Tr. 1323, 1356)

133. Gas odors are controlled with the installation of an improved gas management system which deals with methane more efficiently than the older system that was installed at the Landfill. (Brown, Tr. 1320-22, 1324)

134. Leachate seeps may also generate odor. The gas management system alleviates some of these problems. The Landfill is also inspected every day for seeps in order to address them immediately. (Brown, Tr. 1324-25)

135. PCL also put in place inspection practices, such as perimeter surveys, to address odors as quickly as possible. (Brown, Tr. 1319-20)

136. In the Department's view, although past behavior is often a predictor of future problems, a combination of the resolution of the capping problem, the installation of an

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761 A.2d 634 (Pa. Cmwlth. 2000).

improved gas management system and the improvement of operational practices, allowed it to conclude that odors, although not completely mitigated, constituted a "potential" environmental harm. (Benvin, Tr. 354-58; Exs. PCL-18; BC-41)

137. Mr. Mascaro testified that after a meeting with the Department in December 2000 he had to change his attitude about the importance of compliance with regulations if he was going to continue to stay in business. After that meeting he established a Compliance Department and worked to change the culture of the Landfill operation to emphasize the importance of compliance to employees. (Tr. 1159-61, 1164-67; *see also* Brown, Tr. 1363-64; Benvin, Tr. 1678-80)

138. This change in attitude is perceived as sincere by the Department. (Benvin, Tr. 1670-71)

139. Although it is unrealistic to expect that no odors will ever escape the perimeter of the Landfill, PCL has put a system of inspections in place to make sure that problems are resolved quickly. (Mascaro, Tr. 1185; Mascaro III, Tr. 1768; Maiolie, Tr. 1506)

140. J.P. Mascaro, III, the Compliance Manager for Pioneer Crossing, testified that odor control is a major concern at the Landfill. He described the operational procedures that have been put in place to control odors including the procedure for responding to reports of odors off-site. (Tr. 1753-57)

141. Although there have been complaints concerning odors, they have been relatively few in number. The last notice of violation issued to PCL concerning odor was in January 2001. (Mascaro, Tr. 1113; Brown, Tr. 1315, 1371-72; Benvin, Tr. 358; Mascaro III, Tr. 1757-58)

142. The trend over the last several years is one of improvement of management practices which has resulted in fewer complaints and fewer violations. (Maoilie, Tr. 1512-14)

143. In the Department's view the odor control measures put in place at Pioneer Crossing are effective. (Benvin, Tr. 358; Maiolie, Tr. 1533)

144. Deborah Moyer who lives one-quarter mile east of the Landfill testified at the hearing concerning her experience with odors emanating from Pioneer Crossing. She perceives odors to be a pervasive problem at the Landfill and feels that it interferes with her use and enjoyment of her property. She complained that sometimes the odor is so bad at her home that she can not use the picnic table outside. She expressed a significant degree of frustration because she does not feel the Department is sensitive to the problem or that anything is being done to adequately resolve the odor problem. (Tr. 1705-31)

145. Similarly, Carolyn Brunschwyler also suffers from odors which she believes emanate from the Pioneer Crossing Landfill. She lives less than one mile to the southeast of the Landfill. She testified that it is also her experience that at times odors from the Landfill are so strong that she can not sit outside at her property. She has also experienced odors when she travels on Route 82 and when she fills her car with gasoline. She also expressed some frustration because she does not feel that the Department is sensitive to the issue. (Tr. 1734-45)

Fees as a Benefit

146. The Department determined that a Host Municipality Benefit Fee to Exeter Township constituted a known social/economic benefit. The fee is a payment per ton, ranging from $1.50 per ton for the first five years and increasing every five years until reaching $2.25 per ton. This fee is prepaid annually and is in excess of the statutory requirement of $1.00 per ton. (Exs. P-18; BC-41)

147. This fee was also memorialized in the Host Agreement between Exeter Township and PCL. (Exs. P-3; BC-72)

148. The Department determined that the duration of the benefit was for as long as PCL accepts waste, estimated to be eighteen years. (Exs. P-18; BC-41)

149. Additionally, PCL must pay a $2.00/ton recycling fee and an environmental stewardship fee of $0.25 per ton to the Commonwealth as required by Act 101[17] and the Environmental Stewardship and Watershed Protection Act[18] respectively. (Exs. P-18; BC-41)

150. The Department considered both of these fees to constitute a known benefit. (Exs. P-18; BC-41)

151. In July, 2002, after the expansion permit was issued, the General Assembly passed Act 90. This legislation requires a fee of $4.00 per ton. The Department did not consider this fee in the harms/benefits analysis since PCL's expansion permit had already been issued. (Benvin, Tr. 332-34)

152. The Department did not compare what would happen in other communities if waste were diverted elsewhere. It is very difficult to guess where waste might go if Pioneer Crossing closed because it is a free market. (Newcomer, Tr. 87, 92)

Proximity Impact Fee to Birdsboro

153. PCL agreed to pay Birdsboro a fee per ton to offset the impact on Birdsboro of its proximity to the Landfill expansion. This impact fee is $1.00 per ton in the first five years of the operation of the expansion, and increases by $.10 per ton every five years thereafter. (Exs. PCL-18; BC-41)

154. The Department did not quantify the impact fee to Birdsboro over the life of the permit. However, Pioneer Crossing did project the dollar amount to be paid to Birdsboro in its

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[17] Municipal Waste Planning, Recycling, and Waste Reduction Act, Act of July 28, 1988, P.L. 556, as amended, 53 P.S. § 4000.1301.

[18] 27 Pa. C.S. § 6112.

submission. (Newcomer, Tr. 1454-55, 1467-68)

155. The impact fee to Birdsboro is enforceable by the Department as a condition of the expansion permit. (Korzeniewski, Tr. 641-42)

156. The Department's analysis of whether the impact fee to Birdsboro might offset any loss in tax revenue from alleged property devaluation was considered in the overall balancing of harms to benefits but not otherwise quantified. (Newcomer, Tr. 1454-55)

Additional Waste Services Benefits to Birdsboro, Robeson, Amity and Union

157. PCL also offered additional waste services to residents of Birdsboro, Robeson and Union Townships. (Exs. PCL-18; BC-41)

158. Specifically, those residents receive free disposal for spring and fall cleanup and free disposal of white goods (kitchen appliances, etc.) (Exs. PCL-18; BC-41)

Aesthetics

159. William Tafuto testified as an expert on behalf of Pioneer Crossing Landfill. He did a line-of-sight visibility analysis which the Department used to evaluate the aesthetic impact of the proposed expansion. (Tr. 1215)[19]

160. His study compared the visibility of the Landfill at its current elevation to the original proposed increase in elevation of 89 feet and also the revised proposed increase of 15 feet. (Tr. 1210-12)

161. Although this study was somewhat unique, it employed basic principles of geometry, contour, topography, and spatial relations, all elements with which he is very familiar as a civil engineer. (Tr. 1212)

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[19] Mr. Tafuto is a Vice President of Engineering for the ARM Group in Hershey, PA. He holds a B.S. and an M.S. degree in civil engineering and is certified as a professional engineer in Pennsylvania and five other states. The majority of his work is in the permitting of landfills both

162. Mr. Tafuto identified parks, playgrounds, schools and historic sites within a two-mile radius of the proposed Landfill. He surveyed these locations and used the data to generate topographic linear profiles to determine from what locations the Landfill expansion was currently visible and from which locations it would be visible if the height increased by 85 feet (original proposal) or 15 feet (revised proposal). (Tr. 1217-43)

163. Although the Landfill was not visible from most parks and historic sites due to topography or other factors, it was visible from the Birdsboro Elementary School. (Tr. 1232-46)

164. However, due to the angle of rotation, to a person standing at the Birdsboro Elementary School, the Landfill, at 385 feet – the increased elevation due to the expansion – will only appear to be less than one inch taller than its current elevation of 370 feet. In Mr. Tafuto's view, the Landfill at the increased elevation is only a small part of the horizon. (Tr. 1246-50)[20]

165. Generally, when the elevation of the Landfill increases to 385 feet, the percentage of visibility to Birdsboro will increase by 4.5%. In Exeter, Robeson and Union, the increase in visibility is less than one percent. (Tr. 1255-56)

DISCUSSION

In this third-party appeal of a permitting action by the Department, Berks County, the Appellant bears the burden of proof.[21] It is not enough for the County to show merely that another decision would have been prudent, was unfair to some segment of the public, or that the Board might simply reach a different conclusion if it were reviewing the permit application. The Board will find an abuse of discretion only if the result of its *de novo* review indicates that the

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in Pennsylvania and other states. (Tr. 1206-12)

[20] More details concerning Mr. Tafuto's study can be found in our adjudication also issued today in *Exeter Citizens' Action Committee v. DEP,* EHB Docket No. 2002-156-MG (Adjudication issued March 31, 2005).

[21] 25 Pa. Code § 1021.122(c)(2).

Department's action was unreasonable, inappropriate or in violation of law.[22] As we explain in more detail below, the evidence presented by the County fails to show that the Department's approval of the PCL permit modification was unreasonable, inappropriate or contrary to any rule of law. It's appeal must be dismissed.

Procedural Deficiencies

The County first argues that the Department's review of the PCL application suffers from procedural deficiencies which require us to vacate the permit modification. First, the County charges that the Department erred by commencing the technical review of the application before it had completed the environmental assessment, including the harms/benefits review. Second the County believes that the Department impermissibly allowed PCL to have a "second chance" by allowing it to submit more information after the January 2002 letter in which the Department concluded that at that time it could not conclude that the benefits of the project outweighed the harms. We find that neither of these arguments have any merit.

The County has failed to provide any statutory or logical basis for vacating the permit on the basis of the January 2002 letter. In that letter the Department concluded that the benefits did not outweigh the harms for the proposed expansion project. Yet the Department provided PCL with an opportunity to submit additional information for the Department's consideration. Several members of the review team testified that this opportunity was provided because of issues which arose during the course of their evaluation that were not explicitly raised earlier in the application process, namely the impact of the proposed expansion on the Borough of

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[22] *E.g., Borough of Edinboro v. DEP,* 2003 EHB 725, *affirmed*, 2696 C.D. 2003 (Pa. Cmwlth. filed June 23, 2004); *Smedley v. DEP*, 2001 EHB 131; *Leeward Construction, Inc. v. DEP*, 2000 EHB 742, *affirmed,* 821 A.2d 145 (Pa. Cmwlth. 2003); *see O'Reilly v. DEP*, 2001 EHB 19.

Birdsboro.[23] Accordingly, they felt that in fairness to PCL it should have an opportunity to address this issue with the submission of further information, which was promptly provided by PCL.[24]

We find nothing improper in this course of action. There is no rule of law or mandatory requirement in the Department's regulations which precludes the Department from informing an applicant that with consideration of current information a permit can not be granted, but allowing further submission. In the past the Board has characterized such correspondence as "typical of the give-and-take that goes on during DEPs processing of applications . . . ."[25] Since nothing required the Department to deny the permit application, we will not interfere in the manner in which the Department chooses to process permit applications.

The County further urges us to vacate the Department's approval because the Department performed "significant" technical review before it completed the environmental assessment which is precluded by Section 271.127(g) of the Department's regulations. That section provides:

> (g) *Evaluation.* After consultation with other appropriate agencies and potentially affected persons, the Department will evaluate the environmental assessment in Phase I of permit review or otherwise prior to technical review.

There is no debate that the Department had technical input before the completion of Phase I, the harms/benefits analysis. The harms/benefits component of the environmental assessment regulations was not effective until December 2000 and the Department's technical

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[23] Benvin, Tr. 148, 1674; Korzeniewski, Tr. 629-30; Newcomer, Tr. 1636.

[24] Benvin, Tr. 1673-74; Newcomer, Tr. 1638.

[25] *County of Dauphin v. DEP*, 1997 EHB 29, 31. *See also County of Berks v. DEP,* 2003 EHB 77.

review began before that time.[26] Both Mr. Benvin and Mr. Oren testified that many issues raised in the harms/benefits review involve design and engineering and therefore necessitate some technical review in order for the harms or benefits to be fully evaluated.[27]

This Board has recently held that procedural errors during the processing of a permit application will not provide a basis for remand absent some continuing relevance. In *Shippensburg Township P.L.A.N v. DEP,*[28] the Board refused to remand an encroachment permit because the Department failed to conform with four procedural requirements in conducting its review of the permit applications, by soliciting public comment before the application was administratively complete, allowing a party other than the permittee to submit notice to municipalities and some signature irregularities. Yet the public had ample opportunity to comment, the proper municipalities received appropriate substantive notice, and the permit was in fact approved by the Department. The appellant did not explain any harm which continued from these alleged errors and the Board denied the motion for summary judgment. Similarly, the County has not described any continuing harm from the commencement of technical review in advance of the completion of the environmental assessment, environmental or otherwise. If anything, the Department's review of the harms/benefits assessment was more thorough because of the technical evaluation.

The County's reliance on the Commonwealth Court's decision in *Rochez Bros. Inc. v. Department of Environmental Resources,*[29] and the Board's opinion in *Forwardstown Area Concerned Citizens Coalition v. DEP,*[30] for the proposition that the Department must comply

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[26] Tr. 689; Ex. BC-15.
[27] Tr. 104-06; 661-62.
[28] EHB Docket No. 2004-099-L (Opinion issued July 14, 2004).
[29] 334 A.2d 790 (Pa. Cmwlth. 1975).
[30] 1995 EHB 731.

with mandatory requirements of its regulations is misplaced. In those cases, the Department's failure to comply with its regulations clearly had continuing effect. In *Rochez*, the Department had permitted the reactivation of a coke oven, an action that was not permitted under its regulations; in *Forwardstown*, the Department failed to make written findings as required by its regulations. In this appeal, by contrast, the Department's failure to complete the harms/benefits part of its analysis of the permit application before turning to technical review could have no improper continuing effect on its grant of the permit application. Accordingly, there is no principled reason to vacate the permit solely on the basis of the requirement of Section 127.217(g), that the harms/benefits review be completed before the technical review is commenced.

Act 67/68 and Zoning Review

The Municipalities Planning Code[31] was amended in June of 2000 to include provisions which require state agencies after August 22, 2000, to give consideration to local land use controls when undertaking certain actions such as permitting:

> State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.[32]

This amendment is commonly referred to as "Act 67/68." Prior to the enactment of Acts 67 and 68, the Department had no authority to base a permitting action upon local land use regulation.[33] The legislation was part of an initiative by the Commonwealth to be more sensitive to local

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[31] Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101-11107.

[32] 53 P.S. § 11105(a)(2). *See also* Section 19 of Act 68 of 2000, as amended by Act 127 of 2000, which permits the Commonwealth to rely upon joint municipal zoning ordinances for funding and permitting decisions.

[33] *See, e.g. Oley Township v. Department of Environmental Protection*, 710 A.2d 1228 (Pa. Cmwlth. 1998); *Community College of Delaware County v. Fox,* 342 A.2d 468 (Pa. Cmwlth. 1975), *appeal dismissed as moot*, 381 A.2d 448 (Pa. 1977)(under the Sewage Facilities

decisionmaking relative to land use and zoning.

The Pioneer Crossing expansion application was submitted to the Department shortly before this legislation came into effect in August, 2000. Also in August, the Department developed an interim policy document which outlined its approach to considering comprehensive land use plans and zoning.[34] In accordance with this policy PCL submitted its response to the Department's Land Use Questionnaire which included a description of the zoning limitation and Host Agreement. After review by Mr. Benvin and the permitting team, the questionnaire was referred to the Department's Policy Office for review. The questionnaire also sent it to affected municipalities, including Exeter Township and Berks County. The Policy Office performed a brief review of the materials submitted by PCL, and receiving no comment from either Exeter Township or Berks County, concluded that there were no land use issues that required the Department to deny the expansion application.

The County argues that the Department's review failed to consider several factors and that the Department's conclusion that there were no relevant land use conflicts precluding it from approving the permit is incorrect. The County's position is that the expansion is not a "permitted use" in the Township, and that the Host Agreement which purports to resolve any issues in that regard is illegal. Based on these points, it is the County's view that the Department should have denied the permit. While we agree that the review by the Policy Office was cursory at best, looking at the permit review as a whole by including analysis by Mr. Benvin and his team, the Department reviewed the land use issue to the extent required by Act 67/68.

Act 67/68 does not require the Department to become a "super zoning board" and independently re-evaluate local zoning and land use issues. Nor does the legislation actually

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Act, the Department need only consider the proposed method of sewage disposal).

require it to refuse to permit a facility even if it does detect a land use conflict. The County argues that the Department relied too heavily on the lack of municipal comment as a basis for concluding that there was no zoning or land use conflict. Lou Guerra, the executive policy specialist who performed the land use review for the PCL project, testified that PCL completed a Land Use Questionnaire and that this questionnaire was in turn forwarded to the Berks County Supervisors, the Exeter Township Supervisors and the Berks County Planning Commission for their review and comment. None of these three bodies submitted any comment to his office concerning the PCL land use review.[35] He explained that although the Act invests the Department with some responsibility for integrating land use with permitting decisions,[36] the Department will not attempt to resolve a zoning conflict.[37] Accordingly, if no municipality brings a conflict to the Department's attention, the Policy Office will look no further than the Land Use Questionnaire.[38] Had a municipality identified a conflict, then he would have performed a more comprehensive review and presumably crafted an appropriate response from the Department.[39]

Although Mr. Guerra performed the official land use consistency review, Mr. Benvin and members of his team also considered relevant land use and zoning documents which were submitted during the PCL application process including the Host Agreement. Mr. Benvin was also aware of some zoning litigation pending in the Court of Common Pleas and also had an opinion letter from the Township's environmental counsel concerning a zoning issue related to the Landfill expansion. However, it appeared to the Department that the Host Community

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[34] Ex. BC-84.
[35] Tr. 240-42.
[36] Tr. 196-98.
[37] Tr. 199.
[38] Tr. 246-47.

Agreement resolved whatever difficulty there was between the Township and PCL, and that there was no basis to suspend the Department's review of the permit.[40]

We believe that the Department adequately considered zoning and land use as required by Acts 67/68. The County has not provided any other statutory or regulatory provision which required a more comprehensive review.[41] Act 67/68 does not require the Department to deny any permit, but only provides it with the authority to do so based on land use control. Further, there was nothing inappropriate about the Department's reliance upon the Host Agreement, and it was not required to perform its own independent legal analysis of the document. Act 67/68 does not require the Department to resolve zoning conflicts; it requires simply "consideration." In addition, it is still a long standing principle of law that a permit from the Department only authorizes an activity with respect to the Commonwealth; it does not provide the permittee with authority to override restrictions imposed by other entities to use the property in a certain manner.[42]

The County also argues that the Host Agreement that permitted a landfill contrary to the permitted classification in the Township's zoning ordinance in settlement of a zoning dispute between PCL and the Township, constitutes illegal "contract" zoning in reliance on the Supreme

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[39] Tr. 252.

[40] Korzeniewski, Tr. 621, 1596.

[41] We would also observe that there was no representative from the County Supervisors or the County Planning Commission who testified about any land use conflict that the Department should have considered in its review. Nor was there any explanation given for the County's decision to submit no comment on the Land Use Questionnaire.

[42] "When the Department issues a permit, permit renewal, etc., the permit only authorizes activity *with respect to the Commonwealth*; it does not give the permittee carte blanche to conduct the activity irrespective of the preexisting rights of third parties." *Reading Anthracite Company v. DEP*, 1998 EHB 112, 122. *See also Bernie Enterprises, Inc. v. DEP,* 1996 EHB 239, *Miller v. DEP*, 1997 EHB 335.

Court's decision in *Carlino v. Whitpain Investors.*[43] We find nothing on the face of the Host Agreement, nor anything in Act 67/68, which suggests that the Department's reliance on the Host Agreement as resolving a dispute over the applicability of the zoning ordinance was unreasonable or unlawful in any way.

The *Carlino* decision states only that agreements made on condition of zoning approval are unenforceable, but does not address whether or not a zoning dispute can be resolved by agreement. In the *Carlino* decision the Supreme Court considered a complaint filed by residents against a developer, the township and the Department of Transportation in an action to stop construction of an access road close to their property when the zone in question had been rezoned from single to multi-family dwellings. The residents took the position that the developer's predecessor in title had entered into an agreement with the township to require a buffer area and forego an access road for a planned apartment complex in an area zoned for single family residences in exchange for the rezoning of the area for multi-family dwellings. Thereafter, another developer, the appellee, took over the land development and began construction of the access road. The residents, alleging damage to the enjoyment of their property, sought to enjoin the township from permitting the access road in the construction permit, based on the earlier agreement with the first developer. The Court rejected the argument:

> [W]e reject the view that agreements, and the concomitant representations or stipulations, which induce changes in zoning district classifications limit the effect of those changes once enacted. Thus, if it were proven, as alleged in the complaint, that Developer's predecessor in title procured rezoning of the subject land in exchange for covenanted use restrictions applicable to that land, such restrictions would be unenforceable; hence, proceedings to enforce those restrictions were properly dismissed by the court below.[44]

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[43] 453 A.2d 1385 (Pa. 1982).
[44] 453 A.2d at 1388.

Nothing in the *Carlino* decision suggests that a zoning conflict can not be resolved by the municipality in an agreement made subsequent to the enactment of the zoning ordinance in order to settle a dispute. In this case there was a dispute about whether the PCL Landfill expansion was allowable in the "Light Industrial Zone" of Exeter Township. It appears that PCL's position was that regardless of the language of the zoning ordinance, "no additional zoning approvals are needed for its expansion project because of certain vested and grandfathered rights [PCL] enjoys and because of certain actions previously taken and/or approved by the Township."[45] In order to settle this dispute, Exeter Township and PCL entered into the Host Agreement, which among other things, provided that, in consideration of other concessions, the Township would not pursue the matter through litigation.[46] Attached to the Host Agreement was a letter from the Township's environmental counsel which included an analysis of the zoning issue, the likelihood that the Township would not prevail in the event of litigation, and recommended that the supervisors accept the proffered agreement.

Accordingly, for the Department's purposes, whatever zoning conflict there may have been appeared to be resolved. Act 67/68 only requires the Department to "consider" zoning. It does not require it to perform an independent analysis of a land use situation that reasonably appeared to be resolved by the local municipality. And even if the Department had been unclear on whether there was a conflict or not, the Act only provides that it "may" rely upon local zoning when making permitting decision. The Department is not *required* to deny a permit simply because there may or may not be a zoning issue resolved. The County has not directed us to any language in the statute which required the Department to place any conditions on the permit, nor

[45] Exs. PCL-3 at 5; BC-72 at 5.

has our own research revealed any law in support of that argument. The permit *only* authorizes the permittee to conduct landfilling activities. It does not allow the permittee to avoid whatever other restrictions there may be on the use based on local ordinances. Therefore there is no basis to find that the Department abused its discretion by concluding that the Host Agreement resolved the land use conflict. Since the Department considered the Host Agreement to resolve the zoning dispute, the Department was not required to deny PCL's application. [47]

The Harms and Benefits of the Proposed Expansion

The harms/benefits analysis is a short-hand reference to Section 271.127(c), of the Department's regulation which requires that:

> [T]he applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.[48]

In this case, the Department balanced seven mitigated harms against twenty-three social, economic and environmental benefits that PCL committed to providing to the community as a condition of its expansion permit. This analysis involved consideration of several volumes of documentation, technical reports, comments from citizens, and was characterized by both the Department and PCL as "thorough" and "comprehensive." The County does not challenge all the harms or all the benefits, and accordingly we will only discuss those items which are specifically

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[46] Mascaro, Tr. 947-50, 1017-19.

[47] The foregoing analysis is only applicable to the issue of whether the Department's reliance upon the Host Agreement was an appropriate exercise of discretion. It should not be understood to constitute an analysis of the Agreement under applicable zoning law and is of course not binding upon any other tribunal that may consider that issue.

challenged by the County.[49] Several other items were challenged in the companion case of *Exeter Citizens' Action Committee v. DEP,*[50] issued concurrently with this adjudication, and we would direct the reader to that discussion for those matters which are not addressed here.

The County contends that the Department improperly performed the harms/benefits analysis because it failed to evaluate the harm caused by the expansion relative to real estate devaluation, traffic and odor. The County also argues that the Department erroneously considered statutory fees required by Act 90 and Act 101, the proximity impact fee to Birdsboro and the community clean-up programs which should not have been considered as benefits by the Department. Accordingly, it is the County's position that the benefits do not outweigh the harms for the expansion and that the permit should have been denied. As we explain below, we disagree with the County's assessment and find no error in the Department's consideration of these matters.

A part of the County's claim is the assertion that the Department failed to quantify all of the benefits and harms, presumably in dollar amounts, in reaching its conclusion that the permit applicant has demonstrated that the benefits of the project to the public clearly outweigh the known and potential environmental harms. These contentions are set forth in the County's Requests for Findings of Fact and Conclusions of Law, but not in Legal Analysis of the County's Brief.

The Department clearly believes that such a quantification of all benefits and harms is not necessary. Robert Benvin testified that the Department does not place a monetary value on

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[48] 25 Pa. Code § 271.127(c).

[49] Arguments not raised in a post-hearing brief are deemed waived. Rule 1021.131(c); *see also Lucky Strike Coal Co. v. Department of Environmental Resources,* 547 A.2d 447 (Pa. Cmwlth. 1988); *Riddle v. DEP,* 2002 EHB 283; *Patti v. DEP,* 1999 EHB 610.

[50] EHB Docket No. 2002-156-MG (Adjudication issued March 31, 2005).

benefits or harms as part of its balancing regime.[51] Some benefits, such as the host fees, are readily quantifiable.[52] Others are not. That interpretation of the Department's duty is both reasonable and appropriate. The regulation does not even require the applicant to quantify harms or benefits in dollar amounts. Although PCL quantified much of its proposal with dollar values, those values were neither accepted nor rejected by the Department.[53] Many social benefits and harms, particularly quality of life concerns, are simply too intangible to quantify in dollar amounts in a reasonable way. Some benefits of the project, such as payments of taxes and payments to be made to the affected communities were easily expressed in dollar amounts. A monetary analysis of other benefits might be possible, but the conduct of such an analysis may be unnecessarily expensive and time consuming when the Department's reasonable judgment would be adequate to make the necessary comparison. Many people have made the judgment that curbside pickup of trash has more benefits than harms without analyzing the dollar-for-dollar costs of truck emissions and noise or the inconvenience of personal delivery of trash to a landfill or incinerator. The Department certainly has the discretion to make similar judgments in balancing all of the benefits and harms of the project whether quantified in dollar terms or not.[54]

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[51] Tr. 183-84, 382-86.

[52] Benvin, Tr. 183-84, 382-86.

[53] Benvin, Tr. 385-86.

[54] In addition, the "scintilla of evidence" standard recently applied by the Commonwealth Court in interpreting this regulation strongly suggests that a direct dollar-to-dollar comparison is not required:

> The standard imposed by 25 Pa. Code § 271.127(c) may be met where the benefits to the public outweigh the harms by a mere scintilla so long as the applicant proves, with the requisite high degree of certainty that those benefits do outweigh the harms in the final balancing process." (citation omitted)

Browning-Ferris Industries, Inc. v. Department of Environmental Protection, 819 A.2d 148, 154 (Pa. Cmwlth. 2003)(*en banc), petition for allowance of appeal reserved*, 252 MAP 2003 (Pa. filed December 11, 2003).

The Department's judgment was not made "off the top of the head", but was based on a disciplined analysis of environmental and economic harms, relevant mitigation measures, and the remaining benefits in accordance with the Department's regulations and policy statements. When the Department tentatively concluded that the benefits of the project did not outweigh harms, PCL was given one more chance to submit additional information because the Department's permit team thought the decision was a close one and wanted to be sure that the Department had made a complete analysis of all harms, mitigation measures and benefits. The additional information submitted by PCL included benefits to Birdsboro and reduction of height of landfill, among other things. That information was fully reviewed and led to the Department's conclusion that the requirements of the harms/benefits regulation had been met.

In this analysis the Department accepted 23 social, economic and environmental benefits associated with the expansion project. These benefits include: the host municipality fee payable to Exeter Township that may exceed $25,000,000; proximity impact fees payable to Birdsboro that may exceed $11,000,000; statutory fees including recycling fees and the environmental stewardship fee; and 47 full-time employment positions. In mitigation of seven environmental harms, the Department considered among other things PCL's litter control program, its extensive odor control programs, control measures for noise reduction, traffic control programs, the reduction of the proposed height of the Landfill so as to markedly reduce the visual impact of the Landfill particularly from Birdsboro and the potential reduction of property values.

Harms

Property Devaluation

The County argues that the Department erred by failing to perform an independent assessment of real estate values of the homes in the vicinity of the Landfill by an outside real

estate expert because the Department was put on notice that the Landfill expansion created a harm to real estate values by comments made at the public hearing. The County says that no one on the reviewing team had any significant experience in real estate valuation and points to a memo produced from the computer of John Oren of the Department's reviewing team suggesting that an independent assessment of real estate values should be performed.[55]

The County also proffered expert testimony in support of its view that the expansion will, in fact, significantly harm real estate values. This purported loss in value coupled with the concomitant loss in property tax revenues in the amount of $ 41,000,000 is, the County states, a harm of such proportion that the benefits proposed by PCL are "dwarfed" in comparison.

The issue of real estate devaluation first came to the Department's attention during the public comment period, where several individuals expressed concern about the value of their property should the expansion plan go forward.[56] The Department recognized that many factors might affect property values and determined that the harm associated with property devaluation was a "potential" harm.[57] Crystal Newcomer researched the issue by contacting the Central Office where she learned that studies had been done concerning the impact of landfills on real estate values, but that they were "all over the place" in their conclusions. Some reports even concluded that proximity to a landfill enhances property values.[58] The Department did consider some anecdotal information submitted both by citizens opposed to the expansion and by PCL. Yet other than the generalized concerns raised at the public meeting, no one submitted any information to the Department that their property had been devalued because of proximity to

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[55] John Oren could not recall whether this memo was sent. Tr. 667-75, 692-97; Ex. BC-23.

[56] Newcomer, Tr. 43, 1632-33; Exs. BC-22; PCL-11.

[57] A potential harm is one that may come to pass, but does not have a substantial likelihood of doing so. Benvin, Tr. 375-79; Korzeniewski, Tr. 633, 1604-05.

Pioneer Crossing Landfill.[59]

Accordingly, the Department concluded that property devaluation was not a significant issue because there was no indication that it was more than an issue of public perception expressed by the commenters and not a known harm. The primary residential area in proximity to the Landfill was the Borough of Birdsboro. Birdsboro was only affected by the visual impact of being able to see the Landfill, but was too far away to experience odors or noise. Accordingly, the Department did not believe it was necessary to perform an economic analysis of the property surrounding the Landfill.[60] The Department also considered the property protection plan for homes along South Baumstown Road that are relatively close to the Landfill, the fact that PCL owned significant buffer properties and homes around the Landfill, and the existence of mostly undeveloped industrial lands to the north and west of the Landfill.[61]

Under these circumstances, we think the Department's failure to retain an outside expert to evaluate the effect of the Landfill expansion was reasonable and appropriate. The reviewing team had no reason to believe the issue was a real, substantive harm based on their review of the general comments from the public and the most likely victims of real estate devaluation along South Baumstown Road were either protected by the property purchase agreement or were owned by the PCL itself.

Even if the Department should have scrutinized the issue of property devaluation more closely, the expert testimony presented to the Board at the hearing convinces us that there is no significant negative impact, if any, on the real estate market due to the operation of the expanded Pioneer Crossing Landfill. The County relies on the testimony of Dr. Richard Ready, a Penn

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[58] Tr. 44-47, 1634.
[59] Newcomer, Tr. 1470-71, 1633; Korzeniewski, Tr. 1602-05.
[60] Korzeniewski, Tr. 635-39, 1623-24.

State economist, for its conclusion that the Landfill expansion will adversely impact real estate values and tax revenues by approximately $41 million. Dr. Ready's conclusion was based upon a statistical model which he developed to determine whether the Landfill expansion had an effect on real estate within a 3200 meter radius of the Landfill. He chose a host of input factors which he believed have an effect on the sales price of a home. Most of the data quantifying the inputs came from a database maintained by the Berks County Assessment Office. Dr. Ready then performed a double regression analysis which concluded that the Landfill expansion did have an impact on property values. He then translated that impact into possible lost tax revenues to the school districts and municipalities in proximity to PCL.

Dr. Ready's analysis is not convincing for several reasons. First, Dr. Ready admitted that he himself has no expertise in what factors make a home sell for more and what factors have no effect on sales price. Rather, he relied on a literature review and his own personal experience as a home buyer to choose what factors to use as inputs in his formula. The outcome of the analysis is completely dependent upon the inputs into the formula. Mr. Haring, a real estate professional and PCL's expert, testified that some of the factors used by Dr. Ready do impact sales price, but several factors in his analysis do not affect sales price and the inclusion of an inappropriate factor could have a significant impact on the outcome of the equation.

Second, Dr. Ready had no personal knowledge of the accuracy of the database maintained by the assessment office. He did not "ground true" the data by double-checking it against actual conditions. Mr. Haring testified that the assessment office data is widely known to contain inaccurate or unupdated information and is therefore not a reliable source of information, by itself, for making a determination about sales prices of particular homes. Therefore, some of

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[61] Newcomer, Tr. 1470-71; Benvin, Tr. 376, 386.

Dr. Ready's base data may have been correct, but some data was very likely not accurate.

Third, Dr. Ready's testimony was based on the assumption that the existing Landfill would have no adverse impact on real estate values, but the devaluation of surrounding real estate would be caused solely by the expansion of the Landfill.[62] This assumption appears to be counterintuitive; if the existence of the Landfill for many years has had no impact on real estate values, it is difficult to understand why the expansion of the Landfill would have such an extreme adverse impact as testified to by Dr Ready.

Finally, Dr. Ready admitted that his analysis was a "prediction" of what would happen to home sale prices if the expansion project went forward. He therefore predicted that homes in Birdsboro, Amity, Union and Robeson would all sell for less than their assessed values if the Landfill remained in operation and expanded. Yet, when compared to actual home sales in those areas, the vast majority of the homes sold for more than their assessed values.[63]

We also find Dr. Ready's estimate of lost tax revenue to be unreliable and unrealistic. Property taxes will not change in Berks County until a reassessment is done. There is no evidence in the record that Berks County will be reassessing property anytime in the near future. Therefore, a calculation of present lost property tax revenues is both speculative and contrary to common sense.

The Board also heard the testimony of Mr. Douglas Haring, a certified real estate appraiser with thirty years of experience in the Berks County real estate market. Although he did not attempt to place a value on properties in the 3200 meter radius studied by Dr. Ready, he did study the real estate market within the vicinity of the Landfill. Based on his analysis he concluded that there was nothing in the nature of the market which would indicate that the

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[62] Tr. 475-77, 555-60.

Landfill is adversely impacting home sale prices.[64] Lastly, Dr. Haring reviewed two sales of homes in the South Baumstown Road Area near the landfill to a third party other than PCL. In both cases, the houses were on the market for only a few days and were sold for more than asking price. In both sales the property appreciation was consistent with the Berks County average.[65]

By comparing house sale, demographic, employment and other economic data from the area surrounding the Landfill to data from Berks County as a whole and to other similar communities in the County that do not have landfills nearby, Mr. Haring concluded that there was no significant difference between the housing market in the radius surrounding the Landfill and other markets. Accordingly, he concluded that the Landfill was not having a negative impact on real estate values.

We find the testimony of Mr. Haring to be credible and convincing. He has a great deal of expertise in the area of real estate appraisal and valuation, specifically relating to Berks County markets. Although his method of analysis did not focus on specific values of homes as did Dr. Ready's, his analysis of the market itself and the lack of influence by the Landfill convinces us that property devaluation is not a significant harm posed by the Landfill expansion.

Traffic

The County argues that the Department's assessment of harm caused by trash trucks was too limited because it only considered harms related to the haul route from U.S. Route 422 and State Route 82.

It is not true that the Department only considered the harm caused by truck traffic on the

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[63] Tr. 562-68.
[64] We deny the County's renewed motion to strike Mr. Haring's testimony.
[65] Tr. 799-803.

haul route. Crystal Newcomer and others testified that in the public comment period citizens raised concerns about landfill trucks using other local roads in Exeter Township.[66] Mr. Benvin testified that members of the Department investigated these concerns in their field visits to the area. PCL put in place written approach route guidelines for its truck drivers and also included a provision in the Host Community Agreement that PCL trucks would not use township roads, but would restrict travel to state highway routes and/or interstate highways.[67] Accordingly, the Department concluded that the harm created by traffic was significantly mitigated.[68] The County has not explained what other factors the Department should have considered, has not provided evidence that the mitigation measures put in place are ineffective or illusory, and has therefore failed in its burden of proving that the Department did not properly consider traffic impacts in the harms/benefits analysis.

Odor

The County next contends that odors remain a "significant harm" at the Landfill. This position is based primarily upon PCL's compliance history.[69] Although odors are clearly an issue of concern among some members of the community, we do not find an error in the Department's consideration of odor as a harm related to the expansion as mitigated by PCL's odor control program. Pioneer Crossing clearly had an unacceptable odor problem in the past. This Board is well aware of those problems having adjudicated the Department's assessment of a civil penalty related to those odor violations.[70] Mr. Benvin and other Department witnesses explained in great

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[66] Tr. 1639.

[67] Ex. PCL-3, ¶ 5.

[68] Exs. BC-41; PCL-18.

[69] The County also supports this argument with factual averments concerning a contractor employed by PCL, which were not put into evidence at the hearing. Accordingly, we have not considered those statements in reaching our conclusion.

[70] *See FR&S, Inc. v. DEP*, 1999 EHB 241, *affirmed,* 761 A.2d 634 (Pa. Cmwlth. 2000).

detail that they considered that past history. However, the capping and gas management problem that generated the odor issue had been installed and was operating properly. David Brown testified at great length about the operational improvements that had been put in place to control odors including an improved gas management system, compacting the working face, procedures for odorous loads, reducing the volume of sewage sludge and excluding customers with especially objectionable sludge, improved masking agents and use of a neutralizing agent, sodium hypochlorite. Mr. Brown and others also described the additional monitoring that had been put in place to respond to odor incidents including perimeter surveys, and a hot line phone number for residents to use to report odors.

Mr. Mascaro also testified about the cultural changes at Pioneer Crossing which began with his epiphany that compliance with regulations had to be a top priority in order to remain in business. Accordingly, he created a Compliance Department to monitor the Landfill's adherence to odor and other regulations of the Department. Mr. Benvin, through his personal interaction with Mr. Mascaro, felt this change in attitude was genuine and was thereby persuaded that PCL would continue to practice responsible environmental compliance.

Finally, Mr. Maiolie and others testified that in their opinion these odor control measures were effective and controlling odors at the Landfill. Although it is not possible to completely stop odors from migrating off-site, PCL has response measures in place to address odor issues quickly.

The County presented no credible evidence to challenge the effectiveness of PCL's odor control plan other than a few complaints from persons living immediately adjacent to the Landfill.[71] There is no evidence that odors are a "significant" harm from a regulatory standpoint

[71] See testimony of Deborah Moyer, Tr. 1705-31 and Carolyn Brunschwyler, Tr. 1734-

at Pioneer Crossing. Although clearly there are nearby residents who are troubled by odors which they believe emanate from the Landfill, the Department has not verified that these conditions rise to the level of a violation of the odor regulations.[72]

The County proffered no expert testimony to support a claim that the gas management system and operational controls at the Landfill are not well-designed, are not used properly or are otherwise not reasonably effective. Although there was a great deal of innuendo concerning the reduced tonnage accepted by PCL during the permit review process, there was no specific testimony about the effect of the tonnage reduction on the engineering analysis of the odor controls.[73]

Further, the Department had good reason to conclude that the operational and cultural problems that existed at Pioneer Crossing in the late 1990s have been rectified to the satisfaction of the Department.[74] We have no basis to reach a different conclusion.

Benefits

Act 101 Fees

The Department determined that a Host Municipality Benefit Fee to Exeter Township constituted a known social/economic benefit. The fee is a payment per ton, ranging from $1.50 per ton for the first five years and increasing every five years until reaching $2.25 per ton. This fee is prepaid annually and is in excess of the statutory requirement of $1.00 per ton. This fee

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[72] The County persists in referring to odors reported by citizens as "malodors." However, that term is defined by the Department's regulations: "An odor which causes annoyance or discomfort to the public **and** which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1 (emphasis added). *See also DEP v. Franklin Plastics Corp.,* 1996 EHB 645.

[73] The County included some factual statements concerning a contractor employed by PCL relative to odor control which were not put into evidence at the hearing. Of course we have ignored them, and they are not part of our consideration.

was also memorialized in the Host Agreement between Exeter Township and PCL. The Department determined that the duration of the benefit was for as long as PCL accepts waste, estimated to be eighteen years. Additionally, PCL must pay a $2.00/ton recycling fee and an environmental stewardship fee of $0.25 per ton to the Commonwealth as required by Act 101,[75] and the Environmental Stewardship and Watershed Protection Act,[76] respectively. The Department considered both of these fees to constitute a known benefit.

The County contends that none of these fees should have been considered as benefits by the Department.[77] Specifically, it is the County's view that because Act 101 has a sunset provision for the $2.00 per ton recycling fee, money generated after that date is "without merit and speculative." Further, the County contends that the money generated from the fees is not all applied locally, is mandated by law rather than voluntary, and that because PCL passes the fees onto its customers, it is a "cost of doing business" and not properly considered a benefit. None of these arguments is persuasive.

First, we are unpersuaded by the County's contention that the sunset provision for the Act 101 recycling fee makes the benefit derived from that fee speculative. Section 701 of Act 101 provides that "no fee shall be imposed under this section on and after January 1, 2009."[78] There is little doubt that PCL will continue to operate beyond 2009.[79] However, PCL has agreed to pay the fee for the life of the expansion permit and the fee is imposed as a condition of that permit.

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[74] Benvin, Tr. 1670-71, 1678-80.

[75] Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.1301.

[76] 27 Pa. C.S. § 6112.

[77] In July, 2002, after the expansion permit was issued, the General Assembly passed Act 90. This legislation requires a fee of $4.00. The Department did not consider this fee in the harms/benefits analysis, and as explained below, it is also not part of our consideration.

[78] 53 P.S. § 4000.701.

[79] Mascaro, Tr. 1140-43.

Accordingly, the Department has a basis for requiring the payment of those funds beyond the sunset date of the Act regardless of whether or not the recycling fee provision is legislatively renewed or not.[80]

Next, we are not persuaded that the Department improperly considered the fees a benefit because the money is applied to statewide projects. First, the largest fee is the host fee. That fee is payable to Exeter Township both by the terms of Act 101 and also by the terms of the Host Agreement. Therefore it is clear that that money is being applied to the local area. Second, there is no provision of the harms/benefits regulations which mandates that the Department only consider purely local benefits. In fact, there was no testimony which explained in what manner the fees payable to the Commonwealth are disbursed and therefore it is entirely possible that at least some of that revenue will fund programs in Berks County and its municipalities.

Similarly, there is no requirement that a benefit be strictly voluntary to be considered a benefit or that it is less of a benefit if the operator passes on some of the expense to customers. Any expense incurred by a business is in some manner passed onto customers. The fact is that the Landfill will provide the benefit to the people served by the government that accepts the proceeds; that benefit would not be possible if the Landfill ceased to operate.

The fact that the fees are mandated by law does not impact the quality of the benefit. The harms/benefits analysis does not instruct the Department to only consider those benefits voluntarily offered by the applicant. Act 101, which is to be read *in pari materia*, with the Solid Waste Management Act,[81] defines the host fee as a "benefit fee."[82] Moreover, PCL has agreed to

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[80] In fact, it appears that during the time that PCL's expansion application was under review, the recycling fee from the 1988 legislation had expired in 1999, and was not reenacted until December 2002.

[81] 53 P.S. § 4000.104(b).

[82] 53 P.S. §§ 4000.102(b)(7); 4000.1301.

pay a host fee in excess of the $1.00 per ton required by the statute.

Accordingly, we find no abuse of discretion in the Department's consideration of the host municipality and other fees as benefits in its harms/benefits analysis.

Proximity Impact Fee to Birdsboro

The County takes the position that the impact fee paid to Birdsboro is unenforceable and was improperly considered a benefit rather than the mitigation of a harm by the Department. The County further contends that even if the impact fee is a benefit, it does not offset the harms caused by the expansion.

First, the impact fee is enforceable. The harms/benefits analysis, including the benefits which PCL committed to provide are incorporated into the permit modification and failure to provide the benefits is enforceable by the Department. Similarly, the fact that there is no explicit contract between Birdsboro and PCL establishing the impact fee does not make the benefit illusory or not a benefit. In fact, Birdsboro has been accepting the impact fee money.[83]

Second, we see no basis for finding error in the Department's definition of the fee as a benefit rather than the mitigation of a harm. Although the introduction of the fee was prompted by the visual impact of the Landfill, the fee itself does not in any way change the physical appearance of the Landfill to the residents of Birdsboro and is therefore not a mitigation. Moreover, the Department's treatment of the fee as a benefit is consistent with its treatment of other fees paid by PCL.

Additional Waste Services Benefits to Birdsboro, Robeson, Amity and Union

The County claims that the additional waste services offered to the municipalities

[83] Mascaro, Tr. 1184-85. Mr. Mascaro testified that in the event that did not accept the impact fee, the fee would go to a fund that would be disbursed to Birdsboro's infrastructure. Tr. 1173-74.

surrounding the Landfill were improperly considered by the Department because the benefit was not quantified in a dollar amount and because the benefit was not enforceable by contract.

As with the impact fee to Birdsboro, the lack of a contract between PCL and the municipalities is immaterial because the provision of the services is enforceable by the Department through the permit.[84] Furthermore, there is no requirement in the harms/benefits regulation that the benefits be quantified in a dollar amount.

Finally, as we have explained throughout this opinion, we find no basis for the conclusion that the benefits of this project are outweighed by harms. The Department considered many factors other than the proximity impact fee to Birdsboro or the additional waste service benefits to the municipalities in arriving at its conclusion, and we have found no basis upon which to disturb its analysis.

Local Need and Other Miscellaneous Issues

There are several other issues that are discussed in the briefs by the various parties which we need not address in this adjudication. The County claims that no needs assessment was submitted or considered by the Department. It cites no authority for such a requirement, and the County filed no objection with the Department when the Department was considering the application. This is somewhat understandable since PCL's facility was designated as an authorized facility in the Berks County plan for municipal waste facilities at the time that plan was approved by the Department and is also an authorized facility under the Bucks County Plan. While the Department's harms/benefits regulation authorizes the applicant to include information about the need for the facility, but does not require such information. At the hearing PCL

[84] We might also observe that our review of the record did not provide testimony to support the contention that there is no contract between PCL and the municipalities for these waste services.

demonstrated a local need for the facility with evidence that it had ten-year disposal contracts with several Berks County communities, that it disposes of waste from 25 Berks County municipalities, and that the Landfill is utilized by 19 private Berks County haulers. Accordingly, any absence of a formal needs assessment before the Department does not constitute a violation of Section 501 of Act 101, the Solid waste Management Act or the Department's regulations thereunder.

PCL urges us to consider the payment of Act 90 fees and the closure of the Western Berks Landfill as part of the harms/benefits analysis even though those issues were either not considered by the Department, or were rejected as speculative based on the information the Department had at the time. Since we have concluded that the Department did not abuse its discretion in its harms/benefits analysis and consideration of the PCL permit application, there is no need to substitute our discretion for the Department's by considering other matters.

The County also failed to make legal arguments on several issues upon which it submitted proposed findings of fact. We have held that merely proposing findings of fact without developing any argument is not sufficient to preserve those issues for our review. Accordingly, we have not reached objections relating to the aesthetic impact of the Landfill, civic pride, the aesthetic impact of litter fences or the compliance history of PCL's related entities, or the absence of an approval for the Ingenco project[85] that the Department considered as a benefit in its harms/benefits analysis.[86]

Were therefore make the following:

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[85] Ingenco is a proposal for the beneficial use of landfill gas.

[86] We have discussed the aesthetic impact of the Landfill and Ingenco in great detail in our companion adjudication *Exeter Citizens' Action Committee v. DEP,* EHB Docket No. 2002-156-MG (Adjudication issued March 31, 2005).

CONCLUSIONS OF LAW

1. Our review is *de novo*. *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

2. In this third-party appeal of a permitting action by the Department, Berks County, the Appellant, bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Department may issue a major modification to expand a landfill where the applicant demonstrates that the benefits to the public of the expansion clearly outweigh the known or potential harms associated with the expansion. 25 Pa. Code § 271.127(c); *Browning-Ferris Industries v. Department of Environmental Protection*, 819 A. 2d 148 (Pa. Cmwlth. 2003).

4. The Department properly allowed the permittee to submit additional information after the Department made a preliminary finding that the harms associated with the Landfill expansion did not outweigh the benefits.

5. Although Section 127.217(g) requires the Department to complete the environmental assessment before commencing the technical review, the Appellant failed to demonstrate that its failure to do so had any adverse effect on the Appellant. *Shippensburg Township P.L.A.N v. DEP,* EHB Docket No. 2004-099-L (Opinion issued July 14, 2004).

6. The Department adequately considered zoning and land use as required by Acts 67/68, and its reliance on the Host Agreement as resolving the dispute under the township's zoning ordinance was proper.

7. The County failed to prove that the Department's consideration of property devaluation, traffic, or odor was inadequate.

8. The Department is not precluded from considering fees required by Act 101 and other statutes as benefits in the harms/benefits analysis.

9. The County failed to prove that the Department's consideration of the proximity impact fee to Birdsboro or additional waste services provided to Birdsboro and other municipalities was inadequate.

10. The County has failed to prove that the Department abused its discretion by concluding that the benefits of the expansion of the Pioneer Crossing expansion outweigh the harms. 25 Pa. Code § 271.127(c).

11. The permit modification application submitted by PCL complied with the requirements of the Solid Waste Management Act and the Department's regulations thereunder, as well as all other applicable regulatory requirements.

12. The Department's approval of the permit modification application was consistent with the requirements of the Solid Waste Management Act, Act 101 and the Department's regulations, including the harms/benefits regulation at 25 Pa. Code Chapters 271 and 273.

13. The Department's approval of the permit modification application was reasonable, appropriate and in compliance with all legal requirements.

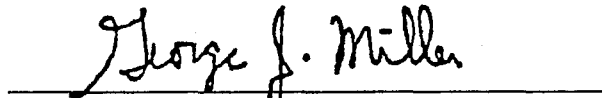
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF BERKS	:
	:
v.	:EHB Docket No. 2002-155-MG
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	:

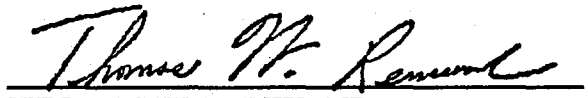
ORDER

AND NOW, this 31st day of March, 2005, the appeal of the Count of Berks is **DISMISSED.**

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 31, 2005

Chief Judge and Chairman Michael L. Krancer and Administrative Law Judge Bernard A. Labuskes, Jr. did not participate in the Majority Opinion; both concurring Opinions are attached.

EHB Docket No. 2002-155-MG

c: **DEP Bureau of Litigation**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF BERKS	:	
	:	
v.	:	**EHB Docket No. 2002-155-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and F.R.&S., INC. and PIONEER CROSSING LANDFILL	:	

OPINION OF BERNARD A. LABUSKES, JR.
CONCURRING IN THE RESULT

By Bernard A. Labuskes, Jr., Administrative Law Judge

I concur with the majority's conclusion that the Department did not err by commencing the technical review of the application before it completed the environmental assessment. Indeed, I think that the supposed distinction between the two reviews is largely illusory. I also concur that the Department did not err by allowing PCL to submit additional information in support of its application following the pre-denial letter.

I also agree that the Appellant has failed in this appeal to show that the Department erred in conducting the review required by Act 67/68. I hesitate to endorse a rather casual approach that allows the Department to satisfy its newfound obligations under Act 67/68 by simply "considering" local issues and relying on local land use ordinances only if it feels like it. I agree, however, that no error was shown to have occurred here.

I split company with the majority on the harms/benefits test and its application in this case. The validity of the test is currently under consideration by the Pennsylvania Supreme Court. I have previously expounded on my difficulties with the test and I will try not to unnecessarily repeat myself here, except to say that I continue to be amazed that we have undergone such a profound

paradigm shift in the way that business is regulated in the Commonwealth without legislative approval. The key focal point of governmental oversight has changed with very little fanfare. Instead of the governmental agency being authorized to regulate the extent of harm to the environment that will be tolerated by an otherwise lawful business, government is now empowered to make the final business decision as to whether a business will be allowed to exist or expand based upon the *government's* balancing of the business's "social," "economic," and "environmental" "harms" and "benefits." I see this as nothing less than an ill advised step away from a free enterprise system, and I am troubled by it, not because I am a fan or an opponent of landfills, but because if this step can be taken by way of regulation against the solid waste industry, there is no reason why it cannot be taken with respect to any other industry. It is a profoundly different way at looking at the role of government, and it has all been accomplished by a regulation instead of by statute.

Putting aside, as I must, my fundamental disagreement with the new regulatory test, it is not entirely clear to me exactly what test is to be applied. As I originally read the regulation, benefits must "clearly outweigh" harms. The adverb "clearly" is immediately next to and would seem to modify the verb "outweigh." In other words, in cases where benefits and harms are too close to call, the permit must be denied. The regulation does *not* say that the applicant shall "clearly demonstrate" that benefits outweigh harms. Yet, in *Browning-Ferris Industries, Inc. v. Department of Environmental Protection*, 819 A.2d 148 (Pa. Cmwlth 2003), (appeal pending), the Commonwealth Court held that

> [t]he standard imposed by 25 Pa. Code 271.127(c) may be met where the benefits to the public outweigh the harms by a mere scintilla so long as the applicant proves, with the requisite high degree of certainty, that those benefits do outweigh the harms in the final balancing process.

819 A.2d at 157. In other words, if we assume that "the requisite high degree of certainty" is a clear showing, the word "clearly" now appears to modify the applicant's standard of proof, not the relative weight of the harms and benefits. Where benefits outweigh harms by the slightest of margins--a "scintilla"--the permit must be issued. I am not sure that applying these two iterations of the test will make any difference in practice, but there is no doubt in my mind that the situation as it currently stands is unsettled. I am not satisfied that the Department knows which standard it should be using, or which standard is adopted by the majority's opinion.

I have previously expressed my concern that the harms/benefits test is too vague because it relies upon too many undefined terms. That concern is only heightened further by the formulation of the test that allows a permit to be issued where the benefits outweigh the harms by a "mere scintilla." I cannot believe that the Environmental Quality Board intended such a result, but I must concede that appears to be the current state of the law.

To be clear, I am neither in favor of nor opposed to tightening the Department's discretion in the final analysis in reviewing landfill permits. I simply believe that the harms/benefits test compels the Department to ask all the wrong questions. The view has been expressed that eliminating the harms/benefits test would force the Department to issue unpopular landfill permits when all of the "technical" requirements in the regulations are met. I disagree that eliminating the harms/benefits test would overly constrict the Department discretion. First, as anyone who has gone through the landfill permitting process knows, there are myriad discretionary decisions and judgment calls to be made along the way in applying the so-called technical regulatory requirements. Second, under 25 Pa. Code § 271.127(b), the Department must ensure that the applicant's mitigation measures "adequately protect" the environment and the public health, safety and welfare. This is the question that the Department should be asking,

and it allows for plenty of discretion.

This point is illustrated by the Department's evaluation of home values in this case. In my view, the Department should have evaluated whether the applicant's efforts to mitigate, say, odors associated with the landfill expansion and volume increase will adequately protect the environment and the public, including those members of the public who live near the landfill. 25 Pa. Code § 271.127(b). Instead, we find ourselves engaged in a misguided effort to evaluate arcane testimony from real estate experts about home values. I would not blame the Department at all if it felt uncomfortable in its new role as a real estate appraiser.[87]

A decent argument can be made that the harms/benefits test in the long run will actually *reduce* the Department's discretion. Landfills are big operations that provide enormous monetary benefits. As the majority points out, those benefits are very easy to measure. On the other hand, environmental harms are largely intangible, although new analyses are slowly emerging to try to attempt to quantify them in dollar terms. In the meantime, cases such as this one illustrate that, where vast amounts of money are involved, it may be very difficult to prove over the course of the entire administrative review and appeal process that harms can ever outweigh those vast benefits.[88]

Given the current state of the law, I believe that the majority has done a yeoman's job of deftly tiptoeing around the 800-pound gorilla sitting in the parlor. Nevertheless, I would like to

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[87] My concerns do not stop there when it comes to the real estate devaluation issue. The record in this case is insufficient to support the assumption that property devaluation in the area of the landfill expansion and volume increase will occur. If we do assume that devaluation occurs, I am not convinced that it is properly considered as within the scope of the regulations. If it is acceptable to consider it, I am not convinced that a buy-out program is sufficient "mitigation." People should not be required to leave their homes to realize their loss, if there is such a loss.

[88] *Browning-Ferris, supra*, is another case in point. There, the Commonwealth Court held that the increase in the net present value of fees resulting from a volume increase of thousands of tons of waste a week at a large state-of-the-art landfill clearly justified approval of the increase. Only time will tell whether, under this view, the harms of a volume increase can under any circumstances be shown to

refrain from endorsing many aspects of the Department's application of the harms/benefits test in this appeal. Without attempting a comprehensive list, I will outline a few examples. First, I do not believe the record supports a finding that the benefits of the volume increase, as distinct from the expansion, outweigh the harms. I see no evidence of any harm, but I also see no distinct benefits. Nevertheless, under the "mere scintilla" test, I see no basis for a reversal or a remand.

I was concerned by the Department's revelation in its brief that the Department based its decision in part on the "psychological effects" of the landfill. I am also concerned that the Department did not appear to evaluate valuable waste disposal capacity as a major benefit. Considering the harms and benefits of a proposed landfill without regard to the fact that it fulfills the basic societal need for waste disposal is like considering the harms and benefits of a proposed hospital without considering the fact that it treats sick people.

It is not clear to me that the Department may consider *potential* benefits. The regulations specifically refer to known and potential harms, but they do not use those adjectives when it comes to benefits. In any event, the unrealized plans for a park and gas generation facility in this appeal strike me as too speculative to be deserving of any consideration in the harms/benefits comparison.

The majority points out that the Department would have denied this permit modification if the applicant had not paid more money to a nearby municipality and lowered the *proposed* height of the expansion. Both determinations are problematic. If the applicant had proposed an increase in height of 200 feet but reduced it to 15 feet, would that have been even more of a mitigating factor, or a "benefit"? And why are important decisions about solid waste facilities turning on how much money the applicant is willing to "voluntarily" contribute over and above statutorily-mandated fees?

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outweigh such an economic windfall.

None of the operative terms that are being used here have been adequately defined and I continue to believe that attempting to define the terms on a case-by-case basis as we go along is fraught with unacceptable uncertainty. For example, it is certainly not obvious to me what constitutes a "harm." One person's harm is another person's benefit. For example, back-up alarms on heavy equipment are designed to protect workers and others who may be present in the sometimes chaotic atmosphere in which heavy equipment operates. Such alarms would seem to be a "benefit" to such workers, even as they may at once by irritating to persons who live close to the landfill. Accordingly, I am hesitant to conclude that the "noise" created by such alarms is fairly construed as a "harm," and I hope that the "mitigation" of reducing that "noise" does not result in injury or worse on this site.

This is not a complete list of my concerns. Despite these issues, I believe that the majority, and for that matter the Department, has done the best job that it could under the difficult circumstances presented, and I see no point to reversing or remanding. I simply do not wish to be on record as endorsing all the many assumptions that have been made in this appeal regarding the application of the harms/benefits test.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 31, 2005

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF BERKS	:	
	:	
v.	:	**EHB Docket No. 2002-155-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and F.R.&S., INC. and PIONEER CROSSING LANDFILL	:	

CONCURRING OPINION OF
CHIEF JUDGE AND CHAIRMAN, MICHAEL L. KRANCER

By Michael L. Krancer, Chief Judge and Chairman

I concur in the majority's upholding of the permit in this case. I write separately, however, to say that after now having seen an attempt to apply the harms/benefits analysis in practice, I am completely perplexed about how the test was applied in this case and how it is supposed to be applied in the future.

I agree with Judge Labuskes that even to define something as a harm or a benefit, especially social or economic harms or benefits in this context, is a hopelessly subjective task which would vary radically depending on from whose frame of reference the question is being viewed. A form of this problem is seen from the divergent opinions which emerged from the Commonwealth Court in *Tri-County Industries, Inc. v. DEP*, 818 A.2d 574 (Pa. Cmwlth. 2003), *Petition for Allowance of Appeal granted*, 835 A.2d 706 (Pa. 2003). There the majority and dissenting Judge Friedman differed on whether establishing schools and making charitable contributions should be included among the social and economic benefits to be considered. *Id.* at 584-86 (Friedman, J., dissenting). However, beyond that, even if the government regulators

could come up with an objective standard to identify and differentiate harms and benefits, the application of the comparison by the regulators is impossible. That is because the supposed harms and benefits are not objectively quantifiable and are not comparable to each other on any equational basis. This case proves it.

The majority speaks at length, and correctly so, *ante*, at 43-45, about how, among the various benefits, some are easy to quantify and others are not. Some are too "intangible" to measure, others are not. Moreover, while some supposed benefits might theoretically be expressed in dollar amounts, others cannot. Some of the "benefits" are financial while others are aesthetic. Aesthetics cannot be measured at all in any consistent way. To one person the Mona Lisa is a timeless masterpiece, to another it was not worth the trip.

The individual harms and benefits which are supposedly identified in this or any case cannot be compared to one another by any equational system. Being so diverse and so subjective, the harms and benefits lack any features which would lend themselves to being suitable for objective comparison to each other by the government. There could be no reasonable way for the government to compare harms to benefits with any sort of objective unit or standard of measurement, i.e., a "metric."[89] In fact, as we already noted, there would be no reasonable way of expressing some of the supposed benefits and/or harms in any objective manner at all. As such, these things, these "harms" and "benefits," cannot be weighed relative to each other in an objective manner. Never in this case or in any case has any party suggested that there is an objective method by which the government compares harms to benefits and which yields a bottom-line outcome expressed in terms of "who won", or which has outweighed the

[89] Students of economics, as I once was, would be familiar in this regard to the concept of "utils." That was the imaginary unit of measurement of the overall "utility" of economic activities. Every student realized, though, that the "utils" metric itself was imaginary.

other, and which is capable of yielding the same result upon repetition of the exercise regardless of which government official performs it.

Given the admitted impossibility of quantifying some of the supposed harms and supposed benefits at all and the inability to compare them on the same standard, apples to apples so to speak, the harms/benefits analysis then calls upon government officials to apply a specific metric: the benefits have to "clearly outweigh" the harms. To make matters even worse, the Commonwealth Court has said that the government need find only that the benefits exceed the harms by a "scintilla". *Browning-Ferris Industries, Inc. v. Department of Environmental Protection*, 819 A.2d 148, 154 (Pa. Cmwlth. 2003) (Petition for Allowance of Appeal filed). Scintilla is Latin for "spark" and it has a quite familiar definition and use in English, especially in legal parlance. It means a very small margin or amount, "[a] small trace or barely perceptible amount of something", "a minute amount, an iota or trace", or a "tiny or scarcely detectable amount."[90] So, the regulation charges the government officials with measuring this subjective, unmeasurable, unquantifiable set of harms and benefits and then comparing them, despite their being unable to be compared to one another, to a standard so precise as to require distinguishing and defining just a spark, a "small trace or barely perceptible amount of something," between the two. It is difficult to imagine any exercise by government which could be more arbitrary.

The problem is made even more pronounced because we now recognize that the harms/benefits regulation has no spatial boundaries. *See ante*, 55-58. I do agree with the majority's statement, *ante*, p. 55, that the regulation does not mandate that DEP consider only purely local benefits. But that, again, shows how impossible the application of the harms/benefits analysis is. If truck traffic were wearing out the roads in Birdsboro and driving

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[90] Merriam Webster Dictionary of the Law, 1996; The American Heritage Dictionary of

its citizens to distraction, the government regulators would have to view that against the benefits the truck traffic creates for United Rubber Workers in Akron, Ohio who make tires, the Ohio economy, United Auto Workers in Detroit who make the trucks, the economy of Michigan, auto plant workers in Japan or Korea who may be making some of the trucks, and the economy of Japan or Korea or entire Pacific Rim for that matter. Even that scope of inquiries would be incomplete.

The majority's discussion of curbside pick-up of trash is paradigmatic of this failure of application of the harms/benefits analysis. Some people have just made a "judgment" that curbside pick-up is more beneficial than personal delivery. Who are these people and exactly how did they arrive at this "judgment?" Is this "judgment" shared by every single person and, if so, with reference to what other choices and what cost of curbside pickup? How was it determined that this "judgment" has supposedly been made? Are there individuals who do not subscribe to that "judgment" but have arrived at a contrary or modified one?" Even to ask these questions shows the problem. We are talking about opinion which is subjective itself. Some people have also made the "judgment" that they like vanilla ice cream better than chocolate. Of course, others have made the contrary judgment and have a contrary opinion. Even the supposed measurement of or statement of a "judgment", like people have made the judgment that they prefer curbside pick-up, is a subjective exercise as the multiple and conflicting pundits of polling data demonstrate during every election cycle.

Judgments based on subjective impressions and personal opinions are commonplace. Democratic elections are often based on subjective judgments and personal opinions. However, it is contrary to our basic system of law for a party's legal rights and/or liabilities to be dependent

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the English Language, 4th Ed., 2000; The WorldNet 2.0, Princeton University, 2000.

upon a government regulator's personal subjective judgments and opinions. The harms/benefits analysis does just that in practice.

So where does that leave us now after this attempted application by the government of the harms/benefits test in this case? We must really be talking about a harms/benefits analysis in which the government regulators are applying their personal subjective "judgment;" just like for curbside pickup which the majority mentions. That is just another way of saying that the standard is personal opinion, personal judgment or gut sense of the government officials involved in doing the work on the ground. But we are supposed to be a government of laws, not of men and women. Clearly, the "harms/benefits" analysis, as we see it today and looking into the future, is antithetical to that principle.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: March 31, 2005

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WILLIAM T. PHILLIPY IV
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EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
v.	:	**EHB Docket No. 2002-156-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	:	**Issued:** March 31, 2005

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal by a citizens group challenging the Department's approval of an expansion permit for a municipal waste landfill based on the appellant's claim that the Department incorrectly applied its environmental assessment provision requiring that the benefits of the proposed project clearly outweigh the project's known and potential harms. The appellant failed to demonstrate that the Department improperly considered benefits and the mitigation plans for various harms identified for the expansion. Accordingly, the Board finds that the Department's conclusion that the mitigated harms associated with the Landfill expansion were clearly outweighed by benefits to the public was reasonable and appropriate.

Background

This matter was commenced on June 28, 2002, with the filing of a notice of appeal by the Exeter Citizens' Action Committee (ECAC), which challenged the Department of Environmental Protection's May 30, 2002 approval of a major permit modification for the expansion of the Pioneer Crossing Landfill located in Exeter Township, Berks County. Specifically, the ECAC charged that the Department had improperly performed the "harms/benefits analysis" required by 25 Pa. Code § 271.127(c)[1], which requires an applicant for a major modification to demonstrate that the environmental harms associated with the modification are clearly outweighed by social, environmental or economic benefits to the public. Four days of hearing were held before the Honorable George J. Miller on December 9-12, 2003, which generated a transcript of 983 pages and 46 exhibits. The parties also filed post-hearing memoranda which included proposed findings of fact and conclusions of law.[2] After full consideration of these materials we make the following:

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[1] The validity of the regulation requiring this analysis was upheld by the Board in *Eagle Environmental II, L.P. v. DEP*, 2002 EHB 335, 362, subject to the Board's review on a case-by-case analysis of the Department's application of the regulation to avoid the risk of any arbitrary action. The Commonwealth Court affirmed *sub nom. Tri-County Industries, Inc. v. Department of Environmental Protection*, 818 A.2d 574 (Cmwlth. 2003).

[2] The final post-hearing brief in this matter was filed with the Board on June 28, 2004. By order dated July 20, 2004, this appeal was consolidated for purposes of adjudication with a companion case, *County of Berks v. DEP,* EHB Docket No. 2002-155-MG. Hearings in that appeal were held in August 2004, and briefing was completed in January 2005.

FINDINGS OF FACT[3]

THE PARTIES

1. The Pennsylvania Department of Environmental Protection (Department) is the agency of the Commonwealth authorized to administer and enforce the Solid Waste Management Act[4]; the Municipal Waste Planning, Recycling, and Waste Reduction Act[5]; and the rules and regulations promulgated thereunder.

2. FR&S, Inc. is a Pennsylvania corporation and the owner, operator and permittee of the Pioneer Crossing Landfill in Exeter Township, Berks County, Pennsylvania (hereinafter "PCL").

3. Exeter Citizens' Action Committee (ECAC or Appellant) is a non-profit organization. It is made up of a group of individuals who live in the Exeter Township community who are concerned about the health, welfare and safety of the citizens of Exeter Township. (Tr. 201)

WITNESSES

4. Deborah Moyer is the president of the ECAC. She lives a quarter of a mile east of the Pioneer Crossing Landfill. As discussed in more detail below, she has lodged many complaints about the noise, odor and dust coming from the Landfill to both local authorities and the Department. She has become frustrated over time because she feels that the Department is no longer responsive concerning her complaints about odor and

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[3] The transcript is designated as "Tr. __"; the Appellant's exhibits as "Ex. A-_"; and Pioneer Crossing's exhibits as "Ex. PCL-_." The Department did not submit any exhibits independently.

[4] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 (Solid Waste Management Act).

[5] Act of July 28, 1988, P.L. 556, 53 P.S. §§ 4000.101- 4000.1904 (Act 101).

she believes that the Township can not respond to her complaints about noise. (Tr. 201, 204, 210)

5. Michelle Kircher was formerly a supervisor for Exeter Township. She also served as a host municipal inspector from 1996-2000. During that period she inspected the Pioneer Crossing Landfill. She received training and was certified by the Department. She testified at the hearing in her role as a concerned citizen. She has complained of odors from the Landfill in the past and also recently. (Tr. 241-45, 327)

6. Dona Starr is a student and concerned citizen. Although she serves as an Exeter Township Supervisor, she was not testifying in that capacity. She, too, has recently smelled odors from the landfill. (Tr. 386-94, 403)

7. Robert Benvin is a Facilities Manager with the Department. His job responsibilities include supervising the technical staff that reviews waste management permits. Although now retired, he was the Department manager who reviewed the Pioneer Crossing Landfill expansion permit application, including the "harms/benefits analysis." (Tr. 8-14)

8. David Brown is the Director of Engineering for FR&S, Inc. and the J.P. Mascaro and Sons related companies. He oversees the permitting and management of the Pioneer Crossing Landfill. He holds degrees in civil engineering and was accepted by the Board as an expert in landfill design, development and operation. (Tr. 766-68)

9. David Brown oversaw the engineering design of the Pioneer Crossing expansion permit application. He also responded to the technical concerns raised by the Department during the permitting process. (Brown, Tr. 770)

10. Pasquale N. Mascaro is the President and sole shareholder of FR&S, Inc. doing business as the Pioneer Crossing Landfill. (Tr. 457-61)

11. Mike Maiolie is an operations supervisor in the Department's waste management program. He is responsible for landfill inspections, complaint investigation and training of staff. He has held that position since 1988. PCL is in the territory that he is responsible for. (Tr. 690)

12. Crystal Newcomer is an engineering supervisor in the Department's waste management program. She has been with the Department for twenty years. She was responsible for compiling and analyzing the multitude of public comments which were received by the Department concerning the Pioneer Crossing expansion. (Tr. 967, 969-71; Ex. PCL-11)

THE PROCEDURAL HISTORY OF THE HARMS/BENEFITS ASSESSMENT FOR THE PIONEER CROSSING LANDFILL

13. On July 13, 2000, the Department received an application for a major permit modification to expand the Pioneer Crossing Landfill because it was nearing full capacity. The request was to occur to the north and east of the existing landfill, encompassing 67 acres and an elevation increase of 89 feet. As explained in more detail below, the application was subsequently revised to decrease the increase in elevation to 15 feet. The expansion application also called for an increase in average daily volume from 1000 tons per day to 1550 tons per day, and a maximum daily volume increase from 1600 tons per day to 1975 tons per day. (Ex. PCL-1; Mascaro, Tr. 464-67)

14. Pioneer Crossing is a relatively small, regional landfill located in Exeter Township, Berks County which has operated under Permit No. 100346 since 1990. (Mascaro, Tr. 459-61, 570, 613; Ex. PCL-2 at Tab C)

15. The vast majority of the waste received by Pioneer Crossing Landfill is local or regional waste. Only a small percentage is out-of-state waste. (Mascaro, Tr. 672)

16. On October 9, 2001, the Department prepared a preliminary harms/benefits analysis and requested further information from PCL. (Mascaro, Tr. 509-23; Ex. PCL-12)

17. PCL thereafter submitted to the Department information relating to the harms and benefits related to the expansion of the landfill. (Ex. PCL-13; Benvin, Tr. 106; Mascaro, Tr. 510)

18. After several exchanges of information between PCL and the Department, the Department concluded, by letter dated January 24, 2002, that the harms were not outweighed by the benefits. But the Department provided PCL with an opportunity to submit further information in support of its application because several issues had come to light that were not raised in the Department's initial October 2001 preliminary analysis. (Exs. PCL-14; PCL-16; A-1; Benvin, Tr. 106, 109-110, 196-97; Mascaro, Tr. 513-20)

19. Thereafter, PCL submitted more information addressing the Department's comments and amending their original submittal. Specifically, PCL reduced the height increase of the landfill to reduce the visual impact, further mitigated noise impact by eliminating the back-up alarms on yellow landfill equipment, submitted more specific information concerning the beneficial gas-use project known as Ingenco, and supplemented its litter control plan. PCL additionally proposed additional social and

economic benefits by providing a proximity impact fee to the Borough of Birdsboro, additional waste services to Birdsboro, Robeson and Union Townships, and an end-use benefit of the creation of Ida E. Mascaro Recreational Park, a comprehensive community sports complex and recreational park and an additional $ 1 million in closure bond to guarantee construction of the park. (Exs. PCL-17A and B; A-2)

20. After reviewing the supplemental materials submitted by PCL, the Department, by letter dated March 27, 2001, approved the environmental assessment portion of the landfill permit on the basis that the benefits outweighed the harms of the proposal. (Ex. PCL-18; Benvin, Tr. 150)

21. By letter dated May 30, 2002, the Department approved the permit application for the expansion of the Pioneer Crossing Landfill. (Ex. PCL-1)

22. The benefits approved by the Department in the environmental assessment must be provided as a condition of PCL's permit. (Ex. PCL-1)

THE DEPARTMENT'S INTERPRETATION OF THE BALANCING ANALYSIS

23. The harms/benefits analysis is an element of the environmental assessment portion of a landfill application. It is required by Section 271.127 of the Department's solid waste regulations:

> [T]he applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.[6]

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[6] 25 Pa. Code § 271.127(c).

24. The Department based its analysis on the harms and benefits generated by the additional 67 acres of the proposed expansion of Pioneer Crossing Landfill. (Benvin, Tr. 67)

25. The Department first assesses the harms identified by the operation of the proposed facility and then considers the mitigation, if any, of those harms. Thereafter, the Department considers the benefits offered by the landfill and balances them against the mitigated harms in order to determine whether or not the benefits of the project clearly outweigh the harms. (Benvin, Tr. 136-38, 162-63)

26. The harms associated with a project include not only those identified by a permit applicant, but also those identified by the Department with input from municipalities, other agencies and the public. (Benvin, Tr. 157-58)

27. A "benefit" is defined by the Department as something that the landfill provides that is a positive aspect of the landfill, either social, environmental or economic; although it should be related to the landfill project, it does not have to be related to the community impacted by the landfill. (Benvin, Tr. 18)

28. A "benefit" is not an amelioration of a harm. (Benvin, Tr. 162-63)

29. The Department considers a "potential" harm to be less serious than a "known" harm. Therefore potential harms are accorded less weight than known harms when the Department balances harms and benefits. (Benvin, Tr. 150)

30. When considering the impact of a harm or a benefit, the Department evaluates the impact based on the lifespan of the landfill expansion, not just the term of the initial permit. (Benvin, Tr. 38-39, 166-67)

IDENTIFIED "HARMS" and MITIGATION

Property Devaluation

31. Property devaluation was considered by the Department as a "harm" because of the perception voiced by members of the community at a public meeting, that people do not want to live near landfills and therefore property values are lower for homes in proximity to a landfill. (Benvin, Tr. 31-33; *see* Ex. PCL-11)

32. The Department concluded that property devaluation was a potential harm resulting from the expansion of the landfill. (Benvin, Tr. 33-34)

33. PCL developed a property protection program for 47 properties on South Baumstown Road, in proximity to the landfill. (Benvin, Tr. 80-81; Mascaro, Tr. 563-64)

34. Under this program the value of the 47 homes on South Baumstown Road to the east of the landfill are fully guaranteed and protected. If any of the homeowners desire to sell their property and if they do not have an acceptable buyer, PCL will purchase the property at its fair market value appraised as if the landfill were not there. (Exs. PCL-3; PCL-13; Mascaro, Tr. 562-63, 621-24, 677)

35. This was considered to be a potential harm by the Department due in part from concerns expressed by citizens at the public meetings rather than by objective data. (Benvin, Tr. 91-92, 139-40)

36. Ms. Moyer's home is protected under the property value protection program. She is aware that she may sell her home under the plan and receive one hundred percent of its value appraised as if the landfill were not there. However, she has lived in her home for 21 years and owns the property free and clear of any mortgage. She has no desire to sell her home and acquire a mortgage on another property. (Tr. 206-207, 213)

Truck Traffic

37. Traffic is also a "known harm" that would be caused by the landfill expansion. The problems caused by landfill traffic, generally are related to congestion, odors and exhaust fumes from the truck traffic. The scope of the problem is largely defined by the haul route, or the route from the nearest highway to the landfill. (Benvin, Tr. 34-35)

38. PCL modified the haul route for landfill trucks; it is now less than one-half mile from the nearest highway to the entrance of the landfill and does not require trucks, other than those collecting waste, to use township roads. The access road to the landfill is paved. (Benvin, Tr. 34-35, 142-46; Mascaro, Tr. 577-82)

39. This modification of the haul route was a significant mitigation of the harm caused by truck traffic and the Department ultimately determined that any problems caused by truck traffic were mostly mitigated. (Benvin, Tr. 81, 142-46; Exs. PCL-1; PCL-18)

40. Letters describing the proposed haul route were also submitted to the surrounding municipalities. The Department received no adverse comment from any of them. (Benvin, Tr. 142-46; Ex. PCL-13 at Tab H; Brown, Tr. 794)

41. The Department submitted a traffic module prepared by PCL as part of the expansion permit application to the Pennsylvania Department of Transportation (DOT). DOT had no negative comments with respect to traffic issues. (Benvin, Tr. 35, 111; *see also* Ex. PCL-11)

Odors

42. There are three types of odors generally associated with landfills: working face odors, gas emissions and sewage sludge. (Benvin, Tr. 39-40; *see also* Brown, Tr. 817)

43. PCL has had difficulty in the past controlling odors at the landfill. These problems were largely attributable to an incomplete flare system and unfinished capping. (Benvin, Tr. 40; 142-46; Maiolie, Tr. 692-97; Kircher, Tr. 270)[7]

44. Working face odors are controlled, in part, by the use of daily cover soil on disposal cells. Additionally, the landfill constructs a minimum-sized disposal cell which can be used on an as-needed basis for particularly odorous loads to make sure that it is covered right away. (Brown, Tr. 786)

45. Working face odors are also controlled by the application of hypochloride. Hypochloride is a bleach solution which is sprayed onto the working face. (Brown, Tr. 787, 814; Benvin, Tr. 82; Maiolie, Tr. 701)

46. Deborah Moyer, who has lived a quarter of a mile from the landfill for the last 21 years, complained that she smells odors such as methane gas, garbage and manure. Sometimes the odors are "fleeting" and sometimes they are strong enough to drive her inside her home. (Moyer, Tr. 201, 205-206)

47. Ms. Moyer testified that the odors increase in the late fall towards November. This past November she complained three times and even called on Thanksgiving Day because the odors were so offensive to her. (Tr. 210)

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[7] *See FR.&S, Inc. v. DEP*, 1999 EHB 241, *affirmed,* 761 A.2d 634 (Pa. Cmwlth. 2000).

48. Ms. Kircher and Ms. Starr also testified that they have recently smelled odors in the vicinity of the landfill. (Tr. 271, 403-404)

49. Mr. Mascaro conceded that there are times that odors leave the property. However, they are dealt with right away and do not persist in duration. (Mascaro, Tr. 594-95; *see also* Maiolie, Tr. 708)

50. PCL also conducts odor surveys throughout the site and maintains odor logs. (Brown, Tr. 786-88)

51. Odors from gas emissions, mostly methane, are controlled by the gas recovery system. (Benvin, Tr. 83-85; Brown, Tr. 789-92)

52. Gas emissions at PCL are currently controlled by burning in an enclosed flare. The proposed flare has a destruction rate of 98%. (Brown, Tr. 807-08; Benvin, Tr. 153)

53. This system was reviewed and approved by both the waste section of the Department, and also the air quality section. (Benvin, Tr. 102)

54. PCL has agreed to accept less sewage sludge, which mitigates the concern caused by sludge odors. (Benvin, Tr. 147-50; Brown, Tr. 787; Mascaro, Tr. 517-18)

55. Although there have been some odor complaints lodged against the landfill in the last two years, none have been verifiable and none have resulted in a notice of violation. (Maiolie, Tr. 708, 729-34)

56. Mr. Maiolie testified that in his view the odor control program at PCL has been successful since 2001. (Tr. 741)

57. Accordingly, in analyzing the harms and benefits attributed to the landfill expansion, odors are considered a "potential" harm. (Benvin, Tr. 150; Ex. PCL-18)

Aesthetics: The Height of the Landfill Expansion

58. The original elevation for the proposed expansion was designed to be 459 feet, an increase of 89 feet in elevation. (Benvin, Tr. 41; *e.g.*, Mascaro, Tr. 525)

59. The Department identified the aesthetic impact of the landfill as being a known environmental harm. Citizens expressed a concern that the height of the proposed expansion will make it the dominant focal point to area residents. (Exs. PCL-18; PCL-11)

60. PCL subsequently reduced the height of the expansion to 385 feet, an increase in elevation of only 15 feet. (*E.g.*, Mascaro, Tr. 525)

61. The Department did not consider the visual impact of the existing landfill as a harm, but instead considered the effect of the increase in height as the harm. That is, the Department's analysis of the visual impact was the difference between how the landfill appears at its current elevation and how it will look at its proposed elevation. (Benvin, Tr. 150-51; Ex. PCL-18)

62. The Department directed PCL to perform a line-of-sight analysis and submit artists' renderings of the landfill at both current and proposed elevations. This information was presented at the current elevation, the original proposed elevation and the revised proposed elevation. (Benvin, Tr. 121-24; Ex. PCL-17-A at Tabs A and B)

63. William Tafuto is the vice-president of engineering for ARM Group, Inc. He is educated as a civil engineer and is licensed in Pennsylvania and five other states. ARM Group is an environmental consulting firm retained by PCL to perform a visibility analysis of the proposed expansion. Mr. Tafuto was accepted by the Board as an expert in civil engineering and line-of-sight analysis. (Tr. 818-29)

64. The purpose of the visibility analysis was to determine areas where the landfill was visible and where the expansion would be visible under the proposed permit elevation. Specifically, the study concerned the impact of the landfill on recreation areas such as parks, and community and school playgrounds within one mile of the landfill; the impact on surrounding communities within three miles of the landfill; and the impact on the Daniel Boone Homestead and the Schuylkill River Scenic Corridor. (Tafuto, Tr. 830-31, 833; Exs. PCL-13 at Tab J; PCL-17-A)

65. The study compared the visibility of the landfill from certain areas at its current elevation of 370 feet, its original proposed elevation of 459 feet and the approved elevation of 385 feet. (Tafuto, Tr. 833-34; Exs. PCL-13; PCL-17-A)

66. Mr. Tafuto used topographic mapping and digital elevation models from the United States Geologic Survey to generate profile mapping of various points as radii from the landfill which show the land surface. From this data he determined at what points the landfill would be obscured by vegetative buffers, terrain or topography. (Tafuto, Tr. 834)

67. Mr. Tafuto then verified his data by traveling to the various areas that were studied to confirm his results. (Tr. 836)

68. Although unlike any previous studies, Mr. Tafuto testified that the study was founded on good science and engineering. (Tr. 834)

69. Although visible from the Birdsboro Elementary School playground, Mr. Tafuto concluded that there would be no significant additional visual impact created by the landfill expansion on recreational areas. (Tr. 850-51)

70. Mr. Tafuto concluded that the landfill expansion would have no visual impact on the Daniel Boone Homestead because it was obscured by topography and by wooded areas. (Tr. 851-53)

71. Although the landfill would be visible at certain points on the Schuylkill River outside the Scenic Corridor, Mr. Tafuto concluded that the proposed landfill expansion would have no significant visual impact on the Schuylkill River Scenic Corridor. (Tr. 853-58)

72. Mr. Tafuto finally concluded that increasing the elevation of the landfill by 15 feet (from its current elevation of 370 feet to 385 feet) would have a minimal visual impact on the surrounding communities. For example, from the Birdsboro Elementary School, Pioneer Crossing at its increased elevation would only appear less than an inch taller than its current elevation. (Tr. 849-50, 862-69)

73. PCL also created a series of photographs to demonstrate what the landfill would look like at the present elevation and proposed elevation. Photographs were taken at certain locations identified by the Department and then triangulation was used to create a rendering of the view of final proposed elevation. (Brown, Tr. 803-07; Ex. PCL-17-A at Tab-A)

74. In the Department's analysis, the change in the proposed elevation of the landfill expansion was the biggest factor which "tipped the scale" and led to the conclusion that the harms associated with the expansion were outweighed by the benefits. (Newcomer, Tr. 973; Benvin 86-87)

Noise

75. Noise caused by trucks driving in and out of the landfill, from unloading of trash trucks and noise from back-up alarms and noise from heavy equipment was identified as known environmental harm by the Department. (Benvin, Tr. 42-43; Ex. PCL-17-A)

76. In order to mitigate that harm, PCL eliminated back-up alarms on certain vehicles and replaced them with video cameras that provide a view behind the machine. The alarms on other trucks were reduced to a level of 87 decibels. PCL also advised customers that the back-up alarms on their trucks should be turned down to 87 decibels. (Brown, Tr. 800-01; Benvin, Tr. 173-74; Ex. PCL-17-A at Tab C)

77. These measures were considered by the Department in reaching its conclusion that noise caused by landfill vehicles was adequately mitigated. (Benvin, Tr. 125; Ex. PCL-1)

78. In the past, the Department has received citizen complaints about noise, particularly the back-up alarm. (Maiolie, Tr. 709)

79. Deborah Moyer has complained about noise on several occasions. She no longer hears back-up alarms but still complains about noise she characterizes as "construction noise." She does not hear noise when she is in her house and the windows are closed. (Tr. 204, 223)

80. Ms. Moyer hears this noise from around 5:30 a.m. until 6:45 a.m. when she leaves to take her son to school. (Tr. 203)

81. Although Exeter Township has a noise ordinance, PCL has never been cited for violating it. (Brown, Tr. 798; Benvin, Tr. 105; Mascaro, Tr. 667)

82. Mr. Maoilie testified that he is unaware of a persistent noise problem at the landfill since 2001. (Maiolie, Tr. 741)

83. PCL's noise expert, Robert G. Richardson, conducted a noise level study in October, 2001. (Tr. 892-95)

84. By comparing readings taken with a sound level meter, he compared ambient noise readings with readings taken when the landfill equipment was in operation. Ambient noise readings ranged from 50 to 55 decibels. The largest increase in noise level after the landfill began operating that he recorded that was attributable to PCL, was 4.4 decibels. (Richardson, Tr. 900-04)

85. An increase in noise levels of less than 5 decibels is not considered significant. (Richardson, Tr. 906)

86. Exeter Township's noise ordinance permits noise levels to reach 77 decibels. Mr. Richardson testified that since there will not be a significant increase in the amount of equipment used by PCL when the landfill is expanded, this standard will not be exceeded. (Richardson, Tr. 907-08)

87. Measures such as the reduction in proposed elevation and the reduction of noise generated by the landfill trucks will decrease the potential impact created by noise at the landfill. (Richardson, Tr. 906, 912)

Litter

88. Based on input from the public hearing, the Department identified litter as a known environmental harm related to the expansion of the landfill. Citizens complained that litter from trash trucks and litter strewn in trees off the landfill property had been a problem. (Benvin, Tr. 43; Ex. PCL-11)

89. David Brown described the litter control plan which was developed to address the Department's concern about wind-blown litter. (Ex. PCL-17-A, Tab E)

90. To mitigate harm potentially created by litter, PCL is scheduled to construct a series of litter fences. The landfill will use a 12-foot high portable litter fence at the working face. At the perimeter of the landfill, a 50-foot high fence will be constructed. At the time of the hearing, 700-800 feet of the 50-foot fence was installed. Eventually, according to a schedule, the 50-foot fence will be 3,750 feet long. (Brown, Tr. 772-73; Ex. PCL-17 at Tab E; *see also* Benvin, Tr. 126-27; Maiolie, Tr. 705-07)

91. In the event that severe weather is predicted, PCL will refuse certain loads of trash that are susceptible to blowing in the wind. PCL also has a protocol for bringing in additional people from other Mascaro companies to pick up trash which escapes the litter fences. (Brown, Tr. 733)

92. The landfill also employs "litter patrols" which involve a worker who polices the access road, a street sweeper and a water truck to clean the access road, and weekly patrols that pick up litter around the perimeter of the landfill. (Brown, Tr. 775-76; *see also* Maiolie, Tr. 705-07)

93. Litter is also controlled by limiting the size of the working face and inspecting trucks for proper tarp coverage. (Brown, Tr. 776-77)

94. These measures were considered by the Department as part of the harms/benefits analysis. (Benvin, Tr. 127)

95. The Department determined that litter remained a potential harm at the landfill; the magnitude of the harm would be measured by the diligence of PCL in

implementing the litter control measures, and potential severe weather conditions. (Ex. PCL-18)

96. However, Mr. Benvin testified that compared to other landfills, PCL is currently one of the best at controlling blowing litter. (Benvin, Tr. 175)

97. Mr. Brown testified that PCL's litter control plan has been successful. The landfill has received no notices of violation related to litter since January 2001. Further during a severe wind event, where the wind speeds averaged 50 to 60 miles per hour, blowing litter was caught by the litter fences and did not escape the perimeter of the landfill. (Brown, Tr. 774-75, 779; Maoilie, Tr. 707, 740)

98. Ms. Kircher saw litter blowing across the landfill as depicted in a photograph taken in March, 2000. (Tr. 257; Ex. A-13)

Dust

99. Dust is controlled by PCL with a fleet of trucks which spray water where needed to control dust. Additionally, dust generation has been greatly reduced since the access road to the landfill was paved. (Brown, Tr. 810)

100. There are buffer properties which surround the landfill in an effort to keep dust and mud from leaving the property. (Mascaro, Tr. 587-88)

101. Deborah Moyer complained about dust at her residence. The dust settles on the picnic table in the summer and comes into the house and on furniture and floors. (Moyer Tr. 206)

BENEFITS

Fees Paid by PCL

102. PCL pays a variety of fees which were considered benefits by the Department, including fees required by law such as recycling fees and environmental stewardship fees. PCL also voluntarily pays proximity impact fees to neighboring municipalities and makes charitable contributions. (Exs. PCL-1, PCL-18; Mascaro, Tr. 529-32, 557-58)

103. The state-mandated fees include host municipality fees, recycling fees, and environmental stewardship fees. PCL pays amounts in excess of that required by the statutes which created these fees, therefore the Department considered them to be a benefit. (Benvin, Tr. 47-48; Ex. PCL-1)

104. The proximity impact fee was also a major factor that the Department considered in concluding that the benefits of the expansion outweigh the harm. (Benvin, Tr. 86-87; Newcomer, Tr. 977)

Beneficial Use of Gas: Ingenco

105. The "Ingenco" project is a proposal for the construction and operation of a 6 megawatt power station for the purpose of recovering and beneficially using landfill gas. (Ex. PCL-18)

106. An air quality permit application for the Ingenco project has been submitted to the Department for approval. (Brown, Tr. 808)

107. Ingenco initially submitted a land use application to Exeter Township for approval. That application was rejected. However, PCL has refiled the application on behalf of Ingenco. (Brown, Tr. 809-10; Mascaro 535-36)

108. The beneficial use of gas was considered a benefit by the Department, but was not given great weight in the balancing process. (Benvin, Tr. 167-68, 175-76; Newcomer, Tr. 973-74)

Proposed Recreational Park

109. The proposed Ida E. Mascaro Recreational Park was considered a benefit by the Department. The proposed park is an "end-use" benefit inasmuch as most of it will be built after final closure of the landfill. A portion of it will be built in seven years. (Mascaro, Tr. 536-40; Ex. PCL-17-B)

110. It was considered by the Department to be a known benefit because its construction was guaranteed by the terms of the permit and there was no indication from Exeter Township that it was a "bad idea." (Benvin, Tr. 186-90; *see also* Mascaro, Tr. 683-88)

Other Benefits

111. The purchase of "local and regional" goods by PCL was determined to be a benefit. (Benvin, Tr. 31-33; Mascaro, Tr. 614-18)

112. Other benefits include recycling drop offs for several neighboring municipalities, a stream restoration project, local employment, a contribution of land and money to the First Baptist Church, taxes paid by PCL employees, presentations to schools and tours for students, other charitable contributions in the amount of $50,000 annually, free township-wide spring cleanup and disposal of white goods for Exeter Township and neighboring municipalities and property tax revenues. (Ex. PCL-18)

113. The Department did not consider PCL's ability to accept waste from other local landfills that were likely to close at the time the expansion permit application was filed. At the time, this was considered too speculative. (Ex. PCL-18; Newcomer, Tr. 977)

Discussion

The sole issue raised in this appeal is whether the Department correctly determined that the benefits associated with the expansion of the Pioneer Crossing Landfill "clearly outweigh" the harms, in accordance with Section 271.127 of the Department's solid waste regulations:

> [T]he applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.[8]

The Appellant must demonstrate that the Department committed an error of law or judgment by concluding that the environmental harms associated with the expansion of the Pioneer Crossing Landfill were outweighed by the benefits provided by the operator of the landfill.[9]

The Appellant contends that the Department failed to adequately assess the severity of certain harms identified by PCL in its application, namely odors, dust, noise, litter, property devaluation and aesthetic impacts. The Appellant also argues that the benefits proposed by PCL were improperly considered benefits and/or do not outweigh

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[8] 25 Pa. Code § 271.127(c).
[9] *See Browning-Ferris,* 819 A.2d at 154.

the harms caused by the expansion. PCL of course disputes these claims, providing evidence that it presented a thorough and complete analysis of the harms and benefits related to the expansion of the landfill and that the Department properly concluded that the benefits outweighed the harms.

On the "harms" side of the balance is the harm caused by the continued operation of the landfill for another twenty years with its attendant noise, dust, traffic, litter and odor for at least some residents, as well as a slight increase in the height of the landfill. On the "benefits" side of the equation are the fees paid for the benefit of the entire community affected by the landfill, including neighboring municipalities, during its continued operation, as well as various waste services, charitable contributions and a proposed recreational facility, among other things. We find that the Appellant failed to adduce any evidence which contradicts the Department's evaluation of the harms and benefits proposed by PCL. It is not sufficient to merely have a different opinion about how the balancing under the regulation could have been done; the Appellant's burden is to demonstrate that the Department was unreasonable or violated the law when it concluded that the harms were adequately mitigated and that they were outweighed by the variety of benefits offered by PCL and required by its permit. Clearly, some of the residents in the vicinity of the landfill remain concerned about the existence and continued operation of the Pioneer Crossing Landfill. Clearly, some of that concern was justified by past behavior and practices by PCL. However, the evidence presented to this Board demonstrates that the Department gave full and complete consideration of the harms and benefits.

Harms

The Appellant first argues that the Department failed to appreciate the harm caused by odors and dust from the landfill expansion. The only evidence in support of the complaint of odors is the subjective view of Deborah Moyer, a nearby resident, that she smells odors from the landfill, Michelle Kircher, a former landfill inspector, that PCL has had problems controlling odors in the past, and testimony of Dona Starr of recently perceived odors from the landfill.

Only Deborah Moyer articulated the nature of the odors that she smells.[10] Her testimony alone is insufficient to support a conclusion that the Department erred by deciding that odors had been sufficiently mitigated by PCL. Dona Starr testified that she smelled an odor once while driving by the landfill, but was not specific about its character or duration.[11] Michelle Kircher also testified that she smelled odors recently while driving by the landfill. However, the bulk of her testimony involved odor issues at the landfill during her tenure as a host municipal inspector and predate the relevant timeframe of the Department's harms/benefits review.[12]

The Department was aware of these complaints and considered these matters in assessing the potential harm caused by odors. Even Mr. Mascaro conceded that from time to time an odor might escape the landfill, but also noted that with the current odor control program in place, sustained odors were being controlled.[13] The Department considered

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[10] Tr. 205.

[11] Tr. 403.

[12] *See generally* testimony of Michelle Kircher describing odor issues at Pioneer Crossing during her tenure as a host municipality inspector from 1996-2000. (Tr. 241-384)

[13] Tr. 594-95.

the mitigation efforts proposed by PCL, including perimeter surveys, working face practices and an updated flare system. The Department did not conclude that the potential for odor problems was completely mitigated by these measures. However, Section 271-127(c), does not require that a landfill cause *no* harm. The Appellant did not adduce any evidence that the measures that PCL would take to control odors to the extent possible were unreasonable or constitute a nuisance under the law. In contrast, Department witnesses testified that there had been no odor violations at the landfill since January 2001 and that the program implemented by PCL seemed to be effective in controlling odors.[14] Accordingly, we can not conclude that there was any error or omission in the Department's consideration of odors.

The Appellant also produced very little evidence that dust was a pervasive problem at PCL. Deborah Moyer testified that she had dust on her car and outdoor furniture, and that if she leaves the windows open, she gets dust inside her home.[15] David Brown testified that to the extent dust was a problem in the past, it had been largely remedied with the paving of the access road to the landfill and other measures.[16] The Appellant presented no evidence that these measures were inadequate to control dust as much as possible.

The Appellant also charges that noise is a significant continuing harm caused by the landfill. Again, this is based on the testimony of Deborah Moyer that she hears truck noises at her home early in the morning.[17]

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[14] Tr. 741.
[15] Tr. 206.
[16] Tr. 810.
[17] Tr. 204.

David Brown testified, PCL has taken significant measures to reduce noise caused by machinery at the landfill, including the replacement of back-up alarms on landfill equipment and the reduction of noise levels on other vehicles.[18] Pioneer Crossing Landfill is located in an area zoned for light industrial use. Operating hours at the landfill are limited.[19] PCL's noise expert testified that noise generated by the landfill was well below the maximum level allowed by the Exeter Township noise ordinance and that the expansion would not significantly increase levels of noise. He reached this conclusion based on the original proposed increase in elevation of 89 feet. He testified that since the elevation of the landfill would only increase by fifteen feet, that there would be even less of an increase in noise.[20] The Appellant produced no evidence that contradicted these conclusions other than implying that PCL changed its mode of operation to skew the results of the noise testing. However, Mr. Brown testified that although he was aware that noise testing was being performed that there was no alteration in the usual landfill routine.[21] The Appellant presented no evidence which contradicts or impeaches his testimony.

The Appellant also failed to prove that litter is an unreasonable problem at the landfill. The only evidence concerning litter was presented by Michelle Kircher. Again, her experience pre-dates the timeframe of the expansion permit and demonstrates only that litter control was a problem at Pioneer Crossing at earlier times. It is the problem in the past which contributed to the Department's identification of litter as a harm related to

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[18] Tr. 800-01.
[19] Ex. PCL-17-A; Tr. 796-801
[20] Tr. 900-08.
[21] Tr. 921-22.

the expansion.[22] PCL has addressed the problem by installing litter fences and litter patrols to help prevent litter from leaving the landfill property. Mr. Brown described procedures that would be followed in the event of severe weather in order to clean up promptly any litter that did leave the landfill. The litter fences were tested and worked successfully during a windstorm.[23] Department witnesses testified that to date PCL's litter mitigation plan was successful, and was in fact one of the better programs among landfill operators.[24] There is simply nothing on the record upon which we could base a conclusion that the Department abused its discretion when it evaluated the harm and mitigation of litter.

PCL has also addressed the identified harm of property devaluation based on public perception that home values are affected by the continued operation of the landfill by creating a property purchase program for homes within a certain radius from the Pioneer Crossing. Although the Appellant provided testimony that Deborah Moyer did not wish to participate in the program, there was no testimony that the purchase prices offered were unreasonable under the purchase program. The Appellant offered no study by an expert in real estate concerning the effect of the landfill on the value of homes in the area. Accordingly, the Board has no basis upon which to dispute the Department's assessment of this program.[25]

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[22] Tr. 157-58.
[23] Tr. 774-75
[24] Tr. 175.
[25] In the companion case, *County of Berks v. DEP,* EHB Docket No. 2002-155-MG (Adjudication issued March 31, 2005), a substantial amount of expert testimony was offered on property devaluation.

Finally, the Appellant contends that landfill expansion will have a significant visual impact on the surrounding communities. There is no dispute that Pioneer Crossing, at its current elevation, is visible from many vantage points in its vicinity.[26] There is no dispute that although vegetated, it does not blend in with the forested land around it.[27] None of this is relevant. Even if the expansion permit were denied, Pioneer Crossing would still be visible from some places in Exeter and Birdsboro. The relevant inquiry, and that assessed by the Department, is the extent to which the increase in elevation of fifteen feet proposed in the expansion application is a negative impact. PCL's expert testified that the increase in elevation of the current landfill by 15 feet will appear insignificant from most vantage points in the area. Although not invisible, even at its original proposed increase in elevation of 89 feet, the landfill was not visible from most historic areas and parks in the area due to topography and trees.[28] Since PCL agreed to reduce the elevation increase from 89 feet to 15 feet, the Department concluded that this harm could be outweighed by the benefits related to the project.[29]

The only challenge that the Appellant raises to the visibility analysis is based upon a charge that the visibility study was scientifically invalid based upon the *Frye* standard[30] because Mr. Tafuto characterized his study as "somewhat original."[31] This argument is completely without merit on several bases. First, the Appellant did not object

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[26] *See generally*, testimony of Michelle Kircher.
[27] *See* Ex. PCL-18.
[28] Tr. 830-69.
[29] Tr. 86-87, 973.
[30] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003)(confirming the *Frye* standard as the evidentiary rule in Pennsylvania.)
[31] Tr. 833-34.

to this evidence at hearing based on *Frye,* or for any other reason. Although counsel for the Appellant *voir dired* Mr. Tafuto, he ultimately did not object to his expertise in civil engineering and light-of-sight analysis. Accordingly, the objection has been waived.[32]

Even if the objection were not waived, there is *no* evidence that Mr. Tafuto's approach was scientifically novel. Under the *Frye* standard, "scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community."[33] Mr. Tafuto testified that although the study itself was novel, the methodology used was based upon sound engineering practices:

> Q [C]an you tell us what a line-of-sight analysis is and how it's conducted?
> A Yes. When this comment came from the DEP, there was really no precedent. There wasn't a sample of work that could guide us to do this. So the work was somewhat original but founded on good science and engineering.[34]

Mr. Tafuto then went on to explain precisely what his study entailed, including analyzing topographic mapping, surveying, digital elevation models from the USGS, and geometric calculations.[35] Not only did the Appellant not object, but it presented no testimony which contradicts the validity of the methods used by Mr. Tafuto or his statement that they were founded on good science and engineering practices. Therefore the *Frye* standard is met.

Next, the Appellant challenges three benefits provided by PCL to offset the mitigated harms created by the operation of the landfill. The Appellant challenges the various host fees, recycling fees and other fees, and on-site recycling services, which are mandated by statute on the basis that fulfilling statutory and regulatory requirements can

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[32] *E.g., McKees Rocks Forging v. DER,* 1994 EHB 220.
[33] *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003).
[34] Tr. 833-34.
[35] Tr. 834-35.

not be considered public benefits. The Appellant also argues that the proposed Ida E. Mascaro Recreational Park and the Ingenco project are too speculative to be considered benefits.

Although the Appellant is correct that the various fees and recycling services are mandated by statute, it cites no legal provision which would preclude the Department from considering these things as benefits. In fact, the Commonwealth Court very recently approved the consideration of the net present value of host fees as a benefit in *Browning-Ferris Industries v. Department of Environmental Protection.*[36] Moreover, the Department considered these fees a benefit, because they are higher than required by the statutes and regulations.[37] Section 271.127 explicitly provides that benefits may be economic.[38] There is nothing to suggest that the Department's interpretation of the regulation of higher than required fees as a benefit is at all unreasonable or contrary to any language in the statute or regulation. Accordingly, we find no error.[39]

The Ingenco proposal is a project to construct a power station for the purpose of recovering and beneficially using landfill gas. Mr. Brown testified that PCL has taken over preparation and submission of land use plans to the local municipality and that PCL has applied for appropriate permits with the Department. In the Department's view, these steps were sufficient to give credit to PCL for providing an environmental benefit.

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[36] 819 A. 2d 148 (Pa. Cmwlth. 2003).

[37] Tr. 47-48

[38] 25 Pa. Code § 271.127; *see also Browning-Ferris*; *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

[39] *Browning-Ferris*; *see also Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002)(the Board will defer to the Department's reasonable interpretation of regulations unless that interpretation is shown to be unreasonable.)

However, Robert Benvin testified that of the many benefits proposed by PCL, the Ingenco project was a minor component of the harms/benefits balancing requirement.[40] Similarly, the proposed Mascaro Recreational Park, which would be built after closure of the landfill, was considered a social and economic benefit to local residents but was not accorded a great deal of weight.[41] The Department received no negative feedback from Exeter Township concerning this proposal, even though the zoning may have to be changed at some point to accommodate it.[42] Because the environmental assessment is part of the permit, the Department can enforce the provision of this benefit upon closure of the landfill.[43]

Even if the Board were to hold that these benefits were too speculative to be properly considered by the Department in balancing mitigated harms and benefits, we can not say that the balance would measurably change. None of the Department witnesses testified that they would have reached a different result in balancing harms and benefits had the Ingenco project and the recreational park been excluded from their consideration. Robert Benvin and Crystal Newcomer testified that in their analysis, the reduction in the elevation increase from 89 feet to 15 feet was the most significant factor in concluding that the benefits outweighed the harms. Proposed benefits such as the proximity impact fees to Birdsboro were also of significant weight.[44] The park and the Ingenco project

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[40] Tr. 167-68; 175-76; 973-74.

[41] Tr. 973-74.

[42] There was great debate at the hearing concerning whether zoning would permit the construction of a park. Since zoning can change in the future, this issue is not especially relevant now. Accordingly, we expressly decline to offer any interpretation of the Exeter Township zoning ordinance as it relates to the recreational park.

[43] Tr. 190.

[44] Newcomer, Tr. 977.

were very minor and were not assigned a great deal of weight.[45] The Commonwealth Court has held that benefits must clearly outweigh harms by a "mere scintilla."[46] Therefore, we have no basis upon which to disturb the Department's judgment that the benefits to be provided by PCL outweighed the harms related to the expansion.[47]

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's review of the Department's action is *de novo*. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

2. The Appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Department may issue a major modification to expand a landfill where the applicant demonstrates that the benefits to the public of the expansion clearly outweigh the known or potential harms associated with the expansion. 25 Pa. Code § 271.127(c); *Browning-Ferris Industries v. Department of Environmental Protection*, 819 A. 2d 148 (Pa. Cmwlth. 2003).

4. The Appellant failed to prove that the harms identified by the Department were inadequately evaluated or that the mitigation measures to address the harms are likely to be ineffective or are otherwise inappropriate.

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[45] Newcomer, Tr. 973-74.

[46] *Browning-Ferris,* 819 A.2d at 154.

[47] PCL argues that the Board should substitute its discretion and include the acceptance of waste from the communities formerly served by the Western Berks Landfill as a benefit. At the time of the Department's balancing of the harms and benefits of the Pioneer Crossing Landfill, the Western Berks Landfill had not yet closed, therefore the Department considered the acceptance of waste too speculative. Because we have found that the Department did not abuse its discretion in concluding that the harms associated with the Pioneer Crossing expansion were clearly outweighed by other benefits, we need not reach this issue.

5. The Appellant failed to prove that the benefits identified and evaluated by the Department were too speculative or were otherwise improperly analyzed by the Department.

6. The Appellant failed to prove that the Department abused its discretion or misapplied the law by concluding that the benefits to the public of the expansion of the Pioneer Crossing Landfill clearly outweigh the mitigated harms associated with the expansion. 25 Pa. Code § 271.127(c).

7. The Department's conclusion that the benefits of the proposed expansion clearly outweighed the mitigated harms of the expansion was reasonable and appropriate. 25 Pa. Code § 271.127(c).

Accordingly, we enter the following order:

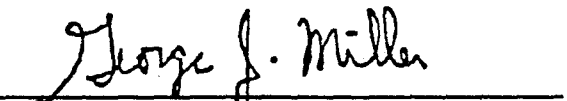
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
v.	:	**EHB Docket No. 2002-156-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FR&S, INC. and PIONEER CROSSING LANDFILL	:	

ORDER

AND NOW, this 31st day of March, 2005, the appeal of the Exeter Citizens' Action Committee is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2002-156-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 31, 2005

Chief Judge and Chairman Michael L. Krancer and Administrative Law Judge Bernard A. Labuskes, Jr. did not participate in the Majority Opinion; both concurring Opinions are attached.

c: **DEP, Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southcentral Region

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For Permittee:
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Harleysville, PA 19438

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
v.	:	**EHB Docket No. 2002-156-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and F.R.&S., INC. and PIONEER CROSSING LANDFILL	:	

OPINION OF BERNARD A. LABUSKES, JR.
CONCURRING IN THE RESULT

By Bernard A. Labuskes, Jr., Administrative Law Judge

For the reasons set forth in my separate opinion in *County of Berks v. DEP*, EHB Docket No. 2002-155-MG, I concur in the result.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 31, 2005

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER CITIZENS' ACTION COMMITTEE, INC.	:	
v.	:	**EHB Docket No. 2002-156-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and F.R.&S., INC. d\b\a PIONEER CROSSING LANDFILL	:	

CONCURRING OPINON OF
CHIEF JUDGE AND CHAIRMAN, MICHAEL L. KRANCER

By Michael L. Krancer, Chief Judge and Chairman

I concur with the opinion of the majority in this case as I did in the companion case of *County of Berks v. DEP,* EHB Docket No. 2002-155-MG (Adjudication issued March 31, 2005). I reiterate and restate here, without reprinting it in full, what I said in my concurring opinion in the *County of Berks* case.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: March 31, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RAVEN CREST HOMEOWNERS ASSOCIATION	:	
v.	:	**EHB Docket No. 2004-122-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHADDS FORD TOWNSHIP	:	**Issued: April 4, 2005**

OPINION AND ORDER ON MOTION TO AMEND APPEAL

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion to amend an appeal filed by a neighborhood association. Read as a whole, the notice of appeal with its attachments embraces the proposed amendments. Furthermore some discovery has occurred based on the information included in the attachments, therefore the other parties will not be significantly prejudiced.

OPINION

Before the Board is a motion by the Raven Crest Homeowners Association to amend their appeal which challenged the Department's approval of a sewage facilities planning module. The approved module provides for the extension of public sewers within the Ridge Road/Raven Crest sewer district and the concomitant pumping station

and collection system. As we explain in more detail below, we must deny the Association's motion because they have failed to meet the criteria for the amendment of appeals found in the Board's rules.

The Association's appeal in this matter was filed with the Board on June 4, 2004 by the Treasurer of the Association. Filed on forms provided by the Board, the appeal properly included a copy of the Department's action, a cover letter, an "addendum" detailing the Association's objection and several exhibits. Included among the exhibits was a document of several pages detailing the Association's objection to the project which was submitted to the Township during the proposal's public comment period.

The Association's original notice of appeal raised one objection to the Department's approval:

> The comments received and the municipal response to comments was not a part of the Plan Update revision. Therefore, we request that the Environmental Hearing Board deny approval of the Project because of failure to follow the rules and regulations of the Department of Environmental Protection.[1]

The remaining typed paragraphs of the objection portion of the notice of appeal detail the history of the Association's submission of comments relating to the project. Exhibits are also included which indicate when comments were submitted and to whom. The Association also included a copy of its detailed comments on the project. The Association now seeks to add two objections to its appeal concerning alleged substantive deficiencies in the Department's consideration of the Township's planning module:

---

[1] Notice of Appeal Addendum.

> Whether, as required by the sewage facilities regulations (including 25 Pa. Code § 71.21 (a)(2)) and the Department's forms required by the regulations, the Department, in light of public comments, correctly accepted the Township's assertion that there is a problem(s) with the existing sewage treatment facilities at the Raven Crest subdivision, and whether such issue was properly compared to the Township's alternate proposed method of sewage collection and treatment identified in its proposed plan revision.
>
> Whether, as required by 25 Pa. Code § 71.32(d)(3), the Department properly determined that the Township adequately considered public comments in the Township's assumption that the [Association's] existing sewage facilities infrastructure (including the Appellant's waste water treatment plant) can be transferred to, or used by, the Township without the Township providing fair compensation for such transfer or usage, when such transfer and usage is fundamental to the Township's plan revision.

The Association contends that these two grounds merely clarify the objection in the original notice of appeal to include not only the complaint articulated in the original appeal itself, but also substantive issues raised by the Association's comments and the Department's consideration of those comments. Both the Township and the Department vigorously oppose the amendment to the appeal, arguing that the Association reviewed the Department's files at least seven months ago and have no reasonable excuse for waiting until now to significantly expand the scope of the appeal.

The Board will grant the motion to amend the appeal. Read as a whole, it is obvious that the Association intended its objection to the project to include the substance of the Department's consideration and reliance upon the comments provided during the comment period and the Township's responses to those comments, and not just the procedural requirement that comments be submitted with the project proposal. Indeed, the Association included in their notice of appeal the very detailed comments that they

submitted which vigorously criticize the Township's alternatives analysis and assessment of the current Raven Crest sewage facility. The Township pursued discovery based on that claim by securing an administrative search warrant to test and inspect the Association's community treatment plant. Therefore, the Township's position that it will be significantly prejudiced by the additional objections is diluted. Moreover, the Board has recently extended the discovery deadlines in the matter, which should provide the parties with ample time to conduct whatever additional discovery they might need.

Accordingly, we will grant the Association's motion to amend its appeal to include the additional two grounds specified in its motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

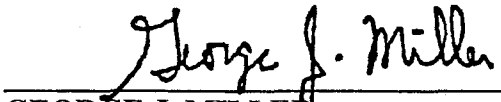
RAVEN CREST HOMEOWNERS ASSOCIATION	:	
v.	:	**EHB Docket No. 2004-122-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHADDS FORD TOWNSHIP	:	

ORDER

AND NOW, this 4th day of April, 2005, the motion of the Raven Crest Homeowners Association to amend the appeal in the above-captioned matter is hereby **GRANTED** to include the following additional objections:

> Whether, as required by the sewage facilities regulations (including 25 Pa. Code § 71.21 (a)(2)) and the Department's forms required by the regulations, the Department, in light of public comments, correctly accepted the Township's assertion that there is a problem(s) with the existing sewage treatment facilities at the Raven Crest subdivision, and whether such issue was properly compared to the Township's alternate proposed method of sewage collection and treatment identified in its proposed plan revision.
>
> Whether, as required by 25 Pa. Code § 71.32(d)(3), the Department properly determined that the Township adequately considered public comments in the Township's assumption that the [Association's] existing sewage facilities infrastructure (including the Appellant's waste water treatment plant) can be transferred to, or used by, the Township without the Township providing fair compensation for such transfer or usage, when such transfer and usage is fundamental to the Township's plan revision.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: April 4, 2005

c: DEP Bureau of Litigation
Attention: Brenda Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN MARTZ, SR. and DONALD MARTZ, JR.	:	**EHB Docket No. 2004-241-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 5, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal of an enforcement order issued by the Department because the notice of appeal was filed more than thirty days after the appellant received the order. Therefore the Board has no jurisdiction over the appeal.

OPINION

This appeal revolves around an order issued by the Department dated September 27, 2004, which required the children of Donald Martz, Sr. and Catherine Martz to cease the improper disposal of waste and to remove and properly dispose of waste on their property. Apparently, both Mr. and Mrs. Martz are deceased and their children, Donald, Jr., John, Michael, David and Linda Bowers have inherited the property. The order included a "Notice of Appeal" with instructions for filing an appeal to the Environmental

Hearing Board. John Martz received a copy of the order on September 29, 2004.[1] Donald Jr. received a copy on October 14, 2004. A notice of appeal was filed with the Board on November 9, 2004[2] by both John and Donald. The Department now moves to dismiss the appeal of John Martz.

A recipient of an action by the Department has thirty days from the time he receives written notification of the action to file his appeal to the Board.[3] Petitions for allowance of an appeal *nunc pro tunc* (filed after the required 30-day period) may be filed pursuant to Rule 1021.53(f),[4] but only in very limited circumstances. Examples include situations where there is fraud or breakdown in the Board's operation or unique and compelling factual circumstances which establish a non-negligent failure to appeal.[5] Because John Martz's appeal was clearly filed beyond the 30-day appeal period, in order for the Board to have the power to hear his appeal, he must establish a non-negligent failure to appeal or a breakdown in the Board's operation.

John Martz has responded to the Department's motion to dismiss with a document entitled "Motion to Accept Appeal" wherein he contends that he was given an extension of time to file his appeal by an assistant counsel of the Board. A conference call was held wherein Mr. Martz was instructed to provide a detailed affidavit in support of his claim. On February 11, 2005, the Board received a sworn statement from Catherine Martz that on an unspecified date she "called the office of DEP" to request an extension to file

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[1] Department Motion to Dismiss, Ex. C.
[2] Department Motion to Dismiss, Ex. D.
[3] 25 Pa. Code § 1021.52(a).
[4] 25 Pa. Code § 1021.53(f).
[5] *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Mon View Mining Corp. v. DEP*, 2004 EHB 542.

"paperwork" and she spoke to a pleasant, but unnamed lady on the phone who told her that she had "plenty of time" and that she would not need an extension. Ms. Martz also states that she "can't remember if she granted an extension or not, she wasn't specific," and the appeal was filed within 48 hours of her conversation.

Regrettably, Ms. Martz's statement is insufficient to provide a basis for an appeal *nunc pro tunc*. It appears that she spoke to someone in the Department and not to a staff member at the Board. The Board is a tribunal completely separate and independent from the Department.[6] Accordingly, even if an employee of the Department misinformed Ms. Martz that she had additional time to file an appeal, there is no fraud or breakdown in the processes at the *Board*.[7] Second, the time for the filing of an appeal with the Board is jurisdictional.[8] No one either at the Department or the Board has the authority to grant an extension for the filing of a notice of appeal.[9] Finally, from Ms. Martz's statement, she is not even sure that she was "given" an extension of time.

Accordingly, we must dismiss the appeal of John Martz. However, it appears that Donald Martz filed his appeal within thirty days of his receipt of notice of the Department's order and the docket will continue under his name alone.

We therefore enter the following order:

---

[6] *See Department of Environmental Protection v. North American Refractories, Inc.*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002); 35 P.S. § 7513(a).

[7] *Cf. Mon View Mining Corp. v. DEP*, 2004 EHB 542 (inadvertently mailing a notice of appeal to the Department but not the Board does not equate to a timely filing of a notice of appeal to the Board and is not sufficient grounds for an appeal *nunc pro tunc*.)

[8] *Rostosky v. Department of Environmental Resources,* 364 A.2d 761, 763 (Pa. Cmwlth. 1976).

[9] *See Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979)("[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence."); *West Caln Township v. Department of Environmental Resources*, 595 A.2d 702 (Pa. Cmwlth. 1991)(The Board can not disregard a filing defect and grant an extension of time for filing an appeal in the "interest of justice.")

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN MARTZ, SR. and DONALD MARTZ, JR.	:	
	:	**EHB Docket No. 2004-241-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of April, 2005, the motion of the Department of Environmental Protection to dismiss the appeal of John Martz, Sr. in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

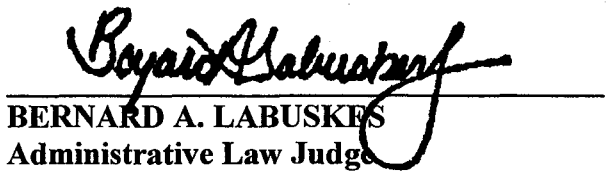
MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2004-241-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES
Administrative Law Judge
Member

DATED: April 5, 2005

c: DEP Bureau of Litigation
Attention: Brenda Morris, Library

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN A. PIKITUS	:	
	:	
v.	:	**EHB Docket No. 2004-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MAHANOY TOWNSHIP, Permittee	:	**Issued: April 5, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion to dismiss filed by the Department. It appears that his notice of appeal objecting to his being required to connect to the township's proposed central sewage facility and pay the fees required was not filed in a timely manner.

OPINION

On October 5, 2004, Mr. John A. Pikitus filed papers with the Board which complained about the "West Mahanoy Township sewer project." Mr. Pikitus' handwritten statement was docketed as an appeal.[1] As the Department explains in its motion to dismiss, the genesis of this sewer project is an Act 537 Plan by the Township

[1] Mr. Pikitus is representing himself in this matter and has not secured the services of legal counsel. We have stated many times, that individuals representing without professional advice do so at their own risk. *See Kleissler v. DEP*, 2002 EHB 737; *Goetz v. DEP*, 2002 EHB 976; and *Van Tassel v. DEP*, 2002 EHB 625. *See also, Barber v. Tax Review Board*, 850 A.2d 866, 868 (Pa. Cmwlth. 2004)(a layperson who represents himself in legal matters assumes the risk that his lack of expertise in legal training will prove his undoing.)

which was approved by the Department on February 2, 2001. When the Township failed to begin implementation of the plan which called for a centralized sewage collection system, the Department issued an order on March 29, 2004, mandating immediate implementation and setting a schedule for doing so. Mr. Pikitus did not attach copies of either of these Department actions to his notice of appeal. Accordingly, on October 8, 2004, the Board issued an order requiring Mr. Pikitus to provide additional information, including, among other things, a copy of the Department's action which was the subject of his appeal. Although Mr. Pikitus supplied some of the missing information, the Board never received a copy of the Department's action that Mr. Pikitus was appealing. Accordingly, the Department filed a motion to dismiss either because Mr. Pikitus' appeal is untimely, or because Mr. Pikitus failed to provide a copy of the Department action under appeal as ordered by the Board. We will dismiss Mr. Pikitus' appeal.

We could dismiss Mr. Pikitus' appeal as a sanction for failing to comply with our order dated October 8, 2004, which required him to supply the Board, the Department and the Township with a copy of the Department action which is the subject of his appeal. Rule 1021.161 provides the Board with authority to impose sanctions for failure to abide by a Board order or a Board rule of procedure. The Rule provides that sanctions may include the dismissal of an appeal.[2] Indeed our consideration of Mr. Pikitus' appeal and his response to the Department's motion is greatly hampered by his failure to identify in some fashion the specific action of the Department which forms the basis of his appeal.[3] In his responses to the motion to dismiss filed on December 29, 2004 and

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[2] 25 Pa. Code § 1021.161.

[3] In December 2004 Mr. Pikitus filed a motion for default judgment on the premise that his action was a complaint rather than a notice of appeal. The Board refused

January 3, 2005, he has clung to his view that the implementation of the Township's sewage plan is too expensive and unfair, but has not specified exactly which Department action he is appealing. Accordingly, we could simply dismiss this appeal as a sanction, and end our discussion here. However, in order to provide a full explanation of all of the issues, we will address the timeliness question as well.

In its motion to dismiss, the Department surmises that, based upon the nature of the complaints made in Mr. Pikitus' notice of appeal, he appears to be challenging either West Mahanoy Township's sewerage plan (Act 537 Plan) or an order of the Department which required the Township to implement its Act 537 Plan. Generally, it appears that Mr. Pikitus does not think he should have to connect to the Township's proposed sewer project by paying a tapping fee and monthly household fees rather than continuing to rely on on-lot sewage disposal or septic tanks. He claims that such a requirement violates his constitutional rights. Rather than attaching a copy of an action by the Department, Mr. Pikitus includes what appears to be handouts prepared by the Township explaining the proposed system.

The Township's Act 537 Plan was approved by the Department by letter dated February 2, 2001.[4] Notice of the approval was published in the *Pennsylvania Bulletin* on February 24, 2001.[5] By order dated March 29, 2004, the Department required the Township to implement the Act 537 Plan by completing certain tasks related to the

---

to construe his appeal as a complaint and denied Mr. Pikitus' motion for default judgment. The Board also informed Mr. Pikitus that to the extent he sought relief in the form of a private request under 25 Pa. Code § 71.14, such request must be filed with the Department and not the Board. *Pikitus v. DEP*, EHB Docket No. 2004-215-MG (Opinion issued December 23, 2004); *see also* 25 Pa. Code § 71.14 ("a person who is a resident . . . in a municipality may file a private request *with the Department* . . .").

[4] Department Motion, Exhibit A.

[5] 31 Pa. Bull. 1176 (2001).

construction of centralized wastewater treatment facilities in several areas of the Township to address sewage problems which evidently pose "a serious public health and environmental hazard."[6]

The Board's rules are explicit concerning the time in which appeals must be filed. The notice of appeal must be received by the Board at its offices in Harrisburg within the 30-day appeal period. Otherwise, the Board ordinarily is deprived of jurisdiction to hear the appeal.[7] Where third-parties are harmed by an action of the Department, they are required to file their notice of appeal within 30 days of publication in the *Pennsylvania Bulletin*, or 30 days after actual notice of the action if no notice of the action is published in the *Pennsylvania Bulletin*.[8] Therefore, under the Board's rules, any appeal of the Township's Act 537 Plan, clearly comes too late since the Department's approval was published in the *Pennsylvania Bulletin* in 2001.

However, Mr. Pikitus argues that the Act 537 Plan approval was "concealed" and that it is unfair to expect him to read the *Pennsylvania Bulletin* in order to receive notice. While we are not unsympathetic to his position that the *Bulletin* may not be a periodical that people ordinarily read, the Board has held that notice in the *Bulletin* is adequate for the purpose of due process:

> In fact, "[n]umerous opinions of the Commonwealth Court and this Board have held that publication of the issuance of a permit in the *Pennsylvania Bulletin* is adequate to afford due process notice from which the 30 day time to appeal begins to run." *Stevens v. DEP*, 1996 EHB 430, 431-32. *See also Grimaud v. DER*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Reading Anthracite Co. v. DEP*, 1998 EHB 602, 607.

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[6] Department Motion, Ex. B.

[7] *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976); Burnside Twp. v. DEP, 2002 EHB 700; *Sweeney v. DER*, 1995 EHB 544.

[8] 25 Pa. Code § 1021.52(a).

> [The appellant's] charge that it is unfair to require ordinary citizens to read the *Pennsylvania Bulletin* was put to rest in *Grimaud*, 638 A.2d at 302. [The appellant's] claim of "deceit" does not seem to go beyond or add anything to his complaint regarding the lack of personal notice. Accordingly, we conclude that the portions of [the appellant's] appeal that relate to the two Vargo permits are untimely.[9]

We see no reason to rule differently based on the facts of the matter before us now.

Similarly, to the extent that Mr. Pikitus may be appealing the Department's March 29, 2004 order to the Township to implement the February 2001 Plan, that appeal is untimely as well.

In conclusion, we must dismiss Mr. Pikitus' appeal. We therefore enter the following:

---

[9] *Clabbatz v. DEP,* EHB Docket No. 2004-216-L (Opinion issued January 26, 2005), slip op. at 3-4 (footnote omitted).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN A. PIKITUS	:	
	:	
v.	:	**EHB Docket No. 2004-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MAHONOY TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 5th day of April, 2005, the motion of the Department of Environmental Protection to dismiss the appeal of John A. Pikitus in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

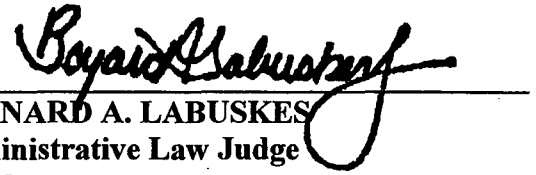
MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2004-215-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES
Administrative Law Judge
Member

DATED: April 5, 2005

c: **Department of Litigation:**
Attention: Brenda Morris
Library

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Northeast Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF EDINBORO and MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-016-R (Consolidated with 2004-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 12, 2005**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a ban on sewer connections has been removed and there is no further relief the Board can grant, the appeal of the ban is dismissed as moot. This case is distinguishable from *Eighty-Four Mining Co. v. DEP*, which involved the "lifting" of various compliance and/or cessation orders. Here, where the ban has been removed, there is no further relief the Board can provide.

OPINION

The genesis of this matter is an administrative order issued by the Department of Environmental Protection (Department) to the Borough of Edinboro and the Municipal Authority of the Borough of Edinboro (collectively Borough). The administrative order required the

Borough to submit a corrective action plan to address what the Department had determined to be a hydraulically overloaded sewage conveyance system. The Borough filed an appeal and, after holding a trial, the Board issued an adjudication that upheld the administrative order and found that the Borough's sewage conveyance system was hydraulically overloaded and the Department had acted appropriately in requiring it to submit a corrective action plan.[1]

Following the adjudication, on December 16, 2003 the Department issued a ban on all connections to the Borough's sewage conveyance system. The Borough appealed the ban and that appeal was docketed at 2004-016-R.[2] While the appeal was pending, the Borough complied with the ban.

The Borough appealed the Board's adjudication of the administrative order to the Commonwealth Court. The Court upheld the Board and subsequently ordered the Borough to submit a corrective action plan to the Department.[3] The Borough did not appeal the Commonwealth Court's decision and submitted a corrective action plan to the Department. The Department approved the corrective action plan on December 2, 2004 and removed the ban on connections to the Borough's sewage conveyance system.

The matter now before us is the Department's motion to dismiss the Borough's appeal of the ban on sewage connections. The Department argues that the appeal is moot since the ban has been lifted and there is no further relief the Board can provide.

The Board may grant a motion to dismiss when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Broad Top Township v. DEP*, EHB Docket No. 2004-012-C (Opinion and Order issued June 21, 2004), p. 4, n. 11. Motions to

---

[1] *Borough of Edinboro v. DEP*, 2003 EHB 725.

[2] The appeal at Docket No. 2004-016-R has been consolidated with another appeal of the Borough at Docket No. 2004-017-R.

dismiss must be evaluated in the light most favorable to the non-moving party. *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion and Order issued July 16, 2004), p. 5.

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived of a necessary stake in the outcome. *Horsehead Resources Development Co., Inc. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001); *Broad Top, supra* at 5; *Solebury Township v. DEP*, EHB Docket No. 2002-323-K (Opinion and Order issued January 16, 2004), p. 6-7.

In response to the motion, the Borough states that it was willing to withdraw its appeal of the ban on sewage connections if the Department would acknowledge that the ban has been "rescinded, vacated and revoked." The Department has refrained from doing so and, therefore, the Borough has not withdrawn its appeal. It is the Borough's position that the removal of the ban is equivalent to the "lifting or termination" of an order, which does not render the underlying appeal moot.

This issue has been discussed at great length in two recent opinions of the Board. In *Eighty-Four Mining Co. v. DEP*, EHB Docket No. 2003-181-K (Opinion and Order issued March 17, 2004), which the Borough relies on in its response to the motion, Chief Judge Krancer extensively considered the question of whether an order that has been "terminated" or "lifted" is moot. In that case, the Department had sought to dismiss an appeal of several compliance and/or cessation orders issued to Eighty-Four Mining Company after a fire had occurred along a conveyor belt in one of its mines. The Department asserted that the appeal was moot since the orders had already been complied with and no tangential penalties could be assessed or permits denied based on the orders. Additionally, the Department considered the orders to be

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[3] *Borough of Edinboro v. DEP*, No. 2696 C.D. 2003 (June 23, 2004) (Opinion not reported).

"terminated."

Following oral argument in Pittsburgh, Judge Krancer declined to dismiss the appeal as moot, finding "[t]here certainly is effective relief that the Board can grant. It can rescind or vacate the orders if Appellant proves its case, a step the Department has declined to undertake itself." *Id.* at 5. In reaching this decision, he posed the question "if [the orders] are moot, why has the Department either refused or declined to rescind them?" *Id.* Finding that the notion of "terminating" an order was borrowed from the concept of "lifting" an order in the surface mining program, Judge Krancer contrasted the notion of "terminating" an order with the notion of "revoking or rescinding" one, by quoting from the Board's decision in *Goetz v. DEP*, 2001 EHB 1127:

> Where DEP has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758. A revoked compliance order no longer exists, and thus the Board cannot provide any meaningful relief with regard to it; moreover a vacated compliance order cannot serve as the basis for any future civil penalties, or be considered in permit or license reviews. *West [v. DEP]*, 2000 EHB [462] at 463; *Kilmer [v. DEP]*, 1999 EHB [846] at 848.
>
> A different situation is presented where DEP issues a compliance order, the order is appealed, the appellant complies with the order, and DEP then "lifts" the order because it has been satisfied. *See Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985); *Harriman Coal Corporation v. DEP*, 2000 EHB 954. When a compliance order has been lifted due to satisfaction of its terms, the compliance order retains its validity and can continue to have a tangential impact on the recipient.

Goetz, 2001 EHB at 1132-33.

Relying on Judge Krancer's analysis, the Board again considered this question in *Wheeling-Pittsburgh Steel Co. v. DEP*, EHB Docket No. 2002-133-R (Opinion and Order issued February 10, 2005). In that case, the Department had issued an administrative order to two

separate but related entities. The Department subsequently negotiated a settlement with one of the entities, which led to a Consent Decree being entered by the Commonwealth Court. The Department moved to dismiss the appeal of the administrative order, arguing that it had been replaced by the Consent Decree and was, therefore, moot. As in the present case, the appellants agreed to withdraw the appeal if the Department agreed to rescind the order. When the Department declined to do so, the appellants argued that the order had continuing legal effect and, therefore, their appeal was not moot. Because the Board found that the order could have continuing legal effect as to the appellant that was not a party to the Consent Decree and because it was not clear whether the order could have an effect on future penalties and compliance reviews, it refused to dismiss the appeal as moot.

In the present case, the Borough argues that it should not be penalized for complying with the ban and submitting a corrective action plan by having its appeal of the ban dismissed. It points to Judge Krancer's analysis in *Eighty-Four Mining* where he noted that to force an appellant to disobey an order, particularly where there is a concern for safety, simply to preserve its right to challenge it would create a disincentive to compliance. *Eighty-Four Mining, slip op.* at 10. The Borough also asserts that the ban could serve as a basis for future civil penalties and could adversely affect its compliance record. It also complains about the stigma attached to having had the ban imposed against it.

In reply, the Department argues that the order imposing the ban was removed, not when the Borough complied with that order, but when it complied with the earlier administrative order that had already been fully litigated before the Board and upheld by the Commonwealth Court and which cannot now be collaterally attacked. Second, the Department asserts that the only option it had under the regulations was to "remove" the ban pursuant to 25 Pa. Code § 94.41.

Section 94.41 states that "a ban [on connections to a sewage conveyance system] may be *removed* by the Department, in the exercise of its discretion" if certain conditions are met by the permittee. (Emphasis added) In this case, the Borough's submission of a corrective action plan, pursuant to the earlier adjudicated administrative order, met the conditions necessary for removal of the ban.

Section 94.31 of the regulations authorizes the Department to impose a ban on sewage connections "whenever the Department determines that the sewerage facilities or any portion thereof are either hydraulically or organically overloaded," and either the Department has determined a ban is necessary to prevent danger to public health or the permittee has failed to submit or implement an appropriate plan to address the overload. Since the Board's adjudication of the administrative order found that the Borough's sewerage system was hydraulically overloaded and that the Borough was required to submit a plan to address it, the Department argues that there is no basis for the Borough to assert that the ban should not have been imposed. It is the Department's contention that once one of these conditions was eliminated, i.e. the Borough's failure to submit a corrective action plan, the ban could not be reimposed or have any continuing legal effect on the Borough.

We find that a wholly different set of facts is presented here than in *Eighty-Four Mining*. First, and most important, in *Eighty-Four Mining* the Board found there was further relief that could be granted, i.e., the orders could be rescinded. Here, there is no longer a ban in effect, sewer connections are now permissible; there is nothing the Board can do to change the *status quo*. In fact, the removal of the sewer ban has reestablished the *status quo ante*. There is no additional relief the Board can grant.

A critical difference between the two cases is that *Eighty-Four Mining* dealt with orders

that had been "lifted," and which the appellant sought to have rescinded or revoked. While the "lifting" of a compliance order is a somewhat artificial concept, the "removal" of a sewer ban is exactly that – a *removal*. It no longer exists. Either there is a ban on sewer connections or there is not. Thus, unlike the situation in *Eighty-Four Mining*, there is no more relief the Board can provide than that which the Department has already done.

Second, there is not the same concern here as in *Eighty-Four Mining* that dismissal of the appeal for mootness might create a disincentive to comply with orders issued by the Department, thereby perpetuating what might be an unsafe condition. That was certainly a concern in *Eighty-Four Mining,* where the safety of mine workers' lives was an issue. Here, however, as the Department points out, it was not compliance with the sewer ban that resulted in its being removed but, rather, compliance with the underlying administrative order that had already been litigated and upheld both by the Board and the Commonwealth Court.

Finally, Edinboro states it is concerned about the continuing impact of the ban with regard to future civil penalties and the stigma associated with it. Again, should any future penalties be assessed, they will be based on the administrative order that has already been litigated and upheld, not on the ban imposed as a result of that order.[4]

Because the ban in question has been removed and there is no further relief that the Board can grant, we find that this appeal should be dismissed as moot.

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[4] Indeed, the appeal docketed at 2004-017-R is an appeal of a civil penalty assessed by the Department based on its May 2000 administrative order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

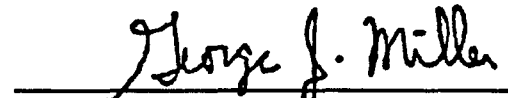
BOROUGH OF EDINBORO and MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-016-R (Consolidated with 2004-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of April, 2005, it is ordered as follows: (1) the appeals consolidated at EHB Docket No. 2004-016-R are hereby unconsolidated, and (2) the Department's *motion to dismiss* is **granted** and the appeal at Docket No. 2004-016-R is **dismissed.** The appeal docketed at Docket No. 2004-017-R shall remain open.

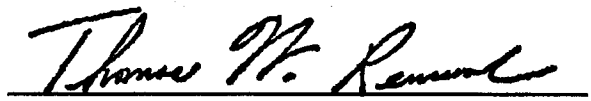
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman



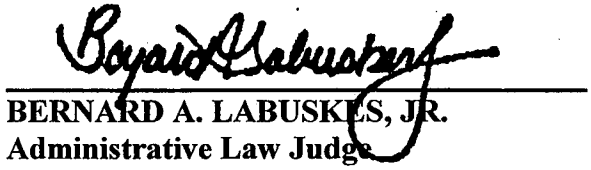
GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2004-016-R
(Consolidated with 2004-017-R)



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: April 12, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	**Issued: April 14, 2005**

OPINION AND ORDER ON SECOND JOINT MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board resolves all factual ambiguities in favor of a nonmoving party in denying a motion to dismiss an appeal as untimely. Failure to perfect an otherwise timely appeal by effecting service on the other parties within 30 days of the Department's action does not render an appeal untimely.

OPINION

This is our second opinion in this appeal. In our first opinion, we addressed a joint motion filed by the Permittee, Ronald Vargo ("Vargo") and the Department of Environmental Protection (the "Department") to dismiss Michael Clabbatz's ("Clabbatz's") appeal. We granted the motion to dismiss with respect to the portions of Clabbatz's appeal brought from Vargo's NPDES and Water Quality Management permits for Vargo's single residence sewage treatment plant because the portions of the appeal brought from those actions were untimely. We denied

the motion, however, with respect to Clabbatz's apparent appeal from the Department's letter to Greenfield Township, which had approved an Official Plan Revision for Vargo's plant. Clabbatz had attached that letter to his response to a Board order requiring him to perfect his appeal by attaching copies of the "Department actions for which review was sought." Therefore, we have assumed for now that Clabbatz's appeal was intended to include the planning approval letter. The first motion to dismiss was denied with respect to the planning approval letter because there was no immediate indication that the portion of the appeal relating to that letter was untimely. *Clabbatz v. DEP, et al.* (Opinion and Order issued January 26, 2005).

The Department and Vargo have now filed a second motion to dismiss. Their argument goes like this: Clabbatz may have filed a copy of the planning approval letter with the Board, but he never served a copy of that letter with the other parties. The Department and Vargo did not even know about the letter when they filed their first motion to dismiss. To this day they have never been served with a copy of that letter. Therefore, Clabbatz has never perfected his appeal. Clabbatz's failure to perfect within 30 days of his actual notice of the approval letter renders the appeal untimely. (Motion ¶ 5; Brief p. 4.) Finally, although the movants never specifically ask for reconsideration of our first order, they seem to suggest that this appeal should not be treated as having included an appeal from the approval letter because Clabbatz has never manifested a clear intent to include that letter in this appeal.

Clabbatz did not file a timely response to the second motion to dismiss.[1] Clabbatz did, however, eventually file a letter responding to the motion to dismiss by stating that he had

[1] An unfortunate pattern and practice seems to be emerging regarding Clabbatz's compliance with the Board's rules. Clabbatz, of course, failed to file a complete appeal, which is what started all of this and resulted in our perfection order. Clabbatz did not respond to that order. He only responded after we took the extra step of issuing a rule to show cause why the appeal should not be dismissed. Clabbatz filed a late response to the second motion to dismiss only after a telephone inquiry from Board staff as to whether he intended to oppose the motion.

"submitted all copies required to all of the parties." Clabbatz also wrote: "My appeal was filed against the entire project, including STF permit and Water Quality permit."

Although we have some appreciation of the movants' frustration as expressed in the second motion to dismiss, that appreciation only goes so far. First, after Clabbatz filed the planning approval letter in response to our rule to show cause, we issued a perfection order, which read as follows:

> AND NOW, this 12th day of November, 2004, Appellant having provided the information required by the Board's order of November 2, 2004, the within appeal is hereby deemed perfected without prejudice to any party's right to raise an objection by filing a proper motion with the Board.

The purpose of that order was in part to avoid precisely the situation that we are faced with here. If the movants had any question about why we were deeming the appeal perfected, they could easily have checked the record. Had they done so, they would have discovered that Clabbatz had filed a copy of the planning letter in response to our order that he identify the Department actions for which review was sought. In fact, we have no record of any objection regarding our perfection order or any other follow-up on the movants' part in response to that order.

A careful read of the Board's order would have also revealed that Greenfield Township was named as an automatic party in this appeal. If the parties assumed or presumed that this appeal was only from the NPDES and Water Quality permits, we would have expected that the presence of Township (the recipient of the planning letter) on the caption would have at least engendered some curiosity.

The movants' argument that Clabbatz has never clearly articulated an intent to appeal from the planning approval might be viewed as an untimely and inappropriate request for reconsideration of our first opinion and order. We found there that, although the record was (and

continues to be) far from clear on the point, we must resolve all factual ambiguities in the context of motions to dismiss in favor of the nonmoving party. *Sri Venkateswara Temple v. DEP*, EHB Docket No. 2003-385-R, slip op. at 2 (February 2, 2005). Clabbatz continues to assert that his appeal is "filed against the entire project," and the planning letter remains in our file as one of the documents identified as "the action being appealed." It is unfortunate that we have been called upon to explain this again in the context of another motion to dismiss.

Indeed, the record is not clear at this point that Clabbatz did in fact fail to serve the parties with a copy of the planning letter. Clabbatz filed a certificate of service at the time he supplied the planning letter to the Board. He continues to assert that he served all necessary copies. Movants claim they have never received the document. We must again resolve this ambiguity in favor of Clabbatz. Therefore, the basic factual premise of the movants' argument in favor of their second motion to dismiss also fails.

Finally, the movants' legal argument is equally invalid. Timely service is not a jurisdictional requirement. *Ainjar Trust v. DEP*, 2000 EHB 505, 509-17; *Thomas v. DEP*, 2000 EHB 598, 601-08, *recon. denied*, 2000 EHB 728. Whether an appeal is timely turns on filing, not service. *Associated Wholesalers v. DEP*, 1997 EHB 1174, 1178. We will not hesitate to exercise our authority in appropriate cases to dismiss an unperfected appeal *as a sanction*, *Norwesco v. DER*, 1986 EHB 1089, but Vargo and the Department have not articulated a case for the imposition of sanctions and we do not independently perceive that the extreme sanction of dismissal is warranted at this time, even if the facts were present to support the parties' motion.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	

ORDER

AND NOW, this 14th day of April, 2005, it is hereby ordered that the Joint Motion to Dismiss Appeal is denied. After the parties consult with each other, the Board will consider any reasonable request for a revised scheduling order.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 14, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
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ROCKWOOD BOROUGH	:	
	:	
v.	:	**EHB Docket No. 2004-034-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 19, 2005**

ADJUDICATION

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A municipality's appeal from an order to replace an undersized culvert that the municipality owns is dismissed. The undersized culvert is causing flooding. The Board finds that the Department acted reasonably in issuing the order to the municipality notwithstanding the fact that the municipality did not install the culvert, it has never altered the culvert or any pertinent watercourse, and the increased stormwater flowing into the culvert is allegedly due to upstream development being carried out by third parties.

Background

Rockwood Borough, Somerset County (the "Borough") files this appeal from a compliance order issued to the Borough by the Department of Environmental Protection (the "Department") dated December 15, 2003. The order directs the Borough to submit a complete permit application for a new culvert to replace the undersized culvert located on Somerset Avenue (SR 3012) in an unnamed tributary to the Casselman River. In accordance with the

parties' joint request, the Board on January 19, 2005 ordered pursuant to 25 Pa. Code § 1021.112 that this appeal would be adjudicated based upon the parties' stipulated record and briefs.

Stipulated Record

The parties' stipulations are reproduced here in their entirety:

JOINT STIPULATIONS OF FACTS AND LAW

A. STIPULATION OF FACTS

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1-693.27 ("Encroachments Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Flood Plain Management Act, the Act of October 4, 1971, P.L. 581, *as amended*, 35 P.S. §§ 697.101-679.601 ("Flood Plain Management Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the Environmental Quality Board's ("EQB") rules and regulations promulgated thereunder ("rules and regulations").

2. Rockwood Borough is a municipal corporation with its offices at 358 Market Street, Rockwood, Pennsylvania 15557, Somerset County, Pennsylvania (the "Borough").

3. Rockwood Borough is a "person" within the meaning of Section 3 of the Encroachments Act, 32 P.S. § 693.3 and Section 105.1 of the rules and regulations, 25 Pa. Code § 105.1.

4. Jack Benford is a "person" as defined in the above-referenced statutes who resides at 609 Somerset Avenue, Rockwood, Somerset County, Pennsylvania ("Benford residence"), such residence constructed in 1972.

5. State Route (S.R.) 3012 (Legislative Route 55171) runs along Somerset Avenue in Rockwood Borough, Somerset County.

6. On or about December 15, 2003, the Department issued Compliance Order No. EN-56-0302 ("Order") to the Borough.

7. Ramez Ziadeh, P.E., Soils and Waterways Senior Civil Engineer Hydraulic, drafted the Order based upon the results of his inspection of an unpermitted 48″ culvert ("culvert") placed in an unnamed tributary ("UNT") to the Casselman River.

8. According to the Borough's engineer, the unpermitted culvert was in existence when the Pennsylvania Department of Transportation ("PennDOT") took over S.R. 3012 sometime before 1962.

9. Rockwood Borough owns the property, *viz.*, that portion of Somerset Avenue upon which the 48″ culvert is located, in an unnamed tributary to the Casselman River.

10. On or before December 31, 1999, Rockwood Borough, through Resolution 99-5 adopted by the Rockwood Borough Council on Tuesday, August 17, 1999, agreed to transfer from state to municipal control S.R. 3012 from segment 0010 (offset 0000) to segment 0021 (offset 0388), a distance of .0650 miles (3432 feet).

11. Resolution 99-5 resulted in Rockwood Borough's ownership and maintenance responsibility for S.R. 3012 in its entirety, including the unpermitted culvert on S.R. 3012.

12. The Order required the Borough to submit by March 10, 2004, a complete permit application"...for a new culvert to replace the undersized culvert located on Somerset Avenue (S.R. 3012) in an unnamed tributary to Casselman River." The Order further provided that the culvert replacement be completed by September 30, 2004.

13. On or about January 14, 2004, the Borough appealed the Order and the appeal

was docketed at EHB Docket No. 2004-034-L.

14. In a prior Department investigation of construction work performed at Rockwood High School ("High School"), in 1996 the Rockwood Area School District submitted a Hydrologic & Hydraulic Analysis of 48″ Concrete Pipe Under Somerset Avenue ("Killam Report") prepared by Killam Associates, an engineering firm in Somerset, Pennsylvania.

15. The authenticity and accuracy of the information contained in the Killam Report is not disputed by the parties.

16. The Killam Report provided a thorough hydrologic and hydraulic evaluation for the unpermitted culvert, which is in issue in the current appeal.

17. The Killam Report's Summary and Conclusions finds,"...As can be seen, the culvert can pass a 2 year event without causing flooding of the Benford Structures. However, the 5, 10 and 25 year storm events overflow Somerset Avenue." See unnumbered page immediately prior to Table 1, with Registered Professional Engineer Seal 30644-E of Cameron Ray Mock.

18. Table 1 of the Killam Report (11/01/96) provides Rockwood School Hydrologic and Hydraulic Evaluation Summary of 48″ Concrete Pipe Under Somerset Avenue. The table lists storm events of 2, 5, 10 and 25 years with estimates of the basement water depth in the Benford residence. Only the 2 year storm event results in a 0-foot basement water depth. The 5-year storm event is estimated to result in a 2.78-foot basement water depth; a 10-year storm event is estimated to result in a 4.3-foot basement water depth; and a 25-year storm event is estimated to result in a 4.9-foot basement water depth.

19. Mr. Ziadeh reviewed the November 1996 Killam Report including hydrologic and hydraulic site calculations prior to issuing the Department's Order.

20. Mr. Ziaheh's investigation of the newly-built residential development upstream of

the Benford residence in Milford Township, also reflected in the Killam Report through site calculations, resulted in his conclusion that the storm water created by the residences resulted in an increase of volume that flowed through the Borough culvert, creating a flooding hazard to the Benford residence from storm events of 5 years or greater.

21. The Department engineer, Ramez Ziadeh, and the borough's engineer, F. Scott Rugh, agree that the construction work by Rockwood Area School District, located in Milford Township, and the construction of various homes within the residential development by Mamco, Inc., in Milford Township have resulted in an increased volume of storm water which flows thorough this borough's culvert, creating the flooding hazard of which Jack Benford complains.

22. Since the culvert fails to satisfy the 25-year design flow criteria in rural areas, the culvert is undersized and fails to meet the requirements of the Environmental Quality Board's Chapter 105 rules and regulations.

23. Consequently, due to the culvert's inadequate size and the likelihood of continued flooding to the Benford residence, the Department issued the Compliance Order requiring the Borough to submit a new Water Obstruction and Encroachment Permit application to obtain a properly-sized culvert to pass the required design flow criteria.

24. The culvert was installed at a time prior to the permit requirements of the Encroachment Act, or its predecessor statute(s).

25. The Department is not claiming that the Borough has modified any water courses or streams which have affected flooding of the Benford residence.

B. <u>STIPULATIONS OF LAW</u>

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325,

as amended, 32 P.S. §§ 693.1-693.27 ("Encroachments Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Flood Plain Management Act, the Act of October 4, 1971, P.L. 581, *as amended*, 35 P.S. §§ 697.101-679.601 ("Flood Plain Management Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

2. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this appeal pursuant to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §§ 7511-7516, 35 P.S. § 7514, and the Encroachments Act, 32 P.S. § 693.24.

3. The Borough is the owner of S.R. 3012, in its entirety.

4. The Department has the burden of proceeding and burden of proof when it issues an order. 25 Pa. Code § 1021.101(b)(4).

5. "Encroachments" are "any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." Section 3 of the Encroachments Act, 32 P.S. § 693.3, and Section 105.1 of the rules and regulations, 25 Pa. Code § 105.1.

6. "Water obstructions" are defined in Section 3 of the Encroachments Act as "...any dike, bridge, culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across, or projecting into any watercourse, floodway or body of water." 3[2] P.S. § 693.3 and Section 105.1 of the rules and regulations, 25 Pa. Code § 105.1.

7. Under the authority of Section 6 of the Encroachments Act, 32 P.S. § 693.6, and Section 11 of the rules and regulations, 25 Pa. Code § 105.11, no one may construct or modify a

water obstruction or encroachment without the prior written permission of the Department.

8. Section 105.12(b)(7) of the Environmental Quality Board's rules and regulations provides:

> (b) The requirements for a permit for existing structures or activities, as provided in section 6(c) of the act (32 P.S. § 693.6(c)), are waived for the following structures or activities, if construction was completed prior to July 1, 1979. If the Department upon complaint or investigation finds that a structure or activity which is eligible for waiver, has a significant effect upon safety or the protection of life, health, property or the environment, the Department may require the owner of the structure or activity to apply for and obtain a permit under this chapter.
>
> . . .
>
> (7) A culvert, bridge or stream enclosure on a watercourse where the drainage area above the culvert, bridge or stream enclosure is 5 square miles or less.

9. Bridges and culverts shall be designed and constructed in accordance with the criteria set forth in 25 Pa. Code § 105.161.

10. The general criteria for design flows in rural areas is to satisfy a 25-year frequency flood flow. 25 Pa. Code § 105.161(c)(1).

11. Section 14 of the Encroachment Act, 3[2] P.S. § 693.14 (emphasis added), imposes the following duties upon the Department:

> (a) Whenever the Department finds there is reasonable cause to suspect the existence of conditions adversely affecting the safety of a dam, water obstruction or encroachment, the Department may order the owner to conduct such investigations, tests and analyses as may be required to determine the continuing safety of the facility.
>
> (b) If the Department determines that any dam, water obstruction or encroachment is unsafe or adversely affects property or the environment or has not been properly constructed, operated, monitored or maintained in compliance with this act, it may order the owner of the facility to repair, alter, maintain or remove the

facility or take such other action necessary to carry out the purposes of this act, within such time as prescribed in the order.

C. JOINT EXHIBITS

The Department and the Borough have reviewed the following submissions and agree that each Exhibit is a true and correct copy of self-authenticating documents, and that the data and information contained therein is true and accurate.

1. October 6, 1999 correspondence from Richard J. Peltz, Deputy Secretary, Local and Area Transportation, PennDot to Brenda Werntz, Secretary, Rockwood Borough.

2. Resolution No. 99-5, August 17, 1999.

3. Hydrologic and Hydraulic Analysis of 48″ Concrete Pipe Under Somerset Avenue Prepared for Rockwood Area School District, submitted to Pennsylvania Department of Environmental Protection by Killam Associates Consulting Engineers, November 1996.

4. December 15, 2003 Compliance Order EN-56-0302 (3 pages and cover letter) from Don Brown to Rockwood Borough, and Domestic Return Receipt.

5. May 21, 2003 correspondence of F. Scott Rugh, P.E., the EADS Group to Donald Warrick, President, Rockwood Borough Council.

6. VCR tape depicting flooding to Benford residence.

7. Curriculum Vitae of Ramez Ziadeh, P.E.

8. October 22, 2002 correspondence from Ramez Ziadeh, P.E. to Brenda Werntz, Secretary, Rockwood Borough.

9. November 26, 2002 correspondence of Borough Solicitor to Don Brown.

10. December 13, 2002 correspondence from Don Brown, Compliance Specialist to William R. Carroll, Esquire.

11. March 8, 2004 Department Request for Admissions and Interrogatory.

12. Other photographic evidence.

Discussion

In this appeal from a compliance order, the parties correctly stipulate that the Department bears the burden of proof. Specifically, the Department must prove by a preponderance of the evidence (1) the facts necessary to support its order, (2) that the order is authorized by and otherwise in accordance with applicable law, and (3) that the order was a reasonable exercise of the agency's discretion. *Carignam v. DEP*, EHB Docket No. 2003-113-MG, slip op. at 7 (Adjudication issued September 3, 2004); *Burnside Borough v. DEP*, 2003 EHB 305, 312; *Goetz v. DEP*, 2002 EHB 886, 895.

The Borough's brief is quite short and contains no citations to legal authority. With regard to the first prong of our analysis, the Borough does not dispute that the facts support the issuance of the order. The Borough further concedes that the Encroachments Act gives the Department the authority to order an owner such as the Borough to take action. The Borough does not allege that the Department committed any other legal error. Still further, the Borough does not deny that, in light of flooding conditions occurring in the vicinity of the existing culvert, it was appropriate for the Department to issue an order to somebody.

The Borough's only contention in support of its appeal, then, is that it is "objectively unfair" to issue the order *to the Borough*. In other words, the Borough does not deny that the culvert needs to be replaced; it simply contends that it was unfair for the Department to issue the order to the Borough instead of Rockwood Area School District and/or Mamco, Inc., whose upstream activities are alleged to have increased the volume of stormwater running into the culvert. In support of its claim, the Borough emphasizes that its only connection to the culvert is its ownership thereof. It has not modified any watercourses or streams. It has not done anything

to increase the volume of water flowing into the culvert. Other parties allegedly caused the increase and those parties are located outside of the Borough limits. The Borough itself has not done anything to increase the risk of flooding or to adversely affect the property of the homeowner most directly at risk, Jack Benford. In a nutshell, the Borough suggests "that any remedies which are available either to Jack Benford or which can be enforced by the Department should be enforced against those organizations, entities, or individuals who are actually causing the problem, being Rockwood Area School District and Mamco Developments."

We do not believe that the Department's decision to order the owner of the culvert to replace it was an unreasonable exercise of the Department's discretion. There is no dispute that the existing condition is causing a hazardous situation and that something needs to be done. There is no question that the culvert needs to be replaced. The Department has a statutory duty to investigate and correct unsafe conditions covered by the Encroachments Act. *Odette's, Inc. v. DCNR*, 699 A.2d 775, 781-82 (Pa. Cmwlth. 1997). The Encroachments Act specifically authorizes the Department to order owners of obstructions or encroachments adversely affecting property or the environment to repair, alter, maintain, or remove the obstruction/encroachment or take other action necessary to carry out the purposes of the Act. 32 P.S. § 693.14(b). It is well settled that the validity of the Department's exercise of its police power under the Encroachments Act depends little upon an owner's responsibility for causing the unsafe condition. *Bonzer v. DER*, 452 A.2d 280, 284 (Pa. Cmwlth. 1982) (quoting *National Wood Preservers v. DER*, 489 Pa. 221 (1980), *appeal dismissed,* 449 U.S. 803 (1980)); *see also Yablon v. DEP*, 1997 EHB 11, 17 (responsibility for constructing berm was irrelevant to issuance of Department order directing removal by owner under the Encroachments Act). The Borough's argument that it did not design or construct the culvert and that it is not the cause of the

hazardous condition which exists is immaterial. The Department is authorized by statute to order the Borough based merely upon its status as *owner* of the culvert to take action to correct the problem. Thus, we cannot say it was unreasonable for the Department to issue the order to the Borough.

Moreover, issuance of the order to the Borough was reasonable as a practical matter. Ordering third parties to replace someone else's culvert on someone else's property would have been equally if not more problematic than taking action against the owner. Among other things, there would be factual and legal questions regarding the third parties' liability. In contrast, the owner's legal responsibility is clear. Third parties would have at a minimum required the owner's permission to carry out all necessary work. There would have been issues regarding site access. The owner would have needed to be involved one way or the other in the entire replacement project. Furthermore, the owner will have future responsibility for the new culvert. *See* 32 P.S. § 693.13.

We are not suggesting that the Department could not have taken enforcement action against third parties. That question is not before us. We are simply saying that doing so would have been more complicated and problematic. In fact, we question whether it would have been in the owner's long-term best interest to have third parties plan, permit, and construct a project that will disrupt the owner's property and for which the owner will be responsible going forward. We cannot say that the Department acted unreasonably in choosing to avoid these complications and pursuing the obvious target for taking corrective action.

Where there are multiple liable parties and the harm is indivisible, in the absence of unusual circumstances not shown to be present here, the Department may normally proceed against one, some, or all of the responsible parties in fulfilling its statutory obligation to ensure

that an environmental problem is expeditiously addressed. *McKees Rocks Forging, Inc. v. DER*, 1991 EHB 730, 732 (Department's failure to take action against third-party allegedly responsible for groundwater contamination was unreviewable); *see also DEP v. Whitemarsh Disposal Corp.*, 1998 EHB 832, 842-43 (Department's failure to initiate enforcement action against third-party could not be addressed).

The Borough contends that the School District and Mamco Development "should be responsible or liable for any damages or repair work." That may be so, and we doubt that the Borough is without legal recourse if it can prove its case in the appropriate court. *See Groves v. DER*, 1976 EHB 266, 268 (Borough that made repairs to culvert had remedy for contribution from responsible party in different forum). But the fact that third parties might eventually prove to be liable for *reimbursing* the Borough for its costs does not limit the Department's discretion to proceed against the Borough or suggest that the Department has acted unreasonably by doing so.

CONCLUSIONS OF LAW

1. The parties' stipulations of law are approved and adopted for purposes of this appeal.

2. The record contains the facts necessary to support the Department's Order.

3. The Order is authorized by and otherwise in accordance with applicable law.

4. Issuance of the order constituted a reasonable exercise of the Department's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCKWOOD BOROUGH	:	
	:	
v.	:	**EHB Docket No. 2004-034-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of April, 2005, it is hereby ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 19, 2005

c: DEP Bureau of Litigation:
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Southwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREENRIDGE RECLAMATION LLC	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 21, 2005**

OPINION AND ORDER ON
MOTION TO DISMISS AND PETITION
TO FILE *NUNC PRO TUNC* APPEAL

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board dismisses an untimely appeal. The Board denies a petition for leave to file a notice of appeal *nunc pro tunc* where the appellant has failed to show unique and compelling circumstances establishing a non-negligent failure to file a timely appeal.

OPINION

Greenridge Reclamation LLC ("Greenridge") received a copy of a modified permit from the Department of Environmental Protection (the "Department") by certified mail on February 9, 2005. Greenridge, through its counsel, prepared a notice of appeal seeking review by this Board of the modified permit. Greenridge placed the notice of appeal in a Federal Express envelope mistakenly addressed to "Clerk, DEP" at the Department's mailing address in the Rachel Carson State Office Building in Harrisburg, Pennsylvania. Federal Express delivered the package in

accordance with the mailing address to the Department. Greenridge did not send the notice of appeal to the Board. Greenridge did not check with the Board until March 21 to determine whether the package had been received, which was well outside of the 30-day appeal period. The Board's staff advised Greenridge at that time that the Board had not received the appeal. Greenridge immediately filed a copy of its appeal by facsimile transmission.

The recipient of a Departmental action has 30 days to file an appeal with the Environmental Hearing Board. 25 Pa. Code § 1021.52(a); *Martz v. DEP*, EHB Docket No. 2004-241-MG (April 5, 2005); *Pikitus v. DEP*, EHB Docket No. 2004-215-MG (April 5, 2005). There is no question here that Greenridge failed to file a timely appeal. Therefore, Greenridge has filed a petition for leave to file its appeal *nunc pro tunc* as authorized by our rules at 25 Pa. Code § 1021.53(f).[1] Petitions for allowance of an appeal *nunc pro tunc* are granted in very limited circumstances, such as where there is fraud or a breakdown in the Board's operations or there are unique and compelling factual circumstances that establish a non-negligent failure to appeal. *Martz*, slip op. at 2, *citing Grimaud v. DER*, 638 A.2d 299 (Pa. Cmwlth. 1994) and *Falcon Oil Co. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992).

Greenridge does not allege that there was fraud or a breakdown in the Board's operation. Instead, it asks this Board to accept its late appeal because the untimely filing was caused by its non-negligent conduct, because counsel took immediate action upon learning of the error, and because no prejudice will result to the Department if the Board allows the appeal to go forward. The Department opposes the petition and asks that the appeal be dismissed.

---

[1] "The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc. The standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." 25 Pa. Code § 1021.53(f).

The Board has dealt with this situation many times. Each time, we have rejected the petition to file an appeal *nunc pro tunc*. We could not grant Greenridge's petition without acting inconsistently with this long line cases. For example, our recent decision in *Mon View Mining Corp. v. DEP*, 2003 EHB 542, is on point. In that case, the appellant served the Department with a copy of its notice of appeal within the 30-day appeal period but inadvertently failed to file a copy with the Board. The appellant took immediate steps to correct the error once its was discovered, but the 30-day appeal period had already expired. The appellant sought permission to file an appeal *nunc pro tunc*. We rejected the petition and dismissed the appeal. We explained our ruling as follows:

> In this case, the facts are undisputed that Mon View Mining did not file its Notice of Appeal within the thirty day period. The fact that it apparently served its appeal with the Department within the appeal period does nothing to cure this jurisdictional defect. As we recently pointed out, timely serving a notice of appeal on the Department instead of the Board does not meet the jurisdictional requirement of filing written notice of appeal with the Board within the thirty day appeal period [*citing Broscious Contracting Company v. DEP*, 1999 EHB 383, 385].
>
> A long line of appellate and Board cases have upheld the thirty day appeal period as jurisdictional and have refused to recognize the serving of appeals with the Department rather than filing them with the Board. In *Rostosky v. Department of Environmental Resources*, [364 A.2d 751 (Pa. Cmwlth. 1976)], appellant's counsel served his notice of appeal with the Department rather than the Board. The Commonwealth Court, in upholding the Board's dismissal of the appeal, set forth the hornbook law in this area. "The untimeliness of the filing deprives the Board of jurisdiction."
>
> The *Borough of Bellefonte v. Department of Environmental Resources*, [570 A.2d 129 (Pa. Cmwlth. 1990)] is a case with arguably stronger facts in favor of the appellant's position than the case at bar. Appellant's attorney's secretary timely mailed the notice of appeal to the Department. However, because of emotional and mental distress caused by domestic problems and an upcoming change of jobs, the secretary delayed mailing the

original notice of appeal to the Board until six days after the appeal period expired. The Commonwealth Court upheld the Board's dismissal of the appeal as being untimely filed depriving the Board of jurisdiction over the appeal.

Tyson v. DER, 1994 EHB 868 was a case where an appellant unrepresented by counsel served his appeal only with the Department. The Board granted the Department's motion and dismissed the appeal because it lacked jurisdiction over the appeal. The Board rejected Appellant's mistaken assumption that serving the notice of appeal with the Department constituted filing with the Board.

Finally, in a case on point with the case at bar, the Commonwealth Court upheld the Board's dismissal of an appeal that was not timely filed with the Board. [*Falcon Oil v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992).] This involved the appeal of a civil penalty assessment by Falcon Oil Company (Falcon). Falcon's counsel prepared a notice of appeal and instructed his secretary to file it with the Environmental Hearing Board and insure that all necessary copies of the appeal were served. Eleven days after receiving written notice of the Department's action, Falcon's counsel's secretary mailed the original notice of appeal to the Department's Regional office and also forwarded a copy to the Department's Office of Chief Counsel. Just like in our case, the notice of appeal form in Falcon set forth in bold print that it must be received by the Board within thirty days of the appellant's receipt of notice of the Department action. Three days after the expiration of the appeal period the Department's assistant counsel assigned to the appeal called Falcon's counsel to inquire why no docket number had been assigned to the appeal by the Environmental Hearing Board. Obviously, the reason why no docket number had been assigned was because the notice of appeal had never been filed with the Board. Three days later Falcon filed a petition for leave to appeal *nunc pro tunc*.

The Commonwealth Court reiterated the well-established law that the timeliness of an appeal is a jurisdictional matter. It held that the serving of the appeal on the Department did not equate to timely filing with the Board. In so holding, it distinguished this situation from the instance where an appeal is filed with the wrong tribunal.

> The defective appeal in *Suburban Cable TV Co., Inc. v. Commonwealth*, 570 A.2d 601 (Pa. Cmwlth. 1990), *aff'd* 591 A.2d 1054 (Pa. 1991), resulted from a filing with the

> wrong tribunal: the Board of Appeals of the Department of Revenue rather than the Board of Finance and Revenue. This Court held that the Judicial Code, 42 Pa. C.S. § 5103, required that such improperly filed appeals be transferred to the appropriate tribunal and treated as if filed on the date filed with the erroneous tribunal. (citations omitted). Because the filing with the Board of Appeals occurred before expiration of the appeal period, the transfer was ordered and the appeal allowed. *Neither the [Department's] Office of Chief Counsel nor the [Department's] Regional Office is a tribunal or court subject to 42 Pa. C.S. § 5103.* (emphasis added) [609 A.2d at 879.]

* * *

The power of this Board or a court, for that matter, to allow an appeal *nunc pro tunc* is extremely limited. [*citing Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976).] "In *Bass v. Commonwealth*, [401 A.2d 1133 (Pa. 1979)], the Pennsylvania Supreme Court explained that an appeal *nunc pro tunc* is appropriate only in cases where there is fraud or some breakdown in the court's operation or where there is a non-negligent failure to file a timely appeal."

The Commonwealth Court's decision in *Borough of Bellefonte v. Department of Environmental Resources*, [570 A.2d 129 (Pa. Cmwlth. 1990)] is most instructive. As discussed earlier in this Opinion, the Appellant's secretary timely mailed the Notice of Appeal to the Department, but forgot to mail the Notice of Appeal to the Board. Appellant claimed it should still be able to file its appeal *nunc pro tunc* even though it did not allege that the delay in filing was caused by fraud or breakdown in the operation of the Board. In rejecting this request, Commonwealth Court declared:

> It is clear that petitioners have not presented a unique and compelling factual circumstances for which an appeal *nunc pro tunc* may be granted. Although the secretary mailed the appeal papers to all other interested parties, she just forgot to mail them to the EHB... The EHB did not err in rejecting this argument. [570 A.2d at 131.]

2003 EHB at 547-50.

Greenridge's attempt to distinguish the case law discussed in *Mon View* is of no avail. Greenridge argues that, unlike the hapless appellants in other cases of untimely appeals, Greenridge knew of the proper filing requirements, arranged for delivery well in advance of the deadline, checked the addresses on the cover letter and the appeal form (but not the mailing envelope), selected a reputable carrier who provided speedy delivery, and verified that the package had been delivered. It is true that no two cases are ever precisely the same, but notwithstanding Greenridge's well-intentioned efforts, the bottom-line, fundamental error here was that Greenridge never checked to see whether the appeal had actually been received by the Board. In other words, even if we assume that Greenridge exercised reasonable care to ensure that its appeal was *sent* to the Board, it has not shown that it took reasonable care to ensure that its appeal was *received* by the Board.

A simple telephone call within the appeal period could have revealed whether the appeal had been received. Counsel could have checked the Board's web site and quickly and effortlessly discovered that no appeal had been docketed.[2] The Board's rules now allow an appeal to be filed almost instantaneously by facsimile transmission, which provides some evidence of receipt. 25 Pa. Code § 1021.32. Alternatively, the appeal could have been hand-delivered by counsel's Harrisburg office, with the messenger instructed to return with a copy date-stamped by the Board. The fundamental error here was not the secretary's use of an incorrect mailing label as Greenridge would have us believe; it was the failure to employ any one of the various methods available to ensure that timely delivery to the Board had actually

[2] The fact that counsel did not receive Pre-hearing Order No. 1, which is typically issued within a few days, or notice of appearance of counsel, while not *necessarily* meaningful, might have provided additional impetus to at least check the Board's web site to ensure that the appeal had been docketed.

occurred.[3] And to close the loop on this analysis, had counsel checked for proper delivery in a timely manner, the earlier error could have been corrected and a timely appeal could have easily been filed.

Among its other arguments in reply to the Department's motion to dismiss, Greenridge cites the Code of Civility and queries why the Department did not advise Greenridge of the mistaken delivery. Greenridge quickly adds that it is not accusing the Department of intentional or calculated silence, but notes that the Department's failure to point out the mistaken delivery lulled Greenridge into a false sense of compliance with the filing requirements.

There are several answers to this rather thinly veiled allegation of impropriety. First, there are no facts to support Greenridge's speculation that the Department was aware of a mistaken delivery. The Department is required to receive service copies of the hundreds of appeals that are filed every year. Greenridge states that the Department should have realized that it had received the "*original*" Notice of Appeal, with the *original* letter addressed to the Board," but it is not clear how the Department was supposed to know that it was in possession of the so-called "originals." Greenridge suggests that the Department may have received multiple copies and that fact should have indicated that something was amiss. The Board, however, receives multiple copies of filings all the time where no such multiple filings are required. We would not view that as evidence that someone was missing a service copy. We cannot agree that the Department's clerical staff has an obligation to take any particular action when it receives unnecessary duplicates of the same service documents.

Aside from lacking a factual foundation, the simple truth remains that counsel was not entitled to rely on the Department's silence, or to cast aspersions on the Department to deflect

[3] We thus are not particularly sympathetic to counsel's effort to blame this situation entirely on the legal secretary. It was not the secretary's ultimate responsibility to ensure that proper delivery had actually occurred.

attention away from counsel's own error. As previously noted, the complete silence of the Department in reaction to what appears to have been a significant appeal might just as easily been interpreted as cause to double-check that the case had been docketed. This is particularly the case where verifying proper delivery and docketing would have been such a simple matter.

Greenridge relies heavily on *Bass v. Commonwealth*, 401 A.2d 133 (Pa. 1979). In that case from the 1970's, a divided Supreme Court allowed an appeal *nunc pro tunc* because of an unexpected debilitating illness of a secretary and because the attorneys' office had procedures in place to adequately and reasonably provide for such contingencies. 401 A.2d at 1136 (Nix, concurring). The Court seemed to conclude that the failure of the procedures to work in the isolated instance before it was not negligent. Here, to repeat, the error was in counsel's failure to have such procedures and safeguards in place to ensure that proper delivery had been accomplished in a timely manner.

Speaking more generally, technology has in many ways made the world a more complicated place, but filing court documents, at least before some tribunals, is one instance where technology has made life more simple. Older case law dealing with *nunc pro tunc* filings was often handed down in a world where parties needed to physically file multiple hard copies of documents at the courthouse. Now that facsimile transmission is an acceptable form of filing, it will and should be more difficult to explain away a late filing.

Greenridge complains that it is very difficult if not nearly impossible to obtain permission to appeal *nunc pro tunc* from the Board. The Board may be rather liberal in excusing or overlooking late filings during the course of litigation, but a different standard must perforce be applied to notices of appeal. The 30-day requirement has frequently been stated to be jurisdictional. *Rostosky*, 364 A.2d at 763; *Martz*, slip op. at 3; *Mon View Mining, supra.*

Furthermore, we have been warned that late appeals are not be allowed as a matter of grace or in the interests of justice. *Bass, supra*; *Caln Township v. DER*, 595 A.2d 702; *Martz*, slip op. at 3.

In conclusion, Greenridge has not demonstrated that there was a non-negligent failure to file a timely appeal. Accordingly, its petition for leave to file an appeal *nunc pro tunc* must be denied. It follows that its admittedly untimely appeal must be dismissed. We, therefore, issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREENRIDGE RECLAMATION LLC	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of April, 2005, it is hereby ordered that Greenridge's Petition for Leave to file a Notice of Appeal *Nunc Pro Tunc* is denied, the Department's Motion to Dismiss is granted, and this appeal is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 21, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARC YOSKOWITZ	:	
	:	
v.	:	**EHB Docket No. 2003-172-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THOMPSON BOROUGH, Intervenor	:	**Issued: April 22, 2005**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

An appeal from the Department's denial of a Private Request, which raises challenges to the propriety of the approval of the underlying official plan and the adequacy of the plan to meet Appellant's sewage needs, is dismissed in part and sustained in part. Only objections that relate to the action which is the subject of the appeal may be brought before this Board. Since only the issue of whether the 1998 Plan adequately meets Appellant's sewage needs is relevant to this specific Private Request, that issue will proceed to a hearing. The other objections are dismissed.

Introduction

This appeal presents a challenge by Marc Yoskowitz (Appellant) to the Department of Environmental Protection's (DEP or Department) denial of Appellant's Private Request submitted pursuant to the Pennsylvania Sewage Facilities Act (Sewage Facilities Act). Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 – 750.20(a). Currently before the Board is the Department's Motion for Summary Judgment (Motion) and Memorandum of

Law in Support of Its Motion for Summary Judgment, Appellant's Answer to the Motion and the Answer to Motion for Summary Judgment filed by Thompson Borough (Borough), in which the Borough joined in the Department's Motion. Neither Appellant nor the Borough filed a memorandum of law. The Department's Motion seeks dismissal of the appeal, arguing that the doctrine of administrative finality precludes the challenges raised by Appellant in the Notice of Appeal (NOA).

Factual and Procedural Background

On November 6, 1998, the Department approved a revision (1998 Revision) to the Borough's comprehensive sewage facilities plan developed by the Borough pursuant to the Sewage Facilities Act. The 1998 Revision provided for construction of a centralized sewage collection system and conveyance system and sewage treatment plant to serve portions of the Borough. Appellant did not file an appeal with this Board challenging the 1998 Revision within the 30 day period established by the Board's rule at 25 Pa. Code § 1021.52(a).

Appellant owns a service station located within the Borough, but outside of the service area for sewage collection established in the 1998 Revision. Appellant submitted a Private Request to the Department dated February 6, 2003 requesting that the Department "have the Borough ... revise their official plans to include my service station for the borough sewerage." Motion, Exhibit B at 1 (Private Request). In a letter dated July 1, 2003, the Department responded to the Private Request and refused to take the requested action. Motion, Exhibit C. Appellant filed a NOA on August 1, 2003 challenging the Department's July 1, 2003 refusal to order the Borough to revise its official plan. NOA ¶ 2(a).

Standard of Review

We recently stated the standard of review applicable to a motion for summary judgment:

> "A grant of summary judgment by the Environmental Hearing Board is proper where 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 that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Services, Inc. v. Dept. of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also County of Adams v. Dept. of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party; all doubts as to the existence of a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal den.*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

Borough of Roaring Springs v. DEP, 2004 EHB 889.

Discussion

The Department's Motion argues that all the objections contained in Appellant's Notice of Appeal challenge the 1998 Revision and not the Department's denial of Appellant's Private Request. Motion ¶ 11. According to the Department, since Appellant did not file a timely appeal challenging the 1998 Revision, "[t]o the extent Appellant's Notice of Appeal challenges the Borough's Sewage Facilities Plan, such objections are precluded pursuant to the doctrine of administrative finality." Motion ¶13.

Similar to the situation in *Winegardner v. DEP*, 2002 EHB 790, the doctrine of administrative finality is not necessary to the resolution of the Motion before us. Rather, the outcome of the issue focuses on the basic concept of the appropriate scope of this appeal. As stated in *Winegardner*:

> If we focus on fundamentals, as opposed to administrative finality, which can at times confuse rather than clarify the issue, prescribing the appropriate scope of this appeal is not all that complicated. Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. *See*

> *Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994), *citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991) (a party's appeal of one permit does not allow it to raise issues related to permits for which it filed no appeals). It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry. *Accord, Perkasie Borough Authority,* slip op. at 18.

2002 EHB at 792-93 (emphasis in original). In *Winegardner*, the Appellant filed an appeal challenging approval of a 2001 update to an official plan, but many of the issues raised in the appeal challenged the concept of centralized sewerage that had been adopted in earlier updates or revisions of the official plan. *Id.* at 794. The Board dismissed Winegardner's objection that solely concerned the earlier updates or revision of the official plan. *Id.*

The present appeal challenges the Department's denial of Appellant's Private Request. The Sewage Facilities Act authorizes a property owner to submit a Private Request to DEP seeking an order from DEP to a municipality requiring the municipality to revise its official sewage plan if the "property owner can show that the official plan is not being implemented or is inadequate to meet the ... property owner's sewage disposal needs." 35 P.S. § 750.5(b); *see* also 25 Pa. Code §71.41(a). Appellant alleged in his Private Request that the Borough's "official plan [is] inadequate for the municipality and the 'Scope of Services' needs to be modified to include my station." Private Request at 1.

DEP set forth two bases for denying Appellant's Private Request, Appellant's failure to show that the Borough's official plan is inadequate to meet Appellant's sewage disposal needs and the Borough's comments opposing the Private Request due to the additional expense the Borough would incur to implement the request. Appellant's NOA raised the following objections:

The Department of Environmental Protection failure to find that the Borough of Thompson failed to satisfy the following:

a.) The Borough of Thomson failed to satisfy the requirements of 25 Pa. Code Section 71.21. Content of official plans by failing to complete the following:

a.) The Borough of Thompson failed to comply with the requirements under 25 Pa. Code Section 71.21(a)(2)(i) in that the Borough failed to identify, map or describe all systems within the Borough that have failed or are otherwise non-functioning in the project area.

b.) The Borough of Thompson failed to satisfy Section 71.21 subpart (a)(2)(i)(c), having failed to provide descriptions of operations and maintenance requirements and the status of compliance of all the present systems within the project area with these requirements.

b.) The Borough of Thompson failed to comply with the requirements of 25 Pa. Code Section 71.21(a)(2)(ii) by failing to identify, map, and describe all areas within the project area that use individual on lot sewage systems. Nor did the Borough satisfy any requirement of sub-parts (A) [sic] through (c) of Section 71.21(a)(2)(ii).

c.) The Thompson Borough having failed to adequately investigate the properties within the Borough in need of being connected to the proposed community system. By failing to adequately investigate the properties and to completely identify those that are in need of connection to the proposed community system, the Borough of Thompson has failed to comply with the above cited provisions of 25 Pa. Code Sections 11. General Requirement. The proposed plan does not provide for the resolution of existing sewage disposal problems nor adequately provide for the future sewage disposal needs of the municipality.

d.) Thompson Borough failed to satisfy their responsibility to revise the sewage plan under 25 Pa. Code Section 71.21 (a) and the Department of Environmental Protection failed to adequately review the proposed plan by failing to determine that the proposed plan is inadequate to meet the existing and future needs of the municipality <u>or portion</u> thereof. The proposed plan's content is inconsistent with the Act (25 Pa. Code Section 71.12(d)).

NOA ¶3 (emphasis in original).

Most of the objections raised in Appellant's NOA relate to the Department's approval of the 1998 Plan and not to the propriety of the Department's denial of the Private Request. The NOA raises issues challenging whether the Borough properly complied with the regulations governing the content of the 1998 Plan and whether the Borough and Department performed the necessary tasks and reviews associated with developing and approving the plan or plan revision. Those issues are not within the scope of this appeal since this is an appeal of the denial of the

Private Request. On the other hand, however, both the Private Request and the NOA put at issue whether the 1998 Plan adequately meets Appellant's sewage needs. In paragraph 4 of its Answer to the Motion for Summary Judgment the Borough addressed this issue. The Borough avers that the 1998 Plan recommended a holding tank ordinance and that a holding tank ordinance was adopted by the Borough in April 2003. The Borough further avers that a holding tank would adequately provide for Appellant's sewage needs. On the contrary, the Private Request states that Appellant was informed by "the borough's SEO" that a holding tank "is not feasible." Private Request at 2. Therefore there is a matter of disputed fact remaining in this appeal and consequently summary judgment may not be granted on that fact. Accordingly we grant summary judgment and dismiss all of Appellant's objections that challenge the 1998 Plan as being beyond the scope of this appeal. *Accord Scott Township Environmental Preservation Alliance v. DEP*, 2001 EHB 90. [1] This appeal will proceed on Appellant's objection that the 1998 Plan does not adequately meet his sewage needs, which centers on the factual dispute regarding the adequacy of the proposed holding tank.

Based on the foregoing, the Board enters the following Order:

[1] In *Scott Township Environmental Preservation Alliance* we stated: "Allowing a party to use a private request to reopen Scott Township's sewage facilities planning process at this point in time would have the effect of an appeal of the municipality's original official plan. Neither the Act nor the private request regulations provide a means to challenge a previous Department approval of an official sewage facilities plan." 2002 EHB at 96.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

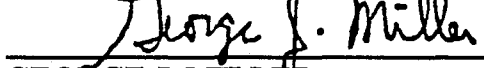
MARC YOSKOWITZ	:	
	:	
v.	:	**EHB Docket No. 2003-172-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 22nd day of April 2005 it is HEREBY ORDERED that the Department's motion for summary judgment is **GRANTED in part and denied in part.** Summary judgment is granted on all issues that challenge the 1998 Plan and denied with regard to the issue whether the 1998 Plan adequately meets Appellant's sewage needs.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman



GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: April 22, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF EDINBORO and MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-017-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 26, 2005**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where disputed questions of law and fact remain with regard to the Department's assessment of a civil penalty, this matter is not appropriate for summary judgment.

OPINION

The genesis of this matter is an administrative order dated May 9, 2000 issued by the Department of Environmental Protection (Department) to the Borough of Edinboro and the Municipal Authority of the Borough of Edinboro (collectively Borough) requiring the Borough to submit a corrective action plan to address what the Department had determined to be a hydraulically overloaded sewage conveyance system. The administrative order also required the Borough and an adjoining municipality, Washington Township, to submit a single update revision

to their Official Plans within 180 days of the order, or November 4, 2000. The Borough did not submit an update revision within the specified timeframe, nor did it seek a supersedeas of the order. The Borough did, however, file an appeal and, after a trial, the Board issued an adjudication that upheld the Department's administrative order.[1] The Borough took an appeal to the Commonwealth Court, which upheld the Board's adjudication.[2]

Thereafter, on December 16, 2003, the Department assessed a civil penalty against the Borough in the amount of $332,100 for failure to submit an update revision. The Borough appealed and that appeal has been docketed at 2004-017-R.[3] A trial on this matter is scheduled for May 17 – 20, 2005.

Both the Department and the Borough have filed motions for summary judgment. Summary judgment may be granted when the record shows there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *County of Adams v. DEP*, 687 A.2d 1222, 1224, n. 4 (Pa. Cmwlth. 1997); *Ainjar Trust v. DEP*, 2001 EHB 59, 69-70.

The civil penalty assessment was issued pursuant to Section 13.1(f) of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, 35 P.S. §§ 750.1 – 750.20a, at § 750.13a(f). That section reads as follows:

> (f) Any municipality which fails to submit any official plan, update revision or special study thereto or has not revised or implemented its official plan as required by any rule, regulation or order of the department shall be subject to a civil penalty. The civil penalty so assessed shall be a minimum of three hundred dollars ($300) per day. The penalty shall be assessed for each day of the failure commencing on the thirtieth day after a date specified for

[1] *Borough of Edinboro v. DEP*, 2003 EHB 725.
[2] *Borough of Edinboro v. DEP*, No. 2696 C.D. 2003 (June 23, 2004) (Opinion not reported).
[3] Docket No. 2004-017-R was also previously consolidated with another appeal of the Borough at 2004-016-R.

> compliance in an order by the department and shall continue until that time as the municipality submits the required official plan, update revision or special study or has commenced implementation of its official plan in accordance with a schedule approved by the department. The penalty shall be paid on the fifteenth day of each succeeding month and shall be sent to the regional office for the region of the department in which the municipality is located.

According to the Department's motion and supporting documentation, the following facts are not in dispute: As of the date of the civil penalty assessment, the Borough had not submitted an update revision, nor had it applied for or received a supersedeas from the Board. The civil penalty assessed by the Department was calculated by determining the number of days that had accrued since the date the Department had ordered the update revision to be filed, minus 30 days (as required by 35 P.S. § 750.13a(f)), and multiplying that number by $300 (the minimum daily amount set forth in 35 P.S. § 750.13a(f)). Based on these facts, the Department contends it is entitled to summary judgment on the amount of the civil penalty.

The Borough contends that the real issue in this case is whether a party must obtain a supersedeas in order to prevent the potential accrual of a large civil penalty every time the Department issues an administrative order. The Borough points out that the civil penalty in this case was not assessed until after the Board had issued a ruling upholding the Department's administrative order and the Borough had appealed to the Commonwealth Court and sought a stay of the Board's ruling, more than three years after the administrative order was first issued.

The Borough likens its position to that in *Kent Coal Mining Co. v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988), in which the Department had issued a compliance order which the appellant chose not to appeal. When the Department later issued a civil penalty assessment based on the violations listed in the compliance order, the appellant appealed the civil penalty and also sought to challenge the violations in the compliance order on which it was based. The Commonwealth

Court allowed the appellant to challenge not only the civil penalty but also the violations set forth in the underlying unappealed compliance order. The court's reasoning was that since the Department does not always issue a civil penalty until much later after a compliance order has been issued, the recipient of the order does not have critical information at the time the compliance order is issued (i.e., if a penalty will be issued and how large it may be) at the time it must decide whether to appeal the order. Therefore, a recipient of a compliance order would be forced to file a cautionary appeal in the event it might be assessed a large penalty at some point in the future. In order to avoid this situation, the court reasoned, the recipient of the order should be allowed to challenge the underlying violations at the time a civil penalty is issued, even if it did not appeal the order in the first instance.[4]

The Borough argues that it was put in a similar position to that of the appellant in *Kent Coal* by having to decide whether to file a cautionary supersedeas in order to avoid the potential for a large civil penalty assessment in the future. Further, as the Borough points out, the standard for receiving a supersedeas is a stringent one and places the burden on the applicant, regardless of which party carries the burden of proof in the underlying appeal.

We understand the Borough's position with regard to *Kent Coal.* However, a critical difference here is that the Borough had an opportunity to litigate the violations set forth in the underlying administrative order and failed to succeed in its appeal, both at the Board and the Commonwealth Court. As the Department points out in its reply, the Borough is precluded by the doctrine of collateral estoppel from relitigating those issues in this appeal of the civil penalty assessment. This was recognized by the court in *Kent Coal*: "[I]f a coal company immediately

[4] The court's decision in *Kent Coal* specifically considered the language of Section 18.4 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. § 1396.1 *et seq.*, at § 1396.22, and the underlying regulations.

appealed from a compliance order challenging the fact of the violation, and lost, the company would be precluded by the doctrine of collateral estoppel from challenging the fact of the violation in a later civil penalty proceeding." 550 A.2d at 283. Moreover, as the Department further points out in its reply, it was not the violations set forth in the administrative order that led to the civil penalty, but the Borough's continuing failure to submit an update revision as required by the Department's order. Therefore, no civil penalty could have been assessed at the time of the order since there was no failure to comply at that time. There was no basis for the penalty until the deadline for submitting the update revision had come and gone, with no update revision having been filed.

The Borough also disputes that the civil penalty was properly calculated under the Sewage Facilities Act. As noted earlier, the Department calculated the penalty under Section 13.1(f). It is the Borough's contention that the Department should have also considered Section 13.1(a), which states in relevant part as follows:

> (a) In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act or any rule or regulation promulgated under this act or any order or permit issued by the department, municipality or local agency pursuant to this act, the department, municipality or local agency, after notice and hearing, may assess a civil penalty against any person for that violation. . . .

35 P.S. § 750.13a(a). That section then goes on to list the factors the Department shall consider in assessing a penalty, which include the willfulness of the violator, damage to natural resources and cost of restoration or abatement, savings to the violator, deterrence of future violations and any other relevant factors. The Department admits it did not consider these factors in assessing the civil penalty against the Borough and asserts that it was not required to do so since only subsection (f) is relevant in this matter. The Borough contends that subsection (a) and (f) must

be read in conjunction with one another in order to provide any guarantee of due process.

The Borough also disputes that it was ever in non-compliance. It argues that the Department's order was not final until the Borough had an opportunity to file an appeal with the Environmental Hearing Board, that it took a timely appeal from the administrative order, and that after both the Board and Commonwealth Court upheld the order, the parties reached a stipulation that was entered as an order by the Commonwealth Court, giving the Borough until March 24, 2005 to submit an update revision. This the Borough contends it did and, therefore, should not be subject to what it calls retroactive penalties.

The parties raise a number of issues with regard to the calculation of the penalty involved in this case. Since the question of whether the Borough is required to submit an update revision has already been litigated and upheld, the only issue that remains is whether the Department acted within its authority in assessing a civil penalty and the appropriateness of the amount of the penalty. We find that there are disputed questions of fact and law with regard to these issues. Because these disputed questions of fact and law must be further addressed, we find that it would not appropriate to grant summary judgment.

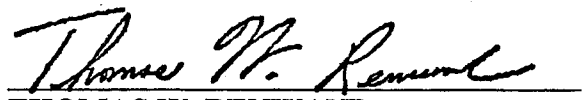
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF EDINBORO AND THE MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2004-017-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of April, 2005, the parties' motions for summary judgment are denied.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: April 26, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:
	:
	: **EHB Docket No. 2004-155-CP-MG**
	:
v.	: **Issued: May 2, 2005**
	:
SHLOMO DOTAN	:

OPINION AND ORDER ON MOTION FOR SANCTIONS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion to limit the defendant's presentation at the hearing on this matter as a sanction for his failure to respond to discovery requests by the Department and comply with an order by the Board to respond to that discovery.

OPINION

Before the Board is a motion by the Department of Environmental Protection seeking sanctions for the failure of the Defendant, Shlomo Dotan, to answer discovery. Specifically the Department seeks to preclude Mr. Dotan from offering any of the documents requested in its discovery request at the hearing, and to preclude Mr. Dotan from presenting any witnesses other than himself. For the reasons explained below, we will grant the Department's motion.

On February 14, 2005, the Department filed a motion for sanctions on the basis that the Defendant, Shlomo Dotan, failed to respond to the Department's First Set of

Interrogatories and Request for Production of Documents dated October 6, 2004. The Board held a conference call with the parties, during which Mr. Dotan agreed to answer the Department's discovery request. Accordingly, by order dated February 23, 2005, the Board required Mr. Dotan to respond to the Department's request on or before March 23, 2005. That order further advised Mr. Dotan that if he failed to comply with the Board's order the Board may grant the Department's motion. By letter dated March 25, 2005, the Department informed the Board that Mr. Dotan had not yet responded to its discovery request, and renewed its request for sanctions by motion filed April 1, 2005. To date, Mr. Dotan has not responded to the Department's motion for sanctions,[1] nor made any attempt to provide the discovery requested by the Department.

The Board's rules clearly provide us with the authority to impose sanctions:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa. R.C.P. 4019 (relating to sanctions regarding discovery matters).[2]

Mr. Dotan has not only failed to abide by the Board's rules of procedure by failing to answer the Department's discovery request, but he has also refused to comply with an order of the Board. The Department properly seeks only to limit Mr. Dotan's presentation of evidence at the hearing on the imposition of civil penalties because the Department bears the burden of proof in this proceeding. Accordingly, we will grant the Department's motion and preclude Mr. Dotan from proffering documents as evidence that were

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[1] *See* 25 Pa. Code § 1021.95(c)("Responses to miscellaneous motions shall be filed within 15 days of the date of service of the motion . . . .").

[2] 25 Pa. Code § 1021.161.

requested in the Department's discovery and preclude him from offering any witnesses' testimony other than his own.[3]

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[3] *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133 (barring the offering of testimony for failure to respond properly to a party's interrogatories); *County Commissioners, Somerset County v. DEP,* 1995 EHB 1015(same).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2004-155-CP-MG**
SHLOMO DOTAN	:	

ORDER

AND NOW, this 2nd day of May, 2005, upon consideration of the renewed Motion for Sanctions filed by the Department of Environmental Protection, the Department's motion is hereby **GRANTED**, as follows:

1. The Defendant shall not be permitted to offer any documents into evidence at the hearing on this matter that were requested to be produced in the Department's Request for Production of Documents; and
2. The Defendant shall not be permitted to offer any witnesses at the trial on this matter other than his own testimony.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: May 2, 2005

c: **DEP Bureau of Litigation:**
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Southcentral Region

Defendant:
Mr. Shlomo Dotan
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: May 2, 2005**

OPINION AND ORDER ON APPELLANT'S APPLICATION FOR DETERMINATION OF FINALITY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Environmental Hearing Board denies Appellant's Application for Determination of Finality because an immediate appeal of the interlocutory order at issue here would not facilitate the resolution of the entire case. Piecemeal interlocutory appeals of orders which do not resolve all claims should only be allowed in exceptional and rare circumstances.

Opinion

This Opinion is written in support of our Order issued on April 11, 2005 denying Appellant James B. Potratz's (Appellant or Mr. Potratz) Application for Determination of

Finality pursuant to Pennsylvania Rule of Appellate Procedure 341 (c) (Application). On March 11, 2005 the Board issued an Opinion and Order granting in part the Pennsylvania Department of Environmental Protection's (Department) and the Erie City Water Authority's (Water Authority) Joint Motion for Partial Summary Judgment. The majority of the Board held that the doctrine of Administrative Finality barred the review of several issues which pertained to an earlier construction permit which Mr. Potratz did not appeal.[1] Although Judge Labuskes and Judge Miller did not adopt the majority's reasoning they fully concurred in the result of dismissing various objections and wrote separate concurring opinions.

As pointed out by the Water Authority and the Department, the Board's Opinion and Order of March 11, 2005 did not resolve the entire Appeal. There are still issues pending before the Board requiring a trial. These issues include (1) alleged current and past violations of the Pennsylvania State Drinking Water Act and underlying regulations in the operation of the fluoridation facilities at the Chestnut Street water treatment plant, and (2) the Water Authority's general obligation to comply with the Safe Drinking Water Act and the underlying regulations to the extent they pertain to the operation of the fluoridation facility.

However, rather than proceeding to trial on these issues Mr. Potratz in his Application wishes to immediately appeal the Board's Order to the Pennsylvania Commonwealth Court. Since the Board did not dismiss his entire case we would have to

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[1] *Potratz v. Department of Environmental Protection and Erie City Water Authority*, EHB Docket No. 2003-084-R (March 11, 2005).

certify under Pennsylvania Rule of Appellate Procedure 341(c) that we have expressly determined that an immediate appeal would facilitate resolution of the entire case. This we simply can not do under the facts and law applicable to this case.

We begin our analysis with the general rule that piecemeal interlocutory appeals of orders which do not resolve all claims of an Appellant should only be allowed in exceptional and rare circumstances. Pennsylvania Rule of Appellate Procedure 341 (a) states that an appeal may be taken "as of right from any final order of an administrative agency or lower court." A "final order" is defined in Pennsylvania Rule of appellate Procedure 341(b)(1) as an order that "disposes of all claims or of all parties." The Pennsylvania Superior Court set forth the general rule in *Continental Bank v. Andrew Building Company*, 648 A.2d 551, 554 (Pa. Super. 1994):

> Barring some exception, an appeal as a final order will not lie from an order ...[in which] all claims have not been dismissed and, therefore, such an order is not a final determination of the initial claim — the complaint [in this case Notice of Appeal] which initiated the action remains pending.

A strong chorus of Pennsylvania cases echo this general rule and caution that the allowance of an interlocutory appeal of a non-final order should only be allowed in the rarest of circumstances. *See Liberty State Bank v. Northeastern Bank of Pennsylvania*, 683 A.2d 889, 890 (Pa. Super. 1996). (Even though an exception to general rule exists "it is not necessarily appropriate to certify a case" for immediate appeal.); *Robert H. McKinney, Jr. Assoc. v. Albright,* 632 A.2d 937, 939 (Pa. Super. 1993); ("An immediate appeal of a non-final order is appropriate and should be made only in the most

extraordinary circumstances. The revisions to Rule 341 were designed to prevent piecemeal appeal which necessarily result in delay."); *Matukonis v. Trainer*, 657 A.2d 1314, 1315 No. 1 (Pa. Super 1995) (Appeals of non-final order should be allowed "only in the most extraordinary circumstances.") Moreover, the federal courts in interpreting Federal Rule of Civil Procedure 54(b), which is very similar to Pennsylvania Rule of Appellate Procedure 341(c), often sing from the same legal songbook. The federal courts voice their general disapproval of piecemeal appeals and warn against the scattershot disposition of litigation. *See Panichella v. Pennsylvania Railroad Company*, 252 F.2d 452, 455 (3rd Cir. 1958) and *Spiegel v Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988).

Moreover, after reviewing the official comments to Pennsylvania Rule of Appellate Procedure 341 which set forth the factors to be considered in determining whether to certify an interlocutory appeal for appeal we are even more convinced that none of those factors favoring an immediate appeal are present. To allow Mr. Potratz to appeal piecemeal here would further delay the resolution of this appeal which was filed more than two years ago.

For all of the foregoing reasons we deny Mr. Potratz's Application for Determination of Finality pursuant to Pennsylvania Rule of Appellate Procedure 341(c.)

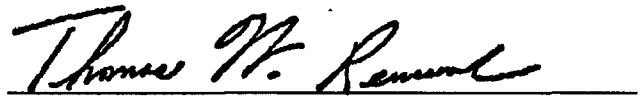
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY	:	

ORDER

AND NOW, this 2nd day of May, 2005, for the reasons set forth in the accompanying Opinion, we reaffirm our Order of April 11, 2005 ***denying*** Appellant James B. Portratz's Application for Determination of Finality pursuant to Pennsylvania rule of Appellate Procedure 341(c).

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: May 2, 2005

EHB Docket No. 2003-084-R

c: **DEP Bureau of Litigation:**
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:
	: **EHB Docket No. 2005-022-MG**
v.	:
	: **Issued: May 9, 2005**
G & R EXCAVATING AND DEMOLITION, INC.	:

OPINION AND ORDER ON MOTION FOR DEEMED ADMISSIONS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion by the Department for deemed admissions where the defendant failed to answer the Department's complaint for civil penalties for violations of the Dam Safety and Encroachments Act and failed to answer the Department's motion. The Board will also order the defendant, a corporation, to retain counsel if it wishes to appear at the hearing on the amount of the penalty.

OPINION

Before the Board is a motion by the Department of Environmental Protection which seeks an order deeming factual allegations made in a complaint for civil penalties admitted because the defendant, G & R Excavating and Demolition, Inc., has failed to file an answer to the complaint. As we explain below, we will grant the Department's motion.

The Board's rules require that answers to complaints be filed with the Board within 30 days after the date of service of a complaint.[1] Such an answer is to set forth any legal objections as well as any denial of any facts set forth in the complaint.[2] The Board's rules further provide that

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted....[3]

In its motion for deemed admissions, the Department avers that the complaint was sent to the Defendant by certified mail on February 7, 2005. A signed return receipt dated February 11, 2005, was returned and was forwarded to the Board with a return of service on February 17, 2005. Hence, an answer to the complaint should have been filed with the Board by March 10, 2005.[4] Nothing further was received by the Board.

The Department filed its motion for deemed admissions on April 15, 2005. The answer to that motion was due on May 3, 2005.[5] To date, no response to the Department's motion has been received by the Board. Accordingly, we see no reason not to grant the Department's motion. We can not allow parties before the Board to flagrantly disregard the Board's rules of practice and procedure.[6] The relevant facts averred in the

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[1] 25 Pa. Code § 1021.74(a).

[2] 25 Pa. Code § 1021.74(b).

[3] 25 Pa. Code § 1021.74(d).

[4] *See* 25 Pa. Code § 1021.35 (the date of service is the date mailed, plus three days if service is by mail.)

[5] *See* 25 Pa. Code § 1021.95(c).

[6] *Cf. DEP v. Barefoot*, 2003 EHB 667 (declining to grant a motion for deemed admissions where the defendants did answer the complaint, but were thirty days late in

Department's complaint will be deemed admitted, and the only issue remaining for hearing shall be the amount of the civil penalty which should be imposed.

We further note that parties, except individuals, are required to be represented by counsel in proceedings before the Board.[7] Accordingly, should the defendant wish to appear, it must do so through an attorney licensed to practice law in Pennsylvania.

In sum, because the facts supporting the Defendant's liability for a civil penalty for violations of the Dam Safety and Encroachments Act[8] have been deemed admitted, the only issue remaining is the amount of the civil penalty which will be assessed. The following order schedules a hearing on that sole issue. We therefore enter the following:

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doing so, distinguishing other Board decisions granting motions where no answer was ever filed.)

[7] 25 Pa. Code § 1021.21.

[8] Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2005-022-MG**
v.	:	
G & R EXCAVATING AND DEMOLITION, INC.	:	

ORDER

AND NOW, this 9th day of May, 2005, the Motion for Deemed Admissions filed by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**. All relevant facts of the Department's Complaint for Civil Penalties are **DEEMED ADMITTED.**

It is further **ORDERED** that

1. The Defendant, G & R Excavating and Demolition, Inc., shall retain counsel pursuant to 25 Pa. Code § 1021.21, within 30 days of this order, should it wish to appear in the remaining proceedings before the Board;
2. A hearing on the amount of the civil penalty to be assessed for the Defendant's violation of the Dam Safety and Encroachments Act will be held on **Thursday, June 23, 2005, beginning at 10 a.m.** at the offices of the

Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17105-8457. If any party is unavailable, they shall promptly advise the Board and provide alternate hearing dates.

3. To assure the orderly conduct of the hearing, it is ordered that the parties shall simultaneously file on or before **June 9, 2005**, pre-hearing memoranda which complies with the requirements of 25 Pa. Code § 1021.104 (contents of pre-hearing memoranda).

4. A party may be deemed to have abandoned all contentions of law or facts not set for in it pre-hearing memorandum. The Board may enter other appropriate sanctions against a party failing to observe the provisions of this order.

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Administrative Law Judge
Member

DATED: May 9, 2005

c: **Department of Litigation**
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SECRETARY TO THE BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 18, 2005**

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board interprets the "Runway Flight Path Exclusionary Criteria" (25 Pa. Code § 273.202(a)(16)(i)), a landfill siting criteria, to prohibit the vertical expansion of a landfill which would penetrate the "conical surface" (a defined imaginary space around and associated with an airport as defined by Federal Aviation Administration regulations) associated with an airport. This is the interpretation proffered by the Department and the basis on which it denied the Appellants permit to vertically expand its existing landfill. The Board does not apply *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461 (Pa. Cmwlth. 2002) (*NARCO*), deference because of conflicting DEP interpretations and its demonstrated and admitted lack of expertise in air traffic control, aeronautical engineering or the Federal Aviation Administration's regulations. The Board rejects Appellant's interpretation under which only penetrations of the conical surface which also intersected with prescribed air

traffic patterns would be barred. The interpretation adopted by the Board is supported by the credible testimony heard at trial and by the language of the regulation. The alternative interpretation offered by Appellant is untenable, inconsistent with other landfill siting criteria, and would yield illogical results.

Introduction

This case presents one narrow issue: the proper interpretation of the landfill siting criteria which provides that a landfill may not be operated,

> (16) *Airport-navigable airspace.* The following relate to airports:
>
> (i) *Conical area.* For areas permitted prior to December 23, 2000, within the conical area at 14 C.F.R. Part 77 (relating to objects affecting navigable airspace) for runway flight paths that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit.

25 Pa. Code § 273.202(a)(16)(i). We will variously refer to this provision as the "Exclusion", the "Regulation," the "(i) provision," or the "Runway Flight Path Exclusionary Criteria." The Exclusion was first promulgated as part of the comprehensive municipal waste regulations package on April 9, 1988. Although it originally appeared in 1988 as subsection (11) rather than (16)(i) as it does today, the Exclusion has always been, and is now, a subsection of Section 273.202 entitled "Areas Where Municipal Waste Landfills Are Prohibited." These are otherwise known as the "siting criteria" or "exclusionary criteria." The Exclusion was re-enacted in 2000 as subsection (16)(i) as part of the comprehensive municipal waste regulation amendments of that year with no change in its language. However, a new subsection (16)(ii) was added in 2000 which provides,

> (ii) *Obstruction.* For areas permitted on or after December 23, 2000, in a manner in which any portion of the landfill would be an

obstruction to air navigation under 14 C.F.R. § 77.23(a)(5) (relating to standards for determining obstructions).

25 Pa. Code § 273.202(a)(16)(ii).

Waste Management Disposal Services of Pennsylvania, Inc. (Appellant or WMI) owns and operates the Pottstown Landfill, a municipal waste landfill located in West Pottsgrove and Douglass Townships, Pennsylvania (the Landfill). The Pottstown Municipal Airport (PMA) is located 4,476 feet, which is about a mile, southwest of the Landfill. PMA has one runway and the airport is at an elevation of 256 feet mean sea level (MSL). The main use of the PMA is by single-engine propeller (piston-type) aircraft. PMA is a non-towered airport meaning there is no flight control tower. Aircraft land and take-off by pilot vision.

In August 2000, WMI submitted a major permit modification application for a proposed vertical expansion of the eastern area of the Landfill (the Vertical Expansion). Pursuant to a Stipulation between WMI and the Pennsylvania Department of Environmental Protection (DEP or Department), WMI resubmitted its application for the Vertical Expansion on April 5, 2002. On the same date, WMI submitted a request to renew its existing solid waste permit which was scheduled to expire on October 2, 2005 (the Permit Renewal).

On October 13, 2004, the Department denied both WMI's application for the Vertical Expansion and the Permit Renewal. The sole basis of the denial is the Department's conclusion that WMI failed to demonstrate that the Vertical Expansion complies with the exclusionary criteria set forth at 25 Pa. Code § 273.202(a)(16)(i).

This case is WMI's appeal of the denial of the Vertical Expansion which it promptly filed on October 29, 2004. WMI and the Department have stipulated that with the exception of the Runway Flight Path Exclusionary Criteria, WMI has demonstrated that no other exclusionary criteria contained in 25 Pa. Code § 273.202 prohibit the Vertical Expansion. Accordingly, the

sole issue the Board faces in this case and the sole issue of the trial is this single dispositive issue: whether the Department properly interpreted the Runway Flight Path Exclusionary Criteria in denying the Vertical Expansion.

From the very start of this case, WMI has pointed out that it has a serious time shortage in this case inasmuch as it faces an October 2, 2005 expiration date for its permit for the Landfill's eastern area and its application is stalled at this threshold stage. The denial, which is on a threshold permitting question, came less than one year before the expiration of its permit and before the Department conducted any Phase I (harms/benefit analysis) or Phase II (technical review) of its application. Thus, even if WMI should prevail in this piece of litigation, its permit application would still be required to undergo much more review at the Department. The Department understood and graciously cooperated fully with WMI's need for expedition of this litigation. Both parties requested expedited handling and trial of this matter which they received. On November 18, 2004 the Board, at the request of the parties, conducted an in-person conference in our Norristown Courtroom during which the parties outlined the issue in the case and WMI's need for expedited case management and trial. On January 21, 2005 the Board entered a consensual Joint Case Management Order and Scheduling Order which called for expedited discovery, pre-trial filings and trial.[1]

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[1] Along the way to trial in February 2005 and into March 2005 in the Commonwealth Court, there was substantial litigation and three Board decisions on a discovery dispute involving three Department internal e-mails which the Department claimed were protected from discovery by the deliberative process privilege. The Board held that the documents were not covered by the privilege and that they be disclosed. *See Waste Mgmt. Disposal Servs. of Pa., Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 25, 2005); *Waste Management Disposal Servs. of Pa., Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 22, 2005); *Waste Mgmt. Disposal Servs. of Pa., Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 14, 2005) (Corrected Opinion issued February 15, 2005). However, the Department appealed to the Commonwealth Court and the matter was pending before the Commonwealth Court as this case was tried. *DEP v. Waste Mgmt. Disposal Servs. of Pa., Inc.*, No. 422 C.D. 2005 (Pa. Cmwlth.). WMI decided that its need for expedition of the trial in this case was so acute that it could not afford to wait for the outcome of the appellate litigation over the documents. WMI has now withdrawn its discovery request covering the disputed documents.

Trial was held in Norristown on Monday, March 14 through Wednesday, March 16, 2005. West Pottsgrove Township, the host township of the Landfill, participated as an Intervenor in support of WMI's position. The trial produced 642 pages of transcript and 53 exhibits which constitute the trial record in this case. In keeping with the desire of all parties and the Board to bring this matter to a trial Adjudication expeditiously, the parties agreed to an expedited post-trial briefing schedule. West Pottsgrove filed its post-trial brief on April 8, 2005 and WMI filed its post-trial brief on April 11, 2005. The Department filed its post-trial brief on April 29, 2005. WMI filed a reply brief on May 6, 2005. West Pottsgrove notified the Board by letter of the same date that it was not filing a separate reply brief but it joined in the reply brief of WMI.

FINDINGS OF FACT

Permitting History (Stipulated By The Parties)

1. The Pottstown Landfill is operated under Solid Waste Disposal and/or Processing Permit No. 100549 (the "Permit") issued by the Department to WMI.

2. On August 22, 2000, WMI submitted major permit modification applications for the proposed expansion of eastern and western areas of the Landfill. On September 11, 2000, pursuant to 25 Pa. Code § 271.202, the Department issued a letter to WMI stating that the applications were administratively complete.

3. After completing a "preliminary review", by letter dated December 7, 2000, the Department determined that: (1) the application "does not demonstrate that the proposed expansion complies with the siting prohibitions in 25 Pa. Code § 273.202" (the "Exclusionary Criteria"). In particular, the Department concluded that WMI failed to satisfy the Exclusionary

Criteria prohibiting areas within 10,000 feet of the PMA; and (2) the application as submitted is not complete or accurate, as required by 25 Pa. Code § 271.201(a)(2).

4. In early January 2001, WMI appealed the Department's December 7, 2000 action (the "Original Appeal") to the Board.

5. On February 7, 2002, the Department and WMI entered into a Stipulation of Settlement regarding the Original Appeal. Pursuant to the terms of the initial Stipulation of Settlement, the parties agreed that an application to vertically expand the eastern portion of the Landfill would be considered by the Department as an "area permitted prior to January 25, 1997" within the meaning of the Exclusionary Criteria.

6. On April 5, 2002, WMI again submitted an application for the Vertical Expansion. In addition, because the Permit was scheduled to expire on October 2, 2005, pursuant to 25 Pa. Code § 271.223, WMI requested a Permit Renewal extending the term of the Permit beyond October 2, 2005.

7. By letter dated April 15, 2002, the Department stated that it could not "receive" the Vertical Expansion application request officially until the Local Municipality Involvement Process ("LMIP") was completed and an alternate project timeline for review of the application and request was established.

8. On August 8, 2002, the Department completed the LMIP process for the Vertical Expansion application.

9. On August 8, 2002, the Department also acknowledged receipt of the Vertical Expansion application associated Permit Renewal request.

10. By letter dated August 15, 2002, the Department determined the Phase I portion of the Vertical Expansion Application and Permit Renewal request administratively accepted and

indicated that review of the application would be concluded in accordance with the 380-day alternate project timeline negotiated as part of the LMIP meeting.

11. By letter dated November 19, 2002, the Department identified technical deficiencies in the Vertical Expansion application and the Permit Renewal request. The Department, *inter alia*, requested additional information relating to: (1) the Exclusionary Criteria for proximity of an expansion to occupied dwellings, 25 Pa. Code § 273.202(a)(9); (2) the Exclusionary Criteria for proximity to a perennial stream, 25 Pa. Code § 273.202(a)(12); (3) the Runway Flight Path Exclusionary Criteria; and (4) the justification for a Permit Renewal term of ten years.

12. The Runway Flight Path Exclusionary Criteria is contained within 25 Pa. Code § 273.202(a)(16) which prohibits landfill operations as follows:

> (16) *Airport-navigable airspace.* The following relate to airports:
>
> (i) *Conical area.* For areas permitted prior to December 23, 2000, within the conical area at 14 C.F.R. Part 77 (relating to objects affecting navigable airspace) for runway flight paths that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit.
>
> (ii) *Obstruction.* For areas permitted on or after December 23, 2000, in a manner in which any portion of the landfill would be an obstruction to air navigation under 14 C.F.R. § 77.23(a)(5) (relating to standards for determining obstructions).

13. The Department's November 19, 2002 letter required WMI to respond in ninety (90) days. The letter states specifically that if deficiencies remain in WMI's application, WMI will be notified and "given an opportunity to correct any deficiencies. A pre-denial letter will summarize these proceedings."

14. On February 19, 2003, WMI submitted its response to the Department's technical deficiency letter. Specifically, WMI provided information supporting its contentions that: (1)

WMI had complied with the Exclusionary Criteria relating to proximity to occupied dwellings and perennial streams; (2) Based on aeronautical studies performed by CH2M Hill, A-8; A-9, WMI had complied with the Runway Flight Path Exclusionary Criteria because the Vertical Expansion will not impact the PMA's runway flight paths; and (3) The rationale for the Permit Renewal request was to allow for operational flexibility to accommodate the waste disposal needs of the surrounding communities and utilize recaptured landfill capacity from enhanced compaction and biodegradation at the Landfill.[2]

15. In correspondence in March 2003, WMI supplemented its legal and factual responses to the Department's technical deficiency letter regarding the Runway Flight Path Exclusionary Criteria. Specifically, the supplemental response letters provided citations to applicable federal and state regulations (and their preambles) and asserted that the Runway Flight Path Exclusionary Criteria would prohibit the Vertical Expansion only if that expansion penetrates the conical surface of the PMA and the height of the expansion interferes with the PMA's runway flight paths. The supplemental letters also advised the Department that the FAA had, on December 13, 2002, issued a Determination of No Hazard to Air Navigation ("No Hazard Determination") in relation to the potential impact of the Vertical Expansion on the PMA's runway flight paths. A-6.

16. On June 18, 2003, WMI advised the Department that the FAA had granted a discretionary review of its No Hazard Determination. WMI suggested voluntarily that the Department suspend review of the Vertical Expansion application and the Permit Renewal request until the FAA completed this discretionary review.

17. On September 30, 2003, as amended on October 8, 2003, the FAA affirmed its No Hazard Determination. A-7.

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[2] WMI's exhibits will be cited as "A-__" and DEP's will be cited as "C-__".

18. Shortly thereafter, the Department continued the suspension of its review of the Vertical Expansion application and Permit Renewal request in order to establish a closure committee consisting of various stakeholders, including WMI, interested in the future of the Landfill.

19. On October 13, 2004, the Department issued a letter denying the Vertical Expansion application and Permit Renewal Request (Denial Letter). A-12.

20. In the Denial Letter, the Department denied WMI's Vertical Expansion application and WMI's Permit Renewal request. The only reason given by the Department in the Denial Letter for denying the Vertical Expansion application is WMI's alleged failure to demonstrate compliance with the Runway Flight Path Exclusionary Criteria, based on which review of the application was terminated. *Id.*

21. In the Denial Letter, the Department asserts that operation of a portion of the Vertical Expansion will "penetrate the conical surface" of the PMA and therefore is prohibited under the Runway Flight Path Exclusionary Criteria "regardless of whether such operation would present an actual harm or hazard." *Id.*

22. The Denial Letter does not provide any evidence disputing the No Hazard Determination.

23. The Denial Letter likewise asserts only one basis for denying the Permit Renewal request. The Department asserts in the Denial Letter that denial of the Vertical Expansion application obviated the need for any permit renewal and that WMI provided no other basis for renewal of disposal operations beyond the October 2, 2005 expiration date.

24. On October 28, 2004, WMI appealed the Department's Denial Letter by filing a Notice of Appeal with the Board, and thereby initiated this action.

25. On January 12, 2005, DEP and WMI entered into a Stipulation. The Department stipulated that "based on its review of all material submitted to the Department as part of or with regard to the [Vertical Expansion] Application, as of the date of this Stipulation, that material and the application demonstrates that, with the exception of 25 Pa. Code § 202(a)(16)(i), no other siting prohibition in 25 Pa. Code § 273.202 prohibits the vertical expansion proposed therein."

26. WMI stipulated that the Vertical Expansion "penetrates both the 'conical surface' and the 'horizontal surface' of the Pottstown Municipal Airport (PMA) runway, as those terms are defined in 14 C.F.R. Part 77."

The Pottstown Municipal Airport

27. The PMA is located 4,476 feet, which is about a mile, southwest of the Landfill. C-8 at 2; A-31 at 1; A-30 at 3.

28. The PMA has one runway and the airport is at an elevation of 256 feet mean sea level (MSL). C-8 at 2.

29. The main use of the PMA is by single-engine propeller (piston-type) aircraft. A-31 at 2.

30. PMA is a non-towered airport meaning there is no flight control tower. *Id.*

31. Aircraft land and take-off by pilot vision. C-8 at 2.

Pertinent Aviation Regulatory Background and Lexicon

32. Federal Aviation Administration Part 77 Regulations, entitled "Objects Affecting Navigable Airspace" (FAA Regulation or Part 77), establishes a detailed protocol for identifying and defining obstructions to air navigation and procedures for either allowing them or, under certain circumstances, forbidding them. 14 C.F.R. Part 77; A-4.

33. Part 77 defines 5 "imaginary surfaces" associated with airport runways. These surfaces are defined in 14 C.F.R. Part 77 which is referenced in the Regulation. Those surfaces are: (1) primary surface; (2) approach surface; (3) transitional surface; (4) horizontal surface; and (5) conical surface. 14 C.F.R. § 77.25; A-4.

34. Only the last two of these five surfaces have direct involvement in this case; the horizontal surface and the conical surface. WMI and DEP agree on the meaning of "horizontal surface" and "conical surface". For the PMA, those terms are defined as follows:

> *Horizontal Surface.* The horizontal surface is defined in 14 C.F.R. 77.25(a) as a flat plane 150 feet above the airport elevation. The perimeter of the horizontal surface is created by swinging arcs with 5,000 feet radii from the center of each end of the runway, and connecting these arcs with tangent lines. The horizontal surface resembles an oblong lid, 150 feet over the top of the airport. 14 C.F.R. § 77.25(a); A-31 at 5-6; Tr. (Day 1) Richard Veazey at 53.
>
> *Conical Surface.* The conical surface is defined in 14 C.F.R. 77.25(b) as a surface extending outward and upward from the perimeter of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet. The conical surface resembles the sides of a bowl. The height of the conical surface ranges from 150 feet to 350 feet above airport elevation. The outer edge of the conical surface is 9,000 feet from the runway. 14 C.F.R. § 77.25(b); A-31 at 6; Tr. (Day 1) Richard Veazey at 54.

35. The horizontal surface is a flat plane 150 feet above the airport and it looks like an oval lid over the top of the airport. The conical surface runs from the outer edges of the horizontal surface and its profile resembles a stadium seating area with the horizontal surface being the middle or playing field area. Tr. (Day 1) Richard Veazey at 53; A-31at 5-7.

36. A "traffic pattern" at an airport is that pattern that is intended to be flown by all aircraft entering into and out of an airport, as recommended by the FAA and adopted by the airport. Tr. (Day 1) Richard Veazey at 57-58; A-40; A-31 at 7-8; A-33 at 2 and Appendix 1; A-38; A-35 at Section 4-3-3; A-36 (Pilot/Controller Glossary definition of "traffic pattern"); Board Ex. 1 at 14, 16, 18.

37. This "traffic pattern" for landing, as a general matter, is described in FAA Advisory Circular AC No. 90-66A (Circular). A-33; A-31 at 8.

38. The Circular provides that the pattern altitude for entry into the landing pattern is 1,000 feet above ground level (AGN). A-33 at 8; Tr. (Day 1) Richard Veazey at 64-65.

39. The "traffic pattern" of PMA follows a very specific series of directions and turns to approach and land at a runway. This is the precise path, prescribed by the FAA and the airport, which planes should be following in making a landing at the PMA. The traffic pattern at PMA is a prescribed 5-leg approach. Tr. (Day 1) Richard Veazey at 60-63; 65-66; A-31 at 8; A-36; Board Exhibit 1 at 14, 16, 18.

40. The altitude along the traffic pattern is referred to as the "pattern altitude." Tr. (Day 1) Richard Veazey at 64-66; Tr. (Day 2) Joseph Del Balzo at 123-24.

41. FAA Part 77 provides for a detailed analysis of proposed structures with reference to potential impact on aviation. 14 C.F.R. Part 77.

42. A "hazard determination," otherwise known as an "airspace analysis," is performed which, depending on its outcome, can result in a proposed structure being prohibited or its plan altered so as to not interfere with aircraft. A-30; A-31; A-34.

43. The FAA "airspace analysis" or "hazard determination" is performed under the provisions of FAA Order 7400.2E, which is entitled, "Procedures for Handling Airspace Matters" (PHAM). The entire process consists of 6 steps outlined in the PHAM. A-34; Tr. (Day 1) Richard Veazey at 44-47.[3]

44. The project proponent in the PHAM procedure is seeking to obtain a "no hazard"

[3] It is actually a bit unclear whether this is the first step of the 6-step airspace analysis or the first part of the first step of the six step airspace analysis. Tr. (Day 1) Richard Veazey at 100, 111. The difference does not matter for our purposes. The bottom line is that this calculation is the threshold step of a multi-step process.

determination from the FAA indicating that its project does not pose a hazard to aviation. This does not mean that the construction cannot or does not intersect into one or more of the imaginary surfaces, only that if it does, there is no hazard to aviation involved. Tr. (Day 1) Richard Veazey at 48, 78-83.

45. If a proposed structure penetrates into any of the imaginary surfaces, there is a rebuttable presumption that the structure is a hazard unless and until all steps of the PHAM process show that the structure is not a hazard. *Id.* at 78-83.

46. The first step in the PHAM process is to determine whether the proposed obstruction has any impact to prescribed airplane flight paths, that is the "traffic patterns" associated with the airport. *Id.* at 45-47; 78-83; A-34; Tr. (Day 2) Joseph Del Balzo at 116-120.

47. That calculation is rather simple to perform and can be done by an engineer or even a lay person in less than one hour. Tr. (Day 1) Richard Veazey at 47-48; Tr. (Day 2) Joseph Del Balzo at 120-21.

48. The PHAM process builds in a 300 foot margin of safety such that any structure which comes to within 300 feet of a prescribed flight path would fail this threshold test under the PHAM. Tr. (Day 1) Richard Veazey at 65, 69-70; 105; Tr. (Day 2); Joseph Del Balzo at 120-21, 124, 128, 135-36.

49. If that threshold calculation shows that the proposed structure would intersect prescribed flight paths, including the margin of safety, the inquiry is over and the project is deemed a hazard to air traffic. Tr. (Day 2) Joseph Del Balzo at 117-120.

50. If, on the other hand, this threshold calculation shows that the structure does not intersect prescribed flight paths into and out of the airport then the rebuttable presumption is not overcome but the process can move on to the next 5 steps in the analysis. *Id.*

51. In this case, the first step of the PHAM airspace analysis runs as follows. Using the FAA Circular pattern altitude of 1,000 feet, landing planes enter the traffic pattern in a counter-clockwise direction for landing at the PMA at an altitude of 1,000 feet above ground level. That translates to 1,256 feet MSL (mean sea level) when the existing elevation of 256 feet MSL of PMA is included.[4] Not all landings would over-fly the Landfill but for those that do, the plane would over-fly Vertical Expansion at the pattern altitude of 1,256 feet. The current elevation of the area of the Vertical Expansion is 443 feet. The vertical expansion would be 99 feet, taking the level of the Landfill to 542 feet. That leaves a clearance of 714 feet. As for departing planes, again, not all of which would be headed in the direction which would take them over the proposed Vertical Expansion, based on prescribed pattern altitudes would clear the proposed Vertical Expansion by 558 feet. The FAA procedures require a 300 foot clearance or "margin of safety", in the airspace analysis process. Thus, under the FAA PHAM airspace analysis process, with the 300 foot margin of safety, the proposed Vertical Expansion passes this threshold calculation. Tr. (Day 2) Joseph Del Balzo at 122-123, 131-132; A-30 at 5-6; A-31 at 8-10.

52. In this case, as the proposed Vertical Expansion did pass this threshold calculation in the airspace analysis process, the remainder of the FAA PHAM airspace analysis did proceed resulting in the FAA issuing a "no hazard" determination with respect to the Vertical Expansion on December 13, 2002. A-6; Tr. (Day 1) Richard Veazey at 49-50.

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[4] Actually, the specific pattern altitude recommended by the PMA is 1,200 feet which is 56 feet lower than 1,000 feet AGL but Mr. Veazey used the FAA 1,000 foot level to conduct his exercise which was aimed at showing that the proposed Eastern Expansion would not actually be in the way of the " traffic pattern" at PMA. As he noted in his expert report, "[u]sing the Airport's traffic pattern data could reduce the clearances presented in this analysis by a maximum of 56 feet.

53. The FAA reissued the "no hazard" determination after further review on October 6, 2003. A-7.

54. The Pennsylvania Department of Transportation, Bureau of Aviation objected to the construction of the Vertical Expansion and has not removed its objection. C-7; Tr. (Day 2) Norman Lamar at 179-80.

55. The basis of its objection is that the proposed Vertical Expansion penetrates both the conical and the horizontal surfaces. C-7; Tr. (Day 2) Norman Lamar at 179-81.

56. The Bureau of Aviation has not performed a "hazard analysis."[5] Tr. (Day 2) Norman Lamar at 179-81.

57. The Bureau of Aviation defers to FAA's Hazard Determination approximately more than 95% of the times that the FAA issues a no hazard determination. Tr. (Day 2) Norman Lamar at 188.

Origin, Authorship and Regulatory History of the Exclusion

58. Mr. William Pounds who was Section Chief of the Solid Waste Management Program of DEP in 1980, and promoted to Division Chief in 1985, and Mr. John Dernbach, DEP legal counsel, wrote the Exclusion in the 1981 through 1988 time period. Tr. (Day 2) William Pounds at 66; Tr. (Day 3) William Pounds at 16-17, 31-32.

59. Although he was not certain where the language he used came from he said he and Mr. Dernbach "didn't just dream the language up. We obviously looked at something to write it." Tr. (Day 3) William Pounds at 109-10.

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[5] WMI states that the reason it has not sought at this point to remove the Bureau of Aviation's objections is that DEP suspended review of this landfill vertical expansion application was suspended for over a year before the denial and now it is fighting the threshold siting criteria battle. WMI says that if its landfill application process is allowed to go beyond the siting criteria stage, it will seek the Pennsylvania Bureau of Aviation's concurrence with the FAA's determinations.

60. Neither Mr. Pounds nor Mr. Dernbach have any expertise in the field of aviation, piloting, air traffic control, aeronautical engineering or the FAA's regulations. Tr. (Day 2), William Pounds at 67-68; A-26 at 9, 20; Tr. (Day 3) William Pounds at 18.

61. The Department has no expertise in those fields either. Tr. (Day 2) William Pounds at 68; Tr. (Day 2) Stephen Socash at 9-10.

62. Although the Exclusion is obviously not *in pari materia* with the FAA Regulation, Mr. Pounds was at least loosely, apparently very loosely, conversant with some of the terms and concepts used in the FAA Regulation. Tr. (Day 3) William Pounds at 16-17, 31-32, 109-10.

63. On June 13, 1987, the Environmental Quality Board ("EQB") proposed amendments to the municipal waste regulations which were published at 17 Pa. Bull. 2303. The amendments proposed, among other things, inclusion of the Runway Flight Path Exclusionary Criteria. A-41.

64. The amendments to the municipal waste regulations containing the Runway Flight Path Exclusionary Criteria appeared in the *Pennsylvania Bulletin*, 18 Pa. Bull. 1681 (April 9, 1988) and became effective on April 9, 1988. A-15.

65. On August 29, 1998, the EQB proposed further amendments to the municipal waste regulations at 28 Pa. Bull. 4319 (August 29, 1998). A-5.

66. On September 19, 2000, the EQB approved the amendments to the municipal waste regulations. The amendments to the municipal waste regulations appeared in the *Pennsylvania Bulletin*, 30 Pa. Bull. 6685 (December 23, 2000) and became effective on December 23, 2000. A-11.

67. The 2000 amendments left the Exclusion unchanged as applicable to areas permitted prior to December 23, 2000. *Id.*

68. The 2000 amendments added an Exclusionary Criteria in 25 Pa. Code § 273.202(a)(16)(ii) for areas permitted after December 23, 2000. The new Exclusionary Criteria is titled "Obstruction" and reads as follows:

> (ii) *Obstruction.* For areas permitted on or after December 23, 2000, in a manner in which any portion of the landfill would be an obstruction to air navigation under 14 C.F.R. § 77.23(a)(5) (relating to standards for determining obstructions).

Id.; 25 Pa. Code § 273.202(a)(16)(ii).

69. The Runway Flight Path Exclusionary Criteria *ab initio* could only apply to two landfills in the Commonwealth, the Pottstown Landfill being one of the two. Tr. (Day 2) William Pounds at 96-97.

70. There has not been any occasion or opportunity for DEP to have developed the expertise relevant to assessing the effect of a regulatory interpretation as to this regulation and in fact it has developed none. *Id.*; Findings of Fact Nos. 58-62, 74-86.

The Parties' Experts

71. WMI's first expert, Richard F. Veazey, is a Senior Aviation Planner employed by CH2M Hill. Mr. Veazey has over 30 years of experience in aviation and was qualified at the hearing as an expert in the FAA regulations, obstruction analysis, FAA terminology, hazard determinations, general aviation matters and aviation planning. A-31 at 1 and attached *Curriculum Vitae*; Tr. (Day 1) Richard Veazey at 20-25.

72. WMI's second expert, Joseph Del Balzo, has been the president of JDA Aviation Technology for the past ten years. Prior to that time, Mr. Del Balzo worked at the FAA for 36 years, including as acting Administrator and Deputy Administrator. Mr. Del Balzo has extensive

experience with all aspects of the aviation matters and was qualified at the hearing as an expert in the FAA Regulations, obstruction analysis, airspace analysis, FAA terminology, general aviation matters, FAA procedures and practice and as a pilot. A-30 at 1; Tr. (Day 2) Joseph Del Balzo at 107-113.

73. DEP offered one expert: Mr. David W. Jones. Mr. Jones is a P.E. and Vice President and Project Manager with Delta Airport Consultants, Inc., a company providing specialized airport consulting services consisting of planning, environmental, engineering, and construction administration. He is a licensed professional engineer in seven states, including Pennsylvania and he has been providing specialized aviation engineering and planning services to numerous general aviation airports for nearly 18 years. He is an active instrument rated private pilot. C-8 at 1; Tr. (Day 3) David Jones at 140-48. Mr. Jones was qualified at the trial as an expert in the fields of aviation construction, aviation terminology including terminology related to FAA obstruction evaluation criteria. Tr. (Day 3) David Jones at 144-148.

DEP's Differing Interpretations

74. On September 13, 2000, the Department submitted a Pre-Hearing Memorandum in *Leatherwood, Inc. v. DEP*, EHB Docket No. 2000-066-C ("Leatherwood Pre-Hearing Memorandum"). A-10.

75. The Department, in paragraphs 17 and 19 of the Leatherwood Pre-Hearing Memorandum, interprets the Runway Flight Path Exclusionary Criteria as follows:

> (17) The conical area referred to in 25 Pa. Code § 273.202(a)(11) [6] is the "conical surface" defined in 14 C.F.R. § 77.25(b) as follows: "A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

[6] The Runway Flight Path Exclusionary Criteria as promulgated in 1988 was located at 25 Pa. Code § 273.202(a)(11). Although the Runway Flight Path Exclusionary Criteria was retained unchanged in 2000, it was renumbered as 25 Pa. Code § 273.202(a)(16)(i).

> (19) The maximum elevation of the proposed Landfill, after disposal of waste pursuant to Leatherwood's Municipal Waste Permit, is 1,890 feet. Thus, the Landfill elevation will always be lower than the elevation of the conical surface. Therefore the Landfill is not within the conical area referenced in 25 Pa. Code § 273.202(a)(11), as illustrated in a drawing prepared by a Department engineer, Shawn Peters.

Id. at 5 (footnote reference added).

76. The Denial Letter in this case interprets the Runway Flight Path Exclusionary Criteria as follows:

> The term "conical area" referred to in this subsection of the Regulations consists of those portions of the flight paths, i.e., navigable airspace, that are delineated by the conical surfaces, as those imaginary surfaces defined by 14 C.F.R. Part 77, surrounding the runways of an airport. This is the area of navigable airspace within which a municipal waste landfill may not be operated pursuant to Section 273.202(a)(16)(i). Section 273.202(a)(16)(i) prohibits the operation of a landfill within this area of navigable airspace, regardless of whether such operation would present an actual harm or hazard.

A-12 at 2.

77. The Department's Answers to Interrogatories in this appeal interpret the Runway Flight Path Exclusionary Criteria as follows:

> The terms "conical surface" and "horizontal surface" are defined in 14 C.F.R. Part 77. Pursuant to the Department's interpretation, the term "conical surface" is not synonymous with the term "conical area." As interpreted by the Department, the term "conical area" of a runway is the bowl shaped surface oriented above that runway that is made up of the horizontal surface and the conical surface for that runway. The "conical area" for an airport with more than one runway includes the "conical area" for all of its runways.

A-3, DEP's Answer to Interrogatory No. 5.

78. In explaining their Answers to Interrogatories at their respective Depositions, Mr. Pounds and Mr. Socash testified that the Runway Flight Path Exclusionary Criteria prohibits landfills that <u>penetrate</u> the conical <u>and</u> horizontal surfaces, and also landfills located <u>beneath</u> those surfaces. A-26 at 83-84; A-27 at 49, 50.

79. Mr. Pounds and Mr. Socash testified that the Department's interpretation of the Runway Flight Path Exclusionary Criteria in the Leatherwood Pre-Hearing Memorandum is inconsistent with their interpretations in this appeal. Tr. (Day 2) William Pounds at 82-83; Tr. (Day 2) Stephen Socash at 37; A-26 at 73; A-27 at 47-48.

80. Mr. Socash testified that the Department's interpretation of the Runway Flight Path Exclusionary Criteria in the Denial Letter is inconsistent with his interpretation in this appeal. Tr. (Day 2) Stephen Socash at 39-40; A-27 at 105.

81. Contrary to Mr. Socash's testimony, Mr. Pounds testified at his deposition that the Department's interpretation of the Runway Flight Path Exclusionary Criteria in the Denial Letter is consistent with his interpretation in this appeal, A-26 at 137-38, and then at the trial he testified that it "may be somewhat different." Tr. (Day 2) William Pounds at 87-91.

82. David W. Jones, the Department's expert, testified that the Department's interpretations of the Runway Flight Path Exclusionary Criteria contained in the Department's Answers to Interrogatories and in the deposition testimony of Mr. Pounds and Mr. Socash are inconsistent with Mr. Jones' expert opinion of the relevant terms because (a) the term "conical area" does not include the "conical surface" <u>and</u> the "horizontal surface," and (b) the term "conical area" does not include the area below the "conical surface" and the "horizontal surface." Tr. (Day 3) David Jones at 227-28; A-32 at 12-13, 88.

83. At trial, Mr. Socash recanted his prior testimony concerning his interpretation of the Runway Flight Path Exclusionary Criteria. Mr. Socash, testified that he made a mistake when he testified previously that the Runway Flight Path Exclusionary Criteria prohibited landfills <u>below</u> the conical surface and horizontal surface. Mr. Socash explained his change in

interpretation on the basis that he "was not prepared to answer the question." Tr. (Day 2) Stephen Socash at 29-31; Tr. (Day 3) Stephen Socash at 118-19.

84. At trial, Mr. Pounds likewise recanted his prior testimony concerning his interpretation that the Runway Flight Path Exclusionary Criteria prohibited landfills below the conical surface and horizontal surface. Tr. (Day 2) William Pounds at 79-80.

85. Mr. Pounds characterized his prior interpretation as "incorrect" and "absurd." *Id.* at 81.

86. Despite his answers to interrogatories, Mr. Pounds was unable to answer at the trial whether the Runway Flight Path prohibits landfills from penetrating the horizontal surface. Tr. (Day 3) William Pounds at 86-87.

DISCUSSION

Regulatory Background and Lexicon

As necessary background for understanding this case and the analysis we must start with Federal Aviation Administration Part 77 Regulations, entitled "Objects Affecting Navigable Airspace" (FAA Regulation or Part 77). This Part establishes a detailed protocol for identifying and defining obstructions to air navigation and procedures for either allowing them or, under certain circumstances, forbidding them. Part 77 defines 5 "imaginary surfaces" associated with airport runways. These surfaces are defined in 14 C.F.R. Part 77 which is referenced in the Regulation. Those surfaces are: (1) primary surface; (2) approach surface; (3) transitional surface; (4) horizontal surface; and (5) conical surface. 14 C.F.R. § 77.25. Only the last two of these five surfaces have direct involvement in this case; the horizontal surface and the conical surface. WMI and DEP agree on the meaning of "horizontal surface" and "conical surface". For the PMA, those terms are defined as follows:

> *Horizontal Surface.* The horizontal surface is defined in 14 C.F.R. 77.25(a) as a flat plane 150 feet above the airport elevation. The perimeter of the horizontal surface is created by swinging arcs with 5,000 feet radii from the center of each end of the runway, and connecting these arcs with tangent lines. The horizontal surface resembles an oblong lid, 150 feet over the top of the airport. A-31 at 5-6; Tr. (Day 1) Richard Veazey at 53.
>
> *Conical Surface.* The conical surface is defined in 14 C.F.R. 77.25(b) as a surface extending outward and upward from the perimeter of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet. The conical surface resembles the sides of a bowl. The height of the conical surface ranges from 150 feet to 350 feet above airport elevation. The outer edge of the conical surface is 9,000 feet from the runway. A-31 at 6; Tr. (Day 1) Richard Veazey at 54.

Quite basically, the horizontal surface is a flat plane 150 feet above the airport and it looks like an oval lid over the top of the airport. The conical surface runs from the outer edges of the horizontal surface and its profile resembles a stadium seating area with the horizontal surface being the middle or playing field area.

Mr. Pounds testified that he and Mr. John Dernbach wrote the Exclusion in the 1981 through 1988 time period. Although he was not certain where the language he used came from he said he and Mr. Dernbach "didn't just dream the language up. We obviously looked at something to write it." Tr. (Day 3) William Pounds at 109-10. We think it is clear that although the Exclusion is obviously not *in pari materia* with the FAA Regulation, that Mr. Pounds was at least loosely, apparently very loosely, conversant with some of the terms and concepts used in the FAA Regulation.

A "traffic pattern" at an airport is that pattern that is intended to be flown by all aircraft entering into and out of an airport, as recommended by the FAA and adopted by the airport. This "traffic pattern" for landing, as a general matter, is described in FAA Advisory Circular AC No. 90-66A. According to the Circular, the pattern altitude for at entry into the landing pattern is 1,000 feet above ground level (AGN). The "traffic pattern" then follows a very specific series of

directions and turns to approach and land at a runway. The altitude along the traffic pattern is referred to as the "pattern altitude." The traffic pattern at PMA is a prescribed 6 leg approach. This is the precise path, prescribed by the FAA and the airport, which planes should be following in making a landing at the PMA.

FAA Part 77 provides for a detailed analysis of proposed structures with reference to potential impact on aviation. A "hazard determination." otherwise known as an "airspace analysis," is performed which depending on its outcome, can result in a proposed structure being prohibited or its plan altered so as to not interfere with aircraft. The project proponent in such a procedure is seeking to obtain a "no hazard" determination from the FAA indicating that its project does not pose a hazard to aviation. This does not mean that the construction cannot or does not intersect into one or more of the imaginary surfaces, only that if it does, there is no hazard to aviation involved.

The FAA "airspace analysis" or "hazard determination" is performed under the provisions of FAA Order 7400.2E, which is entitled, "Procedures for Handling Airspace Matters" (PHAM). The entire process consists of 6 steps outlined in the PHAM.[7] Basically, if a proposed structure penetrates into any of the imaginary surfaces, there is a rebuttable presumption that the structure is a hazard unless and until the PHAM process (a/k/a airspace analysis or hazard determination) shows that the structure is not a hazard. The first step in the PHAM process is to determine whether the proposed obstruction has any impact to prescribed airplane flight paths associated with the airport. That calculation is rather simple to perform and can be done by an engineer or even a lay person in less than one hour. The FAA builds in a 300

[7] It is actually a bit unclear whether this is the first step of the 6-step airspace analysis or the first part of the first step of the 6-step airspace analysis. Tr. (Day 1) Richard Veazey at 100, 111. The difference does not matter for our purposes. The bottom line is that this calculation is the threshold step of a multi-step process.

foot margin of safety such that any structure which comes to within 300 feet of a prescribed flight path would fail this threshold test under the PHAM. If that threshold calculation shows that the proposed structure would intersect prescribed flight paths, including the margin of safety, the inquiry is over and the project is deemed a hazard to air traffic. If, on the other hand, this threshold calculation shows that the structure does not intersect prescribed flight paths into and out of the airport then the rebuttable presumption is not overcome but the process can move on to the next 5 steps in the analysis.

In this case, the first step of the PHAM airspace analysis runs as follows. Using the FAA Circular pattern altitude of 1,000 feet, landing planes enter the traffic pattern in a counter-clockwise direction for landing at PMA at an altitude of 1,000 feet above ground level. That translates to 1,256 feet MSL (mean sea level) when the existing elevation of 256 feet MSL of PMA is included.[8] Not all landings would over-fly the Landfill but for those that do, the plane would over-fly the Vertical Expansion at the pattern altitude of 1,256 feet. The current elevation of the area of the Vertical Expansion is 443 feet. The Vertical Expansion would be 99 feet, taking the level of the Landfill to 542 feet. That leaves a clearance of 714 feet. As for departing planes, again, not all of which would be headed in the direction which would take them over the proposed Vertical Expansion, based on prescribed pattern altitudes, would clear the proposed Vertical Expansion by 558 feet. The FAA procedures require a 300 foot clearance or "margin of safety", in the airspace analysis process. Thus, under the FAA PHAM airspace analysis process, with the 300 foot margin of safety, the proposed Vertical Expansion passes this threshold

[8] Actually, the specific pattern altitude recommended by the PMA is 1,200 feet which is 56 feet lower than 1,000 feet AGL but Mr. Veazey used the FAA 1,000 foot level to conduct his exercise which was aimed at showing that the proposed Vertical Expansion would not actually be in the way of the " traffic pattern" at PMA. As he noted in his expert report, "[u]sing the Airport's traffic pattern data could reduce the clearances presented in this analysis by a maximum of 56 feet. A-31 at 8 n. 1.

calculation.

In this case, as the proposed Vertical Expansion did pass this threshold calculation in the airspace analysis process, the remainder of the FAA PHAM airspace analysis did proceed. That resulted in the FAA issuing a "no hazard" determination with respect to the Vertical Expansion on December 13, 2002. The FAA reissued the "no hazard" determination after further review on October 6, 2003. The Pennsylvania Bureau of Aviation (PBA), however, has objected to the construction of the Vertical Expansion and has not removed its exception. The basis of its exception is that the proposed Vertical Expansion penetrates both the conical and the horizontal surfaces. The PBA has not performed a "hazard analysis."[9]

The Parties' Varying Interpretations of the Exclusion

Two difficult problems of interpretation of the Exclusion immediately come to the fore. First, the Exclusion uses the term "conical area" but FAA Part 77 has no such defined term. The parties are not battling in this case regarding the meaning of "conical area" in the Exclusion as both parties agree that the proposed Vertical Expansion penetrates both the conical surface and the horizontal surface of the PMA. Thus, the Department proffers that the term "conical area" in the Exclusion means both the horizontal surface and the conical surface is not the focus of the dispute here. Second, the Exclusion uses the term "runway flight paths" but there is no such term in Part 77. WMI points us to the FAA Pilot/Controller Glossary, a technical source, which defines a "flight path" as "as line, course or track along which an aircraft is flying or is intended to be flown" and to the American Heritage Dictionary, a non-technical source, which defines

[9] WMI points out that the FAA has issued two "no hazard determinations". The reason WMI has not sought at this point to remove the PBA's objections is that DEP suspended review of this landfill vertical expansion application for over a year before the denial and now it is fighting the threshold siting criteria battle. WMI says that if its landfill application process is allowed to go beyond the siting criteria stage, it will seek the PBA's concurrence with the FAA's determinations. WMI further points out that, Norman Lamar, a representative of the PBA, testified that the Bureau defers to FAA's Hazard Determination approximately 98% of the time. Tr. (Day 2) Norman Lamar at 188.

"flight path" as "the precise route taken or due to be taken through the air by an aircraft or spacecraft." However, in neither of these sources is the term "runway flight path" defined.

This disharmony between the FAA Regulation and the Exclusion led Mr. Lamar of the PBA, a Department witness and an aviator, to conclude that the Exclusion was "not very explanatory" and it "wasn't very clear." Tr. (Day 2) Norman Lamar at 191. For that reason, Mr. Lamar suggested that DEP might want to reword the Exclusion to be more in line with Part 77. *Id.*

DEP's view in this litigation is that the Exclusion prohibits any physical incursion into either the conical or the horizontal surfaces, period. That is so regardless of whether the incursion actually intersects the prescribed traffic pattern. The Denial Letter in this case states that the Exclusion "prohibits the operation of a landfill within this area of navigable airspace, regardless of whether such operation would present actual harm or hazard." A-12 at 2.

WMI's view can be summarized as follows: (1) DEP's interpretation improperly ignores the last 26 words of the Regulation and is thus unreasonable; (2) its interpretation of those last 26 words is the correct one; and (3) as it interprets the Exclusion, the Vertical Expansion is not disqualified under it.

WMI insists that the Exclusion can mean only one thing: that obstructions which penetrate the conical or horizontal surfaces which also intersect with established prescribed runway flight paths are excluded. In other words, only situations which fail the threshold step of the "airspace analysis/hazard determination" are excluded. A significant part of WMI's argument rests on the theory that to interpret the Exclusion the way DEP does would be to ignore the last 26 words of the Exclusion, starting with "for runway flight paths...." WMI contends that DEP's

interpretation renders the phrase "for runway flight paths" meaningless and surplusage and, thus, its interpretation is unreasonable.

The foundation of WMI's argument in this regard is its expert opinions that the term "runway flight paths" in the Exclusion must mean "the flight paths that constitute the traffic pattern at the airport." Thus, Mr. Del Balzo, a WMI expert, opines that "the only reasonable interpretation of the [Exclusion] consistent with its language and incorporated FAA regulation is [that it] prohibits penetrations of the conical surface only to the extent that the penetration is at a height that interferes with the flight paths that constitutes the traffic pattern at an airport." A-30 at 8. WMI also argues that its interpretation becomes evident when one looks at the comment on the Exclusion set forth in the Preamble to the 2000 amendments to the regulations which re-enacted the Exclusion. Moreover, its interpretation is evident also when one looks at the Exclusion in context with the 2000 amendment to the section (a)(16) provision which added a new companion to the Exclusion, i.e., 25 Pa. Code § 273.202(a)(16)(ii) which refers specifically to barring "obstructions" and does not refer to "runway flight paths."

WMI further argues that, under its interpretation of the Regulation, its Vertical Expansion passes this siting criteria because the mathematics show that the Expansion is below the height of the pattern altitude of the PMA. In other words, the Expansion does not intersect the "runway flight paths" as WMI interprets the meaning of that phrase. WMI arrives at this conclusion by performing the mathematics involved in the first part of the six part "hazard analysis" outlined in the FAA PHAM process.

Deference Under NARCO

We need to start by discussing whether this is a case in which the reasonable interpretation of a regulation by the Department is entitled to deference. We think that under the

particular circumstances we see here deferring to DEP's interpretation is not the route to travel.

The Department tells us that the principle of *Department of Environmental Protection v. North American Refractories Company,* 791 A.2d 461 (Pa. Cmwlth. 2002) (*NARCO*), applies here and that we should just defer to its interpretation of the Exclusion because its interpretation is reasonable. WMI, on the other hand, says that *NARCO* deference does not apply because: (1) the Department's interpretation conflicts with the plain meaning of the wording of the Exclusion, *See Tri-State Transfer Co. v. DEP*, 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999); *Plescha v. DEP*, 2004 EHB 529, 537-42; (2) the Department has offered so many different interpretations of the Exclusion that there is no interpretation, reasonable or otherwise, to which we can defer, *Brunner v. DEP*, 2004 EHB 684, 688, *rev'd on other grounds*, 869 A.2d 1172 (Pa. Cmwlth. 2005), *petition for allowance of appeal filed* April 13, 2005; *Envtl. & Recycling Servs. Inc. v. DEP*, 2002 EHB 461, 491; and (3) the Department admittedly has no expertise in the field of aviation. *NARCO*, 791 A.2d at 465; *Younkin v. Bureau of Prof'l and Occupational Affairs, State Real Estate Comm'n*, 774 A.2d 1281, 1285 (Pa. Cmwlth. 2001); *Rosen v. Bureau of Professional and Occupational Affairs, State Architects Licensure*, 763 A.2d 962, 968 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 781 A.2d 150 (Pa. 2001).

We find that *NARCO* deference is not appropriate here because the Department and its officials have offered numerous different interpretations of the Exclusion, the terms of the Exclusion, and the relationship between its terms over the years. WMI has done a good job cataloguing the various DEP interpretations in Exhibit A to its Post-Trial Brief. The salient contradictory and conflicting interpretations of the Exclusion and/or its terms are as follows:

Prior to the Hearing

September 13, 2000 - DEP Pre-Hearing Memorandum in the Leatherwood case states that "conical area" in the Runway Flight Path Exclusionary Criteria is the "conical surface."

October 13, 2004 - DEP's Denial Letter states that "conical area consists of those portions of the flight paths, i.e., the navigable air space, that are delineated by the conical surfaces" and that any penetration of the conical surface is prohibited, "regardless of whether such operation would present an actual harm or hazard."

January 12, 2005 - DEP's Answers to Interrogatories state that "conical area is not synonymous with the conical surface" and that the "conical area" is the "bowl shaped surface" that is "made up of the horizontal surface and the conical surface."

January 19, 2005 - William Pounds and Stephen Socash testify at deposition that:

> The Runway Flight Path Exclusionary Criteria prohibits landfills that <u>penetrate</u> the "conical surface and horizontal surface" <u>and</u> landfills that are <u>below</u> those surfaces.

<u>During the Trial</u>

Mr. Pounds and Mr. Socash recant their deposition testimony and testify that the Runway Flight Path Exclusionary Criteria does not prohibit landfills beneath the "conical surface" and "horizontal surface."

Mr. Socash reiterated that the "conical area" consists of the "conical surface" and the "horizontal surface."

Mr. Pounds could not answer whether the Runway Flight Path Exclusionary Criteria prohibits a penetration of the "horizontal surface."

WMI Post-Hearing Brief, Ex. A. Of course the Department's position at the trial and now is that the Exclusion means no penetration into (meaning higher than the lowest height of) either the conical or the horizontal surfaces.

The record shows a sufficient inconsistency and confusion of DEP on what the Exclusion and its terms mean over time that we do not have an interpretation to which we can defer. As Judge Labuskes said in *Brunner*, "where the Department has failed to adopt a consistent position or it has changed its interpretation over time, the reasons for deferral tend to evaporate." *Brunner v. DEP*, 2004 EHB at 688; *see also*, *Tri-State Transfer Co. v. DEP,* 722 A.2d at 1134 ("considering the variety of interpretations of [the regulation] proffered by the Department in its dealings with TST, we believe that the EHB was not compelled to defer to the Department's

revised interpretation of the regulation"); *Envtl. & Recycling Servs., Inc.*, 2002 EHB at 491 (while the Board must defer to DEP interpretations of environmental regulations which the Board determines are reasonable, where DEP applies differing interpretations we are not required to defer).

We reject the Department's attempt to deflect the non-application of *NARCO* deference by saying that the regulated community was not impacted by the conflicting interpretations. WMI correctly characterizes this as the "no harm, no foul" argument. It is also reminiscent of the age old question: if a tree falls in the woods and nobody is there to hear it, does it make a sound? We do not believe that an investigation of whether anyone was adversely impacted by the conflicting interpretations is part of this analysis. The matter is not one of detrimental reliance but conflicting interpretations and here we have conflicting interpretations. The conflicting interpretations and positions were communicated to tribunals and via sworn discovery responses and sworn testimony in court. That is sufficient.

At the same time we reject DEP's notion that it is only the interpretation in this case at this time, and no other, which we need to consider in determining whether *NARCO* deference applies. This could be labeled the "blinders," "snap-shot" or the "ostrich" approach. It is plainly ridiculous. By definition, inconsistent interpretations happen, if they happen at all over time, and over more than one interpretation. Also, we see here, in this case, more than one interpretation being proffered.

WMI argues also that *NARCO* deference is not required here because the Department does not have expertise in the field of aviation, aviation terminology or aviation safety. Mr. Pounds admitted that to be the case both as to him personally and as to the Department institutionally. Even the Board has had occasion to note the obvious: DEP has no expertise in

the field of aviation and aviation safety. *Jefferson County Cmm'rs v. DEP*, 2002 EHB 132, 189 ("DEP officials readily acknowledged that they possessed no expertise on aircraft safety . . . and that FAA and PADOT were the agencies with such expertise."), *aff'd sub nom, Leatherwood v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003).

WMI has convincing facts and legal authority for application of its argument here. *NARCO* itself is certainly and explicitly based on the predicate that the Department is more likely to develop the expertise in environmental matters and environmental regulation and in assessing the effect of a particular regulatory interpretation. *NARCO*, 791 A.2d at 465. Here, the facts show that DEP brought no expertise into the regulatory drafting process and it has acquired none since then with respect to any aspect of the Exclusion. DEP has no expertise at all in aviation, aviation regulations or in assessing the effect of its particular regulatory interpretation in this case. As we have already pointed out, DEP's own interpretations of key terms in the Exclusion and application thereof have been all over the board. The Exclusion *ab initio* could only apply to two landfills in the Commonwealth so there is not any occasion or opportunity here for DEP to have "develop[ed] the expertise relevant to assessing the effect of a particular regulatory interpretation" as to this regulation and in fact it has developed none. The Exclusion is not an environmental regulation in any sense. Not even DEP has suggested that the Exclusion, like many of the other siting criteria found in 25 Pa. Code § 272.202, is related to environmental protection and it clearly is not. The Exclusion involves reference to another agency's regulations, i.e., the FAA, and the FAA regulations are an important input to the Exclusion.[10] Under such circumstances, the Commonwealth Court has cautioned against over aggressive application of "deference." *See, e.g.*, *Younkin*, 774 A.2d at 1285 ("we cannot simply defer to an

[10] That is not to say that the Exclusion incorporates the FAA Regulation in full or that the Exclusion defers to the FAA on whether a structure is allowed. Neither is the case. The Exclusion borrows from the FAA Regulation in an important way, it does not incorporate it or defer to it.

administrative agency's interpretation of another administrative agency's organic statute or duly promulgated regulations"); *Rosen,* 763 A.2d at 968 (since the matter involved overlapping disciplines, architecture and engineering, the Court found that the State Architects Licensure Board was not uniquely qualified to interpret both statutes at issue in the case).

Thus, we will undertake to interpret the Exclusion on a clean slate without deferring to the Department's interpretation offered in this litigation. We, of course, do consider its interpretation offered here as well as WMI's interpretation. We conclude that the Exclusion is properly construed to mean what the Department says it means. The Exclusion bars any penetration into the conical or horizontal surfaces, regardless of whether the obstruction actually intersects "runway flight paths" as that term is interpreted by WMI to mean "traffic patterns." In that regard, even though this is not a *NARCO* deference case, we do find that the Department's interpretation of the Exclusion is reasonable and plausible. We find, on the other hand, that WMI's proffered interpretation is unconvincing and strained and would lead to the Exclusion being either meaningless or ridiculous or both.

There Is No "Surplusage" Of Language in the Exclusion

WMI is not correct when it says that the Department's interpretation of the Exclusion puts a period at the end of the parenthetical and ignores the last 26 words of the Exclusion. Mr. Pounds, one of the co-drafters of the Exclusion, testified that the terminology "for runway flight paths" of the Exclusion refers to the situation where an airport may have more than one runway. He testified as follows on this question,

> Q Okay. Do you know why the term, for runway flight paths, was included in the regulation?
>
> A I don't recall specifically, but – you know, why we used that term. But I think what we were trying to cover was, we knew -- and I'm drawing back from memory once again -- based on some of the graphics or illustrations in the

> EPA guidance on Bird Strikes, they get airports with different orientations for runways. An airport might have three or four runways going in different directions. And we wanted to make sure we encompassed all of those particular areas that were in the flight path of an airport – or of a plane.

Tr. (Day 3) William Pounds at 34. With respect to the specific point that WMI raises in this case that the "runway flight paths" language limits the area within the conical or horizontal surfaces to which the siting criteria applies, Mr. Pounds testified as follows,

> Q Was there any intention as you understood it to limit it -- limit the portion of the conical area than that was prohibited in terms of penetration by a landfill?
>
> A No.
>
> Q Was the entire conical surface of that which could not be penetrated?
>
> A As I have heard people testify in the definition of conical surface, I would say yes.

Tr. (Day 3) William Pounds at 34-35.

We may agree with WMI that, on retrospect, different wording could have been used to convey this concept of the totality of conical area with respect to all runways at multiple runway airports. We think that the Department would agree that different words could have been used. That, however, is not the point.[11] The undersigned having seen Mr. Pounds testify for two days at the trial of this matter concludes that Mr. Pound's testimony about the purpose of the words and his intent that they do not limit the siting criteria to some subset of the conical area is credible. Furthermore, although the wording used by Mr. Pounds and Mr. Dernbach is not perfect and we all could now do better, we find that the wording in the Exclusion is intelligible

[11] This is an area in which we respectfully differ with the dissenting opinion of Judge Labuskes. Judge Labuskes' analysis apparently is driven at least in part by his view today of how the Exclusion could have or should have been written and what the EQB must have had in mind. As we have noted, we do not think that how the Exclusion could have been written is the main point. Moreover, we heard in testimony from the person who wrote the Exclusion, Mr. Pounds. We know what he had in mind and what he meant. No witnesses who were members of the EQB testified about what anyone else had in mind.

and does reasonably communicate the notion Mr. Pounds talked about without creating the limitation that WMI talks about. [12]

We do not agree with WMI that DEP's reading of the Exclusion improperly equates "conical surface" and "runway flight path." Under the Exclusion as we interpret it, the clause "runway flight path" qualifies or describes "conical surface" so as to convey that if there is more than one runway at an airport, then the conical areas involved are the multiple conical areas associated with the multiple runways.

Besides our basic finding as the trier of fact that Mr. Pounds' testimony is credible on the two points we have discussed, we think his credibility, as well as his points, are corroborated and that his testimony makes sense. Mr. Pounds has no sophistication or technical schooling in aviation matters. To accept WMI's theory that the Exclusion incorporates the specific notion of "runway flight path" as WMI has used the term so as to mean "flight paths that constitute the traffic pattern at the airport" is, quite frankly, to give Mr. Pounds too much credit. WMI itself has pointed out that Mr. Pounds has no expertise in the FAA Regulations, aviation, aeronautical engineering, piloting, airport operations or air traffic control. Mr. Pounds so admits. To carve the specific and technical qualification or limitation into the Exclusion, as WMI's reading of it provides, would have required a sophisticated background in aviation, which Mr. Pounds does not have.

The clause "that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit," fits right in with the scheme of the Exclusion and is

[12] We do not know why Judge Labuskes finds that Mr. Pounds was mendacious about this topic, he does not explain that. As we have noted, after seeing and hearing Mr. Pounds testify in this case over the course of two trial days, we conclude otherwise and do not share Judge Labuskes' distrust of Mr. Pounds' honesty. Also, Judge Labuskes says that Mr. Pounds' testimony is "ambiguous." We did not draw the same conclusion. His testimony to which we refer answers the specific questions: (1) what did you mean by the terms "runway flight paths"?; and (2) did you mean to limit the area within the conical surface to which the siting criteria applies? As noted, we are satisfied that the answers were on point and credible and that the language used is intelligible to communicate the stated purpose and intent.

not surplusage either. This clause describes the type of aircraft as to whose airport runways the Exclusion applies. The clause does not operate in the Exclusion to qualify a part of the conical area as space within the conical area in which penetrations or obstructions are allowed. This reading is consistent with and follows from each of the other exclusionary criteria in Section 202(a) which relate to airports which contain this phraseology to describe the type of aircraft to which it applies. *See* 25 Pa. Code §§ 273.202(a)(14), (15) (no landfills within 10,000 feet of a runway that is or will be used by turbine powered aircraft or within 5,000 feet of a runway that is or will be used by piston-type aircraft). Also, as Mr. Jones testified, the imaginary surfaces of FAA Part 77, and thus implicated in the Exclusion, relate to runways at airports accommodating certain types of aircraft, i.e., fixed-wing piston or turbine aircraft. A different set of imaginary surfaces is implicated with respect to helicopters at heliports. Tr. (Day 3) David Jones at 263-64. Thus, the clause relates to which types of aircraft are involved and not, as WMI would have it, which part of the conical surface is taken out of the Exclusion.

WMI's Interpretation of the "Runway Flight Paths" Clause Is Not Tenable

We do not find WMI's propounded interpretation of "runway flight paths," at least as it would apply to the Exclusion, to be tenable. We see WMI's interpretation of the Exclusion as improperly equating the phrase it has focused on "runway flight path" with "traffic pattern."

WMI correctly notes that "runway flight path" is not a term used in the FAA Regulations. Likewise it is not a term defined in the Pilot/Controller Glossary. WMI offers a technical and a non-technical definition for "flight path." The FAA Pilot/Controller Glossary, the technical source, defines a "flight path" as "as line, course or track along which an aircraft is flying or is intended to be flown." A-36. The American Heritage Dictionary defines "flight path" as "the precise route taken or due to be taken through the air by an aircraft or spacecraft." From there,

WMI uses its experts to define "runway flight path" to mean "flight paths that constitute the traffic pattern at the airport."

However, the traffic pattern refers to the very specific published track that the aircraft is prescribed to take into the airport for landing and out of the airport on take off. The traffic pattern is the pattern that is intended to be flown by all aircraft entering into and exiting out of an airport, as recommended by the FAA and adopted by the airport. In short, the traffic pattern is precisely where in vertical and horizontal space the plane is supposed to be on landing or takeoff. At PMA, for example, the traffic pattern consists of six "legs" or components each of which is expressly prescribed.

The problem and the reason we find WMI's experts not credible insofar as they attempt to place meaning of the term "runway flight paths" in the Exclusion, is that their definition of "runway flight path" incorporates lock, stock and barrel the precise concept of "traffic pattern," *i.e.*, where the plane is supposed to be or is prescribed to be, but shuts out the concept of where the plane may actually be. In other words, WMI equates "runway flight paths" in the Exclusion with the term "traffic pattern." We do not agree that the two are synonymous either in general or in the context of the Exclusion.

Both the FAA and the Dictionary definition of "flight path" talk about where the plane is intended to be flown and <u>where it is being flown</u>. Mr. Jones testified that even with respect to the precise "traffic pattern" and/or pattern altitude at an airport, there is some freedom or "flexibility" for pilots to deviate therefrom, depending upon conditions.[13] Thus, an airplane may,

[13] Tr. (Day 3) David Jones at 153-54. WMI contested this notion that there is some flexibility in what constitutes the traffic pattern and the pattern altitude in cross-examination of Mr. Jones. Tr. (Day 3) David Jones at 191-197. Mr. Jones insisted that the FAA traffic pattern and pattern altitude were "guidance" as opposed to enforceable regulations. Whether the traffic pattern and pattern altitude are "guidance" or "regulation" in terms of enforcement or FAA law is not the central point to our case here. We do note, though, that under WMI's construction, the traffic pattern and the pattern altitude are a discreet set of points in space at discreet and particular altitude.

quite appropriately, be off the prescribed "traffic pattern" to some degree. We also note that there is some discrepancy between the FAA Circular recommended pattern altitude and the pattern altitude for the PMA. The PMA pattern altitude is 56 feet lower than the FAA 1,000 foot mark. Even Mr. Veazey noted this in this Expert Report.[14] Thus, a pilot could, in fact, whether on purpose or not, be approaching for landing and be off the prescribed "traffic pattern." That the pilot could be penalized for being off the "traffic pattern" may be so, but the fact remains that a pilot could be off the prescribed traffic pattern. He or she is not supposed to be off the prescribed traffic pattern but the plane being flown in that position is still on a "flight path" as that term is defined in both the FAA Pilot/Controller Glossary and the Dictionary.

Thus, we conclude that the meaning of the terminology "runway flight paths" in the Exclusion is much closer to Mr. Jones' view of the term which is, "any flight path in and out of that airport...where an aircraft could be flying." Tr. (Day 3) David Jones at 174. We find that testimony more credible than Mr. Veazey's or Mr. Del Balzo's on this subject. In so doing we by no means diminish the expertise of WMI's experts, but we respectfully decline to conclude on the basis of their testimony that, in the context of Exclusion, as a matter of law, the presence of the single word "runway" before the term "flight paths" requires the conclusion that the clause now means only the track that the aircraft are intended to be flown and excludes the meaning where the aircraft are flown. Even Mr. Veazey, WMI's expert, admitted that a "flight path" is any track that a plane is traveling at any given time. Tr. (Day 1) Richard Veazey at 89-90. He even went so far as to say that a plane flying on a flight path approaching for a landing at PMA was on an "airport flight path." *Id.* at 90.

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[14] A-31 at 8 n.1.

We think our declination to so conclude is in line with our view of what Mr. Pounds was referring to in his testimony when he said there was no intent to limit the physical area covered by the Exclusion by placement of the "runway flight paths" clause. Mr. Pounds meant to cover all space within the conical area---wherever an airplane may be therein and not exclusively the specific prescribed "traffic pattern" where the planes are supposed to be. As we have said, we find him credible on that point. Based on what we have seen and heard, we read the Exclusion likewise.

This Exclusion read this way makes sense in that it would provide protection against air collisions not just with respect to where pilots are supposed to be but also with respect to where pilots are not supposed to be but where they might in fact be. As we said, Mr. Jones testified that pilots can be off the mark of the precise traffic pattern and pattern altitude to some degree. So even in the regular course of events, a pilot may be off the exact prescribed traffic pattern. Further, Mr. Del Balzo testified that pilots can and do do stupid things. We agree. Sometimes they may do things which are not necessarily stupid but, nevertheless, put them off course to some degree with the exact prescribed traffic pattern into or out of the airport at any given time. We disagree with Mr. Del Balzo that regulations are not designed to protect against careless people or reckless people or people who do stupid things. Regulations can indeed provide protection both from such people and to such people. We think it makes sense to read this regulation as one that protects pilots who are exactly where they are supposed to be and those who are not exactly where they are supposed to be. It of course, likewise, protects people and property on the ground from the results of air collisions involving planes being flown exactly where they are supposed to be as well as those not exactly where they are supposed to be.

The reference in the Preamble to 2000 amendments to the Exclusion as "offer[ing] important protection against air traffic accidents by protecting against construction at heights that would interfere with an airport's flight path" does not detract from our conclusion here about its meaning. In fact, we think that language and other language of the Preamble strengthens our conclusion about how to interpret the Exclusion.

WMI says that the Preamble language it points to could only mean that the focus of the Exclusion is not to prohibit any obstruction of the conical area but only those obstructions which actually interfere with the airport's "flight path." However, the Preamble uses the phrase "flight path" and not the phrase "runway flight path." Thus, there is even less viability to the argument that the term "flight path" in this context means the prescribed and specific "traffic pattern" which WMI argues the phrase "runway flight path" means in the context of the Exclusion itself. As we noted, "flight path," whether you use the technical definition in the FAA Pilot/Controller Glossary, or the common definition from the Dictionary, means where an airplane is intended to be flown <u>or is flying</u>.

Also, the Preamble describes the prohibition in paragraph (16)(i) as a prohibition "<u>against operating within the 'conical airspace'</u>." 30 Pa. Bull. 6685, 6707 (December 23, 2000).[15] This is precisely what DEP has been arguing the Exclusion means; it prohibits operations within the conical area, period, not within some subset of the conical area.[16]

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[15] Ex. A-11 at 6707.

[16] Judge Labuskes' "interpretation" of the Exclusion is purely a Judge invented creation; there is no support for it from any party or anywhere in the record. Not being happy the way Mr. Pounds wrote the Exclusion and explained it, Judge Labuskes' dissent creates this concept of the Exclusion covering where the planes are or where they "might reasonably be expected to be, considering not only the prescribed approaches and take-offs, but all deviations that might reasonably be anticipated therefrom." *Labuskes Dissent* (*L.D.*) at 6. There is no explanation where this came from or even what it means.

Judge Labuskes also gets side-tracked in saying that he does not think that it is a stretch to conclude that the EQB incorporated the concept "flight path" into the Exclusion to reflect the fact, undisputed in this appeal, that there

The Exclusion Is Not Inconsistent with 25 Pa. Code § 273.202(a)(16)(ii)

There is no inconsistency between the Exclusion and its new neighbor, 25 Pa. Code § 273.202(a)(16)(ii). As we have noted, this subsection provides,

> (ii) *Obstruction.* For areas permitted on or after December 23, 2000, in a manner in which any portion of the landfill would be an obstruction to air navigation under 14 C.F.R. § 77.23(a)(5) (relating to standards for determining obstructions).

25 Pa. Code § 273.202(a)(16)(ii). This provision was added to the siting criteria in 2000. Thus, it came along well after the Exclusion at issue here. Everyone agrees that the (ii) provision provides more or additional protection beyond that provided in the (i) provision. The Preamble to the 2000 amendments to the regulations provides that,

> A new subparagraph (ii) was added to paragraph 16, to include all of the "imaginary surfaces" which the Federal Aviation Administration protects in 14 C.F.R. § 77.23(a)(5) (relating to standards for determining obstructions), not just the conical airspace. This will offer greater protection against intrusion to the airport's flight path.

30 Pa. Bull. 6707. WMI argues that based on the absence of the clause "runway flight path" and the presence of the term "obstruction" twice in the (ii) provision we are required to conclude that the (ii) provision provides more protection in that the (ii) provision prohibits any incursion into the imaginary surfaces while the (i) provision only prohibits incursions which intersect the runway flight path meaning the prescribed runway traffic patterns.

We disagree that such a conclusion is required or the two provisions are so inconsistent as to require that WMI's interpretation of the (i) provision is mandated. We have already noted

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is no need or point to including the entire conical surface in a siting exclusion. *L.D.* at 3. Again, the question is not what dissenting Judge Labuskes thinks now is needed. The real question is what did the EQB do, not what did it need to do. The other real question is whether the EQB did establish an exclusionary criteria applicable to the conical area, not whether it needed to do so. Judge Labuskes' dissent answers the off-point questions, not the real ones. What is worse, it does so by creating a whole new concept of the Exclusion, one which: (1) was not envisioned or propounded by anyone at trial; (2) that the author of the Exclusion specifically denied intending to create; and (3) for which there is no evidence that the regulatory body which passed it, the EQB, meant to create either.

that we do not accept WMI's interpretation of "runway flight path" to mean only the prescribed precise "traffic pattern." That the language used is different in (ii) than (i) does not compel the conclusion that WMI proffers. The (ii) provision came more than a decade after the (i) provision which could account for the variation in terminology used in the two. Also, we read the (ii) provision as providing more protection over and above that already provided in the (i) provision in that the (ii) was added to incorporate all of the FAA Regulation's imaginary surfaces into the Exclusion and to prohibit any penetration of any such imaginary surface, not just the conical surface and the horizontal surface which is covered in the (i) provision. This is what Mr. Pounds testified. We credit Mr. Pounds' testimony on that and find that the (ii) provision does what Mr. Pounds said it does.

The Exclusion In Its Context As A Siting Criteria

We think that WMI's interpretation fails also in light of the form and context of the Exclusion as one of many "siting criteria" under 25 Pa. Code § 273.202(a)(1)-(18). The Runway Flight Path Exclusionary Criteria is contained within this set of siting criteria. Of course the term "siting criteria" is a bit of a misnomer because this Section provides for places or circumstances in which siting of landfills is prohibited. In any event, there was much testimony and discussion at the trial about the nature and form of "siting criteria" at the trial. The focus at trial was whether the siting criteria of Section 273.202 established so-called "bright-line" tests of exclusion. The Department said that they do and that, therefore, WMI's interpretation of Section 16(i) does not fit because it requires expert analysis and calculation to determine whether it applies.

WMI did a very credible job of dismantling that argument by showing that various of the siting criteria, by their own language, permitted the particular exclusion criteria involved to be

waived or set aside upon certain technical, expert-witness oriented showings. For example, Section 273.202(a)(2) provides that no landfill storage, processing or disposal activities may be located within 100 feet of a wetland unless it is shown, presumably by expert analysis, that no adverse hydrologic or water quality impacts will result. 25 Pa. Code § 273.202(a)(2). Similarly, in Section 273.202(a)(6) no landfill may be located in a valley, ravine or head of hollow, where the operation would result in the elimination, pollution or destruction of a portion of a perennial stream. 25 Pa. Code § 273.202(a)(6)(emphasis added). Also, in Section 273.202(a)(12) landfill storage, processing or disposal operations are prohibited from being within 100 feet of a perennial stream, unless it can be shown that there would be no adverse hydrological or water quality impacts. 25 Pa. Code § 273.202(a)(12).

As WMI showed, many of the exclusionary criteria do not involve "bright line" tests and involve expert analysis of questions upon which experts can have differing opinions. The Department and WMI did not even agree on what would be a "bright line" test. For example, the Department maintained that whether a stream is perennial and whether there would be damage to it from any operation is a black and white subject. WMI disagrees.

Both parties' analysis of this aspect of the case misses an important point of commonality among these siting criteria in Section 273.202. Perhaps the parties' inability to even agree on a "bright line" test to determine what is and what is not a "bright line" test is a hint that their inquiry in this regard is off-track. The key that we see is not whether the exclusionary criteria establish "bright line" tests, whatever that means, or whether they do or do not involve expert analysis and input about which different experts can disagree. The key is that the form, the genre if you will, of these exclusionary criteria is that they establish broad spatial buffers or "no-fly zones" (no pun intended) in which landfills may not be sited. These exclusionary criteria

establish cautionary spatial separations between the landfill activity and the things to be protected. The siting criteria establish prophylactic distances of separation between features to be protected and a landfill because of the risk landfill operations pose to those features. Landfills are barred within 100 feet of a perennial stream, or 300 feet of an exceptional value wetland, 100 feet of a non-exceptional value wetland, 10,000 feet of an FAA certified airport for turbine-powered aircraft, 5,000 feet of an FAA certified airport for piston-type aircraft. These distances do not profess to be precise liminal markers to the foot-line or inch-line markers where on one side of the prescribed distance a landfill is safe but on the other it is not. That is not what these siting criteria are designed to do.

Each siting criteria in Section 273.202 is a "neighborhood play" to borrow a term from baseball. In the "neighborhood play," which usually occurs in the context of a double play grounder in the infield, the runner is out at second base when the fielder is in "the neighborhood" of second base.[17] WMI's interpretation of the Exclusion, though, would cast it completely out of character with the form of a siting criteria and the form of any of the other subsections of Section 273.202. Under WMI's interpretation, there is no prophylactic isolation distance at all. Under

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[17] See The Language of Baseball, http://www.enlexica.com/sp/bb/index.html. An interesting discussion of the neighborhood play concept was provided by Judge Daniels in *Tiger Natural Gas v. General Services Administration*, 2003-2 BCA (CCH) ¶ 32,321 (GSBCA July 16, 2003)(2003 GSBCA LEXIS 139). Tiger, a government contractor, had attempted to appeal a decision of the GSA regarding an amount Tiger owed to the GSA. The only issue was whether Tiger's appeal had been received on time by the GSA clerk. Tiger argued, among other things, that its courier was actually in the vicinity of the Clerks Office with the filing but, for whatever, reason did not actually open the Clerk's door and hand him or her the filing. Judge Daniels had this to say about that,

> The "neighborhood play," in which a shortstop "forces out" a runner at second base by taking a throw near, but not at the base, sometimes deceives an umpire in baseball. See Official Rule of Major League Baseball 7.08(e) ("A runner is out when . . . [h]e fails to reach the next base before a fielder tags him or the base, after he has been forced to advance by reason of the batter becoming a runner.") (emphasis added), available at [http://www.mlb.com/NASApp/mlb/mlb/official_info/official_rules/runner_7.jsp]. The neighborhood play does not work here, though. If the Clerk does not take possession or delivery of a document, that document is not filed, even if a courier carries it near the Clerk's Office.

Id. Unlike, the situation Judge Daniels was dealing with, the exclusionary criteria in Section 273.202(a) are based on the premise of the "neighborhood play."

WMI's view of the Exclusion, it applies to that very precise point in space exactly where the threat intersects with the thing protected. Obstructions would be permitted up to that very point where planes are prescribed to be flying.[18]

It is not an answer to that problem to say, as WMI might, that there is a 300 foot zone of safety built into the FAA hazard determination. That 300 foot buffer is external to the definition of "runway flight path" as WMI propounds it and external to the Exclusion.[19] The "runway flight path" as WMI portrays it is the height and course where the planes fly, i.e., the pattern altitude. For air traffic entering the traffic pattern at PMA that is exactly 1,256 feet MSL or precisely 1,200 feet above the ground. The "runway flight path" as viewed by WMI includes no 300 foot buffer. The 300 foot buffer comes in at the hazard determination stage under FAA procedures, it is not part of the definition of "runway flight path" or the Exclusion.

Moreover, siting criteria do not involve prohibitions against certain harm. None of them proscribe conduct which is certain to have harmful results. They provide for protection against risk situations which, in the past, have shown danger and the potential for harm and, as embodied in some the exclusionary criteria, could, under some circumstances be overcome by a showing

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[18] This is graphically demonstrated at Board Ex. 1, p. 15. In this Exhibit, the topographic of the current landfill is shown at a height of 443 above sea level in brown with the proposed vertical expansion overlaid in yellow, 99 feet high reaching a height of 542 feet above sea level. Above the landfill there is shown a flying airplane flying along the traffic pattern at pattern altitude of 1,256 feet. There are two shaded blue areas reaching up from the landfill to the flying airplane. One shaded blue area goes from the top of the landfill as is to the landing gear of the flying airplane while the other shaded blue area goes from the top of the proposed vertical expansion up to the landing gear of the flying airplane. The blue shaded areas have measurements meant to depict how much clearance there is between the top of the landfill as is, and as proposed, to the landing gear of the flying airplane. The blue shaded area reaching up from the current landfill to the flying airplane is shown to be 813 feet. The other blue shaded area, which is meant to show how much clearance there will still be after the vertical expansion is shown to be 714 feet. Under WMI's view of the Exclusion, all it prohibits is the building of the 813 foot structure or one even higher.

[19] Judge Miller in his dissent says "[t]he term runway flight paths could easily have been interpreted by the Department to require an adequate margin of safety." *Miller Dissent* at 2. However, it is not explained what that means or how that would be applied. Nor is it explained on what basis DEP was supposed to make such an interpretation. Then that dissent states "[t]he clearances of 714 and 558 feet referred to in Finding of Fact No. 51 appear to be more than adequate for safety purposes." It is not explained how what "appears" to Judge Miller ties into what the EQB did in this Regulation.

that there will not be harm. Thus, it is not certain that landfills located in limestone geology will result in harm. It is possible to have landfills in limestone geology without the actual harm resulting. However, experience shows that there is a high risk of harm in such circumstances. Moreover, some proximity to limestone geology is permissible under certain circumstances. 25 Pa. Code § 273.202(a)(7). Landfills within 300 feet or 100 feet of wetlands are not certain to destroy wetlands. It is possible that wetlands may not be harmed by a landfill located within 300 feet or 100 feet of a wetland. However, experience shows that there is a substantial risk to wetlands under such circumstances. Moreover, in some situations, if it can be shown to be safe, landfills are not excluded from being closer than those distances to wetlands. 25 Pa. Code § 273.202(a)(2). The same can be said about landfills within 100 feet of perennial streams. 25 Pa. Code § 273.202(a)(6), (12).

Thus, the siting criteria, again, provide rough prophylactic zones of safety so that we do not venture into that zone of higher risk that the landfill will pose to the protected thing. Thus, also, the siting criteria we have discussed provide for their not being applied when it can be proven that the landfill will not damage the protected thing. It could be said that the siting criteria in Section 273.202(a) are "better safe than sorry" type regulations. But WMI's proffered interpretation of the Exclusion makes it a very different creature indeed from its sister siting criteria. WMI's reading bars only landfills that are built directly in the prescribed traffic pattern of oncoming air traffic. It cannot be said that landfills which are built right into the flight paths of oncoming airplanes have potential to cause harm or that they could be shown to be safe. When landfills are built so that they intersect with prescribed landing and takeoff patterns, certain and fatal results will happen. Obviously, there is no way to make landfills which are in prescribed flight paths safe. WMI's reading casts the Exclusion not as a "better safe than sorry"

type rule but as a criminal proscription against risking a catastrophe in the form of an airplane collision. *See* 18 Pa. C.S. § 3302.[20]

This is an area in which we respectfully differ from Judge Labuskes' dissent. His dissent opines that the Department's interpretation is "unreasonable" because there is no "point," i.e., need, to include the entire conical surface in the siting criteria. *L.D.* at 3. Despite the disclaimer, the dissent does indeed treat this case as though it were a challenge to the validity of the regulation on a "no rationale basis" theory. The dissent "doth protest too much" on this point. *Shakespeare, Hamlet, III, ii*, 242. Judge Labuskes' own description of what he is doing is that he is "interpreting" the Exclusion--in a manner not suggested by anyone in the case by the way--in order to, as he says, make the Exclusion rational. *L.D.* at 4 n.1. This confesses that Judge Labuskes' dissent comes at this precisely from the angle disclaimed.

Not even WMI disputed that the Department could include the entire conical area in the siting prohibition if it wanted to. WMI's argument is not that it could not have done so but that it did not do so. We have already demonstrated that the question in this case is not what a Judge today thinks the regulation needs to do or what he or she may think that the EQB needed to do, or whether there was a good point to what the EQB did. Our job in this particular case, as we find it, is to determine the EQB did. Also, it is obvious that this "point" or need based analysis

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[20] 18 Pa. C.S. § 3302, entitled, "Causing or risking catastrophe" reads as follows:

> (a) Causing Catastrophe-- A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage, including selling, dealing in or otherwise providing licenses or permits to transport hazardous materials in violation of 75 Pa.C.S. Ch. 83 (relating to hazardous materials transportation), commits a felony of the first degree if he does so intentionally or knowingly, or a felony of the second degree if he does so recklessly.
>
> (b) Risking Catastrophe-- A person is guilty of a felony of the third degree if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in subsection (a) of this section.

A person who builds a structure into the direct path of the prescribed pattern that aircraft will be flying in for landings and takeoffs at an airport should certainly be charged with causing a catastrophe.

does not fit this context. Everyone agrees that 25 Pa. Code § 273.202(a)(16) (ii) prohibits any penetration into any of the imaginary surfaces, regardless of whether there is an intersection with Judge Labuskes' personal definition of "flight path" and regardless of whether the FAA has issued a "no hazard" determination. There would be no need or "point," as Judge Labuskes puts it, to bar penetrations into imaginary surfaces which do not intersect with his version of "flight paths," but that is what everyone agrees 25 Pa. Code § 273.202(a)(16)(ii) does. Moreover, both airport siting criteria dealing with potential bird-strikes (25 Pa. Code §§ 273.202(a)(14) & (15)) prohibit landfills within 10,000 feet or 5,000 feet of airports regardless of whether there is an actual danger in any particular case of a bird-strike.[21] There is no point or need to bar landfills within 10,000 feet or 5,000 feet of those airports in which there is no actual danger of bird strikes but that is exactly what those two provisions do. Accordingly, a "needs analysis" to determine regulatory intent in this instance fails.[22]

These observations about the other airport related siting criteria corroborate Mr. Pounds' testimony and our conclusion that Exclusion covers the entire conical area. All of the other siting criteria relating to airports are of the same ilk. They bar landfills from being a certain

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[21] In fact, as explained in the Preamble to the 2000 municipal waste regulations amendments, the proposed version of the municipal waste regulations did propose to amend the bird-strike siting criteria to allow an exception to a landfill operator who could demonstrate that the landfill was designed and operated so that it would not pose a bird hazard to aircraft. However, as the Preamble further explains, "[o]n final, the [EQB] deleted the exception and returned the regulatory language to its original form as it existed [before]. 30 Pa. Bull. 6685, 6706. This shows that the EQB knew how to put in an exception to the airport related siting criteria allowing individual operators to demonstrate that their particular landfill was designed and operated so that it would not pose a specific hazard to aircraft. It did not do so in the Exclusion; Mr. Pounds said so. We believe him. However, we respectfully maintain that both Judge Labuskes' and Judge Miller's dissents treat this case as if the EQB had incorporated such an exception into this siting criteria. As we said in Note 10, *supra*, the Exclusion refers to FAA regulations, it does not incorporate them in toto, nor does it indicate that DEP is to defer in toto to the FAA and its "no hazard" PHAM process. It would seem that to varying degrees, both dissenting opinions espouse that the Exclusion does both. We respectfully do not see it that way. While we may also, "take great comfort in the FAA's conclusion that this expansion presents no threat to air navigation," our inquiry here is not what does the FAA say about the project, but what does the EQB say about it in the Exclusion. We have demonstrated that the Exclusion is not, was never intended to be, nor could it be an identity with the FAA "no hazard" PHAM process.

[22] Of course, as noted before, we heard testimony from the author of the Exclusion on what was intended by the Exclusion.

proximity, either on the ground or in the air, to airports. The area barred is defined by distance (feet) or space (imaginary surfaces), not by the outcome some complicated, or even not complicated, set of air traffic control, aeronautical engineering mathematical calculations. One could debate whether there is a "point" or need from a policy point of view to do so as to all the space so barred, but this in not the proper forum for that debate, that is the province of the EQB.

In addition, returning to Judge Labuskes' dissent, it is not up to us, the judicial branch, to reform or recast regulations based our view of what the appropriate "point" of the legislative branch ought to have been or on our thinking on whether the enactment is needed or not as policy. The executive branch and the legislative branch, which in this case is the EQB, serve the function of determining what is needed and whether there is point to following a particular policy. Paraphrasing here how the Commonwealth Court so nicely put it in *NARCO*, in the tripartite structure that governs environmental regulation in Pennsylvania, the Department is the executive branch, the EQB the legislative branch and the EHB the judicial branch. *NARCO*, 791 A.2d at 462. We interpret the law, not make it based on what we think ought to be the point or what is needed from a policy perspective. *Id.* at 466 (EHB does not occupy a policy-making role). The reformation of the Exclusion so as to provide the EQB with a "point" is a struggle to make what Judge Labuskes sees as an irrelevant pointless regulation into one which to him has a "point." His creation of his definition of "flight paths" in the Exclusion through his "point" or needs-based analysis is legislating and is a usurpation of the executive and legislative functions. Just last year in *Plescha*, 2004 EHB 529, we criticized the Department for attempting to divine into a set of residual waste regulations a panoply of elaborate and detailed requirements, mostly policy based, but which were not found in the regulations themselves. We would not let the Department do it saying that, "the Department...cannot impose [these requirements] by fiat in

the guise of [regulatory interpretation]". 2004 EHB at 540. Judge Labuskes has done just that by his personal, policy, need, point driven conclusion about the terminology "flight paths" in the Exclusion.

The factors we have discussed make WMI's reading of this exclusionary criteria diametrically different in form and character with all of the other exclusionary criteria in Section 273.202. As such, we cannot embrace it.

DEP's Lack Of Expertise in Aviation Matters Negates WMI's Proposed Construction of the Exclusion

WMI makes much about DEP's lack of expertise in aviation matters as an institution and, Mr. Pounds' and Mr. Dernbach's particular lack of expertise in aviation matters. As we have noted before, there is no question about that, DEP does not contend otherwise. WMI's proffered interpretation of the Exclusion, however, would require us to conclude that the drafters of the Exclusion surgically engrafted only one of six or seven of the steps in an FAA hazard determination process into the Exclusion. That would have required a detailed and sophisticated working familiarity of both FAA Part 77 and FAA Order 7400.2E, the previously discussed airspace analysis/hazard determination (PHAM) process. We know that neither Mr. Pounds nor Mr. Dernbach could have done this intentionally. The words of the Exclusion do not require that we interpret it so as to find that they did so by accident. Moreover, the words of the Exclusion do not require us to interpret it so as to match precisely the first of the six or seven steps of the airspace analysis even though it is beyond dispute that passing the first step only does not remove the rebuttable presumption that the obstruction is a hazard.

Reading the Exclusion As WMI Proposes Would Lead To Illogical Results

Reading the Exclusion as WMI prefers would also yield illogical and silly results. WMI's reading renders the Exclusion meaningless in a number of respects. First, if the

Exclusion bars only obstructions that fail the first step of the airspace analysis then such structures would be barred in any event by the FAA Regulations. As Mr. Del Balzo testified, if the threshold test is failed, that is the end of the process. But, the Exclusion, while it does refer to the FAA Regulation, does not defer to the FAA process. So, in effect, the Exclusion does not do anything and is meaningless.

Along the same lines, if the Exclusion bars only structures that actually would physically be in the way of traffic patterns at airports, it bars here only the construction of an 813 foot high or higher structure.[23] Not anything less than an 813 foot structure or landfill expansion; but an 813 foot high or higher one. Remember that the 300 foot buffer is a concept in the FAA Regulations, not the Exclusion. Remember also that WMI would have us equate "runway flight paths" with "traffic pattern" which is a discreet and very precise prescribed set of points in space.[24] So the Exclusion as WMI would have us read it allows a landfill expansion that reaches to within one foot, one inch, one millimeter, and the infinity of smaller distances down to zero, of the "traffic pattern" of PMA. That conclusion is not tenable because it does not make sense. First, we do not read the Exclusion to allow building to within infinitesimally small distances of an airport traffic pattern. That could not be what the Exclusion allows. Conversely, as we have alluded to already, we do not read the Exclusion to preclude only the construction of an obstruction that is, by definition, directly in the path of oncoming air traffic. Read that way the Exclusion would be a criminal proscription against causing a public catastrophe, not a landfill siting regulation. Moreover, at this site, as WMI reads the Exclusion, the only thing prohibited would be an 813 foot high expansion. The landfill now is at 443 feet and the expansion of 99

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[23] *See* Note 18, *supra*.

[24] *See supra*, the discussion contained under the heading **"WMI's Interpretation of the "Runway Flight Paths" Clause Is Not Tenable"**, especially Note 13.

feet will take the elevation up to 542 feet. An 813 foot expansion is so ridiculous as to be silly to think about but under WMI's interpretation of the Exclusion it would only be that silliness which is covered. In effect, again, the Exclusion covers nothing. We cannot conclude that the Exclusion is to be construed in that way.

CONCLUSIONS OF LAW

1. The Department's interpretation of the Exclusion is not entitled to deference in this case under *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461 (Pa. Cmwlth. 2002).

2. The phrase "conical area" in the Exclusion means both the horizontal surface and the conical surface as those terms are defined at 25 C.F.R. §§ 77.25(a) and (b).

3. The phrase "runway flight paths" means the conical area of all runways at a multiple- runway airport.

4. The phrase "runway flight paths" does not and cannot reasonably mean to qualify the Exclusion such that it applies <u>only</u> where the conical area is penetrated <u>and</u> the prescribed traffic pattern is intersected.

5. The Exclusion applies when there is any penetration of the conical area.

6. The Department correctly interpreted and applied the Exclusion in this case to apply to WMI's application for the Vertical Expansion.

Conclusion

Based on the foregoing Findings of Fact, Discussion and Conclusions of Law we conclude that WMI's appeal cannot be sustained and we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of May, 2005, it is hereby ordered that the appeal of Waste Management Services of Pennsylvania, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 18, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF
BERNARD A. LABUSKES, JR.

By Bernard A. Labuskes, Jr.

I respectfully dissent. I believe that the Department erred by failing to give any function to the regulatory reference to "runway flight paths" in applying the exclusionary criterion to the Pottstown Airport.

The Department's interpretation of 25 Pa. Code § 273.202(a)(16)(i) is inconsistent with the plain language of the regulation, and it is otherwise unreasonable. The interpretation is inconsistent with the plain meaning of the regulation because it has the effect of writing the concept of "flight paths" out of the regulation. Whenever possible, we must construe regulations so as to give effect to every word contained therein and all of the regulations' provisions. *Yost v. McKnight*, 865 A.2d 979, 982 (Pa. Cmwlth. 2005).

The Department's latest position, as characterized by the majority, is that the only reason flight paths are mentioned in the regulation is to clarify that the term "conical area" is intended to apply to all runways at an airport. The problem with this position is that everything that the majority says in its opinion by way of apology for this explanation accounts for the presence of

the term "runway" in the regulation, but it does not account for the term "flight paths." In other words, everything that the majority says would be more accurate, or at least just as accurate, if the regulation said "within the conical area...for runways[ ] that are or will be used" instead of "within the conical area...for runway flight paths that are or will be used." This demonstrates that the words "flight paths" have been given no effect, which is a violation of a cardinal rule of regulatory interpretation. *See* 1 Pa. C.S. § 1921(a); *Forwardstown Area Concerned Citizens Coalition v. DER*, 1995 EHB 731, 736.

Thus, the Department's explanation is not satisfactory because it does not give the regulatory language its due. Furthermore, the evidence in support of the Environmental Quality Board's intent as expressed in the regulation is simply not credible. The testimony quoted by the majority is ambiguous. Even in the course of providing his explanations the Departmental witness continued to refer to flight paths, not just runways. I am left with the distinct impression, admittedly based upon my review of a cold record, that the Department has no clear understanding or recollection of why the Environmental Quality Board referred to runway flight paths instead of runways.

In fact, the witness's testimonial reference to "flight paths" is entirely consistent with the notion that the phrase "runway flight paths" was intended to have something more than a vestigial presence in the regulation. Everywhere we look there are references to "flight paths," not just airplanes, airports, runways, air traffic, or air safety. Of course, the regulation itself uses the phrase. The Department's written expressions of interpretation repeatedly refer to flight paths. So does the regulation's preamble.

The explanation endorsed by the majority is also not satisfying because we are required to assume that regulations do not contain surplusage. *Forwardstown*, 1995 EHB at 736. Conical

surfaces by definition relate to runways. Putting the supposed explanatory language in the regulation was completely unnecessary.

There are several other reasons why I cannot endorse the Department's interpretation. There is absolutely no relationship in aviation parlance between conical surfaces and flight paths. The interpretation ignores the grammatical construction of the regulation. By making "conical area" the only operative, meaningful measure, and assigning an explanatory, background role to the words "flight paths," the interpretation also writes out the entire last phrase of the regulation regarding "use" by aircraft because aircraft do not "use" conical surfaces. Without belaboring the point any further, I simply cannot agree that the interpretation does justice to the regulatory language.

Aside from giving no effect to key regulatory language, I also disagree with the majority's decision to adopt the Department's interpretation because I believe that interpretation is otherwise unreasonable. Unlike the majority, I do not think that it is a stretch to conclude that the Environmental Quality Board intended to incorporate the concept "flight path" into the regulation to reflect the fact--undisputed in this appeal--that there is no point to including the *entire* conical surface in a strict siting exclusion, which acts as an absolute bar to landfill placement. Indeed, I search the majority opinion and the record in vain for any rational support for referencing the *entire* conical surface, beyond the generalized idea that the more airspace we protect, the better. No one can deny that razing every man-made structure within twenty miles of all runways at all airports would be better from a purely air-safety point of view, but short of that, there is no demonstrable, reasonable basis for selecting the conical surface as the *exclusive* focus of attention, divorced from any consideration of where planes are actually expected to be. I ask myself: why the conical surface as opposed to something else? and I came up with nothing on this

record. In fact, the record suggests that aircraft will rarely, if ever, penetrate the conical surface at Pottstown or any other airport, so I am left to wonder why are we protecting aircraft in a point in space that aircraft almost never intersect. Paradoxically, the Department's interpretation provides no independent measure of safety to flight paths--a place where airplanes are almost certain to be.

There is probably some background explaining the significance or derivation of the conical surface somewhere in the regulatory history for the *federal* regulations, but there is no explanation in our record. With respect to the federal regulations, the conical surface is only one of several artificial surfaces pertinent to air safety. Here, it has been pulled out of the context of all of those other provisions and given independent significance, not by the regulation itself, but by the Department's unsupported interpretation of that regulation. If the EQB regulation is interpreted properly to give some attention to actual flight paths, the otherwise isolated reference to the conical area seems to become more palatable.[25]

Thus, the record does not show me that the Department's exclusive reliance on the conical surface is reasonable. Furthermore, that reliance does not appear to have any otherwise obvious or commonsensical support. Instead, the interpretation fails to give any consideration to where aircraft are actually likely to be. Take the Pottstown Airport for example. Even though the landfill expansion would penetrate the conical surface, there is no dispute that this matter has nothing to do with actual air safety at the facility. While we debate air safety in the context of interpreting the landfill siting criterion, during the four-year period in which the Department pondered WMI's application, the Federal Aviation Administration has specifically found, twice, that the landfill expansion would pose *no* hazard to air navigation. Furthermore, in my opinion,

[25] To be clear, I am *not* saying that the regulation is irrational, void for vagueness, or otherwise infirm on its face. To the contrary, I believe that the regulation can be interpreted in a way that makes it rational.

the overwhelming weight of expert opinion that was presented in this case confirms that the expansion will pose *no* actual threat to airport safety as a result of the conical surface penetration.

In my opinion, the majority has painted itself into the corner of adopting an unreasonable interpretation that is inconsistent with regulatory language because it views it as the lesser of two evils. The majority certainly does not sing the praises of the Department's interpretation. Rather, it focuses its most persuasive weight on discrediting WMI's proposed interpretation of the regulation as a whole. I do not believe that we are compelled to make this Hobson's choice.

The majority finds itself in this position because it simply accepts WMI's argument that "runway flight paths" equate to prescribed traffic patterns. Yet, there is no reason to uncritically accept this equation. The Department correctly points out in its brief that there is no regulatory or universally accepted definition of "flight path." The Department criticizes WMI's definition but provides no definition of its own, merely suggesting instead that the term can be defined broadly in the interests of protecting air traffic. I agree with both the criticism of WMI's interpretation and the conclusion that the phase should be interpreted broadly in the interest of protecting air safety. The experts opined, in my view credibly, that the term can be defined quite broadly. (T. (Day 1) 90; T. (Day 3) 173-174.) The Pilot/Controller Glossary, for example, defines "flight path" as "a line, course, or track along which an aircraft is flying *or* intended to be flown." (emphasis mine) (A.Ex. 36) In other words, using this source as an example, a flight path can describe not only where an airplane *should* be, but where it actually flies.

There is certainly nothing in the regulatory language itself to support WMI and the majority's narrow definition of runway flight paths or to preclude us from adopting a more reasoned approach. It would have been a simple matter to insert language specifying that only an

airport's official traffic patterns for landing and takeoffs should be considered. There is no such limitation in the language of the regulation.

It is impossible for me to believe that the EQB only intended to protect aircraft in *prescribed* traffic patterns. Query how many airplanes at the Pottstown Airport really follow the *prescribed* approach and take-off patterns with absolute precision, even when there is an experienced pilot flying an airplane with perfect instrumentation and mechanical performance in ideal weather conditions. It is unreasonable and entirely unnecessary to interpret the regulatory reference to runway flight paths in so narrow and restrictive a manner. By doing so, the majority has forced itself unnecessarily into a situation where the Department's improper interpretation looks better by comparison. Instead, we ought to be trying to make the best possible sense out of an admittedly difficult regulation that does not do violence to the regulatory language.

If "runway flight paths" is given a broader, functional definition, it would be possible to respect the regulatory language *and* effectuate the EQB's goal of protecting airport safety. Used in this way, 25 Pa. Code § 273.202(a)(16)(1) might define, for example, the siting exclusion to apply to those portions of the conical area where aircraft are intended to fly or actually do fly. In other words, the regulation would read that a landfill may not be sited in any area penetrating the conical surface where aircraft actually fly, considering not only the prescribed approaches and take-offs, but all deviations that might reasonably be anticipated therefrom. As a practical matter, these defined or actual flight paths may prove to encompass much of the conical area, but this interpretation is more acceptable to me from an analytical point of view because it respects the regulatory language and specifically considers the likely location of aircraft, not just an arbitrary geometric construct in a point in space where no aircraft are typically found. By disregarding

where aircraft are likely to be found (and equally, where they are *not* likely to be found), the majority misses an important component of the regulation.

Given its interpretation that the conical surface is the only relevant area, the Department apparently never gave any dispositive consideration to flight paths at the Pottstown Airport. I would have found this to have been the critical error in this case. The record convinces me beyond a doubt that (1) the concept of flight paths should have been given *some* functional meaning, and (2) the concept allows for some flexibility beyond the precisely prescribed airport traffic patterns. The record is not as clear to me on exactly what that definition should be. Had I been in the majority, I might have supported a remand with instructions to the Department to at least consider flight paths at the Pottstown Airport. On the other hand, this matter has already dragged on too long. The record generated before this Board strongly suggests that the landfill encroachment would not interfere with any prescribed flight path or any actual flight paths at the Pottstown Airport. I take great comfort in the FAA's conclusion that this expansion presents no threat to air navigation, and I could have been convinced that there is no point to second-guessing that evaluation in the guise of applying a siting criterion under the unique circumstances presented in this case. Because I find myself in the minority dissenting camp, I decline to definitively resolve what might have been.

In any event, I am not under the naïve impression that either approach would have been the end of the matter. Even without a remand on the siting issue, I am not even suggesting that the Department would have been precluded from considering air safety in the course of the other myriad analyses that it would have needed to perform in reviewing the application.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 18, 2005

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC. and WEST POTTSGROVE TOWNSHIP, Intervenor	:	
v.	:	**EHB Docket No. 2004-236-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF
GEORGE J. MILLER

By George J. Miller, Administrative Law Judge

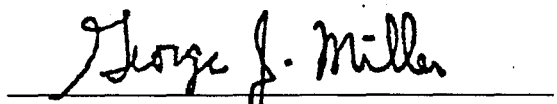
I also respectfully dissent for many of the reasons set forth in the Dissenting Opinion of The Honorable Bernard A. Labuskes, Jr.

It is plain to me that a purpose of 25 Pa. Code § 273.202(a)(16)(i) is to grant some leniency to existing landfills in the nature of grandfather rights. I believe that leniency for existing landfills turns on the language of "runway flight paths" which should be interpreted to mean that the permit application of an existing landfill would not be denied merely because of the penetration of the conical areas defined in the regulations of the Federal Aviation Administration. Of course, a likely penetration of either the conical or horizontal areas described in the regulation of the Federal Aviation Administration at 14 CFR 77.25(a)(5) by a proposed new landfill would bar the application of the more restrictive provisions of 25 Pa. Code § 273.202(a)(16)(ii).

I believe that the leniency granted by the "runway flight paths" language for an existing operation should be given effect and that the Department should proceed to process the

application without regard to the penetration of the landfill into the conical area referred to in the Department's regulations. The term "runway flight paths" could easily have been interpreted by the Department to require an adequate margin of safety. The clearances of 714 and 558 feet referred to in Finding of Fact No. 51 appear to be more than adequate for safety purposes.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: May 18, 2005

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BRUCE C. JACKSON	:
	:
v.	:
	: **EHB Docket No. 2004-032-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HIGHWAY MATERIALS, INC., Permittee	: **Issued: May 20, 2005**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion for summary judgment by the Department of Environmental Protection and dismisses an appeal from a surface mining permit. The appellant failed to produce admissible evidence in support of his objections to the permit issuance in response to the Department's claim that he cannot sustain his burden of proof at a hearing.

OPINION

This matter involves an appeal filed by Bruce C. Jackson (Appellant) from the reissuance of a noncoal surface mining permit, NPDES permit and authorization to mine (collectively, Permit), issued to Highway Materials, Inc. (Permittee) for the Perkiomenville Quarry Operation located in Malborough Township, Montgomery County. This appeal, filed on January 16, 2004, contains four numbered paragraphs detailing the Appellant's objections to the Department's approval: (1) the Permittee failed

to include the Appellant's well in a "baseline study"; (2) the Appellant's well may be impacted by mining activities due to "an extraordinary [sic] slow recharge rate;" (3) blasting practices at the quarry fail to "insure adequate protection regarding health and safety procedures, existing adjacent land use, or adjacent stream use;" and (4) the Permit does not require a perimeter fence.

On March 21, 2005, the Department filed a motion for summary judgment challenging the Appellant's ability to support his claims with admissible evidence at a hearing.[1] Specifically, it is the Department's position that the Appellant's claims regarding hydrology and the adequacy of the blasting practices authorized by the Permit must be supported by expert testimony. The Department's motion says that the Appellant failed to provide expert reports or answers to expert interrogatories and represented to the Department that he did not intend to provide expert testimony. The Department also contends that the Department regulations do not require a perimeter fence and that various berms and signage are adequate to provide notice of the presence of the quarry operation and are all that the law requires.

The Appellant filed a letter responding to the Department's motion on May 4, 2005.[2] In his letter he charges that the Department's investigation of a complaint that he

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[1] The Permittee joined in this motion.

[2] The Appellant was given an extension of time to file his response by order dated April 15, 2005. That order also directed the Appellant to file a response which conforms to the Board's rules at 25 Pa. Code §§ 1021.91 and 1021.94. Rule 1021.94 requires that a response to a motion for summary judgment conform to the requirements of Pennsylvania Rules of Civil Procedure (Pa. R.C.P.) 1035.1 to 1035.5. Unfortunately, the Appellant's response does not conform to those rules by demonstrating, that he has evidence to

filed alleging that blasting at the quarry operation would cause damage to the windows in his home, was inadequate. He mentions that the Permittee promised that his well would be included in a baseline study at a public meeting held regarding the Permit application. But the only attachment appended to his response is a letter to the chief of explosive safety in the Department's Bureau of Mining and Reclamation in Harrisburg. Not only did the Appellant not include any expert reports in support of any of the claims made in his notice of appeal, he did not present affidavits based on his personal knowledge or any other evidence that would be admissible at a hearing on the Department's approval of the Permit. Accordingly, as we explain more fully below, we have no choice but to grant the Department's motion and dismiss the Appellant's appeal.

The purpose of summary judgment is to challenge the sufficiency of the evidence that the other party has to support his claim at a hearing. In this matter, the essence of the Department's motion is that the Appellant has no evidence and will not be able to sustain his burden of proving at a hearing that the Department improperly approved the Permit.[3] The Department's motion is supported by sworn affidavits.

In order to withstand the Department's properly supported motion, in his response, the Appellant must identify evidence in the record[4] which indicates that he can

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support his claims that would be admissible at a hearing. Nevertheless, we have made our best effort to resolve the issues raised by the Appellant. *See* 25 Pa. Code § 1021.4 (the Board may disregard any error or defect of procedure which does not affect the substantial rights of the parties.)

[3] Pa. R.C.P. No. 1035.2(2).

[4] The record consists of the pleadings, depositions, answers to interrogatories, admissions of record and affidavits based on personal knowledge. Pa. R.C.P. No. 1035.1.

prove[5] that the Department made some error by approving the Permit,[6] or which contradicts the statements made by the Department's witnesses with other evidence that would be admissible at a hearing. Although we must view the record in the light most favorable to the Appellant as the non-moving party,[7] the Appellant cannot "rest upon mere allegations."[8] Rather, he must make some demonstration with documents from the record or affidavits based on personal knowledge of witnesses that can support his claim with admissible evidence.

The Department first argues that the Board should dismiss the Appellant's claims about the baseline study and the possible effect that mining may have on his well because the Appellant has no expert testimony to support his claim.[9] The Department's position comes as no surprise to the Appellant. In at least three conference calls, on August 25, 2004, October 29, 2004, and January 6, 2005, the Presiding Administrative Law Judge

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[5] Pa. R.C.P. No. 1035.3.

[6] 25 Pa. Code § 1021.122(c)(2)(in a third-party appeal, the appellant bears the burden of proof). Specifically, the Appellant must prove that the Department's action was unreasonable, inappropriate or not in accordance with the law. *Lower Mount Bethel Township v. DEP,* 2004 EHB 662, 673; *Birdsboro v. DEP*, 2001 EHB 377, *affirmed,* 795 A.2d 444(Pa. Cmwlth. 2002).

[7] *Ehman v. DEP*, EHB Docket No. 2003-015-C (Opinion issued March 10, 2005), slip op. 5-6 (quotations and citations omitted).

[8] Pa. R.C.P. No. 1035.3(a). *See also Lower Mount Bethel Township v. DEP,* 2004 EHB 38; *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *Drummond v. DEP,* 2002 EHB 413; *Riddle v. DEP,* 2002 EHB 321.

[9] By letter dated January 21, 2005, the Appellant informed the Board that he would not be presenting expert testimony. Shortly thereafter the Board held a conference call and after explaining the necessity for expert testimony, provided the Appellant with additional time to secure experts to testify on his behalf. Nevertheless the Appellant has clung to his position that it is the Department's obligation to secure an expert to dispute his claim, at least as it relates to his blasting complaint.

warned the Appellant that expert testimony would be required of him and that he bore the burden of proof. He said that he understood that, but wanted the Department to provide experts for him to avoid the expense of presenting expert testimony. Even before those calls, the Board sent the Appellant a letter on January 22, 2004, warning him that he needed an attorney with appropriate experts to successfully pursue his claims and to avoid the frustration that results from a lay person representing himself before the Board.

The Appellant's response does not deny that expert testimony is required. The only mention of this requirement by the Appellant is his recollection that the Permittee represented in a public meeting that it would include the Appellant's well in a study. Nothing in the Appellant's response indicates that he has admissible evidence that this omission was inappropriate. Further, the Appellant has not provided a map that shows the location of his well relative to the mine site, nor provided any legal provision which shows that the Permittee was required to include the Appellant's well in any study in the permit application. Further, without expert testimony, or even an explanation of how he might prove that his well is adversely affected by mining activity, the Board cannot conclude that the Department improperly approved the permit application on the basis of an incomplete or inadequate review of the groundwater resources in the vicinity of the mining operation.[10]

The Department also argues that the Appellant's objection in his appeal that the quarry site should be surrounded by a fence should be dismissed because there is no legal

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[10] *See Lower Mount Bethel Township v. DEP,* 2004 EHB 38, 43.

requirement that the site be surrounded by a fence. The Appellant's letter in response to the Department's motion does not even mention this claim.

Finally, the Department contends that the Appellant cannot support his objection relating to the blasting provisions of the Permit because this claim can only be supported by expert testimony. The great majority of the Appellant's response is devoted to the subject of blasting at the Permittee's quarry operation. Specifically the Appellant argues that he filed a complaint with the Department concerning the effect of blasting on the insulated glass windows of his home, and that the Department's investigation of this complaint was inadequate. In his view, the Department should have engaged an expert of insulated glass windows as part of its investigation of his complaint. However, the Appellant fails to explain how he intends to prove at a hearing that the Department's consideration of the blasting plan in the *permit application* was inadequate or improper. The Department's investigation of his complaint is not a matter before the Board. If the Appellant's view is that the Department should have had input from a window expert in order to properly evaluate the blasting plan included in the permit application, the Appellant has the burden of adducing evidence which supports that claim. There is nothing in the Appellant's response to the motion for summary judgment which even hints at the existence of such evidence, nor do we have any reason to believe that the Appellant himself has any specialized knowledge in the technical area of blasting practices which would support his claim. Rule 1035.4 of the Rules of Civil Procedure

requires that the responsive affidavits "must show affirmatively that the signor is competent to testify to the matters stated therein."[11]

In summary, after reviewing the Department's motion for summary judgment, we must grant the motion and dismiss the Appellant's appeal. We therefore enter the following:

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[11] Pa. R.C.P. No. 1035.4.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRUCE C. JACKSON	:	
	:	
v.	:	
	:	**EHB Docket No. 2004-032-MG**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and HIGHWAY MATERIALS,	:	
INC., Permittee	:	

ORDER

AND NOW, this 20th day of May, 2005, upon consideration of the motion for summary judgment by the Department of Environmental Protection in the above-captioned matter, it is hereby **ORDERED** that the motion is **GRANTED**. The appeal of Bruce C. Jackson is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 20, 2005

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