Environmental Hearing Board

Adjudications and Opinions

1996

Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1996

Chairman	GEORGE J. MILLER
Member	ROBERT D. MYERS
Member	RICHARD S. EHMANN (Resigned February 29, 1996)
Member	THOMAS W. RENWAND
Member	MICHELLE A. COLEMAN
Secretary	M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1996 EHB 1

ISBN No. O-8182-0223-8

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1996.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources 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 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, however, is unchanged by the Environmental Hearing Board Act; it still is empowered "to hold hearings and issue adjudications. . . on orders, permits, licenses or decisions" of the Department of Environmental Resources.

ADJUDICATIONS

OPINIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

EASTERN CONSOLIDATION & DISTRIBUTION SERVICES, INC., HUGO'S SERVICES, INC., EASTERN REPAIR CENTER, INC. and BARON ENTERPRISES	:	
v.	:	**EHB Docket No. 94-200-C (Consolidated with 94-201-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	**Issued: October 10, 1996**

OPINION AND ORDER ON MOTION TO COMPEL AND MOTION FOR SANCTIONS

By Michelle C. Coleman, Administrative Law Judge

Synopsis

A motion to compel and motion for sanctions are denied. A motion to compel answers to interrogatories is moot where answers to the interrogatories have been submitted to the party seeking discovery, albeit after the motion was first filed. A motion for sanctions is denied, despite late answers to interrogatories and failure to file responses to discovery motions, where there has been no order to compel and the failure to timely file answers to interrogatories and responses to discovery motions do not yet rise to the level where sanctions are warranted even absent a violation of an order to compel.

OPINION

This matter was initiated with the July 19, 1994, filing of a notice of appeal by Eastern Consolidation and Distribution Services, Inc., (Eastern Consolidation), Hugo's Services, Inc. (Hugo's), Baron Enterprises (Baron), and Eastern Repair Center, Inc. (Eastern Repair). The notice of appeal challenged a June 16, 1994, permit issued to Waste Management of Pennsylvania, Inc., (Waste Management) under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003, which authorizes the construction and operation of a waste transfer station in Hampden Township, Cumberland County. The appeal was docketed at EHB Docket No. 94-201. On July 20, 1994, Arnold Industries, Inc. (Arnold); New Penn Motor Express, Inc. (New Penn); and Lebarnold, Inc. (Lebarnold); filed a separate appeal to the same permit. The two appeals were consolidated at EHB Docket No. 94-200 on August 30, 1984.

The instant action concerns a motion to compel discovery and a motion for sanctions. Both motions were filed by Waste Management against Eastern Consolidation, Hugo's, Baron, Eastern Repair, Arnold, New Penn, and Lebarnold (collectively, the Appellants). The background for these motions is straightforward. On April 30, 1996, Waste Management served its Second Set of Interrogatories upon the Appellants who failed to submit answers to the interrogatories until June 17, 1996, after Eastern Consolidated filed its motion to compel the Appellants to answer its interrogatories. The Appellants *never* filed a formal response to the motion to compel. Waste Management filed its motion for sanctions on June 28, 1996. In that motion, Waste Management asks the Board to impose sanctions against the Appellants because they filed their answers to the discovery requests late and failed to provide complete answers to interrogatory No. 2 and 3. As in the case of the motion to compel, the Appellants never filed a response to the motion for

sanctions. They did, however, supplement their answers to interrogatories No. 2 and 3.

We deny both Waste Management motions. The motion to compel is moot because the Appellants provided Waste Management with answers to its discovery requests--albeit after Waste Management filed the motion,. *See Barshinger v. DEP,* EHB Docket No. 96-027-MG (opinion issued August 22, 1996). The motion to compel is inappropriate for a similar reason: the Appellants have provided Waste Management with supplemental answers to interrogatories No. 2 and 3 since the motion for sanctions was filed, and Waste Management has not indicated that it finds the supplemental answers to be deficient. Even assuming the Appellants did not provide Waste Management with supplemental answers to interrogatories # 2 and # 3, the motion for sanctions would still be problematic. If Waste Management were not satisfied with the first answers to the interrogatories it received, it should have renewed its motion to compel. *See Nothstein v. DER,* 1990 EHB 1633. Ordinarily, discovery sanctions are not imposed unless a party defies an order compelling discovery, *see, e.g., Griffin v. Tedesco*, 355 Pa. Super. 475, 513 A.2d 1020, 1024 (1986), and we have not issued an order compelling discovery here. Although sanctions are occasionally appropriate even in the absence of a motion to compel, they must be justified by the severity of the violation. *DER v. Chapin & Chapin*, 1992 EHB 751. While the Appellants' repeated late answers and failure to file responses to Waste Management motions are maddening, they do not yet rise to the level where sanctions are warranted even without a violation of an order to compel.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EASTERN CONSOLIDATION & DISTRIBUTION SERVICES, INC., HUGO'S SERVICES, INC., EASTERN REPAIR CENTER, INC. and BARON ENTERPRISES	:	
v.	:	**EHB Docket No. 94-200-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	

ORDER

AND NOW, this 10th day of October, 1996, it is ordered that motion to compel and motion for sanctions are denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 10, 1996

See following page for service list.

c: **DEP, Bureau of Litigation:**
Library: Brenda Houck
Harrisburg, PA

For the Commonwealth, DEP:
Ember S. Jandebeur, Esq.
Southcentral Region

For Appellants:
Eugene E. Dice, Esq.
Harrisburg, PA

For Permittee:
John F. Stoviak, Esq.
SAUL, EWING, REMICK & SAUL
Philadelphia, PA
and
William J. Cluck, Esq.
SAUL, EWING, REMICK & SAUL
Harrisburg, PA

jb/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

OLEY TOWNSHIP, *et al.*	:	
	:	
v.	:	**EHB Docket No. 95-101-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WISSAHICKON SPRING WATER, INC. Permittee	:	**Issued: October 24, 1996**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a third party appeal of a Safe Drinking Water Act permit issued to Wissahickon Spring Water, Inc. Because we find that the Department did not determine whether or not the project complied with the Clean Streams Law and its regulations by analyzing the effect of the project on 65 acres of adjacent exceptional value wetlands, the permit is remanded for further consideration.

BACKGROUND

This notice of appeal by Oley Township, Pine Creek Watershed Association, Oley Valley Youth League, Inc., Pike Oley District Preservation Coalition, J. Scot Williams, and Bruce Littlefield (Appellants) was filed with the Board on January 12, 1995. Appellants appeal the issuance of a Public Water Supply Permit No. 0695501 by the Department of Environmental

Protection to Wissahickon Spring Water Inc. (Permittee) for the construction and use of a well which will supply water for Permittee's Kutztown bottling facility.

After the close of discovery the Department filed a motion for summary judgment on the grounds that the Delaware River Basin Commission had exclusive jurisdiction over this matter. This motion was denied on June 26, 1996.[1] A hearing was held on July 15 and 16, 1996, before the Honorable George J. Miller. After a full review of the entire record, we make the following:

FINDINGS OF FACT

1. Appellants are Oley Township, Pine Creek Watershed Association, Oley Valley Youth League, Inc., Pike Oley District Preservation Coalition, J. Scot Williams, and Bruce Littlefield.

2. Appellee is the Department of Environmental Protection, the agency of the Commonwealth with the duty and responsibility to enforce the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§721.1- 721.17, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001, and the rules and regulations promulgated pursuant to those statutes.

3. Permittee is Wissahickon Spring Water, Inc., a corporation.

---

[1] The Department attempts to reargue this issue in its post-hearing brief. In fact, this is the Department's only argument in its post-hearing brief. The jurisdiction of the Board and the DRBC was fully considered by the Board in its June 26 opinion, and we see no reason to revisit it now, particularly since the Department has cited no new authority in support of its argument. *See Oley Township v. DEP*, EHB Docket No. 95-101-MG (Opinion issued June 26, 1996).

4. On April 26, 1995, the Department issued Public Water Supply Permit No. 0695501 to Permittee for the construction of a well and the use of the well as a source of supply for Permittee's bottling facility. (Notice of Appeal, Ex. A)

The Department's Review of the Permit Application

5. On January 24, 1995, the Department's Bureau of Water Supply and Community Health received an application for a Public Water Supply Permit from Permittee to construct a well and treatment facilities and use the Sterling Spring well in Pike Township, Berks County as a source of raw water for its Kutztown bottling facility. (Yesh, N.T. 225)[2]

6. The application sought approval for a bulk water loading facility whose water source is a new well. The proposed project calls for the removal of up to 288,000 gallons per day of water. (Ex. W-1)

7. Upon receipt, Thomas Shaul, Chief of Technical Services for the Bureau, assigned the application to John Yesh, Sanitary Engineer, for review. (Yesh, N.T. 225)

a. Mr. Yesh performed both an administrative and a sanitary engineering review of the permit application;

b. After he reviewed the application, he issued a notice to Permittee that the application was administratively complete. (Yesh, N.T. 225-26; 231; Ex. C-5)

8. Mr. Yesh also prepared the published notice of the application for the *Pennsylvania Bulletin*. No comments were received by the Department. (Yesh, N.T. 226; Shaul, N.T. 292-93)

---

[2] Reference to the notes of testimony of the hearing are cited at "N.T. ___." The Department's exhibits will be cited as "Ex. C-___"; Permittee's exhibits as "Ex. W-___"; and Appellants' exhibits as "Ex. O- ___."

9. The application was also forwarded to the Delaware River Basin Commission because the project involved a withdrawal of groundwater of more than 100,000 gallons per day. (Yesh, N.T. 227)

10. Mr. Yesh also prepared "Form 1." Form 1 is the formal method of communication among bureaus within the Department which allows other programs to assess a project to determine if a permit from another program is necessary. (Ex. C-1; Yesh, N.T. 228-29).

a. Form 1 is prepared as part of the administrative review of the permit application;

b. the description, prepared by Mr. Yesh, was based upon a 'cursory' review of the application;

c. the amount of water to be pumped and the presence of nearby wetlands were not included in the description. (Yesh, N.T. 229; 242)

11. Form 1 was circulated to six other bureaus within the Department; those that responded checked a box which indicated that no permit was required. The Bureau of Water Supply had no other formal communications with any other bureau. (Ex. C-1;Yesh, N.T. 245)

12. Mr. Yesh testified that there were also informal mechanisms for communication among the various bureaus. For example, if some fact came to light later in the permitting process he might write a memo or personally speak to the relevant person. In this case there were no informal communications with any other bureau. (N.T. 230)

13. Mr. Yesh testified that he believed that the scope of his review was to make sure that the proposed project met drinking water quality and sanitary standards to protect public health. In addition,

a. Each component of the application was reviewed from an engineering standpoint to determine if the water proposed for human consumption would receive adequate sanitary protection "from the production well to the tanker truck." (N.T. 224;231)

b. Mr. Yesh did not consider the effect of increased traffic from the proposed project. (Yesh, N.T. 240)

14. A copy of the application was forwarded to Mr. H. Thomas Fridirici, a hydrogeologist, for a review of the hydrogeologic aspects of the project. (Yesh, N.T. 233-34)

15. He reviewed the hydrogeologic report included in the permit application as Appendix F. (Fridirici, N.T. 261; Ex. W-1)

16. The report in the permit application included the results of a 48 hour constant rate pump test on the Sterling Spring well, and aquifer calculations and graphic displays. (Ex. W-1, Appendix F; Fridirici, N.T. 264). Mr. Fridirici testified that:

a. The purpose of the test is to gauge the quantity of water that can be pumped from a well. (N.T. 264)

b. The results of the test indicated an abundance of water on the site, and that the aquifer is a confined or "leaky" confined aquifer. (N.T. 268)

c. The test was not specifically designed to address the issue of what impact the well might have on wetlands or springs in the area, nor can the data be extrapolated to gauge any impacts. (N.T. 266; 270;275)

17. Mr. Fridirici visited the site of the proposed project as part of his review. He observed areas which he thought might be wetlands which were not identified on the permit application. (Fridirici, N.T. 276)

18. Mr. Fridirici did not inform anyone at the Department that he had observed these areas because he felt this was not part of his review of the application. (N.T. 276-77) He testified that his only duty was to review the sanitary and engineering aspects of the permit application. (N.T. 266).

19. Mr. Shaul also testified that the Bureau of Water Supply only considered wetlands to the extent they would be affected by construction; if construction plans indicated that delineated wetlands would be affected, the Bureau of Water Quality would be so informed. (N.T. 298-99)

20. Mr. Fridirici informed Mr. Yesh that he recommended approval of the permit. (Yesh, N.T. 234; Ex. C-3)

21. Mr. Yesh also found that the application with revisions was acceptable, and forwarded the relevant materials to Mr. Shaul. (Yesh, N.T. 236; Ex. C-4)

a. Mr. Shaul forwarded the materials to Elmer Knaub, Bureau Director, who approved the application based on the recommendations of Messers. Fridirici, Yesh, and Shaul. (Yesh, N.T. 236)

b. The permit was finally issued after the Department received notification of approval by the Delaware River Basin Commission. (Yesh, N.T. 237-38)

The Ecology of the Wetlands

22. Dr. James A. Schmid testified on behalf of Appellants as an expert on wetlands. He has extensive experience in the delineation of wetlands, and is certified in their delineation by the U.S. Army Corps of Engineers. He is also certified as a senior ecologist by the Ecological Society of America, and as a professional wetland scientist by the Society of Wetland Scientists. He has over 20 years of experience in delineating wetlands. (Schmid, N.T. 116-17; 119)

23. He delineated wetlands within the 3,000 foot radius of influence of the proposed production well identified by Permittee's hydrogeologist, Dr. Brewer. (Schmid, N.T. 113-14)

a. Dr. Schmid determined that there were approximately 65 acres of wetlands within the 3,000 foot radius. (N.T. 114; Ex. O-6)

b. Thirty acres of wetlands are within the recharge area. (N.T. 115; Ex. O-7)

c. There are wetlands within 150 feet of the production well. (N.T. 111)

d. To delineate these areas, Dr. Schmid visited the site four times in March and April 1996, examined published sources including, among others, the U.S. Geological Survey, the National Wetland Inventory overlays to those maps, and used the 1987 U.S. Army Corps of Engineers Wetland delineation manual. (Schmid, N.T. 106-107)

e. A portion of the wetlands and Pine Creek are located in Oley Township. (Ex. O-2; Ex. O-5)

24. All of the wetland areas identified by Dr. Schmid are biologically connected and form one ecological "system." (N.T. 111;115) However, the two areas of wetlands identified by Permittee in the application are isolated. (Ex. O-9 at 19)

25. Dr. Schmid testified that of the many wetlands that he has delineated, this wetland area is among the best that he has seen because:

a. there is a diversity of plant and animal species found in the wetlands, some of which include rare and endangered species;

b. there are large areas which are wet all year round; and

c. the wetlands are undisturbed. (N.T. 119)

26. Further these wetlands meet the criteria for "exceptional value" wetlands as defined by 25 Pa. Code § 105.17(1) because they:

a. serve as habitat for threatened or endangered plants and animals;

b. there are areas of wetland on the property of the proposed well that are hydrogeologically connected to and within one-half mile of wetlands that serve as habitat to endangered and threatened species;

c. the wetlands are located in or along the floodplain of a wild trout stream or "exceptional value waters". (Ex. O-9 at 19-22; Schmid, N.T. 118, 120)

27. Pine Creek is an officially listed Class A trout stream by the Pennsylvania Game Commission and is designated as an Exceptional Value watershed by the Department's regulations. (Ex. O-9 at 22; 25 Pa. Code § 93.9f)

28. Lowering the watertable would have adverse effects on the wetland area. As little as a foot of drawdown could jeopardize shallow rooted plant species, which include several threatened and endangered species. (Schmid, N.T. 122-23)

29. The ability of the wetlands to serve their biological and ecological function could be compromised if the water level was sufficiently lowered in the area. (Schmid, N.T. 122)

30. Dr. Charlotte S. Munch testified about the plant species found in the wetlands. She is a botanist, teaching at Albright College, which holds a 23 acre easement on the property adjacent to the proposed project. (See Ex. O-2) She often visits the wetland area and brings students to study the diversity of plant life in the area. (Munch, N.T. 133-35)

31. There are areas of the wetlands that are wet all year round and always contain seeps. (Munch, N.T. 135-36)

32. Dr. Munch testified that she has observed several species of endangered plants, one rare plant, and one plant tentatively listed on the Pennsylvania National Diversity Index. (N.T. 139-44)

33. It would be possible to restore some of the plants that could die from lack of water if water were restored, but it would be very difficult to replace the combination of plants that are currently present, and because of the age of some of the older and larger individual plants and trees, it would take a very long time. (Munch, N.T. 148)

The Hydrogeology of the Area

34. Dr. Elly K. Triegel testified on behalf of Appellants as an expert witness concerning the hydrogeology of the area. Dr. Triegel has a Ph.D. in Soil Science and Masters degrees in Environmental Engineering and Geological Sciences. She is a registered professional geologist, a certified ground water professional, soil scientist and geological scientist. Dr. Triegel has participated in soils and hydrogeological investigations for wetland delineations, residential developments and water supply projects. (Ex. O-11)

35. Dr. Thomas Brewer testified as an expert on hydrogeology on behalf of Permittee. Dr. Brewer holds a Ph.D. in Geology and has specialized in providing expert services to spring and commercial water companies in the last ten years, performing approximately 100 source evaluations. (Brewer, N.T. 310)

36. Dr. Triegel first described the geology of the area using Exhibits O-1 and O-2 which were prepared largely from information contained in Dr. Brewer's report. (See Ex. W-6)

a. The production well is located at the base of a series of hills, with the area to the west becoming flat, and eventually becoming a valley. (Ex. W-6)

b. The well is located in a formation known as the Leithsville formation; the well draws its water from the permeable dolomite in that formation. (Triegel, N.T. 41-42; Ex. O-1)

c. The site is bordered in the east by a quartzite formation known as the Hardyston formation. This formation forms a barrier to groundwater flow because it is relatively impermeable. (Triegel, N.T. 35; Brewer, N.T. 347)

37. Pine Creek lies 1,000 feet west of the production well. It flows north to south and is a discharge area for the site. (Triegel, N.T. 35-36; Ex. O-2)

38. Water level elevations are higher in the north and south. The groundwater comes from high points to the north and south, is closed in by a barrier to the east, and drains toward the production well and discharges ultimately into Pine Creek. (Triegel N.T. 38, 40; Brewer, N.T. 352-353; see Ex. O-2)

39. Dr. Triegel testified that numerous seeps in the wetlands form channels that flow into Pine Creek. (Triegel, N.T. 38)

a. The seeps are numerous. (N.T. 43-44)

b. The seeps are high in volume (N.T. 45)

c. The seeps are the source of water for the wetlands. (N.T. 40, 42)

d. Dr. Triegel observed these seeps on her four visits to the wetland area. (N.T. 87)

40. Dr. Brewer did not make any observations of the wetland or creek area. (N.T. 403-404)

41. Dr. Brewer testified that the purpose of his pump test was to generate quantifiable numbers which would characterize the performance and behavior of the aquifer. (N.T. 315)

a. The pump test was a 72 hour test with five observation wells. (N.T. 340)

b. His test was not designed to measure the effect of pumping on the wetland area. (Brewer, N.T. 387)

42. The data from the test indicated that:

a. There is a "no flow boundary" to one side of the well. This means that there is no source of recharge from this direction. (N.T. 324)

b. There is a "constant head boundary" which indicates surface water close to the well that is connected to the aquifer. (N.T. 325)

c. The aquifer is confined to semi-confined. (N.T. 340)

d. The radius of influence for the production well is 3,000 feet. This means that no changes are likely to occur beyond this distance. (N.T. 344-45)

43. Dr. Triegel reviewed the results of the pump test performed by Dr. Brewer.

a. She agreed that the aquifer had more characteristics of a confined aquifer than an unconfined aquifer. (N.T. 48)

b. However, she did not believe that this conclusion meant that there would be no effects on adjacent water resources, because there are leaky areas which connect the pump zone to the wetland area. (N.T. 46, 65)

44. Dr. Triegel testified with a reasonable degree of scientific certainty that the groundwater discharges to the wetland area which are the source of water for the seeps are in the same hydrologic zone as the pump zone for the proposed well. (N.T. 40)

45. Dr. Triegel did not believe that perched water was the source of water for the wetlands.

a. The drilling logs for the well did not indicate the presence of soils which indicate an impermeable layer;

b. The high volume of water which she observed in the seeps do not indicate perched water;

c. There was flow in the seeps even in dry conditions;

d. Perched water seeps are more often low in volume and dry up in drought conditions. (N.T. 54-58)

46. Dr. Brewer did believe that the source of water for the wetlands was perched water. He could not quantify what effect the pumping would have on perched water, but believed it would be "small." (N.T. 379-80)

47. Dr. Triegel testified with a reasonable degree of scientific certainty that the pumping of the proposed well will have an impact on the wetlands, because if a hydrogeologic connection between the ground water and the water in the wetlands. (N.T. 46-47; 76) The likely effects include:

a. Drawdown of the water levels in the wetland area;

b. It will probably reverse the direction of flow of groundwater;

c. It will likely increase the duration of dry periods.

48. Dr. Triegel also testified that although the pump test performed by Dr. Brewer yielded important data, there were no observation wells in the wetlands or in the areas immediately adjacent. Accordingly, it is difficult to quantify the impact of the proposed project on the surrounding water resources. (N.T. 68) Dr. Triegel herself could not quantify what the adverse impact on the wetlands would be. (Triegel, N.T. 93-94)

49. However. Dr. Triegel could only opine that the pumping "may" have an impact on nearby springs, and that it was "possible" that the pumping would impact nearby drinking water wells. (N.T. 77-79)

50. Dr. Brewer testified with a reasonable degree of scientific certianty that during extreme drought conditions the drop in the potentiometric elevation[3] is likely to be less than eight feet within a 600 foot radius of the proposed well. He stated that under dry conditions (30 days without rain) the drop is likely to be less than six feet. (Brewer, N.T. 369-70)

51. Dr. Brewer could not form any definite conclusions about the effect of the pumping of the proposed well on the wetland area, but opined, based on his experience with confined aquifers, that if there were any drawdown effects, such effects would be "small." He was unable to quantify how much drawdown would be "small." (N.T. 377-78)

52. Dr. Brewer could design a pump test that would quantify the drawdown effects in the wetlands by installing two adjacent wells, one within the aquifer, and one a surface well. (N.T. 386)

53. Dr. Brewer did not believe that the pumping of the well would have measurable drawdown effects on the springs and wells located to the south of the proposed production well. (N.T. 367)

54. Dr. Brewer also did not believe that the pumping would affect Pine Creek even if the flow were reduced because the lowest flow of the creek is during the cooler months rather than in the heat of the summer. (N.T. 363)

---

[3] The potentiometric elevation is roughly equivalent to the water table.

Traffic and Community Concerns

55. Kevin Johnson testified on behalf of Permittee as an expert on traffic engineering.

56. After driving the roads which would be used by trucks and assuming that there would be one truck going to the site, and one truck going from the site every hour, truck traffic would increase from two percent of the vehicles to three and a half percent of vehicles. This is below the state average of five percent. (Johnson, N.T. 415)

57. The roads which the trucks would be using have a lower than average accident rate. (Johnson, N.T. 415-16)

58. Based on these facts Mr. Johnson concluded that from a traffic engineering perspective, the truck traffic associated with the project would have no impact on health, safety and welfare. (N.T. 414)

59. In his report, Mr. Johnson stated that his opinions would not change even if the expected number of trucks were doubled. (Ex. W-9 at 4)

60. The report filed by Appellants' traffic expert (Ex. O-10) is not credible because the report's analysis of the paving does not take into account the history of the area, and its analysis of the roadway is based on a Department of Transportation manual which does not apply to existing roadways. (Johnson, N.T. 418-23)

61. Several citizens of the Township testified that they were concerned about the effect of increased traffic on the community. These citizens based their concern on the assumption that 96 trucks would be entering and leaving the proposed facility every day. This figure was arrived at by dividing 288,000 gallons by 6,000, which equals 48. Thus they concluded that 48 trucks would

go into the facility to load up. and 48 trucks would leave the facility to deliver their load. (Kestler, N.T. 160)

62. Deborah Heffner, President of the Oley Valley Youth League, believed that the trucks will create a danger to children who play at a nearby sporting field. (N.T. 157)

63. David R. Kestler, Oley Township Supervisor, also testified that he believed the truck traffic would create a safety hazard and create a danger to the historical landmarks in the township. (N.T. 163-64)

64. Harlan Snyder, Vice-President of the Pine Creek Watershed Association testified that:

a. he used and enjoyed Pine Creek for hiking and fishing (N.T. 168); and

b. his house, located one mile from the site would be endangered by the trucks and he would be disturbed by noise and vibration caused by the trucks passing by. (N.T. 169-171)

DISCUSSION

I. Water Resources

Appellants, as the party appealing the issuance of the permit in this matter, bear the burden of proof. 25 Pa. Code § 1021.101(c)(2). The scope of the Board's review is to determine whether the Department abused its discretion in issuing the permit. Abuses of discretion include instances where the Department acted arbitrarily, capriciously, or contrary to law. *Harmar Township v. DER*, 1993 EHB 1856; *Sussex, Inc. v. DER,* 1984 EHB 355, 366. Our review authority is *de novo*; where the Board finds that the Department abused its discretion, we may substitute our discretion. *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556 (Pa. Cmwlth. 1975).

A. Wetlands and Other Water Resources

The Appellants' evidence concerning the quality of the wetlands adjacent to the site or Pine Creek was not contradicted by Permittee or the Department. Dr. Schmid testified that there are approximately 65 acres of wetlands within 3,000 feet of the proposed well. (Finding of Fact No. 23(a)) There are 30 acres within the area identified by Dr. Brewer as the recharge area. (Finding of Fact 23(b); Ex. O-7) All of the wetland areas are biologically connected, and form one ecological "system." (Finding of Fact No. 24) Of the many wetlands that he has delineated, this wetland area is among the best that he has seen because of the diversity of plant and animal species found in the wetlands, some of which include rare and endangered species. Additionally, there are large areas which are wet all year round, and the wetlands are undisturbed. (Finding of Fact No. 25) Further these wetlands meet the criteria for "exceptional value" wetlands as defined by 25 Pa. Code § 105.17(1) because they serve as habitat for threatened or endangered plants and animals; there are areas of wetland on the property of the proposed well that are hydrogeologically connected to and within one-half mile of wetlands that serve as habitat to endangered and threatened species; and the wetlands are located in or along the floodplain of a wild trout stream or "exceptional value waters." (Finding of Fact No. 26) Pine Creek is an officially listed Class A trout stream and is designated as an Exceptional Value watershed by the Department's regulations. (Finding of Fact No. 27)

Dr. Schmid also testified that a lowering of the water table would have adverse effects on the wetland area. (Finding of Fact No. 28) The degree of change is difficult to quantify because of the variety of plant and animal species; as little as a foot of drawdown could jeopardize several endangered plant species that rely on wet conditions all year round and have shallow root systems. (*Id.*) Dr. Munch noted that it would be possible to restore some of the plants that could die from lack

of water if water were restored, but it would be very difficult to replace the combination of plants that are currently present, and because of the age of some of the older and larger individual plants and trees, it would take a very long time. (Finding of Fact No. 33)

B. Section 721.7(j) of the Safe Drinking Water Act

Appellants first argue that the Department abused its discretion by issuing the permit without considering whether the possible effect on the adjacent wetlands would be contrary to the requirements of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001. After reviewing the testimony and hearing exhibits, we agree.

Section 721.7(j) of the Safe Drinking Water Act, defines the Department's authority to issue permits under that Act:

> The department shall have the power to grant a permit *if it determines* that the proposed water system is not prejudicial to the public health and complies with the provisions of this act, the regulations adopted hereunder, and all other applicable laws administered by the department. . . . .

35 P.S. § 721.7(j)(emphasis added). The language of the statute is clear that the Department has authority to issue a permit under the Safe Drinking Water Act only if it does three things: it must determine (1) that the proposed water system is not prejudicial to the public health, *and* (2) complies with the Safe Drinking Water Act and its regulations, *and* (3) complies with other laws within the Department's jurisdiction. While it appears that the Department made a determination that the project was not prejudicial to the public health and complied with the Safe Drinking Water Act and its regulations, the record reveals that the Department did not adequately determine whether or not the proposed water system would violate other laws such as the Clean Streams Law.

Several representatives of the Department's Bureau of Water Supply & Community Health testified that they did not consider the impact of the proposed project on the wetland area. John Yesh, a Sanitary Engineer who was responsible for the review of the application, explained that there are only two methods of communication between his bureau and other bureaus within the Department. One method, considered a formal method of communication, is a Form 1 which is prepared as part of the administrative review of the permit application. (Finding of Fact No. 10) One section includes a description of the proposed project which is based on Mr. Yesh's preliminary "cursory" review of the application. (Finding of Fact 10(b)) This project was described as follows:

> A bulk water loading facility consisting of the Sterling Spring Well, 2 cartridge filters, UV light, 15,000 gallon storage tank. Water will be a raw water source for the Kutztown Plant of the Wissahickon Water Co.

(Ex. C-1) Mr. Yesh testified that the wetlands identified by the Permittee were not mentioned in the description either because its mention was missed in the initial review, or because he thought that the .05 acres identified in the application was insignificant. The amount of water to be pumped from the well, 288,000 gallons per day, was also omitted from the description. (Finding of Fact 10(c)) Form 1 was circulated to six other bureaus within the Department. Those that responded checked a box indicating that no permit was required. The Bureau of Water Supply and Community Health had no other formal communication with any other bureau within the Department. (Finding of Fact No. 11)

The second method of communication among bureaus is informal; if some fact of interest turns up later in the Bureau's consideration of a permit application, Mr. Yesh testified that he might write a memo, or personally speak to the relevant person. In this case there was no informal communication about the project to any other bureau in the Department. (Finding of Fact No. 12)

The Bureau of Water Supply itself did not consider the effect of the project on wetlands either. Thomas Friderici, the Bureau's hydrogeologist, testified that on his site visits he observed areas he thought might be wetlands in an area other than the area identified by the Permittee's application. (Finding of Fact No. 17) He testified that he did not inform anyone else of this observation:

> Q Did you notify anyone else in the Department that there were wetlands nearby?
>
> A No. . . . [I]t is not part of my review.

(N.T. 276-77; Finding of Fact No. 18) Mr. Fridirici also testified that the data gathered from the pump test that was performed for the application can not be used to extrapolate the effect of the pumping on the wetlands, nor was it designed to address impacts on wetlands, springs, wells, or Pine Creek. (Finding of Fact No. 16(c)) His only duty was to review the sanitary and engineering aspects of the permit application. (Finding of Fact No. 18)

Finally, Thomas Shaul, the Chief of Technical Services for the Bureau of Water Supply testified that other bureaus within the Department would only be informed about the presence of wetlands if those wetlands would be impacted by the construction of a proposed project. (Finding of Fact No. 19) Since the two small patches of wetlands identified by the Permittee on the application would not be affected by the construction, no other bureaus were notified.

In sum, no other bureau was notified concerning the presence of wetlands on the site of the production well, nor was any consideration given to the creeks in close proximity to the production well. No other bureau was provided with any meaningful information concerning the project, such that those responsible for enforcing other laws could make a meaningful determination that no other

laws within the Department's jurisdiction would be violated. For example, how could Water Quality determine that there would be no impact on stream uses without even the geographic location of the site of the project. How could the Bureau of Dams & Waterway Management determine that there would be no encroachment that would require a Chapter 105 permit, without any information about the wetlands or any other water resources in proximity to the well.

Not only were no other bureaus notified, the Bureau of Water Supply itself did not make any determination concerning the effect of the proposed project on these water resources. Without making any determination concerning the effect of the project upon the water resources, the Department could not have determined that the Clean Streams Law, or any other environmental law would not be violated pursuant to its duty under Section 721.7(j) of the Safe Drinking Water Act.

There are several ways that the Clean Streams Law could be violated by the proposed project. For example, the distinct possibility exists that the proposed project would affect the adjacent water resources to the point that many of the plant and animal species would be unable to survive. Dr. Schmid testified that the ability of the area to serve its ecological functions would be compromised, depending on the degree of change in the water levels in the wetlands. (Finding of Fact No. 29) Both the Pine Creek watershed and the wetlands are statutorily protected as "exceptional value" water resources under the Department's regulations. Accordingly, any degradation which would adversely affect the existing uses of these water resources would violate the Clean Streams Law. 25 Pa. Code §§ 93.2 (water quality standards apply to wetlands), 93.9f (designation of Pine Creek), 95.1(c)(exceptional value waters shall be maintained and protected); *see also* 25 Pa. Code § 105.17; Section 303 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1313.

These regulations effectuate the federal requirement that the beneficial uses of water resources be preserved. The United States Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S.Ct. 1900 (1994), recently recognized that the antidegradation policy of the Clean Water Act requires states to protect the uses of water resources which includes not just water quality, but also water quantity.

Further Section 611 of the Clean Streams Law makes it unlawful to cause pollution of waters of the Commonwealth. 35 P.S. § 691.611. The definition of "pollution" under the Clean Streams Law is very broad:

> **"Pollution"** shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, *including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters*, or change in temperature, taste, color or odor . . . .

35 P.S. § 691.1 (emphasis added). Thus any physical or biological alteration of the wetlands or other water resources as a result of the proposed project would constitute pollution under Section 611, and thereby violate the Clean Streams Law. *See also PUD No. 1* (diminishment of water quantity can constitute water pollution).[4]

---

[4] The U.S. Supreme Court drew this conclusion based on the federal definition of pollution, which is similar to Pennsylvania's:

> The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. § 1362(19).

Where the Department does not review an application as required by the statutes and regulations, it abuses its discretion. *Harmar Township v. DER*, 1993 EHB 1856; *Kwalwasser v. DER*, 1986 EHB 24. However, the Board has held that we need not necessarily reject a permit where the Department's failure to comply with statutes and regulations is environmentally inconsequential. *Kwalwasser*, 1986 EHB at 55; *see also Hopewell Township v. DEP*, EHB Docket 95-005-MR (Adjudication issued August 13, 1996). Mr. Fridirici testified that he would not reevaluate his analysis of the permit application even after reviewing the expert testimony concerning the effect of the project on the adjacent water resources.

First, Dr. Triegel testified on behalf of Appellants concerning the effects of the proposed project on the adjacent water resources.[5] She reviewed the results of the pump test performed by Dr. Brewer and agreed that the results indicated that the aquifer had more characteristics of a confined aquifer than an unconfined aquifer. (Finding of Fact No. 43 (a)) [6] However, there are leaky areas which connect the pump zone to the wetland area, which is adjacent to the well site on the west. (Finding of Fact No. 43(b); Ex. O-1) Dr. Triegel testified that Dr. Brewer's conclusion that the

---

[5] For a physical description of the geology of the area, see Finding of Fact Nos. 34-38.

[6] Generally, the source of water for an unconfined aquifer, which is made up of loose or fractured material, is the soil mass in the immediate vicinity of the aquifer. (Brewer, N.T. 328-29). A confined aquifer, on the other hand, is typically made of a confined body of rock, and the water is located above a confining layer, and is compressed in the space; unlike an unconfined aquifer, it is not open to the atmosphere, but is isolated from the surface, often by a non-permeable layer consisting of shale or clay. (Brewer, N.T. 329-331; 333). If the same amount of water is to be pumped from a confined aquifer as from an unconfined aquifer, "the effect in the confined aquifer will be much more widespread, because in order to generate that much water volume requires a much larger aquifer volume in order to generate it." (Brewer, N.T. 332).

aquifer was a confined aquifer does not necessarily mean that there would be no effect on adjacent water resources. (Finding of Fact No. 43(b))

Dr. Triegel further explained that the source of water for the wetlands was not perched water, which is a layer of water located on top of an impermeable layer. She arrived at this conclusion because the drilling logs for the well did not indicate the presence of soils which indicate an impermeable layer, that the high volume of water in the seeps feeding the wetlands was not indicative of perched water, and that there was flow in the seeps even in dry conditions; perched water seeps generally are limited in flow and dry up in drought conditions. (Finding of Fact No. 45)

Dr. Triegel summed her testimony concerning the effect of the proposed well on the wetland by stating that the pumping will have an impact on the wetland with a reasonable degree of scientific certainty. (Finding of Fact No. 47) The impacts will include a drawdown of water levels, the reversal of the direction of flow of water from the well to the wetlands, and an increased duration of dry periods. She also testified with a reasonable degree of scientific certainty that there is likely to be a decrease in volume of Pine Creek because the same groundwater which feeds the wetlands also feed the creek in low flow conditions. (Finding of Fact No. 49)

Dr. Triegel also testified that although the pump test performed by Dr. Brewer yielded important data, there were no observation wells in the wetlands or in the areas immediately adjacent. It therefore is difficult to quantify the impact of the proposed project on the surrounding water resources. (Finding of Fact No. 48) Even a small amount of drawdown from the well could have significant impacts on the wetland areas, because of the sensitivity of this particular wetland area. (Finding of Fact No. 47; Finding of Fact No. 28) Yet, she could not quantify how much drawdown there would be in the wetland area. (Finding of Fact No.48)

Next, Dr. Brewer, Permittee's expert, acknowledged that the effect of pumping could result in a drawdown of the water table in the wetland area. He also testified that during a 30 day period without rain, there could be a drawdown effect of less than six feet within a 600 foot radius of the proposed well, which includes a portion of the wetland area. (Finding of Fact No. 50)[7] He noted that if there were any drawdown effects in the wetland area, the effects would be "small," but was unable to quantify what a "small" effect was. (Finding of Fact No. 51) This opinion was based upon his experience with confined and unconfined aquifers. (*Id.*) Moreover, even though he believed that the source of the water in the wetlands was perched water, he did not preclude the possibility that the perched water would be affected by the pumping, but stated that the effects would be "small." Again, "small" could not be quantified with existing data. (Finding of Fact No. 46)

Importantly, Dr. Brewer also conceded that the pump test was not designed to measure effect of pumping on the wetland area. (Finding of Fact No. 41) However, he *did* testify that he could design a pump test that would quantify the drawdown effects of the proposed project on the adjacent wetlands. (Finding of Fact No. 52)

After reviewing the expert testimony of Dr. Triegel and Dr. Brewer, we find that it is not possible to conclude that the Department's failure to consider the effects of the project on the wetlands and creek is environmentally inconsequential, or that there is a reasonable basis to conclude that the information would not make any difference in the Department's review of the permit application. We believe that the testimony of Dr. Triegel raises a marked possibility that the proposed project would have an adverse impact at least upon the adjacent wetlands. While neither

---

[7] Dr. Brewer did not make any observations of the wetland or creek area. (Finding of Fact No. 40)

Dr. Triegel nor Dr. Brewer could quantify the effect of pumping on adjacent wetlands, both testified that there could be some effect in that area. Dr. Brewer also testified that a well pump test could be designed that would provide a basis for the Department to quantify the effect of the proposed project on the wetlands. (Finding of Fact No. 52) Consideration of these facts should have an effect on the Department's review of the permit application. Drs. Schmid and Munch testified that many of the endangered and unique species of wildlife found in the wetland area would be adversely affected by even a small change of the wetland environment. Since the Department has a clear mandate to protect waters of the Commonwealth from degradation, the effects of the proposed project on the wetlands must be considered.

Our holding here is distinguishable from our recent adjudication in *Hopewell Township v. DEP*, EHB Docket No. 95-005-MR (Adjudication issued August 13, 1996). In that case we considered the significance of the Department's failure to consider wetlands pursuant to the issuance of a noncoal surface mining permit. There the Board found that the Department was unaware of the presence of the wetlands in its final review of the application; the wetland area was 100 feet wide and 1,000 feet long; and the wetland was not shown on the National Wetlands Inventory Map. The Department did consider, however, areas within 1,000 feet of the perimeter of the proposed permit area which included the area occupied by the wetlands, and which included a tributary which flowed through the wetland area. The Department's witness testified that the omission of the wetlands from his consideration was insignificant because he considered the effect of mining on surface water, and the danger from runoff into the area was very small. Significantly, the appellant's expert witness could only describe possible impacts on the wetland area, and could not state with a reasonable degree of scientific certainty that the proposed mining would have a negative impact on the wetland.

In contrast, in this case, at least one member of the Department, Mr. Fridirici, was at least aware that wetland indicators were present; the wetland area is approximately 65 acres of exceptional value wetlands; and the wetland area was indicated on the National Wetlands Inventory Map. Unlike the situation in *Hopewell,* the Department did not consider the effect of the pumping on any other water resources in the area. Finally, Appellants' expert here was able to testify with a reasonable degree of scientific certainty that she believed that the wetlands would be adversely affected by the proposed project. In addition, Permittee's expert conceded that there would be a significant drawdown as a result of pumping the proposed well which could affect the wetlands, but he could not determine the extent of that effect without a pump test designed to make such a determination.

Having concluded that the Department failed in its duty to make a determination whether the proposed project would comply with other environmental laws, and thereby abused its discretion, there remains the question of whether the Board should vacate the permit, remand the permit to provide the Department with the opportunity make a determination of whether the proposed project will violate other environmental laws, or substitute our discretion by requiring that a condition be added to the permit pursuant to our *de novo* authority. After reviewing the record, there is not sufficient evidence for the Board to make its own determination. Thus, the most prudent course is to remand the permit to allow the Department to gather the information necessary to properly assess the compliance of the project with the Clean Streams Law, by determining the effect, if any, the project will have on surrounding water resources. *See County of Schuykill v. DER*, 1989 EHB 1241 (where evidence is insufficient to make a determination, the Board will remand a permit to the Department).

II. Other Issues

A. Traffic

Appellants argue that the Department abused its discretion because it did not consider traffic safety, did not notify the Department of Transportation concerning truck traffic, and did not consider the effect of noise and vibration created by truck traffic associated with the proposed project.

First, we have held that provisions of applicable statutes and regulations determine whether or not the Department is required to consider the impact of an activity on traffic. *RESCUE Wyoming v. DER*, 1994 EHB 425. Appellants have cited no statutory authority which requires the Department to consider traffic safety or notify the Department of Transportation.

Moreover, Permittee presented very credible testimony that truck traffic will create no hazard to health, safety or welfare. Kevin Johnson, Permittee's traffic expert, testified that after driving the roads which would be used by trucks and assuming that there would be one truck going to the site, and one truck going from the site every hour, that truck traffic would increase from two percent of the vehicles to three and a half percent of vehicles. (Finding of Fact No. 56) This is below the state average of five percent. (*Id.*) He also noted that the roads which the trucks would be using have a lower than average accident rate. (Finding of Fact No. 57) Based on these facts he concluded that from a traffic engineering perspective, the truck traffic associated with the project would have no impact on health, safety and welfare. (Finding of Fact No. 58) In his report, Mr. Johnson stated that his opinions would not change even if the expected number of trucks were doubled. (Ex. W-9 at 4)

Appellants presented no similarly competent and credible evidence on this point. The report

filed by Appellants' traffic expert (Ex. O-10)[8] is not credible because the report's analysis of the paving does not take into account the history of the area, and its analysis of the roadway is based on a Department of Transportation manual which does not apply to existing roadways. (Finding of Fact No. 60) Appellant's other witnesses, Deborah Heffner, David Kestler and Harlan Snyder, testified concerning their belief that the truck traffic associated with the project would create a hazard. (Finding of Fact Nos. 62-64) This testimony does not support the assertion that the increased truck traffic actually will endanger the health and welfare of the community.

Finally, Appellants argue that the Department abused its discretion in not considering the effect of noise and vibration created by truck traffic. Even if the Department was required to consider noise and vibration created by truck traffic, there is virtually no evidence on the record concerning noise and vibration created by truck traffic. *See Hopewell Township v. DEP*, EHB Docket 95-005 (Adjudication issued August 13. 1996)(dust and noise generated by traffic on a local road are not problems which the Department must consider in issuing a noncoal surface mining permit). Only Harlan Snyder testified that he could feel noise and vibration caused by passing trucks. (Finding of Fact No. 64(b)) Appellants' other witnesses only testified about their concerns for safety. Also, there will only be a minor increase in truck traffic. This evidence hardly rises to the level of a public nuisance, and we find that the Department did not abuse its discretion in not considering noise and vibration created by truck traffic. *See Plumstead Township v. DER* , 1995 EHB 741; *Santus v. DER*, 1995 EHB 897.

---

[8] Appellants' traffic expert, Great Valley Consultants, did not testify at the hearing.

B. Standing

In its post-hearing brief, Permittee challenges for the first time the standing of the Appellants to institute this appeal. Appellants argue that the Board should not entertain Permittee's challenge because the issue was not preserved in its pre-hearing memorandum, and should therefore be considered waived. We agree.

It has long been the law that issues not raised in a party's pre-hearing memorandum are waived. *Jay Township v. DER*, 1994 EHB 1724. The Pennsylvania Supreme Court and the Commonwealth Court have both held that standing is a waivable issue. *E.g., Erie Indemnity Co. v. Coal Operators Casualty*, 272 A.2d 465 (Pa. 1971)(standing is waived where the defendant failed to raise the plaintiff's capacity to sue in preliminary objections or the answer to the complaint); *Appeal of McNelly*, 553 A.2d 472 (Pa. Cmwlth. 1989), *petitions for allowance of appeal denied*, 581 A.2d 571, 581 A.2d 575 (Pa. 1990)(failure to raise standing below, waives the issue on appeal); *see also* 3 Standard Pennsylvania Practice 2d § 14:6 (1994). Hence, Permittee's failure to raise the question of whether or not the Appellants have standing either in dispositive motions or their pre-hearing memorandum precludes our consideration of the question at this late date.[9]

We note that a prior decision of the Board, *Del-Aware Unlimited, Inc. v. DER*, 1990 EHB 759, did state that standing was a jurisdictional issue which could be raised at any time. *Id.* At 785.

---

[9] If we were to consider the standing of Appellants, based on this record we would find that at least Oley Township has the capacity to sue based on the Pennsylvania Supreme Court's holding in *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718 (Pa. 1982) because a portion of the wetlands and Pine Creek are located in Oley Township. (Finding of Fact No. 23(e)). *See also Upper Merion Township v. State Horse Racing Commission*, 602 A.2d 459 (Pa. Cmwlth. 1992); *cf. Pennsylvania Game Commission v. Department of Environmental Resources*, 555 A.2d 812 (Pa. 1989)(Game Commission had a substantial interest in protecting lands within its jurisdiction which abutted the site of a proposed landfill).

We do not believe this to be a correct statement of Pennsylvania law. While it is true that standing is a jurisdictional matter in the federal courts, this doctrine is based upon the "case or controversy" requirement of Article III of the United States Constitution. *E.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Since there is no similar provision in the Pennsylvania Constitution, and the courts of this Commonwealth have explicitly held that standing must be raised early in proceedings, we now hold that in appeals before this Board, the issue of standing must be raised either in a dispositive motion, or the pre-hearing memorandum.

III. Conclusion

In sum, while the Department did not have any duty to consider the effects of truck traffic which would result from the proposed project, it does have an affirmative obligation to make a determination concerning the effect of the project on the adjacent water resources and whether the project will violate any other environmental laws. Accordingly, we will remand this permit to the Department for further consideration.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeal.

2. Appellants have the burden of proving that the Department's issuance of the permit was unlawful or an abuse of discretion.

3. The Department abused its discretion by failing to consider the effect that the proposed project might have on adjacent wetlands, thereby failing to make a determination that the permit would not violate other environmental laws as required by Section 721.7(j) of the Safe Drinking Water Act.

4. The Department did not abuse its discretion by failing to consider the effect of increased truck traffic as the Department is not required to make that determination by the Safe Drinking Water Act.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OLEY TOWNSHIP, ET AL.	:	
	:	
v.	:	**EHB Docket No. 95-101-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WISSAHICKON SPRING WATER, INC. Permittee	:	

ORDER

AND NOW, this 24th day of October, 1996, the appeal in the above-captioned matter is hereby REMANDED to the Department of Environmental Protection for reconsideration consistent with this opinion.

Jurisdiction relinquished.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 24, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Paul Bruder, Esq.
Ember Jandebeur, Esq.
Southcentral Region

For Appellants:
John Wilmer, Esq.
Media, PA

For Permittee:
James D. Morris, Esq.
LANGSAM, STEVENS & MORRIS
Philadelphia, PA

ml/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EBB Docket No. 95-232-R**
	:	**Consolidated with 95-233-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	**Issued: October 24, 1996**

OPINION AND ORDER
JOINT MOTION TO STRIKE

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

The Board's Order allowing the filing of responsive expert reports more than two months before trial did not preclude the filing of reports by experts not previously identified. After a review of the record and the report filed on behalf of Pennsylvania American, the Board denies the Joint Motion of the Department and Eighty-Four to strike. The Joint Motion alleges no prejudice and the Board finds none. The Department and Eighty-Four are not prejudiced because they have ample time to review the report prior to the trial of this appeal.

OPINION

Presently before the Board is the Joint Motion of Eighty-Four Mining Company ("Eighty-Four") and the Department of Environmental Protection (the "Department") to Strike Pennsylvania

American Water Company's ("Pennsylvania American") Expert Report of Jeffrey S. Maze ("Joint Motion"). Pennsylvania American filed a response in opposition to the Joint Motion.

This consolidated appeal stems from the Department's approval of a permit allowing Eighty-Four to operate a long-wall mine in Washington County, Pennsylvania. Trial of the consolidated appeal is now scheduled to commence on November 12, 1996.[1]

The parties have engaged in extensive discovery including numerous depositions. The Board issued an Order on May 29, 1996, directing the parties to file expert reports or their equivalent (such as answers to expert interrogatories or designated deposition testimony) several months in advance of the trial date. Pursuant to the Order, Pennsylvania American filed the reports of three expert witnesses on July 18, 1996. It did *not* file a report or identify one of its employees, Jeffrey S. Maze, as an expert at that time.

In conformity with the May 29, 1996 Order, the Department and Eighty-Four filed several expert reports approximately two weeks later. Eighty-Four filed a motion to extend the time to file the expert report of Ronald Spray because of Mr. Spray's health problems. Pennsylvania American agreed to this extension. The Board issued an Order on August 14, 1996, granting the extension and ordering that "all parties **may** file expert reports responsive to other parties' expert reports. Such responsive expert reports shall be filed on or before **Friday, September 6, 1996.**" (Emphasis in original Order).

---

[1]Originally trial was scheduled to commence on October 15, 1996 but was delayed so the Board could rule on the pending Motions for Summary Judgment.

On September 6, 1996, Pennsylvania American identified Mr. Maze as an expert and filed his report. On September 16, 1996, Eighty-Four and the Department filed their Joint Motion. Pennsylvania American filed its reply opposing the Joint Motion on September 19, 1996.

Eighty-Four and the Department argue that Mr. Maze, a professional engineer, should not be allowed to testify as an expert because:

1) He was only identified as a fact witness (and not an expert witness) in response to specific questions submitted to Pennsylvania American in discovery.

2) He was not identified as an expert until Septemberr 6, 1996.

3) He had been working on this matter *before* the Department issued the permit which is the subject of this appeal.

4) Mr. Maze's report not only responds to Eighty-Four's original expert reports but also asserts opinions as to the amount of subsidence which has occurred.

Pennsylvania American argues that Mr. Maze should be allowed to testify because:

1) The Board's Order allowing the filing of responsive expert reports was not limited to experts previously identified.

2) Mr. Maze's report is responsive to one section of Mr. Spray's expert report and to the testimony of Mr. Berdine and Mr. Wilcox.

3) Mr. Maze is a "rebuttal expert witness."

4) Mr. Maze is not a surprise witness. He was deposed, identified as a fact witness, and verified interrogatory answers on behalf of Pennsylvania American.

5) Mr. Maze can offer "opinion testimony as a lay witness with firsthand knowledge of the situation at issue."

6) Finally, Mr. Maze's proposed testimony about the amount of subsidence is in the nature of rebuttal testimony and could not have been provided earlier because the mining and subsidence which is the subject of his report just recently took place.

Before specifically addressing the Joint Motion a few things need to be stated about the discovery process. Parties should always strive to fully and accurately respond to discovery requests in a timely fashion. The selection of experts and the formulation of their opinions generally take place after some discovery is conducted. However, parties should never use "ongoing discovery" as a rubric to hide their experts from their opponents.

One of the Board's responsibilities is to insure that all parties receive a fair trial and occasionally this includes intervening to make sure that parties receive all the information to which they are entitled. See *Stern v. Vic Snyder, Inc.*, 473 A.2d 139 (Pa. Super. 1984). This often involves balancing tests, a determination of the costs involved, and determining whether the discovery requests will lead to admissible evidence. *Uhl v. C.H. Shoemaker & Son Inc.*, 637 A.2d 1358 (Pa. Super. 1994).

Many of the issues in this case require expert testimony. Discovery of experts and their opinions is therefore necessary for the parties to prepare their cases. *Augustine by Augustine v. Delgado*, 481 A.2d 319 (Pa. Super. 1984). That it is the reason the Board issued its orders specifically directing the parties to file their expert reports well in advance of trial. Pennsylvania American's listing Mr. Maze as a fact witness is not a proper substitute for not listing him as an expert witness. *Clark v. Horner*, 525 A.2d 377, 382. (Pa. Super. 1987). Nor does the Board condone the admission of expert testimony under the guise that it is opinion testimony of a lay

witness. As noted [by the late Judge Wieand] in *Clark*, to allow a party to shield an expert under the guise that his testimony is merely rebuttal or is so-called opinion testimony of a lay witness would "reintroduce the trial by ambush which the rules were intended to prevent." 525 A.2d at 382. *But see Allegheny Ludlum Corporation v. Municipal Authority of Westmoreland County*, 659 A.2d 28 (Pa. Cmwlth. 1995).

With this as background, we have extensively reviewed the record and the papers filed relative to the Joint Motion. Based on this review it is apparent that Pennsylvania American has consistently adhered to the Rules and indeed identified various experts early in the litigation. This fact is acknowledged by both the Department and Eighty-Four. *See* paragraphs 1 and 2 of the Joint Motion. It does not appear that listing Mr. Maze as an expert was done to circumvent any previous Order or to ambush the other parties. Instead, Pennsylvania American listed Mr. Maze in response to opinions set forth in the expert reports filed by the Department and Eighty-Four. Our Order of August 14, 1996 clearly assumes that some of the responsive expert reports could be submitted by new experts. It also gave all parties the ability to file responsive expert reports on or before September 6, 1996.

We will not strike Mr. Maze's report and (assuming he is qualified as an expert) he will be permitted to testify at the upcoming trial. Although he was not identified as an expert until September 6, 1996, Eighty-Four and the Department still have ample time to review his report and respond accordingly at trial. If the Department and Eighty-Four need to reopen discovery because of Pennsylvania American's identification of Mr. Maze as an expert they can file an appropriate motion setting forth in detail the discovery they desire.

In sum, no prejudice is alleged by the Department and Eighty-Four and we find none. Therefore, the Joint Motion is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**Consolidated with 95-233-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	

ORDER

AND NOW, this 24th day of October, 1996, the Joint Motion of Eighty-Four and the Department to Strike Pennsylvania American's Expert Report of Jeffrey S. Maze is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 24, 1996

See next page for listing.

c: **DER Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DER:
Steven F. Lachman, Esq.
Patience Robinson Nelson, Esq.
Diana Stares, Esq.
Western Region

For People United to Save Homes:
Robert W. Thomson, Esq.
Pittsburgh, PA

For PA American Water Company:
Michael D. Klein, Esq.
LeBEOUF LAMB GREEN & MacRAE, L.L.P.
Harrisburg, PA

Jan L. Fox, Esq.
LeBEOUF LAMB GREEN & MacRAE, L.L.P.
Pittsburgh, PA

For Eighty-Four Mining Company:
Henry Ingram, Esq.
Thomas C. Reed, Esq.
Stanley R. Geary, Esq.
Stephen C. Smith, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

LOWER PROVIDENCE TOWNSHIP MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 96-134-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 25, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Department of Environmental Protection ("Department") has filed a motion to dismiss the appeal of Lower Providence Township Municipal Authority from the issuance by the Department of a notice of violation because the Board lacks jurisdiction over this appeal. A notice of violation which required no specific action on the part of the appellant is not a final action of the Department. The Department's motion is granted.

OPINION

This appeal filed on June 24, 1996 contests a notice of violation issued by the Department on May 21, 1996. The notice of violation consists of a letter from the Department addressed to the appellant's golf course superintendent reporting on the results of its inspection of appellant's golf course. The letter stated that a blue colorant had been placed on a pond in the golf course resulting in a discharge of the colorant to a nearby stream in violation of the Clean Streams Law,

Act of June 22, 1937, P.L. 19897, as amended, 35 P.S. § 691.1 et seq. The letter also contains the following two paragraphs:

> This colorant can produce a negative aesthetic impact on the creek, and the proximity of the school and playground to the creek makes it an undesirable situation. We request that the golf course refrain from using any colorant or chemical which could leave the course and adversely affect any Water of the Commonwealth.
>
> Notify this office in writing no later than May 31, 1996 of the action you have taken to comply, the date the compliance was accomplished and the steps you have taken to prevent a recurrence of the violation.

The appeal claims that the release of the colorant is not a violation of the Clean Streams Law. In addition, appellant objects to the Department's determination that this colorant can produce a negative aesthetic impact on the creek and its determination that it is an industrial waste as being a subjective determination, discriminatory in nature and beyond the Department's power. The appeal states that the product used has long been marketed for the purpose used by the appellant, has passed EPA tests for toxicity to certain fish, and that it is safe for use in irrigation, swimming, and recreational sports. In addition, this appeal states that the substance is not harmful to fish, waterfowl or animals.

The appellant's response to the Department's motion claims that the Board has jurisdiction because the issuance of the violation and the Department's actions in holding press conferences regarding its inspection constitutes an adjudication which is appealable within the Board's jurisdiction.

We grant the Department's motion to dismiss this appeal for lack of jurisdiction. A notice of violation containing a listing of violations, the mention of the possibility of future enforcement

actions or the procedure necessary to achieve compliance is not an appealable action. *M.W. Farmer Co. v. DER,* 1995 EHB 29. See also *Sandy Creek Forest v. DER,* 505 A.2d 1091 (Pa. Cmwlth. 1986); *Eagle Enterprises v. DEP,* EHB Docket 133-MG (Opinion issued September 5, 1996).

Even assuming that the Department held press conferences as the appellant alleges which resulted in the news items attached to the appellant's answer to the motion, the Department actions have not required the appellant to do anything. In addition, the Department's employees, like all citizens of the United States, are granted freedom of speech by the First Amendment to the Constitution subject only to the limitations of the laws relating to libel and slander. This Board has no jurisdiction to determine whether or not those limits have been exceeded.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

LOWER PROVIDENCE TOWNSHIP MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 96-134-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of October, 1996, the notice of appeal of Lower Providence Township is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-134-MG

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 25, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Martha E. Blasberg, Esq.
Southeast Region

For Appellant:
Richard Sheehan, Esq.
Audubon, PA

rk/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WESTINGHOUSE ELECTRIC CORPORATION

v. : **EHB Docket No. 88-319-CP-MR**
: **(Consolidated with 88-296-MR)**

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION : **Issued: November 5, 1996**

ADJUDICATION

By Robert D. Myers, Administrative Law Judge

Synopsis

The Board assesses a civil penalty of $5,451,283 on a complaint for civil penalties under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- .1001 (Clean Streams Law), and dismisses an appeal of an order to resume operation of an air stripping tower.

An agent's statements are admissible as admissions against the agent's principal only if the agent had the authority to make the statements.

The Board will strike rebuttal testimony which could have been raised in the proponent's case-in-chief, and which was not addressed in the opponent's case-in-chief.

Ordinarily, the limitations period for violations of sections 301, 307, and 401 of the Clean Streams Law, 35 P.S. §§ 691.301, 691.307, and 691.407, and for 25 Pa. Code § 101.3(a), does not

start to run until an industrial waste or polluting substance actually enters a water of the Commonwealth. The limitations period for violations of 25 Pa. Code §§ 101.2(a) and 101.2(b), meanwhile, does not ordinarily start to run until the duty to provide notice and take corrective action under those sections terminates. The "discovery rule" applies to actions under the Clean Streams Law.

The Board will not consider residential well water samples to be tainted on the basis that some of the samples were collected by individuals without gloves, that some of the samples were not refrigerated, that some of the samples were collected without using trip blanks and field blanks, that the samples were analyzed using EPA methods 501.2 and 624, that sample data was reported at concentrations lower than the method detection limit published at 25 Pa. Code § 16.102, or because of the screening and purging techniques used in analyzing the samples, where the Department shows that the analysis of well samples is reliable nevertheless.

A corporation violates sections 301, 307, and 401 of the Clean Streams Law, and 25 Pa. Code § 101.3(a), by allowing degreasers containing trichloroethylene (Tri) and 1,1,1-trichloroethane (Ta) to escape into the groundwater and surface waters. A corporation violates 25 Pa. Code § 101.2(a) by failing to promptly notify the Department of Environmental Protection (Department) and downstream users of such discharges and violates 25 Pa. Code § 101.2(b) by failing to take steps to minimize the harm to downstream users and property and the waters themselves.

The Board will assess a civil penalty only to the extent that the penalty requested is reasonable given the violations the Department has proven. The Board will dismiss an appeal to an order as moot where the parties to the action agree the order is moot.

Outline

INTRODUCTION

This adjudication concerns two consolidated actions the Department initiated against Westinghouse Electric Corporation (Westinghouse) regarding an elevator manufacturing plant (plant) Westinghouse owns and operates in Cumberland Township, Adams County. The first is a July 22, 1988, Department order directing Westinghouse to resume operation of an air stripping tower at the plant site. The second is a complaint for civil penalties against Westinghouse, filed

with the Board on August 16, 1988.

On August 12, 1988, Westinghouse filed a notice of appeal challenging the issuance of the Department's order. The notice of appeal asserted, among other things, that the order was barred by the statute of limitations, violated the 14th Amendment to the U.S. Constitution, and was inconsistent with a consent order the corporation had entered into with the Environmental Protection Agency (EPA). The appeal was docketed at EHB Docket No. 88-296-M.

The complaint for civil penalties requested that the Board impose a civil penalty totaling $9,081,336 against Westinghouse: $414,952 for allowing degreasers containing Tri and Ta to escape from the plant and contaminate groundwater and surface water, in violation of sections 301, 307, and 401 of the Clean Streams Law, 35 P.S. §§ 691.301, 691.307, and 691.401; $2,677,384 for failing to alert the Department and downstream water users to the water pollution, in violation of section 101.2(a) of the Department's regulations, 25 Pa. Code § 101.2(a); and $5,989,000 for failing to implement remedial measures necessary to prevent the chemicals from reaching waters of the Commonwealth or causing injury to property and downstream users, in violation of sections 101.2(b) and 101.3(a) of the Department's regulations, 25 Pa. Code §§ 101.2(b) and 101.3(a). The complaint for civil penalties was docketed at EHB Docket No. 88-319-CP-F.

There were a number of procedural developments between the time the actions were filed and the hearing on the merits. On October 3, 1988, the Board granted in part and denied in part a petition for supersedeas that Westinghouse filed with respect to the Department's order. *See Westinghouse Electric Corporation v. DER*, 1988 EHB 857. The Board superseded the order until Westinghouse completed a Phase I Field Investigation or until January 20, 1989, whichever came first. On February 13, 1989, the appeal of the order and the Department's action for civil penalties

were consolidated at EHB Docket No. 88-319-CP-F. On March 1, 1991, Administrative Law Judge Fitzpatrick denied a motion filed by the Department requesting that the Board preclude the admission of certain documents and expert testimony at the hearing on the merits. *See Westinghouse Electric Corporation v. DER*, 1991 EHB 353.

A hearing was held in Harrisburg on December 4-8, 1989; November 19-22, 1991; January 21-24, 1992; February 4-7, 1992; November 17-20, 1992; and February 23-26, 1993. Administrative Law Judge Fitzpatrick initially presided over the hearing, but, upon his resignation from the Board, the proceedings continued under Administrative Law Judge Robert D. Myers.[1] Both the Department and Westinghouse were represented by counsel.

The Department and Westinghouse filed their post-hearing memoranda on August 10, 1993, and November 5, 1993, respectively. The Department filed a reply memorandum on December 15, 1993.

Both parties agree in their memoranda that Westinghouse's appeal of the Department's order is moot. We shall confine our attention here, therefore, to the Department's complaint for civil penalties.

The Department argues that Westinghouse discharged the degreasers into storm drains and the groundwater, in violation of sections 301, 307, and 401 of the Clean Streams Law; that Westinghouse failed to notify the Department and downstream users that the degreasers had been placed in a location where they could enter the storm sewer and groundwater, in violation of section

---

[1] The consolidated action was reassigned from Board Member Fitzpatrick to Board Member Myers on August 24, 1992. At that time it acquired its current docket number, EHB Docket No. 88-319-CP-MR.

101.2(a) of the Department's regulations; and that Westinghouse failed to take all measures necessary to prevent the degreasers from entering the storm sewer and groundwater, and from injuring property and downstream users, in violation of sections 101.2(b) and 101.3(a) of the Department's regulations. According to the Department, the substantial civil penalty it requests here is reasonable because, among other things:

> (1) the violations resulted in extensive contamination of waters of the Commonwealth;
>
> (2) the violations are "continuing violations" and calculated on a daily basis;
>
> (3) the cost of restoring the damaged waters is high; and,
>
> (4) the penalty must account for the Department's reasonable investigative costs and should deter future violations.

The Department also maintains that Westinghouse is collaterally estopped from arguing that it did not cause the contamination.

Westinghouse takes issue with many of the Department's arguments and raises several additional issues. Westinghouse argues, for instance, that the plant did not cause the contamination at the site, that the contamination at the site did not cause the contamination in most of the nearby residential wells, that the Department overestimated the amount of contamination because it relied on faulty sampling and analytical techniques, and that the plant acted responsibly to help and protect those living in the vicinity. Westinghouse also argues that the action for civil penalties is barred by the statute of limitations, that the alleged violations are not continuing violations, that the corporation is not estopped from litigating the issue of whether it caused the contamination, and that the Board should exclude certain rebuttal evidence and hearsay testimony which were admitted at the hearing.

Any issues not raised in the post-hearing memoranda are deemed waived. *Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources*, 546 A.2d 447 (Pa. Cmwlth. 1988).

The record consists of the pleadings, a transcript of 4,742 pages and 179 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Department is an administrative department of the Commonwealth of Pennsylvania and the agency authorized to administer and enforce the provisions of the Clean Streams Law and the regulations thereunder.

2. Westinghouse is a Pennsylvania corporation with a business address at Westinghouse Building, 6 Gateway Center, Pittsburgh, PA 15222. (Complaint and Answer, para. 3)

3. The plant is an elevator manufacturing plant located off Biglerville Road in Cumberland Township, Adams County, Pennsylvania. (Complaint and Answer, para. 4; N.T. 24)

4. From 1968, when construction on the plant started, to January of 1989, when the plant was sold to another corporation, Westinghouse was the sole owner and operator of the plant.[2] (N.T. 584-585)

5. During the period 1969 to at least 1984, Westinghouse used degreaser in the plant containing Tri and Ta. (N.T. 78; H.D. 22-24)

---

[2] Exhibits from the Department are noted as "Ex.C-___" and those from Westinghouse as "Ex.D-___." Hess' deposition is referred to as "H.D.___," and the notes of testimony as "N.T.___."

6. Tri is also known as "TCE" and "trichloroethylene." (N.T. 140, 2395)

7. Ta is also known as "trichlorothane"; "methyl chloroform"; "1,1,1"; and "TCA." (N.T. 140, 1276, 1980)

8. PCE is also known as "perchloroethylene" and "tetrachlorethylene." (N.T. 3484)

9. Exposure to Tri or Ta can result in a wide variety of symptoms, including intoxication, memory defects, instability, cardiac arrhythmia, and liver and kidney damage, among others. (N.T. 1987, 1989-90, 2027-28)

10. Tri is approximately 20 times as toxic as Ta. (N.T. 2028)

11. In addition to its toxicological effects, Tri is also a probable human carcinogen. (N.T. 2007)

12. A "probable human carcinogen" is a substance which has been proven to cause cancer in animals but for which there is limited or inadequate data to determine whether it causes cancer in humans. (N.T. 2212-13)

13. The units micrograms per liter (µg/l) and parts per billion (ppb) are equivalent. (N.T. 2010, 3909)

14. Joel Steigman was a solid waste specialist with the Department from 1981 to 1988. (N.T. 451-52)

15. Steigman conducted three routine hazardous waste generation inspections at the Westinghouse site prior to the discovery of contamination: the first on October 2, 1981; the second on August 10, 1982; and the third on February 24, 1983. (N.T. 516-17, 1046-51)

16. Steigman conducted the inspections at the plant as part of a Department effort to sort out just which facilities in the Commonwealth were engaged in activities governed by the federal

Resource Conservation and Recovery Act, Act of October 21, 1976, P.L. 94-480, *as amended*, 42 U.S.C. § 6901 *et seq.* (RCRA). (N.T. 1640-41)

17. After RCRA was enacted, approximately 1300 facilities in the Department's central region took the precaution of notifying EPA that they engaged in activity involving the generation, treatment, storage, and disposal of hazardous waste. (N.T. 1640-41)

18. Since many of the facilities which notified EPA did not actually engage in activity governed by RCRA, the Department's regional office conducted some preliminary inspections to determine just which of the facilities would be covered by RCRA and which would not. (N.T. 1640-41)

19. Grates ordinarily lay at the bottom of the painting booth, where they covered a pit containing agitated water. (N.T. 103)

20. When components at the plant were painted, the air inside the booth was blown downwards, forcing any paint which missed its mark through the grates and into the water. (N.T. 103)

21. The grease on the components at the plant was removed with degreaser in the step immediately prior to the components entering the painting booth. (N.T. 1470, 1573, 1885; H.D. 13)

22. A thick coating of paint covered the grates by the time they were cleaned. (N.T. 1262)

23. To remove the paint, the grates were removed from the booths, taken to the pumphouse, and submerged overnight in a tank filled with a paint stripper. (N.T. 105, 1262)

24. The paint stripper loosened up the paint. (N.T. 1291)

25. The grates were then removed from the stripper and steam cleaned. (N.T. 1262)

26. Where the grates were steam cleaned depended upon the size of the grates: the lighter ones were cleaned on a concrete pad outside the pumphouse. (N.T. 1262-63, 1468; H.D. 19)

27. The concrete pad had a storm drain. (N.T. 117, 230; Ex. C-121(a))

28. Liquid generated during the steam cleaning would sometimes run off the grates during the cleaning process. (N.T. 1265, 1468; H.D. 64)

29. The liquid which escaped down the drain entered a storm sewer which discharged into a stream (the "eastern tributary") opposite the entrance to the plant. (N.T. 231, Ex. C-121(a))

30. The eastern tributary is a very small stream and the storm sewer discharge is essentially its headwater. (N.T. 25)

31. An August 16, 1983, surface water sample of the "eastern tributary," taken just below the storm sewer discharge, revealed the presence of 2 ppb Tri and 4 ppb Ta. (N.T. 25, 41, Ex. C-1(a))

32. A sample taken from the "eastern tributary," taken in December of 1988 or January of 1989, revealed the presence of approximately 10 ppb Tri. (Ex. D-81, Table 4-4)

33. A January 1989 water sample from the storm sewer, collected near the pumphouse, revealed the presence of 11 ppb Ta. (Ex. D-81, Table 4-8 and Fig. 2-3)

34. The pumphouse is located at the far "upstream" end of the storm sewer. (Ex. D-87, Fig. 3-2)

35. Tri was not used in the actual process of steam-cleaning the grates. (N.T. 79)

36. Ta was not used in the actual steam-cleaning process itself. (N.T. 1290)

37. Before certain components at the plant were painted, they were put through the degreasing machines, where they were exposed to fumes from the degreasers. (N.T. 80)

38. A residue remained on the components after they emerged from the degreasing machines. (N.T. 1592)

39. Employees used additional degreaser to wipe the residue off just prior to the components entering the painting booth. (N.T. 1470, 1573, 1885; H.D. 13)

40. Large amounts of paint remained on the grates at the time they were steam cleaned. (N.T. 1264)

41. The paint stripper bath was changed very infrequently. (N.T. 1492)

42. The grates still had liquid from the bath on them when they were steam cleaned. (N.T. 1468)

43. The grates were cleaned at least several times a year until early 1984, when Westinghouse started shipping the grates offsite for cleaning. (N.T. 154; H.D. 21, 27, 64)

44. Metal turnings were generated as metal was machined in the manufacturing area of the plant. (N.T. 113-114, 1474)

45. The turnings were collected and placed in several small hoppers positioned around the manufacturing area. (N.T. 113-114, 1386, 1474)

46. The turnings were loaded into the small hoppers using pitchforks. (N.T. 1421)

47. The contents of the small hoppers were periodically dumped into two large hoppers specifically designated to receive the turnings. (N.T. 1426, 1463, 1891)

48. The two large hoppers were located at the railroad dock, near the northwestern corner of the plant. (N.T. 113-114, 1386, 1396)

49. The metal turnings did not have degreaser on them at the time they were loaded into the small hoppers. (N.T. 235)

50. The Department elicited testimony from three Westinghouse employees that degreaser was dumped in the small hoppers:

a. Robert McKinney testified that spent degreaser was dumped into the small hoppers "several times a week" during the time he was responsible for emptying them. (N.T. 1385-87, 1391-92, 1421)

b. Gary Hull testified that employees dumped degreaser into the small hoppers when he was responsible for emptying them. (N.T. 1890)

c. Ronald Sadler testified that he saw at least one individual dump degreaser into the small hoppers "on several occasions" during a six-month period somewhere between 1970 and 1975. (N.T. 1510, 1524)

51. McKinney emptied the small scrap hoppers between 1973 and 1978. (N.T. 1389)

52. Hull was responsible for emptying the hoppers in 1973. (N.T. 1890)

53. Westinghouse elicited testimony from three plant employees suggesting that degreaser was not dumped into the small hoppers:

a. Thomas Romito testified that he did not think he ever saw liquid in the hoppers. (N.T. 114)

b. Richard Althoff testified that he never saw employees dump degreaser into the small hoppers. (N.T. 3264)

c. Gerard Schilling testified that he never saw degreaser in the hoppers. (N.T. 298)

54. Romito worked in the maintenance department of the plant. (N.T. 76-78)

55. The maintenance department was not responsible for emptying the hoppers. (N.T. 114)

56. Althoff worked in the maintenance department from July, 1969, to October, 1989. (N.T. 3249)

57. Schilling did not start working at the plant until 1982. (N.T. 208)

58. To the extent that McKinney, Hull, and Sadler's testimony is inconsistent with that of Romito, Althoff, and Schilling concerning the dumping of degreaser into the small hoppers, the testimony of McKinney, Hull, and Sadler is more credible.

59. The metal turnings had coolant, water, and cutting oil on them when they were put into the small hoppers. (N.T. 1281-82, 1421-22, 1474)

60. The liquid in the small hoppers appeared as though it consisted primarily of degreaser. (N.T. 1477-78)

61. McKinney could sometimes smell degreaser when he dumped the small hoppers. (N.T. 1394)

62. Jesse Buckley was responsible for dumping the small hoppers in the early 1970s. (N.T. 1475-83)

63. When he was responsible for dumping the small hoppers into the large hoppers, Buckley sometimes saw half a gallon to 5 gallons of liquid enter the large hoppers with the contents of the small hoppers. (N.T. 1477)

64. Hull sometimes found liquid in the small hoppers when he dumped them, usually between three and five gallons. (N.T. 1893-94, 1914)

65. McKinney and Richard Robinson saw fluids enter the large hoppers when the small hoppers were dumped. (N.T. 1394, 1282)

66. The two large hoppers designated to receive the metal turnings each had holes in the bottom. (N.T. 1392, 1423, 1426-27, 1476)

67. The holes were put in the large hoppers specifically so that liquid in the hoppers would drain out. (N.T. 1396)

68. Fluid from the large hoppers leaked out the holes and onto the floor below. (N.T. 115, 1894, 1247)

69. Virtually every day between 1973 and 1976, when the large hoppers were lifted up and emptied, approximately 1-5 gallons of liquid would pour out of the holes and onto the floor. (N.T. 1396-97)

70. The liquid was sometimes whitish or bluish in color, depending upon which coolant had been used in the machining area, but on other occasions the liquid appeared very dirty and it was difficult to tell what color it was. (N.T. 1395, 1589)

71. Tri is clear when new, but can become brown or even black after it is spent. (N.T. 1416, 1446, 1564, 1923)

72. How dark Tri is depends on how much it has been used. (N.T. 1618)

73. Ta has the same appearance as Tri. (N.T. 1417)

74. The coolant used in the machining area is white or blue, depending on the particular coolant used. (N.T. 1395, 1422, 1425-26)

75. McKinney usually smelled degreaser when the large hoppers were emptied and liquid poured out the bottom, but not every time. (N.T. 1397)

76. Railroad tracks ran into the railroad dock area of the plant from outside the building. (N.T. 1397)

77. The floor in the railroad dock area was concrete and sloped downwards from the place where the large hoppers were kept to the place where the railroad tracks entered the building. (N.T. 1017)

78. The hoppers sat atop the railroad tracks and the liquid which leaked from them collected in the grooves for the tracks. (N.T. 1396, 1461)

79. Some of the liquid which leaked from the hoppers flowed down a drain in the railroad dock area. (N.T. 1399)

80. Most of the liquid followed the tracks outside the building and seeped into the ground. (N.T. 1397)

81. The soil outside the railroad dock area developed dark stains. (N.T. 363, 1015-16, 1153, 1268, 1487)

82. Lab analyses of soil samples taken from outside the railroad dock area revealed the presence of high concentrations of Tri and Ta. (Ex. C-131)

83. The release of degreaser into the soil outside the railroad dock area would result in contamination entering the groundwater. (N.T. 4532, 4693)

84. The pattern of groundwater contamination indicates that there were at least two separate discharges. (N.T. 2589)

85. Tri evaporates very readily. (N.T. 1997)

86. Westinghouse never notified the Department or downstream users that it had released Tri or Ta degreaser into the environment. (N.T. 2736-37, 3017)

87. Tri and Ta are very mobile in the soil and can leach quickly into the groundwater. (N.T. 1997-98, 2222)

88. The old waste drum storage area was located outside the southwestern corner of the plant. (N.T. 1897; H.D. 60, 142, Ex. C-121(c))

89. Drums of spent degreaser were stored there between 1971 and 1978. (N.T. 1400)

90. The drums were stored on pavement, but part of the edge of the pavement bordered soil. (N.T. 1402)

91. Earl Plank testified that he had seen drums leak in the area between 1969 and 1973, but that none of the leaks resulted in the release of more than a few gallons of degreaser. (N.T. 1571, 1600)

92. Between 1971 and 1978, drums of spent degreaser in the old waste drum storage area leaked once or twice a week. (N.T. 1404, 1406, 1433, 1451)

93. The liquid which leaked out of the drums of spent degreaser ran off the pavement and into the adjacent soil. (N.T. 1399, 1407, 1409)

94. The soil next to the old drum storage area is discolored. (N.T. 1407)

95. A 0.5' soil sample taken from the old waste drum storage area by RE Wright indicated the presence of 40 ppb Tri. (Ex. C-131)

96. In 1981, the plant started receiving degreaser shipments in a solvent storage tank located in the courtyard area of the plant. (N.T. 228; H.D. 22, 50)

97. At first, the storage tank was filled by pumping degreaser into the tank from a tank truck. (N.T. 228, H.D. 22, 50)

98. The storage tank was refilled every 6-8 weeks. (H.D. 41)

99. In 1984, the procedure changed, and Ta was loaded into the storage tank by "blowing it off"--pressurizing the tank on the tank truck and forcing the Ta out and into the storage tank. (H.D. 22-24)

100. Sometimes there would be leakage from the valves in the courtyard during this process, but releases were rare compared to filling the tanks by pumping in the Ta. (H.D. 23-24)

101. Ta was detected in at least one of the soil samples taken from the courtyard. (N.T. 4395; Ex. D-81 at Table 4-2)

102. Between the winter of 1970 and the end of 1974, Ronald Sadler was responsible--off and on--for unloading the drums of new degreaser from the trucks. (N.T. 1503)

103. The drums were unloaded on the southwest side of the plant, near the volatile storage area. (N.T. 1503-04)

104. On several occasions when Sadler was responsible for unloading the drums, particularly during the winter of 1970, drums of degreaser were dropped as they were being unloaded and started to leak. (N.T. 1507-08, 3276, 3318)

a. Ordinarily, when this occurred, relatively little degreaser escaped. (N.T. 1507)

(1) On several occasions, however, "a lot" leaked out. (N.T. 1508)

(2) On at least one occasion, more than half of a 55-gallon drum escaped. (N.T. 1503-04)

b. The degreaser which escaped from the damaged drums fell onto the pavement in the volatile storage area, then ran down the incline on the pavement to an adjacent grassy area. (N.T. 1516-17; Ex. C-121(c))

105. On one occasion between 1973 and 1975, one of the pumps on the large degreaser malfunctioned and a relatively large amount of degreaser leaked to the floor of the plant. (N.T. 1510, 1522)

106. The spilled degreaser was cleaned up. (N.T. 1522)

107. There were floor joints in the degreasing area. (N.T. 1510)

108. The floor joints were filled with about 1/2" of rubber tar. (N.T. 1896)

109. Cracks and holes existed in the floor joints in some parts of the plant. (N.T. 1897)

110. Degreaser was used in the welding area to remove dirt and grease from metal before it was welded. (N.T. 1383)

111. Employees in the welding area kept the degreaser in several half-gallon or gallon containers. (N.T. 1387)

112. McKinney was a welder at the plant during the night shift until approximately 1973. (N.T. 1383)

113. McKinney did not start working at the plant until August of 1971. (N.T. 1382)

114. Prior to 1973, McKinney occasionally saw employees in the welding area pouring spent degreaser from the small containers into the floor joints. (N.T. 1387, 1419, 1445-46)

115. McKinney saw this occur between 3-10 times. (N.T. 1439)

116. While he worked in the welding area, McKinney saw employees in the area dump small containers of spent degreaser on the grass outside a fire escape door on the west wall of the plant. (N.T. 1387-88, 1420)

117. In the early 1970s, Plank dumped approximately 50 gallons of Tri from a 275-gallon storage tank onto the ground behind the plant. (N.T. 1569, 1576, 1594)

118. Plank has worked in the maintenance Department of the plant since 1969. (N.T. 1562)

119. The tank had sat outside from approximately 6 months before Plank dumped it. (N.T. 1605)

120. The tank contained spent Tri degreaser when it was placed outside and had a flip-top on it. (N.T. 1608)

121. During the 6 months the tank remained outside, it had rained, and, at the time the tank was dumped, it contained some water. (N.T. 1605)

122. The liquid which Plank dumped from the tank smelled like Tri. (N.T. 1617).

123. Most of the liquid in the tank at the time that the tank was dumped was Tri degreaser. (N.T. 1608)

124. The first time Westinghouse attempted to clean up or contain the pollutants in the soil was on December 13, 1983, when Westinghouse started to excavate soil at the plant. (N.T. 2763)

125. Westinghouse did not obtain authorization from the Department for the excavations. (N.T. 491-96, 1076-1088)

126. Westinghouse excavated approximately 33 drums of earth in and around the storm drain near the pumphouse. (N.T. 243)

127. The soil was placed in drums and then shipped to a hazardous waste landfill. (H.D. 27, 68)

128. Ken Hess had directed that the soil be removed. (N.T. 243; H.D. 27, 84)

129. Hess was supervisor of plant engineering and responsible for the maintenace of

facilities from 1980. (H.D. 7)

130. Hess had the soil removed because it contained paint chips and he suspected it might be contaminated. (H.D. 69)

131. The soil was not tested to determine whether degreaser was present. (H.D. 68)

132. Westinghouse also removed soil which it suspected of being contaminated from near the railroad dock area. (N.T. 2763; H.D. 128)

133. This soil was also never tested. (H.D. 83, 85).

134. Approximately 10 drums of earth were removed and shipped to a hazardous waste landfill. (N.T. 245; H.D. 83-84)

135. Westinghouse discontinued the excavations when the Department discovered it had been removing the soil and ordered Westinghouse to desist. (N.T. 335, 244, 247-248)

136. Sometime after the excavations ceased, Westinghouse agreed to Department and EPA requests that it undertake three other measures to minimize the injury to downstream users and waters of the Commonwealth:

a. distributing carbon filters free to persons in the vicinity who wanted them; (N.T. 1772, 2988)

b. distributing bottled water free to any local residents who wanted it; (N.T. 252, 1344, 1739, 1772) and,

c. providing municipal water to many residents in the vicinity of the contaminated wells. (N.T. 1334, 2521)

137. Westinghouse agreed to these three measures only after April 26, 1984. (N.T. 1344)

138. In the fall of 1984, Westinghouse started operating an air stripping tower to remove contamination from the groundwater on site. (N.T. 289, 1774)

139. Before the plant was constructed, an old farm pond lay where the central portion of the eastern side of the plant is now located. (N.T. 2421; Ex. C-121(k))

140. The pond was filled in during construction of the plant. (N.T. 570)

141. Three witnesses testified concerning the condition of the pond at the time it was filled:

a. Thomas Romito testified that when the pond was drained, refrigerators, trash cans, and other "junk"--including several steel drums--were found. (N.T. 75-76)

b. George Dorman testified that the pond contained auto parts, scrap metal, and the like. (N.T. 570)

c. Hess testified that he had seen several old cars in the pond, but never anything that seemed like it would contain chemical waste. (H.D. 38)

142. Romito is a former Westinghouse employee who served as the building coordinator for the site. (N.T. 73)

143. Romito conceded that he had previously testified that no drums were found, but added that he had thought more about it since that testimony and had changed his mind. (N.T. 75-76)

144. Dorman is a former Westinghouse employee and plant manager at the time the plant was constructed. (564-566)

145. Hess was supervisor of manufacturing at the time the plant was constructed and has lived all his life within view of the land where the plant was constructed. (H.D. 38)

146. To the extent that Romito's testimony is inconsistent with that of Dorman and Hess with respect to the contents of the old farm pond, Dorman and Hess's testimony is more credible.

147. Two expert witnesses testified on the issue of whether the old farm pond was the source of the groundwater contamination present at the plant site: Patrick O'Hara, a civil engineer called by Westinghouse (N.T. 4341), and Jeffrey Molnar, a hydrogeologist called by the Department (N.T. 4449).

a. O'Hara testified that:

(1) the old farm pond was the source of the groundwater contamination because the highest concentrations of Tri contamination were in the old farm pond area and because all of the monitoring wells upgradient of the old farm pond were contaminated, but none of those downgradient were. (N.T. 4401, 4421-22, 4449)

(2) it was possible that the contamination centered in the old farm pond area could have arisen from spills in other areas of the Westinghouse plant site. (N.T. 4535)

b. Molnar testified that:

(1) pollutants dumped in the old farm pond could not have caused the groundwater contamination at the site because:

(a) fill in the area of the pumphouse was contaminated; (N.T. 2626-28; Ex. C-131)

(b) the fill in the pumphouse area was added after the pond was emptied; (N.T. 2627-28) and,

(c) contamination from the pumphouse area could migrate to the area of the old farm pond, but contamination from the old farm pond could not migrate to the area of the contaminated pumphouse fill. (N.T. 4695-4696)

(2) the high concentrations of contaminants in the area of the old farm pond could have resulted from spills in the area of the courtyard and pumphouse areas which would follow the bedrock contours downhill to the area where the farm pond had been located. (N.T. 4695)

(3) depending on precisely where the release occurred, contaminants released in the railroad dock area could also flow to the old farm pond area. (N.T. 4694, 4709)

148. Molnar has a bachelor's degree in geology. (N.T. 2310; Ex. C-155).

149. Molnar had been employed as a hydrogeologist for at least fourteen years at the time he testified. (N.T. 2303-09)

150. Molnar participated in approximately 1,000 hydrogeological studies. (N.T. 2306, 2602)

151. O'Hara has never been employed as a hydrogeologist and does not have a degree in geology or hydrogeology. (N.T. 4351)

152. O'Hara took only 5 courses in college pertaining to hydrogeology and has only been qualified as an expert in the field once, in the supersedeas hearing in this case. (N.T. 4354-55).

153. To the extent that Molnar's testimony is inconsistent with O'Hara's on the issue of

whether the old farm pond was the source of the groundwater contamination present at the plant site, we find Molnar's testimony to be more credible.

154. All but two of the thirteen facilities Westinghouse argues could have been sources of some of the contamination are located downgradient of the most severe pollution. (N.T. 4463, 4487-90; Ex. D-85))

155. Certain septic tank and household products contain Tri. (Ex. C-72)

156. The Material Safety Data Sheets, provided to Westinghouse by the degreaser supplier, indicate that the Tri degreaser is 100.00 percent Tri. (Ex. C-38, C-39)

157. The Tri degreaser is manufactured by removing hydrochloric acid from 1,1,2,2-tetrachloroethane. (N.T. 4652)

158. In the late 1960s and early 1970s, the 1,1,2,2-tetrachloroethane used to produce Tri in this reaction typically contained PCE as well, because the latter was a byproduct of the process used at that time to generate the 1,1,2,2-tetrachloroethane. (N.T. 4653)

159. The PCE does not degrade at all in the reaction to change the 1,1,2,2-tetrachloroethane to Tri. (N.T. 4654)

160. Commercial grade Tri frequently contained PCE. (N.T. 4665)

161. Despite the fact that the Tri degreaser Material Data Safety Sheets state that the degreaser was 100.00 percent Tri, the sheets also state that paint grade "Tri" contains approximately 0.4% acrylonitrile by volume. (N.T. 4669; Ex. C-38, C-39)

162. In most commercial grade Tri degreaser, Tri accounts for only 80 percent of the primary product. (N.T. 4667)

163. Removing PCE and the other non-Tri components of the product requires multiple

distillations and would increase the price of the Tri product by a factor of 10 to 100. (N.T. 4657-4658)

164. Some of the residential water wells in the vicinity of the plant are contaminated with Ta, some with Tri, and some with both chemicals. (Ex. C-98, C-99, C-100)

165. Two expert witnesses testified concerning the direction of groundwater flow in the vicinity of the plant:

a. O'Hara

(1) O'Hara testified that contamination at the Westinghouse site could not have contaminated the residential wells southeast of the plant because the groundwater in the area flows to the east or northeast, and because the ratio of Ta to Tri in the southeastern wells differs from that found in wells which were east or northeast of the plant. (N.T. 4400, 4420, 4546-47)

b. Molnar

(1) Molnar testified that:

(a) the groundwater currently flows to the east or northeast of the plant, but the flow only recently changed to that direction, and used to be to the east or southeast of the plant. (N.T. 2615, 4701)

(b) absent any external factors, the groundwater would flow to the northeast, but pumping of the residential wells southeast of the plant had drawn the groundwater in a more southerly

direction, contaminating the wells. (N.T. 2414-2415, 4703)

(c) the groundwater started to flow more to the north only when the water supplies of those living southeast of the plant were replaced and the residents stopped pumping their wells. (N.T. 4702)

166. None of the residences southeast of the plant had public water prior to the spring of 1984, and many of them did not get it until the fall of 1987. (N.T. 4277; Ex. D-77)

167. To the extent that Molnar's testimony is inconsistent with O'Hara's concerning the direction of groundwater flow, Molnar is more credible.

168. Molnar's explanation accounts for how the wells southeast of the plant became contaminated with Tri and Ta, but O'Hara's does not. (N.T. 4704-05)

169. O'Hara based his conclusions on the direction of groundwater flow on well data collected in 1989 as part of the Phase 2 Study, after the residences southeast of the plant had been supplied with public water. (N.T. 4421-22; Ex. D-81, vol. 1, at 4-12 and 4-19 to 4-21)

170. The preliminary investigation of volatile organic chemical contamination, Ex. C-112, prepared for Westinghouse by R.E. Wright Associates, identified the direction of groundwater flow as to the southeast. (N.T. 2615; Ex. C-112)

171. The February 1988 draft of the work plan for the remedial investigation/feasibility study, Ex. C-121(d), prepared for Westinghouse by Paul Rizzo Associates identified the flow direction to the southeast or east. (N.T. 2616)

172. O'Hara testified that pumping groundwater wells can influence the direction of groundwater flow in the vicinity. (N.T. 4522)

173. The overwhelming majority of residential wells nearby are located to the southeast of the plant: approximately 66 wells are located to the southeast, 34 to the east, and 13 to the north. (Ex. C-97)

174. The levels of Tri and Ta in some of the wells southeast of the plant varied because:

a. in geologic structures like the one beneath the plant, contamination tends to travel in "slugs" in the groundwater; they are not dispersed evenly; (N.T. 2410-2411, 2506, 2425)

b. different chemicals may have entered the groundwater at different times, depending on when they were released into the environment or when they leached from the soil into the groundwater; (N.T. 2425, 2612-14) and,

c. some wells may have been located closer to fractures than other wells. (N.T. 2552)

175. The residential well sampling near the plant detected the presence of a number of contaminants, including Tri; Ta; 1,1-DCE; 1,2-DCE; 1,2-DCA; PCE; chloroform, and chloroethane. (Ex. C-131)

176. The Board adopts the data in Table 1 of the Appendix, regarding water samples from residential wells where analysis of at least one sample indicated the presence of quantifiable levels of Tri; 1,1-DCE; PCE; or 1,2-DCA.

177. The one-in-a-million cancer risk level for a substance in drinking water is the concentration of that substance which would result in one extra person out of a million getting cancer, assuming the individuals drinking the water are 70 kilogram (kg) adults and drink 2 liters of water a day for 70 years. (N.T. 2008)

178. The relationship between exposure to a carcinogen and the cancer risk is directly

proportional for that exposure pathway; doubling the exposure doubles the risk of cancer. (N.T. 2011-2012)

179. There is general agreement in the scientific community with EPA's cancer risk levels and the methods used to derive them. (N.T. 2009)

180. The most recent one-in-a-million cancer risk level EPA had assigned to Tri at the time of the hearing was 2.6 ppb. (N.T. 2010, 3566)

181. Although EPA had withdrawn the one-in-a-million cancer risk level for Tri by the time of the hearing, toxicologists and EPA continued to routinely use the withdrawn 2.6 ppb figure when it was necessary to assign a one-in-a-million cancer risk level for Tri. (N.T. 2124, 2126-31)

182. The one-in-a-million cancer risk level for 1,1-DCE is 0.061 ppb. (N.T. 3489-90; Ex. C-161)

183. The one-in-a-million cancer risk level for PCE is 0.67 ppb. (N.T. 3490-93; Ex. C-161)

184. The one-in-a-million cancer risk level for 1,2-DCA is 0.38 ppb. (N.T. 3489; Ex. C-161)

185. The Board adopts the data in Table 2 of the Appendix, regarding water samples from residential wells where analysis of at least one sample indicated the presence of quantifiable levels of Ta.

186. The Ta degreaser contained Ta. (Ex. C-40)

187. The Tri degreaser contained Tri. (Ex. C-38, C-39)

188. The Tri degreaser also contained PCE, a byproduct produced in the manufacture of Tri. (N.T. 869-71, 3484, 4653-54, 4665)

189. The chemicals 1,1-DCE and 1,2-DCA are degradation products of Tri. (N.T. 2220)

190. It is possible, but unlikely, that the degradation of Tri would result in chloroform formation. (N.T. 2247)

191. The chemicals PCE, 1,1-DCE, and 1,2-DCA have toxicological characteristics very similar to those of Tri and Ta. (N.T. 1940)

192. PCE has been proven to be a human carcinogen in epidemiological studies. (N.T. 2242-44)

193. The chemical 1,2-DCA is a probable human carcinogen. (Ex. C-148)

194. The chemical 1,1-DCE is a potential human carcinogen. (Ex. C-149)

195. Substances which are potential human carcinogens have been shown to cause cancer in limited animal testing, but for which there is insufficient human data available to determine whether they cause cancer in humans. (N.T. 2044, 2213)

196. The Department ordinarily advises users not to drink water when the concentration of carcinogenic substances exceeds the one-in-a-million cancer risk level. (N.T. 918-20; Ex. C-84)

197. The cancer risk level based on *ingestion* of Tri accounts for only half of the actual cancer threat posed by Tri in the water supply: the inhalation of Tri released during showering, cooking, and other household activities using water results in exposure levels comparable to those attributable to ingestion alone. (N.T. 2023)

198. Insufficient samples were taken of the water in residential wells to determine what levels of contamination were present in the wells over time. (N.T. 2539)

199. Contaminants in groundwater can travel in "slugs," which can result in even day-to-day fluctuations in the levels of contamination measured in wells. (N.T. 2410)

200. At least 114 residential wells were in the path of the contamination plume, and therefore at risk. (N.T. 2730)

201. Once Tri or Ta gets into groundwater, it can persist for thousands of years if nothing is done. (N.T. 1998, 2031)

202. Even with active remediation, it will take at least twenty years to restore the aquifer. (N.T. 2436-37)

203. Before the contamination, the groundwater was potable and had good water quality. (N.T. 2365, 2604)

204. Lee Yohn is a Department compliance specialist. (N.T. 2720-21)

205. Yohn has worked on at least 15 previous investigations involving groundwater contamination. (N.T. 2720-21)

206. The damage to the water supply resulting from the degreaser contamination is extraordinary and by far the most extensive Yohn has seen. (N.T. 2760, 2763-65)

207. The connection between Tri and cancer became known in approximately 1975. (N.T. 1999-2000)

208. Other toxic effects of Tri exposure have been well known for at least 40 years. (N.T. 1998)

209. The adverse consequences of Ta exposure were detailed in a material safety data sheet the Westinghouse plant received on September 24, 1979. (Ex. C-40)

210. Ta has been listed as a hazardous substance by the EPA since at least July 7, 1980. (N.T. 2868)

211. McKinney witnessed releases from the old drum storage area during the course of

his work at the plant. (N.T. 1382-83, 1389, 1401-02)

212. Hess witnessed releases from the refilling of the storage tank during the course of his work at the plant. (H.D. 7, 22)

213. Sadler witnessed releases from drums of degreaser dropped as they were being unloaded from the delivery truck during the course of his work at the plant. (N.T. 1503-04)

214. McKinney witnessed releases from the large hoppers during the course of his work at the plant. (N.T. 1382-83, 1385-89, 1392-96)

215. There were certain areas around the slab where the grates were cleaned where no grass would grow--despite the fact that the slab lay in a grassy area. (N.T. 3323)

216. Westinghouse never conducted an environmental audit to determine whether the soil or groundwater in the area was contaminated before the Department detected contamination on the site and directed Westinghouse to have the area studied. (N.T. 73, 128-89, 1809)

217. Westinghouse has refused to pay to extend municipal water lines to homes on Pin Oak Lane. (N.T. 4328)

218. Westinghouse instructed its consultants to first verify whether Westinghouse was the source of the contamination before moving on to characterize the contamination itself. (N.T. 258-261, 1812, 1814-15)

219. Westinghouse implemented the remediation program only after it had been ordered to do so by the EPA. (N.T. 4444)

220. Department personnel frequently had to request information repeatedly before Westinghouse would produce it. (N.T. 1358-59, 3068; Ex. C-54)

221. Contrary to the usual practice, Westinghouse would not allow its consultants to

speak with the Department unless Westinghouse personnel were present. (N.T. 1763, 1185)

222. Westinghouse also refused to let the Department speak directly to the consultants during the preparation of the plan of study. (N.T. 1040)

223. When Westinghouse's consultant prepared a report on the preliminary hydrogeologic evaluation and concluded that Westinghouse was the source of the contamination, Westinghouse submitted a summary of the report to the Department, omitting all reference to the consultant's conclusion that Westinghouse was the source. (N.T. 1820-24, 1848; Ex. C-112, C-113)

224. After the Department first detected contamination at the plant site, Hess, Westinghouse's Supervisor of Maintenance at the plant, had soil from two areas--outside the railroad dock and near the slab at the pumphouse where the grates were cleaned--excavated, stored in drums, and removed from the plant. (N.T. 243-46, 1803; H.D. 83-84)

225. The soil removed from outside the railroad dock was stained, and Hess had it removed because he thought it might be contaminated. (H.D. 127)

226. The soil which was removed was never tested for contaminants. (H.D. 85, 93)

227. Shortly after the Department discovered contamination at the plant, Westinghouse had employees steam clean the railroad tracks in the railroad dock area. (N.T. 1248-53)

228. The material removed from the tracks was a dark sludge and had a strong unpleasant odor. (N.T. 1249, 1253, 1464-65)

229. At least one employee involved in the cleaning had to leave because he became lightheaded from inhaling the fumes--a reaction he also had when working with degreaser at the plant. (N.T. 1465, 1469)

230. The Department spent at least $35,015 in wages and lab expenses investigating the spills. (N.T. 2735, Ex. D-35)

231. At least four Department personnel collected residential well water samples: Durand Little, Kenneth Malick, Rodney Nesmith, and Edgar Shaw. (N.T. 42-43, 522-524, 706-711, 910-915, 931-932)

232. Malick, Nesmith, and Shaw failed to wear gloves when they collected the well water samples. (N.T. 541, 718, 931)

233. Shaw testified that he sometimes got his hands wet when he capped a sampling bottle but that his hands never came in contact with the water in the bottles. (N.T. 726, 733-734)

234. Both Malick and Nesmith testified that they slowed the water down to a trickle before collecting their samples. (N.T. 541, 910)

235. The only evidence introduced at the hearing which suggested that any of the Department samples were not refrigerated was Durand Little's testimony that he could not remember whether he had refrigerated his August 16, 1983, water sample. (N.T. 53)

236. Little's August 16, 1983, sample was of surface water, not well water. (N.T. 21-41; Ex. C-1(a))

237. Failure to refrigerate a water sample would result in data suggesting that Tri and Ta levels are lower--not higher--than those actually present in the water sampled. (N.T. 749, 866)

238. Four witnesses testified concerning the difference between "trip blanks" and "field blanks": Joel Steigman, Edgar Shaw, David Lane, and Beth Cockroft. (N.T. 505-06, 722, 3877, 4057)

239. Steigman's duties included collecting water samples. (N.T. 451-52)

240. Steigman collected water samples from wells near the plant. (N.T. 451-52)

241. Shaw collected water samples from wells near the plant. (N.T. 705)

242. Shaw worked as a sanitarian at the Department at the time he collected the samples, and collecting samples was one of the duties of his job. (N.T. 451-52)

243. Lane is the laboratory manager for Gannet Fleming. (N.T. 3590)

244. Lane analyzed the water samples Westinghouse collected concerning the plant site after 1987-88. (N.T. 3590-91)

245. Cockroft is an engineer and was the project coordinator for the remedial investigation/feasibility plan for the plant site. (N.T. 3977, 3987)

246. Cockroft collected water samples near the plant as part of her duties as project coordinator. (N.T. 3987)

247. Steigman, Lane, and Cockroft's testimony about the difference between trip blanks and field blanks is more credible than Shaw's testimony on that topic.

248. Trip blanks are blanks prepared in the lab with distilled water and then carried out to the field with the sample bottles. (N.T. 505-506, 3877)

249. Trip blanks are used to determine whether samples could test positive for contamination as a result of simply being kept where the sample bottles are kept, and the "trip" blank bottle is not opened in the field. (N.T. 3877-78)

250. Field blanks are blanks prepared in the field using distilled water from the lab . (N.T. 505-506, 4057)

251. The purpose of field blanks is to determine whether a sample could test positive for contamination simply as a result of coming into contact with filters, bailers, or other sampling

equipment used in the field. (N.T. 4057)

252. Malick used trip blanks for some samples, but did not use field blanks. (N.T. 542-43)

253. Nesmith also used trip blanks for some samples but did not use field blanks. (N.T. 932)

254. Shaw did not use field blanks and did not remember whether he had used trip blanks. (N.T. 721-723)

255. Malick, Nesmith, and Shaw all collected their samples directly from the tap or pressure tank spigot, without passing the water through other sampling equipment. (N.T. 540-541, 706-707, 910)

256. Cockroft conceded that field blanks were unnecessary for samples where water samples are taken directly from a tap or pressure tank spigot, and not passed through other equipment. (N.T. 4057)

257. The Department had to correctly identify and quantify contaminants present in EPA standards as part of the annual EPA-certification process. (N.T. 754, 841-42)

258. In the analyses performed using EPA method 624, the Department used a gas chromatograph/mass spectrometer (GC/MS) to identify volatile and semi-volatile organic compounds present in the samples. (N.T. 751)

259. Using the GC/MS is an accepted procedure for analyzing and identifying volatile and semi-volatile compounds like Tri and Ta. (N.T. 751, 755)

260. The analyses performed according to EPA method 501.2 were performed using the "VOC extraction method." (N.T. 865)

261. The VOC extraction method has been tested in exhaustive analyses of standards containing known concentrations of contaminants, is generally accepted in the field, and is one of the more accurate tests for determining Tri and Ta contamination levels. (N.T. 861, 864-65)

262. There is not a single method detection limit for a particular compound; the limit depends upon the machine used for the testing and is determined by analyzing known standards. (N.T. 817, 839)

263. The Department ascertained the method detection limits for its lab equipment by performing its own studies with known standards. (N.T. 832, 842)

264. Many of the method detection limits for the equipment at the Department's lab were below the method detection limits listed at 25 Pa. Code § 16.102. (N.T. 849)

265. When the Department's lab analyzed the residential well samples in the gas chromatograph, chemists would smell the samples before introducing them into the machine. (N.T. 827)

266. If the chemists detected an odor when they smelled the samples, they would dilute the sample before running it. (N.T. 827)

267. The chemists would also dilute samples when requested to do so by the person who collected the samples. (N.T. 827)

268. When the gas chromatograph detected extremely high levels of contamination, the lab would run a blank after that sample to ensure that no contaminants remained in the tube before running another sample, and would run blanks between samples for some time afterwards. (N.T. 825)

269. Although, even using this procedure, it is possible for contaminants from the high

sample to affect subsequent samples without affecting the blanks run in-between, there is no better alternative, and, if the lab feels that the high sample might be affecting subsequent analyses despite these measures, it performs the analyses a second time. (N.T. 825-826)

270. On August 16, 1988, the Department filed a complaint seeking assessment of civil penalties against Westinghouse for violations of sections 301, 307, and 401 of the Clean Streams Law, and sections 101.2(a), 101.2(b) and 101.3(a) of the Department's regulations. (Complaint)

DISCUSSION

The Department bears the burden of proof with respect to its complaint for a civil penalty: section 1021.101(b)(1) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.101(b)(1).[3] We shall address the arguments raised in the post-hearing memoranda separately below.

I. SHOULD THE BOARD REFUSE TO CONSIDER CERTAIN PORTIONS OF THE RECORD?

A. Evidence Concerning Out-of-Court Statements

Westinghouse argues that the Board erred in admitting the following evidence concerning out-of-court statements:

> (1) Gary Hull's testimony that Jim Knouse or Dan Markham told him in 1973 that they were taking drums of waste behind the plant to dump them; (N.T. 1905)
>
> (2) Richard Robinson's testimony that an individual at the plant told him that Hess had directed that they should continue cleaning the railroad tracks; (N.T. 1252)

---

[3] The Board's rules of practice and procedure were amended after the hearing in this case was conducted. The provision pertaining to the allocation of the burden of proceeding and burden of proof has since been moved from 25 Pa. Code § *21*.101 to 25 Pa. Code § *1021*.101. Apart from the renumbering, the amended rule at section 1021.101 is unchanged.

(3) Durand Little's testimony that Hess indicated that Westinghouse had dumped materials on site in the 1970s; (N.T. 48) and,

(4) Francis Fair's testimony that Schilling said Tri might have leaked out of the bottom of the scrap metal hoppers and followed the railroad tracks out the door (N.T. 1018), and his testimony that Schilling told him that contaminants which might have leaked out the door could have entered a French drain and followed a geological feature beneath the building. (N.T. 1034)

According to Westinghouse, the out-of-court statements referred to in this testimony are inadmissible because they were made by individuals with no authority to speak for Westinghouse. The Department argues that the testimony is admissible because the out-of-court statements are admissions made by individuals with the authority to make the statements. The Department also contends that Schilling's statements to Fair are not hearsay because they were offered only to show Westinghouse *had notice* that Tri waste might be escaping from the railroad dock, not to show that Tri was in fact doing so.

The Department contends that the declarants had the authority to make the statements because each declarant either had first-hand knowledge of the subject-matter, or spoke concerning an area where they had duties and responsibilities. But, even assuming the declarants had first-hand knowledge, or that their statements concerned areas where they had duties and responsibilities, the Department has not established that the declarants' statements are admissible as admissions.

An agent's statements are admissible as admissions against the agent's principal only if the agent had the authority to make the statements. *Catagnus v. Montgomery County*, 536 A.2d 505 (Pa. Cmwlth. 1988). We cannot conclude that an agent has the authority to make statements simply because he speaks on the basis of first-hand information: an agent can have first-hand knowledge

of a topic without being authorized to make admissions about it. Nor can we conclude that the statements here were authorized simply because they pertained to the declarants' duties and responsibilities. The fact that an agent is authorized to do an act or conduct a transaction does not mean that he is authorized to make statements about it. *Campbell v. G.C. Murphy Co.*, 186 A. 269 (Pa. Super. 1936) (citing Restatement, Agency, § 288).

To the extent that the statements were offered to prove the truth of the matter asserted, they are inadmissible hearsay and we shall strike them from the record. Since Fair's testimony about Schilling's statements were offered only to show that Westinghouse *had notice* that Tri might be escaping from the railroad tracks, and not to prove the truth of the matter asserted, we shall consider Schilling's statements for purposes of the notice issue only.

B. Rebuttal Testimony

Westinghouse argues that the Board erred in admitting certain testimony from Jeffrey Molnar and Michael Webb on rebuttal. According to Westinghouse, Molnar's testimony was improper rebuttal because he simply elaborated on testimony he gave in the Department's case in chief and stated that he disagreed with testimony elicited from Westinghouse's experts. With respect to Webb, Westinghouse argues that his testimony that contamination from the plant was responsible for the presence of PCE in some residential wells was improper rebuttal because that evidence could have been included in the Department's case in chief.

The Department maintains that Molnar's testimony was necessary to rebut the assertion, raised in Westinghouse's case in chief, that an old farm pond--not the plant itself--was the source of the groundwater contamination at the plant site. While the Department concedes Molnar's rebuttal testimony did revisit some of the basic geological information that he testified about in the

Department's case in chief, the Department argues that the repetition is appropriate because a different Administrative Law Judge presided over the presentation of the Department's rebuttal, and the repetition was necessary to show the foundation for Molnar's expert opinion. With respect to Webb, the Department argues his testimony concerning the PCE in the residential wells was proper rebuttal because it rebutted a matter raised by Westinghouse. In its case in chief, Westinghouse elicited testimony from one of its experts suggesting that Westinghouse was not the source of the groundwater contamination because Westinghouse had never used PCE at the plant and industrial-grade Tri degreaser did not contain PCE. During the presentation of the Department's rebuttal, Webb testified that industrial-grade Tri degreaser does contain PCE.

Whether the Board will admit evidence in rebuttal which could have been introduced in the plaintiff's case in chief is a matter within the Board's sound discretion. Rebuttal testimony which could have been presented in the offering party's case in chief may properly be excluded. *Pittsburgh-Des Moines Steel Co., Inc. v. McLaughlin*, 466 A.2d 1092 (Pa. Cmwlth. 1983). But it may also be admitted: the Board has the discretion to admit such evidence so long as it does not act arbitrarily or capriciously. *Potochnik v. Pittsburgh Railways Co.*, 108 A.2d 733 (Pa. 1954).

1. Molnar's testimony

Westinghouse's characterization of Molnar's rebuttal testimony is misleading. While much of his testimony concerned matters which were, or could have been, addressed during the Department's case in chief, he also rebutted some of the points Westinghouse had developed during its case in chief.

We will strike Molnar's rebuttal testimony except to the extent that it rebuts matters raised in Westinghouse's case in chief and could not have been raised in the Department's case in chief.

To the extent that Molnar's rebuttal testimony repeats what he testified to in the Department's case in chief, the evidence is cumulative.[4] To the extent that Molnar's rebuttal testimony raises new matters not addressed in Westinghouse's case in chief, the testimony is prejudicial. The Board did not allow surrebuttal. Consequently, Westinghouse did not have the opportunity to present its own witnesses and exhibits contradicting any new matters raised by the Department in rebuttal. Instead, Westinghouse was limited to cross-examining the Department's witnesses.

Striking Molnar's rebuttal testimony to the extent indicated is the most equitable means of effectuating the interests of both Westinghouse and the Department. The Department had no reason to expect that matters it could have raised in its own case in chief, but not addressed in Westinghouse's case in chief would be admitted on rebuttal. Therefore, the Department is not prejudiced by striking the rebuttal testimony concerning those matters. As for the other testimony the Department elicited on rebuttal, it will still be part of the record. Westinghouse is not prejudiced with respect to that evidence because it knew ahead of time that there would be no surrebuttal and had the opportunity to develop the evidence in its case in chief accordingly.

2. Webb's testimony

We shall not strike Webb's rebuttal testimony that industrial-grade Tri contains PCE. That testimony is appropriate because it directly rebuts a point raised in Westinghouse's case in chief. Westinghouse elicited testimony suggesting that the plant was not the source of the contamination in the residential wells because: (1) PCE was one of the contaminants found in a number of the

---

[4] Such testimony may have been useful to acquaint the new presiding Administrative Law Judge with Molnar's qualifications and other general background information developed during the Department's case in chief, but that purpose has been served even if we strike the testimony now.

wells, (2) Westinghouse had never used PCE at the plant, and (3) the degreasers at the plant did not contain PCE. In the Department's case in rebuttal, Webb testified that the Tri degreaser used at the plant likely *did* contain PCE because: (1) PCE was a byproduct of the process used to manufacture Tri in the late 1960s and early 1970s, when the plant used the Tri degreaser, and (2) it was very unlikely that the Tri degreaser used at the plant would have had the PCE removed because doing so would have required multiple distillations and increased the price by ten to 100 times. Although the Department could conceivably have introduced this evidence as part of its case in chief, it was not required to anticipate Westinghouse's defense. Accordingly, the evidence was appropriate rebuttal.

II. IS WESTINGHOUSE COLLATERALLY ESTOPPED FROM ARGUING THAT IT DID NOT CAUSE THE CONTAMINATION?

The Department argues that Westinghouse is collaterally estopped from arguing that it did not cause the groundwater contamination at and near the plant site because Westinghouse has been determined to be the cause of that contamination in two previous actions--*Fishel v. Westinghouse*, 617 F.Supp. 1531 (M.D. Pa. 1985), and *Merry v. Westinghouse*, 684 F.2d 852 (M.D. Pa. 1988)--brought by the users of nearby residential wells. According to the Department, in *Fishel* summary judgment was entered against Westinghouse on the issue of causation after Westinghouse stipulated that it had caused the contamination of the wells at issue. In *Merry*, a jury found by special interrogatory that the organic solvents contaminating wells in the vicinity came from the plant. The Department argues that the Board erred by preventing the Department from introducing evidence regarding *Fishel* and *Merry* at the hearing, and urges us to hold Westinghouse liable for causing the groundwater contamination in the wells near the plant on the basis of the reported decision in

Fishel v. Westinghouse Electric Corporation, 617 F. Supp. 1531 (M.D. Pa. 1985).

Westinghouse maintains that collateral estoppel is inappropriate here because: (1) additional evidence has come to light since the previous litigation on the issue of who caused the contamination; (2) Westinghouse bore a heavier burden on the issue in the previous litigation than it does here; (3) Westinghouse did not have a full and fair opportunity to litigate the issue in the previous litigation; (4) the issue resolved in the previous litigation is not identical to the one here; and, (5) the issue resolved in the previous litigation was not essential to the judgment in those cases.

Fortunately, we need not resolve this issue. Even assuming collateral estoppel were inappropriate here, the Department has provided ample evidence to show that Westinghouse is responsible for the contamination in the wells near the plant.[5]

III. WAS THE DEPARTMENT'S INVESTIGATION OF THE CONTAMINATION TAINTED BECAUSE SOME IN THE DEPARTMENT SUSPECTED WESTINGHOUSE WAS THE SOURCE OF THE CONTAMINATION EVEN BEFORE THE INVESTIGATION STARTED?

Westinghouse argues that the Department's investigation of the site was tainted because some Department personnel suspected that the plant was the source of the contamination even before the investigation started. The Department failed to respond to this argument in its post-hearing memoranda.

Even assuming some Department personnel suspected that Westinghouse was the source of the pollution prior to the investigation, that would not show that the Department was

[5] We detail the reasons why we conclude the plant is the source of the contamination in the wells in our analysis of other possible sources, at section IV.D.1 of the discussion.

impermissibly biased against Westinghouse. As we held in *Harbison-Walker Refractories v. DEP*, EHB Docket No. 91-268-MJ (Adjudication issued February 23, 1996), the Department does not improperly stray beyond its prosecutorial role simply because it believes a person is responsible for violations before it conducts an investigation.

IV. THE REMAINING ISSUES

Our analysis of the remaining issues in this case is complicated by the way the parties have presented them. Since these complications affect the disposition of the case, we shall briefly describe them and how they affected out analysis.

Ordinarily in a case for civil penalties, the Board is presented with an allegation that an individual is liable for a specific number of violations of particular statutory or regulatory provisions as the result of specific incidents occurring on certain occasions. The Department might argue, for instance, that John Doe is liable for 10 violations of section 301 of the Clean Streams Law because he discharged industrial waste into waters of the Commonwealth without a permit every other day between June first and 20th, 1994.

The situation here is different, however. The Department never alleges when many of the individual violations occurred, or how many occurred, in its complaint or post-hearing memoranda. Nor did the Department request a specific civil penalty for each violation. It simply lumped the alleged violations into three loose groups--one for the violations of sections 301, 307, and 401 of the Clean Streams Law; one for violations of section 101.2(a) of the Department's regulations; and one for violations of sections 101.2(b) and 101.3(a) of the Department's regulations--and requested a specific penalty for each group.

In its post-hearing memoranda, the Department asserts that Westinghouse violated

sections 301, 307, and 401 of the Clean Streams Law because:

(1) Westinghouse's plant supervisor had 50 gallons of spent Tri degreaser dumped onto the ground from a storage tank, resulting in Tri entering the groundwater;

(2) Westinghouse allowed degreaser to escape to the soil from the old drum storage area, and, ultimately, to enter the groundwater;

(3) Westinghouse allowed degreaser accidentally spilled while refilling the degreasing machines to escape through floor joints, and, ultimately, to enter the groundwater;

(4) Westinghouse allowed degreaser which leaked from drums damaged during delivery to escape into the ground outside the volatile storage area and, ultimately, to enter the groundwater;

(5) Westinghouse allowed plant employees in the welding area to dump spent degreaser into the floor joints and onto the ground, from where the degreaser eventually entered the groundwater;

(6) Westinghouse allowed degreaser-contaminated runoff from cleaning the paint grates to escape to the groundwater near the pumphouse;

(7) Westinghouse allowed degreaser which had leaked from the storage tank pump, and from the chemical trucks refilling the tank, to spill onto the ground in the courtyard area and, ultimately, to enter the groundwater;

(8) Westinghouse allowed degreaser-contaminated runoff from cleaning the paint grates to escape to the storm sewer near the pumphouse; and,

(9) Westinghouse allowed degreaser to escape from the railroad dock area onto the ground and, ultimately, into the groundwater.

For most of the types of violations above, the Department never alleges how many of each type of violation occurred or identified the facts behind each separate violation. Instead, the Department is content to simply group the various individual violations into generic categories, list one or more examples from each category, and resort to one-size-fits-all arguments. The Department also fails to allege precisely when each of the violations occurred. The Department's

post-hearing memoranda aver only that the violations took place "[f]rom the time [Westinghouse] began operations in 1969" and occurred "on a regular and continuing basis." (The Department's post-hearing memorandum, p. 114) The only exceptions are the alleged dumping of a storage tank, which the Department alleges occurred once in the 1970s, and the alleged violations concerning the leaks from drums damaged during delivery, which the Department alleged occurred "in the early seventies until 1975." (The Department's post-hearing memorandum, p. 130)

The Department used the same approach with respect to the alleged violations of its regulations. It is impossible to tell from the complaint and post-hearing memoranda just how many violations are alleged to have occurred, when they are supposed to have taken place, or the incidents giving rise to each violation.

Westinghouse never objected to the Department's lack of specificity. Instead, it too resorted to the one-size-fits-all approach. For instance, when Westinghouse argued that the statute of limitations had run before the Department filed its complaint because the Department had failed to show that the degreasers had been mishandled at the plant within five years of the time the complaint was filed, Westinghouse assumed that the limitations period for all the different types of statutory and regulatory violations alleged here started to run at the time degreaser was mishandled. This, as we shall explain shortly, is incorrect.

The same inattention to detail with respect to individual violations infected the parties' presentation of evidence. Where there was testimony concerning conditions and practices at the plant, for instance, both parties frequently made little effort to narrow down precisely what time periods were involved.

Why is the number of violations and the time when each of them occurred so important?

The number of violations, obviously, is a key factor in determining the appropriate amount of the civil penalty. The time the violations occurred, meanwhile, is key for a number of reasons. First, since the Legislature increased the maximum penalty for each continuing day of Clean Streams Law violations on October 10, 1980, the penalty that can be imposed for each day of a continuing Clean Streams Law violation depends on whether the violation occurred before or after the civil penalty provisions were amended. Second, since the Clean Streams Law provides that the maximum penalty increases for each day of continued violation, the appropriate penalty depends on when the violation started and when it ended. Third, the appropriate civil penalty depends on whether the violation occurred before or after 1975, because: (1) Tri is more toxic than Ta, (2) the plant switched from Tri to Ta degreaser in 1975, and (3) the witnesses who testified about the handling of degreaser at the plant often did not specify whether the releases involved Tri or Ta degreaser. Finally, since Westinghouse argues that the Department's action is barred by the statute of limitations, the dates when the violations occurred are important for determining when the causes of action accrued and whether the limitations period expired before the Department filed its complaint.

The Board appreciates the fact that this was a long and complex case and that the parties expended considerable effort preparing for it. But, by opting to economize on many of their arguments, the parties have rendered a complicated case even more convoluted and have caused delay in the preparation of this adjudication.

The perils of resorting to one-size-fits-all arguments in the face of complex facts and varied legal issues will soon be apparent. Since the parties have raised the issues, the Board must address them. But, because the parties have raised many of the issues in the way they did, they overlooked

many of the smaller issues which affect the resolution of the broader issues addressed in the post-hearing memoranda. The end result: Despite the extensive time and resources the parties devoted to litigating this action, numerous aspects of this case turn on issues other than those the parties may have anticipated.

The discussion of the details of the substantive issues in this case is divided into four major categories: (A) whether the Department's action is barred by the statute of limitations; (B) the reliability of the Department's water sampling; (C) whether the Department has proven Westinghouse committed the violations alleged; (D) what civil penalty is appropriate given the violations proven.

We turn our attention first to the statute of limitations issues. Since the Department cannot prevail with respect to any aspect of the complaint which is barred by the statute of limitations, we can eliminate those aspects of the complaint from our analysis of other issues.

A. <u>Is the Department's Action Barred by the Statute of Limitations?</u>

Westinghouse argues that the complaint for civil penalties is barred by the statute of limitations with respect to all of the alleged violations. According to Westinghouse, the Department failed to file the complaint within the applicable limitations period because:

> (1) The limitations period starts to run at the time the violations occurred, as opposed to when the Department discovered the contamination in the area;
>
> (2) The Department did not file the complaint for civil penalties until August 16, 1988;
>
> (3) The Department failed to show that chemicals were mishandled at the plant after August 15, 1983; and,
>
> (4) The limitations period for bringing a civil penalty action ended on June 27, 1979, for violations occurring prior to June 27, 1978; was two years for violations

occurring between June 27, 1978, and October 9, 1978; and was five years for violations occurring after June 27, 1978.

The Department, meanwhile, argues that the limitations period started to run when it discovered the contamination--not from when the violations occurred--and that its complaint for civil penalties was timely because the complaint was filed within five years of the Department discovering the contamination. The Department also raises the novel argument that, because Westinghouse has admitted that the actions were filed within five years of the Department's discovery of the contamination, Westinghouse cannot now argue that the Department *should have* discovered them sooner. (The Department post-hearing reply brief, p. 37)

Neither Westinghouse nor the Department went to the trouble of analyzing the statute of limitations issue with respect to each of the alleged violations separately. As noted previously, Westinghouse argued that the limitations period for violations of sections 301, 307, and 401 of the Clean Streams Law started to run at the time the degreasers were mishandled at the plant, but Westinghouse never explained why the limitations period started to run at that time rather than when the degreaser actually entered the groundwater--the event which triggers liability under sections 301, 307, and 401. As for the Department, it made no attempt to explain why the discovery rule applies in the same manner to violations involving failure to dike a paved area in the open and violations pertaining to the subterranean discharge of pollutants to groundwater.

1. <u>The applicable statute of limitations</u>

The statute of limitations applicable to actions for civil penalties under the Clean Streams Law has changed several times since 1969, when the Department alleges the first violations occurred at the plant. Initially, no statute of limitations applied to actions for civil penalties brought

under the Clean Streams Law. *See, e.g., DER v. Rushton Mining Company*, 1976 EHB 117, 131. Later, however, the Legislature enacted a two-year statute of limitations for a variety of actions, including Commonwealth actions for civil penalties. That statute of limitations (the general statute of limitations), at 42 Pa.C.S. § 5524, became effective on June 27, 1978.[6] The limitations period for civil penalty actions under the Clean Streams Law changed again when the Legislature added a limitations provision to the Clean Streams Law, at section 605(c) of the Clean Streams Law, 35 P.S. § 691.605(c). That provision (the Clean Streams Law statute of limitations) became effective on October 10, 1980, and extended the limitations period for actions brought under the Clean Streams Law to five years.[7]

Westinghouse argues that, in light of these statutes of limitation, the Department had to file a complaint for civil penalties on or before June 28, 1979, for causes of action which accrued before June 27, 1978; before October 10, 1980, for causes of action which accrued between June 27, 1978,

---

[6] Section 5524 provided:

> The following actions . . . must be commenced within two years:
>
> > (5) An action upon a statute for a civil penalty . . . , where the action is given to a governmental unit.

(Section 5524 was amended in 1982, but the amendment is immaterial here.)

[7] Section 605(c) provides:

> Any other provision of law to the contrary notwithstanding, there shall be a statute of limitations of five years upon actions brought by the Commonwealth pursuant to this section.

35 P.S. § 691.605(c).

Section 605 pertains to civil penalties under the Clean Streams Law.

and October 9, 1978; and within five years for causes of action which accrued on or after October 10, 1978. The Department counters that the action is not barred because it filed the complaint within five years of discovering the contamination, and the limitations period started to run only when the Department discovered the contamination, not when the violations actually occurred.

Since neither of the parties allege that the limitations period for any of the violations started to run and then was tolled sometime thereafter (as is the case, for instance, where a cause of action accrues against a defendant who later leaves the state for four months or more), whether the Department filed its complaint within the limitations period for each of the alleged violations turns on the length of applicable limitations period and when the limitations period started to run.

2. <u>The length of the limitations period</u>

Since the applicable statute of limitations changed between some of the alleged violations here, the length of the limitations period varies depending on when the period started to run. For actions where the limitations period started to run before June 27, 1976, the Department had to file by June 27, 1979, based on the following analysis. The general statute of limitations at 42 Pa.C.S. § 5524, which became effective on June 27, 1978, and provided that the Commonwealth had to bring actions for civil penalties within two years actions where the limitations period started to run prior to June 27, 1976, might seem to bar such actions as of June 27, 1978, based on § 5524 alone. But in the same act in which the Legislature enacted the general statute of limitation, the Legislature also adopted a savings clause. Section 25(a) of the Act of July 9, 1976, P.L. 586, No. 142, provides a one-year grace period for actions which would otherwise have been extinguished

by the general civil penalties statute of limitation.[8]

For violations where the limitations period started to run between June 27, 1976, and October 9, 1978, the Department had to file a complaint within two years, as provided by the general statute of limitations at section 5524.

For violations where the limitations period started to run on or after October 10, 1978, the Department had five years to file a complaint for civil penalties. The situation with respect to violations where the limitations period started to run on or after October 10, *1980*, is straightforward: since the Clean Streams Law statute of limitations had been enacted by that time, the Department had to file civil penalty actions on those violations within five years. The situation with respect to violations where the limitations period started to run between October 10, 1978, and the time the Clean Streams Law statute of limitations became effective is more complicated.

---

[8] Section 25(a) provides:

> (a) Any civil action or proceeding:
>
> > (1) the time heretofore limited by statute for the commencement of which is reduced by any provision of this act; and
> >
> > (2) which is not fully barred by statute on the day prior to the effective date of this act;
>
> may be commenced within one year after the effective date of this act, or within the period heretofore limited by statute, whichever is less, notwithstanding ... any other provision of this act providing a shorter limitation.

Since there was no applicable statute of limitations for Commonwealth civil penalty actions prior to the effective date of section 5524, section 5524 reduced the time in which an action could be filed. Therefore, the savings clause provides the Department with a one-year grace period from June 27, 1978, to file actions on those violations which would otherwise have been extinguished under section 5524.

Although the initial statute of limitations required that these actions be filed within two years, the actions would have still been viable at the time the limitations period was extended to five years.[9] When the Legislature extends the statute of limitations period applying to a class of actions, the longer time period applies to those actions accruing under the prior statute of limitations which had not expired prior to the extension. *Taglianetti v. Workmen's Compensation Appeal Board (Hospital of University of Pennsylvania)*, 469 A.2d 548 (Pa. 1983); *Clark v. Jeter*, 518 A.2d 276 (Pa. Super. 1986).

Since the longest of the relevant limitations periods was the 5 year period in effect on August 16, 1988--when the action for civil penalties was filed--causes of action are barred where the limitations period started to run before August 16, 1983.

3. <u>When the limitations period starts to run</u>

When the limitations period starts to run depends on whether the limitations period is tolled or not. Ordinarily, the statute of limitations for an action begins to run when the cause of action accrues. *Leedom v. Spano*, 647 A.2d 221 (Pa. Super. 1994). A cause of action "accrues," for limitations purposes, when the plaintiff could first successfully prosecute the action. *United National Insurance Company v. J.H. France Refractories Company*, 612 A.2d 1371 (Pa. Super. 1992). Usually, this is when the harm or injury giving rise to the action occurred. *See, e.g., Ayers v. Morgan*, 154 A.2d 788, 792 (Pa. 1959).

---

[9] The extension of the statute of limitations did not, however, revive those actions which had already expired under the general civil penalties statute of limitation. After an action has become barred by an existing statute of limitations, the general rule is that no subsequent legislation will remove the bar or revive the action. *Larthey v. Bland*, 532 A.2d 456 (Pa. Super.), *petition for allowance of appeal denied*, 544 A.2d 1343 (Pa. 1987).

There are, however, exceptions to the general rule that the limitations period starts to run when the cause of action accrues. The only exception that the Department argues is applicable here is the so-called "discovery rule." Where the discovery rule applies, the running of the limitations period is tolled from the time the cause of action accrues until the person filing the action knew, or reasonably should have known, that an actionable injury has been sustained. *See, e.g., Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992).

The Department argues that the violations alleged here fall within the discovery rule because the federal courts have applied the rule when calculating when the limitations period starts to run for violations under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (Clean Water Act), and because Pennsylvania courts have held that the rule applies in other actions involving subsurface injury. The Department also argues that, because Westinghouse has admitted that the complaint was filed within five years of the Department's discovery of the contamination, Westinghouse cannot now argue that the Department *should have* discovered the violations sooner.

Westinghouse argues that the discovery rule is inapplicable here because the Department would have discovered the contamination in the vicinity earlier had the Department exercised "reasonable diligence." In support of its position, Westinghouse asserts that the Department inspected the site at least three times prior to August 15, 1983, that the Department concedes that evidence of contamination at the plant was obvious, and that the Department had the authority under section 5(b)(8) of the Clean Streams Law, 35 P.S. § 691.5(b)(8), to inspect the site at any time to determine whether an improper release had occurred.

Neither Westinghouse nor the Department explained why the discovery rule applied, or did not apply, to individual violations.

We need only determine whether the discovery rule applies with respect to those aspects of the Department's action which Westinghouse has proven would otherwise be barred by the statute of limitations. Since the statute of limitations is an affirmative defense, Westinghouse bears the initial burden of showing that the Department action was filed after the limitations period would have expired had it started to run at the time the cause of action accrued. *Re Huffman's Estate*, 36 A.2d 640 (Pa. 1944). Assuming Westinghouse satisfies that criteria, the burden then shifts to the Department to show that the discovery rule tolled the running of the statute of limitations:

> The plaintiff has the burden of justifying any delay beyond the date on which the limitation would have expired if computed from the date on which the acts giving rise to the cause of action allegedly occurred. He must allege and prove facts which show that he made a reasonable efforts to protect his interests and which explain why he was unable to discover the operative facts for his cause of action sooner than he did.

Bickel v. Stein, 435 A.2d 610, 612 (Pa. Super. 1981).

Before we turn to the issue of the applicability of the discovery rule, therefore, we shall first determine whether Westinghouse has proven that any aspects of the Department's complaint are barred by the statute of limitations assuming the limitations period started to run when the cause of action accrued. Since the Department filed the complaint for civil penalties on August 16, 1988, and the limitations period has been five years since 1980, Westinghouse must prove that a cause of action accrued before August 16, 1983, to show that the limitations period for a violation expired before the Department filed its complaint.

a. The alleged violations of sections 301, 307, and 401 of the Clean Streams Law

The Department maintains that Westinghouse violated sections 301, 307, and 401 by allowing Tri and Ta to escape from the plant and contaminate groundwater and surface water in the

vicinity. Westinghouse argues that the Department cannot recover for these alleged violations because the Department did not present any evidence showing that Westinghouse mishandled any of the chemicals within five years of the Department filing its complaint.

There are at least two major problems with Westinghouse's argument. First, as noted above, *Westinghouse*--not the Department--bears the initial burden with respect to whether the action was filed within the limitations period as calculated from the time the cause of action accrued. If Westinghouse proves that the action was not filed within that time, *then* the burden shifts to the Department to show that the running of the statute was tolled in some way.

Second, Westinghouse is mistaken when it assumes that the cause of action for these violations accrued when the chemicals were mishandled. As noted above, a cause of action "accrues," for limitations purposes, when the plaintiff could first successfully prosecute the action. *United National Insurance Company v. J.H. France Refractories Company*, 612 A.2d 1371 (Pa. Super. 1992). Sections 301 and 307(a) prohibit the introduction of "industrial wastes" into waters of the Commonwealth. 35 P.S. §§ 691.301 and 691.307(a). Section 401 prohibits the introduction of substances "resulting in pollution." 35 P.S. §§ 691.401. Therefore, a cause of action accrues for violations of these sections only when industrial waste, or a substance resulting in pollution, actually *enters* waters of the Commonwealth--not when it is first released into the environment. To sustain its burden, Westinghouse had to show that the alleged violations involve discharges that reached waters of the Commonwealth before August 16, 1983.

b. The alleged violations of 25 Pa. Code § 101.3(a)

The situation is similar with respect to section 101.3(a) of the Department's regulations. The Department argues that Westinghouse engaged in "repeated and continuous" violations of

section 101.3(a) because Westinghouse: (1) failed to design its facility to minimize the chances of accidental releases, (2) failed to educate its employees with adequate instruction in how to handle Tri and Ta, and (3) failed to "manage the solvents" adequately. (The Department's post-hearing memorandum, p. 165)

Neither the Department nor Westinghouse's post-hearing memoranda addressed section 101.3(a) in their statute of limitations analyses. The alleged violations of section 101.3(a) are simply lumped in with those of the other regulations. We are left to resolve the question of whether section 101.3(a) violations are barred based on Westinghouse's general argument because the complaint was not filed within five years of the time Westinghouse allegedly mishandled the degreaser, and the Department's general argument that the complaint was filed within the limitations period because it was filed within five years of the Department discovering the contamination at the site.

As in the case of violations of sections 301, 307, and 401 of the Clean Streams Law, a cause of action accrues under section 101.3(a) of the Department's regulations only when pollution actually enters a water of the Commonwealth. Section 101.3(a) provides, in pertinent part, that persons involved in the storage, use, or disposal of "polluting substances" must take "necessary measures" to prevent the substances from reaching waters of the Commonwealth. 25 Pa. Code § 101.3(a). Precisely when a cause of action accrues under section 101.3(a) turns on the construction of the phrase "necessary measures." If a person is liable for a violation of section 101.3(a) only for omissions which *actually* result in a polluting substance entering a water of the Commonwealth, then a cause of action accrues under section 101.3(a) only when the pollutant enters the water. (Prior to that time, the Department would not be able to successfully prosecute an action because

the person responsible could still take "necessary measures" to keep the pollutant from reaching the waters.) If, however, one is also liable for omissions which could *conceivably* result in a polluting substance entering a water of the Commonwealth, then the cause of action accrues at the time of the omission, since that would be the first time one could successfully prosecute an action. We have not addressed the issue in our previous decisions involving section 101.3(a).

Although neither party addressed section 101.3(a) in their statute of limitations analysis, the Department does address the construction of section 101.3(a) elsewhere in its post-hearing memoranda.[10] The Department argues that one is liable under section 101.3(a) for any omission which could conceivably result in a polluting substance entering a water of the Commonwealth. In support of that proposition, it points to *DER v. Marileno Corp.*, 1989 EHB 206, 213; *J.T.C. Industries, Inc. v. DER*, 1985 EHB 619; and *COA Pallets, Inc. v. DER*, 1979 EHB 267, 283.

The Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992). Here, however, the Department's interpretation *is* clearly erroneous. Under the Department's reading, persons who use a polluting substance and allow that substance to enter a water of the Commonwealth are liable for a separate violation of section 101.3(a) for each and every measure they *might have* implemented to prevent the release: if a release could have been averted by designing a storage container differently, that would be one violation of section 101.3(a); if the same release could have been prevented by providing better training in the handling of the chemical, that would be another violation; if the release could have

---

[10] Westinghouse did not address the construction of section 101.3(a) in its post-hearing memorandum.

been prevented by placing the storage container on pavement which was diked, that would constitute still another violation; and so on *ad infinitum*. The construction the Department suggests would effectively eviscerate the meaning of the word "necessary" in section 101.3(a).[11] Section 101.3(a) does not require that persons who use polluting substances take *every conceivable* measure to prevent polluting substances from entering Commonwealth waters; it provides only that they shall take "*necessary* measures" to do so. 25 Pa. Code § 101.3(a) (emphasis added). We cannot conclude that a person has failed to take a measure which is "necessary" to prevent a polluting substance from entering a water of the Commonwealth unless there is some evidence that the omission has resulted in the substance entering the water. In other words, where a person using a polluting substance allows the substance to enter a water of the Commonwealth, he is liable for one violation of section 101.3(a); he is not liable for individual violations of section 101.3(a) for each and every action he might have taken which would have prevented the release.

As for the Department's reliance on *DER v. Marileno Corp.*, 1989 EHB 206, 213, *J.T.C. Industries, Inc. v. DER*, 1985 EHB 619, and *COA Pallets, Inc. v. DER*, 1979 EHB 267, 283, that reliance is misplaced. *Marileno* and *J.T.C. Industries* refer to section 101.3, but otherwise are

---

[11] There are also some practical problems with accepting the proposition that one is liable for separate violations under section 101.3(a) for failing to take every action which might have averted a spill. For instance, that construction of section 101.3(a) would require a virtually microscopic examination of the chain of events leading up to any release. Bacon attested to the difficulty of this type of causation analysis when he wrote, "It were infinite for the law to judge the cause of causes, and their impulsion of one another; therefore it contenteth itself with the immediate cause, and judgeth by that, without looking to any further degree." Bacon, *Maxims of Law*, Reg. I (*as quoted in* W. Page Keeton, *Prosser and Keeton on the Law of Torts,* § 42, at n.4 (5th ed. 1984)).

entirely unrelated to the issue here.[12] *COA Pallets*, meanwhile, does not stand for the proposition that one can be liable for violating section 101.3(a) even in the absence of a polluting substance entering a water of the Commonwealth. The sum total of our analysis of section 101.3(a) in *COA Pallets* consisted of a quote from that regulation and then a statement that section 101.3(a) had been violated because polluting substances had been stored in an improper manner. 1979 EHB 267, 283. The Board had already found, earlier in the *COA Pallets* adjudication, that because of improper storage, polluting substances had reached the groundwater. 1979 EHB 274.

Since a cause of action accrues under section 101.3(a) when a polluting substance enters a water of the Commonwealth, Westinghouse had to show that one of these situations existed prior to August 16, 1983, with respect to the alleged section 101.3(a) violations.

c. The alleged violations of 25 Pa. Code § 101.2(a)

The situation is slightly more complicated with respect to the alleged violations of section 101.2(a) of the Department's regulations. Section 101.2(a) provides that, where a substance causing pollution enters a water of the Commonwealth, or is placed in a position where it "might" enter a water of the Commonwealth, the person in charge of that substance must "forthwith notify the Department by telephone of the location and nature of the discharge and, if reasonably possible

---

[12] In *Marileno*, a partial default adjudication, we held that the owners of a power station violated section 101.3 by failing to prevent their power transformers from releasing 4,000 gallons of oil into the Susquehanna River, and failing to contain and clean up the spill after it occurred. There is no indication in that opinion that one can be liable for multiple violations of section 101.3(a) for events surrounding one release. *J.T.C. Industries*, meanwhile, does not pertain to section 101.3(a) at all. In that decision, we denied a motion for summary judgment submitted by an appellant which insisted that it was entitled to judgment as a matter of law on the issue of whether it had submitted an appropriate prevention, preparedness, and contingency plan to the Department in accordance with *section 101.2(b)* of regulations.

to do so, to notify downstream users of the waters." 25 Pa. Code § 101.2(a).

The Department avers that Westinghouse violated section 101.2(a) because Westinghouse failed to properly notify it and downstream users of the Tri and Ta releases and argues that it filed its complaint within the limitations period because Westinghouse's continued failure to provide adequate notice constituted a continuing violation from the time that plant started operations in 1969 to at least the time the Department filed the complaint for civil penalties.

Westinghouse argues that the limitations period started to run from the moment section 101.2(a) was first violated because neither the Clean Streams Law nor the regulations thereunder provide that violations are "continuing violations," where each day of an extended violation is treated as a separate offense and the statute of limitations begins anew on each day, for purposes of calculating civil penalties. In support of its position, Westinghouse invokes the principle of statutory construction that the mention of one thing implies the exclusion of others, and then points to language in section 602(d) of the Clean Streams Law, 35 P.S. § 691.602(d), and a number of civil and criminal penalty provisions from other Commonwealth statutes.

To the extent that Westinghouse argues that each day it failed to notify the Department and the downstream users did not count as a separate and distinct violation of § 101.2(a) of the regulations, Westinghouse is correct. Neither the regulations nor the civil penalty provisions of the Clean Streams Law expressly provide that each day of a violation of the regulations counts as a separate violation for purposes of civil penalties. Where the Legislature includes specific language in one portion of a statute, but excludes it from another, the language is not implied where excluded. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Prekop*, 627 A.2d 223 (Pa. Cmwlth. 1993). Since section 602(d) of the Clean Streams Law expressly provides that

each day of violation of the regulations counts as a separate offense for purposes of *criminal* penalties,[13] the omission of similar language from section 605, the *civil* penalties provision of the Clean Streams Law, shows that each day of a violation is not to be treated as a separate violation for purposes of civil penalties.[14]

Westinghouse's failure to give proper notice of the danger of contamination, therefore, is technically only one violation. But the fact that the failure to notify amounted to *one* extended violation--rather than *many* daily violations--does not necessarily mean that the limitations period started to run on the first day of the violation, as Westinghouse suggests.

Where a cause of action is based on the failure to perform a duty, the statute of limitations usually starts to run from the date the duty was not performed. *Plazak v. Allegheny Steel Co.*, 188

---

[13] Section 602(d) provides, in pertinent part: "Each day of continued violation of any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to this act shall constitute a separate offense."

[14] The provisions Westinghouse cites from acts other than the Clean Streams Law are irrelevant here. The rule that "the expression of one thing excludes others" is applied *within* a statute, not *between* statutes. Here Westinghouse argues that the expression of one thing in one statute implies its exclusion in other statutes where not expressly mentioned. In support of that proposition, Westinghouse cites *O'Boyles Ice Cream Island, Inc. v. Commonwealth*, 605 A.2d 1301, 1302 (Pa. Cmwlth. 1992). Yet *O'Boyles Ice Cream Island* involved a comparison of two provisions in the *same* statute. And when the Commonwealth Court articulated the applicable law in that case, it wrote, "Where the legislature includes specific language *in one section of a statute* and excludes the language *from another*, the language should not be implied where excluded." *Id.* (emphasis added) When construing the meaning of language within a statute, the overriding goal is to effectuate the intent of the Legislature. *Frontini v. Department of Transportation*, 593 A.2d 410 (Pa. 1991). Given the fact that none of the provisions from the other statutes pertain to the same subject matter as the civil penalty provisions in the Clean Streams Law, and the fact that all of the provisions but those from the Solid Waste Management Act were enacted *after* the last pertinent amendment to the civil penalty provisions in the Clean Streams Law, the provisions from the other acts shed no real light on the Legislature's intent with respect to the Clean Streams Law civil penalty provisions.

A. 130 (Pa. 1936). If the duty is a continuous one, however, the failure to perform it is also regarded as continuous and the limitations period runs from the time the duty terminates. *Id.* The crucial issue here, therefore, is not whether a violation of section 101.2(a) is a *continuing violation*, but whether the duty to provide notice under the regulation is a *continuous duty*. If the duty is continuous, the limitations period starts to run on the last day of the violation; if it is not, the limitations period will typically start to run on the first day of the violation.

The duty to notify the Department and downstream users of the danger of contamination under section 101.2(a) is a *continuous* duty. The manifest objective of section 101.2(a) is to get persons responsible for contamination threatening Commonwealth waters to provide notice so that the Department and persons using the water can take appropriate precautions. If the duty to report under section 101.2(a) were not continuous, an individual who failed to notify the Department promptly would have no duty to notify the Department afterwards. This construction would frustrate the very policy goals section 101.2(a) was intended to implement. Individuals responsible for conditions posing a threat to Commonwealth waters would have an incentive to lie low and provide no notice, hoping that the contamination and their role in it would never come to light. Section 101.2(a) was promulgated precisely because chemical releases and other conditions which pose a threat to Commonwealth waters are often not readily apparent to other users and the Department.

Because the duty to provide notice under section 101.2(a) is a continuous duty, the limitations period for any section 101.2(a) violations did not start to run until Westinghouse no longer had a duty to notify the Department and the downstream users. Westinghouse, however, *never* notified the Department or others users of the danger of contaminated surface water or

groundwater. (N.T. 2736-737, 3017) Even assuming Westinghouse's duty to notify ended when the Department and downstream users received notice of the danger from sources other than Westinghouse, Westinghouse failed to elicit evidence that either one received notice from any source prior to August 16, 1983. Since the Department filed its complaint on August 16, 1988, and the limitations period at the time was five years, Westinghouse had to show that its duty to provide notice ended before August 16, 1983, to show that the limitations period would have run if calculated from the date the cause of action accrued.

d. The alleged violations of 25 Pa. Code § 101.2(b)

The analysis of when the limitations period starts to run for violations of section 101.2(b) of the Department's regulations is similar to that for when the limitations period starts to run under section 101.2(a). Subsection (b) of section 101.2 provides that, where a substance causing pollution enters a water of the Commonwealth, or is placed in a position where it might enter a water of the Commonwealth, the person in charge of the substance must "immediately take or cause to be taken necessary steps to prevent injury to property and downstream users of the waters and to protect the waters from pollution or a danger of pollution...." 25 Pa. Code § 101.2(b) The parties make essentially the same arguments with respect to section 101.2(b) that they make with respect to section 101.2(a).

As in the case of section 101.2(a), section 101.2(b) imposes a *continuous duty* upon individuals responsible for conditions which pollute, or threaten to pollute, waters of the Commonwealth. The clear purpose of section (b) is to ensure that persons responsible for these conditions do whatever they can to minimize the harm to downstream water users, nearby property, and the waters of the Commonwealth. If the duty to take these measures were not continuous, then

individuals who failed to take such measures "immediately"--as required by section 101.2(b)--would have no duty to take the measures thereafter. That construction would undermine the very policy goals section 101.2(b) was meant to implement.

Since the duty under section 101.2(b) is a continuous one, where a person fails to "immediately" take action to minimize the harm from a spill threatening waters of the Commonwealth, the limitations period starts to run from the time he or she does take such action. To show that the limitations period expired with respect to the alleged section 101.2(b) violations, therefore, Westinghouse had to show that it had, prior to August 16, 1983, taken those steps necessary to minimize the harm which would result from the alleged releases. Since Westinghouse never even argues that it took such steps prior to August 16, 1983, it has not sustained its burden.

4. <u>The discovery rule</u>

Since Westinghouse has not met its burden of showing that the limitations period would have expired if calculated from the time the cause of action accrued, Westinghouse's statute of limitations argument fails even if Westinghouse were correct in asserting that the discovery rule does not apply here. But even assuming Westinghouse had shown that the limitations period would have expired if calculated from the time the cause of action accrued, the statute of limitations would still not bar the Department's action. The discovery rule applies in this case.

The Department argues that the alleged violations fall within the discovery rule and, therefore, the limitations period for them did not start to run until the Department discovered them. In support of its position, the Department notes that in actions for subsurface injury, Pennsylvania law deems the limitations period as starting to run when the injury was discovered or should have been discovered, and that federal courts have applied the discovery rule when calculating the

limitations period for violations under the federal Clean Water Act, Act of October 18, 1972, P.L. 92-500, *as amended*, 33 U.S.C. § 1251 *et seq.* (Clean Water Act).

Westinghouse argues that the discovery rule does not apply to violations of the Clean Streams Law and that, even if it did, the Department's action would still be untimely. According to Westinghouse, the Department would have known of the contamination more than five years before the action was filed had the Department been exercising "reasonable diligence." In support of that proposition, Westinghouse notes that the Department: (1) had the authority under section 5(b)(8) of the Cleans Streams Law, 35 P.S. § 691.5(b)(8), to inspect the plant site at any time to determine whether an improper release had occurred; and (2) conducted three hazardous waste generation inspections at the site after the releases occurred but more than five years before the complaint was filed.

The question of whether the discovery rule applies to violations of the Clean Streams Law and the regulations thereunder is one of first impression. Unlike statutes pertaining to actions concerning environmental contamination in some other states, the Clean Streams Law does not expressly provide that the limitations period starts to run only when the plaintiff knows or should know of the injury. But nor does the Clean Streams Law provide that the limitations period begins to run from the "violation" or words to that effect. It provides only that "there shall be a statute of limitations for actions" brought by the Commonwealth for civil penalties.[15] If a statute of limitations does not either expressly or impliedly prohibit application of the discovery rule, then

---

[15] The situation is similar with respect to the general statute of limitations at 42 Pa.C.S. §5524. Section 5524 neither codifies the discovery rule nor states that the limitations period begins to run from the "violation." It merely says that actions upon statutes for civil penalties must be commenced "within two years."

courts are free to employ it. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa.1987); *Levenson v. Souser*, 557 A.2d 1081 (Pa. Super.), *petition for allowance of appeal denied*, 571 A.2d 383 (Pa. 1989).

Where, as here, states do not expressly provide by statute when the limitations period begins to run for actions based on environmental contamination, the limitations period is usually deemed to run from the time the plaintiff knows, or has reason to know, of the injury.[16] The courts have taken a similar approach with respect to the statute of limitations at 28 U.S.C. §2462--also silent on the issue of whether the limitations period starts to run from the time of violation or the time plaintiffs discovered, or should have discovered, they were injured. The majority of courts that have interpreted that statute of limitations in the context of alleged violations of the Clean Water Act have applied the discovery rule.[17]

We will apply the discovery rule to violations alleged here for a number of reasons. First,

---

[16] Some recent cases in the federal courts construing state law are illustrative. *See, e.g., G.J. Leasing v. Union Electric*, 825 F.Supp. 1363, *order vacated in part on denial of reconsideration*, 839 F.Supp. 21 (S.D.Ill. 1993), *HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F.Supp. 318 (D.Md. 1993), *One Wheeler Road Associates v. Foxboro Co.*, 843 F.Supp. 792 (D.Mass. 1994), *Presque Isle Harbor v. Dow Chemical* Co., 875 F.Supp. 1312 (W.D.Mich. 1995), *Montana Pole & Treatment Plant v. I.F. Laucks and Co.*, 775 F.Supp. 1339, *aff'd*, 993 F.2d 676 (D.Mont. 1991), and *Tourist Village Motel, Inc. v. Massachusetts Engineering Co., Inc.*, 801 F.Supp 903 (D.N.H. 1992). *But see Mortkowitz v. Texaco, Inc.*, 842 F.Supp. 1232 (N.D.Cal. 1994) (Discovery rule under California law did not toll statute of limitations that otherwise barred property owners' tort claims against service station operator for soil contamination, in light of owner's knowledge of age of underground tanks system, and owner's statutory duty to conduct reasonable investigation of property to determine the extent of any contamination and its source).

[17] *U.S. v. Windward Properties, Inc.*, 821 F.Supp. 690, 694 (N.D.Ga. 1993). *See, e.g., Public Int. Research Group of N.J. v. Witco Chemical Corp.*, 31 ERC 1571 (D.N.J. 1990); *Atlantic States Legal Foundation v. Al Tech Specialty*, 635 F.Supp. 284 (N.D.N.Y. 1986); *U.S. v. Hobbs*, 736 F.Supp. 1406 (E.D.Va. 1990).

violations arising from the contamination of groundwater, like those here, are difficult to detect immediately, and, therefore, interpreting the limitations period as running from the time of violation would undermine the purpose of the Clean Streams Law and the regulations thereunder. Second, the discovery rule will adequately balance the interests of the Commonwealth and those alleged to have violated the Clean Streams Law. On the one hand, the Commonwealth cannot unreasonably delay in bringing an action; on the other, the public is protected because the Commonwealth can bring an action with respect to those violations that it could not reasonably have discovered. Third, the fact that some violations are easier to detect than others is taken into account by the objective nature of the discovery rule: if a violation is relatively easy to detect, the plaintiff should know of it sooner and the limitations period will start to run earlier. Finally, applying the discovery rule here is consistent with those Pennsylvania cases which have addressed the question of when the statutes of limitation start to run for other types of actions based on subsurface injury. *See, e.g., Smith v. Bell Telephone*, 153 A.2d 477 (Pa. 1959), and *Lewey v. H.C. Fricke Coke Co.*, 31 A. 261 (Pa. 1895).

Westinghouse argues that, even if the discovery rule applies here, the statute of limitations bars the Department's action for civil penalties because the Department would have known about the contamination in the vicinity of the plant more than five years before it filed the action had it been exercising "reasonable diligence." The Department argues that it would be unreasonable to impute knowledge of the contamination to it because of its authority to inspect the site or the three actual inspections. In support of that position, it notes that virtually all regulatory agencies have the authority to inspect the sites they regulate; and that the inspections conducted at the site were limited in scope and duration, were concerned only with current practices at the site (as opposed

to inspections for past contamination), and were just several of thousands of hazardous waste generation inspections the Department had to conduct in the region.

There is no question that, under section 5(b) of the Clean Streams Law, the Department had the legal authority to inspect the plant site to determine whether Westinghouse complied with the provisions of the Clean Streams Law and the regulations promulgated thereunder.[18] Nevertheless, we will not impute knowledge of the contamination at the site to the Department.

For purposes of determining when the limitations period starts to run where the discovery rule exception applies, courts look to see when the plaintiff, exercising reasonable diligence, first knew or should have known of the cause of action. *Ingenito v. AC & S, Inc.*, 633 A.2d 1172, 1174 (Pa. Super. 1993) (quoting *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468 (Pa. 1983)). To determine whether a plaintiff exercised reasonable diligence in a particular case, the courts evaluate the plaintiff's actions to discover whether he exhibited "those qualities of attention, knowledge, intelligence and judgement which society requires of its members for the protection of their own interests and the interests of others." *Petri v. Smith*, 453 A.2d 342, 347 (Pa.Super 1982). The standard of reasonable diligence is an objective or external one that is the same for everyone. *Petri*, 453 A.2d at 347.

---

[18] Section 5(b) of the Clean Streams Law, 35 P.S. §691.5(b), provides, in pertinent part:

> The department shall have the power and its duty shall be to:
>
> > (8) Make such inspections of public or private property as are necessary to determine compliance with the provisions of this act, and the rules, regulations, orders or permits issued hereunder.

35 P.S. § 691.5(b).

The Department did not fail to exercise reasonable diligence simply because it had the authority to conduct inspections at the site but did not detect the contamination. The Department may have had the *authority* to have routinely subjected the entire site to intensive groundwater sampling, or even to have had personnel on site at the time the alleged releases occurred, but that does not mean that it acted *unreasonably* by not doing so. The Department has limited resources. It cannot reasonably be expected to know everything about every site it regulates at all times because it has the right, or indeed the duty, to inspect a site.

Nor can we say that the Department should have known there were potential problems on the basis of the three hazardous waste generation inspections conducted at the plant. The three inspections were routine hazardous waste generation inspections conducted by Joel Steigman, a Department solid waste specialist, on October 2, 1981; August 10, 1982; and February 24, 1983; and were performed prior to the discovery of the contamination at the site. (N.T. 451-452, 516-17, 1046-51) They were conducted as part of a Department effort to sort out just which facilities in the Commonwealth were engaged in activities governed by the federal Resource Conservation and Recovery Act, Act of October 21, 1976, P.L. 94-480, *as amended*, 42 U.S.C. § 6901 *et seq.* (RCRA). (N.T. 1640-41) After RCRA was enacted, approximately 1300 facilities in the Department's central region took the precaution of notifying EPA that they engaged in activity involving the generation, treatment, storage, and disposal of hazardous waste. (N.T. 1640-41) Since many of these facilities did not actually engage in activity governed by RCRA, the Department conducted some preliminary inspections to determine just which of the facilities would be covered by RCRA and which would not. (N.T. 1640-41)

Although Westinghouse argues that the Department should have discovered the

contamination on site by virtue of these three inspections, Westinghouse failed to elicit any evidence showing that there were any indicia of possible releases or contamination on site at the time of the inspections. For example, several persons testified that they noticed areas of stained soil at the site at different times, but there was no evidence that soil at the site was stained at the time of Steigman's inspections. Similarly, while a number of persons testified that the solvents at the plant were improperly handled or disposed of on various occasions, there was no evidence that any sign of these activities existed when Steigman conducted his inspection.

Absent a showing that indicia of possible releases or contamination even existed on the site at the time of Steigman's inspections, Westinghouse cannot prevail on this issue, because, for the reasons which follow, Westinghouse had the burden of proving that the Department should have discovered the contamination as a result of Steigman's inspections.

It is well settled, under Pennsylvania law, that a defendant invoking the statute of limitations as a bar bears the initial burden of proving that the limitations period would have expired if computed from the date the acts giving rise to the cause of action allegedly occurred. *Patton v. Commonwealth Trust Co.*, 119 A. 834 (Pa. 1923), *Bickell v. Stein*, 435 A.2d 610, 612 (Pa. Super. 1981). Once he does so, the burden shifts to the plaintiff to prove that the limitations period was tolled. *Johns v. Estate of Cheeseman*, 322 A.2d 648 (Pa. 1974). But the courts do not appear to have addressed the question of who bears the burden of proof where it has been established that the statute is tolled, but the question is for how long.

We are not entirely without guidance, however. Section 1021.101(a) of the Board's rules, 25 Pa. Code § 1021.101(a), provides, in pertinent part:

In proceedings before the Board the burden of proceeding and the burden of proof

shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of an issue.

Westinghouse is the party asserting the affimative of the issue here: whether indicia existed at the plant which should have alerted Steigman to the potential contamination at the site. If the burden rested on the Department, then the Department would have to show that such indicia *did not* exist at the site. As a practical matter, it is easier to prove that a condition exists at a site than that it did not. Furthermore, Westinghouse was in a much better position to know the conditions at the site at the time of Steigman's visit than the Department. Westinghouse personnel were at the site day-in and day-out, while Steigman was present only briefly for the inspections. Finally, this approach is consistent with the allocation of the burden of proof and burden of going forward on the initial question of whether the action was filed within the limitations period if that period started to run at the time the cause of action accrued: In both situations, the burden is initially on the party asserting the statute as a bar to show that the action was not brought within the limitations period.

B. <u>The Reliability of the Department's Water Sampling</u>

We turn our attention next to the parties' arguments concerning the reliability of the Department's water sampling.

In presenting its case, the Department relies, in part, on evidence of sampling it conducted in the vicinity of the plant to show that Westinghouse engaged in certain violations and to show the extent of contamination in the area. Westinghouse argues that the Department used faulty techniques when it sampled and collected residential well samples, causing it to overestimate the amount of contamination in the wells.

1. <u>Gloves</u>

Westinghouse argues that the data from the Department's residential well samples--both those from Pin Oak Lane and others--are suspect because Department personnel failed to wear gloves when they collected the samples. The Department maintains that whether the individuals who collected the samples wore gloves is immaterial because the water they sampled never touched their hands.

The evidence at hearing established that at least four Department personnel collected residential well water samples: Little, Malick, Nesmith, and Shaw.[19] (N.T. 42-43, 522-524, 706-711, 910-915, 931-932) At least three of these individuals--Malick, Nesmith, and Shaw--failed to wear gloves when they collected the samples. (N.T. 541, 718, 931) But Westinghouse failed to present any evidence showing that any of these individual's hands came into contact with the water samples they collected. There was no evidence, for instance, indicating that Malick or Nesmith ever got their hands wet, and both slowed the water down to a trickle before collecting their samples. (N.T. 541, 910) Shaw sometimes got his hands wet when he capped a sampling bottle, but his hands never came in contact with the water in the bottles. (N.T. 726, 733-734)

Given the fact that there is no evidence that the hands of the Department collectors ever came into contact with the water in the samples, we will not consider the samples tainted simply on the basis that some of the samples were collected by individuals without gloves.

2. Chilling

Westinghouse maintains that the data from the samples is suspect because the samples were not refrigerated from the time they were collected until they were delivered to the lab. The

---

[19] It is unclear whether these individuals took all of the Department's residential well samples. There is no indication in the record as to who collected some of those samples.

Department responds by arguing that the only evidence suggesting that a Department sample was not refrigerated was testimony from Durand Little saying that he did not remember whether he had refrigerated a sample he collected on August 16, 1983.

The only evidence introduced at the hearing which suggested that any of the Department samples were not refrigerated was Little's testimony that he could not remember whether he had refrigerated his August 16, 1983, surface water sample.[20] (N.T. 53) Since Westinghouse only raised the lack of refrigeration objection with respect to the samples taken from residential wells, the reliability of Little's surface water sample is not at issue. Furthermore, even if it were, it is clear from the expert testimony at the hearing that failure to refrigerate a sample would result in data suggesting that Tri and Ta levels are, if anything, lower--not higher--than those actually present in the water sampled. (N.T. 749, 866)

3. <u>Blanks</u>

Westinghouse maintains that the data from the residential well samples are suspect because the Department failed to use field and trip blanks. The Department argues that the blanks were unnecessary to ensure that the samples were reliable since the Department followed standard sampling procedures.

The evidence adduced at hearing pertained to two types of blanks: "trip" blanks and "field" blanks.[21] "Trip" blanks are blanks prepared in the lab with distilled water and then carried out to

---

[20] The results for this sample were listed among the *residential* well results in Ex. C-131, but Little himself identified it as a *stream* sample in his testimony and sample collection sheet. (N.T. 21-41; Ex. C-1(a))

[21] Four witnesses testified about the distinction between a "field blank" and a "trip blank": Steigman, Shaw, Lane, and Cockroft. (N.T. 505-06, 722, 3877, 4057) They did not all agree on

the field with the sample bottles. (N.T. 505-506, 3877) They are used to determine whether samples could test positive for contamination as a result of simply being kept where the sample bottles are kept, and the "trip" blank bottle is not opened in the field. (N.T. 3877-78) "Field" blanks, meanwhile, are blanks using distilled water from the lab which are prepared in the field. (N.T. 505-506, 4057) The purpose of "field" blanks is to determine whether a sample could test positive for contamination simply as a result of coming into contact with filters, bailers, or other sampling equipment used in the field. (N.T. 4057)

Westinghouse failed to elicit any evidence suggesting that Little did not use blanks for the residential well samples he collected, so we can dispense with Westinghouse's objections to the samples he collected. The situation is a little more complicated with respect to the samples Malick, Shaw and Nesmith collected. Malick used trip blanks on some occasions, but did not use field blanks. (N.T. 542-43) Nesmith used trip blanks for some of his samples but did not use field blanks. (N.T. 932) Shaw did not use field blanks and did not remember whether he had used trip blanks. (N.T. 721-723) Malick, Nesmith, and Shaw all collected their samples directly from the tap or pressure tank spigot, without passing the water through other sampling equipment. (N.T. 540-541, 706-707, 910)

The fact that Malick, Nesmith, and Shaw did not use field blanks is immaterial here. Even

---

what was a "trip" blank as opposed to a "field" blank. What the other witnesses referred to as "trip blanks," Shaw called "field blanks." (N.T. 722) However, since Shaw was the only witness to attribute this meaning to "field blanks," and since he testified he was unfamiliar with the term "trip blank," we discounted his interpretation of those terms when we decided what each one meant. (N.T. 722) Where it is clear from the context of Shaw's testimony which types of blanks he is referring to, we shall refer to blanks prepared in the lab as "trip blanks," and those prepared in the field as "field blanks"--despite the fact that Shaw himself called them by different names.

the individual who collected Westinghouse's residential well samples, Beth Cockroft conceded that field blanks were unnecessary where the water sampled is taken directly from a tap or pressure tank spigot, and not passed through other equipment. (N.T. 4057)

Nor does the fact that Malick, Nesmith, and Shaw may not have used trip blanks every time they collected well samples throw the reliability of their samples into question. There was no evidence that other contamination existed in the environment (apart from that in the water) which could affect the sample results. Furthermore, there is no indication in the record that preparing trip blanks for these types of samples is standard procedure in the field, or even that Cockroft, the individual who collected the residential well samples for Westinghouse, used trip blanks when she collected her samples. Absent any evidence of this sort, we cannot say that Malick, Nesmith, and Shaw's samples are unreliable simply by virtue of the fact that those individuals may not have used trip blanks when they sampled the water.

4. <u>EPA methods 501.2 and 624</u>

Westinghouse argues that the data from the residential well water samples are unreliable because the samples were analyzed using EPA methods 501.2 and 624, as opposed to a method which was EPA-approved for analyzing drinking water, like EPA methods 502.1 or 502.2. The Department argues that the data is reliable because the Department's lab is EPA-certified, and because the Board held in *Baumgardner v. DER*, 1989 EHB 61, that the methods the Department used to analyze the samples are reliable.

Westinghouse's argument misses the mark. The fact that the methods the Department used to analyze the residential well samples were not EPA-approved for analyzing drinking water does not necessarily mean that the Department's analytical data is unreliable. The EPA-approved

methods are generally presumed to be reliable, but not all reliable methods are necessarily EPA-approved.

The Department's arguments, however, are also problematic. Just as we cannot presume all reliable analytical methods are EPA-approved, we cannot assume that all tests run at an EPA-certified lab are reliable. While the Department did have to correctly identify and quantify contaminants present in EPA standards as part of the annual EPA-certification process, there was no evidence to show that the Department used EPA method 501.2 or method 624 to analyze the standards it sent to EPA as part of this certification process. (N.T. 754, 841-42) As a result, we cannot say that those methods are reliable for analyzing drinking water samples simply by virtue of the fact that the Department's lab is EPA-certified.

The Department's reliance on *Baumgardner v. DER*, 1989 EHB 61, is also misplaced. In *Baumgardner*, an appellant argued that Department lab reports for soil and groundwater samples analyzed using EPA method 624 were not properly authenticated, and were therefore inadmissible, where they were offered for admission without calling the person who conducted the actual testing as a witness. The Board held that the test for determining whether the reports were adequately authenticated was whether the Department had shown that the test itself was accurate and reliable and had been conducted by a qualified person. 1989 EHB at 69 (citing *Commonwealth v. Dugan*, 381 A.2d 967, 969-70 (Pa. Super. 1977)). Although the Board ultimately concluded that the lab reports were properly authenticated, we noted that our decision was based, in part, on the fact that the appellant never questioned the validity of using EPA method 624. 1989 EHB at 69. In the case presently before the Board, by contrast, Westinghouse *is* challenging the validity of EPA method 624--Westinghouse alleges it is unreliable as a method for analyzing drinking water samples.

Furthermore, even assuming *Baumgardner* were controlling here, that case would only be relevant with respect to the samples analyzed using EPA method 624. *Baumgardner* does not pertain at all to the other method the Department used to analyze the residential well samples at issue here: EPA method 501.2.

The critical issue here is not whether the Department's lab or tests are EPA-approved but whether the method of testing is reliable. The uncontradicted evidence at hearing is that both methods the Department used are reliable. In the analyses performed using EPA method 624, the Department used a gas chromatograph/mass spectrometer (GC/MS) to identify volatile and semi-volatile organic compounds present in the samples. (N.T. 751) This is an accepted procedure for analyzing and identifying volatile and semi-volatile compounds like Tri and Ta. (N.T. 751, 755) The analyses performed according to EPA method 501.2 were performed using "the VOC extraction method." (N.T. 865) That method has been tested in exhaustive analyses of standards containing known concentrations of contaminants and is generally accepted in the field. (N.T. 861, 864-65) Indeed, it is one of the more accurate tests for determining Tri and Ta contamination levels. (N.T. 865)

5. <u>Method detection limit</u>

Westinghouse also argues that the Department's residential well data are suspect because the Department attempted to quantify results below its published method detection limits at 25 Pa. Code § 16.102, and because the Department assumed that it could determine whether a chemical was present in a sample even below the method detection limit. The Department argues that individual pieces of lab equipment were capable of being calibrated to an accuracy limit more sensitive than the regulatory method detect limit, and that at concentrations above the individual

machine's limit, the Department could detect whether a particular contaminant was present.

It is unclear from the record just what figures the Department lab used for its method detection limits. Although there was testimony concerning the lab's use of "detection limits" of 10 ppb, 1.0 ppb, and .5 ppb--depending on the type of analysis, the date of the analysis, and the chemical detected--there was no testimony that these were the "method detection limits" the Department used. (N.T. 764, 788-89, 814-816, 880; Ex. C-13) We cannot assume that "detection limits" necessarily refer to "method detection limits" because there was also testimony concerning "minimum detection limits"[22] and the Department's regulations at 25 Pa. Code § 16.102 refer to "detection limits" to be used when "method detection limits" are not available. *See* 25 Pa. Code § 16.102(a)(3)(i).

Even assuming the Department did use a method detection limit lower than that set forth at 25 Pa. Code § 16.102, that would not necessarily throw the Department's residential well data into question. First, section 16.101(b) of the Department's regulations, 25 Pa. Code § 16.101(b), expressly provides that the method detection limits set forth at section 16.102 are for use in evaluations of effluent with respect to NPDES permits. The case before us does not involve the analysis of effluent to be discharged pursuant to an NPDES permit. Second, it is possible to have method detection limits lower than those set forth at section 16.102. There is not a single method detection limit for a particular compound; the limit depends upon the machine used for the testing

---

[22] Two Department chemists testified concerning the difference between method detection limits and minimum detection limits: Walter Robinson and John Maljevac. Robinson testified that the two detection limits were the same thing. (N.T. 847) Maljevac, however, testified that they were different. (N.T. 867) Given Maljevac's testimony and the fact that 25 Pa. Code § 16.102(a)(3)(i) refers to other types of "detection limits" we cannot assume that testimony concerning "detection limits" necessarily refers to "*method* detection limits."

and is determined by analyzing known standards. (N.T. 817, 839) The Department ascertained the method detection limits for its lab equipment by performing its own studies with known standards. (N.T. 832, 842) Many of the method detection limits derived for the equipment at the Department's lab were below the method detection limits listed in section 16.102. (N.T. 849)

Since it is unclear from the record just which method detection limits the Department used, we cannot determine which, if any, of the Department's data were lower than the lab equipment's method detection limits. Therefore, even assuming Westinghouse had shown that the Department could not reliably detect the presence of a chemical below the equipment's method detection limits, Westinghouse has not shown that the Department's data here is unreliable in that respect.

6. <u>Screening and purging procedures</u>

Westinghouse argues that the Department failed to utilize adequate screening and purging procedures to ensure that samples containing high contaminant concentrations did not compromise the analyses of samples run subsequently. The Department failed to respond to this argument in its post-hearing memoranda.

When the Department's lab analyzed the residential well samples in the gas chromatograph, the chemists would smell the samples before introducing them into the machine. (N.T. 827) If they detected an odor, they would dilute the sample before running it. (N.T. 827) They would also dilute samples when requested to do so by the person who collected the samples. (N.T. 827)

When the gas chromatograph detected extremely high levels of contamination, the lab would run a blank after that sample to ensure that no contaminants remained in the tube before running another sample, and would run blanks between samples for some time afterwards. (N.T. 825) Although one of the chemists at the Department's lab testified that, even using this procedure,

it was possible for contaminants from the high sample to affect subsequent samples without affecting the blanks run in-between, he also said that he knew of no better alternative, and that, if the lab feels that the high sample might be affecting subsequent analyses despite these measures, it performs the analyses a second time. (N.T. 825-826)

Westinghouse argues that the Department's methods rendered the reliability of analyses run after a high sample suspect because: (1) the concentration of volatile organic compounds in a sample can be high enough to disrupt subsequent analyses even if the sample has no detectable odor, and (2) once a sample with high levels of contamination is run, the column of the gas chromatograph must be purged for subsequent analyses to be reliable.

There are a number of problems with Westinghouse's arguments. First, the fact that the chemists smelled the samples before running them through the gas chromatograph does not necessarily mean that the sample data are unreliable, it just means that the Department could have run samples with concentration levels so high that the samples could potentially affect subsequent analyses. Second, there was no evidence as to how high the levels of contamination had to be before a sample would affect the analyses of samples run subsequently. Absent such evidence, we cannot determine which--if any--of the samples analyzed here would have affected the analysis of subsequent samples. Similarly, there is no indication in the record as to which samples were run on the same gas chromatograph, or in the same batch, or the relative order in which the samples were analyzed. Therefore, even assuming Westinghouse had shown that samples were run with contaminant levels so high that they would interfere with subsequent analyses, we could not tell which of the sample data here is from analyses which were performed subsequently as part of the same batch on the same machine and might be tainted.

Westinghouse argues that once a gas chromatograph column is exposed to high concentrations of a volatile organic compound, the column must be purged before reliable results can be obtained. In support of that proposition, it points to testimony of David Lane, a chemist whom Westinghouse called as an expert witness, at page 3888 of the transcript of the hearing. Nothing on that page of the transcript, however, pertains to a need to purge the column after samples containing high concentrations of contaminants. It would appear Westinghouse is referring to Lane's testimony on page 3887 of the transcript, but even that testimony does not stand for the proposition that Westinghouse suggests. On page 3887, Lane testifies that it was "routine procedure" in his lab to purge, wash, and bake the bubbler tubes to eliminate the possibility of contamination from previous samples. (N.T. 3887) There is no indication in the record as to when Lane's lab performed this "routine procedure" (that the tubes were cleaned after tests indicating high levels of contamination, for instance, as opposed to once a day, once a week, after every sample, etc.). Nor is there any indication that it is generally accepted in the field that the bubbler tubes must be cleaned after tests indicating high sample concentrations in order for the results of subsequent tests to be reliable. Even assuming that the results from samples analyzed without the routine cleaning of the bubbler tubes are *less* reliable than they would have been had the tubes been cleaned, we cannot say those results are not reliable.

C. Has the Department Proven That Westinghouse Is Liable for the Violations Alleged?

1. The alleged violations of sections 301, 307, and 401 of the Clean Streams Law

Sections 301, 307, and 401 regulate the discharge of deleterious substances into waters of

the Commonwealth. Section 301 provides:

> No person ... shall place or permit to be placed, or discharged or permit to flow, into any of the waters of the Commonwealth any industrial wastes....

35 P.S. § 691.301.

Section 307 provides:

> No person ... shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department....

And section 401 provides:

> It shall be unlawful for any person ... to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person ... into any of the waters of the Commonwealth, any substance ... resulting in pollution....

For each alleged violation of sections 301, 307, or 401, therefore, the Department had to prove that "industrial waste" or a "substance resulting in pollution" entered a "water of the Commonwealth."

a. Are degreasers containing Tri or Ta "industrial waste" or "substances resulting in pollution"?

The Department alleges that Westinghouse violated sections 301, 307, and 401 by discharging degreaser containing Tri and degreaser containing Ta into waters of the Commonwealth. Both types of degreaser are "industrial wastes" within the meaning of the Clean Streams Law. Section 1 of the Clean Streams Law, 35 P.S. § 691.1, defines "industrial waste" as including "any ... substance ... resulting from manufacturing or industry...." Since the degreasers are the product of manufacturing or industry, they are "industrial waste."

The degreasers are also "substances resulting in pollution" within the meaning of

section 401. Section 1 of the Clean Streams Law, 35 P.S. § 691.1, defines "pollution" as including:

> contamination ... such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic ... or other legitimate beneficial uses....

The discharge of degreasers containing Tri or Ta fall within this definition. Although Tri is approximately 20 times as toxic as Ta, exposure to either substance can result in a wide variety of symptoms, including intoxication, memory defects, instability, cardiac arrhythmia, and liver and kidney damage, among others. (N.T. 1987, 1989-90, 2027-28) In addition to its toxicological effects, Tri is also a probable human carcinogen. (N.T. 2007)

b. Are storm sewers and the groundwater "waters of the Commonwealth"?

The Department maintains that some of the alleged violations of sections 301, 307, and 401 resulted in discharges to storm sewers and the rest resulted in discharges to the groundwater. Either destination constitutes a "water of the Commonwealth." Storm sewers are expressly listed in the definition of "waters of the Commonwealth" at section 1 of the Clean Streams Law,[23] and we have previously held that discharges to groundwater constitute discharges to a "water of the Commonwealth." *See, e.g., Sechan Limestone Industries, Inc. v. DER*, 1986 EHB 134, 165.

c. Did the Department prove that Westinghouse discharged the degreaser into waters of the Commonwealth?

The Department, however, only proved that some of the alleged violations of sections 301,

---

[23] Section 1 of the Clean Streams Law defines "waters of the Commonwealth" as including:

> any and all rivers, streams, creeks, rivulets, impoundments, ditches..., storm sewers..., and all other bodies or channels of conveyance of surface and underground water, ... whether natural or artificial, within ... the boundaries of this Commonwealth.

307, and 401 actually involved discharges to waters of the Commonwealth. We shall examine each of the various alleged types of violations of sections 301, 307, and 401 below.

d. The alleged discharges to the storm drains from grate-cleaning operations near the pumphouse

The Department proved that Westinghouse allowed wastewater containing Tri and Ta degreaser to escape down a storm drain near the pumphouse during grate-cleaning operations. Although neither Tri nor Ta degreaser were used in the actual steam cleaning process itself, the evidence does indicate that some Tri and Ta degreaser was on the grates and entered the storm sewer during the steam cleaning process. (N.T. 79, 1290)

The grates ordinarily lay at the bottom of the painting booth, where they covered a pit containing agitated water. (N.T. 103) When components at the plant were painted, the air inside the booth was blown downwards, forcing any paint which missed its mark through the grates and into the water. (N.T. 103) The components were painted in the step immediately after the grease on them was removed with degreaser. (N-1470, 1573, 1885; H.D. 13)

A thick coating of paint covered the grates by the time they were cleaned. (N.T. 1262) To remove the paint, the grates were first removed from the booths, taken to the pumphouse, and submerged overnight in paint stripper. (N.T. 105, 1262) The paint stripper loosened up the paint. (N.T. 1291) Then the grates were removed from the stripper and steam cleaned. (N.T. 1262) Where the steam cleaning took place depended on the size of the grates: the lighter ones were cleaned on a concrete slab outside the pumphouse. (N.T. 1262-63, 1468; H.D. 19) The concrete pad had a storm drain, and liquid generated during the steam cleaning would sometimes run off the grates and escape down the storm drain. (N.T. 117, 230, 1265, 1468; Ex. C-121(a); H.D. 64)

The liquid which escaped down the drain entered a storm sewer which discharged into a stream (the "eastern tributary") opposite the entrance to the plant. (N.T. 231; Ex. C-121(a)) The eastern tributary is a very small stream and the storm sewer discharge is essentially its headwater. (N.T. 25)

Since it is clear that the steam cleaning resulted in discharges to the storm sewer, the only remaining question is whether those discharges contained Tri or Ta. The evidence shows that they did. An August 16, 1983, surface water sample of the "eastern tributary," taken just below the storm sewer discharge, revealed the presence of 2 ppb Tri and 4 ppb Ta. (N.T. 25, 41; Ex. C-1(a)) Another sample taken from the "eastern tributary," in December of 1988 or January of 1989, revealed the presence of approximately 10 ppb Tri. (Ex. D-81, Table 4-4) Given that the eastern tributary is a very small stream and the storm sewer discharge is essentially its headwater, the contamination detected in these samples most likely entered the stream from the storm sewer. The view of the storm sewer as the conduit of the contamination in the eastern tributary is bolstered by the fact that contamination was detected in the storm sewer itself. A January 1989 water sample from the storm sewer, collected near the pumphouse, revealed the presence of 11 ppb Ta. (Ex. D-81, Table 4-8 and Fig. 2-3) Because the pumphouse is located at the far "upstream" end of the storm sewer, the contamination detected there had to have originated near the pumphouse. (Ex. D-87, Fig. 3-2)

Tri and Ta could have existed in the discharge from the steam cleaning because degreaser was used on the components just prior to their entering the painting booth. Before certain components at the plant were painted, they were put through the degreasing machines, where they were exposed to the fumes of the degreasers. (N.T. 80) A residue remained on the materials after

they emerged from the degreasing machines. (N.T. 1592) Employees used additional degreaser to wipe the residue off just prior to the components entering the painting booth.[24] (N.T. 1470, 1573, 1885; H.D. 13) The grates were submerged in paint stripper before they were steam cleaned, but large amounts of paint remained on the grates at the time they were steam cleaned, the paint stripper bath was changed very infrequently, and the grates still had liquid from the bath on them when they were steam cleaned. (N.T. 1264, 1468, 1492)

The question then becomes: How many violations of sections 301, 307, and 401 of the Clean Streams Law did the Department prove resulted from discharges to the storm sewer? The answer to that question turns on the number of separate discharges to the storm sewer, an issue both parties failed to address in their post-hearing memoranda.

There was evidence that the grates were cleaned at least several times a year until early 1984, when Westinghouse started shipping the grates offsite for cleaning. (N.T. 154; H.D. 21, 27, 64) But there was no evidence concerning how often the waste-water generated during grate-cleaning contained Tri or Ta, or how frequently the waste water escaped down the storm drain when the grates were cleaned. As a result, we cannot determine how often contaminated water escaped down the drain based on the number of times the grates were cleaned.

Nor can we conclude how many times contaminated water escaped down the drain based

---

[24] Earl Plank testified that the degreaser evaporated as the materials were wiped with it. (N.T. 1592) Plank, however, worked in the maintenance Department and was not actually involved in wiping down the components himself. (N.T. 1563) Given the fact that Westinghouse provided no alternative explanation for why there was solvent contamination in the storm sewer near the pumphouse, it is more likely that some degreaser remained on the materials to be painted (at least on some occasions) than that the degreaser always entirely evaporated and the contamination in the storm sewer arose from some source other than Westinghouse's activities at the plant.

on the levels of Tri and Ta contamination in the storm sewer and to the "eastern tributary." There was no evidence as to how many separate discharges would be necessary to result in the levels of contamination detected. We also cannot conclude that, because both Tri and Ta were found in the storm sewer, at least two discharges must have taken place. There is no evidence showing that the grates were cleaned between the last time the plant used Tri degreaser and the first time it used Ta degreaser. Tri and Ta could have been on the grates at the same time.

Since the Department bears the burden of proving that the violations occurred and there is no evidence showing that the contamination in the eastern tributary or the storm sewer resulted from multiple discharges, the Department has proven that Westinghouse violated sections 301, 307, and 401 only once with respect to the steam cleaning of the grates.

e. The alleged discharges to groundwater resulting from releases near the railroad dock

With respect to the alleged releases from the railroad dock, the Department proved that there were at least two discharges to the groundwater in violation of sections 301, 307, and 401.

Metal turnings were generated as metal was machined in the manufacturing area of the plant. (N.T. 113-114, 1474) Plant employees collected the turnings and then, using pitchforks, placed them into several small hoppers positioned around the manufacturing area. (N.T. 113-14, 1421) The turnings were loaded into the small hoppers using pitchforks. (N.T. 1421) The contents of the small hoppers were then periodically dumped into two large hoppers specifically designated to receive the turnings. (N.T. 1426, 1463, 1891) The two large hoppers were located at the railroad dock, near the northwestern corner of the plant. (N.T. 113-114, 1386, 1396)

The Department proved that Tri and Ta degreaser were dumped into the small hoppers,

transferred to the large hoppers with the metal turnings, escaped from holes in the bottom of the large hoppers, and flowed outside the door of the railroad dock area, contaminating the soil and groundwater.

(1) How degreasers came to be in the small hoppers

The metal turnings did not have degreaser on them at the time they were loaded into the small hoppers. (N.T. 235) But degreaser entered the hoppers when it was dumped there by Westinghouse employees. Robert McKinney, who dumped the small scrap hoppers between 1973 and 1978, testified that spent degreaser was dumped into the small hoppers several times a week during that period. (N.T. 1385-87, 1389, 1391-92, 1421) Gary Hull, who emptied the small hoppers in 1973, testified that employees dumped degreaser into the small hoppers when he was responsible for emptying the hoppers. (N.T. 1890) Ronald Sadler, who also sometimes dumped the small hoppers, testified that he saw at least one individual dump degreaser into the small hoppers on "several occasions" during a 6-month period somewhere between 1970 and 1975. (N.T. 1510, 1524)

Although Westinghouse did elicit testimony from other witnesses who worked at the plant saying that they had never seen employees dump degreaser into the small hoppers or that they had not seen degreaser in the small hoppers, that testimony is less reliable. Thomas Romito testified that he did not think he ever saw liquid in the small hoppers. (N.T. 114) But Romito worked in the maintenance department, which was not responsible for emptying the hoppers. (N.T. 76-78, 114) There is no indication in the record indicating how he would know the contents of the hoppers. Richard Althoff testified that he never saw employees dump degreaser into the small hoppers. (N.T. 3264) But, like Romito, Althoff worked in the maintenance department during the

period the other witnesses testified degreaser was dumped into the hoppers, and there is nothing in the record to suggest that he was in the manufacturing area often enough that he would have seen the dumping had it actually occurred. (N.T. 3249) Gerard Schilling testified that he had never seen degreaser in the hoppers, but his testimony is even more problematic than the others. Schilling did not start working at the plant until 1982--long after the incidents McKinney, Hull, and Sadler testified about transpired--and there is nothing in the record to show that he was in a position to know the contents of the hoppers in any event. (N.T. 208, 298)

Most of the liquid in the small hoppers was degreaser. The metal turnings had coolant, water, and cutting oil on them when they were put into the small hoppers. (N.T. 1281-82, 1421-22, 1474) But the amount of the non-degreaser liquids which made it into the small hoppers must have been minimal because, as noted above, the turnings were loaded into the small hoppers with a pitchfork. Since there is no indication in the record that any liquids other than degreaser were added to the small hoppers, we conclude that most of the liquid from the small hoppers consisted of degreaser. This is consistent with Jesse Buckley's testimony that the liquid in the small hoppers appeared as though it consisted primarily of degreaser and McKinney's testimony that he could sometimes smell degreaser when he dumped the small hoppers. (N.T. 1394, 1477-78)

(2) How the degreaser came to be in the large hoppers

Degreaser was transferred to the large hoppers when the small hoppers were dumped into them. When Buckley dumped the small hoppers in the early 1970s, half a gallon to five gallons of liquid would sometimes enter the large hoppers. (N.T. 1475-83) Hull sometimes found liquid in the small hoppers when he dumped them, usually between three and five gallons. (N.T. 1893-94, 1914) In addition, both McKinney and Richard Robinson saw fluids transferred to the large

hoppers when the small hoppers were dumped. (N.T. 1282, 1374)

The liquid in the large hoppers leaked onto the floor of the railroad dock. The two large hoppers designated to receive the metal turnings each had holes in the bottom. (N.T. 1392, 1423, 1426-27, 1476) The holes were put there specifically so that liquid in the hoppers would drain out. (N.T. 1396) Fluid from the large hoppers leaked out the holes and onto the floor below. (N.T. 115, 1894, 1247) Virtually every day between 1973 and 1978, when the large hoppers were lifted up and emptied, approximately one to five gallons of liquid would pour out of the holes and onto the floor. (N.T. 1396-97) The liquid was sometimes whitish or bluish in color, depending upon which coolant had been used in the machining area, but on other occasions the liquid appeared very dirty and it was difficult to tell what color it was. (N.T. 1395, 1589)

Since there was no evidence that any liquid was added to the large hoppers apart from that which was transferred from the small hoppers with the metal turnings, we conclude that the composition of the liquid which escaped from the large hoppers was the same as that in the small hoppers, and, therefore, consisted primarily of degreaser. The fact that the liquid was whitish or bluish in color, or occasionally very dirty, does not change our conclusion. Tri is clear when new, but can become brown or even black after it is spent. (N.T. 1416, 1446, 1564, 1923) How dark it is depends on how much it has been used. (N.T. 1618) The same is true for Ta. (N.T. 1417) Since, as noted above, coolant was on the metal turnings when they were loaded into the small hoppers, and since the coolant used in the machining area is white or blue, the color of the liquid described as leaking from the large hoppers is consistent with what we would expect of a substance composed primarily of degreaser but containing some coolant as well. (N.T. 1422, 1425-26) The conclusion that the liquid from the large hoppers contained degreaser is also consistent with

McKinney's testimony that he usually smelled degreaser when the large hoppers were emptied and liquid poured out the bottom.[25] (N.T. 1397)

(3) How the degreaser came to be in the groundwater in the railroad dock area

Some of the liquid which leaked from the hoppers flowed down a drain in the railroad dock area,[26] but most flowed out the railroad dock door and into the ground outside. (N.T. 1399) Railroad tracks ran into the railroad dock area from outside the building. (N.T. 1397) The floor in the railroad dock area was concrete and sloped downwards from the place where the large hoppers were kept to the place where the railroad tracks entered the building. (N.T. 1017) The hoppers sat atop the railroad tracks and the liquid which leaked from them collected in the grooves for the tracks. (N.T. 1396, 1461) Most of the liquid followed the tracks outside the building and seeped into the ground. (N.T. 1397) The soil outside the railroad dock area developed dark stains. (N.T. 363, 1015-16, 1153, 1268, 1487) The soil was also badly contaminated: lab analyses of soil samples revealed the presence of high concentrations of Tri and Ta. (Ex.C-131)

At least some of the contamination which escaped into the soil entered the groundwater. Two witnesses testified regarding the fate of materials entering the soil where the railroad tracks enter the plant: Jeffrey Molnar, a hydrogeologist with the Department's South Central Region, and

---

[25] McKinney actually testified that he could usually smell "TCE." It is clear from the context of his testimony, however, that he referred to "TCE" to denote the degreasers as a class, not to distinguish those containing Tri from those containing Ta. Furthermore, both types of degreaser smell the same. (N.T. 1417.)

[26] The Department did not mention the discharge to the drain in its complaint, so we will not address that conduct here. We mention the release down this drain only for purposes of showing that some of the liquid which escaped from the hoppers did *not* flow out the railroad dock door and into the ground.

Patrick O'Hara, a civil engineer who testified on behalf of Westinghouse. (N.T. 2303, 4341) Both testified that the release of degreaser in that area would result in at least some contamination entering the groundwater. (N.T. 4532, 4693)

(4) Molnar's testimony, the number of violations

Westinghouse argues that there could not have been spills in the railroad track area because Molnar testified that some of any contamination released in that area would flow northwards, and no contamination was found in the groundwater monitoring wells located to the north of the area. But Westinghouse's position relies on a mischaracterization of Molnar's testimony. Molnar did not testify that some of any contamination released in the railroad track area would *necessarily* flow northwards; he testified that the contaminants "could go *either* [north] *or* towards the old farm pond." (N.T. 2491) (emphasis added). Therefore, even assuming there were no contamination north of the railroad track area, that would not show that contaminants were not released in the railroad track area. It could simply mean that the contaminants flowed southeast, towards the old farm pond area, rather than northwards.

Since the Department has established that Westinghouse discharged Tri and Ta to the groundwater in the area of the railroad dock, the question then becomes: How many discharges to the groundwater were there?[27] The only testimony concerning the number of discharges consisted

[27] We are concerned with the number of separate discharges *to the groundwater,* not the number of separate discharges *to the ground*, since discharging to the groundwater is what violates sections 301, 307, and 401 of the Clean Streams Law. Although the Department argues in its post-hearing memoranda that the degreaser could leach from the soil into the groundwater for years, the Department did not point to any evidence showing that the contamination would enter the groundwater continually (as opposed to sporadically), or even that the discharges would occur on a regular basis.

of testimony from Jeffrey Molnar, a hydrogeologist with the Department, who testified that the groundwater contamination patterns indicated that there had been at least two separate discharges to the groundwater. (N.T. 2589) We find Molnar's testimony credible.

As we explain immediately below, the Department has failed to prove that Westinghouse discharged degreaser into the groundwater with respect to the discharges at other parts of the plant. Since the railroad dock area is the only place where the Department has proven that Westinghouse discharged Tri or Ta to the groundwater, and since the groundwater contamination patterns indicate there were at least two discharges to the groundwater, the Department has also proven that at least two separate discharges occurred in the railroad dock area.[28, 29] Each one constitutes a violation of sections 301, 307, and 401 of the Clean Streams Law.

f. The other alleged violations of sections 301, 307, and 401

The Department failed to prove that the other alleged violations of sections 301, 307, and 401 actually involved discharges to the groundwater. Consider, for instance, the Department's allegation that a Westinghouse employee dumped 50 gallons of spent Tri from a 275-gallon tank

---

[28] While Westinghouse argues that some or all of the pollution on site and in the wells in the vicinity resulted from the activities of others, we reject both of those assertions. As noted in section IV.D.1 of the discussion, below, Westinghouse failed to prove that anyone else had discharged Tri or Ta into the groundwater, and that discharges in the area of the plant alone could not account for the contamination patterns detected here.

[29] Because the Department has shown that Westinghouse had an overwhelming number of releases of degreaser to the soil, we suspect that the groundwater contamination resulted from more than just two releases. The Department failed, however, to elicit any evidence showing that more than two releases to the groundwater were involved. For instance, there was no evidence that each release of degreaser to the ground would result in a separate release of degreaser to the groundwater or that more than two releases would be necessary to account for the concentration of degreaser in the groundwater.

onto the ground and that, as a result, Tri entered the groundwater. There was no evidence at hearing showing that this release, or one substantially similar to it, would result in contamination of the groundwater. Even assuming the Department showed that the tank contained Tri, and that the contents of the tanks were spilled on the ground, we cannot infer that Tri necessarily entered the groundwater as a result of the spill.[30] The Department had to elicit some evidence in support of that proposition--especially where, as here, the release involves Tri, a substance which evaporates very readily. (N.T. 1997) Since the Department failed to show that this release resulted in contamination entering the groundwater, the Department has failed to sustain its burden of proof with respect to the alleged violations of sections 301, 307, and 401 pertaining to this release.

The same reasoning applies to the alleged discharges to the groundwater resulting from the releases in the old drum storage area, the releases caused by degreaser spilled when refilling the

---

[30] *See, e.g., Kerrigan v. Department of Environmental Resources*, 641 A.2d 1265 (Pa. Cmwlth. 1994). *Kerrigan* involved a challenge by a battery recovery facility to a Department order directing the facility to cease operation and remediate lead contamination on the facility's property. The Board dismissed the facility's appeal and held that the Department established that lead contamination on the site presented a danger to the waters of the Commonwealth because the Department proved that (1) lead contamination existed in the soil at the site, (2) the soil at the site tends to leach lead contamination, and (3) groundwater lay beneath the contaminated soil.

The operator appealed the Board's decision to the Commonwealth Court, which reversed it. The court held that the Department had failed to show that the lead contamination presented a danger to the groundwater. The court pointed out that all the soil the Department used for its leaching tests came from the top 12" of soil on site, that the water table could be as much as 35 feet below the surface of the soil, and that the Department failed to present evidence concerning the characteristics of the subsurface material between the lead contamination and the water table. 641 A.2d at 1268-1269.

Although *Kerrigan* was technically decided under section 316 of the Clean Streams Law, 35 P.S. § 691.316, rather than sections 301, 307, or 401, *Kerrigan* does conclusively show that contamination is not presumed to enter the groundwater simply because it enters the soil. (The dissent's assertion that the Board can infer that pollution which enters the soil enters the groundwater, and that we can infer how quickly it will enter the groundwater, is inconsistent with *Kerrigan*.)

degreasing machines, the releases outside the volatile storage room which occurred when drums of degreaser were being unloaded, and the releases caused by the dumping of spent degreaser in the welding area. To prove that these alleged releases resulted in violations of sections 301, 307, and 401, the Department had to prove not only that the releases actually occurred, but also that each of them resulted in pollution entering the groundwater. Even assuming the Department proved that each of these releases actually occurred here, it failed to adduce any evidence showing that they would result in Tri or Ta entering the groundwater. Therefore, the Department has failed to prove that these alleged violations of sections 301, 307, and 401 occurred.

The situation is slightly more complicated with respect to: (1) the alleged releases near the pumphouse from the grate-cleaning operations, and (2) the alleged releases in the courtyard area from the leaking storage tank pump and spills from chemical trucks when the storage tank was being refilled. The only evidence that the Department elicited tending to show that these releases would result in discharges to the groundwater was testimony from Molnar: He testified that spills in the pumphouse and courtyard area would enter the groundwater. (N.T. 4694-697) This testimony, however, appears in that portion of his rebuttal testimony which has been stricken. Therefore, the Department has also failed to prove these releases resulted in violations of sections 301, 307, and 401.[31]

2. <u>The alleged violations of 25 Pa. Code § 101.3(a)</u>

The Department argues that Westinghouse engaged in "repeated and continuous" violations of 25 Pa. Code § 101.3(a) because Westinghouse failed to take "necessary measures" to prevent

---

[31] *See* section I.B.1 of the discussion, above.

Tri and Ta degreaser from entering waters of the Commonwealth "since 1969." (The Department's post-hearing memorandum, p. 165) Precisely what "necessary measures" the Department is referring to is unclear. The Department contends that Westinghouse failed to provide its employees with adequate instruction on how to handle Tri and Ta, that Westinghouse failed to design its operations and facilities in a manner which would reduce the chances of an accidental discharge, and that Westinghouse failed to "manage" the degreasers adequately. (The Department's post-hearing memorandum, p. 165) In support of the last two contentions, the Department lists examples. With respect to the assertion that Westinghouse failed to design its operations and facilities to minimize the possibility of an accidental discharge, the Department writes, "For example, Westinghouse should have diked around the edges of paved areas where the degreasers were stored or used ... to prevent them from running off onto the ground surface." (The Department's post-hearing memorandum, p. 164) With respect to the assertion that Westinghouse failed to properly manage the degreasers, the Department points to Westinghouse's alleged failure to conduct environmental audits and failure to repair a leaking hose and pump associated with a solvent storage tank.

In its post-hearing memorandum, Westinghouse failed to respond to the Department's arguments with respect to section 101.3(a).

Section 101.3(a) provides:

> Persons ... engaged in an activity which includes the ... storage, use ... or disposal of polluting substances shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, ... or from another cause.

We explained earlier in this adjudication that Tri and Ta are polluting substances within the meaning of the Clean Streams Law. Since they are polluting substances and Westinghouse used them at the plant, Westinghouse had a duty under section 101.3(a) to take those measures necessary to ensure that they did not enter the groundwater or the storm sewers. Furthermore, as we explained earlier in our discussion of when the statute of limitations started to run with respect to alleged violations of section 101.3(a), to prove that a person has failed to take a measure which is "necessary" to prevent a polluting substance from entering a water of the Commonwealth in violation of section 101.3(a), the Department must show that the omission resulted in a polluting substance actually entering a water of the Commonwealth.

Since we have already found that the Department proved that Westinghouse allowed Tri and Ta to escape from the plant and enter a storm sewer at least once and enter the groundwater at least twice, the Department has proven that Westinghouse violated section 101.3(a) at least 3 times.

To the extent that the Department alleges that there were other violations of section 101.3(a)--and it is difficult to tell from its complaint and post-hearing memoranda precisely *what* the Department alleges were violations of section 101.3(a)--the Department has failed to sustain its burden of proof. The Department failed to prove that any of the alleged omissions resulted in discharges of degreaser other than those which we have already said constituted violations of section 101.3(a).

3. The alleged violations of 25 Pa. Code § 101.2(a)

As noted previously, § 101.2(a) provides that persons owning facilities which allow a polluting substance to be placed in a location where the substance could enter a water of the Commonwealth must notify the Department and downstream users. The Department argues that

Westinghouse violated section 101.2(a) because Westinghouse failed to notify the Department and downstream users that it had allowed Tri and Ta degreasers from the plant to be placed in a position where they could enter the storm sewer near the pumphouse or the groundwater.

The Department, however, never identifies precisely which of the alleged releases resulted in degreaser being placed in a position where it could enter the storm sewer or groundwater. The Department simply states that the releases occurred "from the time Westinghouse began its operations in 1969," and that, by failing to notify the Department of them, Westinghouse engaged in "repeated and continuous" violations of section 101.2(a). (The Department's post-hearing memorandum, p. 157)

Westinghouse's post-hearing memorandum, meanwhile, fails to address the Department's arguments with respect to section 101.2(a) at all.

Westinghouse never notified the Department or downstream users that it had released Tri or Ta degreaser into the environment. (N.T. 2736-37, 3017) Therefore, Westinghouse violated section 101.2(a) with respect to any instance in which it allowed a polluting substance to be placed where it could enter a water of the Commonwealth.

Since the Department bears the burden of proof with respect to the section 101.2(a) violations, the Department's post-hearing memoranda should have identified every instance in which Westinghouse placed degreaser in a position where it could enter the groundwater or storm sewer, and the memoranda should have pointed to those parts of the record which supported its assertions for each one. The Department, however, failed to identify each of the releases which it felt gave rise to a section 101.2(a) violation. Instead, the Department simply argued that such releases had occurred "from the time Westinghouse began its operations in 1969," and have been

"repeated and continuous." These allegations are so vague as to be useless.

As noted earlier in this adjudication, parties waive all arguments that they omit from their post-hearing briefs. The Board has also held that proposing findings of fact without developing any argument is ordinarily not sufficient to preserve issues for the Board's review. *County Commissioners, Somerset County v. DEP*, EHB Docket No. 95-031-MG (Adjudication issued April 4, 1996); *Heasley v. DER*, 1994 EHB 624. It is the parties' responsibility, not the Board's, to sift through the record and frame their post-hearing briefs so as to present their best case. Therefore, we will not pore through the voluminous evidence collected at hearing and identify every possible release giving rise to a section 101.2(a) violation. For purposes of determining which violations of section 101.2(a) the Department has proven, we will only consider the handful of specific releases the Department actually mentions in its discussion of section 101.2(a).[32]

The Department's list contained the following allegations regarding releases:

(1) "The leak from the large scrap hopper was seen on a daily basis." (The Department's post-hearing memorandum, p. 158)

(2) "Drums of spent solvent and other industrial wastes were regularly seen ...leaking in the old drum storage area. (The Department's post-hearing memorandum, p. 158)

(3) "In the courtyard area, hoses from delivering tanks leaked solvent." (The Department's post-hearing memorandum, p. 158)

(4) "[S]pills from various mishaps occurred from delivery trucks." (The Department's post-hearing memorandum, p. 158)

---

[32] Even here we are being generous. The only references to specific releases in the Department's discussion of section 101.2(a) appear in a list of facts which the Department avers should have put Westinghouse on notice that contamination problems existed at the plant. Had Westinghouse responded in its post-hearing memorandum to any of the Department's arguments with respect to section 101.2(a), we might have been inclined to be less generous.

(5) "At one point..., the degreaser leaked [Tri] all over the floor." (The Department's post-hearing memorandum, p. 158)

(6) "On a regular basis, small containers of spent solvent from the welding operation were ... dumped into the floor joint cracks or emptied onto the ground outside...." (The Department's post-hearing memorandum, p. 158)

(7) "On one occasion, instruction was given to intentionally release 50 gallons of spent [Tri] from the degreasing tank onto the ground...." (The Department's post-hearing memorandum, p. 158)

We shall examine each of the alleged releases separately and determine whether the Department has proven that each case resulted in a section 101.2(a) violation, and, if so, how many.

a. Leaking from the large scrap hoppers

The Department proved that Westinghouse violated section 101.2(a) numerous times with respect to the leaks from the large scrap hoppers. We have already discussed many of the key facts regarding these leaks in our analysis of the violations of sections 301, 307, and 401 of the Clean Streams Law, above: (1) Westinghouse employees dumped degreaser containing Tri or Ta into small hoppers in the plant; (2) the liquid and other contents of the small hoppers were transferred to large hoppers in the railroad dock area; (3) 1-5 gallons of liquid leaked out holes in the bottom of the large hoppers daily; and, (4) most of that liquid consisted of degreaser, and followed the railroad tracks out of the plant and seeped into the ground outside.

The introduction of Tri or Ta into the soil put those chemicals in a position where they could enter the groundwater. Tri and Ta are very mobile in the soil and can leach quickly into the groundwater. (N.T. 1997-98, 2222) Consequently, Westinghouse violated section 101.2(a) every time it allowed degreaser to escape from the hoppers to the ground.

The question therefore becomes: How many times did Westinghouse allow this to occur?

The Department maintains that Tri or Ta was released in this manner every day. But the evidence does not support that. The evidence the Department cites in support of its position establishes only that *liquid* leaked from the large hoppers almost every day *between 1973 and 1978*. And the Department did not prove that the liquid contained degreaser each time it leaked. McKinney, who testified that he saw the liquid leaking from the hoppers between 1973 and 1978, testified that he could *usually* smell degreaser when the liquid leaked, but not every time. (N.T. 1397) He also testified that, between 1973 and 1978, employees dumped spent degreaser into the small hoppers "several times a week." (N.T. 1391) All the Department has proven, therefore, is that Westinghouse allowed Tri or Ta to escape from the large hoppers into the ground several times a week between 1973 and 1978.

b. Drums leaking in the old drum storage area

The Department proved that Westinghouse violated section 101.2(a) at least once a week between 1971 and 1978 with respect to the alleged releases from leaking drums in the old waste drum storage area.

The old waste drum storage area was located outside the southwestern corner of the plant. (N.T. 1897; H.D. 60, 142; Ex. C-121(c)) Drums of spent degreaser were stored there between 1971 and 1978. (N.T. 1400) The drums themselves were stored on pavement, but part of the edge of the pavement bordered soil. (N.T. 1402)

Two witnesses testified about leaks in the old drum storage area: Earl Plank and McKinney. Plank testified that he had seen drums leak in the area between 1969 and 1973, but that none of the leaks resulted in the release of more than a few gallons of degreaser. (N.T. 1571, 1600) Plank's testimony, however, is problematic. He never testified how many leaks he saw or whether any of

the degreaser which spilled left the pavement on which the drums were kept and entered the soil. Furthermore, while Plank refers to the releases as occurring between 1969 and 1973, it is unclear how many of those releases--if any--he saw on or after July 31, 1970. That date is significant because it is the date on which the civil penalties provision of the Clean Streams Law, at 35 P.S. § 691.605, became effective. We have previously held, in *DER v. Froehlke*, 1973 EHB 118, that we will not impose civil penalties under the Clean Streams Law for violations occurring before that date.

Given the problems with Plank's testimony, the Department has not established any section 101.2(a) violations based on the releases he described.

McKinney testified that, between 1971 and 1978, he saw drums of spent degreaser in the old waste drum storage area leaking once or twice a week. (N.T. 1404, 1406, 1433, 1451) He also testified that the degreaser which leaked out of the drums ran off the pavement and into the adjacent soil. (N.T. 1399, 1407, 1409) The soil next to the old drum storage area is discolored and a 0.5' soil sample taken from the old waste drum storage area indicated the presence of 40 ppb Tri. (N.T. 1407; Ex. C-131)

McKinney's testimony has its own problems: there is no indication as to the amount of degreaser which escaped in any releases he described, for instance. But his testimony is sufficient for us to conclude that the Department proved that Westinghouse violated section 101.2(a) at least once a week between 1971 and 1978 with respect to the releases in the old waste drum storage area.

c. Leaking hose from the delivery truck

In 1981, the plant started receiving degreaser shipments in a solvent storage tank in the courtyard area. The tank was re-filled every 6-8 weeks. (H.D. 41) At first, the storage tank was

filled by pumping degreaser into the tank from a tank truck. (N.T. 228; H.D. 22, 50) Ta was pumped into the solvent storage tank in the courtyard area from a tank truck. Approximately one cup of Ta would spill each time the storage tank was filled. (H.D. 100) In 1984, the procedure changed, and Ta was loaded into the storage tank by "blowing it off"--pressurizing the tank on the tank truck and forcing the Ta out and into the storage tank. (H.D. 22-24) Sometimes there would be leakage from the valves in the courtyard during this process, but releases were rare compared to filling the tanks by pumping. (H.D. 23-24) Ta was detected in at least one of the soil samples taken from the courtyard. (N.T. 4395; Ex. D-81 at Table 4-2)

There are a number of problems with the evidence concerning the releases associated with refilling the storage tank, however. With respect to the releases resulting from pumping degreaser into the tank, there is no evidence whether the degreaser which escaped entered the soil or remained on pavement. Given the volatility of Tri and Ta, spills to the pavement may well have evaporated rather than run off into the surrounding soil. The evidence concerning the releases resulting from "blowing off" degreaser into the tank is even more problematic. The Department failed to elicit any evidence as to how many releases occurred, how much degreaser was spilled in each release, or whether the degreaser which escaped entered the soil or remained on pavement.

Although the evidence concerning these releases is incomplete, it does show that there was at least one violation of section 101.2(a). The Ta contamination in the soil, taken together with the spills of degreaser in the area, indicate that spilled degreaser entered the soil at least once.

d. Releases during unloading of new degreaser drums from the delivery truck

Between the winter of 1970 and the end of 1974, Ronald Sadler was

responsible--off and on--for unloading the drums of new degreaser from the trucks which delivered it. (N.T. 1503) The drums were unloaded on the southwest side of the plant, near the volatile storage area. (N.T. 1503-04) On several occasions when Sadler was responsible for unloading the drums, particularly during the winter of 1970, drums of degreaser were dropped as they were being unloaded and started to leak. (N.T. 1507-08, 3276, 3318) Ordinarily, when this occurred, relatively little degreaser escaped. (N.T. 1507) On several occasions, however, "a lot" leaked out. (N.T. 1508) On at least one occasion, more than half of a 55-gallon drum escaped. (N.T. 1503-04)

The degreaser which escaped from the damaged drums fell onto the pavement in the volatile storage area, then ran down the incline on the pavement to an adjacent grassy area. (N.T. 1516-17; Ex. C-121(c))

The evidence concerning these releases is problematic because it is unclear whether any of the releases occurred on or after July 31, 1970, when the civil penalties provision of the Clean Streams Law became effective. The evidence indicates that the drums were dropped and started leaking on several occasions, and that this was a particular problem in the winter of 1970. There is no indication whether the remaining leaks occurred before or after July 31, 1970. We cannot conclude that Westinghouse is liable for a civil penalty under section 101.2(a) of the regulations where, as here, it is unclear whether the alleged violation occurred before the civil penalties provision of the Clean Streams Law became effective.

e. The release from the degreasing machine to the floor of the plant

On one occasion between 1973 and 1975, one of the pumps on the large degreaser malfunctioned and a relatively large amount of degreaser leaked to the floor of the plant. (N.T. 1510, 1522) The spilled degreaser was cleaned up, but the Department contends that some of the

degreaser made its way through the floor and into the environment. (N.T. 1522) There were floor joints in the degreasing area, each of which was filled with about 1/2 inch of rubber tar. (N.T. 1510, 1896) Cracks and holes existed in the floor joints in some areas of the plant, but the Department failed to elicit any evidence that the floor joints in the degreasing area had these problems. (N.T. 1897)

The Department has failed to prove that this spill resulted in degreaser being put in a position where it might enter a water of the Commonwealth. Although the evidence indicates that there was a spill in the degreasing area, that there were floor joints in the same area, and that the floor joints in some parts of the plant had cracks or holes in them, there is no evidence here to suggest that the spill led to degreaser being put in a position where it might enter a water of the Commonwealth. To show that the spill resulted in a violation of section 101.2(a), the Department had to show that the soil beneath the area where the spill occurred had been contaminated, or, at the very least, to show that the floor joints were not secure in the area where the degreaser was spilled.

f. The dumping of small containers of spent degreaser from the welding area

Employees in the welding area used degreaser to remove dirt and grease from metal before it was welded. (N.T. 1383) They kept degreaser in several half-gallon or gallon containers. (N.T. 1383, 1387) Prior to 1973, McKinney occasionally saw the employees pour spent degreaser from the small containers into the floor joints. (N.T. 1387, 1419, 1445-46) He saw this occur between 3-10 times. (N.T. 1439) McKinney also testified that, while he worked in the welding area, employees there dumped the containers of degreaser onto the grass outside a fire escape door on

the west wall of the plant. (N.T. 1387-88, 1420) McKinney did not start working at the plant until August of 1971, and was a welder until approximately 1973. (N.T. 1382-83) Therefore, we know that the releases occurred after July 31, 1970, when the civil penalty provision of the Clean Streams Law became effective.

The evidence shows that Westinghouse violated section 101.2(a) with respect to the dumping of degreaser outside. The degreaser was dumped directly onto the soil, where it could contaminate groundwater. The Department failed, however, to elicit any evidence as to how many times this occurred. As a result, the Department has only proven that one violation of section 101.2(a) resulted from dumping on the grass.

The Department failed to prove that the dumping of degreaser into the floor joints would put degreaser in a position where it could enter a water of the Commonwealth. As in the case with the alleged violations resulting from the spill from the degreasing machine, the Department failed to elicit any evidence showing that the soil beneath the relevant floor joints was contaminated or that those floor joints leaked.

g. The dumping of the 275-gallon tank

The Department proved that Westinghouse violated section 101.2(a) with respect to the alleged dumping of the 275-gallon tank. Earl Plank testified that, in the early 1970s, he dumped approximately 50 gallons of Tri from a 275-gallon storage tank onto the ground behind the plant. (N.T. 1562, 1569, 1576, 1594) Although Plank conceded that the tank had sat outside from approximately six months before it was emptied, that it had rained during that time, and that the tank contained some water, he also testified that the tank contained spent Tri degreaser when it was placed outside, that the tank had a flip-top, that most of the liquid in the tank was spent Tri, and that

the liquid which he dumped from the tank smelled like Tri. (N.T. 1605, 1608, 1617)

Westinghouse argues that Plank's testimony was rebutted by testimony elicited from Althoff, but we disagree. Plank testified that he *thought* that Althoff was present when the dumping occurred and that he dumped the tank on a gravel driveway behind the plant. (N.T. 1575, 1595-96) Westinghouse argues that Plank's testimony is not credible in light of Althoff's testimony that he (Althoff) was never present at such an incident; that the driveway behind the plant was dirt, not gravel; and that the road was so rutted that the tow motors used to move the storage tank would not have worked on the road. (N.T. 3254, 3259, 3260, 3312) Westinghouse neglects to mention, however, that Althoff also testified that Plank could have dumped the contents of the tank on the driveway from an adjacent blacktopped area without ever having to use the tow motor on the driveway itself. (N.T. 3312) Since Plank did not pretend to be certain that Althoff was present during the dumping, the only aspect of their testimony which is inconsistent pertains to whether the driveway was gravel or dirt, a question which is immaterial. We find Plank's testimony with respect to the dumping of the tank to be credible.

4. <u>The alleged violations of 25 Pa. Code § 101.2(b)</u>

The Department argues that Westinghouse violated 25 Pa. Code § 101.2(b) because Westinghouse failed to immediately take steps to minimize the injury to downstream users and waters of the Commonwealth after degreaser had escaped at the plant and was in a position where it could enter the storm sewer and groundwater. As in the case of the alleged violations of section 101.2(a), above, the Department alleges that violations of section 101.2(b) were "repeated and continuous." The Department neglects, however, to identify just which of the alleged releases resulted in degreaser being placed in a position where it could enter the storm sewer or

groundwater. Nor does the Department point to specific evidence showing that Westinghouse failed to take steps necessary to protect downstream users and their property. The Department simply argues that "Westinghouse's conduct in the Old Drum Storage Area is *a good example*" of Westinghouse's failure to take such steps and then explains why Westinghouse's conduct with respect to the old drum storage area was deficient. (The Department's post-hearing memoranda, p. 166 (emphasis added))

Westinghouse's post-hearing memorandum fails to address the alleged violations of section 101.2(b) specifically but does argue that Westinghouse acted promptly and responsibly to determine the source of the pollution, to provide downstream users with water filters and bottled water, and to remediate contaminated groundwater.

As we explained in our analysis of section 101.2(a) above, we will not sift through the evidence to identify every possible release giving rise to a section 101.2(b) violation. The Department was responsible for doing so in its post-hearing memoranda. We shall not take that yoke upon our shoulders simply because the Department identified only one "example" of releases resulting in section 101.2(b) violations.

Here, however, it is clear that there were numerous releases resulting in section 101.2(b) violations even without resorting to the tedious process of combing through the record for them ourselves. We have established above, in our analysis of the section 101.2(a) violations, numerous instances in which Westinghouse allowed Tri or Ta degreaser to be placed in a position where it could enter the groundwater. Where a person has a duty to provide notice under section 101.2(a), he also has a duty under section 101.2(b) to immediately take steps to protect the water, property,

and downstream users from the danger of pollution.[33] Therefore, Westinghouse violated section 101.2(b) with respect to any of the section 101.2(a) violations for which it failed to take immediate action to protect the water, property, and downstream users.

The first time Westinghouse attempted to clean up or contain the pollutants in the soil was on December 13, 1983. (N.T. 2763) At that time, without receiving prior authorization from the Department, Westinghouse started excavating soil from two areas at the plant. (N.T. 491-96, 1076-1088) It excavated approximately 33 drums of earth in and around the storm drain near the pumphouse. (N.T. 243) This soil was placed in drums and then shipped to a hazardous waste landfill. (H.D. 27, 68) Ken Hess, the supervisor of plant engineering and responsible for maintenance of the plant, directed that the soil be removed because it contained paint chips and Hess assumed it was contaminated. (N.T. 243; H.D. 27, 69, 84) The soil was not tested to determine whether degreaser was present. (H.D. 68) Westinghouse also removed soil which it suspected of being contaminated from near the railroad dock area. (N.T. 2763, H.D. 128) This soil was also never tested. (H.D. 83, 85) Approximately 10 drums of earth were removed, and shipped to a hazardous waste landfill. (N.T. 245, H.D. 83-84) Westinghouse discontinued the excavations when the Department discovered it had been removing the soil and ordered Westinghouse to desist. (N.T. 244, 247-248, 335)

---

[33] Section 101.2(b) provides, in pertinent part:

> In addition to the notices set forth in [section 101.2](a), the person ... shall immediately take or cause to be taken necessary steps to prevent injury to property and downstream users of the waters and to protect the waters from pollution or a danger of pollution....

25 Pa. Code § 101.2(b).

Sometime after the excavations ceased, Westinghouse agreed to EPA and Department requests that it undertake three other measures to minimize the injury to downstream users and waters of the Commonwealth:

> (1) distributing carbon filters free to persons in the vicinity who wanted them (N.T. 1772, 2988);
>
> (2) distributing bottled water free to any local residents who wanted it (N.T. 252, 1344, 1739, 1772); and,
>
> (3) providing municipal water to many residents in the vicinity of the contaminated wells. (N.T. 1334, 2521)

Westinghouse agreed to these measures only after April 26, 1984, approximately 8 months after contamination was first detected at the plant site. (N.T. 1344) In the fall of 1984, Westinghouse implemented a fifth measure: it started operating an air stripping tower to remove contamination from the groundwater on the site. (N.T. 289, 1774)

Even assuming Westinghouse fulfilled its duty to protect the water, property, and downstream users when Westinghouse excavated the soil at the plant on December 13, 1983, the Department has proven that Westinghouse failed to take that action immediately--as required by section 101.2(b)--with respect to each of the releases which served as the basis of section 101.2(a) violations.

a. Leaking from the large scrap hoppers

We established above that Westinghouse violated its duty to provide notice under section 101.2(a) numerous times with respect to the releases from the large scrap hoppers which occurred between 1973 and 1978. Even assuming Westinghouse fulfilled its duty to take action to protect the groundwater, property, and downstream users from the consequences of those

releases on December 13, 1983, Westinghouse failed to fulfill that duty "immediately" as required by section 101.2(b). Therefore, Westinghouse violated section 101.2(b) with respect to each of the releases from the large hoppers which served as the basis for the section 101.2(a) violations.

b. Drums leaking in the old drum storage area

We established above that Westinghouse violated its duty to provide notice under section 101.2(a) numerous times with respect to releases from leaking drums in the old waste drum storage area which occurred once a week between 1971 and 1978. Even assuming Westinghouse fulfilled its duty to take action to protect the groundwater, property, and downstream users from the consequences of those releases on December 13, 1983, Westinghouse failed to fulfill that duty "immediately" as required by section 101.2(b), with respect to most of the releases which served as the basis for the section 101.2(a) violations.

c. Leaking hose from the delivery truck

The Department failed to elicit evidence showing that the section 101.2(a) violation attributable to the release from this source would also be a section 101.2(b) violation assuming Westinghouse fulfilled its duty to take action to protect the water, property, and downstream users as of December 13, 1983. It is unclear from the evidence whether this release even occurred before that date. The soil sample showing the courtyard area was contaminated was not taken until 1988, and deliveries of Ta to the tank continued into 1984. (Ex. D-81, at Table 4-2)

d. The outdoor dumping of small containers of spent degreaser from the welding area

We established above that Westinghouse violated its duty to provide notice under section 101.2(a) with respect to the deliberate dumping of small containers of spent degreaser from

the welding area into the soil between 1971 and 1973. Even assuming Westinghouse fulfilled its duty to take action to protect the groundwater, property, and downstream users from the consequences of those releases on December 13, 1983, Westinghouse failed to fulfill that duty "immediately" as required by section 101.2(b). Therefore, Westinghouse violated section 101.2(b) with respect to each deliberate dumping of the small containers which served as the basis for the section 101.2(a) violations.

e. The dumping of the 275-gallon tank

We established above that Westinghouse violated its duty to provide notice under section 101.2(a) with respect to the intentional dumping of the 275-gallon tank outside the plant in the early 1970s. Even assuming Westinghouse fulfilled its duty to take action to protect the groundwater, property, and downstream users from the consequences of that release on December 13, 1983, Westinghouse failed to fulfill that duty "immediately" as required by section 101.2(b). Therefore, Westinghouse violated section 101.2(b) once with respect to this release.

D. Are the Civil Penalties the Department Requests Appropriate Given the Violations Proven?

Having established which violations the Department has proven, the only remaining question is the appropriate amount of civil penalties to be assessed. Unlike many other Commonwealth environmental statutes where the Department assesses civil penalties and the person assessed then has the option of the appealing to the Board, the Clean Streams Law authorizes the Board itself to assess civil penalties. *DEP v. Silberstein*, EHB Docket No. 95-208-CP-MG (Opinion issued May 31, 1996); *DER v. Allegro Oil & Gas Co.*, 1991 EHB 34. Where, as here, the Department files a complaint for civil penalties under the Clean Streams Law, the

Department's calculation of the civil penalty is advisory only. *E.M.S. Resource Group, Inc. v. DER*, 1995 EHB 834. We need not consider the Department's rationale for the penalties. *See, e.g., DER v. Landis*, 1994 EHB 1781.

Section 605 of the Clean Streams Law, 35 P.S. § 691.605, provides that, when determining the amount of a penalty under the Clean Streams Law, the Board shall consider "the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors...." These "other relevant factors" include, among other things, the deterrent effect of the penalty and any reasonable costs the Department has expended investigating the violations. *See, e.g., DER v. Southwest Equipment Rental, Inc.*, 1986 EHB 465, 480 (deterrence); *DER v. Berks Associates, Inc.*, 1973 EHB 111, 115-116, and *DER v. Merle Construction Co.*, 1980 EHB 73, 85-86 (reasonable investigative costs). Since Westinghouse has agreed to undertake the cost of remediation itself, we shall not hold that cost against Westinghouse for purposes of calculating the civil penalties. Since we do not include the cost of remediation to begin with, we will not deduct the cost of remediation from the penalties we ultimately arrive at, as the dissent suggests. Were we to do so, we would be giving Westinghouse credit *twice* for the remediation costs.

The maximum amount the Board may assess for a violation of the Clean Streams Law depends on when the violation occurred. Prior to 1980, section 605 provided that the maximum penalty which could be assessed for a single violation was $10,000, plus $500 for each day of continued violation. Effective October 10, 1980, however, the Legislature raised the maximum amount the Board can assess for violations which last more than one day; section 605 now provides that the civil penalty "shall not exceed ten thousand dollars ($10,000) per day for each violation."

35 P.S. § 691.605(a). As noted above, the Department proved that Westinghouse engaged in extended violations of the Clean Streams Law and the regulations thereunder both before and after October 10, 1980.

The Department requests that we assess a civil penalty of $414,952 for violations of sections 301, 307, and 401 of the Clean Streams Law; $2,677,384 for violations of section 101.2(a) of the Department's regulations; and $5,989,000 for violations of sections 101.2(b) and 101.3(a) of the Department's regulations. Many of the issues pertaining to the reasonableness of the penalties to be imposed here are interrelated. For instance, the degree of contamination in the groundwater is not only relevant in determining the appropriate penalty for the unlawful discharge of Tri and Ta, in violation of sections 301, 307, and 401 of the Clean Streams Law, it is also relevant to determining what penalty is appropriate for failing to notify downstream users, in violation of section 101.2(a) of the Department's regulations.

We shall examine some of these overlapping issues before determining whether each of the three separate penalties the Department requests is appropriate given the violations it has proven.

1. Other possible sources of Tri and Ta contamination

a. The burden of proof and burden of proceeding

Westinghouse argues that the Department bore the burden of proving that sources other than Westinghouse did not cause or contribute to the groundwater contamination in the area. The Department argues that it need only prove that Westinghouse is the more likely cause of the pollution.

Section 1021.101(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.101(a), provides:

> In proceedings before the Board, the burden of proceeding and the burden of proof shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of an issue to establish it by a preponderance of the evidence.

To satisfy the "preponderance of evidence" standard, a party need not foreclose the possibility of other alternatives; it need only prove that the existence of a contested fact is more probable than not. *South Hills Health System v. Department of Public Welfare*, 510 A.2d 934, 936 (Pa. Cmwlth. 1986); *C & K Coal Co. v. DER*, 1992 EHB 1261, 1289. Because the burden of proceeding and burden of proof generally lie with the party asserting the affirmative of an issue, once the Department proves that a defendant has illegally discharged a polluting substance into a water of the Commonwealth, the burdens shift to the defendant to prove that others caused or contributed to the amount of that substance in the water. Therefore, since the Department has proven that Westinghouse discharged Tri and Ta into the groundwater at the plant, Westinghouse bears the burden of proving that some--or all--of the groundwater contamination in the area came from other sources. Westinghouse has failed to do so here.

b. The old farm pond

Westinghouse argues that Tri and Ta contamination at the site originated from chemical wastes disposed of in an old farm pond before Westinghouse moved to the area. The pond was filled in during construction of the plant and lay partly beneath what is now the central portion of the eastern side of the plant. (N.T. 570, 2421; Ex. C-121(k)) In support of its position, Westinghouse notes that there was testimony that steel drums were discovered in the pond when it was drained prior to being filled in, and that groundwater samples retrieved from the area where the pond had been located contained some of the highest contaminant levels of any of the

groundwater samples taken at the site.

The Department argues that chemical waste was not dumped in the pond prior to construction of the plant, and that the contamination in the old farm pond area today has migrated there from spills at other parts of the plant.

We find the Department's position more persuasive.

Three witnesses testified concerning the condition of the pond at the time it was filled. Thomas Romito, a former Westinghouse employee who served as the building coordinator for the site, testified that when the pond was drained, refrigerators, trash cans, and other "junk"--including several steel drums--were found. (N.T. 73, 75-76) Although he conceded that he had previously testified that no drums were found, he testified at the hearing that he had thought more about it and had changed his mind. (N.T. 75-76)

George Dorman, a former Westinghouse employee and plant manager at the time the plant was constructed, testified that the pond contained auto parts, scrap metal, and the like. (N.T. 564-566, 570) He did not mention steel drums or any other container likely to contain Tri or Ta.

Hess, supervisor of manufacturing at the time the plant was constructed and who had lived all his life within view of the land where the plant was constructed, testified that he had seen several old cars in the pond, but never anything that seemed like it would contain chemical waste. (H.D. 38)

Of the three witnesses who testified about the condition of the pond, only Romito testified that there was any indication that chemical waste may have been disposed there. Given the fact that he had previously testified that no drums were found in the pond, we find Romito's testimony to be more suspect than that of Dorman or Hess.

The other evidence concerning whether the old farm pond was the source of the groundwater contamination at the site consisted of expert testimony from Patrick O'Hara and Jeffrey Molnar. O'Hara, a civil engineer called by Westinghouse, testified that he concluded that the old farm pond was the source of the groundwater contamination because the highest concentrations of Tri contamination were detected in the old farm pond area and because all of the monitoring wells upgradient of the old farm pond were contaminated, but none of those downgradient were. (N.T. 4341, 4401, 4421-22, 4449) O'Hara did, however, concede that it was possible that the contamination centered in the old farm pond area could have arisen from spills in other areas of the Westinghouse plant site. (N.T. 4535)

Molnar, a hydrogeologist with the Department, testified that pollutants dumped in the old farm pond could not have caused the groundwater contamination at the site because (1) fill in the area of the pumphouse was contaminated (N.T. 2626-28; Ex. C-131); (2) the fill in the pumphouse area was placed after the pond had been emptied (N.T. 2627-28); and, (3) contamination from the pumphouse area could migrate to the area of the old farm pond, but contamination from the old farm pond could not migrate to the area of the contaminated pumphouse fill. (N.T. 4695-96) He explained the high concentrations of contaminants in the area of the old farm pond by noting that spills in the area of the courtyard and pumphouse areas would follow the bedrock contours downhill to the area where the farm pond had been located. (N.T. 4695) Molnar also testified that, depending on precisely where the release occurred, contaminants released in the railroad dock area could also flow to the old farm pond area. (N.T. 4694, 4709)

We find Molnar's testimony to be more credible for a number of reasons. First, his qualifications are better in the field of hydrogeology. Molnar has a bachelor's degree in geology

and had been employed as a hydrogeologist for at least fourteen years at the time he testified. (N.T. 2303-10; Ex. C-155) He has also participated in approximately 1,000 hydrogeological studies. (N.T. 2306, 2602) O'Hara, meanwhile, has never been employed as a hydrogeologist and does not have a degree in geology or hydrogeology. (N.T. 4351) He took only five courses in college pertaining to hydrogeology and has only been qualified as an expert in the field once, in the supersedeas hearing in this case. (N.T. 4354-55)

Second, it is more likely that the contamination in the old farm pond area originated from contamination elsewhere on the site than vice versa. The Department has proven that Westinghouse discharged Tri and Ta to the groundwater elsewhere on the site, but Westinghouse did not prove that Tri or Ta were pre-existing in the old farm pond. Were we to accept Westinghouse's proposition that the contamination resulted from Tri and Ta from the old farm pond, we would have to assume that, before the plant was constructed, the pond just happened to be contaminated with the same degreasers Westinghouse later used at the plant. Given the other evidence, we find this improbable.

Finally, we note that while O'Hara testified that he did not think it likely that the contamination in the old farm pond resulted from spills elsewhere on the site, he did concede it was possible. Molnar did not qualify his conclusion in the same way.

c. Potential sources off-site

Westinghouse also argues that some of the contamination present near the plant is attributable to releases from sources off the plant site. In its post-hearing memorandum, Westinghouse identifies thirteen commercial facilities where volatile organic compounds were used, or might have been used. According to Westinghouse, each of these facilities was a potential

source of the contamination and some were closer to contaminated residential wells than the plant was, and, therefore, the Department had to prove that none of these other facilities could have been the source of the pollution. Westinghouse also argues that the Department had the burden of proving that the contamination was not caused by nearby homeowners using septic system cleaners which may have contained Tri or Ta.

As noted above, since the Department has proven that Westinghouse discharged Tri and Ta into the groundwater in the vicinity, Westinghouse bears the burden of proving that other sources contributed to the groundwater contamination.

Westinghouse failed to show that any of the contamination was attributable to any of the thirteen facilities it contends could have been sources. First, Westinghouse's own expert on the migration of contaminated water, Patrick O'Hara, conceded that all but two of the facilities are located outside the area potentially affected by groundwater contamination, and that the two which are not are located downgradient of the most severe pollution in the area. (N.T. 4463, 4487-90; Ex. D-85) Second, Westinghouse failed to elicit evidence establishing that Tri or Ta entered the soil at any of the thirteen facilities, much less entered the groundwater. Third, the only evidence that any of the facilities even used Tri or Ta consisted of a statement by Calvin Kirby, a solid waste specialist with the Department who investigated the possibility that the contamination might have arisen from other sources. (N.T. 593-94, 616) Kirby testified that a body shop in the area, Keller's Body Shop, had a container of "mineral spirits" in its possession which the label indicated contained 5% Tri. (N.T. 606) Although Kirby testified that the body shop cleaned its brushes and spray-painted outside on a macadam surface, he also testified that most of the waste evaporated, the rest went down a sanitary drain, and that there was no indication of soil contamination. (N.T.

633-34) There was no evidence to suggest that the "mineral spirits" or any other Tri or Ta-containing substance was used in the spray-painting or brush-cleaning operations.

Westinghouse also failed to show that any of the groundwater contamination was caused by nearby homeowners using septic system cleaners. While Westinghouse adduced some evidence to the effect that certain septic tank and household products contain Tri, there was no evidence that any of those products contain Ta, that any of the homeowners in the vicinity used the products containing Tri, or that, even if the homeowners did use products containing Tri, the use of those products would result in Tri entering the groundwater. (Ex. C-72)

d. PCE contamination present in some residential wells

Westinghouse also argues that it could not have been the source of all the Tri and Ta contamination present in nearby residential wells because some of the wells were contaminated with PCE. According to Westinghouse, the PCE shows that some of the Tri and Ta contamination came from other sources because Westinghouse did not use PCE at the plant, and PCE is not a component or degradation product of the degreasers used at the plant.

There are two major problems with Westinghouse's argument. First, even assuming Westinghouse were not the source of the PCE contamination present in some of the wells, that would not show that another source caused the Tri or Ta contamination in those wells. The fact that another source discharged PCE does not show that it discharged Tri or Ta. Second, Westinghouse failed to prove that the degreasers discharged at the plant did not contain PCE.

In support of its contention that the Tri degreaser did not contain PCE, Westinghouse points to Material Safety Data Sheets, provided by the degreaser supplier, which indicate that the product is 100.00 percent Tri. (Ex. C-38, C-39) Other evidence suggests, however, that the Tri degreaser

Westinghouse used at the plant did contain PCE.

The Tri degreaser is manufactured by removing hydrochloric acid from 1,1,2,2-tetrachloroethane. (N.T. 4652) In the late 1960s and early 1970s, the 1,1,2,2-tetrachloroethane used to produce Tri in this reaction typically contained PCE as well, because the latter was a byproduct of the process used at that time to generate the 1,1,2,2-tetrachloroethane. (N.T. 4653) The PCE would not degrade at all in the reaction to change the 1,1,2,2-tetrachloroethane to Tri. (N.T. 4654) As a result, commercial grade Tri frequently contained PCE. (N.T. 4665)

Although the Material Data Safety Sheets state that the product Westinghouse purchased was 100.00 percent Tri, that figure is suspect since the sheets also state that paint grade Tri contains approximately 0.4% acrylonitrile by volume. (N.T. 4669; Ex. C-38, C-39) The implication is that the product is not really 100.00 pure Tri despite the percentage figure listed on the Material Safety Data Sheets. Furthermore, Michael Webb, Chief of Organic Chemistry Section of the Department's Bureau of Laboratories, testified that, in most commercial grade "Tri," actual Tri accounts for only 80 percent of the primary product, and that it was unlikely that Westinghouse had purchased "pure" Tri, because removing tetrachloroethene and the other non-Tri components of the product would require multiple distillations and increase the price of the Tri product by a factor of 10 to 100. (N.T. 4639, 4657-4658, 4667)

In light of the foregoing, the evidence of PCE contamination in some of the residential wells does not persuade us that there was a source of Tri or Ta contamination in addition to Westinghouse.

e. Could the plant have contaminated the residential wells to the southeast?

Westinghouse also argues that it could not have contaminated the residential wells southeast of the plant because the groundwater in the area flows to the east and northeast. Some of those wells were contaminated with Ta, some with Tri, and some with both chemicals. (Ex. C-98, C-99, C-100)

The Department argues that the direction of groundwater flow has not been constant and that, while groundwater may currently flow to the north or northeast, it used to flow to the east or southeast, contaminating the wells southeast from the plant.

The evidence here does not show that the wells southeast of the plant were contaminated by a source other than Westinghouse.

Two expert witnesses testified concerning the direction of groundwater flow in the vicinity of the plant: O'Hara, for Westinghouse, and Molnar, for the Department. O'Hara testified that contamination at the Westinghouse site could not have contaminated the residential wells southeast of the plant because the groundwater in the area flows to the east or northeast, and because the ratio of Ta to Tri in the southeastern wells differs from that found in wells which were east or northeast of the plant. (N.T. 4400, 4420, 4546-47) O'Hara did not account for how the wells southeast of the plant became contaminated with Tri or Ta.

Molnar testified that, although the groundwater currently flows to the east or northeast of the plant, the flow only recently changed to that direction, and used to be to the east or southeast of the plant. (N.T. 2615, 4701) He explained that, absent any external factors, the groundwater would flow to the northeast, but that pumping of the residential wells southeast of the plant had

drawn the groundwater in a more southerly direction, contaminating the wells. (N.T. 2414-2415, 4703) According to Molnar, the groundwater started to flow more to the north only when the water supplies of those living southeast of the plant were replaced and the residents stopped pumping their wells. (N.T. 4702) None of the residences southeast of the plant had public water prior to the spring of 1984, and many of them did not get it until the fall of 1987. (N.T. 4277; Ex. D-77)

We find Molnar's testimony regarding the direction of groundwater flow to be more credible for a number of reasons. First, for the reasons set forward at section IV.D.1.b (concerning the old farm pond) above, Molnar has greater expertise in the field of hydrogeology. Second, Molnar's explanation accounts for how the wells southeast of the plant became contaminated with Tri and Ta, but O'Hara's does not. Third, O'Hara based his conclusions on well data collected in 1989 as part of the Phase 2 Study, after the residences southeast of the plant had been supplied with public water. (N.T. 4421-22; Ex. D-81, vol. 1, at 4-12 and 4-19 to 4-21) Although O'Hara testified that he did not think that pumping from the southeastern wells would affect the direction of groundwater flow, he did not point to data or studies conducted while the wells were still being pumped, in support of his position. (N.T. 4523, 4525) In fact, the studies and reports based on earlier data support Molnar's position: that the groundwater flowed to the east or southeast. The preliminary investigation of volatile organic chemical contamination, Ex. C-112, prepared for Westinghouse by R.E. Wright Associates, identified the direction of groundwater flow as to the southeast. (N.T. 2615; Ex. C-112) And the February 1988 draft of the work plan for the remedial investigation/feasibility study, Ex. C-121(d), prepared for Westinghouse by Paul Rizzo Associates identified the flow direction as to the southeast or east. (N.T. 2616) Furthermore, while O'Hara testified that the pumping of the wells would not affect the direction of the groundwater flow here,

he did concede that pumping groundwater wells can have an influence on the direction of groundwater flow in the vicinity.[34,35] (N.T. 4522) Finally, while the levels of Tri and Ta in some of the wells southeast of the plant varied somewhat from those detected elsewhere in the vicinity, Molnar testified that he would expect to see such differences because:

> (1) in geologic structures like the one beneath the plant, contamination tends to travel in "slugs" in the groundwater; they are not dispersed evenly; (N.T. 2410-2411, 2506, 2425)
>
> (2) different chemicals may have entered the groundwater at different times, depending on when they were released into the environment or when they leached from the soil into the groundwater; (N.T. 2425, 2612-14) and,
>
> (3) some wells may have been located closer to fractures than other wells. (N.T. 2552)

In light of the foregoing, Westinghouse has failed to show that the contamination in the wells southeast of the plant came from a source other than the plant.

2. <u>Harm to waters of the Commonwealth and those who use them</u>

As noted in our discussion of the alleged violations of sections 301, 307, and 401 (at section IV.C of the discussion above), the Department proved that Westinghouse discharged degreaser to both surface waters and groundwater in the vicinity of the plant. The harm resulting from the contamination of the surface water is relatively minor. The Department proved that the eastern

---

[34] Although Westinghouse argues that the cessation of pumping would not have had an effect on the direction of groundwater flow because more wells are located to the east and north of the plant than to the south of it, the overwhelming majority of the residential wells in the vicinity of the plant are located southeast of the plant: approximately 66 wells are located to the southeast, while only approximately 34 are to the east, and approximately 13 are to the north. (Ex. C-97)

[35] In an earlier decision in this case, granting a partial supersedeas to Westinghouse, we noted that when the air stripping tower was in operation, the pumping of groundwater to the tower affected the direction of groundwater flow. *See Westinghouse Electric Corporation v. DER*, 1988 EHB 857, 861.

tributary contained 2 ppb Tri and 4 ppb Ta. on August 16, 1983; that the tributary contained 10 ppb Tri in December of 1988 or January of 1989; and that a January, 1989, water sample from the storm sewer, collected near the pumphouse where the grates were cleaned, contained 11 ppb Ta. Since the last steam-cleaning of the grates occurred in 1984, the 1988-1989 samples from the storm sewer and tributary suggest that the pollution persisted in those waters for some time. Still, there was no evidence that the pollution in the storm sewer or tributary resulted in the contamination of anyone's drinking water, or that it resulted in other harmful consequences. Furthermore, the levels of contamination detected were relatively small.

The contamination in the groundwater, however, is another matter entirely. Westinghouse's releases resulted in extensive groundwater contamination. The residential well sampling near the plant detected the presence of a number of contaminants, including Tri; Ta; 1,1-DCE; 1,2-DCE; 1,2-DCA; PCE; chloroform, and chloroethane. (Ex. C-131.) Many of these chemicals exist in the groundwater as the result of the releases of degreaser. The degreaser contained Tri or Ta--obviously--depending on whether it was Tri or Ta degreaser. (Ex. C-38, C-39, C-40) In addition, the Tri degreaser contained PCE, a byproduct produced in the manufacture of Tri. (N.T. 869-71, 3484, 4653-54, 4665) The chemicals 1,1-DCE and 1,2-DCA, meanwhile, are degradation products of Tri.[36] (N.T. 2220) Since the Department has established that Westinghouse discharged Tri and Ta degreaser into the groundwater and failed to show that any other source contributed to the Tri, Ta, PCE, 1,1-DCA, or 1,2-DCE contamination, Westinghouse is liable for all the contamination

[36] There was also testimony that chloroform was a possible degradation product of Tri. (N.T. 2247) Since even this testimony stated that such an occurrence would be unlikely, we have not considered the chloroform contamination for purposes of determining the appropriateness of the civil penalties requested here.

attributable to those chemicals in the residential wells. The question then becomes: What threat did Tri, Ta, PCE, 1,1-DCE, and 1,2-DCA pose to the individuals using the wells?

We noted above (at section IV.C.1 of the discussion) that exposure to Tri or Ta can result in a wide variety of adverse effects--including intoxication, memory defects, instability, cardiac arrhythmia, and liver and kidney damage--and that Tri is a probable human carcinogen. The chemicals PCE, 1,1-DCE, and 1,2-DCA have toxicological characteristics very similar to those of Tri and Ta. (N.T. 1940) In addition, those chemicals have carcinogenic properties. PCE has been proven to be a human carcinogen in epidemiological studies. (N.T. 2242-44) 1,2-DCA is, like Tri, a probable human carcinogen. (Ex. C-148) And 1,1-DCE is a *potential* human carcinogen.[37] (Ex. C-149)

Samples taken from many of the residential wells indicated that they contained high levels of these chemicals. Of the 132 residential wells sampled, samples from at least 63 residences contained quantifiable contamination from Tri; 1,1-DCE; PCE; or 1,2-DCA. (Table 1 in Appendix) Samples from at least 44 of the wells contained levels of contamination in excess of the one-in-a-million cancer risk level for one or more of these contaminants; samples taken from at least 33 of the residences had excess levels of Tri; samples taken from at least 19 residences had excess levels of 1,1-DCE; samples taken from at least six of the residences had excess levels of PCE; and samples taken from at least two wells had excess levels of 1,2-DCA. (Table 1 of Appendix) Ordinarily, when the concentration of carcinogenic substances in drinking water exceeds the one-

---

[37] Substances which are potential human carcinogens have been shown to cause cancer in limited animal testing, but for which there is insufficient human data available to determine whether they cause cancer in humans. (N.T. 2044, 2213)

in-a-million cancer risk level, the Department advises users not to drink the water. (N.T. 918-20; Ex. C-84) Here the concentration of the contaminants exceeded the one-in-a-million cancer risk level by a factor of ten in many instances, and sometimes even a factor of 100.[38] (Table 1 of Appendix) The Tri contamination in the water is a special concern because the cancer risk level based on *ingestion* of Tri accounts for only half of the actual cancer threat posed by Tri in the water supply: the inhalation of Tri released during showering, cooking, and other household activities using water results in exposure levels comparable to those attributable to ingestion alone. (N.T. 2023)

The residential well samples also detected extensive Ta pollution. Samples from at least 29 of the wells contained quantifiable levels of Ta contamination. (Table 2 of Appendix)

Precisely what degree of harm the users of the wells suffered from the contamination is unclear. There was no evidence showing that anyone who drank contaminated water actually suffered any ill effects from doing so. Nor did the Department present evidence as to just how many people drank the contaminated water. Although the Department did present evidence on how to calculate the cancer risk caused by exposure to a carcinogen in drinking water given the concentration of the carcinogen in the water, the length of exposure, and the one-in-a-million cancer risk level, the Department failed to provide evidence with respect to essential parts of the equation here. The Department never established when the contaminants first entered the drinking water, for instance. It also failed to prove what levels of contamination existed in the water

---

[38] At the George F. Coleman residence, for instance, one sample indicated that the water contained 350 times the one-in-a-million cancer risk level for Tri, another indicated that it contained 869 times the one-in-a-million cancer risk level for 1,1-DCE. (*See* Table 1 of Appendix)

consumed.

The evidence regarding the residential well sampling shows that many wells were contaminated on multiple occasions over the course of several years. But the Department never established that the levels of contamination present when the samples were taken were representative of the levels of contamination between samples, or at other times. Indeed, the evidence tends to show that the levels of contamination present in the samples are *not* representative of the levels of contamination at other times. Consider the levels of contamination detected in the samples: the concentrations of the same contaminant in samples taken at the same location can vary widely even though both samples were taken within a short time of one another.[39] The Department's own expert witness in hydrogeology conceded that insufficient samples were taken here to determine what levels of contamination were present in the wells over time. (N.T. 2539) Furthermore, as noted previously in this adjudication, contaminants in groundwater can travel in "slugs"--they are not distributed in a uniform manner.[40] This phenomena can result in even day-to-day fluctuations in the levels of contamination measured in wells. (N.T. 2410)

While it may be hard to draw precise conclusions about the health threat given these problems, we can make some generalizations about the harm caused by the releases of the degreaser. First, whatever the deficiencies in the Department's case regarding the specific

---

[39] At the George F. Coleman residence, for instance, samples indicate that the concentration of Ta increased by 20 times and Tri by over 300 times over the course of 22 days. (Tables 1 and 2 in Appendix)

[40] Indeed, the Department points to this fact to explain why the varying levels of contamination detected in the samples do not indicate a problem with the analysis of the samples.

carcinogenic threat posed by the contaminants, it is clear that at least some of the wells contained potentially dangerous levels of contaminants on at least some occasions. Second, although samples from only 63 of the wells tested contained quantifiable levels of contaminants, at least 114 wells were in the path of the contamination plume, and therefore at risk. (N.T. 2730) Third, the contamination will persist for an exceedingly long time. Once Tri gets into groundwater, it can persist for thousands of years if nothing is done. (N.T. 1998) The same is true for Ta. (N.T. 2031) Even with active remediation, it will take at least twenty years to restore the aquifer. (N.T. 2436-37) Fourth, the contamination was severe. Before the contamination, the groundwater was potable and had good water quality. (N.T. 2365, 2604) Lee Yohn, a Department compliance specialist who had worked on at least 15 previous investigations involving groundwater contamination, testified that the damage to the water supply was "in a class by itself" and by far the most extensive he had seen. (N.T. 2720-21, 2760, 2763-65)

3. Willfulness

To determine the wilfulness of the violations, we must first ascertain the extent of Westinghouse's knowledge regarding them. The Department argues that Westinghouse is deemed to have the knowledge acquired by any or all Westinghouse officers or agents acting within the scope of their employment and authority, and, therefore, Westinghouse knew or should have known of the releases of the degreaser. Westinghouse does not respond to the Department's argument.

As we noted in our decision in *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, a corporation is deemed to know all material facts which its officers or agents acquire within the scope of their employment and authority, even if they do not communicate it. 1986 EHB at 475 (*citing* C.J.S. Corporations § 1078; *A. Schulman, Inc. v. The Baer Company, Inc.*, 178 A.2d 794

(Pa. Super. 1962); *In re Mifflin Chemical Corp.*, 123 F.2d 311 (3rd Cir. 1941) *cert. denied*, 315 U.S. 815 (1942)). Since Westinghouse does not argue that its officers or employees were not acting within the scope of their employment or authority at the time of the spill, the only question here is: What did Westinghouse officers and employees know about the releases and the efforts to clean them up? Anything they did know will be imputed to Westinghouse.

Westinghouse knew or should have known of the dangerous propensities of Tri. Although the connection between Tri and cancer did not come to light until approximately 1975, the other toxic effects of Tri exposure have been well known for at least 40 years. (N.T. 1998-2000) Westinghouse also should have known of the dangerous properties of Ta. Although the Department did not present any evidence showing that Westinghouse should have known of the adverse effects of Ta exposure prior to September of 1979, it did show that Westinghouse should have been aware of danger posed by the chemical after that time: The adverse consequences of Ta exposure were detailed in a material safety data sheet the Westinghouse plant received on September 24, 1979, and it has been listed as a hazardous substance by the EPA since at least July 7, 1980. (N.T. 2868; Ex. C-40)

Westinghouse is deemed to have knowledge of many of the releases of degreaser which occurred at the site. Since Plank was a Westinghouse employee, and he dumped the 50 gallons of Tri from the 275-gallon tank during the course of his work and at the direction of his supervisor, Westinghouse is deemed to have knowledge of that spill. Because its employees acquired knowledge of the releases during the course of their work at the plant, Westinghouse is also deemed to know that employees in the welding area were dumping the small containers of degreaser onto the ground outside; that drums of spent degreaser in the old drum storage area occasionally leaked

onto the pavement and ran onto the adjacent ground;[41] that the hose used to refill the degreaser storage tank would sometimes leak degreaser onto the ground in the courtyard;[42] that drums of degreaser sometimes dropped as they were being unloaded from the delivery truck, releasing degreaser into the ground.[43]

Westinghouse *should have known* about other releases of degreaser at the plant. The Department proved that Westinghouse employees knew that degreaser was dumped into the small hoppers, that the small hoppers had liquid in them which resembled the degreaser and was dumped, along with the other contents, into the large hoppers; that the large hoppers had holes in the bottom put there specifically so that the liquid dumped into them could escape; that liquid from the large hoppers smelled like degreaser and leaked out of the holes, onto the floor, and ultimately ran across the concrete in the railroad dock, out the door, and into the ground outside; and that the soil outside the railroad dock area was stained. The Department also proved that Westinghouse employees had witnessed the releases occur on a regular basis for a period of years.[44]

Westinghouse was less negligent with respect to the releases associated with the grate-

---

[41] As noted earlier in this adjudication, we concluded that the releases from the old drum storage area occcurred, in part, because McKinney testified that he had witnessed those releases. He saw the releases during the course of his work at the plant. (N.T. 1382-83, 1389, 1401-02)

[42] We concluded that the releases from the refilling of the storage tank occured, in part, because Hess testified that he had seen those releases. Hess saw these releases during the course of his work at the plant. (H.D. 7, 22)

[43] We concluded that the releases from the drums of degreaser dropped as they were being unloaded occcured, in part, because Sadler testified that he witnessed those releases. He saw the releases during the course of his work at the plant. (N.T. 1503-1504)

[44] We concluded that the releases from the hoppers occured, in part, because McKinney testified that he had witnessed those releases during the course of his work at the plant. (N.T. 1382-83, 1385-89, 1392-96)

cleaning operations near the pumphouse. Given the fact that degreaser was not used in the grate-cleaning process, and that the grates were never directly exposed to the degreaser, it would have been less obvious to Westinghouse and its employees that discharges from the grate cleaning might contain degreaser. Still, Westinghouse and its employees were aware that the grates were from the painting booth, that the components entered the painting booth shortly after they had been exposed to degreaser; that the grates, when they were cleaned, were covered with excess paint from the painting booths; that some of the runoff from the grate cleaning entered the storm sewer; and that there were certain areas around the slab where the grates were cleaned where no grass would grow--despite the fact that the slab lay in a grassy area. (N.T. 3323) There is also no indication in the record that Westinghouse took any steps to ascertain that no pollutants were in the runoff which escaped into the storm sewer as a result of the cleaning.

Despite the fact that Westinghouse knew or should have known of many of the discharges of degreaser to the ground, the company never conducted an environmental audit to determine whether the soil or groundwater in the area was contaminated before the Department detected contamination on the site and directed Westinghouse to have the area studied. (N.T. 73, 128-89, 1809) The Department characterizes Westinghouse's conduct as "negligent."

4. <u>Cooperation with the Department</u>

In its post-hearing memorandum, Westinghouse maintains that the civil penalties the Department requests are too high because Westinghouse fully cooperated with the Department's investigation. In support of its position, Westinghouse argues that it provided filters, bottled water, and ultimately municipal water to nearby residents with affected wells; that it initiated a program to locate and quantify the source and cause of the groundwater contamination at the site; and that

it has initiated a program to remediate the groundwater contamination. The Department responds by arguing that it did not consider the extent of Westinghouse's cooperation when it decided upon what civil penalty to request, but that, even if it had, Westinghouse would not be entitled to a reduction on the basis of its cooperation. In support of its position, the Department pointed to a number of instances which allegedly show that Westinghouse would not cooperate with the Department.

While there is evidence that Westinghouse cooperated with the Department with respect to some aspects of the investigation, the record, when viewed as a whole, clearly shows Westinghouse's poor cooperation. Indeed, even the examples Westinghouse cites betray the company's lackluster cooperation. Contrary to its arguments, Westinghouse did not provide municipal water to all residents in the vicinity with affected wells. Westinghouse contaminated certain wells on Pin Oak Lane but has refused to pay to extend municipal water lines to those homes. (N.T. 4328) Although Westinghouse argues that it acted promptly to ascertain the source and extent of the contamination on site, Westinghouse instructed its consultants to first verify whether Westinghouse was the source of the contamination before moving on to characterize the contamination itself. (N.T. 258-261, 1812, 1814-15) While Westinghouse argues that the remediation program it has undertaken shows the extent of Westinghouse's cooperation, Westinghouse implemented the remediation program only after it had been ordered to do so by the EPA. (N.T. 4444)

There are numerous other examples of Westinghouse failure to cooperate adequately. Department personnel frequently had to request information repeatedly before Westinghouse would produce it. (N.T. 1358-59, 3068; Ex. C-54) Westinghouse also hampered the Department's access

to Westinghouse's consultants. Contrary to the usual practice, Westinghouse would not allow its consultants to speak with the Department unless Westinghouse personnel were present and refused to let the Department speak directly to the consultants during the preparation of the plan of study. (N.T. 1040, 1185, 1763) When Westinghouse's consultant prepared a report on the preliminary hydrogeologic evaluation and concluded that Westinghouse was the source of the contamination, Westinghouse submitted a summary of the report to the Department, omitting all reference to the consultant's conclusion that Westinghouse was the source. (N.T. 1820-24, 1848; Ex. C-112, 113)

In at least two instances, Westinghouse took action which may have directly frustrated the Department's investigative efforts. After the Department first detected contamination at the plant site, Westinghouse's Supervisor of Maintenance at the plant, Ken Hess, had soil from two areas of the plant--outside the railroad dock and near the slab at the pumphouse where the grates were cleaned--excavated, stored in drums, and removed from the plant. (N.T. 243-46, 1803; H.D. 83-84) The soil removed from outside the railroad dock was stained, and Hess had it removed because he thought it might be contaminated.[45] (H.D. 127) Shortly after the Department discovered contamination at the plant, Westinghouse had plant employees steam clean the railroad tracks in the railroad dock area--the same tracks the degreaser ran along as it traveled from the holes in the bottom of the large hoppers to the ground outside the dock. (N.T. 1248-53) The material removed from the tracks was a dark sludge, and had a strong unpleasant odor. (N.T. 1249, 1253, 1283, 1464-65) At least one employee involved in the cleaning had to leave because he became lightheaded from inhaling the fumes--a reaction he also had when working with degreaser at the

[45] The soil which was removed, however, was never tested for contaminants. (H.D. 85, 93)

plant. (N.T. 1465, 1469)

Westinghouse's actions throughout were more directed at corporate damage control than anything else. While that may be a natural reaction, it can hardly be seen as cooperation.

5. Investigative costs

The Department spent at least $35,015 in wages and lab expenses investigating the spills. (N.T. 2735; Ex. D-35) Although the Department did not prove all the violations alleged in its complaint, this amount is reasonable given the violations it has proven, and we shall include it in the civil penalty assessment.

6. The appropriateness of the penalty requested for violations of sections 301, 307, and 401 of the Clean Streams Law

The Department requests that the Board assess a penalty of $414,952 against Westinghouse for discharging degreaser into waters of the Commonwealth in violation of sections 301, 307, and 401 of the Clean Streams Law.[46] That penalty, however, would be too high given the violations the Department has proven. We shall only assess a penalty of $61,500.

a. The violations pertaining to the leaks from the large hoppers near the railroad dock

The Department proved that Westinghouse engaged in at least two violations of sections 301, 307, and 401 of the Clean Streams Law with respect to the leaks from the large hoppers in the railroad dock area. Since the Department failed to elicit any evidence showing that there were discharges to the groundwater which lasted for more than one day, the maximum

---

[46] This amount is based on the Department's investigative costs ($35,015) and the estimated cost of supplying public water to the affected area for 20 years ($379,937.60), the length of time estimated to clean up the groundwater.

amount that the Department could assess for these violations is $60,000--$10,000 for each violation.

We shall assess the maximum $60,000 penalty here. Although the releases to the soil in the railroad dock area were not intentional, they were commonplace. Westinghouse should have known that degreaser was leaking out of the large hoppers and into the soil, and that the chemicals could enter the groundwater. Furthermore, the violations resulted in extensive contamination to the groundwater supply--damage it will take decades to remedy--and resulted in high concentrations of dangerous chemicals compromising the drinking water of large numbers of nearby residents and threatening to taint the water supplies of even more. Many local residents may have been exposed to high concentrations of Tri, Ta, and other dangerous compounds as a result of Westinghouse's violations.

b. The releases associated with the steam cleaning of the grates

The Department also proved that Westinghouse engaged in one violation of sections 301, 307, and 401 of the Clean Streams Law with respect to the steam cleaning of the grates. As in the case of the violations pertaining to the discharges in the railroad dock area, the Department failed to elicit any evidence showing that the discharge occurred over the course of more than one day. The maximum that we could assess for these violations is $30,000--$10,000 for each violation.

We shall only assess a penalty of $500 per violation for each of the three violations here, however. These violations were far less serious than those which occurred in the railroad dock area: the contamination resulting in the surface waters was far less severe; there was no evidence that the discharge resulted in the contamination of anyone's water supply, or any other harmful effects; and Westinghouse had less reason to suspect that the runoff from the grate-cleaning

contained degreaser. Still, one cannot write off these violations entirely. Tri and Ta *are* dangerous chemicals and Westinghouse had the obligation of ensuring that they were not discharged into the waters of the Commonwealth. Furthermore, while Tri contamination does not persist in surface water for as long as in groundwater, the evidence here suggests that the Tri and Ta pollution can persist in surface water for some time. As noted above in our discussion of the harm to waters of the Commonwealth, Tri and/or Ta contamination persisted in the storm sewer and eastern tributary in 1988 and 1989--even though Westinghouse discontinued the grate-cleaning operation years earlier, in 1984.

7. The appropriateness of the penalty requested for the violations of section 101.2(a) of the Department's regulations

The Department requests that the Board assess a penalty of $2,677,384 against Westinghouse for violating section 101.2(a) by failing to promptly notify the Department and downstream users that a polluting substance had entered, or could enter, a water of the Commonwealth.[47]

While the amount is considerable, it is not excessive. The $924 per day figure used by the Department for the period July 7, 1980, to September 15, 1983, could have been higher. If the Department had termed the severity "severe" rather than "moderate," the starting point would have

---

[47] The Department arrived at this figure by assessing $500 per day (the statutory maximum) for each day of the 3,200 days from September 2, 1971 (the effective date of section 101.2(a)) to July 6, 1980 (the day before the date when the statutory maximum increased to $10,000). To this figure ($1,600,000) was added $1,077,384 to cover the period from July 7, 1980, to September 15, 1983 (the date the Department notified Westinghouse of the problem). This latter figure, calculated in accordance with the Department's Civil Penalty Assessments Procedure, started with moderate severity ($7,000), was reduced to $2,800 by considering only willfulness, and was reduced further to $924 by considering the willfulness to be negligent. The $924 per day was applied to the 1,166 days.

been $10,000 per day rather than $7,000 per day. Damage to waters of the Commonwealth, which can account for up to 50% of the total daily amount, was not even considered. Willfulness, which *was* considered (up to a maximum of 40% of the daily amount) was felt to be only negligent (33% of the 40%), whereas it might have been considered reckless (66% of the 40%). The daily amount could very easily have been in the neighborhood of $6,400,[48] resulting in a calculation of more than $7 million just for the final three years of the assessment period.

The Department, in its calculation, did not consider the number of violations of section 101.2(a). Nonetheless, as noted earlier in this adjudication, the Department proved that Westinghouse violated section 101.2(a) repeatedly with respect to the leaks from the large hoppers in the railroad dock area, and also with respect to releases from: (1) leaking drums in the old drum storage area, (2) the leaking hose used to refill the solvent storage tank, (3) the dumping of small containers of degreaser outside by employees in the welding area, and (4) the intentional dumping of the degreaser stored in the 275-gallon tank.

The $2,677,384 penalty the Department requests for these section 101.2(a) violations would not be unreasonable even if it were only based on the section 101.2(a) violations pertaining to the leaks from the large hoppers.[49] This can easily be illustrated.

---

[48] If the severity classification is considered "severe," the starting figure is $10,000 per day. Damages can account for up to $5,000 of this amount; willfulness for up to $4,000. If the damages are viewed as "high," 75% of the $5,000 is assessed ($3,750). If willfulness is viewed as "reckless," 66% of the $4,000 is assessed ($2,640). These two figures add up to $6,390.

[49] Our analysis of the civil penalties requested here is easily distinguishable from the approach the Commonwealth Court criticized in *Wilbar Realty v. DER*, 663 A.2d 857 (Pa. Cmwlth. 1995).

Wilbar involved a $36,900 civil penalty assessed by the Department against an operator of two public water systems for violations of the Pennsylvania Safe Drinking Water Act, Act of May

We have noted already in this opinion that: (1) Westinghouse allowed Tri or Ta degreaser to escape from the hoppers to the ground several times a week between 1973 and 1978; (2) the plant switched from the Tri to the Ta degreaser sometime in 1975; (3) Tri is approximately 20 times more toxic than Ta; section 101.2(a) imposed a continuous duty on Westinghouse to notify the Department and downstream users of releases from the date of the release; and, (4) Westinghouse never notified the Department or downstream users of the releases.

1, 1984, P.L. 206, *as amended,* 35 P.S. §§ 721.1-721.17 (Safe Drinking Water Act). The Board held that the Department failed to satisfy due process notice requirements with respect to one of the violations, and reduced the total civil penalty by the amount that had been assessed for that violation, $1,850. Noting that the operator had failed to contest any of the other underlying violations, the EHB then upheld the remaining $35,050 of the penalty, reasoning that, because the full $35,050 penalty would not have been unreasonably high for one of the remaining violations taken alone, the penalty could not have been unreasonably high for all of the remaining violations taken together. *See Wilbar Realty v. DER*, 1994 EHB 999.

The operator appealed the Board's decision to the Commonwealth Court, arguing that, rather than determining whether the $35,050 penalty was unreasonably high given all of the remaining penalties, the Board should have looked at each of the individual violations separately and determined whether that particular violation justified the penalty the Department assessed for it. The Commonwealth Court expressly stated that it did not endorse the Board's method of analyzing whether the penalty was reasonable. 663 A.2d at 861. Nevertheless, the court affirmed the Board's decision. The court explained that even though the Board's reasoning was flawed, it was clear on the basis of the record that the penalty assessed for each of the separate violations was reasonable. *Id.*

Although we look at multiple violations when determining whether the penalties requested against Westinghouse are reasonable, our analysis of the civil penalties requested here does not present problems akin to those which arose in *Wilbar* for two reasons. First, as the Commonwealth Court noted in *Wilbar*, the Safe Drinking Water Act provides that civil penalties under that act are assessed *by the Department*; penalties under the Clean Streams Law, however--such as those at issue here--are assessed *by the Board.* Second, the Department did not request penalties for individual violations here. It assessed them for groups of violations: one penalty for all the violations of sections 301, 307, and 401 of the Clean Streams Law; another for the violations of 25 Pa. Code § 101.2(a); and a third for the violations of 25 Pa. Code §§ 101.2(b) and 101.3(a). There is no indication as to how the requested penalty is apportioned among each of the various types of individual violations within each class. We have no way of knowing the size of the penalty the Department requests for each violation, and, consequently, no way of determining whether the amount the Department requests for each violation is reasonable.

Given that degreaser escaped to the soil several times a week, we shall assume that there was a release once every three days, or approximately 122 releases per year. Since the Department has the burden of persuasion, Tri is more toxic than Ta, and it is unclear when in 1975 Westinghouse switched from the Tri to Ta, we shall assume that all of the releases in 1975 involved Ta. That would mean there were 244 releases of Tri during 1973 and 1974 (122 releases per year for two years), and 488 releases of Ta from 1975 through 1978 (122 releases per year for four years). The average penalty for the Tri releases would start to run on January 1, 1974, and for the Ta releases on January 1, 1978. The time that elapsed between those dates and the date we are assuming the duty to notify ended--August 15, 1983--is 3,939 days for the Tri releases and 2,843 days for the Ta releases. Since Tri is 20 times more toxic than Ta, we shall also assume that the penalty per day for failing to provide notice of the Tri releases is 20 times more than the penalty for the Ta releases.

Given all these factors, the $2,677,384 requested by the Department breaks down to only $2.60 per day per Tri release and $0.13 per day per Ta release.[50] That amount is not unreasonable

---

[50] These penalties were calculated as follows:

x = penalty per day per Ta violation
20x = penalty per day per Tri violation

penalty for § 101.2(a) violations =[(# of Ta violations) (ave # of days per Ta viol) (penalty per day for Ta violations)]
+ [(# of Tri violations) (ave # of days per Tri viol) (penalty per day for Tri violations)]

$2,677,384 = [(488) (2,843 days) (x)] + [(244) (3,939 days) (20x)]

= [1,387,384 (x)] + [19,222,320 (x)]

= 20,609,704 (x)

∴ x = $\frac{\$2,677,384}{20,609,704}$ =$0.1299 ≈ $0.13 = the penalty per day per Ta violation.

for a number of reasons. First, the amount is minuscule compared to the maximum penalty--$10,000 per violation; plus $500 per day for each day of continued violation prior to October 10, 1980; plus $10,000 for each day of continued violation on or after that date. Second, Westinghouse knew of other releases at the property--such as the deliberate dumping of the 275-gallon tank in the early 1970s--and should have known of the releases from the large hoppers. Had Westinghouse notified the Department and downstream users when the releases first started taking place, the Department, Westinghouse, and Westinghouse's neighbors could have taken measures to minimize the danger to those drinking the groundwater and to ensure that similar releases would not occur in the future. Instead, Westinghouse was content to simply do nothing. Indeed, it did worse than nothing: it continued to allow hundreds of similar releases for years afterward, without ever providing the Department or downstream users with notice of the potential danger.

The foregoing mathematical exercise demonstrates that the $2,677,384 requested by the Department is not unreasonable and might have been even higher. Mathematics can only be a guide, however. The final figure we arrive at in the exercise of the discretion given to us by the Clean Streams Law must be a reasonable fit for the violations committed. While we do not adopt the Department's calculations, we are of the opinion that the $2,677,384 is a reasonable fit for the section 101.2(a) violations committed by Westinghouse. We shall, therefore, assess that amount.

8. The appropriateness of the penalty requested for the violations of sections 101.2(b) and 101.3(a) of the Department's regulations

The Department requests that the Board assess a penalty of $5,989,000 against Westinghouse for violating sections 101.2(b) and 101.3(a) by failing to implement remedial

---

20x = 20 x $0.1299 ≈ $2.60= the penalty per day per Tri violation.

measures necessary to prevent the degreaser from entering waters of the Commonwealth or injuring property or downstream users.[51]

While the Department lumped them together, sections 101.2(b) and 101.3(a) impose different requirements. Under section 101.3(a), Westinghouse was required to use Tri and Ta in such a way that they would not escape into the environment and reach waters of the Commonwealth. We have already concluded that Westinghouse violated this requirement on three occasions when improper handling of Tri and Ta resulted in those substances reaching waters of the Commonwealth.

The duty under section 101.2(b) is different. It arises only when polluting substances are discharged into waters of the Commonwealth or are put in a position where they might discharge into such waters. When this occurs (for whatever reason and whether or not it is a result of the failure to comply with section 101.3(a)), the responsible party is required to act "immediately" to protect property and downstream users from the impact of the discharge. This includes a requirement to remove residual substances from the ground and the affected water within fifteen days after the discharge. We have already concluded that Westinghouse violated this duty repeatedly (in conjunction with every section 101.2(a) violation except for the leaking hose used to refill the solvent storage tank).

---

[51] The Department arrived at the figure by assessing $500 per day for the 3,200 days used in the calculation for section 101.2(a) violations--producing a figure of $1,600,000--and adding to it $4,389,000 to cover the period from July 7,1980, to December 12, 1983 (the date Westinghouse initiated soil removal). This latter figure, also calculated in accordance with the Department's Civil Penalty Assessments Procedure, started with moderate severity ($7,000) and was reduced to $3,500 by considering only damage to waters of the Commonwealth. The $3,500 figure was applied to the 1,254 days.

We are puzzled by the Department's proposed assessment for these violations ($5,989,000) compared to that for the section 101.2(a) violations ($2,677,384). The great difference seems to stem entirely from that part of the Department's calculation that covered the 1980-1983 period. For the section 101.2(a) calculation, the Department used a daily figure of $924 whereas for the sections 101.2(b) and 101.3(a) calculation it used a daily figure of $3,500.

The record shows no justification for such a difference in approach. The section 101.2(b) violations took place at the same time as the section 101.2(a) violations and are no more or no less serious. The duty to give notice under section 101.2(a) is just as critical as the duty to take remedial action under section 101.2(b). They are separate but coordinate elements of the same regulatory scheme. We see no basis for considering one to be four times more serious than the other.

We did not specifically adopt the $924 per day used by the Department in the latter phase of the section 101.2(a) calculation but did adopt the $2,677,384 resulting figure as an appropriate penalty for those violations. We will assess the same amount here. We recognize that there was one fewer section 101.2(b) violation, but believe it is offset by the three section 101.3(a) violations. We are convinced that the $2,677,384 assessed here is not excessive for the same reasons enunciated with respect to the section 101.2(a) violations and is a reasonable fit for the section 101.2(b) and section 101.3(a) violations.

9. <u>The total penalty</u>

Based on the foregoing, we assess a penalty of $5,451,283: $61,500 for the violations of sections 301, 307, and 401 of the Clean Streams Law; $2,677,384 for violations of 25 Pa. Code §101.2(a); $2,677,384 for violations of 25 Pa. Code §§ 101.2(b) and 101.3(a); and $35,015 for the

costs the Department incurred in investigating those violations.

10. Deterrence

The Department did not specifically consider deterrence in its calculations, although it justified its requested amounts by observing that Westinghouse is a "large" corporation. In order for a civil penalty to have a deterrent effect, it must be in an amount that awakens the attention of management to bring about needed changes in operations and attitudes. In other words, it has to hit the violator in the pocketbook to the point where it hurts. The size of the violator is important.

Unfortunately, there is no evidence in the record on Westinghouse's financial condition. The Department did not enter any because it had not considered deterrence. Westinghouse, for obvious reasons, did not enter any either. This lack of evidence hamstrings the Board, to a certain extent, in Clean Streams Law civil penalty proceedings because we have no basis for considering deterrence if we choose to apply it.

Although the penalty is substantial, we do not know if it will be carry deterrent effect. We trust that it will send a message to potential polluters, awakening them to the financial hazards that result from a lack of vigilance in this area. We hope that it will induce those in management positions to pay greater heed to the voices of those in their employ who call for stricter attention to environmental matters.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. The Department has the burden of proving by a preponderance of evidence that the civil penalty is appropriate.

3. An agent's statements are admissible as admissions against the agent's principle

only if the agent had the authority to make the statements. *Catagnus v. Montgomery County*, 536 A.2d 505 (Pa. Cmwlth. 1988).

4. The fact that a declarant has first-hand knowledge of certain subject matter, or has duties or respensibilities in a particular area, does not mean that he is authorized to make statements about it.

5. The Board may properly strike rebuttal testimony offered by a party on matters which were not raised in that party's or the opposing party's case in chief.

6. The Department does not improperly stray beyond its prosecutorial role simply because it believes a person is responsible for violations before it conducts an investigation. *Harbison-Walker Refractories v. DEP*, EHB Docket No. 91-268-MJ (Adjudication issued February 23, 1996).

7. When the Legislature extends the statute of limitations period applying to a class of actions, the longer time period applies to those actions accruing under the prior statute of limitations which had not expired prior to the extension. *Taglianetti v. Workmen's Compensation Appeal Board (Hospital of University of Pennsylvania)*, 469 A.2d 548 (Pa. 1983); *Clark v. Jeter*, 518 A.2d 276 (Pa. Super. 1986).

8. Where the discovery rule applies, the running of the limitations period is tolled from the time the cause of action accrues until the person filing the action knows, or reasonably should know, that an actionable injury has been sustained. *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992).

9. Since the statute of limitations is an affirmative defense, Westinghouse bears the initial burden of showing that the Department's action was filed after the limitations period

would have expired if calculated from the time the cause of action accrued. *Re Huffman's Estate*, 36 A.2d 640 (Pa. 1944).

10. Ordinarily, a cause of action accrues when the plaintiff could first successfully prosecute the action. *United National Insurance Company v. J.H. France Refractories Company*, 612 A.2d 1371 (Pa. Super. 1992).

11. For violations of sections 301, 307, and 401 of the Clean Streams Law and 25 Pa. Code § 101.3(a), a cause of action accrues when industrial waste or pollution enters a water of the Commonwealth.

12. Westinghouse failed to prove that the alleged violations of sections 301, 307, or 401 of the Clean Streams Law involved discharges to waters of the Commonwealth which occurred before August 16, 1983.

13. The "discovery rule"--an exception to the ordinary rule that the limitations period starts to run at the time a cause of action accrues--applies to actions brought under the Clean Streams Law.

14. Westinghouse failed to prove that the Department knew or should have known of the contamination on site more than five years before the complaint was filed had the Department exercised "reasonable diligence."

15. Westinghouse failed to prove that the alleged violations of section 101.3(a) of the Department's regulations involved discharges to waters of the Commonwealth which occurred before August 16, 1983.

16. Where the Legislature includes specific language in one portion of a statute but excludes it from another, the language is not implied where excluded. *Pennsylvania State*

Police, Bureau of Liquor Control Enforcementt v. Prekop, 627 A.2d 223 (Pa. Cmwlth. 1993).

17. Where a cause of action is based upon failure to perform a continuous duty, the limitations period starts to run from the time the duty terminates. *Plazak v. Allegheny Steel Co.,* 188 A. 130 (Pa. 1936).

18. Westinghouse failed to prove that its duty to provide notice under 25 Pa. Code §101.2(a) of the Department's regulations expired before August 16, 1983.

19. Westinghouse failed to prove that it had taken steps necessary to minimize the harm from the degreaser in accordance with 25 Pa. Code § 101.2(b) prior to August 16, 1983.

20. The fact that a lab is EPA-certified does not necessarily mean that every method the lab uses is reliable.

21. Any substance resulting from manufacturing or industry is an "industrial waste" within the meaning of the Clean Streams Law. 35 P.S. § 691.1.

22. Any substance which is likely to create a nuisance or render waters of the Commonwealth harmful, detrimental, or injurious to public health, safety or welfare, or to domestic or other benficial uses, is a "substance resulting in pollution" for purposes of the Clean Streams Law. 35 P.S. § 691.1.

23. Storm sewers are "waters of the Commonwealth." 35 P.S. § 691.1.

24. Groundwater is a "water of the Commonwealth." *Sechan Limestone Industries, Inc. v. DER,* 1986 EHB 134, 165.

25. The Department has proven that Westinghouse violated sections 301, 307, and 401 of the Clean Streams Law, and sections 101.2(a), 101.2(b), and 101.3(a) of the Department's regulations.

26. The Board has the authority to assess civil penalties under section 605 of the Clean Streams Law. *DEP v. Silberstein*, EHB Docket No. 95-208-CP-MG (Opinion issued May 31, 1996).

27. The Board will not assess civil penalties for violations of the Clean Streams Law which occurred before July 31, 1970, when the civil penalties provision of the Clean Streams Law became effective. *DER v. Froehlke*, 1973 EHB 118.

28. Once the Department proved that Westinghouse illegally discharged Tri and Ta into a water of the Commonwealth, the burden shifted to Westinghouse to prove that others caused or contributed to the amount of that substance in the water.

29. A corporation is deemed to know all material facts which its officers or agents acquire within the scope of their employment and authority. *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465.

30. Having reviewed the evidence, we assess a civil penalty against Westinghouse of $5,451,283:

A. $61,500 for the violations of sections 301, 307, and 401 of the Clean Streams Law;

B. $2,677,384 for violations of 25 Pa. Code § 101.2(a);

C. $2,677,384 for violations of 25 Pa. Code §§ 101.2(b) and 101.3(a); and,

D. $35,015 for the costs the Department incurred in investigating those violations.

APPENDIX

TABLE 1

Water Sample Data from Residential Wells Where Analysis of at Least One Sample Indicated the Presence of Quantifiable Levels of Tri; 1,1-DCE; PCE; or 1,2-DCA[52]

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
Becker, Joseph C. Sr.	101	60 Cedar Ave (Ex. C-124)	3/4/86	408.0	**157**						
Botterbusch, Duane A.	9132	90 Table Rock Road (Ex. C-124)	5/29/86			4.0	**65.6**				
Bowling, Ralph L.	[unclear]	455 Table Rock Rd. (Ex. C-125)	10/15/84					1.2	**1.8**		
" [F]	"	"	10/26/87								
Breighner, Peggy	137	530 Boyd School Rd. (Ex. C-125)	12/2/83	54.0	**20.8**	1.0	**16.4**				
"	"	"	3/2/84	14.0	**5.4**						
Bridendolph, Patricia	37	1123 Biglerville Rd. (Ex. C-126)	9/27/83	27.0	**10.4**	NA				NA	
"	"	"	2/15/84	51.0	**19.6**	0.5	**8.2**				
Carver, Donald	118	1310 Biglerville Rd. (Ex. C-125)	12/5/83	3.7	**1.4**						
"	"	"	10/10/84	<1.0							
Ciolino, Salvatore	62 C	325 Table Rock Road (Ex. D-63)	10/10/84	2.1	**0.81**						
" [G]	"	"	10/27/87								
Clapper, Eugene	9130	55 Cedar Avenue	5/29/86	5.9	**2.3**						
Clapper, Vernon	89	45 Maple Ave. (Ex. C-196)	5/19/86	1.1	**0.4**						
Coleman, George F.	123	1230 Biglerville Rd. (Ex. C-196)	8/16/83	2.0	**0.77**						
"	"	"	9/7/83	650.0	**250**	NA				NA	
"	"	"	11/30/83	1000.0	**385**	NA				NA	
"	"	"	1/16/84	909.0	**350**						

[52] Except where indicated otherwise, all information for this table is taken from Ex. C-131. (Notes referred to in the table appear after the table.)

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
"	"	"	2/15/84	>120.0	**>46.2**	53.0	**869**	<1.0			
Coleman, John F. Welding	134	570 Boyd School Rd. (Ex. C-125)	12/2/83	17.0	**6.5**						
Coleman, William F.	107	1280 Biglerville Rd. (Ex. C-125)	11/1/83	3.8	**1.5**						
Coston, William F.	56	240 Table Rock Rd (Ex. C-125)	12/19/83	4.3	**1.7**						
"	"	"	6/17/85	4.2	**1.6**						
D'Agostino, Paul Rob't	200	25 Pin Oak Lane (Ex. C-82)	5/20/86	1.6	**0.62**						
" [G]	"	"	10/26/87								
" [G]	"	"	2/11/88								
Decker, Leonard R.	46	987 Biglerville (Ex. C-51)	3/14/84	<1.0		2.0	**32.8**				
Dixon, Virginia [H]	?	41 Pin Oak Lane (Ex. C-124)	7/14/87	4.3	**1.7**						
" *(Duplicate taken of this sample–Ex. D-68)* [G]		"	2/11/88	0.34	**0.13**						
Felt, Franklin D.	121	1260 Biglerville Rd. (Ex. C-125)	11/1/83	~500.0 {~= est. con.}	**~192**	20.0	**328**				
"	"	"	1/16/84	660.0	**254**						
Gallatin, Kelly B.	9145	1159 Biglerville (Ex. C-51)	9/7/83	45.0	**17.3**	NA				NA	
"	"		2/7/84	37.0	**14.2**						
Gebhart, Kenneth	141	95 Table Rock (Ex. C-51)	4/17/84	<0.5							
"	"	"	3/28/85	5.6	**2.2**						
"	"	"	5/7/85								
Geesey, Lenus	139	26 Table Rock Road (Ex. C-124)	6/12/86	18.0	**6.9**			1.2	**1.8**		
Gilman, John W.	43	1049 Biglerville Rd. (Ex. C-125)	12/19/83	7.0	**2.7**	27.0	**443**				
"	"	"	2/15/84	7.0	**2.7**	17.0	**279**				
"	"	"	3/2/84	4.7	**1.8**						
Green, Kathleen	96	909 Biglerville	5/19/86	300.0	**115**						

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
Gulden, Donald C.	76 (lot 77 according to Ex. C-196.)	951 Biglerville Rd. (Ex. C-125)	5/7/84	<1.0		3.6	59				
Harness, William	9133	88 Table Rock Rd. (Ex. C-125)	5/29/86			1.5	24.6				
Harris, Gail M.	100	40 Cedar Ave. (Ex. C-196)	5/19/86	1.5	0.58						
Hartlaub, Randy	85	(Table Rock Rd according to Ex. C-127; Apple according to Ex. C-97(a))	5/21/84	3.0	1.2						
"	"	"	2/6/85	4.7	1.8						
"	"	"	4/24/85	2.9	1.1						
"	"	"	8/5/85	3.2	1.2						
"	"	"	11/19/85	2.9	1.1						
Herff/Jones publishers	146	525 Boyd School Rd (Ex. C-125)	12/19/83	4.5	1.7						
Hess, Harold	131	1255 Biglerville (Ex. C-51)	11/1/83	1.2	0.46						
"	"	"	11/23/83	1.2	0.46						
"	"	"	1/11/84			NA				NA	
Hess, Kenneth	135	550 Boyd School Rd. (Ex. C-125)	12/14/83	~440.0	~169	5.3	86.9				
"	"	"	1/27/84	142.0	54.6						
Jury, Ray M. Jr.	138b	44 Table Rock Road (Ex. C-124)	5/29/86	1.4	0.54			1.0	1.5		
Karsteter, Rob't B.	84	90 Maple (Ex. C-51)	5/14/84	1.3	0.50						
Kime, Roland	129	43 Cedar Avenue (Ex. C-124)	3/4/86	15.0	5.8						
Kriel, Donald C.	124b	1225 Biglerville Rd. (Ex. C-126)	9/27/83	250.0	96.2	NA				NA	
"	"	"	1/27/84	233.0	89.6						
"	"	"	2/15/84	>120.0	>46.2	14.0	230	<1.0			
Kuhn, Robert	99	30 Cedar (Ex. C-51)	6/12/86	1.2	.46						

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
Lauer, John	95	919 Biglerville Rd. (Ex. C-196)	6/5/86	1.4	**0.54**						
Lightner, Janet[I]	?	33 Pin Oak Lane	7/14/87	3.9	**1.5**						
" [G]	"	"	10/26/87								
" *(duplicate taken for this sample--Ex. D-68)* [G]	"	"	2/11/88	0.61	**0.23**						
Marass, Charles J.	122	1250 Biglerville Rd. (Ex. C-126)	9/27/83	2.0	**0.77**	NA				NA	
"	"	"	1/11/84	1.2	**0.46**	NA				NA	
"	"	"	2/15/84	<1.0							
McCleaf, Charles E.	62e	305 Table Rock Rd. (Ex. C-125)	8/1/84	4.0	**1.54**						
"	"	"	4/24/85	2.6	**1.0**						
"	"	"	8/5/85	2.4	**0.92**						
"	"	"	11/19/85	3.7	**1.42**						
" [G]	"	"	10/27/87								
McGough, Ray M.	41	1069 Biglerville Rd. (Ex. C-125)	11/1/83	<1.0		<1.0					
McKinney, Robert S.	62a	345 Table Rock Rd (Ex. D-63)	8/1/84	1.0	**0.38**						
" [G]	"	"	10/26/87								
Memorial Baptist Church	27	1096 Biglerville Rd. (Ex. C-126)	9/27/83	17.0	**6.5**	NA				NA	
Merry, Linda	101a	50 Cedar Ave. (Ex. C-124)	6/17/85	83.0	**31.9**					3.4	**8.4**
Mickley, J.		55 Pin Oak Lane (Ex. C-82)	7/14/87	2.3	**0.88**						
" [G]		"	2/11/88	0.37	**0.14**						
Miller, Kenneth L.	9129	585 Boyd School Rd. (Ex. C-125)	12/2/83	1.0	**0.38**						
"	"	"	2/6/85	1.4	**0.54**						
"	"	"	4/24/85	1.9	**0.73**						
"	"	"	8/5/85							3.2	**8.4**
Mundy, Charles E.	136	540 Boyd School Rd. (Ex. C-125)	12/14/83	214.0	**82.3**	5.5	**90.2**				
"	"	"	3/2/84	74.5	**28.7**						

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
Myers, Nelson	148b	89 Table Rock (Ex. C-51)	5/29/86	1.0	**0.38**	4.3	**70.5**				
O'Brien, Matthew J.	111a	663 Boyd School Rd. (Ex. C-125)	12/2/83	<1.0		1.0	**16.4**				
"	"	"	10/10/84	<1.0		1.0	**16.4**				
"	"	"	4/24/85	<1.0							
"	"	"	8/5/85	<1.0							
"	"	"	11/19/85	<1.0				1.1	**1.6**		
Olofski, Victor A. Jr.	36	1133 Biglerville Rd. (Ex. C-125)	12/5/83	>120.0	**>46.2**	5.7	**93.4**	<1.0			
"	"	"	3/2/84	174.0	**66.9**						
"	"	"	2/5/85	50.8	**19.5**						
Potter, Russel	35	1139 Biglerville Rd. (Ex. C-125)	12/5/83	>120.0	**>46.2**	2.2	**36.1**				
"	"	"	2/22/84	57.0	**21.9**						
Punchard, E. Mark, Sr.	83	80 Maple Ave. (Ex. C-125)	12/7/83	1.0	**0.38**	NA				NA	
"	"	"	3/14/84	<1.0				1.4	**2.1**		
"	"	"	11/20/85	1.0	**0.38**						
Pyatt, Charles	98	20 Cedar (Ex. C-51)	5/19/86	2.0	**0.77**						
Re, Victor V	9123	Apple Ave [non-residential] (Ex. C-196)	6/12/86	1.1	**0.42**						
Redding, Herman	120	1270 Biglerville Rd (Ex. C-125)	12/5/83	>120.0	**>46.2**	10.0	**164**	<1.0			
"	"	"	2/22/84								
Rourke, Dennis[H]	(not listed)	65 Pin Oak Lane	7/14/87	3.3	**1.3**						
" [G]		"	10/26/87								
" *(this sample analyzed in duplicate--N.T. 3633-34)* [G]		"	2/11/88	*0.67 in one sample, 0.77 in the other*	**0.26** **0.30**						
Sheads[I]		49 Pin Oake Lane	7/14/87	2.2	**0.85**						
Sheads, M.[G]		41 Pin Oak Lane	10/26/87	0.21	**0.08**						

Resident	Lot	Address	Date	Tri		1,1-DCE		PCE		1,2-DCA	
				conc. (ppb)	cancer risk[A,B]	conc. (ppb)	cancer risk[C]	conc. (ppb)	cancer risk[D]	conc. (ppb)	cancer risk[E]
" [G]		"	2/11/88	0.21	**0.08**						
Shriver, Charles	138c (Ex. C-101)	28 Table Rock Road (Ex. C-84)	5/29/86	2.7	**1.0**			<1.0			
Stahl, Richard F.	62d	315 Table Rock Rd. (Ex. C-125)	10/10/84	2.6	**1.0**						
Toddes, Walter E. Jr.	9128	1325 Biglerville Rd (Ex. C-125)	12/5/83	1.6	**0.62**						
"	"	"	12/14/83	<1.0							
"	"	"	4/11/86	99.0	**38.1**	3.0	**49.2**				
"	"	"	5/20/86	110.0	**42.3**	3.9	**63.9**				
Wagner, Robert E.	63		8/1/84	1.3	**0.50**						
Walter, George W.	9143	1145 Biglerville Rd (Ex. C-125)	12/5/83	79.0	**30.4**	18.0	**295**				
"	"	"	2/22/84	103.0	**39.6**						
Westinghouse Plant[J]			12/19/83	14	**5.3**			<1.0			
Wormley, John J.	9137	64 Table Rock Rd (Ex. C-124)	6/5/86	4.0	**1.5**			2.4	**3.6**		
"	"	"	7/29/86	1.3	**0.50**						

[A] The "cancer risk" for purposes of this table, represents the number of times the concentration of the contaminant in the sample exceeds the one-in-a-million cancer risk level for that substance. (The one-in-a-million cancer risk level for a substance in drinking water is the concentration of that substance which would result in one extra person out of a million getting cancer, assuming the persons drinking the water were all 70kg adults drinking 2 liters of water a day for 70 years. (N.T. 2008)) For instance, the "cancer risk" for the Tri in each sample was calculated by dividing the concentration of Tri in the sample--listed in the column preceding the cancer risk column--by the one in a million cancer risk level for Tri. The "cancer risk" posed by the other chemicals from the degreaser in each sample was calculated in a similar manner: by dividing the concentration of the substance in the sample by the one-in-a-million cancer risk level for that substance. A "cancer risk" of 157 for Tri indicates the concentration of Tri in that sample is 157 times greater than the one-in-a-million cancer risk level. The relationship between exposure to a carcinogen and the cancer risk is directly proportional for that exposure pathway; doubling the exposure doubles the risk of cancer. (N.T. 2011-2012) Therefore, individuals consuming water with a "cancer risk"of 157 for a carcinogen, will have 157 times more cases of cancer than individuals consuming similar water containing the one-in-a-million cancer risk level for that carcinogen.

Referring to the "cancer risk" posed by the concentrations of particular chemicals in the samples allows us to illustrate the relative threat posed by the levels of each contaminant in the sample. Otherwise, since not all carcinogens are equally carcinogenic, it would be difficult to compare the carcinogenic threat posed by a well containing 3 ppb Tri and one containing 3 ppb 1,1-DCE.

(The Board relied on the one-in-a-million cancer risk levels derived by the EPA. Westinghouse argued that the Board should look to standards other than the EPA standard to determine the one-in-a-million cancer risk level for Tri--specifically, the levels listed in 25 Pa. Code § 16.51, Appendix A, Table 1, or the level derived by the National Academy of Sciences. But even assuming either of these alternatives were otherwise acceptable, we would still opt for the EPA cancer risk levels here. The Department's expert witness in toxicology testified that there is general agreement in the scientific community with EPA's cancer risk levels and the methods used to derive them. (N.T. 2009) Westinghouse failed to elicit any evidence suggesting that either of the standards it proposed enjoyed a similar level of acceptance.)

[B] The one-in-a-million cancer risk level used to derive the "cancer risk" for Tri concentrations was 2.6 ppb. There is general agreement in the scientific community with EPA's cancer risk levels and the methods used to derive them. (N.T. 2009) The most recent one-in-a-million cancer risk level EPA had assigned to Tri at the time of the hearing was 2.6 ppb. (N.T. 2010, 3566) Although EPA had withdrawn that number by the time of the hearing, toxicologists and EPA continued to routinely use the withdrawn 2.6 ppb figure when it

was necessary to assign a one-in-a-million cancer risk level for Tri. (N.T. 2124, 2126-31)

[C] The one-in-a-million cancer risk level used to derive the "cancer risk" for 1,1-DCE concentrations was 0.061 ppb. This was the one-in-a-million cancer risk level assigned to 1,1-DCE by the EPA at the time of the hearing. (N.T. 3489-90; Ex. C-161)

[D] The one-in-a-million cancer risk level used to derive the cancer risk for PCE concentrations was 0.67 ppb. This was the one-in-a-million cancer risk level assigned to PCE by the EPA at the time of the hearing. (N.T. 3490-93; Ex. C-161)

[E] The one-in-a-million cancer risk level used to derive the cancer risk for 1,2-DCA concentrations was 0.38 ppb. This was the one-in-a-million cancer risk level assigned to 1,2-DCA by the EPA at the time of the hearing. (N.T. 348; Ex. C-161)

[F] Sample data from Ex. D-67.

[G] Sample data from Ex. D-63.

[H] Sample data from Ex. C-124.

[I] Sample data from Ex. C-184.

[J] Sample data from Ex. C-82.

[K] Sample data from Ex. C-125.

TABLE 2

Water Samples from Residential Wells Where Analysis of at Least One Sample Indicated the Presence of Quantifiable Levels of Ta[53]

Resident	Lot	Address	Date	Ta
Botterbusch, Duane A.	9132	90 Table Rock Road (Ex. C-124)	5/29/86	100.0
Breighner, Peggy	137	530 Boyd School Rd. (Ex. C-125)	12/2/83	2.5
"	"	"	3/2/84	1.5
Bridendolph, Patricia	37	1123 Biglerville Rd. (Ex. C-126)	9/27/83	19.0
"	"	"	2/15/84	8.1
Coleman, George F.	123	1230 Biglerville Rd. (Ex. C-196)	8/16/83	4.0
"	"	"	9/7/83	80.0
"	"	"	11/30/83	140.0
"	"	"	1/16/84	126.0

[53] Except where indicated otherwise, all information for this table is taken from Ex. C-131.

Resident	Lot	Address	Date	Ta
"	"	"	2/15/84	>120.0
Decker, Leonard R.	46	987 Biglerville (Ex. C-51)	3/14/84	2.5
Doyle, Helen E.	9135	80 Table Rock (Ex. C-51)	5/29/86	1.9
Felt, Franklin D.	121	1260 Biglerville Rd. (Ex. C-125)	11/1/83	~160.0
"	"	"	1/16/84	121.0
Gallatin, Kelly B.	9145	1159 Biglerville (Ex. C-51)	9/7/83	32.0
"	"	"	2/7/84	37.0
Gilman, John W.	43	1049 Biglerville Rd. (Ex. C-125)	12/19/83	67.0
"	"	"	2/15/84	69.0
"	"	"	3/2/84	41.7
Gladfelter, Charles	48	36 Apple Avenue (Ex. C-125)	4/24/84	9.7
Gulden, Donald C.	76 (lot 77 according to Ex. C-196.)	951 Biglerville Rd. (Ex. C-125)	5/7/84	19.0
Harness, William	9133	88 Table Rock Rd. (Ex. C-125)	5/19/86	34.0
Hemler, Charles A.	102	108 Table Rock (Ex. C-51)	5/19/86	1.0
Hess, Kenneth	135	550 Boyd School Rd. (Ex. C-125)	12/14/83	15.0
"	"	"	1/27/84	21.8
Kriel, Donald C.	124b	1225 Biglerville Rd. (Ex. C-126)	9/27/83	20.0
"	"	"	1/27/84	44.0
"	"	"	2/15/84	39.0
Lee, Ruth	49	44 Apple (Ex. C-51)	3/14/84	1.3
McGough, Ray M.	41	1069 Biglerville Rd. (Ex. C-125)	11/1/83	1.4
Miller, Kenneth L.	9129	585 Boyd School Rd. (Ex. C-125)	4/24/85	1.1
Mundy, Charles E.	136	540 Boyd School Rd. (Ex. C-125)	12/14/83	16.5
"	"	"	3/2/84	13.7
Myers, Nelson	148b	89 Table Rock (Ex. C-51)	5/29/86	100.0

Resident	Lot	Address	Date	Ta
Nickels, W.	112	690 Boyd School Rd. (Ex. C-125)	11/1/83	3.3
"	"	"	10/10/84	1.8
O'Brien, Matthew J.	111a	663 Boyd School Rd. (Ex. C-125)	12/2/83	3.0
"	"	"	10/10/84	2.5
"	"	"	4/24/85	1.6
"	"	"	8/5/85	1.5
"	"	"	11/19/85	1.5
Olofski, Victor A. Jr.	36	1133 Biglerville Rd. (Ex. C-125)	12/5/83	19.0
"	"	"	3/2/84	13.2
"	"	"	2/5/85	2.7
Potter, Russel	35	1139 Biglerville Rd. (Ex. C-125)	12/5/83	7.2
"	"	"	2/22/84	5.1
Redding, Herman	120	1270 Biglerville Rd. (Ex. C-125)	12/5/83	60.0
"	"	"	2/22/84	
Toddes, Walter E. Jr.	9128	1325 Biglerville Rd. (Ex. C-125)	12/5/83	<1.0
"	"	"	12/14/83	
"	"	"	4/11/86	5.0
"	"	"	5/20/86	14.0
Walter, George W.	9143	1145 Biglerville Rd. (Ex. C-125)	12/5/83	120.0
"	"	"	2/22/84	53.0
Wetzel, Raymond J. Jr.	58	218 Table Rock (Ex. C-51)	5/14/84	1.2
Wiley, Steven D.	79	50 Maple (Ex. C-124)	5/21/84	
"	"	"	11/20/85	1.5

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTINGHOUSE ELECTRIC CORPORATION	:
	:
v.	: **EHB Docket No. 88-319-CP-MR**
	: **(Consolidated with 88-296-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:
	:
	: **Issued: November 5, 1996**

ORDER

AND NOW, this 5th day of November, 1996, it is ordered that:

1. Westinghouse's appeal of the Department's July 22, 1988, order directing the corporation to resume operation of the air stripping tower at the plant is dismissed.

2. civil penalties are assessed against Westinghouse in the total amount of $5,451,283:

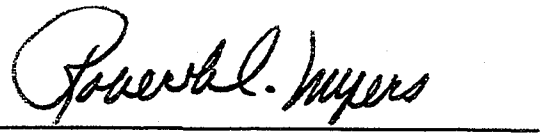
a. $61,500 for the violations of sections 301, 307, and 401 of the Clean Streams Law;

b. $2,677,384 for the violations of 25 Pa. Code §101.2(a);

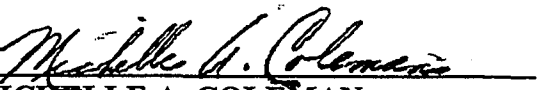
c. $2,677,384 for the violations of 25 Pa. Code §§ 101.2(b) and 101.3(a); and,

d. $35,015 for the costs the Department incurred in investigating those violations.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Chairman George J. Miller's concurring opinion and Administrative Law Judge Thomas W. Renwand's dissenting opinion are attached.

DATED: November 5, 1996

c: **DEP, Bureau of Litigation:**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DEP:
Carl B. Schultz, Esq.
Janice J. Repka, Esq.
Southcentral Region
For the Appellant/Defendant:
David J. Armstrong, Esq.
Leonard A. Costa, Esq.
John N. Cox, Esq.
DICKIE, McCAMEY & CHILCOTE
Pittsburgh, Pennsylvania

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTINGHOUSE ELECTRIC CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-319-CP-MR**
	:	**(Consolidated with 88-296-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	
	:	**Issued: November 5, 1996**

CONCURRING OPINION OF CHAIRMAN GEORGE J. MILLER

I agree with everything said in the foregoing opinion except for the opinion's analysis of when a claim accrues for a violation of section 101.3(a) of the Department's regulations. I believe that a failure to take necessary measures after a spill of polluting materials to prevent those substances from reaching the waters of the Commonwealth occurs when the failure to do anything about the spill occurs. The Department need not, in my view, wait until the substances reach the ground water to issue a notice of violation as one of the many enforcement options which it has. This view, however, does not change the result in this case because Westinghouse failed to present evidence that the Department knew or should have known of the failure of Westinghouse to clean up its spills of hazardous materials more than five years before this action was brought.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTINGHOUSE ELECTRIC CORPORATION	**:**
	:
v.	**: EHB Docket No. 88-319-CP-MR**
	: (Consolidated with 88-296-MR)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	**:**
	:
	: Issued: November 5, 1996

DISSENTING OPINION OF ADMINISTRATIVE LAW JUDGE THOMAS W. RENWAND

I respectfully dissent on two grounds: (1) the application of the statute of limitations; and (2) the computation of the civil penalties.

The majority has assessed the largest civil penalty award in the history of the Board. They have done so even though Westinghouse has spent millions of dollars to remedy the environmental harms it caused. They have done so even though there is not a line of evidence to indicate that Westinghouse's management was aware of the contamination or that it concealed it. In doing so, the Board has made new law by applying the discovery rule to the Clean Streams Law and applying penalties for violations which occurred, in many instances, in the 1970s. The Board has made new law in holding for the first time that a cause of action does not accrue when the violation occurs but when the unknowing corporation discharges its duty to notify. Such a ruling could allow the Department potentially to fine companies millions of dollars for violations that occurred in the 1970s but were not discovered until now or in the future.

This is an action for civil penalties. The Department's views on the size and scope of the penalties are merely advisory. Although the Department's recommendations should not be ignored, the law places the responsibility for setting the penalty squarely on the Board's shoulders. Thus, it is the duty of the Board within the framework of the law to fashion the most appropriate penalty based on the facts of record. *EMS Resource Group, Inc. v. Department of Environmental Resources,* 1995 EHB 834; *Department of Environmental Resources v. Allegro Oil & Gas Co.,* 1991 EHB 34.

I am reviewing this matter from a very cold record. Hearings commenced in December 1989 and concluded in February 1993. The final post-hearing brief was filed nearly three years ago, in December 1993. Thus, a good deal of the information, especially dealing with the extensive remediation steps undertaken by Westinghouse and largely ignored by the majority, is somewhat stale. According to the record, Westinghouse performed extensive cleanup at the site and committed to spend millions of dollars to complete the cleanup. I assume that Westinghouse has continued in these remediation efforts.

I fully agree with the majority opinion that Westinghouse violated the Clean Streams Law and that these violations resulted in contamination of the waters of the Commonwealth. Westinghouse, according to the record, although continuing to deny liability in the face of overwhelming evidence to the contrary, proceeded rather quickly to spend millions of dollars to remedy the situation. I agree with Westinghouse that by extending the municipal water supply to affected property owners it completely eliminated the risk that anyone would continue to be affected by the contamination that migrated into residential wells. While I question whether Westinghouse really took this action voluntarily, nonetheless, it did so rather quickly.

Westinghouse began connecting residences to municipal water in April 1984.

Westinghouse argues that none of the violations occurred after 1982. It makes these arguments throughout its post-hearing brief. It argues that since the complaint for civil penalties was not brought until August 1988 the five year statute of limitations expired. The statute of limitations is set forth at 35 P.S. §691.605(c) as follows:

> Any other provision of law to the contrary notwithstanding, there shall be a statute of limitations of five years upon actions brought by the Commonwealth pursuant to this section.

By its plain language, Section 691.605(c) clearly limits the assessment of civil penalties under the Clean Streams Law to violations that occurred within five years of the time the complaint was filed. *Scott Paper Co. v. Department of Environmental Resources,* 1987 EHB 13, 15.

The majority argues that Westinghouse did not sustain its burden because, as to violations under the Clean Streams Law, Westinghouse did not prove that the violations occurred before August 16, 1983. As to the violations dealing with its duty to report and warn under 25 Pa Code §101.2(a) , the majority argues that the statute does not begin to run until Westinghouse discharges its duty by giving a warning or advising the Department of the pollution to the waters of the Commonwealth. I disagree.

The Department waited nearly five years after it learned of Westinghouse's violations to bring this action for civil penalties under the Clean Streams Law. In fact, four years and eleven months after learning of the violations, the Department filed a civil penalty complaint in which it argued that Westinghouse should pay fines of more than nine million dollars because of the severe contamination of the groundwater caused by industrial operations at the

Westinghouse plant.

The majority opinion strongly admonishes the Department because its Complaint makes no mention of any individual violations or the specific dates of those violations. In my view, Westinghouse properly raised the statute of limitations issue in its New Matter by alleging that none of the violations took place within the five year period preceding the filing of the Complaint. It also raised the argument extensively in its post-hearing brief. The Department, implicitly recognizing the veracity of this argument, argues for an application of the discovery rule, to toll the statute of limitations. Under the Department's interpretation, it did not know nor could it have known of the violations until September 16, 1983. Therefore, the Department contends that the Complaint is not time barred because it was filed approximately four years and eleven months after it received knowledge of Westinghouse's substantial violations.

The majority finds that Westinghouse cannot prevail and use the statute of limitations as a bar to the Complaint because it did not prove that the violations occurred prior to August 16, 1983. I respectfully disagree. Furthermore, I contend that the majority misapplies the law in this instance. Westinghouse has raised the issue that none of the violations occurred after 1982, *see, e.g.,* findings of fact 242 and 349 and the voluminous citations to the record.

The statute of limitations begins to run as soon as the right to institute and maintain a cause of action arises. *Hayward v. Medical Center of Beaver County,* 608 A.2d 1040, 1042 (Pa. 1992); *Nesbitt v. Erie Coach Co.,* 204 A.2d 473 (Pa. 1964). Lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations. *Baumgart v. Keene Bldg.. Products Corp.,* 666 A.2d 238, 240 (Pa. 1995). Once the applicable statute of limitations has run, a party is prevented from bringing suit unless it can establish an exception to the general

rule which acts to toll the statute of limitations. "The 'discovery rule' is such an exception, and arises from the *inability* of the injured, *despite the exercise of due diligence,* to know of the injury or its cause." *Pocono Intern. Raceway v. Pocono Produce,* 468 A.2d 468, 471 (Pa. 1983) (emphasis in original).

One of the pins supporting the majority opinion is that the burden of proof concerning the statute of limitations is on Westinghouse. This is true in the sense that the statute of limitations is an affirmative defense that must be raised by Westinghouse. However, once Westinghouse raises the issue and alleges that the action was not timely filed the burden to come forward is on the Department to show that it filed the action within the statute of limitations. *Bickell v. Stein*, 435 A.2d 610, 612 (Pa. Super. 1981).

The majority opinion cites *Re Huffman's Estate*, 36 A.2d 640 (Pa. 1944), for the proposition that Westinghouse bears the initial burden of proof that the Department's action was filed after the limitations period expired. *Huffman* involved a claim against an estate that the estate argued was barred by the applicable statue of limitations. The Supreme Court sustained the estate's argument in holding:

> The claim is objected to on account of the running of the statue of limitations. This plea is well taken ...And as the Statute of Limitations operates on the remedy, it begins to run as soon as the right of action accrues. When the action has been delayed for more than six years, and the statute is pleaded, the burden of proving facts to resist its operation, or in the usual phrase, to take the case out of the statute, is upon the plaintiff.

36 A.2d at 642.

The majority bases its holding that Westinghouse did not properly prove that the action was filed outside the statute of limitations because it did not show when the contamination

entered the waters of the Commonwealth. In the majority's view no party even addressed this issue. The majority however finds that the contamination from the spills (that mostly took place from 1973 through 1978) did indeed enter the waters of the Commonwealth. And more importantly, the majority starts its penalty computations from the dates (as it determines from the testimony) of the spills.

This reasoning strikes me as exceedingly technical and very unfair. Are we to believe that spills which occurred in 1973 through 1978 did not enter the waters of the Commonwealth until after August 16, 1983? In *New Hanover Township v. Department of Environmental Protection*, EHB Docket No. 88-119-MR (Adjudication issued June 25, 1996) this Board warned the Department of the dangers of trying to ride two horses at the same time. I respectfully contend that the same warning is applicable here. The majority cannot have it both ways. It cannot assess the penalties from the dates of the chemical mishandling and then conclude that those dates are inconsequential or that the pollution actually entered the waters of the Commonwealth years later. It is analogous to saying I can hit a golf ball into the air on September 30, 1973 but there is no proof the ball hit the ground prior to August 16, 1983. It certainly is within this Board's power, based on our technical expertise, to find that if spills occurred from 1973 through 1978 that they entered the groundwater long before August 16, 1983. *Department of Environmental Resources v. Big B Mining Co.*, 554 A.2d 1002, 1007 (Pa. Cmwlth. 1989) ("[G]iven the technical nature of the evidence presented, we would be loathe to engage in our own evaluation of it, and must defer to the Board's expertise."); *Swartwood v. Department of Environmental Resources*, 424 A.2d 993, 997 (Pa. Cmwlth. 1981); and *Harman Coal Co. v. Department of Environmental Resources*, 384 A.2d 289, 292 (Pa. Cmwlth. 1978);

("Members of Environmental Hearing Board and its staff workers have an expertise in the scientific and technical aspects of environmental protection not possessed by this Court"). I would so find.[54]

The majority, after finding that Westinghouse did not prove that the violations occurred before August 16, 1983, subsequently sets forth in great detail that nearly all of the actual violations occurred *prior* to August 16, 1983. The majority misperceives what Westinghouse must prove. It is not Westinghouse's burden to prove that violations occurred at any time, let alone *prior* to August 16, 1983. It may simply allege and prove that no violations occurred after August 16, 1983. Westinghouse met its burden. Therefore, I would find that the five year statute of limitations prohibits the Department from prosecuting this civil penalty action unless the discovery rule applies.

The majority, apparently realizing that its first holding on this issue might be built on legal quicksand, attempts to shore up the foundation of its holding by finding that the application of the discovery rule results in a tolling of the statute of limitations. This is a close question. After a review of the record, I believe that the Department had notice of evidence which, if it had conducted its investigation with *due diligence* (which is required to invoke the discovery rule), should have alerted it to the substantial mishandling problems at the plant that

---

[54] The majority misconstrues my analysis. It is not inconsistent with *Kerrigan v. Department of Environmental Resources*, 641 A.2d 1265 (1994). In *Kerrigan*, the Commonwealth Court reversed a decision of this Board because we concluded that because contaminants were in the soil they posed a danger of pollution to the waters of the Commonwealth. The Court pointed out that there was no testing to establish the location of the groundwater in relation to the contaminants in the soil. In this case, the majority found that the contaminants contained in the spill *actually polluted* the groundwater.

resulted in the contamination of the groundwater. The Department made three hazardous waste inspections of the plant in October 1981, August 1982, and February 1983. One of the express purposes of these inspections was to determine whether used degreaser fluids were being handled properly. N.T. 1048, 1667-68. The Department argues in its supplemental brief that its inspector was only at the Westinghouse plant no more than 1 ½ hours on any one inspection. There is no allegation or evidence in the record that the inspections were in any way restricted or curtailed by anyone, including Westinghouse. If the Department spent minimal time at the plant and did not discover what it should have discovered, then by definition it did not act with the requisite due diligence to discover the harm.

The majority argues at page 72 of the opinion that "Westinghouse failed to elicit any evidence of possible releases or contamination on site at the time of the inspections." The majority goes on to say that although there was testimony of stained soil there is no evidence that these conditions were evident at the time of the three hazardous waste inspections in 1981, 1982 and 1983. As pointed out earlier, the majority later finds that nearly all of the releases took place prior to the inspections. On pages 93 and 106 of the opinion, while discussing the individual spills, most of which it determined occurred in the 1970s, the majority finds the existence of dark stains near the railroad dock and the stained soil near the old waste drums to be clear evidence of the extent of the contamination. Obviously, it can be inferred that these stains were present when the trained department inspector conducted his three hazardous waste inspections in 1981, 1982 and 1983.

Moreover, the majority opinion discusses the daily spills that leaked from the hoppers from 1973 to 1978. It certainly may be inferred that these spills caused much of the staining which

should have been readily visible to the Department inspector.

A reading of the majority opinion and the record reveals an industrial operation in the 1970s and early 1980s that was sloppy at best in its handling of hazardous chemicals. This should have been apparent to the Department. As pointed out recently by our Supreme Court in *Cochran v. GAF Corp.*, 666 A.2d 245 (Pa. 1995):

> Our cases firmly establish that the "reasonable diligence" standard has some teeth. A person claiming the discovery rule exception has the burden of establishing that he pursued the cause of his injury with "those qualities of attention, knowledge, intelligence and judgment which society requires of their own interests and the interests of others." *Burnside v. Abbott Laboratories,* 505 A.2d 973, 988 (Pa. Super. 1985).

666 A.2d at 250.

The Supreme Court in *Cochran* held that the discovery rule did not apply and that it would not "expand the discovery rule and open the flood gates to allow anyone with a good faith lack of diligence to claim benefit of the rule." *Id.* Indeed, here the majority has opened the flood gates by ignoring the Department's lack of due diligence in this case even though it conducted three inspections. Such a finding results in the harm the Supreme Court warned against--the severe erosion of the statute of limitations and the establishment of a "no diligence" rule allowing any party with a good faith, even if mistaken, belief to claim the benefits of the discovery rule exception.

The majority fashions a unique solution to the statute of limitations issue concerning the duty to notify set forth in the regulations. First, I concur with the majority that each day Westinghouse failed to notify the Department and the downstream users of the discharge did

not count as a separate and distinct violation of 25 Pa. Code §101.2(a). In other words, it is not a continuous violation. I disagree with the majority's analysis that this section of the regulations mandates a continuous duty so that the statute of limitations did not start to run until the Department and the downstream users became aware of the contamination (since Westinghouse never notified the Department or downstream users).

This is a unique interpretation of the statute of limitations. The majority cites *Plazak v. Allegheny Steel Company*, 188 A. 130 (Pa. 1936) as the sole authority for its holding that where "a cause of action is based on the failure to perform a duty, the statue of limitations usually starts to run from the date the duty was not performed." *Plazak* was an action which concerned the duty of an employer to provide a safe workplace for its employees. The employee alleged the employer failed to warn or notify him of job dangers which rendered him ill. The issue in the case was the date of the employee's last day of employment. The employer never warned the employee of the danger. The court did not hold that this duty to warn or notify extended beyond the last day of employment. Under this Board's majority's analysis the statute of limitations would not start to run until the warning or notification was made. This is clearly not the Supreme Court's holding in *Plazak*.

The majority argues public policy favors its continuous duty rule because wily polluters "would have an incentive to lie low and provide no notice" hoping that the statue of limitations would expire. Although this is surely a valid concern the existence and application of the discovery rule should act as an appropriate prophylactic device to prevent this injustice from occurring yet still retaining the efficacy of the statute of limitations.

Since I would find that the Department did not file suit within five years of any of the

violations I would not reach the issue of the assessment of civil penalties because I think they are time-barred in this case. However, I disagree with the severity of the penalties imposed by the majority. First, the legislature never envisioned fines which date back more than five years. Second, and most important, the majority applies present day environmental standards to violations which occurred in some instances nearly twenty-five years ago. Under the majority decision, the Department could investigate industrial properties, find violations that occurred years ago and then, applying the discovery rule, levy draconian fines. If the goal is to emphasize compliance with environmental laws, then the Department should be treating industry like partners--not like criminals. Moreover, if the Board wishes to deter other violators and encourage them to voluntarily report violations, then credit should be given to corporations that act responsibly and that agree to undertake expensive remediation steps. This is especially important if the Department lacks, according to its briefs, a sufficient number of inspectors to uncover every violation. I fear the majority opinion may deter corporations from voluntary disclosure and cleanup because even if corporations spend millions of dollars on remediation, they still may be punished with enormous civil penalties. The heavy fines meted out in this case do nothing to enhance the protection of our precious natural resources and groundwater.

By considering and rewarding remediation efforts, especially when the corporations report the violations, an atmosphere of trust will hopefully be developed. By rewarding such corporate environmental responsibility in a civil penalty assessment proceeding, the Board can provide a strong incentive for companies to engage in environmentally beneficial activities. However, I caution to add that initial compliance with the law and zero pollution should be the

primary goals. Where it is shown that a corporation deliberately or recklessly pollutes the natural resources of the Commonwealth and has done little or nothing to remediate the harm, then we should impose harsh penalties such as those assessed by the majority in this case.

In this case, I do not see the necessity to assess the level of civil penalties the majority has ordered. Setting aside the determinative statute of limitations issue, I would have assessed the following penalties:

1) $10,000 for the violations of the applicable sections of the Clean Streams Law;

2) $35,015 for the costs the Department incurred in investigating these violations; and

3) $50,000 for the violations of the regulations regarding remedial actions and failure to warn.

Such an assessment of penalties would afford due consideration and credit for the $2 million Westinghouse spent through 1993 and the additional $4.4 million it projects to spend on the cleanup of this serious environmental contamination. I would hope that treating responsible corporations that act responsibly in such a manner would foster a respect for the environmental laws of this Commonwealth that protect our vital natural resources.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 5, 1996

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT M. HOOPER	:	
	:	
v.	:	**EHB Docket No. 95-264-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LINDA SEATS and BRIAN PETERSHEIM, Intervenors	:	**Issued: November 5, 1996**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for partial summary judgment is granted in an appeal from the Department's order under the Solid Waste Management Act and the Clean Streams Law requiring the submission of closure and postclosure plans as well as chemical analysis reports. The order was proper because appellant was in violation of the statutes and their accompanying regulations by failing to file the appropriate documents. In addition, the Department's order requiring a groundwater assessment plan was proper because the degradation of the groundwater near the landfill can be reasonably attributed to Appellant's landfill

OPINION

The motion currently before the Board arises from an appeal filed by Robert M. Hooper (Appellant) on December 19, 1995 from the Department of Environmental Protection's issuance of

an order concerning a landfill located in West Brandywine Township, Chester County. The order requires Appellant, *inter alia*, to: begin and continue groundwater monitoring as required by the permit, install additional monitoring wells along the perimeter of the landfill, and submit closure and post-closure plans to the Department for approval and, upon approval, implement those plans.[1]

Appellant's notice of appeal asserts the Department's issuance of the order was an abuse of discretion for the following reasons:

> - the operation and closure of the landfill were permitted by or ordered by the Department;
> - the maintenance and closure of the landfill have been approved by the Department;
> - the monitoring points surrounding the landfill were drilled pursuant to the directions of the Department and the submittals to the Department to date have shown fewer than the maximum allowable contaminant levels;
> - whatever problems a private well off site may have had are not related to this site;
> - Appellant believes that the test results of the adjacent site are either inaccurate or inapplicable to Appellant;
> - Appellant believes that he has complied with all of the requirements of the Department;
> - any degradation of the water supply is not due to any activity or lack of activity by Appellant. Any such degradation is caused by persons other than Appellant;
> - the activities of Appellant or lack of activities of Appellant have not created any danger of pollution. Any such danger has been remediated by Appellant and/or caused by other property owners;
> - the order directing the order is not supported by the facts and is outside of the scope of authority of the Department;
> - the order is excessive under the circumstances;
> - the order directs Appellant to do things at the property not controlled by Appellant and to do things which he has no right or authority to do;
> - the Department's actions constitute an unconstitutional taking or

[1]The portion of the order concerning the requirement to provide a replacement water supply for the intervenors is not subject to this motion.

are otherwise constitutionally impermissible under the Constitutions of the State of Pennsylvania and the United States;
- the order imposes unrealistic time constraints upon Appellant;
- the order directs Appellant to do things which are not justified by the circumstances or which are not authorized by law or by departmental regulation.

BACKGROUND

Appellant owns 19.1 acres, consisting of three parcels of land, on Barren Hill Road in Brandamore, West Brandywine Township, Chester County. On approximately 3.5 acres of the property extending approximately 400 feet to the north of Barren Hill Road Appellant operated a sanitary landfill. From 1961 to 1976 Appellant disposed of municipal waste and sewage sludge at the landfill. From November 12, 1976 until August 1984 Appellant only disposed of municipal waste at the landfill. In August of 1984 Appellant ceased all operations at the landfill.

On November 12, 1976 Appellant received his solid waste permit, SWP No. 100719, from the Department for the operation of a landfill. Under the terms of the permit Appellant had to submit the following: a groundwater module, Phase II; a chemical analysis quarterly report for each monitoring point; a chemical analysis annual report for each monitoring point on or before December 31st of each year; and a certification by a Registered Professional Engineer of site construction in accordance with the approved plans. In accordance with the terms of the permit three monitoring points were drilled.

Between 1978 and 1988 the Department issued several Notices of Violation for Appellant's failure to submit quarterly and annual groundwater analysis reports to the Department and failure to submit a certified closure plan for the landfill to the Department following termination of operations at the landfill in 1984. Chemical analysis quarterly reports have not been submitted to

the Department for the monitoring points at the landfill since January 25, 1989 and the Chemical Analysis Annual Reports have never been submitted. In addition, a closure plan was submitted in 1987, but was neither approved nor accepted as final by the Department because it did not adequately meet disclosure requirements of the Solid Waste Management Rules and Regulations. On April 9, 1988, the Environmental Quality Board replaced the 1978 regulations and promulgated new comprehensive regulations for the siting, management and closure of municipal waste landfills in the Commonwealth. By letter dated April 11, 1988, the Department notified Appellant about the new regulations and what he needed to do to come into compliance with them.

On September 9, 1994 the Chester County Health Department responded to a complaint that contaminated groundwater was found while a private well was being drilled on property adjacent to the landfill. On September 13, 1994 the Department conducted an investigation of the contamination including collecting several samples of the groundwater at the location of the well drilling. The results indicated that a number of compounds were at or above the maximum contaminant level limits for drinking water.

The owners of a drinking water well on the property near the landfill, Linda Seats and Brian Petersheim (Intervenors), were granted leave to intervene.

DISCUSSION

The Department's motion for summary judgment, as amended[2], asserts that the Department did not abuse its authority because the order was within the scope of its authority and constitutionally

---

[2] The motion was originally filed on August 19, 1996 before the close of discovery. Accordingly, we apply Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure which became effective on July 1, 1996.

permissible. The Department argues that it properly ordered Appellant to submit closure and postclosure plans to the Department for approval and upon approval implement the plans under statutory and regulatory provisions. The Department's motion is based primarily on the affidavit of Sarah Pantelidou based on her personal knowledge as required by Rule 1035.4 of the Pennsylvania Rules of Civil Procedure. The Intervenors joined in the Department's original and amended motion.

Appellant's response to the motion as amended says that the motion should be denied because the Department failed to set forth with any specificity the relief requested in its motion, because genuine issues of material fact exist and because there are many issues of law in dispute. However, the response fails to set forth any particular factual dispute in response to the motion as required by the Board Rule at 25 Pa. Code § 1021.70 and fails to submit any affidavits or other evidence in the record from which it might be concluded that there is a genuine dispute of material fact as required by the now effective Rule 1035.3 of the Pennsylvania Rules of Civil Procedure.[3] Since Appellant failed to exercise his opportunity to file a response to the amended motion, we assume he wants his original arguments to remain the only arguments he wishes the Board to consider.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the evidence of record show that 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. 1035.3. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Grand*

---

[3] Substantially the same requirements were applicable under Rule 1035(b) of the Pennsylvania Rules of Civil Procedure prior to July 1, 1996.

Central Sanitary Landfill, Inc. v. DEP, EHB Docket No. 96-012-MG (Opinion issued July 3, 1996).

The undisputed facts are set forth above under the title of "Background." As a result of its investigation, the Department determined that the degradation of the water supply at the intervenors' property was reasonably attributable to the landfill. On November 20, 1995, the Department issued an administrative order to Appellant pursuant to its authority under the Solid Waste Management Act requiring Appellant to conduct a groundwater assessment.

Was the Department's Order within its Scope of Authority ?

The Department argues that it was authorized to issue the order under Sections 601 and 602 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003 (SWMA) because Appellant not only had a history of violations but also was in violation of the regulations and the permit to the degree that the situation was a nuisance. In addition, the Department was authorized to issue the order under Sections 316 and 610 of the Clean Streams Law, Act of June 22,1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001 (CSL) because the condition of the water supply near the landfill constitute either pollution to or a danger of pollution resulting from a condition existing on land in the Commonwealth within the meaning of Section 316 of the CSL and the activities create a danger of pollution of the waters within the meaning of Section 402(a).

Appellant did not address this argument.

We agree with the Department that it did not abuse its authority in issuing the order under either the SWMA or the CSL.

Under Section 602 of the SWMA, the Department may issue orders to such persons and municipalities as it deems necessary to aid in the enforcement of the provisions of this act. The

section also provides:

> Such orders may include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons and municipalities to cease unlawful activities or operations of a solid waste facility which in the course of its operation is in violation of any provision of this act, any rule or regulation of the department or any terms and conditions of a permit issued under this act.....

35 P.S. § 6018.602.

The CSL includes similar provisions. Section 316 of the CSL provides that "whenever the department finds that pollution or danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department..." 35 P.S. § 691.316 The CSL also provides:

> The department may issue [enforcement] orders as are necessary to aid in the enforcement provisions of this act.... Such an order may be issued if the department finds ... that the permittee, or any person ... is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department....

35 P.S. § 691.610.

Clearly, the Department has authority to issue orders if there is unlawful activity. Thus, we must determine whether Appellant has committed any unlawful activity under either of the statutes.

Section 610 of the SWMA provides:

> It shall be unlawful for any person or municipality to ..... construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility ... in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.

35 P.S. § 6018.610. Under Section 601, any violation of any provision of the act, any rule or

regulation of the Department, any order of the Department or any term or condition of any permit, shall constitute a public nuisance. 35 P.S. § 6018.601.

The CSL has a similar unlawful activity provision. Section 611 of the CSL provides:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to cause air or water pollution ....

35 P.S. § 691.611

The affidavit of Sarah Pantelidou, a Department hydrogeologist, demonstrates that the Appellant has violated the terms of the permit and the statutes and their accompanying regulations. According to Ms. Pantelidou, Appellant's permit required monitoring reports and that the Chemical Analysis Quarterly Reports for the landfill's monitoring points have not been submitted to the Department since January 25, 1989 and the Chemical Analysis Annual Reports have never been submitted. (Affidavit of Sarah Pantelidou, ¶H) Furthermore, Ms. Pantelidou stated in her affidavit that although Appellant submitted a closure plan for the landfill in 1987 it was rejected as inadequate and no subsequent plan was ever submitted or accepted by the Department as final. (Affidavit of Sarah Pantelidou, ¶F) Appellant's failure to submit these documents is a violation of the permit, the SWMA and CSL as well as the regulations.[4]

---

[4] The Department relies on the argument that during 1978 to 1988, the Department issued seven notices of violation (NOVs) for violations of the SWMA and the CSL and their regulations. These NOVs were issued on: April 18, 1978, November 23, 1981, May 2, 1984, May 3, 1984, April 24, 1985, January 7, 1987 and April 26, 1988. The NOVs cited Appellant for such violations as the failure to institute a groundwater monitoring program, inadequate daily covering, the need for final earth cover on much of the site, improper grading, inadequate cover, litter problems, failure to follow the approved design and operational plans, dumping in an unpermitted section of the property, leachate collecting and running onto property off site, and the absence of a certified closure plan for

Was the order constitutionally permissible ?

The Department contends the order was constitutionally permissible because it does not deprive a landowner or occupier of due process by ordering him to abate pollution pursuant to Section 316 of the CSL.

Appellant contends that there are many issues of law in dispute which include constitutional questions.

We agree with the Department. The Board has held that the Department is authorized under Section 316 of the CSL to order a landowner or occupier to correct a polluting condition on his land, even if he did not cause or associate himself with the condition or even have actual or constructive knowledge of it. *Adams Sanitation Company, Inc. v. DER*, 1994 EHB 502, *aff'd* ___ A.2d ___ (Pa. Cmwlth. 1996). Furthermore, the Department does not deprive a landowner or occupier of due process by ordering him to abate such pollution. *Id.* Therefore, the Department's issuance of the order was not unconstitutional.

Closure and Post Closure Plans and Chemical Analysis Reports

The Department contends that it properly ordered Appellant to submit closure and post-closure plans and thereafter to implement them. The Department argues that its action was justified since Appellant's actions were in violation of the terms of the permit and the regulations by failing to submit and implement an approved closure plan upon cessation of operations and by failing to submit the Chemical Analysis Quarterly and Annual Reports.

---

various parts of the property. While these notices are admissible to prove background facts, we cannot rely on the factual statements made in the notices of violation to establish that the appellant has violated the statutes or regulations. However, the charged violations have been established through the affidavit of Sarah Pantelidou based on personal knowledge.

Appellant contends that there are genuine issues of material fact in dispute whether a closure plan was submitted and the circumstances surrounding its acceptance or rejection. However, Appellant has pointed to no evidence in the record indicating that the closure plan was filed, and it is too late now to claim that the plan was rejected improperly.

While we agree with the Department on the matter of the closure plan, we disagree that Appellant violated the terms of the permit regarding closure. There is nothing in the permit which states that Appellant must submit a closure plan upon cessation of the operations of the landfill. The November 12, 1976 permit only required Appellant to submit a Groundwater Module, Phase II, including the Chemical Analysis Annual Report, a Chemical Analysis Quarterly Report, a Chemical Analysis Annual Report and certification by a registered professional engineer of site construction in accordance with the approved plans. Therefore, there is nothing in the permit which requires a closure submission. Although there is nothing in the permit, the regulations require such a submission.

The 1988 regulations required:

> A person ... possessing a permit for a municipal waste landfill ... under the act or a permit for an impoundment used for municipal waste disposal issued under the Clean Streams Law ..., which was issued by the Department prior to April 9, 1988 shall file with the Department, by October 11, 1988, one of the following:
>
> (1) A preliminary application for permit modification ....
> (2) A closure plan under § 271.113 ....

25 Pa. Code § 271.111.

The regulation applies to Appellant since his permit was issued in 1976. Consequently, Appellant was to file either a permit modification or closure plan. A permit modification was

inappropriate since Appellant ceased all operations in 1984. Therefore, Appellant should have filed a closure plan. According to the documents, Appellant did submit a closure plan in 1987, but, it was neither approved nor accepted as final by the Department. Appellant never submitted another plan. Affidavit of Sarah Pantelidou, ¶F. By failing to file an approvable closure plan, Appellant clearly has violated the solid waste regulations.

In addition, Appellant's failure to submit the Chemical Analysis Annual and Quarterly Reports demonstrates he has failed to comply with the terms of the permit as well as the regulations. Under the terms of the permit, Appellant was to file a Groundwater Module, Phase II, including the Chemical Analysis Annual Report, a Chemical Analysis Quarterly Report and a Chemical Analysis Annual Report. These filings are in accordance with the regulations which state, "A person or municipality operating a municipal waste landfill shall conduct sampling and analysis from each monitoring well ..." regarding specified frequencies and parameters, which are either quarterly or annually. 25 Pa. Code § 273.284. Under 25 Pa. Code § 273.201(c), "a person or municipality that operates a municipal landfill shall comply with the following: (1) [T]he act, this article and other applicable regulations promulgated under the act. (2) [T]he plans and specifications in the permit, the terms and conditions of the permit, the environmental protection acts, this title and orders issued by the Department." 25 Pa. Code § 273.201(c).

Here, Appellant has not filed any Chemical Analysis Quarterly Reports with the Department since January, 1989 and he has never filed a Chemical Analysis Annual Report. Therefore, he is in violation of the permit conditions as well as Sections 273.201(c) and 273.284 of the regulations. Appellant's violations of the permit terms and the regulations clearly are unlawful conduct under both statutes. The Department is responsible for ensuring that a party complies with the

environmental statutes. As noted earlier, under other provisions, specifically Sections 601 and 602 of the SWMA and Sections 316 and 610 of the CSL, the Department has the authority to order Appellant to submit closure and post-closure plans for approval and to implement those plans.

Groundwater Assessment

The Department argues that it properly ordered Appellant to conduct a groundwater assessment under Section 273.286 of the SWMA regulations.

Section 273.286(a) provides:

> A person or municipality operating a municipal waste landfill shall prepare and submit to the Department a groundwater assessment plan within 30 days after one of the following occurs: ...
>
> > (2) Laboratory analyses of one or more contiguous public or private water supplies shows the presence of degradation that could reasonably be attributed to the facility.

25 Pa. Code § 273.286(a).

Appellant contends that genuine issue of material fact exist regarding the groundwater assessment because other possible sources of contamination exist in the vicinity of the complaint site.

The Department's order to conduct a groundwater assessment was proper. Samples of the groundwater indicate that there was degradation of the water supply. Linda Seat and Brian Petersheim are owners of property adjacent to the landfill. They filed a complaint with the Chester County Health Department on September 9, 1994 that contaminated groundwater was found while a private well was being drilled on the property. On September 13, 1994 the Department conducted an investigation and collected several samples of the groundwater at the location of the well drilling.

The results of the samples indicated that several compounds exceeded the standards set forth in the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. § 721.1 *et seq* and its accompanying regulations. Those compounds include:

Compound	Concentrate	Maximum Contaminant Level
Lead (total)	20.55 ppb[5]	MCL[6]=15 ppb
Iron (total)	129 ppm[7]	MCL=0.3 ppm
Manganese	1490 ppb	MCL= 50 ppb
Benzene	15 ppb	MCL= 5 ppb

Clearly, the results show that the samples far exceed the standards. The Department hydrogeologist stated that these compounds are indicative of contamination by landfill leachate. She states that in her professional opinion the contamination is the result of the landfill since no other industrial activities are located in the immediate area and there is no other observable potential sources. Affidavit of Sarah Pantelidou, ¶¶I-P. Appellant has submitted no contrary evidence of record for our consideration. Indeed, the Department points out that a consultant retained by the Appellant also has concluded that further investigation of the presence of leachate at the landfill is warranted. Amended Motion, par. 22; Exhibit K.

---

[5] The abbreviation "ppb" stands for parts per billion.

[6] Maximum Contaminant Level is the maximum permissible level of a contaminant in water which is delivered to any user of a public water system. Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L.206, 35. P.S. § 721.1 *et seq*.

[7] The abbreviation "ppm" stands for parts per million.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT M. HOOPER	:	
	:	
v.	:	**EHB Docket No. 95-264-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LINDA SEATS and BRIAN PETERSHEIM, Intervenors	:	

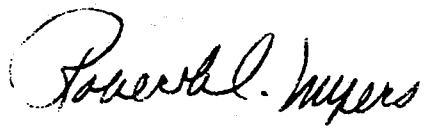
ORDER

AND NOW, this 5th day of November, 1996, it is ordered that the Department of Environmental Protection's motion for partial summary judgment is granted and summary judgment is entered for the Department and against Appellant on the issues raised in the notice of appeal concerning the Department's authority to issue the order requiring groundwater monitoring, the installation of additional monitoring wells, the submission of appropriate closure and post-closure plans and the implementation of these plans.

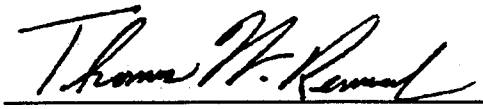
ENVIRONMENTAL HEARING BOARD

George J. Miller

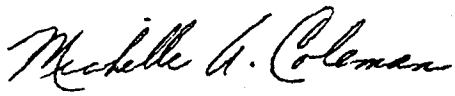
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 5, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Mark L. Freed, Esquire
Jacqueline Hatoff, Esquire
Southeast Region

For Appellant:
Patrick O'Donnell, Esquire
Garth Heald, Esquire
West Chester, PA

For Intervenors:
Paul Boni, Esquire
Philadelphia, PA

kh/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

JOHN WILLIAM FONTAINE, II and	:	
MARK C. SCOTT, Appellants	:	
BERKS COUNTY, Intervenor	:	
	:	
v.	:	**EHB Docket No. 95-246-MG**
	:	**(Consolidated with 95-247-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, WASTE MANAGEMENT	:	
DISPOSAL SERVICES OF PENNSYLVANIA,	:	
Permittee	:	**Issued: November 6, 1996**

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

Because the applicant for a permit for an expansion of an existing solid waste disposal facility located in both Berks and Montgomery Counties failed to provide notice of the application for the permit to Berks County on the theory that the proposed expansion would be located only within Montgomery County, summary judgment is granted to Berks County and the application remanded to the Department because Act 101 and the Solid Waste Management Act require that the applicant give notice of such an application to both counties in which the existing facility is located.

Berks County is entitled to raise this objection now as an intervenor in timely filed appeals even though it did not file an appeal within thirty days of the Department's action because it was not given the personal notice of the application to which it was legally entitled under Act 101 and the Solid Waste Management Act.

OPINION

Background

Waste Management Disposal Services of Pennsylvania, Inc. ("Waste Management") owns and operates the Pottstown Landfill, a municipal and residual waste landfill in Westgrove Township, Montgomery County and Douglass Township in Berks County pursuant to a permit initially issued by the Department in 1973. The Department subsequently issued modifications to the permit authorizing expansions of the landfill in 1988, 1992 and 1994. In October, 1992, Waste Management submitted a permit application pursuant to the provisions of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101, *et seq.* ("SWMA") and the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101, *et seq.* ("Act 101") and the regulations thereunder, to construct and operate an Eastern Expansion of the Pottstown Landfill. Following its review of the permit application, including comments received during the public comment period, the Department issued the permit to construct and operate the Eastern Expansion.

The appellants, John W. Fontaine, II ("Fontaine") and Mark C. Scott ("Scott"), filed identical appeals from the issuance of the permit on November 20, 1995. These appeals raised the following five "objections" or grounds for setting aside the issuance of the permit: (1) Notice of the application was not provided by either the permittee or the Department to Berks County and Douglass Township allegedly in violation of the SWMA and Act 101, (2) Waste Management has failed to meet its post-closure trust funding obligations to Berks County under Act 101 with respect to that portion of the permitted facility which is located in Berks County, (3) Issuance of the permit will worsen and maintain a malodorous atmosphere created by landfill emissions, (4) The Department did not

condition the issuance of the permit on the issuance of a Federal Clean Air Act Part D Permit, and (5) The permit authorizes a land use not permitted by the zoning ordinance of West Pottsgrove Township. Both appeals reserved the right to raise additional grounds for appeal upon completion of discovery.

In February, 1996, Berks County was permitted to intervene in the case based on objections 1-3 raised by the appellants, and the Board entered an order consolidating these appeals.

Near or after the close of discovery, appellants and Berks County filed amended notices of appeal alleging that the issuance of the permit authorizing the Eastern Expansion is unlawful and an abuse of discretion because it unjustifiably jeopardizes public safety by permitting the operation and expansion of a landfill approximately 4,000 feet from the Pottstown Municipal Airport, contrary to directives of the Federal Aviation Administration ("FAA") and over the objections of the FAA.

All of the parties to this proceeding have filed motions for summary judgment. In addition, Waste Management has filed a motion to strike the amendments to the appeal relating to the regulations of the FAA.

Waste Management's Motion for Summary Judgment and to Strike Appeal

The motions for summary judgment with respect to appellants Scott and Fontaine assert substantially the same grounds. In addition, Waste Management claims that the Fontaine appeal comes too late in that he had actual notice of the issuance of the permit more than 30 days before his appeal was filed. In the case of each of these appellants, Waste Management asserts that neither Fontaine nor Scott have standing to raise any of the grounds set forth in the appeal.

With respect to the first objection, Waste Management says that proper notice was given only to Montgomery County rather than to Berks County, and to West Pottsgrove Township because the

proposed permit area is located solely within West Pottsgrove Township in Montgomery County. In the case of the second objection, Waste Management says that it has properly met its post-closure funding obligations by payment of monies to Montgomery County where Berks County had failed to establish a post-closure trust fund for operations within Berks County.

In response to the third objection relating to odor control, Waste Management says that the Department properly approved its application which provides proper measures for control of odor and properly conditioned the issuance of a permit on Waste Management's obtaining an air quality permit from the Department. In addition, Waste Management asserts that there have been only sporadic complaints of off-site odors prior to the issuance of the permit and that appellants have insufficient evidence of odors which violate the Department's regulation with respect to odor control. In the case of the fourth objection, Waste Management says that no federal permit is required under Part D of the Federal Clean Air Act and that appellants are unable to demonstrate that such a permit is required.

In the case of the fifth objection relating to zoning ordinances, Waste Management says that the Board has no jurisdiction to consider local zoning ordinances in SWMA permitting decisions. In the case of the amendment to the appeal, Waste Management says that the Board has no jurisdiction to consider that amendment because no good cause has been shown for not raising that issue in the original appeal and because the Pottstown Municipal airport is not an FAA certified airport within the meaning of the FAA requirements.

Waste Management asserts most of the same arguments against Berks County in its motion for summary judgment against Berks County. Waste Management does not claim that Berks County lacks standing to pursue these objections but says Berks County cannot pursue the objection for

which appellants lack standing because Berks County did not raise these issues within the required time for appeal.

The Motion for Summary Judgment of Fontaine, Scott and Berks County

The appellants and the intervenor have moved for summary judgment against Waste Management on the ground that neither the permittee nor the Department provided Berks County or Douglass Township with formal notice of the permit application as they say is required by the SWMA and Act 101. It appears from the discovery materials and affidavits submitted by the parties that no such notice was given. Waste Management claims that notice to those municipal entities was not required because the proposed expansion is located solely within Montgomery County and Westgrove Township which were given the notices required by SWMA and Act 101. Appellants and intervenors say in response that Berks County and Douglass Township were also entitled to notice since the location of the landfill, and not just the particular expansion involved, is determinative under SWMA and Act 101.

The Department has adopted the position of Waste Management as its own.

The Timeliness of the Fontaine Appeal

Mr. Fontaine's appeal was timely filed within 30 days from the time of the publication of the notice of the issuance of the permit in the Pennsylvania Bulletin. Even though Mr. Fontaine had actual notice of the issuance of the permit from the Department as a result of his participation in the Department's proceedings, he was not a "party appellant" within the meaning of the Board Rule at 25 Pa. Code 1021.52 relating to timeliness and perfection. Instead, Mr. Fontaine was an "interested party" who was given notice by publication of the issuance of the permit in the Pennsylvania Bulletin as provided in the Board Rule at 25 Pa. Code 1021.36. Mr. Fontaine therefore had 30 days

from the date of the publication of this notice in the Pennsylvania Bulletin to file the appeal and his appeal was filed within 30 days of that date. Therefore, the appeal is timely. See *Lower Allen Citizen's Action Group, Inc. v. DER*, 538 A.2d 130 (Pa. Cmwlth. 1988).

Failure to Notify Berks County and Douglass Township

The first ground set forth in the original appeal and adopted by intervenor, Berks County, is that the Department and the permittee failed to provide notice and opportunity to comment on the Eastern Expansion to Berks County and Douglass Township as required by section 504 of SWMA and section 507 of Act 101 when the overall facility is co-hosted by Berks and Montgomery counties and by both Douglass Township and West Pottsgrove Township. This ground for appeal is also the subject of motions for summary judgment by both appellants and Berks County.

Waste Management responds that the Department was not required to provide such a notice under either the SWMA or Act 101 because the Eastern Expansion will be located solely in West Pottsgrove Township and in Montgomery County. The appellants and Berks County respond that while the proposed expansion may be located solely in West Pottsgrove Township, the expansion is an integral part of the overall Waste Management facility so that Berks County and Douglass Township were entitled to notice from the Department of the permit application as co-hosts to the entire facility. It is undisputed that the Department did not provide notice to either Berks County or Douglass Township. Waste Management contends, however, that appropriate officials of the county knew of the application and made no comment during the period of time that the Department was accepting comments from the public on the permit application.

The issue presented by the parties is not easily resolved because no provision of the SWMA or of Act 101 speaks directly to the resolution of this issue. We are to read Act 101 *in pari materia* with SWMA. Act 101 § 104(b); *Borough of Dunmore v. DER*, 616 A.2d 95 (Pa. Cmwlth. 1992).

Section 507 of Act 101 requires notice from the applicant to the "governing body of the proposed host county" pursuant to section 504 of SWMA as a part of the permit application review before a permit can be issued. Section 504 of the SWMA does not require that such notice be given, but does require that the application for a permit be reviewed by the "appropriate county, county planning agency or county health Department where they exist" and by the "host municipality." They may recommend to the Department conditions upon, revisions to, or disapproval of the permit. The Department must publish a justification for overriding any such recommendation in the Pennsylvania Bulletin if it issues the permit.

Unfortunately, the SWMA provides no definition of either "appropriate county" or "host municipality." While this provision is written in the singular, the drafters of the Act clearly understood that more than one county or municipality may be involved in the original facility or any expansion of that facility. In section 201 of SWMA, the drafters required a joint submission of a plan for waste management facilities "when more than one municipality has authority over an existing or proposed waste management system or systems or any part thereof...."

The drafters of Act 101 did provide a definition of "host municipality", but that definition is not decisive in resolving this issue. Section 103 of Act 101 defines "host municipality" as "the municipality other than the county within which a municipal waste landfill or resource recovery facility is located or is proposed to be located." That definition might be read to mean that there would be multiple host municipalities if the landfill or facility is located within more than one host

municipality because the drafters of Act 101 were well aware of the potential for a facility to be located in more than one host municipality. In section 1301 of Act 101 relating to the host municipality benefit fee, for example, the drafters of the legislation provided for an apportionment of the fee where the landfill or facility is located in more than one host municipality according to the percentage of the permitted area located in each municipality.

One of the Department's regulations issued under the SWMA and Act 101 gives some indication that the Department intended that notice be given to both municipalities where the original facility is located and the municipality where the proposed permit area is located. The Department's regulation at 25 Pa. Code § 271.141(d) provides that an applicant for a new permit or major permit modification shall "give written notice to each municipality in which the site or proposed permit area is located." These regulations define "site" at 25 Pa. Code § 271.1 as follows:

> "The area where municipal waste processing or disposal facilities are operated. If the operator has a permit to conduct the activities, and is operating within the boundaries of the permit, the site is equivalent to the permit area."

By contrast, the Department's regulations with respect to public notice required by the Department refer only to the requirement of giving notice to the "host municipality and the appropriate county...." 25 Pa. Code § 271.142(b).

Waste Management says that the Department clearly interpreted its regulations to mean that notice was required to be given only to Montgomery County as the appropriate county because that is where the expanded portions of the landfill were to be located and to West Pottsgrove Township for the same reason. Mr. Lunsk for the Department testified that he determined that Montgomery County was the appropriate county for purposes of notice and that West Pottsgrove Township was

the host township. (Lunsk Deposition, pp. 70-72). Indeed, the permit issued by the Department expressly provides that it is "a permit for a solid waste disposal and/or processing at (municipality) West Pottsgrove Township in the County of Montgomery County...." Appellants and Berks County point out, however, that the permit issued by the Department bears the same number as the original permit and argue that the landfill is an integrated facility, the location of which is defined by the entire permit area so that both Berks and Montgomery County were entitled to notices from the applicant at the time the application was filed.

We interpret SWMA and Act 101 as well as the Department's regulations together to mean that both Berks and Montgomery County were entitled to notice as appropriate host counties from the applicant at the time the application was filed. As indicated above, section 201(b) of SWMA requires that, where more than one municipality has authority over an existing or proposed Waste Management system or systems or any part thereof, a joint submission of a plan for the Waste Management facilities be made to the Department by the municipalities concerned or by any authority or county. We think it follows that where joint planning is required initially, the same municipalities should be consulted when any further expansion of the facility is to be made. We find it significant that Act 101's prohibitions with respect to permit issuance in section 507 is entitled "Relationship between plans and permits", that its requirements are directed to insure that permit issuance will be consistent with county plans and that the governing body of the proposed host county receives written notice of the proposed facility from the applicant. This emphasis on planning in relationship to the issuance of permits is also contained in section 504 of SWMA requiring review by the appropriate county, county planning agency or County Health Department where they exist.

This requirement of notice to each county where the waste facility is located is clearly the interpretation which the Department has made of the Act in its regulation at 25 Pa. Code § 271.141(d) requiring the applicant for a new permit or major permit modification to give written notification to each municipality in which the site or proposed permit area is located. As indicated above, the site is defined by the Department's regulations so as to include the entire permit area of the facility. Because that is the scope of the notice required to be given by the applicant, we think that the requirement of section 507 of Act 101 requiring notice to the "governing body of the proposed host county" must also be given to all counties and municipalities having jurisdiction over the site defined as the entire permit area. The DEP officer who issued the permit, Ronald C. Furlan, testified that the same permit number was given to the Eastern Expansion as was assigned to the existing facility because it is an amendment to the existing permit for the Pottstown landfill. The Commonwealth Court has held that in interpreting the requirements of section 1301 of Act 101 relating to the host municipality benefit fee, the entire permit area is to be the decisive issue in determining who was entitled to what portion of the host municipality fee. *Borough of Dunmore v. DER*, 616 A.2d 95 (Pa. Cmwlth. 1992).

This conclusion also fits within the policy of Act 101. Where a waste facility is located in more than one municipality or county, it is almost inevitable that the interests of all of these governmental bodies will be involved by an expansion of the facility even if the boundary of the expansion is to be limited to only one municipality. In this case, the existing facility and the proposed expansion would be operated as an integrated facility. As pointed out by Gary Von Stetina of Waste Management in his deposition, the gas extraction system is operating in all parts of the landfill and that 25 of the 225 acres of the landfill are in Berks County. The extraction process

entails the use of approximately 180 wells, approximately 20 of which are located within Berks County. Six of the 25 monitoring wells are also located in Berks County. Von Stetina Deposition, pp. 14-16. He also testified that the facility's capacity for gas extraction has reached capacity, so that additional facilities will be required for continued operations with the proposed expansion.

We therefore hold that the applicant failed in its duty to supply appropriate notification to both Berks County and Montgomery County as required by Act 101 and SWMA and that, as a result, the Department failed to see that appropriate notification was given to those counties and their planning departments to enable them to provide a reasoned response to the permit application considering all current conditions of the landfill as well as the original plans for the landfill.

We give no weight to Waste Management's argument that the Department has interpreted the applicable legal requirements to mean that only the county in which the expansion is located need be given notice of the permit application. As indicated above, the Department's regulations at 25 Pa. Code § 271.41(d) and 25 Pa. Code § 271.1 require that notice be given to each municipality in which the site is located, site being defined as equivalent to the permit area. In addition, the Governor's Executive Order No. 1996-5 dated August 29, 1996 with respect to solid waste policy interprets the applicable law to mean that Commonwealth agencies must consult with the affected county and local governments as an essential initial step in the review of all municipal waste facility applications. Since SWMA required joint planning of the initial facility, we conclude that both Montgomery and Berks counties are affected county governments with respect to proposed expansion of the facility.

We now turn to the question of what relief, if any, can or should be granted. Waste Management claims that neither Fontaine nor Scott have standing to complain of the absence of

notice to Berks County and Douglass Township. Waste Management points out that Fontaine resides in Montgomery County and does not own property or pay taxes to either Berks County or Douglass Township and cannot purport to represent their interest. As to Scott, Waste Management claims that his concerns amount only to an allegation of an interest equal to that of the general public in insuring compliance with the notice provisions of the Department's regulations and the statutes the Department is charged with administering. Waste Management also points out that Scott was well aware of the pending application and took no action to testify or submit any written comments to the Department. Scott responds, among other things, that his residence is located within 2-1/2 miles of the facility and that he and his family regularly experience objectionable landfill odors at his home and near his son's school. He states that the Eastern Expansion would increase the size, total waste disposed, active life span and total emissions from the facility.

We conclude that neither Fontaine nor Scott have standing in their individual capacities to complain of the absence of notice to Berks County. Fontaine cannot even claim to be a citizen of either Berks County or Douglass Township and therefore cannot represent their interests. While Scott can clearly assert that he will be affected by an expansion of the landfill, his interest in the issue of notice to Berks County is not "immediate". It may very well be that, even if Berks County were given appropriate notice, no objection would have been filed by Berks County which could have led to a denial of the permit application. Scott was not then a Berks County Commissioner, but was aware of the existence of the permit application. He did not testify when the opportunity to testify was given to him in connection with the Department's proceedings. Some Berks County Commissioners may have been aware of the application as a result of a reference in a summary of

a multi-page trip report of the Douglass Township Host Municipality inspector, but took no action based on that report.

We now turn to the question of whether or not we can or should grant relief to Berks County by granting its motion for summary judgment. Waste Management claims that because Berks County did not file an appeal within the required thirty days of the Department's action or of notice of it in the Pennsylvania Bulletin, it cannot now invoke the Board's jurisdiction as an intervenor to raise issues that it could have raised in an appeal from the Board's action. This contention requires a resolution of the tension between the provisions of sections 4(c) and 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. § 7511 *et seq.* Subsection 4(c) of that Act provides that 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" and have a hearing thereon in accordance with the Board's regulations as provided in subsection (g). Subsection 4(c) also states: "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 the person." By contrast, section 4(e) provides that any "interested party" may intervene in any matter pending before the Board.

Berks County was permitted to intervene because a portion of the landfill is in Berks County and its residents may be affected by the permitted expansion of the landfill so that it is an "interested party" permitted to intervene within the meaning of section 4(e) of the Environmental Hearing Board Act. In *Borough of Glendon v. DER*, 603 A.2d 226 (Pa. Cmwlth. 1992), the Commonwealth Court upheld the general standing of a host municipality to appeal the issuance of a permit for a waste incinerator, but also specifically held that it had standing to enforce a proximity restriction relating

to a public park within its jurisdiction. The Court said this was because it has jurisdiction over the park, and the park, because of its close proximity to the proposed incinerator, is at a heightened risk of contamination both to Borough residents who use the park, especially children and to the grounds of the park itself. 603 A.2d at 233. See also, *Franklin Township v. DER*, 452 A.2d 718 (Pa. 1982). The Commonwealth Court has also held that the Board has no discretion but to permit an "interested party" to intervene. *Browning Ferris v. DER*, 598 A.2d 1057 and 1061 (Pa. Cmwlth. 1991).

There are several ways to resolve this tension. One would be to hold that once a party is permitted to intervene it has all the rights of a party to the action. See, *Municipality of Penn Hills*, 546 A.2d 50 (Pa. 1988) (in a tax assessment appeal, intervenor not limited to claims made in appeal filed by other persons within 30 day time limit because the Board had *de novo* review authority to either increase or decrease the tax assessment). Secondly, we might hold that the intervenor takes the litigation as it finds it and can take advantage of the appellants' timely appeal even though the appellants may not have standing to raise one or more of the grounds for appeal which the intervenor otherwise waived by not filing a timely appeal. Under this approach, the only limitation on the intervenor would be that it could not raise new issues or issues that had been decided prior to its intervention. While this would serve the interests of the Department and Waste Management in having a time limit in which appeals can be brought and new issues raised, it gives little credit to the statement in subsection 4(c) of the Environmental Hearing Board Act that the Department's action shall be final as to a person who does not perfect a timely appeal. However, giving complete weight to that statement would either reduce the rights of an intervenor who might have appealed to those of an *amicus curiae* or to the conclusion that an interested party who could have, but failed to file a timely appeal, has no right to intervene at all.

We adopt a third course in resolving this tension for purposes of this case by finding that Berks County was not given the opportunity to appeal to which it was legally entitled within the meaning of section 4(c) of the Environmental Hearing Board Act. As we have held above, Berks County was entitled to receive personal notice of the filing of the application under SWMA and Act 101. Had the Department treated Berks County as a host county, it would have given Berks County personal notice of the Department's action and of Berks County's right of appeal as was given to Montgomery County when the Department issued the permit for the expansion. Accordingly, because Berks County was not given the notice of the Department's action to which it was entitled, it is not now barred from raising the claim that the permit was issued without the notice required by SWMA and Act 101 upon the filing of the permit application whether or not the appellants have standing to raise that issue. While official notice was given of the action by publication in the Pennsylvania Bulletin, that is insufficient notice where the interested person is entitled to personal notice. *Cf. Grimaud v. DER,* 638 A.2d 299 (Pa. Cmwlth. 1994).

Because we conclude that the applicant and the Department should have given notice to Berks County and to Douglass Township, we find that the Department abused its discretion in issuing the permit without assurance that such a notice had been given. Mr. Ronald C. Furlan of the Department said that when he issued the permit he did not know whether or not Berks County or Douglass Township had been so notified. As indicated above, section 507(a)(2)(iv) of Act 101 prohibits the Department from issuing any such permit without determining that the governing body of the proposed host county has received written notice of the proposed facility from the applicant pursuant to section 504 of SWMA.

Waste Management argues that the interests of Berks County are not "relevant" where it had

actual written notice of the pending permit application. Scott, who was then Executive Director of the Berks County Solid Waste Authority knew of the public hearing on the permit application, but neither attended the hearing nor submitted written comments on the application to the Department. He was also a Douglass Township Supervisor. Waste Management also claims that the Berks County Commissioners learned of the pendency of the application. Berks County Commissioner Carabello and perhaps two other Berks County Commissioners received copies of a summary of an inspection report from the Douglass Township Host Municipality Inspector, John T. Ravert, dated July 28, 1994, which said that Waste Management was seeking a larger expansion known as the Eastern Expansion which would be wholly within West Pottsgrove Township, Montgomery County. Ravert Deposition, pp. 80-81 and Ravert Exhibit 10. Mr. Carabello and other Berks County Commissioners also appear to have received Mr. Ravert's report of May 25, 1995 which referred to the status of DEP's review of the Eastern Expansion permit application.

We do not believe that this limited information can be said to mean that Berks County would not have taken action if the full application had been submitted to it in October, 1992 when the Berks County Commissioners and its planning agencies would have had a right to consider the application fully and comment on it. It is obvious that Berks County wants a right to comment on that application now. It may well have done that in 1992 had it been given full notice of the application and a right to comment on it then. Berks County has submitted the affidavit of Glenn R. Knoblauch, Executive Director of the Berks County Planning Commission, stating that the Planning Commission would have reviewed and commented on the application for the Eastern Expansion if it had been given an opportunity to do so. It also states that it provided such comment to the

Department in 1991 when the Planning Commission was given notice of the application for the Western Expansion of the landfill. Berks County Motion for Summary Judgment, Exhibit C.

We therefore grant the motion of Berks County for summary judgment and remand this matter to the Department for further consideration after the notice required by Act 101 and SWMA is given to Berks County and Douglass Township and any responsive comments are considered by the Department.

Other Issues

Because appellants and the intervenor have raised a number of other issues in this appeal, we submit the following for the Department's guidance in consideration on remand.

Post-Closure Trust Funding Obligations

The second ground for appeal is the claim that Waste Management has failed to meet its post-closure trust funding obligations with respect to that portion of the permitted facility which is located in Berks County so that the Department has failed to obtain funding compliance from Waste Management as is required by section 1108 of Act 101 and the Department's regulations thereunder. We conclude that this claim does not bar the issuance of a permit.

Section 1108 of Act 101 requires each county to establish an interest-bearing trust with an accredited financial institution for every municipal waste landfill that is operating within its boundaries within 60 days of the effective date of the act. The trust money may be used only for remedial measures and emergency actions that are necessary to prevent or abate adverse effects upon the environment after closure of the landfill. Each operator of a municipal waste landfill is to pay into the trust on a quarterly basis an amount equal to 25 cents per ton of all solid waste received at the landfill. The Department is given certain powers to expend the money for the purposes for which

it was created upon certain certification given to the trustee. Nothing in section 1108 of Act 101 imposes any duties upon the Department.

Waste Management claims that it has complied with section 1108 of Act 101 by depositing the appropriate funds into the Montgomery County Trust Fund under section 1108 and says that this is proper in view of the failure of Berks County to establish the trust fund even in the face of a notice of violation from the Department to Berks County (Notice of Violation dated June 23, 1994 issued to Berks County).

While the establishment of the Berks County Trust Fund appears to be in dispute, the Board believes that there is no dispute as to any material fact because nothing in Act 101 bars the issuance of the permit because Berks County has not met its responsibility to obtain the monies due for the facility's operations in Berks County. As noted above, section 1108 of Act 101 imposes no duty upon the Department with respect to the payment due from the operator of the municipal landfill. If the appropriate trustee has not received the funds from the operator, the Department's regulations provide that on notice to it, it will notify the operator that it must pay to the trustee the quarterly payment due within 15 days of the Department's notification. In the event the operator fails or refuses to pay to the trustee the quarterly payment as so required, the Department is to proceed or the trustee may proceed to collect the quarterly payment in a manner provided by law.

In view of the above, we view the issue of to whom the amounts should have been paid to be a dispute separate from the propriety of the Department's issuance of the permit.

Odor Emissions

In objection 3 the appellants claim that the issuance of the permit will worsen and maintain the malodorous atmosphere created by uncombusted fugitive landfill emissions which is detectable

at a distance over two miles from the permitted facility, the Pottstown landfill. The appeal states that the odors generated at the landfill, which the permit authorizes to expand, constitute a public nuisance and imposes an unacceptable health risk contrary to law. Section 503(e) of SWMA cited by appellants in their appeal states that any permit granted by the Department shall be revocable and subject to modification or suspension at any time the Department determines that the facility's operations are in violation of the act or the regulations thereunder, is creating a public nuisance, is creating a potential hazard to the public health, safety and welfare, which is adversely affecting the environment, is being operated in violation of any terms or conditions of the permit or has operated pursuant to a permit which was not granted in accordance with law.

Waste Management also contends that the odor objection is legally insufficient because Section 503(e) of SWMA relates only to the Department's authority to revoke or suspend a permit and does not provide a legal basis for the Department to deny the permit application. On the question of whether the Department has authority to deny the application, Waste Management points out that it has complied with the Department's regulations in presenting technical material meeting the requirements of the regulations relating to a nuisance control plan, a plan to contain or control odors, and a gas management plan.

We agree with Waste Management that Section 503(e) of the SWMA does not provide a legal basis for the Department to deny a permit application. The applicable requirement with respect to the denial of the permit is section 502(d) of SWMA which requires the permit to set forth the manner in which the operator plans to comply with the requirements of, among other things, the Air Pollution Control Act ("APCA"), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. § 4001 *et seq.* Section 502(d) specifically provides "no approval shall be granted unless the plan

provides for compliance with the statutes hereinabove enumerated and that the failure to so comply shall be cause for revocation of any permit issued by the Department to the operator."

Nevertheless, the Department should consider whether the expansion, taken together with the facility's prior difficulties in odor control, would raise the problem of odor to the level of a public nuisance. Presumably, that task also will be, and is being, undertaken by the Department in consideration of Waste Management's application for an air quality permit.

In addition, the appellants and the intervenor are at liberty to ask the Department to void the existing permit for the operation of this facility under the provisions of section 503(e) of SWMA by presenting evidence to the Department that the current facility is being conducted in violation of the act or the regulations thereunder, is creating a public nuisance or is creating a potential hazard to the public health, safety and welfare or for any of the other reasons set forth in section 503(e).

Federal Air Permit

The fourth objection raised by the appellants is that the Eastern Expansion requires a Federal Clean Air Act Part D Permit. Waste Management contends that this claim is not supported by the final decision in *Ogden Projects, Inc. v. New Morgan Landfill*, 91 F. Supp. 863 (E.D. Pa. 1996), and that the appellants' fourth objection must fail based on that decision. Unfortunately, the issue of whether or not a Part D Permit is required can be determined only on the basis of evidence relating to the amount of emissions of volatile organic compounds from the Eastern Expansion or the facility taken as a whole. Appellants' responses to the motion for summary judgment present no evidence, expert or otherwise, which would provide a basis for a determination that such a permit is required. Accordingly, we can make no determination of this issue.

Land Use

The fifth objection contained in the appeal is that the permit authorizes an activity or land use not permitted by zoning ordinances of West Pottsgrove Township, Montgomery County. The claim is that issuance of the permit prior to the necessary revision of the applicable local zoning ordinances constitutes an unwarranted intrusion by the Department in the matters reserved solely for municipal authorities in violation of both Act 101 and the Pennsylvania Municipalities Planning Code. The apparent legal basis for this contention is set forth in Scott's answer to the motion and supporting brief contending that section 505(c) of Act 101 provides as follows:

> (c) Zoning Powers unaffected. - Nothing in this act shall be construed or understood to enlarge or diminish the authority of municipalities to adopt ordinances pursuant to, or to exempt persons acting under the authority of this act from the provisions of the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, provided such ordinances do not interfere with the reasonable expansion, pursuant to a permit application filed with the department prior to the effective date of this act, of existing permitted municipal owned municipal waste landfills.

This savings clause of Act 101 preserves the municipality's rights under its zoning laws. However, it does not prohibit the Department from issuing a permit under the SWMA or Act 101 until appropriate zoning changes have taken place. This Board repeatedly has held that it does not have jurisdiction to consider local zoning ordinances in SWMA permitting decisions, and that the Department's permitting decisions are not required to take into account local zoning. *Hanover Twp. v. DER*, 1992 EHB 119. In addition, the issuance of a permit by DEP does not in any way infringe on the exercise of the township's zoning powers. The most significant restriction on the township's zoning powers is that it may not deny zoning because it believes that DEP might not issue a permit

for the facility for which the zoning application was made. See *Glendon Energy Co. v. The Borough of Glendon,* 656 A.2d 150 (Pa. Cmwlth. 1995).

Aviation Safety

At various times near the close of discovery, appellants and Berks County purported to amend the appeal by filing the following ground of appeal:

> Permit No. 100549 authorizing the Pottstown Landfill Eastern Expansion is unlawful and represents arbitrary and capricious exercise of the Department's functions and duties and is an abuse of discretion in that said Permit unjustifiably jeopardizes public safety by permitting the expansion and operation of a landfill approximately 4,000 feet from the Pottstown Municipal Airport, contrary to Federal Aviation Administration Order 5200.5A "Waste Disposal Sites on or Near Airports;" and contrary to 25 PA Code 273.202(a)(9), (10); and 25 PA Code 201(a)(1). FAA Order 5200.5A is attached hereto as Exhibit "A".

Waste Management moves to strike these amended notices of appeal on the ground that good cause has not been shown for such an amendment. We make no resolution of this issue as a result of our remand order with respect to the failure of the applicant to give the required notice to Berks County.

Waste Management also states that the contention that the Department could not issue the permit because the proximity of the landfill to the landfill has no merit as a matter of law because the Department's regulation barring the issuance of a permit for a solid waste management facility in proximity to a landing field applies only to an FAA certified airport and that this airport was not certified. Appellants and Berks County do not counter Waste Management's evidence on this point, but do point out that the airport does receive some federal funds.

Whether the airport is FAA certified or not, however, is not the end of the question. The

requirement of the Department's regulations with respect to proximity to FAA certified airports relates only to whether or not there is a bar as a matter of law to the issuance of the permit. It may still be that the issuance of the permit over the opposition of the FAA is an abuse of discretion. Appellant Scott has submitted the affidavit of a Lead Inspector of the FAA which says that the Pottstown Airport is an FAA grant agreement airport which has received federal funding for certain operational improvements. It also states that the Airports Division, Certification Safety and Standards Branch of the FAA has reviewed expansions of the Pottstown landfill three times and on each occasion has opined that the expansions were and are incompatible with applicable federal guidelines for air safety as set forth in FAA Administrative Order 5200.5A. It further states that notwithstanding the bird mitigation efforts undertaken by the operator, the FAA remains unalterably opposed to the Eastern Expansion of the landfill.

While the testimony of Mr. Lunsk is that the DEP considered the issue of air safety in issuing the permit, we have nothing in the record to indicate whether that consideration was adequate in view of the opposition of the FAA to the expansion. On remand the Department may choose to give further consideration to air safety issues, including any applicable provision of the Federal Aviation Reauthorization Act of 1996 enacted on October 10, 1996.

For the reasons set forth above, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN WILLIAM FONTAINE, II and	:	
MARK C. SCOTT, Appellants	:	
BERKS COUNTY, Intervenor	:	
	:	
v.	:	**EHB Docket No. 95-246-MG**
	:	**(Consolidated with 95-247-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, WASTE MANAGEMENT	:	
DISPOSAL SERVICES OF PENNSYLVANIA,	:	
Permittee	:	

ORDER

AND NOW, this 6th day of November, 1996, upon consideration of cross-motions for summary judgment, summary judgment is **GRANTED** to Berks County with respect to its contention that it was not properly given notice of the application for the Eastern Expansion, and the matter is remanded to the Department for further consideration.

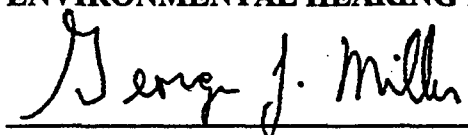
The motion of Waste Management for summary judgment against Berks County with respect to the issuance of notice to Berks County is **DENIED**. The motion for summary judgment of Waste Management with respect to the standing of Fontaine and Scott to raise the issue of the absence of notice to Berks County is **GRANTED**. The remaining issues raised by the motions for summary judgment of Waste Management are moot.

EHB Docket No. 95-246-MG
(Consolidated with 95-247-MG)

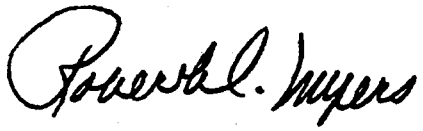
The matter is remanded to the Department for further consideration not inconsistent with this Order and Opinion.

Jurisdiction is relinquished.

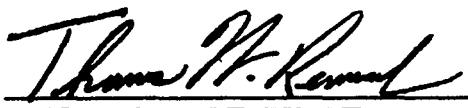
ENVIRONMENTAL HEARING BOARD



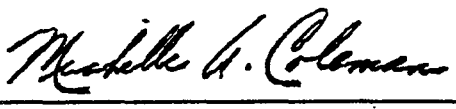
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 6, 1996

See following page for service list.

c: **For the Commonwealth:**
Mark Freed, Esquire
Southeast Region

For Appellants:
Mark C. Scott, Esquire
Boyertown, PA

John William Fontaine
Pottstown, PA

For Permittee:
William J. Cluck, Esquire
SAUL, EWING REMICK & SAUL
Harrisburg, PA

For Intervenor:
Alan S. Miller, Esquire
Reading, PA

rk

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

OLEY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-198-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STAUFFER REIFSNEIDER, Intervenor	:	**Issued: November 6, 1996**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies Appellant's petition for supersedeas because Appellant has failed to establish that it is likely to succeed on the merits of its appeal of an order of the Department requiring it to revise its official sewage plan. Specifically, the Department did not err in ordering the revision by relying upon a court order which deemed the proposed subdivision approved pursuant to the Municipalities Planning Code, where the sewage planning module was otherwise consistent with the township official sewage plan. Second, the Department's order does not violate the regulations under the Sewage Facilities Act. Third, the evidence indicates that the proposed subdivision will not result in a violation of the safe drinking water standard for nitrates.

FACTS

On October 2, 1996, Oley Township (Appellant) filed a notice of appeal seeking review of an order of the Department of Environmental Protection which directed Appellant to revise its official sewage plan to incorporate a planning module for a residential subdivision to be developed by Stauffer Reifsneider (Intervenor). On October 8, 1996, Appellant filed a petition for supersedeas of the Department's order. The Board held a hearing on Appellant's petition on October 22, 1996.[1]

Many of the facts of this case are not in dispute. The plan revision requested by Intervenor is for a 13 lot residential subdivision (Reifsneider subdivision) which will utilize on-lot septic systems for sewage disposal. The lots in the Reifsneider subdivision range in size from 1.54 acres to 2.06 acres. By order of the Court of Common Pleas of Berks County, Appellant was ordered to approve the Reifsneider subdivision plan because it had failed to act on Intervenor's request for approval of the subdivision within the 90-day review period mandated by Section 508(3) of the Municipalities Planning Code, 53 P.S. § 10508(3). *Estate of Clarence W. Reifsneider v. Board of Supervisors of Oley Township*, No. 4491-92 A.D. (C.P. Berks County, filed April 23, 1993). This order was affirmed by the Commonwealth Court. *Reitnour v. Oley Township Board of Supervisors*, Nos. 1156-1160 C.D. 1993 (Pa. Cmwlth. filed May 11, 1994), *petition for allowance of appeal denied*, No. 264 M.D. Allocatur Dkt. 1994 (Pa. filed January 10, 1995).

---

[1] Because of a scheduling conflict which prevented the holding of the hearing until the compliance deadline on the Department's order had passed, the Department and Intervenor agreed to the entry of a temporary supersedeas. As the Department and Intervenor wished to submit briefs at the close of the supersedeas hearing, the temporary supersedeas was continued until November 7, 1996.

Having received approval for the development as required by the Municipalities Planning Code, Intervenor then submitted a planning module in order to secure approval as required by the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a. Appellant refused to approve the planning module as a revision to its official sewage plan, asserting that the module was inconsistent with township and county comprehensive plans which called for preservation of agricultural uses for the land where the subdivision was located, was inconsistent with the official sewage plan which permitted only limited residential development, was inconsistent with the Commonwealth's policy regarding prime agricultural land, and nitrate-nitrogen levels in the area were considered too high by Appellant's hydrogeologic consultant. Intervenor then submitted a private request to the Department pursuant to Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), to order Appellant to revise its official sewage plan to provide for the sewage disposal needs of the Reifsneider subdivision. After receiving comments from Appellant and Berks County and reviewing the information provided in the planning module, the Department determined that the zoning issues had been resolved by the courts and that the on-lot sewage proposed for the subdivision was consistent with Appellant's official sewage plan. By order dated September 18, 1996, the Department ordered Appellant to adopt the planning module as a revision to its official sewage plan within thirty days.

DISCUSSION

Appellant is entitled to a supersedeas only if it can prove that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm; and (3) there is no likelihood of injury to the public or other parties. Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7514(d). Supersedeas is an extraordinary remedy which will not be granted

absent a clear demonstration of appropriate need. *F.A.W. Associates v. DER*, 1990 EHB 1791. Thus, a party seeking a supersedeas of an order of the Department must satisfy all of the criteria. *Id.* Because Appellant failed to make the requisite demonstration that it is likely to succeed on the merits, its petition for relief must be denied.

Appellant argues that it is entitled to a supersedeas of the Department's order because, among other things, it is likely to succeed on the merits. Specifically, Appellant contends it is likely to succeed because (1) the plan revision for the Reifsneider subdivision is inconsistent with the official sewage plan of Oley Township; (2) the Department's order violates the consistency requirements found in the regulations; and (3) the order is unreasonable because it will cause or exacerbate groundwater contamination above the drinking water standard. We will address each of these arguments in order.

Consistency with the Official Sewage Plan

Appellant argues that the Department erred in ordering the revision to the official sewage plan because the Reifsneider subdivision is inconsistent with that plan. Specifically, the plan only allows for two dwelling units on tracts of property between 7 and 30 acres in the agricultural area of the township. (Ex. A-1 at 1-4)[2] Appellant argues that this density limitation precludes the Department from lawfully ordering Appellant to revise its official sewage plan to include the Reifsneider subdivision. Our review of the official sewage plan and the law on this issue leads us to conclude that this density requirement is in the nature of a zoning or land use issue which can not be attacked under the Sewage Facilities Act and its regulations.

---

[2] Appellant's exhibits are noted as "Ex. A-___"; the Department's exhibits are "Ex. C-___"; and Intervenor's exhibits are "Ex. I-___."

Private requests to the Department to order a municipality to revise its official sewage plan are governed by Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b). Section (b.1) requires the Department to consider, among other things, the municipality's official sewage plan. 35 P.S. § 750.5(b.1)(5). Case after case before this Board and the Commonwealth Court have made it clear that the Department's consideration of an official sewage plan is primarily to evaluate the method of sewage disposal, and not land use and zoning matters. *E.g., Smartwood v. Department of Environmental* Resources, 424 A.2d 993 (Pa. Cmwlth. 1981); *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), *appeal dismissed as moot*, 381 A.2d 448 (Pa. 1977); *Andrews v. DER*, 1993 EHB 548. Thus, while the Department must consider municipal zoning requirements, it is only one of many factors, and is not to be considered to the exclusion of other more relevant factors which the Department evaluates as part of its broader sewage planning concerns. *South Huntingdon Township v. DER*, 1990 EHB 197.

Moreover, it has also be consistently held that sewage facilities challenges before this Board are not the proper forum to litigate land use issues:

> Thus, under the Sewage Facilities Act, the DER is entrusted with the responsibility to approve or disapprove official plans for sewage systems submitted by municipalities, but, while those plans must consider all aspects of planning, zoning and other factors of local, regional, and statewide concern, it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved. *Moreover, impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge to the actions of those agencies as the law provides, not for an indirect challenge through the DER.* . . . [T]he proper function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water management; it is the local government agencies, who are responsible for planning, zoning and other such functions.

Fox, 342 A.2d at 478 (emphasis added); *see also South Huntingdon Township*, 1990 EHB at 206 (the Board is not the proper forum for a township to fight its zoning battles).

In this case, the municipal density requirement found in Appellant's official sewage plan is part of an overview of the municipality's land use planning documents. (Ex. A-1) This review is required by Section 5(d)(4) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(4). The Department witness testified that he considered this density requirement in reviewing Intervenor's planning module, but the apparent conflict had been resolved by litigation in the court system. (Wagner, N.T. 133-34) This review of zoning and land use is all that is required by the Sewage Facilities Act. The Department did not err in concluding that the method of sewage disposal for the subdivision in the planning module, on-lot sewage, was the same as the method of sewage provided by the official sewage plan in that area of the township. Since both the planning module and the official sewage plan provide for on-lot sewage, the Department concluded that the module was consistent with the official sewage plan. (Wagner, N.T. 132)[3]

Our decision in *Borough of Sayre v. DER*, 1979 EHB 25, is directly on point. In that case, the Department received a request to amend the borough's official sewage plan. As in this case, the borough had been ordered by the court to issue the developer a building permit as a variance to the borough's zoning ordinance because the variance was deemed approved under the Municipalities

---

[3] We note that Section 5(b.2) of the Sewage Facilities Act provides that "[t]he department may not refuse to order a requested revision because of inconsistencies with any applicable zoning, subdivision or land development ordinances, but it may make its order subject to any limitation properly placed on the property by the municipality under its zoning, subdivision or land development ordinances or *court orders*." 35 P.S. § 750.5(b.2) (emphasis added). This language clearly does not give the Department the authority to override the court order approving the subdivision, the apparently conflicting township density requirements notwithstanding.

Planning Code. Guided by this court order, the Department ordered the borough to revise its official sewage plan to include the developer's project. Although the borough urged the Board to ignore the court order, the Board held that the Department did not abuse its discretion in ordering the revision, because "[w]hile DER's regulation §71.17(c)(3) requires that applicable zoning be considered in this matter, DER and this board must be guided by a decision of the appropriate common pleas court regarding zoning rights." *Id.* at 32.[4]

In sum, Appellant had its opportunity to enforce its land use planning goals before the Court of Common Pleas of Berks County and the Commonwealth Court. Those courts definitively resolved the question, and it would not be appropriate to revisit the issue in the context of a sewage facilities challenge. The Department did not err in relying on the courts' resolution of the land use matter when it determined that Intervenor's planning module was consistent with Appellant's official sewage plan. Thus Appellant is unlikely to succeed on the merits on this point.

The cases relied on by Appellant, *Pequea Township v. DER,* 1994 EHB 415, and *Herr v. DER*, 1995 EHB 311,[5] are distinguishable. Both cases involved the same proposed development. The developer sent a private request to the Department to order the township to revise its official sewage plan. He had received zoning approval from the appropriate local agency *which was conditioned on his securing sewage facilities approval.* Moreover, the township's official plan

---

[4] Although, as Appellant asserts in its reply brief, *Borough of Sayre* pre-dated significant revisions of the Sewage Facilities Act and its regulations, we find nothing in the current law which would change the relevant conclusions of the adjudication.

[5] *Herr v. DER*, 1995 EHB 311, was reversed and remanded to the Board by the Commonwealth Court on a different issue than that which is before us now. *Herr v. Department of Environmental Resources*, No. 862 C.D. 1995 (Pa. Cmwlth. filed May 31, 1996).

provided for the area to remain unsewered, but the proposed development called for municipal sewage facilities. Therefore, the planning module and the official sewage plan provided for different methods of sewage disposal and were found to be inconsistent. Land use issues played little part in this conclusion. Finally, the developer did not have a final zoning decision. In contrast, Intervenor in this case has an approved and recorded subdivision plan.

Consistency Requirements under 25 Pa. Code § 71.21(a)(5)

Appellant also argues that the Department violated its own regulations in ordering the sewage plan revision because the planning module is not consistent with the comprehensive plans of the township and the county, and is not consistent with the Commonwealth's prime agricultural land policy. Appellant contends that the lack of consistency violates 25 Pa. Code § 71.21(a)(5)(i)(D) and (G).

The Board's recent decision in *Patterson v. DEP*, EHB Docket 94-347-MR (Opinion issued May 14, 1996),[6] held that comprehensive land use planning has no binding effect on sewage facilities decisions. In that case, as here, the Department was aware of the comprehensive plans for the township and the county, and considered these plans; no more was required.

As to consistency with the Commonwealth's agricultural land policy, Appellant has not demonstrated how the Reifsneider subdivision is inconsistent with the policy to preserve prime agricultural land for agricultural purposes simply because the proposed development is located in an area of prime agricultural lands. If the policy were meant to be that broad, *any* building in that area would be proscribed. In fact, the density provisions of the township's zoning plan would be

---

[6] This case has been appealed to the Commonwealth Court at docket number 1432 C.D. 1996.

inconsistent because although it limits development in agricultural areas, it certainly does not forbid it entirely. Most important, just as the Department does not have the authority to regulate land use pursuant to the Sewage Facilities Act, it follows that it also has no authority to regulate the preservation of agricultural land, unless such disturbance is caused by the method of sewage disposal. *See Andrews v. DER*, 1993 EHB 548 (the Department bears no duty to review a sewage plan revision for effects on "prime farmland"). The burden of proof in a supersedeas petition is Appellant's, *McDonald Land and Mining Co., Inc. v. DER*, 1991 EHB 129, and we can not find that Appellant has adduced sufficient evidence to demonstrate that it is likely to succeed on the merits on this ground.

We also note that Section 71.21 lists the requirements of official sewage plans submitted to the Department for approval. The plain language does not require the Department to reject a request for a revision to an official plan simply because it is inconsistent with certain factors. At most, consistency with comprehensive land use planning and the Commonwealth's agricultural land policy must be considered, but inconsistency with either element does not mandate rejection of the planning module. Instead it requires only that the Department consider the resolution of identified inconsistencies. 25 Pa. Code § 71.21(a)(5)(ii).

Groundwater Contamination

Appellant finally argues that the Department erred in ordering the revision to the official sewage plan because the Reifsneider subdivision will cause or exacerbate contamination of groundwater above the drinking water standard.

First, Appellant contends that the preliminary hydrogeologic evaluation submitted as part of the planning module is deficient because the calculation for the background quality of water was

derived from two on-site wells. In support of this argument Appellant presented the testimony of Dr. James Richenderfer, a hydrogeologist. Dr. Richenderfer performed calculations using ten additional water samples from wells taken within a quarter mile radius of the Reifsneider subdivision. Dr. Richenderfer concluded that, averaging these samples together, the background nitrate-nitrogen level for the area was 8.14 mg/l. Using the Departments formula for determining the nitrate concentration as a result of the subdivision, he produced a concentration value of 13.83 mg/l, which is higher than the drinking water standard of 10 mg/l.[7]

Dr. Richenderfer's testimony alone is not sufficient to carry Appellant's burden of proving that it is likely to succeed on the merits of the contamination issue. Dr. Richenderfer did not know how the water samples which provided the basis of his calculations was collected, nor was he able to testify as to whether the tested wells were upgradient or downgradient of the Reifsneider subdivision. Appellant presented no testimony of any type of hydrogeologic connection between the tested wells and the subdivision. Nor did Dr. Richenderfer's testimony convince the Board that the methodology of the hydrogeological evaluation of the planning module was so unacceptable that the Department's reliance upon it was an abuse of discretion.

Second, Appellant contends that Intervenor's hydrogeological evaluation did not include adequate "dispersion plume" information as required by 25 Pa. Code § 71.62(c)(3)(ii). This argument also must fail. Dispersion plume information is only required in the narrative portion of the hydrogeologic evaluation and the Department's witness, Mark Sigouin, testified that plume was described in a manner acceptable to the Department. He testified that in projects the size of the

---

[7] *See* 25 Pa. Code § 109.202.

Reifsneider subdivision, the Department does not require actual plumes to be drawn from every system, because it would not be useful to accurately estimate contamination from the subdivision as a whole. Rather, the Department reviews the average groundwater concentration to predict the degradation caused by the subdivision. (N.T.156-60; Ex. C-4) Appellant has presented no evidence that this alternate method of determining dispersion plume-type information constitutes an abuse of discretion or violates the regulation.

Because we find that Appellant has failed to carry its burden of proving that it is likely to succeed on the merits of the various contentions of error, we need not consider the remaining requirements for supersedeas relief. We note however, that since there is insufficient evidence to show that the planning module contained deficient hydrogeological information, there is also insufficient evidence to demonstrate that Appellant will suffer irreparable harm due to groundwater contamination. Also, since Appellant can not enforce its land use planning goals through sewage facilities proceedings, the presence of the subdivision in an area where Appellant does not want a subdivision to be also can not provide a basis for irreparable harm.

Accordingly we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OLEY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-198-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STAUFFER REIFSNEIDER, Intervenor	:	

ORDER

AND NOW, this 6th day of November, 1996, the petition for supersedeas of Oley Township in the above captioned matter is hereby DENIED. The temporary supersedeas initially issued on October 15, 1996, and continued by order dated October 22, 1996, is hereby VACATED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: November 6, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Gina M. Thomas, Esq.
Southcentral Region

For Appellant:
Eugene E. Dice, Esq.
LAW OFFICE OF EUGENE E. DICE
Harrisburg, PA

For the Intervenor:
Maxine M. Woelfling, Esq.
MORGAN, LEWIS & BOCKIUS
Harrisburg, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

INDIAN LAKE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 96-071-R**
	:	**(Consolidated with 95-096-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PBS COALS, INC. and ROXCOAL, INC., Permittees	:	**Issued: November 7, 1996**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

The Board denies a Petition for Supersedeas, seeking to suspend operations under coal mining permits, where the petitioners fail to present evidence of irreparable harm, fail to establish a likelihood of prevailing on the merits, and where the suspension of the permits would result in the loss of 160 jobs.

OPINION

Presently before the Board is the Petition for Supersedeas filed by Indian Lake Borough ("Indian Lake"). This controversy stems from Indian Lake's appeals of mining permits granted to RoxCoal, Inc. ("RoxCoal") and its sister company PBS Coals, Inc. to operate underground mines northwest of Indian Lake. Indian Lake alleges in its Petition that the lake is being dewatered by the mining and asks the Board to suspend the permits or limit them so as not to drain the lake. RoxCoal and the Department object to the Petition arguing that the lake is not being dewatered by the

mining. RoxCoal further contends that if the Board grants the supersedeas approximately 160 miners and related workers will lose their jobs.

The Petition was filed on August 20, 1996 and hearings were held in Pittsburgh before the Board on September 4, 6, and 9, 1996. The record consists of 1,038 pages with multiple exhibits. At the parties' request, the Board set a briefing schedule with the last briefs received by the Board on November 5, 1996.

The grant of a supersedeas is an extraordinary remedy that the Board orders only in the clearest of cases. *See CARE and Moosic Lakes Homeowners Association v. Department of Environmental Resources,* 1995 EHB 725. To obtain a supersedeas, Indian Lake must prove by a preponderance of the evidence that (1) it will suffer irreparable harm if the supersedeas is not granted; (2) it is likely to prevail on the merits of the appeal; and (3) there is little or no chance of injury to the public or other parties if the supersedeas is granted. *Pennsylvania Mines Corporation v. Department of Environmental Protection,* EHB Docket No. 95-157-R (consolidated) (Opinion issued July 1, 1996); *See also* Section 4(d)(1) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d)(1); 25 Pa. Code §1021.78(a). As we recently said in *Pennsylvania Mines,* we must balance these factors collectively to determine if a supersedeas should be issued. It is necessary for the petitioner to make a credible showing on each of the three criteria. *Lower Providence* v. *Department of Environmental Resources,* 1986 EHB 395, 397.

Indian Lake argues that if the Board does not suspend the permits to prohibit mining in certain sections closest to the lake it will suffer irreparable harm. It argues that a dewatering of the lake will have devastating consequences for the Borough and its residents, both economically and aesthetically. Indian Lake is certainly one of the most beautiful lakes in the Commonwealth and a

dewatering will expose the shoreline, kill the fish, and otherwise turn an oasis of recreation and beauty into a large mudhole. No party in this case wants that to happen and this Board will not allow it. The question is whether Indian Lake has indeed presented sufficient evidence to convince us that these dire consequences will take place if the mining is not curtailed.

Indian Lake presented testimony at the hearing through various witnesses, including two experts, Dr. Milena Bucek and mining engineer Ms. Lysa Holland. Both individuals presented detailed testimony complete with graphs, maps, and charts in attempting to support their theories that the mining has resulted in a reversal of the hydrogeologic gradient i.e., that the ground water is no longer flowing toward the lake but into the mine. They believe this will have catastrophic consequences because it will eventually dewater the lake. Indian Lake's experts contend that Roxcoal is pumping five to six times the water it had predicted in its permit application from the mine. More importantly, Dr. Bucek opined that static water measurements taken from water wells prove that the mine is operating like a giant sump and drawing the groundwater into the mine. She claims that approximately 500,000 to 1,000,000 gallons of water a day that would normally flow into Indian Lake are now flowing into the mine. Thus, the main thrust of Indian Lake's argument is that mine operations have resulted in the reversal of the groundwater flow from Indian Lake into the mine and water levels in residential wells have dropped precipitously as a result of RoxCoal's pumping. If not stopped, Indian Lake argues that the aquifer which supplies the lake's "life blood" will be drained.

Are RoxCoal's mining operations dewatering Indian Lake?

RoxCoal is pumping two to three million gallons of water a day from its mines. In fact, it is drastically increasing the size of its settling ponds in order to handle the increased water.

Nevertheless, despite this large amount of water flowing into the mines, Indian Lake presented no evidence that the lake was being adversely affected. In response to questioning by the Board, Dr. Bucek indicated that the lake was recharged by base flow from the groundwater and from streams that empty into the lake. Most importantly, she specifically stated that the level of the lake itself has not gone down. In fact, RoxCoal submitted testimony that in the past the lake had experienced seasonal fluctuations where the actual level of the lake dropped seven to eight inches.

RoxCoal's experts, Ms. Barbara Dunst and Dr. Thomas Earl, opined that the water pumped from the mine is coming from the regional aquifer system which does not flow into the lake. They contend that the lake is recharged by a more shallow groundwater system that is not affected by the mining.

After hearing the testimony and reviewing the various exhibits, including the numerous photographs contained in Exhibit F, the Board concludes that Indian Lake has not made the requisite showing on this issue in order to obtain a supersedeas. For example, photographs 4, 5, 15, and 22 show water flowing over the spillway of the lake. These photographs were taken during the hearing at a time of year where the lake is often at a low point. Moreover, RoxCoal presented testimony showing that an unnamed tributary over the area of the mining was still flowing into the lake. Finally, a close inspection of photographs 85 through 89 evidence absolutely no drop in the lake. A drop would be readily apparent in these photographs because of the very shallow depth of the water in this area.

Is the drop in the water levels of some residential water wells an indication that the groundwater which recharges the lake is now flowing into the mine and that the lake will eventually be drained?

Indian Lake presented testimony that several wells have experienced sharp drops in static water levels. Dr. Earl, however, has convinced the Board that the drops are seasonal fluctuations or isolated incidents which have no short-term or long term effects on the lake itself.

The lake has far more water flowing into it than it needs to remain filled. Much of the water which recharges it is not even in the same watershed as the mine. In addition, Dr. Earl pointed to readings in several wells in the same vicinity which showed absolutely no effects from the mining and where static water levels had not dropped. In some cases, the levels actually increased. Ms. Dunst pointed out that the readings in the Kimmel well, which is between the mine and the lake, show that the well extends below the level of the lake yet the static water level is 61 feet above the lake. Furthermore, Dr. Earl and Ms. Dunst pointed out the problems with comparing wells from different water bearing zones and over different time periods. Indian Lake also did not adequately distinguish contrary readings from different wells, other relevant groundwater data such as that gleaned from springs and the unnamed tributary, and the high static water elevation in the abandoned Borough well.

The Borough's argument that the permit was deficient does not form a basis for granting the supersedeas. There simply was not enough evidence submitted to rebut the explanations provided by RoxCoal. There is nothing to lead this Board to believe that the Lake would be adversely affected by the mining. Dr. Earl testified the permit applications adequately characterized the groundwater hydrology. Moreover, based on the horizontal 800 foot barrier between the mine and the lake, plus the fact that in most instances the mine is 300 to 400 feet below the ground surface, Dr. Earl concluded that Indian Lake will not be affected by the mining.

Indian Lake argues that this Board must act now and not wait for the autopsy to determine

the terrible health of the lake. From the evidence submitted by the parties, it seems that if the lake is affected at all by the mining, the effect should be likened to a slight cold with absolutely no indication that it will develop into life-threatening pneumonia.

Based on a complete review of the transcript together with the briefs and exhibits Indian Lake has not convinced the Board that it will prevail on the merits or that it has suffered irreparable harm from RoxCoal's mining operations. Moreover, the grant of the supersedeas would result in the immediate loss of several hundred well-paying jobs. Under these circumstances, we have no choice but to deny the Supersedeas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

INDIAN LAKE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 96-071-R**
	:	**(Consolidated with 95-096-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PBS COALS, INC., and	:	
ROXCOALS, INC., Permittee	:	

ORDER

AND NOW, this 7th day of November, 1996, Indian Lake's Borough's Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 7, 1996

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Michael J. Heilman, Esq.
Barbara J. Grabowski, Esq.
Western Region

For Appellant:
Robert P. Ging, Jr., Esq.
Confluence, PA

For Permittee:
Vincent J. Barbera, Esq.
Somerset, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

FLORENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 95-107-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC.	:	**Issued: November 25, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment with respect to the issuance of a solid waste permit for an expansion to an existing solid waste management facility is granted as to claims that (1) the permit was improperly issued before the issuance of applicable air quality permits, (2) the applicant failed to meet the requirements of 25 Pa. Code § 271.127 with respect to mitigation measures and a social and economic benefit analysis, and (3) the landfill will be located within a 100 year-floodplain.

The motion is denied with respect to the claim that the expansion was not provided for in the county plan and that alternate requirements were not met under section 507(a) of Act 101.

OPINION

Background

This appeal by Florence Township ("Florence") filed on June 20, 1995 challenges the approval by the Department of an application by Waste Management of Pennsylvania, Inc. ("Waste Management") for a solid waste management permit for the Southern Expansion of Waste Management's landfill in Tullytown Borough, Bucks County, Pennsylvania. The permit was issued by the Department on May 23, 1995 pursuant to the provisions of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* and the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101, *et seq.* ("Act 101"). The Background of this appeal is set forth fully in our opinion on Waste Management's motion to dismiss issued on March 6, 1996 which dismissed paragraphs 3(3) and 3(8) of Florence's appeal. Waste Management now moves for summary judgment with respect to the remaining objections set forth in Florence's appeal.

Compliance With Air Quality Requirements

Florence contends in paragraph 3(1) of the appeal that Waste Management's application did not demonstrate compliance with the Air Pollution Control Act ("APCA"), Act of January 8, 1960, P.L. (1959), 2119, *as amended*, 35 P.S. § 4001 *et seq.* and the Federal Clean Air Act, 42 U.S.C.A. § 7401, *et seq.* Section 502(d) of SWMA requires that the application for a solid waste management permit "set forth the manner in which the operator plans to comply with...the [APCA]." It further provides that no permit shall be issued unless the plan provides for compliance with the APCA, and that failure to comply shall be cause for revocation of the solid waste management permit. As described in our prior opinion on Waste Management's motion to

dismiss, the solid waste management permit is conditioned on the issuance of an air quality permit under the APCA. Waste Management says that its application materials contained extensive materials on how it planned to comply with both state and federal air quality requirements.

In response, Florence presents a legal argument based on that portion of the language of section 502(d) of the SWMA stating that no approval shall be granted unless the plan provides for compliance with the APCA. Florence contends that there can be no such compliance until after the required air quality permit has been issued. Florence also argues that section 503(c) of the SWMA provides for the denial of a permit if the application indicates a lack of intention to comply with the APCA.

We reject Florence's legal arguments in response to this aspect of the motion for summary judgment. We have interpreted section 502(d) of the SWMA to mean that the Department has met its obligations under the act by determining that the application sets forth the manner in which the operator plans to comply with the requirements in a way which shows a likelihood of compliance, and the Department conditions the solid waste management permit by prohibiting the disposition of waste pursuant to the permit until after appropriate air quality permits are issued. *County Commissioners, Somerset County v. DEP,* EHB Docket No. 95-031-MG (Adjudication issued April 4, 1996); *Florence Township v. DEP,* EHB Docket No. 95-121-MG (Consolidated) (Opinion issued March 6, 1996); *Lower Windsor Township v. DER*, 1993 EHB 1305.

We have reviewed the materials which Waste Management submitted to the Department with respect to how it planned to comply with the requirements of the APCA and find that plan

to be sufficient to indicate a likelihood of compliance with air quality requirements for purposes of the issuance of a solid waste management permit. Those materials indicate a credible plan for the control of fugitive dust and the operation of a methane emissions capture and destruction system sufficient to meet ordinary requirements of the APCA. Although Florence contends that the plan does not demonstrate that the plan is sufficient to meet the complex new source review requirements under the APCA, we hold that the question of whether Waste Management can meet new source review requirements and other highly technical requirements of the APCA is an issue which is properly reserved for a determination by the Department's air quality permitting staff in connection with the issuance of required air quality permits.

We do not read section 503(c) of SWMA to provide for the denial of a permit if the application presents a plan for compliance with the APCA, but indicates a view that new source review is not required as Florence contends. Section 503(c) does provide for denying permits if it finds that the applicant has failed or continues to fail to comply with the APCA. Florence presents no evidence that Waste Management falls into this category. Whether new source review is required in connection with air quality requirements is a complex determination which is properly made by its experts on air permitting and, as a result of a condition in the solid waste management permit, that determination can be made before waste is disposed of in the proposed facility. If the Department issues an air quality permit, that is a further indication that there will be compliance with the APCA. As a fail safe compliance requirement, the solid waste management permit may be revoked under section 502(d) of SWMA for failure to comply with those requirements at any time during the facility's construction or operation.

Florence also contends that the expansion of the landfill does not comply with the new

source review provisions of the APCA and the Clean Air Act by referring to its Memorandum of Law in the related appeal from the air permit, Docket No. 96-045-MG. Nothing in that Memorandum of Law raises any factual issue which would indicate that the Department abused its discretion in issuing the solid waste management permit which is the subject of this appeal.

Because we hold that the Department did not abuse its discretion in issuing the solid waste management permit, summary judgment will be entered in favor of Waste Management with respect to paragraph 3(1) of this appeal. In the Opinion and Order issued today with respect to the appeal from the air permit, we have found that a hearing will be required with respect to whether or not the air quality permit was properly issued. As a result, we do not reach the arguments of the parties as to whether or not the filing of the air permit application makes moot Florence's contentions with respect to the solid waste management permit.

The Bucks County Plan

Florence contends in paragraphs 3(2), 3(4) and 3(5) of the appeal that the Southern Expansion was not provided for in the Bucks County Plan within the meaning of Section 507(a)(1) of Act 101, 53 P.S. § 4000.507(a)(1). Florence contends, as a result, that the permit was issued improperly in the absence of proof of the alternate requirements of section 507(a)(2) of Act 101 were met, including the requirement that the proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors. The Department's representative who made the determination that the Southern Expansion was provided for in the Bucks County Plan, Ronald C. Furlan, P.E., had difficulty in reaching the conclusion that the Southern Expansion was so provided for in the Bucks County Plan. The critical portion of the Bucks County Plan on which he based his final conclusion is

contained in Volume II of the Addendum to the Plan containing Table 23 which is entitled "Designated Facilities for Bucks County Municipal Waste, 1990 through 2000." This table includes the Tullytown Landfill as one of the Municipal Waste Disposal Facilities included in the plan. It describes the landfill's available capacity as 10,000 tons per day, which is the permitted disposal rate under the DEP permit. It lists this landfill's expansion capacity as "0". However, it describes its remaining life as 3.7 to 5.2 years and describes the capacity of the landfill to be used by Bucks County over the period 1990 to the year 2000 in specified tons per day during each year. (Exhibit 7 to Waste Management's Motion for Summary Judgment).

In his final decision as to whether or not the Southern Expansion was provided for in the Bucks County Plan, Mr. Furlan accepted Waste Management's argument that the expansion capacity of the landfill was listed as "0" in Table 23 because Waste Management did not plan to increase the tons per day above the present 10,000 tons per day shown under the title of "available capacity" in the Plan. He also relied on the fact that Waste Management had issued a contractual guarantee to the county for waste disposal over a period of ten years in an agreement dated December 5, 1988. This agreement indicated that Waste Management intended to provide landfill capacity to the county into the late 1990's. To do this, the Bucks County Plan would have required some reasonable expansions of existing facilities. (Furlan memorandum dated May 17, 1995, Exhibit 6 to Waste Management's Memorandum of Law in Support of Motion for Summary Judgment). Mr. Furlan also considered two letters from the Bucks County Commissioners dated April 27, 1994 and November 30, 1994 in which the Commissioners expressed the view that the Southern Expansion was included in the Bucks County Plan. (Exhibits 10 and 11 to Waste Management's Memorandum of Law).

Florence contends that Mr. Furlan's determination that the Southern Expansion is provided for in the Bucks County Plan is clearly erroneous. Florence points to pages 15-16 of Volume I of the Municipal Waste Management Plan which says that any proposed expansion of facilities listed in Table 3 of the Plan shall be considered a plan revision subject to the provisions of section 501(d) of Act 101 which specifies a required procedure for considering plan revisions. Table 3 of Volume I describes the Tullytown Landfill as an operating facility with a capacity of 5,400 tons per day and an expansion capacity of 2,100 tons per day. It also describes the Tullytown Landfill as having a remaining life of 3.7 to 5.2 years. (Exhibit A to Florence's Answer to the Motion for Summary Judgment). Florence argues that since there has been no plan revision authorizing the Southern Expansion that the Southern Expansion is not "provided for" in the Bucks County Plan within the meaning of section 507(a)(1) of Act 101. Florence argues that Mr. Furlan could not consider the Addendum to Volume II of the Plan to mean that a plan revision was not required for expansion of a facility designated in the Plan as an existing facility. Florence points in particular to the transmittal letter in which Bucks County resubmitted its Waste Management Plan and Addendum. In this letter, Robert E. Moore, Executive Director of the Bucks County Planning Commission, said:

> The Addendum does not constitute any change to the policies, programs, or recommendations in the original draft plan *Volume I -- The Plan* (enclosed). The Addendum represents the provision of additional information and detail requested by the DER. This additional information should enable the DER to consider the plan 'complete' and 'approvable.'

Florence also points out that other persons involved with the expansion had differing

views on whether or not an expansion of the Tullytown Landfill was provided for in the Plan. By letter dated March 15, 1994, the Bucks County Commissioners asked the Department to do all that it could to guarantee that the Tullytown Landfill not be expanded if such expansion enables more out of state trash to be disposed of in Bucks County. (Exhibit D to Florence's Memorandum of Law). In response to this letter, James W. Rue, Regional Director of the Department's Southeast Regional Office, expressed the view that little could be done and said: "Please remember the Tullytown Landfill expansion is called for in the Bucks County Plan." (Exhibit E to Florence's Memorandum of Law). The response of the Bucks County Commissioners to Mr. Rue's letter expressed the reason for the inclusion of the expansion in the Bucks County Plan. The letter stated:

> We believe it is important for you to be aware of the reason for the inclusion of the expansion in the Bucks County Plan. Quite simply, that reason is solely the wording of Act 101 which defines proposed facilities and expansions as 'existing facilities.'

This is an apparent, but not a certain, reference to section 502(c) of Act 101, 53 P.S. § 4000.502(c), which requires the Plan to identify and describe the facilities where municipal waste is being disposed of or processed, the remaining available permitted capacity of such facilities as well as the capacity which could be made available through the reasonable expansion of such facilities. Section 502(c) of Act 101 further provides that the Plan "shall not substantially impair the use...[by such a facility]...of remaining capacity or the capacity which could be made available through the reasonable expansion of such facilities." A simplified summary of the definition of a reasonable expansion is the growth of an existing permitted

municipal waste to landfill which is contiguous to the existing landfill, which land is owned by the municipal waste operator and which has the same geological features which are present in the municipal waste landfill. Act 101, § 103, 53 P.S. § 4000.103.

In view of the foregoing, we decline to enter summary judgment in favor of Waste Management on the issue of whether or not the Southern Expansion was provided for in the Bucks County Plan within the meaning of section 507 of Act 101. There is a significant issue as to whether or not the expansion of the existing facility could be provided for in any way other than an amendment to the plan. Whether the Addendum to Volume II of the Bucks County Plan can be considered to be an amendment to the Plan is a contested issue of fact. It may be that a provision requiring a plan amendment for a "reasonable expansion" of the landfill may substantially impair the use of capacity which could be made available through the reasonable expansion of the existing facility within the meaning of section 502(c) of Act 101, particularly in view of the 1988 contract between Waste Management and Bucks County.

We can grant summary judgment only if discovery materials, affidavits and expert reports show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2; *Snyder v. DER*, 588 A.2d 1001 (Pa. Cmwlth. 1991). Summary judgment may be entered only in those cases where the right to judgment in the movant's favor is clear and free from doubt. *Hayward v. Medical Center of Beaver County,* 608 A.2d 1040 (Pa. Cmwlth. 1992); *SCA Services of Pennsylvania, Inc. v. DER,* 1994 EHB 1.

We find that Waste Management's right to judgment on the issue of whether or not the Southern Expansion is provided for in the Bucks County Plan for purposes of section 507 of Act

101 is not that clear. Mr. Furlan himself initially thought that any expansion of the facilities designated in the Bucks County Plan would require a plan revision under section 501(d) of Act 101. (Exhibits 12 and 13 to Waste Management's Memorandum of Law). However, he subsequently concluded that Table 23 "replaced" Table 3 of the "Draft Plan" and eliminated the requirement found in the original plan revision for any expansion of the existing Tullytown Landfill. (Exhibit 6 to Waste Management's Memorandum of Law; Furlan Deposition at pp. 52-53, 81-82). However, his explanation of the basis for his conclusion is in conflict with the explanatory text of the letter transmitting this Addendum to the Department which indicated that Table 23 was not intended to alter the substance of the Plan as set forth in Volume I of the plan. However, DEP's conclusion that this Table was amendatory of Volume I of the Plan may yet be sustained as a factual matter. Even if Table 23 is not amendatory of Volume I of the Plan, which on its face requires a plan amendment for a facility expansion, it may be that under the facts of this case a provision requiring a plan amendment for such an expansion would substantially impair the use of capacity which could be made available through a reasonable expansion of the facility within the meaning of section 502(c) of Act 101 as well as the contract between Bucks County and Waste Management. The facts on which such determinations might be made are not before the Board at this time in sufficient detail to justify the issuance of a summary judgment on this issue.

Mitigating Measures

We reject Florence's contention at paragraph 3(6) of the appeal that the application fails to comply with 25 Pa. Code § 271.127(c) because Waste Management did not include an analysis of "alternative locations." This regulation provides that alternatives to the proposed

facility or portions thereof may be a sufficient response to the Department's determination that the proposed operation may cause environmental harm. It is also clear from the regulation that, in the alternative, appropriate mitigation measures also may be a sufficient response to the Department's determination. This subsection of the regulation provides as follows:

> (c) If the Department or the applicant determines that the proposed operation may cause environmental harm, the applicant shall provide the Department with a written explanation of how it plans to mitigate the potential harm, through alternatives to the proposed facility or portions thereof, including alternative locations, traffic routes or designs or other appropriate mitigation measures.

25 Pa. Code § 271.127(c).

Florence seeks to avoid this interpretation by claiming that the interpretation is inconsistent with section 507(a) of Act 101, 53 P.S. § 4000.507(a). We see no such inconsistency. Section 507(a)(2)(iii) requires that the applicant demonstrate that the proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors, but only if the proposed facility is not provided for in the Bucks County Plan. In this case, Waste Management's position is clear that the facility is so provided for in the Bucks County Plan. In the event that contention should ultimately be rejected, Waste Management's burden under section 507(a)(2)(iii) of Act 101 is significantly greater than is its burden under the regulation to which Florence refers.

Need/Harm Analysis

Florence's remaining objection contained in paragraph 3(6) of the appeal is that the Department allegedly failed to determine that the need for the Southern Expansion outweighs the potential harm posed by its operation pursuant to 25 Pa. Code § 271.127. Subsections (d), (f)

and (g) of this regulation provide that if the Department determines that the proposed operation may cause environmental harm, the applicant must describe the social and economic benefits of the project to the public including a detailed explanation of the need for the facility and the consistency of the facility with municipal, county, state or regional solid waste plans in effect where the waste is generated. Subparagraph (g) of the regulation states that the Department may consider that a proposed municipal waste landfill, or a proposed extension thereof, is needed for municipal waste disposal if the proposed facility or expansion is provided for in an approved county plan. (Emphasis supplied.)

Florence contends that this requirement cannot be met because the Southern Expansion is not provided for in the Bucks County Plan and there is no separate analysis of the need for a facility to support Waste Management's contention that the facility was needed.

Our review of the record indicates that there is no basis for Florence's contention. Waste Management did submit an economic and social benefits analysis to the Department which the Department reviewed. Aside from the Department's determination that the facility was called for by the Bucks County Plan, the Department said that the existing landfill site also receives wastes from other communities. It is also included in the Waste Management Plan of Philadelphia County. The Department's review of the need for the facility under Act 101 resulted in the determination that the need for the facility was fully justified. (Public Hearing Response Document at page 8, Exhibit 14 to Waste Management's Memorandum of Law; see also, the Department's Issuing Memorandum at pages 2-3, Exhibit 6 to Waste Management's Memorandum of Law).

Accordingly, we grant summary judgment to Waste Management with respect to

paragraph 3(6) of the appeal because Florence has failed to raise any material issue of fact indicating that Waste Management and the Department failed to comply with 25 Pa. Code § 271.127.

The Floodplain Issue

In paragraph 3(7) of the appeal, Florence contends that the permit was improperly issued because the issuance of the permit does not comply with the "Criteria for Permit Issuance" contained in 25 Pa. Code § 271.201(a)(3). Florence argues that the construction of the facility will require removal of dredge spoil material previously placed within the 100-year floodplain, and the applicant has not demonstrated that this removal has been properly authorized by state, regional of federal permits. In our previous opinion on Waste Management's Motion to Dismiss, we indicated that Florence has not demonstrated that it has a direct, substantial or immediate interest in a claim that the Southern Expansion would be in the 100-year floodplain in relation to Florence's objection in paragraph 3(8) of the appeal that there was no demonstration that Waste Management had legal rights to operate in the area where the expansion was to be located. *Florence Township v. DEP*, EHB Docket No. 95-121-MG, slip op. at 18-20.

Waste Management contends that this objection in paragraph 3(7) of the appeal to the Department's action should also be dismissed because Florence has not come forward with facts sufficient to demonstrate that it has standing to raise this objection. In addition, Waste Management asserts that even if Florence did have standing to assert this objection, the uncontradicted fact is that no part of the 100-year floodplain will be affected by the Southern Expansion.

The Department's regulations at 25 Pa. Code § 273.202(a)(1) prohibit the operation of a

municipal waste landfill in the 100-year floodplain of waters in this Commonwealth. Waste Management served a notice of a deposition directing Florence to designate as a deposition witness all persons upon whom Florence relies for asserting legal standing to each challenge raised in the appeal. Florence designated Gregory Lee as the sole person on whom Florence relies to establish standing in each objection raised in the appeal including the floodplain issue. (Lee Deposition, at p. 146, Exhibit 15 to Waste Management's Memorandum of Law). Mr. Lee repeatedly said that he is, and would be, adversely affected by the Southern Expansion because of odor, noise, dust, visual effects and the impact on Florence's prosperity. At no time did he state any interest relating to the Southern Expansion's alleged encroachment on the 100-year floodplain. In addition, Henry Boucher, P.E., Florence's expert on floodplain issues, did not present any evidence showing that the alleged encroachment would cause any adverse impact on Florence.

In the absence of any evidence in the record to demonstrate standing, Florence's counsel devised an imaginative argument that the prohibition against permitting an operation located in the floodplain is really a requirement of Pennsylvania's Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* The Department's regulations under this act state that the rationale for floodplain management is to"[p]rotect people and property in floodplains from the dangers and damage of flood waters and from materials carried by such flood waters...." 25 Pa. Code § 106.2 (emphasis added). Counsel for Florence goes on to point out that Florence and its citizens have an interest in protecting their property from environmental incursion from contamination or sedimentation which might come from a waste disposal facility in the event the landfill does not remain isolated from flood waters. Mr.

Lee did testify that as a riverfront community the river provides recreational activities for its citizens. (Lee Deposition, pp. 26, 33-34, Exhibit I to Florence's Memorandum of Law). The argument continues that if the landfill should suffer a flood event, Florence, as the directly adjacent community, will suffer the consequences. As imaginative an argument this is, Florence can point to no admissible evidence in the record to support the conclusion that any of Florence's officials or citizens are concerned about materials carried from flood waters to Florence's shores or that rising flood waters would carry those materials across the river rather than downstream to Philadelphia. Accordingly, we hold that appellant has no standing to contest the issuance of the permit based on Objection 3(7) of the appeal. *Tessitor v. DER*, 682 A.2d 434, 437-8 (Pa. Cmwlth. 1996).

Waste Management also contends that Florence has failed to raise any issue of material fact relating to the claimed intrusion upon the 100-year floodplain. Indeed, Waste Management contends that uncontradicted field service data conclusively proves the Southern Expansion does not encroach on the 100-year floodplain. The parties agreed that the 100-year floodplain is defined by the 12 foot contour that represents the height of the land above mean sea level on a topographic map. The drawings relied upon by Florence's Mr. Boucher, which establish the location of the 12 foot contour, were produced through the use of aerial photogrammetric mapping which is used to approximate the topography of an area. In reaching his original conclusion that the Southern Expansion would encroach upon the 100-year floodplain based on this mapping, Mr. Boucher was unaware that the method used to collect the data for the drawings submitted by Waste Management, indicating that the floodplain was outside the permit boundary for the Southern Expansion, was based on a precise field survey as opposed to the

approximations from aerial photogrammetry.

Mr. Boucher admitted in his deposition that field surveying is a more precise method of collecting data to generate topography contours on aerial mapping and that given more precise field data he would change his opinion regarding the location of the 12 foot contour. (Boucher Deposition, pp. 76-77, Exhibit 16 to Waste Management's Memorandum of Law).

The mapping done by Waste Management which indicates that the facility will not intrude on the 100-year floodplain level is based on the Radial Topography Field Survey performed by Joseph Wright, a licensed land surveyor. Waste Management's engineers in charge of designing the Southern Expansion used this more precise 12 foot contour to more precisely identify the boundary of the 100-year floodplain and to insure that the permit boundary of the Southern Expansion did not encroach upon the 100-year floodplain. The 12 foot contour generated from the field survey shows that the Southern Expansion in no way encroaches on the 100-year floodplain. (Declaration of Charles Ballod, Exhibit 20 to Waste Management's Memorandum of Law).

Florence's answering brief does not point to any evidence indicating that the Southern Expansion would intrude upon the 100-year floodplain level. Instead, it argues that all of the land area above the floodplain in the general area consists of dredged fill placed there by the United States Army Corps of Engineers within the last two decades. Florence asserts that all of this dredged fill is to be removed during the construction of the Southern Expansion based on information contained in the solid waste management permit application. The argument is that removal of this fill would require a permit under the Dam Safety and Waterway Management regulations. In addition, Florence claims that the Department's staff did not make an adequate

review of whether the permit was needed to modify an obstruction in the floodplain.

None of this constitutes evidence that the Southern Expansion would intrude on the 100-year floodplain. Accordingly, summary judgment is granted to Waste Management with respect to paragraph 3(7) of the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FLORENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 95-107-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC.	:	

ORDER

AND NOW, this 25th day of November, 1996, in consideration of the motion for summary judgment of Waste Management of Pennsylvania, Inc., it is hereby ordered:

1. The motion for summary judgement is **GRANTED** with respect to paragraphs 3(1), 3(6) and 3(7) of the appeal, and those portions of the appeal are hereby dismissed;

2. The motion for summary judgment is **DENIED** as to paragraphs 3(2) and the related paragraphs 3(4) and 3(5) of the appeal.

3. A hearing on the merits will be scheduled promptly and will be limited to the question of whether the solid waste management permit was properly issued in view of the requirements of section 507(a) of Act 101 and the related regulations thereunder as raised by objections 3(2), 3(3), 3(4) and 3(5) of the appeal.

EHB Docket No. 95-107-MG

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 25, 1996

See following page for service list.

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Mark L. Freed, Esquire
Douglas G. White, Esquire
Southeast Region

For Appellant:
Wendy Carr, Esquire
Philadelphia, PA
and
Thomas J. Germine, Esquire
Whippany, NJ

For Permittee:
Bruce S. Katcher, Esquire
Neil S. Witkes, Esquire
MANKO GOLD & KATCHER
Bala Cynwyd, PA

rk

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	**Issued: November 25, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment by a permittee in an appeal from the issuance of an air quality plan approval for a proposed expansion to municipal waste landfill is denied. After consideration of the motion and the exhibits, the Board finds that the permittee's right to summary judgment is not clear and that the permittee has failed to demonstrate that there are no issues of material fact in dispute concerning the applicability of the new source review requirements of the Clean Air Act and the Air Pollution Control Act to its proposed expansion of a solid waste landfill.

BACKGROUND

On February 1, 1996, the Department of Environmental Protection issued air quality plan approval no. 09-322-005 to Waste Management of Pennsylvania, Inc. (Permittee) which authorized the construction of regulated air emission sources associated with the proposed expansion to the

southern boundaries of the Tullytown Resource Recovery Facility[1] landfill (Southern Expansion) located in Tullytown Borough and Falls Township, Pennsylvania. The Township of Florence (Appellant) filed a timely appeal to the issuance of the permit on February 22, 1996.[2] In response to a motion filed by Permittee, the Board dismissed all but two objections of the notice of appeal. *Township of Florence v. DEP*, EHB Docket No. 96-045-MG (Opinion issued July 18, 1996). The only issues remaining in this appeal, are whether or not federal and state new source review provisions apply to the Southern Expansion. In the present motion Permittee charges that there are no issues of material fact in dispute which support the remaining allegations in the notice of appeal.

DISCUSSION

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and expert reports, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2; *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991). Summary judgment may be entered only in those cases where the right to judgment in the movant's favor is clear and free from doubt. *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992); *SCA Services of Pennsylvania, Inc.*

---

[1] The existing Tullytown Resource Recovery Facility is hereinafter referred to as "Landfill."

[2] Appellant also filed an appeal from the issuance of the solid waste permit which was issued for the Southern Expansion. This appeal is currently before the Board at EHB Docket No. 95-107-MG. *See Florence Township v. DEP*, EHB Docket 95-121-MG (consolidated)(Opinion issued March 6, 1996).

v. DER, 1994 EHB 1.[3]

Federal New Source Review

Permittee first argues that it need not obtain a federal major source permit because the new source provisions of the Clean Air Act[4] do not apply because of the increase in emissions associated with the Southern Expansion. Permittee states that "the net increase in VOC [volatile organic compound] emissions associated with any modifications" to the existing landfill do not exceed 25 tons per year and the Southern Expansion is therefore exempted from new source review pursuant to Section 182(c)(6) of the Clean Air Act, commonly referred to as the "*de minimis* rule."

Section 182(c)(6) of the Clean Air Act provides:

> The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method

---

[3] Our consideration is governed by the content of the motion and the exhibits attached to it. The briefs are only to provide a more detailed discussion of the bases of the motion, and not to add new arguments or new facts. *Barkman v. DER*, 1993 EHB 738. Accordingly, the exhibits attached to Permittee's reply brief are not part of our consideration. *See County of Schuylkill v. DER*, 1990 EHB 1370 (exhibits attached to legal memoranda can not properly form the basis for granting a motion of summary judgment).

[4] As we explained in our July opinion:

> Section 172(c)(5) of the Clean Air Act, 42 U.S.C. § 7502(c)(5), requires states in which nonattainment areas are located to include, as part of the state implementation plan (SIP), provisions for the permitting of construction and operation of new or modified major stationary sources in accordance with the provisions of Section 173 of the CAA, 42 U.S.C. § 7503. The permitting procedures outlined by Section 173 are commonly referred to as "new source review." These requirements have been implemented by the Department in Chapter 127 of the Pennsylvania Code, 25 Pa. Code §§ 127.201-.217, which provides that a proposed source that has the "potential to emit" VOCs in excess of the established threshold of 25 tons per year must comply with Part D permitting requirements, as implemented in Pennsylvania's SIP.

Slip op. at 4.

> of operations of, a stationary source located in the area shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

42 U.S.C. § 7511a(c)(6). Permittee argues that this provision applies because (1) the permit imposes legally enforceable and effective restrictions on the Southern Expansion which limit VOC emissions to less than 25 tons per year; (2) no modifications at the Landfill during the consecutive five calendar years have caused any increase in VOC emissions; and (3) fugitive emissions should not be counted in determining VOC emissions.

Appellant counters that (1) the Board can not conclude as a matter of law that the Southern Expansion's "potential to emit" VOCs is 25 tons per year because the emission controls do not meet the standard of "demonstrable effectiveness" required by federal law; (2) there is evidence of net increases in VOC emissions from the Landfill which, when aggregated with emissions from the Southern Expansion, exceed the 25 ton per year threshold; and (3) Pennsylvania law requires the inclusion of fugitive emissions in the emissions calculations.

Permittee has failed to show that there is no dispute that the potential VOC emissions form the Southern Expansion are less than 25 tons per year. Permittee relies upon *Ogden Projects, Inc. v. New Morgan Landfill*, 911 F. Supp. 863 (E.D. Pa. 1996), to demonstrate that the controls at the facility will assure that its emissions will be less than 25 tons per year. In our July opinion we held that:

> *Ogden Projects* analyzed the "potential to emit" requirement to determine whether or not a landfill itself qualified as a "major source" within the meaning of the CAA. Specifically, the court determined that operational or physical controls which are "demonstrably effective" and "stem from state or local government regulation" may

> be considered when determining a facility's potential to emit VOCs. *Id.* at 876. The court concluded that the landfill did not qualify as a major source because the permit required the landfill to achieve 99 percent efficiency in controlling emissions *and* the data in the permit application demonstrated the adequacy of the pollution control equipment. The Board only has information concerning the emission limitation contained in the permit, which only arguably satisfies one prong of the *Ogden Projects* inquiry.

Slip op. at 5-6. We concluded that we could not grant the motion to dismiss because (1) there was no evidence demonstrating the effectiveness of the pollution control equipment for the Southern Expansion, and (2) the *Ogden Projects* opinion did not provide guidance for determining the effect of operational limits which applied only to the Southern Expansion. Permittee has attempted to remedy the factual shortcoming of its initial motion with a "declaration" from Michael Niemann who provided technical consulting services to Permittee by designing the gas control equipment for the Southern Expansion. (Permittee Ex. C) He states that it is his opinion that the gas collection system for the Southern Expansion will collect at least 92% of the landfill gas generated by the expansion, and destroy 98% of the landfill gas generated by the expansion, therefore the maximum potential emissions from both fugitive and point source emissions will be less than 25 tons per year. (Permittee Ex. C ¶¶ 5,7,10) Further the permit requires Permittee's equipment to achieve these collection and destruction efficiencies, and requires monitoring and annual compliance demonstrations. (Permittee Ex. A, Conditions 3 and 4)

Appellant challenges the calculations upon which the collection efficiency for the Southern Expansion was calculated, based upon correspondence from Department personnel and submissions from Permittee to the Department pertaining to a Title V operating permit application which appears to present different calculations. (Appellant's Ex. C, G and H) For example, Appellant argues that the method used to calculate the collection efficiency for the Southern Expansion inherently

overestimates the actual amount of gas which will be extracted, therefore the controls can not be demonstrably effective.

Appellant's allegations raise questions of fact which must be resolved at the hearing. As we stated in our earlier opinion, permit conditions alone are not sufficient to support a conclusion that emissions controls are demonstrably effective. Moreover, if these conditions were based upon questionable calculations, their credibility is further called into question. The conclusion of the court in *Ogden Projects* is based on facts which are distinguishable from the facts presented here because the parties in that case stipulated to the accuracy of the data contained in the permit application.[5] In contrast, the supporting data in the permit application is disputed by Appellants.

Even if the Board assumes that the potential to emit for the Southern Expansion is in fact less than 25 tons per year, it is impossible to grant summary judgment in Permittee's favor because there is not sufficient uncontroverted information concerning emissions from the Landfill.

For example, if the Southern Expansion is to be viewed as a modification of the Landfill, the Clean Air Act requires that the emissions from the Southern Expansion not exceed 25 tons per year "when aggregated with all other net increases in emissions from the source." 42 U.S.C. § 7511a(c)(6). In its motion Permittee alleges that it "has offered uncontradicted evidence that no modifications at the Landfill . . . have resulted in *any* increase in VOC emissions at the Landfill." (Permittee Motion ¶ 11) Permittee relies upon the declarations of Sachin Shankar of the Department

---

[5] Permittee emphasizes the fact that Appellant has performed no independent analysis of estimated emissions from the Southern Expansion nor does Appellant intend to call its own expert witnesses. Appellant counters that it intends to carry its burden through the testimony of Permittee's expert and Department witnesses. We will not find that as a matter of law Appellant will be unable to carry its burden in this manner.

and Mr. Niemann. (Permittee Exs. B and C)

Permittee has failed to provide sufficient uncontroverted information which would permit the Board to conclude that the Landfill does not contribute emissions which must be aggregated with emissions from the Southern Expansion. EPA regulations define "net increases in emissions" as (1) any increase in actual emissions from a modification; and (2) decreases in actual emissions at the source "that are contemporaneous with the particular change *and are otherwise creditable.*" 40 C.F.R. § 51.165(vi)(A)(1)-(2) (1995). Actual emissions *decreases* are only "creditable" where (1) the old level of emissions exceeds the new level of emissions; (2) the emissions level is federally enforceable at the time construction of the modification is begun; (3) the Department has not "relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the state has not relied on it in demonstrating attainment or reasonable further progress . . . ."; and (4) the decrease has the same qualitative significance as the increase attributed to the modification. 40 C.F.R. § 51.165 (vi)(E)(1)-(4)(1995).

Although Permittee has supplied statements that emissions at the Landfill have decreased and not increased, there is no explicit information which would allow the Board to determine whether or not these decreases are "creditable" as defined by Section 51.165(vi)(E). First, the declarations in support of Permittee's assertion only state that there have not been any emissions increases, but do not provide values for the old level of emissions versus the new level of emissions.[6] Second, there is no evidence that these decreases are federally enforceable or were not relied on by the Department in issuing the permit for the Southern Expansion or demonstrating reasonable further

[6] We held in our disposition of the July motion to dismiss that this lack of information concerning emissions from the existing landfill was one factor which required denial of the motion.

progress. Permittee has not directed the Board's attention to any permit limitation on VOC emissions from the Landfill, other than the collection efficiencies of the gas management system. (Permittee Ex. H) Third, Appellants dispute the fact that emissions from the Landfill have in fact decreased, and cite Department memoranda in support of this assertion. (Appellant Ex. H)[7]

Pennsylvania New Source Review

The Board also can not grant summary judgment on the issue of the applicability of Pennsylvania's new source review requirements. The state "*de minimis* rule" provides that:

> The applicability of requirements in § 127.211 [pertaining to new source review] apply except as provided by this subsection. A modification to an existing facility with the potential to emit 25 tons per year or more which results in an increase in the potential to emit VOC . . . may not be considered a de minimis increase. The requirements of this subchapter apply, if the increase in potential to emit, when aggregated with the other net emission increases in potential to emit occurring over a consecutive 5-calendar-year period exceeds 25 tons per year . . . .

25 Pa. Code § 127.203(c)(1). The state's provisions are very similar to the federal provisions, and for the reasons discussed above, Permittee's motion must fail. Further, Permittee has presented no clear evidence which establishes what the Landfill's potential to emit was at the beginning of the five-year period which begins in 1990. What evidence there is concerning historical emissions from the Landfill is in the form of Mr. Shankar's memorandum attached as Appellant's Exhibit H which presented emission modeling for 1990 and 1994 based on EPA default values. The reliability of the data which provides the basis of his analysis is disputed by the parties. *See* note 7.

---

[7] Permittee disputes Appellant's reliance upon Appellant Ex. H, an internal memorandum of the Department which projected possible emissions from various landfills, including the Landfill and the Southern Expansion. We believe that the weight to attribute to this memorandum is better left for determination after a hearing. Although Mr. Shankar states in his declaration that his calculations were based upon default values rather than site specific data, the source and significance of data submitted by Permittee is unclear.

In addition to failing to provide adequate evidence to determine the applicability of the *de minimis* regulation, Permittee has also failed to show that there is no dispute concerning the applicability of the emission decreases at the Landfill. Section 127.211 of the Department's regulations provides the formulation for determining net emission increases, including the requirements for the inclusion of emissions decreases under state law. Specifically, emissions decreases are not "creditable" unless (1) the decrease is federally enforceable and the emission credit provisions[8] have been complied with; (2) there is no significant change in the character of emissions between the decreases and the proposed increase; and (3) the emissions decrease represents the same qualitative significance for public health as the proposed increase. 25 Pa. Code § 127.211(b)(3)(iii)(B)(I)-(III). Just as Permittee has failed to provide adequate evidence that emissions decreases at the Landfill are federally creditable, there is insufficient evidence to conclude that the decreases are creditable for the purposes of determining the applicability of state new source review. For example, there is no evidence that the decreases are federally enforceable or that the emission credit provisions have been complied with.

Finally, Permittee argues that fugitive emissions should not be used in calculating the emission rates for the Southern Expansion or the Landfill. However true this may be for federal new source review, Section 127.204 of the Department's regulations explicitly provides that potential and actual emissions include, among others, "stack and additional fugitive emissions." 25 Pa. Code § 127.204(a). Therefore, even though federal rules do not provide for the inclusion of fugitive emissions, states are not precluded by the Clean Air Act or its regulations from providing more

---

[8] *See* 25 Pa. Code § 127.207.

stringent requirements for air pollution control. In determining VOC emissions from the Landfill and Southern Expansion for the purpose of determining whether Pennsylvania's new source review requirements apply, it is appropriate to include fugitive emissions.

In sum, Permittee's motion for summary judgment must be denied because Permittee has failed in its burden of proving that there are not material facts in dispute and that it is clearly entitled to judgment in its favor.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	

ORDER

AND NOW, this 25th day of November, 1996, the motion for summary judgment of Waste Management of Pennsylvania, Inc. in the above-captioned matter is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: November 25, 1996

See following page for service list.

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Mark L. Freed, Esq.
Douglas G. White, Esq.
Southeast Region

For Appellant:
Wendy E. Carr, Esq.
Philadelphia, PA
and
Thomas J. Germine, Esq.
Whippany, NJ

For Permittee:
Bruce S. Katcher, Esq.
Neil S. Witkes, Esq.
Bart E. Cassidy, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

ml/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**Consolidated with 95-233-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	**Issued: November 27, 1996**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis

A mining company's mine subsidence control plan must set forth the measures it will take to prevent or minimize damage, destruction or disruption to a water line under which the company has received approval from the Department of Environmental Protection to conduct longwall mining. Providing notice to the water company prior to the start of mining is one measure which may be taken but, by itself, does not fulfill the requirements of the statute and regulations.

OPINION

Presently before the Board are Motions for Summary Judgment that involve common factual and legal issues. In September 1995 the Department of Environmental Protection ("Department") approved a revision to allow Eighty-Four Mining Company to mine additional areas in Washington County. Eighty-Four Mining Company was granted permission to mine under water lines owned

by the Pennsylvania American Water Company. The issue that is the subject of this opinion was succinctly set forth by Eighty-Four Mining Company in its brief as follows: Did the Department abuse its discretion in issuing the Permit Revision because it did not require Eighty-Four Mining Company to take sufficient measures to minimize damage, destruction or disruption to Pennsylvania American Water Company's 30-inch water line which transports water to the City of Washington and the surrounding communities and by authorizing Eighty-Four Mining Company to conduct full extraction longwall mining beneath this water line?

Under this Permit Revision, Eighty-Four Mining Company utilizes the longwall method of mining. Longwall mining is one of the most efficient and profitable ways to mine coal. The coal company operates a mining machine that shears the coal and immediately drops it on a conveyor belt. The mining machine proceeds across the entire face of the coal seam. Eighty-Four Mining Company's seams in this mine are anywhere from 900 to 1,145 feet wide and up to 10,123 feet long. Shields to support the roof are set up behind the mining and as the mining machine shears the coal and moves forward the shields also move forward. The roof of the mine behind the shields collapses. This can result in subsidence on the surface.

This method of mining is more efficient than the traditional room and pillar method. In room and pillar mining blocks of coal are left in place which supply support to the mine. The longwall method allows the coal company to remove all or nearly all of the coal in a seam in a fast and very efficient manner. The proper operation of the method is a testament to the skill and ingenuity of the mining companies and their highly skilled employees.

Coal is a vital energy source that is an important component in the Commonwealth's energy mix. Pennsylvania and the nation derive many benefits from a strong coal industry. Coal, in great

measure, creates the electricity that lights our homes and powers our industry. A strong coal industry decreases our dependence on foreign oil. Coal companies employ thousands of hard-working Pennsylvanians in high-paying and skilled jobs. At the same time, mine subsidence is a problem that if not properly managed can have disastrous effects. A safe and efficient public water supply is also vital and critical to the people of Pennsylvania.

The General Assembly, recognizing both the importance of coal and the need to protect the public (including the public's interest in a safe water supply), enacted the Bituminous Mine Subsidence and Land Conservation Act, (the "Act"), Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §1406.1 et seq. Section 1406.2 sets forth the purpose of the Act as follows:

> **§1406.2 Purpose**
>
> This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than "open pit" or "strip" mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public and private water supplies, to provide for the restoration or replacement of water supplies affected by underground mining, to provide for the restoration or replacement of or compensation for surface structures damaged by underground mining and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania.

The next section sets forth legislative findings which recognize the terrible harm the public suffered from past mine subsidence and the legislature's intent to prevent future mine subsidence and damage. At the same time, the legislature recognizes the importance of fostering and supporting the continued development of the state's coal industry. The legislature specifically declares that "it

is necessary to develop an adequate remedy for the restoration and replacement of water supplies affected by underground mining." Section 1406.19 states that the "Act is intended as remedial legislation designed to cure existing evils and abuses and each and every provision hereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction."

The main water line undermined by Eighty-Four Mining Company is a 30-inch concrete pre-stressed pipe which is nearly 15 miles long. The line is underground and runs along State Route 136 in North and South Strabane Townships in Washington County. It conveys an average of over 6 million gallons of water a day to the City of Washington and its surrounding communities. The line consists of twenty foot sections of pipe fastened together. Separation or destruction of one joint in the line would create an immediate failure of the line and would cut off the water supply to Washington. Moreover, because of the pressure and volume of water, a break could cause damage to surrounding property and State Route 136.

If the damage was such that it could not be repaired in twenty-six hours Pennsylvania American Water Company's storage facilities would be drained and the City of Washington and its surrounding communities would be without water. In addition to affecting thousands of residents, this would result in the complete loss of water service to hospitals, schools, and police and fire departments.

Faced with the imminent loss of its huge water line, Pennsylvania American Water Company has undertaken (in its words) a risky "ByPass Project." This involves the construction of an above ground 20-inch ductile iron cement bypass water line installed above ground along State Route 136.

It connects to the 30-inch line at a point not affected by subsidence and then reconnects at another point beyond the first long-wall panel.

It is uncertain whether the bypass line will function under subsidence conditions. Since the bypass line is above ground, cold weather may have a detrimental effect on it. There may be other problems such as vandals and even lightning strikes that might detrimentally affect the line. It is literally a "life line" to the residences, businesses, hospitals, schools, and fire departments of the City of Washington and surrounding communities.

The Department is charged with administering and enforcing the Act and the Underground Mining of Coal Regulations, 25 Pa. Code §§86.37, 86.42, 89.67, 89.141 and 89.143 (the "Regulations"). The Department's Regulations set forth a comprehensive framework to accomplish the goals of the legislature of advancing and promoting the coal industry in a safe and environmentally prudent manner. Section 86.37(a)(1) provides that before the Department approves an application for a mining permit the mining company must affirmatively demonstrate that its application is complete and accurate "and that all the requirements of the acts and this chapter have been complied with." Section 89.67 (b) requires that all underground mining activities "shall be conducted in a manner which minimizes damage, destruction or disruption of services provided by ...water and sewage lines which pass over, under or through the permit area."

Section 89.141(d) requires the mining company to include a mine subsidence control plan in its permit application. The Section requires very specific and detailed information to implement the goal of fostering modern and efficient mining, such as longwall, while at the same time minimizing subsidence damage.

(d) *Subsidence control plan.* The permit application shall

include a subsidence control plan which describes the measures to be taken to control subsidence effects from the proposed mining operations. In determining the area to be protected, a 25° angle of draw shall be projected from the limits of the mine to the surface. Portions of the mine in which no underground mining activities will occur over the term of the permit need not be included. The subsidence control plan shall include the following information:

(1) A description of the method of coal removal, such as longwall mining, room and pillar mining, hydraulic mining or other extraction methods, including the size, sequence, and timing for the development of underground workings.

(2) For each structure and surface feature, or class of structures and surface features, listed in §89.143(b)-(d) (relating to performance standards), a detailed description of the measures to be taken to prevent, minimize or avoid subsidence from causing damage or lessening the value or reasonable foreseeable use of the surface land, including:

(i) The anticipated effects of planned subsidence, if any.

(ii) Measures to be taken in the mine to reduce the likelihood of subsidence, including measures such as:

(A) Backfilling or backstowing of voids.

(B) Leaving support pillars of coal.

(C) Setting forth areas in which no coal extraction is planned, including a description of the overlying area to be protected by leaving coal in place.

(iii) Measures to be taken on the surface to minimize the damage or lessening of the value or reasonable foreseeable use of the surface.

(iv) Monitoring, if any, to determine the commencement and degree of subsidence so that other appropriate measures can be taken to prevent or reduce the damage.

Finally, Section 89.143 requires that the mining be conducted in accordance with the subsidence plan. It contains a specific subsection entitled "Protection of Utilities."

> (c) *Protection of utilities.*
>
> (1) Underground mining activities shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services provided by oil, gas and water wells; oil gas and coal slurry pipelines; rail lines; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area unless otherwise approved by the owner of the facilities and the Department.
>
> (2) The measures adopted to minimize damage, destruction or disruption of services protected by this subsection may include, in addition to those measures discussed in §89.141(d), a program for detecting subsidence damage and avoiding disruption in services, and a notification to the owner of the facility which specifies when the mining activity beneath or adjacent to the structure will occur.

In interpreting this Regulation, the Commonwealth Court declared "it is obvious that this regulation has been established to protect water and land resources (both above and below ground) as well as the public health and safety." *Culp v. Consol Pennsylvania Coal Co.*, 506 A.2d 985, 989 (Pa. Cmwlth. 1986).

With this laudable and comprehensive legislative and regulatory framework as a guide, the Department's application form requires that the mining company "describe the measures to be taken to minimize damage, destruction or disruption of services" to various structures, including water lines. In Eighty-Four Mining Company's initial Subsidence Control Plan of its permit revision application it stated that Pennsylvania American Water Company would be provided with notice before it mined under its water line. Additionally, Pennsylvania American Water Company would

be provided the opportunity to review updated maps to determine what steps Pennsylvania American Water Company should take to minimize damage to its water line.

The Department was not satisfied with this plan and asked Eighty-Four Mining Company to identify "any additional measures or protection plans to minimize damage, destruction or disruption of service to...water lines" and any plans or measures taken "to eliminate the potential of an imminent hazard to human health and safety by longwall mining under the large...water lines." Eighty-Four Mining Company responded as follows:

> EFMC will work with the engineers and personnel of the utility to identify potential damage and possible service re: disruption to their facilities. EFMC will provide a schedule of planned mining activities to each affected utility and will remain [sic] communications with the utility as the mining approaches the structures. Methods which may be used to protect various utilities are: trenching around structures, trenching of sections of pipelines, installation of a slip sleeve protection in areas of predicted higher tension or compression, installation of additional shutoff valves to isolate sections of pipelines, maintenance of vertical or horizontal alignment with mechanical supports, ongoing inspections and monitoring of the structure. Other measures may be developed or required by specific conditions or circumstances.

The Department approved the Subsidence Control Plan and issued the permit revision. It attached Special Condition 18 to the Permit which reads as follows:

Special Condition 18

> Eighty-Four Mining Company shall conduct its underground mining activities so as to minimize damage, destruction or disruption in services provided by oil, gas and water wells; oil, gas and coal slurry pipelines; rail lines; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area unless otherwise approved by the owner of the facilities and the Department.

Eighty-Four Mining Company shall suspend its mining activities beneath urbanized areas, cities, towns and communities if its mining activities will present an imminent danger to the inhabitants of the urbanized areas, cities, towns or communities.

Eighty-Four Mining Company shall take all actions necessary to insure that the conditions above are met, including, but not limited to:

a. Before mining occurs in areas which may impact gas utilities through subsidence, Eighty-Four Mining Company will verify that gas service to impacted surface owners has been disconnected, as planned by the gas utility, or that mitigation plans designed to eliminate risk to human safety have been implemented. Verification herein required must be reported in writing to the McMurray District Mining Office, DEP prior to mining in areas which may impact gas utilities. In the alternative, Eighty-Four Mining Company may submit additional information, which must be approved by DEP prior to undermining, that demonstrates that subsidence will not cause damage to gas lines and subsequent risk to human safety.

b. With the consent of surface owners, Eighty-Four Mining must implement the Subsidence Control Plan and other mitigation measures contained in the permit application which are designed to minimize damage or destruction of utility lines; or disruptive in utility service.

c. Copies of the six month notification to the utilities, and copies of the schedule of planned mining activities submitted to the utilities, must also be provided to the Pennsylvania Public Utility Commission at the following address:

PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

d. Eighty-Four Mining Company shall maintain daily communication with utilities when mining activities are within two weeks of undermining the utility.

> Special conditions above shall not be construed as a waiver of the responsibility of public utilities to protect the public from danger and reduce hazards or to provide and maintain continuous service, as required by the Public Utility Code, 66 P.S. Section 101, *seq.* , and the rules and regulations promulgated thereunder. [Eighty-Four Mining Company's Notice of Appeal]

Although Special Condition 18 tracks language contained in the regulations, the depositions of various Department officials reveal that the Department has interpreted its regulations and Special Condition 18 to only require the giving of notice by the mining company as the steps necessary to "minimize or prevent damage." Moreover, when asked specifically, employees of the Department stated that they had conducted no investigation into whether the measures proposed in Eighty-Four Mining Company's Subsidence Control Plan could prevent subsidence damage to the 30-inch line.

This is especially important considering the fact that Section 1406.9(a) of the Act holds that if the Department determines that a proposed mining technique creates an imminent hazard to human safety, "utilization of such technique or extraction ratio shall not be permitted unless the mine operator, prior to mining, takes measures approved by the [Department] to eliminate the imminent hazard to human safety." As set forth above, Special Condition 18 contains similar language. However, when asked at depositions, both employees of Eighty-Four Mining Company and the Department indicated that the only actions Eighty-Four Mining Company had to take under the permit were to notify the water company that they would be mining under their lines. It would then be up to the water company to take any preventive measures to make sure the water line remains in operation. The Department's interpretation of the Regulations and Special Condition 18 allows mining to proceed even if it causes the complete destruction of the line.

Q. Has the Department made a decision as to whether or not

they would allow mining underneath the 30-inch line if it will result in the destruction of the line?

A. Yes.

Q. And what was that decision?

A. **That we will allow mining.**

Q. And that's a final decision?

A. I think that decision was made when we issued the Permit.

(Deposition of Jeffrey Jarrett, Director of District Mining Operations for the Department, p.41, line 15;p.42, line 3.) (emphasis added)

Moreover, an "issue paper" was prepared by the Department and produced during discovery. The Department stated in answers to interrogatories that the "issue paper" was "prepared in approximately late August 1995 by Joel Koricich and William Plassio" at Mr. Plassio's direction. Mr. Plassio is the District Mining Manager. The "issue paper" recognized, more than a month before the Department issued the permit, that to "continue past practice by only requiring notification of the utility...does not address imminent hazard situation, or public perception."

The Department's interpretation of its own regulations and the statutes it is charged with enforcing and administering is entitled to deference. *Mathies Coal Company v. Department of Environmental Resources,* 559 A.2d 506, 512 (Pa. 1989). However, when the Department abuses its discretion and ignores the clear language of both the regulations and the Act, then we are not bound by the Department's interpretation. *Daneker v. State Employees' Retirement Board,* 628 A.2d 491, 496-97 (Pa. Cmwlth. 1993); *Department of Environmental Resources v. Rushton Mining Company,* 591 A.2d 1168, 1174 (Pa. Cmwlth. 1991). An agency cannot, under the guise of

interpretation, ignore the language of its regulations, for the agency as well as the regulated public is bound by the regulation. *Delaney v. State Horse Racing Commission*, 535 A.2d 719 (Pa. Cmwlth. 1988). In this case, the Department completely ignores the language of its own regulations by only requiring notification to the water company. If the Department is correct, then most of the language cited above is surplusage. The regulations could be distilled to only one sentence merely requiring the mining company to notify utilities of its mining operations. There would be no need for any subsidence plans requiring coal companies to adopt measures to minimize mine subsidence such as leaving pillars in place or backfilling.

The Permit Revision authorizes Eighty-Four Mining Company to longwall mine under Pennsylvania American Water Company's 30-inch line without requiring Eighty-Four Mining Company to take measures to minimize damage or destruction to the line in clear violation of Sections 89.67(b), 89.141, and 89.143 of the Department's own Regulations. The Department, which admitted all 45 paragraphs of Pennsylvania American Water Company's Motion for Summary Judgment, argues that the burden is on Pennsylvania American Water Company to make sure that steps are taken to maintain water service to the thousands of residences and businesses served by the water line because it is mandated to provide continuous service by the Public Utility Commission. The requirement of utilities to maintain continuous service does not excuse the Department from carrying out the clear language of the Act and its own Regulations. This obligation does not constitute a license for others to disrupt or destroy public water supplies. The danger to the line and service is caused by the mining not the water company.

The construction of the bypass line does not excuse the Department from enforcing its own regulations and requiring Eighty-Four Mining Company to prepare a subsidence plan in accordance

with the law. More importantly, there is no guarantee that the temporary line will work. It too could be damaged by the mining, freezing temperatures, vandals, and even lightning. What then? Eighty-Four Mining Company has no plans to provide replacement water in the event of a catastrophe. What if a major fire developed in one of the many areas served by the line and the line was out of commission due to mine subsidence?

In this appeal, the Department has abused its discretion. These Regulations and this Act are clear. Notice is not sufficient to safeguard the lives and property of thousands of citizens.

Pennsylvania American Water Company and People United to Save Homes request that because the necessary subsidence plan was not included in the application we should rescind the issuance of the Permit Revision. Although this is clearly in our power to do, it would result in severe hardship to not only Eighty-Four Mining Company but to hundreds of hard-working men and women and families who rely on the mine for their livelihoods. Therefore, we will fashion a remedy that protects the citizens of Washington County while at the same time not unduly penalizing Eighty-Four Mining Company.

Eighty-Four Mining Company is a modern and sophisticated coal company. Likewise, the Department has an expert staff well versed in mining and mining methods. It should not be difficult for Eighty-Four Mining Company to fashion a subsidence plan in accordance with the Regulations and the Act which takes advantage of advances in technology so as to safeguard the water lines of Pennsylvania American Water Company.

Therefore, Eighty-Four Mining Company will be able to continue to longwall mine. It is prohibited from mining under Pennsylvania American Water Company's water lines until its revised

subsidence plan is approved by the Department or until Pennsylvania American Water Company gives permission to Eighty-Four Mining Company to mine under its lines.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES, and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**Consolidated with 95-233-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

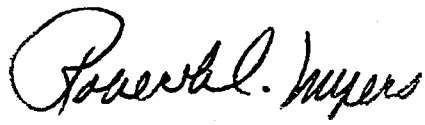
AND NOW, this 27th day of November, 1996, Pennsylvania American Water Company's Motion for Summary Judgment is **granted in part.** Eighty-Four Mining Company is prohibited from conducting mining under Pennsylvania American Water Company's lines until it has submitted a revised subsidence control plan and received approval thereof from the Department of Environmental Protection consistent with the requirements set forth in this Opinion or until Pennsylvania American Water Company has provided Eighty-Four Mining Company with permission to mine under its water line.

ENVIRONMENTAL HEARING BOARD

George J. Miller

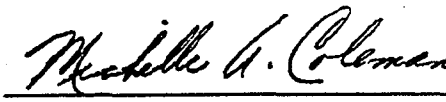
GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 95-232-R
(Consolidated with 95-233-R)



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **November 27, 1996**

See following page for service list.

EHB Docket No. 95-232-R
(Consolidated with 95-233-R)

c: **Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Steven Lachman, Esq.
Patience Robinson Nelson, Esq.
Diana Stares. Esq.
Western Region

For PUSH:
Robert W. Thomson, Esq.
MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK
Pittsburgh, PA

For Pennsylvania American Water Company:
Michael D. Klein, Esq.
LeBEOUF LAMB GREENE & MacRAE, L.L.P.
Harrisburg, PA
and
Jan L. Fox, Esq.
LeBEOUF LAMB GREENE & MacRAE, L.L.P.
Pittsburgh, PA

For Eighty-Four Mining Company:
Henry Ingram, Esq.
Thomas C. Reed, Esq.
Stephen C. Smith, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

med/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**(Consolidated with 95-233-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	**Issued: November 27, 1996**

OPINION AND ORDER ON EIGHTY-FOUR MINING COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PEOPLE UNITED TO SAVE HOMES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a permittee's motion for partial summary judgment directed against a citizen's group in an appeal of a mining permit revision to add acreage to the permittee's mine site. Although the appellant may challenge any matters which have arisen in connection with the application to add acreage to the site and the cumulative effect of the addition of acreage to the site, it is barred by the doctrine of administrative finality from challenging any matters approved by the Department of Environmental Protection in prior permitting actions which the appellant did not appeal. Those actions are now final, and the appellant may not use its appeal of the permit revision as a vehicle for challenging prior, unappealed permitting actions.

Secondly, where the appellant does not support the allegations in its response to the motion for partial summary judgment with proper documentation, the Board may not rely on those allegations.

OPINION

This consolidated appeal stems from the Department of Environmental Protection's ("Department") issuance of a revision to a mining permit held by Eighty-Four Mining Company ("Eighty-Four Mining").[1] Trial of this appeal is scheduled to commence on December 10, 1996.

On May 29, 1996, as amended on July 11, 1996, the Board ordered the parties to file dispositive motions on or before July 16, 1996. Oral argument on the motions was held on September 30, 1996. This Opinion addresses a motion for partial summary judgment filed by Eighty-Four Mining against People United to Save Homes ("PUSH") on July 12, 1996. PUSH filed a memorandum in opposition to the motion on August 19, 1996.

Summary judgment may be entered in whole or in part as a matter of law whenever there is no genuine issue of any material fact. Pa. R.C.P. 1035.2. Based on the uncontested affidavits of Michael Berdine, Eighty-Four Mining's planning engineer, and Joseph Leone, Chief of the Department's Bituminous Mine Permit Section, which accompany the motion, the undisputed facts in this matter are as follows. Eighty-Four Mining operates a longwall mine in Washington County known as "Mine 84." This site has been mined since 1897. Prior to Eighty-Four Mining's operation of Mine 84, the mine was owned and operated by BethEnergy Mines, Inc. ("BethEnergy") pursuant

---

[1]Columbia Gas of Pennsylvania, Inc. and the Township of South Strabane also filed appeals from the permit revision. In addition, Eighty-Four Mining filed an appeal objecting to the terms of the revision. These appeals have been settled and are no longer pending before the Board.

to Coal Mining Activity Permit No. 63831302 ("the original permit"), issued on March 30, 1987. The original permit covered 22,300 acres of subsurface area and approximately 200 acres of surface area. The subsidence control plan for the original permit covered approximately 7000 acres. The original permit authorized both room and pillar mining as well as longwall mining. On October 7, 1992, the Department issued a revision to the original permit ("the 1992 permit"). The 1992 permit covered 22,680 acres of subsurface area and approximately 200 acres of surface area. The subsidence control plan for the 1992 permit covered 16,940 acres. Several members of PUSH resided over the area covered by the 1992 permit revision subsidence control plan at the time the revision was either approved or issued. No member of PUSH filed an appeal of the 1992 permit revision.

Eighty-Four Mining acquired Mine 84 from BethEnergy on December 30, 1992. From that date until June 7, 1994, when the permit was transferred to Eighty-Four Mining ("the 1994 permit transfer"), the mine was operated under BethEnergy's permit. Prior to its purchase of the mine, Eighty-Four Mining made a decision to change the orientation of the longwall panels in a section of the mine site. This decision was implemented in January 1994 upon approval by the Department.

The 1994 permit transfer to Eighty-Four Mining increased the underground permit area to 35,307 acres and the surface area to 225.5 acres. The same members of PUSH who resided over the area covered by the 1992 subsidence control plan also resided over the area covered by the 1994 subsidence control plan. No member of PUSH filed an appeal from the 1994 permit transfer.

On September 22, 1995, the Department issued a revision to Eighty-Four Mining's permit ("the 1995 revision"). The 1995 revision added 1955 acres to the underground permit area and 5340 acres to the subsidence control plan area and deleted 1804 acres from the underground permit area

in the southern part of the mine.[2] This revision is the subject of the present appeal by PUSH and the Pennsylvania American Water Company.

Eighty-Four Mining's motion seeks summary judgment on 54 of the more than 200 objections raised by PUSH in its appeal. Although Eighty-Four Mining seeks summary judgment based on a number of grounds, the primary basis for its motion is that several of the objections raised by PUSH in its appeal relate to permit conditions or other issues in the 1995 permit revision which were also present in the 1992 permit revision and 1994 permit transfer. It is Eighty-Four Mining's position that PUSH is barred from raising these issues under the doctrine of administrative finality. Although PUSH acknowledges that the 1995 permit revision contains a number of the same conditions and other issues as did the 1992 permit revision and 1994 permit transfer, it argues that it is not barred by the doctrine of administrative finality from raising these issues, first, because the 1995 permit revision amounted to a "new permit" and, second, because the 1995 permit revision was issued under amendments to the Bituminous Mine Subsidence and Land Control Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. § 1406.1 *et seq.*, ("Mine Subsidence Act"), which became effective after the 1992 permit revision and 1994 permit transfer. Because much of Eighty-Four Mining's motion is based on the position that PUSH's objections are barred by administrative finality, we examine this issue first.

---

[2]There is no indication by either Eighty-Four Mining or PUSH that any members of PUSH reside over the area covered by the 1995 subsidence control plan who did not also reside over the area covered by the 1992 or 1994 subsidence control plans.

Administrative Finality

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). The Board has held that where a party aggrieved by an administrative action of the Department fails to appeal that action, neither the content nor validity of the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Tinicum Township v. DEP*, EHB Docket No. 95-266-MG (Opinion issued July 3, 1996); *Kennametal, Inc. v. DER*, 1990 EHB 1453. Eighty-Four Mining contends that because PUSH failed to appeal the issues in question in either 1992 when the permit was revised or in 1994 when the permit was transferred to Eighty-Four Mining, those issues are now final and PUSH is precluded from challenging them in this appeal.

The doctrine of administrative finality has been applied in the case of a permit renewal and permit reissuance to bar a third party from raising objections to issues which appeared in the original permit where the third party failed to file an appeal from the original permit issuance. *See New Castle Township Board of Supervisors v. DER*, 1994 EHB 1336; *Borough of Ridgeway v. DER*, 1994 EHB 1090, 1102; *Blevins v. DER*, 1986 EHB 1003. In the case of an appeal of a permit reissuance or renewal, the appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed. *Borough of Ridgeway, supra* at 1102; *Specialty Waste Services, Inc. v. DER*, 1992 EHB 382, 384.

PUSH asserts, however, that a different standard applies in the case of a permit revision which adds acreage to the permit area as compared to the renewal or reissuance of a permit. PUSH

directs us to 25 Pa. Code § 86.52, the regulation governing "permit revisions." Section 86.52(d) requires the Department to treat an application for a permit revision to add acreage to the permit area as an application for a new permit.[3] PUSH asserts that administrative finality has no application here since the permit revision amounts to a new permit.

In considering the positions advanced by Eighty-Four Mining and PUSH, we must address the purpose behind the doctrine of administrative finality. This issue was examined in *Wheeling-Pittsburgh,* where the Commonwealth Court held:

> 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 operation of administrative law.

348 A.2d at 767. Likewise, in *Tinicum Township, supra,* the Board explained that the policy behind the principle of administrative finality is to allow "the Department to go about its business without having to accept new challengers with new grounds for appeal which are brought more than 30 days after the Department's action has taken place." *Id.* at 7. Thus, once the Department has approved a permit, its conditions become final unless challenged within thirty days. Where those same conditions appear in subsequent permit renewals, they may not be challenged by either the permittee or a third party except under special circumstances. These circumstances include changes in statutes

---

[3]25 Pa. Code § 86.52(d) reads, "The addition of acreage for mining of coal shall be considered as an application for a new permit, except for insignificant boundary correction."

or resolutions, changes in permit conditions, or the development of previously unavailable evidence. *Tinicum Township, supra* at 12.

Where a permittee seeks to add acreage to its existing mining permit and subsidence control plan, it must apply for a revision to its existing permit. In reviewing the permittee's request to add acreage to its already permitted area, the Department must treat it as "an application for a new permit." 25 Pa. Code § 86.52 (d). The requirement that the Department treat an application to add acreage to a permitted area as an application for a new permit insures that a permittee who seeks to add new acreage to its mining permit area is placed in no better position than an applicant filing for a new permit to mine the same area. In determining whether to grant the application to add acreage, the Department must apply the same criteria and conduct the same evaluation as it would for a new permit to mine the area. If the Department approves the application to add acreage to the already permitted area, a revised permit is issued which covers the already permitted area plus the newly approved acreage.

Because the Department is required to review the application for additional acreage in the same manner as it would an application for a new permit, the doctrine of administrative finality may not be used to bar an appeal of the permit revision even though a party may not have appealed any of the earlier permits. Thus, a party may appeal the Department's approval of an application to add acreage to the permit site even though it did not challenge the original permit for the site or any subsequent permit revisions adding acreage to the site. To bar such an appeal on the basis of administrative finality would thereby produce an inequity in the law by allowing the permittee-applicant to receive more preferential treatment than a new applicant. Therefore, PUSH is correct

in its assertion that the application to add acreage must be viewed as a new permit and is subject to an appeal even though the appellant did not challenge any of the prior permitting actions.

However, PUSH goes one step further in its analysis and argues that, because a permit revision to add acreage must be evaluated by the Department as a new permit, this opens up all previous permitting actions to attack. It is PUSH's contention that, in its appeal of the permit revision, it may raise issues which were a part of the earlier permitting actions. We disagree with this interpretation. The requirement that the Department treat the application for additional acreage as an application for a new permit requires that the Department evaluate the application for additional acreage in the same manner and under the same criteria as it would an application for a new permit to mine the same area. It does not, however, require the Department to go back and review all previous permitting actions anew. Nor does it require the permittee to resubmit or the Department to reconsider all of the information previously submitted in support of earlier permit applications. The Department is required only to consider the permittee's request to add acreage to its already permitted area and to evaluate this request as it would an application for a new permit. To hold otherwise would nullify all previous permit approvals issued by the Department for the mine site in question and would require the permittee to reapply for areas which have already been permitted. We do not find that this is the intention of 25 Pa. Code § 86.52 (d).

In support of its argument, PUSH cites *Florence Mining Co. v. DER*, 1991 EHB 1301, which also involved an appeal of a permit revision to add acreage to the permit area. In *Florence Mining*, the appellant mining company had appealed the issuance of its original mining permit. However, the appeal was dismissed for failure to prosecute. Four years later, the Department issued a revised permit which increased the appellant's surface area by .6 acres and its subsurface area by 738 acres.

The appellant filed an appeal from the revised permit and, in doing so, objected to certain conditions in its revised permit which had also appeared in its original permit. These conditions dealt with effluent limitations; bonding; monitoring, sampling, reporting, and recordkeeping requirements; and the incorporation of certain regulations. The Department sought to preclude the appellant from challenging these conditions on the basis of administrative finality. The Administrative Law Judge presiding over the appeal ruled that administrative finality did not preclude the appellant from challenging these conditions in its appeal of the permit revision on the following basis:

> [T]here are issues involved in this appeal which Florence could not have raised in a challenge of its 1987 [coal mining activity permit]. Every issue raised in Florence's notice of appeal which is challenged by DER's motion is raised as to the .6 acres of new surface area and the 738 acres of new subsurface area...Moreover, where a 576 acre mine becomes a more than 1300 acre mine, DER must consider the cumulative impact of the new acreage and the original acreage on its decisions reflected in the 1987 [coal mining activity permit].

1991 EHB at 1308.

In the present appeal, unlike *Florence Mining*, many of PUSH's objections do not concern the new acreage added by the permit revision or even the cumulative impact of the new acreage and the original acreage. Rather, PUSH's objections focus on the original permitting action. In *Florence Mining*, the appellant was allowed to challenge conditions in the revised permit which had appeared in the original permit only because these conditions were affected by the addition of new acreage. In the present appeal, PUSH is using the issuance of the permit revision as a means of challenging earlier permitting actions.

Moreover, in *Florence Mining*, the appellant was able to demonstrate, through actual flow volumes and water quality analyses, that the estimates of water flow volume and water quality relied upon by the Department in its earlier permitting action were in fact incorrect. Thus, the new data necessitated a reconsideration of the effluent limits carried over from the original permit to the revised permit. There is no indication of similar changed circumstances in the present appeal.

PUSH asserts, however, that changed circumstances do exist since the 1995 revised permit was issued under a new law, the amended Mine Subsidence Act, which did not take effect until August 1994.[4] It is true that a change in the law between the time of the original action and the subsequent action may bar application of the doctrine of administrative finality. *See, e.g., Dithridge House v. DER,* 541 A.2d 827 (Pa. Cmwlth. 1988); *Tinicum Township, supra* at 12; *Specialty Waste Services,* 1992 EHB at 384. However, this is true only where the change in the law has somehow affected the issue which the appellant now seeks to raise.

The facts in *Dithridge House* illustrate this point. In 1973 a contractor applied for a public bathing place permit for a swimming pool constructed at a condominium complex. The Department denied the application on the basis that it did not comply with the Department's "Bathing Place Manual." The contractor did not appeal the denial. In 1979, the legislature amended the Public Bathing Law to exclude condominium pools from the definition of "public bathing place" except for certain enumerated cases. Six years later, Dithridge House submitted another application for a permit for the pool. It later requested permission to withdraw the application because it had received a legal opinion stating that the 1979 amendment exempted the pool from the permit requirement.

---

[4]In June 1994, the Mine Subsidence Act was substantially amended. The amended act, which became effective in August 1994, is commonly referred to as "Act 54."

The Department denied the request to withdraw the application, based on its view that the permit requirement still applied. Dithridge House appealed the Department's decision to the Environmental Hearing Board, which held that Dithridge House was precluded from challenging the Department's decision since it had not appealed the earlier denial. On appeal, the Commonwealth Court reversed the decision of the Board, holding that the intervening change in the law, and Dithridge House's status under the law, created an exception to the doctrine of administrative finality. Specifically, the Court held as follows:

> If Dithridge were precluded now from arguing that the permit requirement no longer applies to its pool, then Dithridge would remain subject to the permit requirement (and subject to the 1974 closure order for lack of a permit) while other similarly situated condominium pool operators, by virtue of the amendment, would not be. Circumstances involving an intervening change in the law, which would result in inequitable administration of the law if preclusion were applied, also create an exception to preclusion based on the doctrine of finality of administrative decisions. In the present case the policy of equitable administration of the laws overrides the policy served by the doctrine of administrative finality....

541 A.2d at 831.

The effect of an intervening change in the law was also examined in *Blevins v. DER*, 1986 EHB 1003. In 1977, the Department issued a permit for the operation of a natural renovation solid waste landfill. No appeal was filed. The permit was subsequently reissued in 1982 and in 1984. The appellants filed an appeal from both of the permit reissuances. After the issuance of the initial permit, but prior to the first and second reissuances of the permit, there was a change in the law on solid waste disposal. The initial permit was issued pursuant to the Pennsylvania Solid Waste

Management Act, Act of July 31, 1968, P.L. 788, 35 P.S. § 6001 *et seq.* This law was repealed in 1980 by the enactment of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 *et seq.* The permittee moved to dismiss the appeals on the basis of administrative finality, asserting that the 1980 solid waste law was essentially identical to the 1968 law. The Board rejected the permittee's argument, finding that the "quantity and quality of factors" considered under the 1980 law were not the same as those evaluated under the 1968 law. The Board found that the 1980 law had "expanded the scope of factors to be considered by DER prior to the issuance of a solid waste permit." In particular, the Board noted that under the 1980 law the Department (1) could deny a permit if it found that the permittee had shown a lack of ability or intention to comply with any provision of the Solid Waste Act or any of the acts referred to therein and (2) was required to consider the environmental concerns enunciated in Article I, § 27 of the Pennsylvania Constitution. To implement these factors, the Department developed special forms which were incorporated into the permit application. These requirements were not contained in the 1968 law and were not considered by the Department when it issued the initial permit. The Board noted that these issues, which were raised in the appeals of the permit reissuances, could not have been raised in an appeal of the original permit issuance.

In the present case, PUSH does not indicate that the issues which it seeks to raise in this appeal, and which are the subject of Eighty-Four Mining's motion for summary judgment, could not have been raised prior to the amendments to the Mine Subsidence Act. Although it asserts that it is not subject to the doctrine of administrative finality due to the changes in the Mine Subsidence Act which occurred between the earlier permitting actions and the 1995 permit revision, it makes no effort to show that the change in the law affected its ability to raise these issues. Unlike *Blevins*

where the entire statutory scheme under which the permit was issued changed, here certain sections of an existing act were amended, and PUSH has not indicated how such changes affect the issues which it seeks to raise with respect to earlier permitting actions.

Based on this analysis, we find that PUSH may challenge only those issues which have arisen in connection with the application to add acreage and may not use its appeal of the permit revision as a vehicle for challenging prior permitting actions. We now turn to the specific objections in the notice of appeal which are the subject of Eighty-Four Mining's motion for partial summary judgment.

Bonding Requirements

In paragraphs 3.m and 3.gt through 3.gy of the notice of appeal, PUSH asserts that the amount of the subsidence bond required for the 1995 permit revision is inadequate. The amount of the subsidence bond for the 1995 permit revision is $10,000. This was also the amount of the subsidence bond for the 1992 permit revision and the 1994 permit transfer. According to the affidavit of Joseph Leone, Chief of the Department's Bituminous Mine Permit Section, the Department always requires a subsidence bond of $10,000 for underground mining permits. (Exhibit N to Motion) Eighty-Four Mining argues that, because the amount of the subsidence bond for both the 1992 and 1994 permits was $10,000 and because the Department always requires a $10,000 subsidence bond as a matter of policy, PUSH should have raised the issue of the adequacy of the subsidence bond in an appeal of either the 1992 permit revision or the 1994 permit transfer.

We disagree with Eighty-Four Mining that administrative finality precludes PUSH from challenging the adequacy of the subsidence bond at this time. As noted above, the permit revision adds 1955 new acres to the underground permit area and 5340 acres to the area covered by the

subsidence control plan. Thus, the bond covers a different area than that covered by the 1992 and 1994 permits. As in *Florence Mining*, this is a different issue than that which could have been raised in an appeal of the earlier permits because it applies to a different permit area and subsidence control plan area. Therefore, PUSH could not have raised this issue in an appeal of the earlier permits. This is true even if, as Mr. Leone states in his affidavit, the Department always requires a subsidence bond in the amount of $10,000 as a matter of policy. Although PUSH may have chosen not to challenge $10,000 as an adequate bond amount when the acreage of the underground mining permit was 35,307 and the area of the subsidence control plan was 16,940 acres, that does not preclude PUSH from challenging the adequacy of the bond when the underground acreage has increased by a net amount of 151 acres and the area of the subsidence control plan has increased by 5340 acres. Moreover, the fact that the Department always requires a subsidence bond in the amount of $10,000 regardless of the amount of the permit acreage may be evidence that the Department failed to give this matter sufficient consideration.

This is similar to the situation in *City of Philadelphia v. DER*, EHB Docket No. 92-034-E (Consolidated) (Adjudication issued February 13, 1996), in which the City of Philadelphia challenged the percentage of interest expense which the Department held to be recoverable under the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. § 701 *et seq.*, commonly referred to as "Act 339." Since 1953, the Department or its predecessor had allowed 1.5% of the amount of interest expense to be recovered for subsidy applications filed under Act 339. Every Act 339 application form contained the statement that the interest allowed by the Department was 1.5%. In a number of consolidated appeals filed by the City of Philadelphia beginning in 1992, the City challenged the 1.5% figure. The Department asserted that the City's challenge was barred by the

doctrine of administrative finality since the City had not challenged the 1.5% rate in prior years. The Department also asserted that the use of the 1.5% rate since 1953 made it a Departmental policy, which allowed the Department to stabilize its expenditures and to make a reasonable expenditure of the public funds.

The Board disagreed that the City was barred by the doctrine of administrative finality from challenging the 1.5% limitation on recoverable interest expense. In reaching this conclusion, the Board agreed that the City could not go back and challenge prior decisions by the Department to impose the 1.5% rate. However, the Board found that the Department made a new decision with each new year's crop of Act 339 applications to impose the 1.5% rate and, therefore, the appeals were timely. *Id.* at 38-39.

Likewise, in the present case, the Department must make a new decision with each application for a new mining permit or for additional acreage as to the amount of the subsidence bond to be imposed. Even though the Department imposes a $10,000 bond as a matter of policy, as it did a recovery rate of 1.5% in *City of Philadelphia*, a new decision is made with each permit application and, therefore, PUSH's appeal of the adequacy of the bond amount is timely.

Based on this reasoning, we conclude that PUSH is not barred from challenging the adequacy of the subsidence bond in this appeal. Therefore, summary judgment is denied with respect to paragraphs 3.m and 3.gt through 3.gy of the notice of appeal.

Conditions Appearing in 1995 Permit Revision and Earlier Permitting Actions

The following paragraphs in the notice of appeal challenge conditions in the 1995 permit revision which also appeared in the 1992 permit revision and/or the 1994 permit transfer: 3.o, 3.q, 3.r, 3.s, 3.t, 3.ac, and 3.ed.

Paragraphs 3.o and 3.s pertain to surface mining operations. Paragraph 3.o challenges a condition in the 1995 permit revision which contains a variance for conducting surface mining operations within 100 feet of certain streams. This same variance appeared in both the 1992 permit revision and the 1994 permit transfer. (Exhibit G, para. 45) Paragraph 3.s of the notice of appeal states that the permit application materials do not describe methods and techniques sufficient to prevent adverse hydrologic or water quality impacts that could result from conducting mining operations within 100 feet of an unnamed tributary to Chartiers Creek. Condition E.11 of the 1995 permit revision authorizes surface mining operations within 100 feet of the unnamed tributary to Chartiers Creek for an access road stream crossing and a sedimentation pond. This stream variance was originally approved in 1992 and was revised in 1994. (Exhibit G to Motion, para. 48)

According to the affidavit of Michael Berdine, the 1995 permit revision did not add any new surface operations or facilities to the permit. All of the surface operations and facilities were permitted either under the original mining permit or by revisions to the permit which predated the 1995 revision. (Exhibit G, para. 56) Clearly, the variances in question were in no way impacted by the 1995 permit revision, which did not add to or alter the amount of surface area subject to the mining permit. Because the 1995 permit revision did not affect any surface operations or facilities, PUSH's objections are untimely. Therefore, Eighty-Four Mining is granted summary judgment as to paragraphs 3.o and 3.s of the notice of appeal.

Paragraphs 3.q and 3.t of the notice of appeal deal with effluent limits and monitoring requirements in the permit. Paragraph 3.q objects to the effluent limits established for outfall 009. These effluent limits were first imposed in a permit revision in 1991. The monitoring frequency for outfall 009 was imposed in 1994 with the permit transfer. No changes occurred between the 1994

permit transfer and the 1995 permit revision with regard to effluent limitations or monitoring frequency. (Exhibit G to Motion, para. 46) Paragraph 3.t of the notice of appeal objects to the sufficiency of the monitoring requirements with regard to certain springs. These monitoring requirements were first adopted as part of the 1994 permit revision. (Exhibit G to Motion, para. 49)

There is insufficient information in both Eighty-Four Mining's motion and PUSH's memorandum to determine whether these conditions were impacted by the addition of acreage as a result of the permit revision. In *Florence Mining*, it was determined that the appellant was not barred from raising issues as to effluent limits and monitoring requirements in the permit revision even though the effluent limits and monitoring requirements had not changed from those in the original permit. There, it was determined that the Department was required to reevaluate these conditions in light of the additional acreage and the cumulative impact caused by the addition of acreage. However, in *Florence Mining* the mining company also was able to demonstrate changed circumstances based on new data which showed the Department's estimates to be inaccurate. Because we do not have sufficient data before us to determine whether the addition of acreage to the underground permit area and the area of the subsidence control plan impacts the conditions in question, we are unable to rule on this issue at this time. Therefore, Eighty-Four Mining's motion is denied with respect to paragraphs 3.q and 3.t of the notice of appeal.

Paragraph 3.r of the notice of appeal contends that the permit conditions are insufficient to insure that the Ellsworth Mine No. 51 pool will be maintained at a certain elevation. Condition E.9 of the 1995 permit revision deals with the elevation of the Ellsworth Mine No. 51 pool. This condition also appeared in the 1992 permit revision and the 1994 permit transfer. (Exhibit G to Motion, para. 47) As with paragraphs 3.q and 3.t, there is insufficient information for us to make a

determination as to whether the addition of acreage by the 1995 permit revision impacts Condition E.9. On that basis, summary judgment must be denied with respect to paragraph 3.r of the notice of appeal.

Paragraphs 3.ac and 3.ad of the notice of appeal challenge special conditions in the permit revision dealing with subsidence control. Paragraph 3.ac avers that the special conditions regarding subsidence control are insufficient to protect structures which the law requires to be protected. Paragraph 3.ad asserts that the special conditions regarding subsidence control allow submissions of information after the public comment and review period.

The 1995 permit revision contains four special conditions regarding subsidence control. Three of these conditions also appeared in the 1994 permit transfer. Eighty-Four Mining asserts that PUSH should be precluded from challenging the adequacy of these three conditions in the instant appeal since they could have been challenged in an appeal of the 1994 permit transfer. Although it is true, as Eighty-Four Mining notes, that PUSH could have challenged these conditions in an appeal of the 1994 permit transfer, the 1995 permit revision also affects the areas subject to subsidence control. The 1995 permit revision caused an additional 5340 acres to be subject to the subsidence control plan. Even though the 1994 permit transfer contained three of the same provisions which PUSH is now challenging, these conditions now apply to a different, more expanded area. Because the subsidence control conditions apply to a different area, PUSH may not be precluded from challenging these conditions at this time. Therefore, summary judgment is denied with respect to paragraphs 3.ac and 3.ad of the notice of appeal.

Impact of Mining on Utility Companies

PUSH's notice of appeal also contains a number of objections relating to the impact of mining on utilities in the area. These objections are contained in paragraphs 3.u, 3.v, 3.fw, 3.hh, 3.x, 3.z, 3.dw, 3.dy, and 3.dz of the notice of appeal. Eighty-Four Mining again asserts that these objections should be barred on the basis of administrative finality since a number of utility lines are located over areas covered by both the 1992 and/or 1994 mining permits and subsidence control plans. PUSH responds that it is simply requesting that the 1995 subsidence control plan comply with the law and minimize damage to utilities, regardless of whether this was done in previous subsidence control plans.

According to the affidavit of Michael Berdine, utility lines, such as gas lines, Pennsylvania American Water Company's thirty-inch water line, telephone lines and electric lines, are located over the areas covered by the 1992 permit revision, the 1994 permit transfer *and* the 1995 permit revision. (Exhibit G to Motion, para. 53) Because the 1995 permit revision affects areas over which utility lines are located, the Department was required to assess these areas in connection with Eighty-Four Mining's plan for subsidence control. Moreover, because the 1995 permit revision added substantial acreage to the area covered by the subsidence control plan, it was necessary for the Department, in reviewing the request for a revision, to evaluate the subsidence control plan with respect to the acreage to be covered by the 1995 permit revision.

It is PUSH's contention that the subsidence control plan adopted in connection with the 1995 permit revision does not provide adequate protection for utility lines located in the area of mining and the area covered by the subsidence control plan. Because the 1995 permit revision covers an area on which utility lines are located and because the Department was required to examine and

approve the subsidence control plan submitted by Eighty-Four Mining in connection with the 1995 permit revision, PUSH is not precluded by the doctrine of administrative finality from raising these issues at this time. Therefore, Eighty-Four Mining's motion is denied with respect to paragraphs 3.u, 3.v, 3.fw, 3.hh, 3.x, 3.z, 3.dw, 3.dy, and 3.dz of the notice of appeal.

Hazards to Area Residents

PUSH also raised a number of objections in its notice of appeal relating to hazards posed to area residents by mining. These include exposure to methane gas (paragraph 3.ea), subsidence damage to septic systems (paragraph 3.eb), and increased levels of radon gas (paragraph 3.ec). Eighty-Four Mining asserts that these issues could have and should have been raised in an appeal of an earlier permitting action since members of PUSH have resided in the area affected by the mining since at least as early as the 1992 permit revision. Eighty-Four Mining contends that the 1995 permit revision poses no new risks in these areas.

Whether the 1995 permit revision does, indeed, pose a risk of imminent harm to members of PUSH in the areas described above is a factual question which may not be resolved in a motion for summary judgment. In reviewing the application to add acreage to Eighty-Four Mining's permit area, the Department was required to evaluate the cumulative impact of mining under the new permit area. *Florence Mining, supra.* If it is demonstrated that mining in the area poses an imminent threat of harm to residents by exposure to methane or radon gas or damage to septic systems, this may be evidence that the Department abused its discretion in approving the revision to add more acreage. Applying the doctrine of administrative finality in such a case could have the unintended result of barring an appellant who is exposed to imminent harm from challenging it simply because it was determined in an earlier permitting action, either correctly or incorrectly, that no such threat of harm

existed. Therefore, on this ground we deny Eighty-Four Mining's motion with respect to paragraphs 3.ea, 3.eb, and 3.ec of the notice of appeal.

Surface Activities

PUSH also raises a number of issues in its appeal regarding surface activities. These issues are raised in the following paragraphs of the notice of appeal: 3.ar, 3.as, 3.cp through 3.cw, 3.ei, 3.en, 3.fd, 3.fm, and 3.ft. Specifically, these paragraphs contend that the application for the 1995 permit revision did not contain information regarding surface operations. Eighty-Four Mining counters that such information was not required in the application since the 1995 permit revision did not add any new surface area to the permit. PUSH responds, first, that such information was required since the application was to be considered an application for a new permit and, thus, included the entire permit area, both subsurface and surface. We have already addressed and dismissed this argument. In addition, PUSH contends that, even if the 1995 permit revision added only subsurface area, nonetheless, underground mining activities will affect the surface and, therefore, surface structures should have been considered in connection with the 1995 permit revision. In order to address this contention, it is necessary to consider what information is required by the regulations with regard to surface area.

Paragraphs 3.ar and 3.as of PUSH's notice of appeal state that Eighty-Four Mining failed to comply with the requirements of 25 Pa. Code § 86.62 (2) by failing to provide the information required by this regulation. Section 86.62 (2) of the regulations requires a mining application to include the names and addresses of "every legal or equitable owner of record of the coal to be mined and areas to be affected by surface operations and facilities" and "the holders of record of a leasehold interest in the coal to be mined and areas to be affected by surface operations and facilities." 25 Pa.

Code § 86.62 (2) (ii) and (iii). Section 86.62 (2) clearly requires that this information is to be provided for areas to be affected by *surface operations and facilities.* It does not pertain to surface areas to be affected by underground operations. According to the affidavit of Michael Berdine, the 1995 permit revision did not add any new surface operations or facilities. (Exhibit G to Motion, para. 56) It is not disputed by PUSH that the 1995 permit revision did not add any new surface operations or facilities. Because the 1995 permit revision did not involve any new surface operations and facilities, Eighty-Four Mining was not required to provide this information as part of its application. Therefore, summary judgment is granted to Eighty-Four Mining with respect to paragraphs 3.ar and 3.as of the notice of appeal.

Paragraphs 3.cp through 3.cs of the notice of appeal contend that Eighty-Four Mining's application did not comply with 25 Pa. Code § 89.71 because it failed to include a reclamation plan. Section 89.71 of the regulations requires that a mining application contain a reclamation plan for lands which have been or will be disturbed in support of underground mining activities. 25 Pa. Code § 89.71(a). According to the affidavit of Mr. Berdine, no surface areas will be affected by the 1995 permit revision. PUSH did not demonstrate that any evidence exists to the contrary. Because the 1995 permit revision does not involve any surface areas, Section 89.71 (a) is not applicable. Nor was Eighty-Four Mining required to resubmit a reclamation plan for other areas of the mine site for which a plan has already been submitted. Therefore, Eighty-Four Mining is granted summary judgment on paragraphs 3.cp through 3.cs of the notice of appeal.

Paragraphs 3.ct through 3.cw of the notice of appeal contend that Eighty-Four Mining failed to comply with 25 Pa. Code § 89.72. Subsection (a) of Section 89.72 states, "The reclamation plan shall contain a statement of the condition, capability, and productivity of lands greater than five acres

which will be affected by surface operations and facilities within the proposed permit area..." Again, this regulation deals only with surface operations and facilities. Because the application for the 1995 permit revision did not pertain to surface operations and facilities, Eighty-Four Mining was not required under Section 89.72 to submit a reclamation plan with its application. Therefore, summary judgment is granted to Eighty-Four Mining on paragraphs 3.ct through 3.cw of the notice of appeal.

Paragraphs 3.ei and 3.en of the notice of appeal contend generally that the application for permit revision did not contain information concerning surface activities to be conducted or surface land which will be affected by surface activities. As stated, no new surface activities are covered by the 1995 permit revision. (Exhibit G to Motion, para. 56) Because the 1995 permit revision did not add any surface activities to those which were already permitted, there was no requirement that Eighty-Four Mining provide information on surface activities or surface land to be affected by surface activities in the permit revision application. Therefore, summary judgment is granted to Eighty-Four Mining on paragraphs 3.ei and 3.en of the notice of appeal.

Paragraph 3.fd of the notice of appeal asserts that the permit application was deficient because it did not contain sufficient inventory data on all water supplies within 1000 feet of each surface activity site. Likewise, paragraph 3.fm of the notice of appeal contends that the permit application did not include an adequate narrative addressing water quality impacts on streams which will receive mine drainage and runoff from surface activity sites. As noted, the 1995 permit revision did not authorize any new surface activity sites. Therefore, Eighty-Four Mining was not required to provide such information. On that basis, summary judgment is granted to Eighty-Four Mining on paragraphs 3.fd and 3.fm of the notice of appeal.

Paragraph 3.ft of the notice of appeal challenges the fact that the permit application did not include "a drawing for each shaft, slope or drift entry showing those features which are relevant to protecting the hydrologic balance." According to the affidavit of Michael Berdine, no shaft, slope or drift entries were added by the 1995 permit revision. PUSH does not dispute this contention. Therefore, summary judgment is granted to Eighty-Four Mining on paragraph 3.ft of the notice of appeal.

Urbanized Areas

Paragraph 3.w of the notice of appeal states that the mining activities present an imminent danger to the inhabitants of urbanized areas, cities, towns and communities on the surface above the activities. This issue is governed by 25 Pa. Code § 89.143 (f), which reads as follows:

> (f) *Urbanized areas.* Underground mining activities shall be suspended beneath urbanized areas, cities, towns and communities, and adjacent to or beneath industrial or commercial buildings, solid and hazardous waste disposal areas, major impoundments or perennial streams, if the activities present an imminent danger to the inhabitants of the urbanized areas, cities, town or communities.

25 Pa. Code § 89.143 (f).

Eighty-Four Mining argues that because there is no definition of "urbanized area" in the Mine Subsidence Act, 52 P.S. § 1406.1 *et seq.*, we must apply the common meaning of "urbanized area." (Citing *Centolanza v. Lehigh Valley Dairies, Inc.*, 658 A.2d 336 (Pa. 1995)) Eighty-Four Mining asserts that the common meaning of "urban area" is "a city or town," based on the definition in *Webster's Third New International Dictionary of the English Language* (Unabridged), 1971 ed.,

page 2520.[5] Because the 1995 permit revision does not authorize any mining beneath a city or town, Eighty-Four Mining argues that Section 89.143 (f) is not applicable.

We disagree that Section 89.143 (f) applies only to mining beneath an "urban area", whether "urban area" is defined as a city or a town. Although labeled "Urbanized areas," this section by its very language states that it is not limited solely to urbanized areas. Section § 89.143 (f) states that underground mining activities shall be suspended beneath, not just urbanized areas, but also cities, towns *and* communities where the activities pose an imminent danger to the inhabitants of these areas. Under Eighty-Four Mining's reasoning, we would also be required to ignore the section's reference to waste disposal areas, major impoundments and perennial streams since these do not fall within the definition of "urban area."

Although the area over which the permitted activities are being conducted may not qualify as a city or town, it may well qualify as a community, given the number of residents impacted by the mining activities. On that basis, we cannot find, as Eighty-Four Mining argues, that 25 Pa. Code § 89.143 (f) is inapplicable to this appeal. Therefore, summary judgment is denied with respect to paragraph 3.w of the notice of appeal.

Subsidence Damage

Paragraph 3.ab of the notice of appeal contends that the permit application failed to demonstrate compliance with 25 Pa. Code § 89.143 (b) (1). Section 89.143 (b) (1) states that underground mining activities shall be planned and conducted in a manner which prevents subsidence damage to (i) public buildings and noncommercial structures customarily used by the

---

[5]According to the definition in *Webster's Ninth New Collegiate Dictionary* (1989), page 1298, the definition of "urban" is "of, relating to, characteristic of, or constituting a city."

public; (ii) dwellings, cemeteries, municipal public service operations and municipal utilities which were in place on April 27, 1966; (iii) impoundments and other bodies of water with a storage capacity of 20 acre feet or more; (iv) aquifers, perennial streams and bodies of water which serve as a significant source for a public water supply system; and (v) coal refuse disposal areas. Paragraphs 3.fv, 3.hf and 3.hg of the notice of appeal contain a similar objection. In addition, paragraph 3.gf of the notice of appeal objects that the application did not include a subsidence control plan map identifying the features set forth in 25 Pa. Code § 89.143 (b) (1).

Eighty-Four Mining argues that 25 Pa. Code § 89.143 (b) (1) was based on former Section 4 of the Mine Subsidence Act, former 52 P.S. § 1406.4. Former Section 4 was repealed by the June 1994 amendments to the Mine Subsidence Act, which became effective on August 22, 1994 ("the Act 54 amendments"). Eighty-Four Mining points out that some of the structures and features which were protected by former Section 4 of the Mine Subsidence Act are now protected by Section 9.1 (c) of the amended Mine Subsidence Act. Section 9.1 (c) was added by the Act 54 amendments. Section 9.1 (c) states that underground mining activities shall not be conducted beneath or adjacent to any of the following structures, unless the subsidence control plan demonstrates that subsidence will not cause material damage to or reduce the reasonably foreseeable use of such features or facilities: public buildings and facilities; churches, schools or hospitals; impoundments with a storage capacity of 20 acre-feet or more; or bodies of water with a volume of 20 acre-feet or more. 52 P.S. § 1406.9a. Because Section 9.1 (c) does not include dwellings, cemeteries, municipal public service operations and municipal utilities which were in place on April 27, 1966, Eighty-Four Mining contends that these structures are no longer protected.

PUSH argues that these structures were not eliminated from protection by the passage of the Act 54 amendments. First, PUSH points out that the Mine Subsidence Act continues to require the permit application to "set forth a detailed description of the manner, if any, by which the applicant proposes to support the surface structures overlying the bituminous mine or mining operation" and further requires the Department to determine whether "the application discloses that sufficient support will be provided for the protected structures..." 52 P.S. § 1406.5 (a). The Act further requires that the permit application set forth the measures the mine operator shall adopt "to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land..." *Id.* at § 1406.5 (e). Finally, the Mine Subsidence Act empowers the Department "to adopt such rules, regulations, standards and procedures as shall be necessary to protect the air, water and land resources of the Commonwealth and the public health and safety from subsidence..." *Id.* at § 1406.7 (b). PUSH asserts that these provisions of the Mine Subsidence Act, as amended, provide the authority for 25 Pa. Code § 89.143 (b).

Section 89.143 was amended in December 1995, after the effective date of the Act 54 amendments to the Mine Subsidence Act. The December 1995 amendments did not eliminate the requirement in 25 Pa. Code § 89.143 that mining activities be conducted in a manner which prevents subsidence damage to dwellings, cemeteries, municipal public service operations and municipal utilities which were in place on April 27, 1966. Moreover, as PUSH points out, although the Mine Subsidence Act, as amended, does not single out these structures for special protection, it does require a coal mine operator to describe in his permit application the measures he will adopt to prevent subsidence causing damage and to maintain the value and reasonably foreseeable use of the

surface land. 52 P.S. § 1406.5 (e). Therefore, we reject Eighty-Four Mining's argument that the Act 54 amendments to the Mine Subsidence Act rendered any part of Section 89.143 (b) invalid.[6]

Based on the above, we find that Eighty-Four Mining was required to submit information concerning the prevention of subsidence damage to the structures listed in paragraph (1) of Section 89.143 (b). Therefore, summary judgment is denied with respect to paragraphs 3.fv, 3.gf, 3.hf and 3.hg of the notice of appeal and that portion of paragraph 3.ab dealing with 25 Pa. Code § 89.143 (b) (ii).

Eighty-Four Mining also seeks summary judgment with respect to paragraph (iii) of Section 89.143 (b) (1), which requires that mining activities be conducted in a manner to prevent subsidence damage to impoundments and other bodies of water with a storage capacity of 20 acre feet or more. In support of its contention, Eighty-Four Mining relies on the affidavit of Michael Berdine, which states that there are no impoundments or other bodies of water with a storage capacity of 20 acre feet or more over the area covered by the 1995 permit revision subsidence control plan. (Exhibit G to Motion, para. 54) However, on September 18, 1996, the Board conducted a view of the Eighty-Four Mining permit site. During this view, the parties visited a body of water located in the vicinity of the area to be mined by Eighty-Four Mining. Although it was not apparent from the site view whether the body of water in question had a storage capacity of at least 20 acre feet or whether this

---

[6]PUSH also notes that the mining application is to be "on a form prepared and furnished by the department." 52 P.S. § 1406.5 (a). According to PUSH, Module 18 of the permit application form used by the Department asks the applicant to ""describe in detail how mining activities will be planned and conducted to prevent subsidence damage to the following features as present within the subsidence control plan area" and then lists the structures named in Section 89.143 (b). Unfortunately, PUSH did not include a copy of Module 18 with its response or an affidavit confirming that Module 18 requests this information. Therefore, we may not rely on it.

particular body of water was affected by the 1995 permit revision, this raises a question of material fact. Where a question of material fact exists, we may not grant summary judgment. Therefore, Eighty-Four Mining is denied summary judgment on that portion of paragraph 3.ab of the notice of appeal dealing with 25 Pa. Code § 89.143 (b) (1) (iii).

Mitigation Plans

In paragraph 3.y of the notice of appeal, PUSH avers that the Department did not require Eighty-Four Mining to develop and implement mitigation plans designed to eliminate risk to human safety. In its motion, Eighty-Four Mining states that it is aware of no statutory or regulatory authority which requires an underground mine permit applicant to develop and implement mitigation plans to eliminate risk to human safety. PUSH provided no response to this argument in its memorandum. However, based on our review of the Mine Subsidence Act, we find that Eighty-Four Mining is not entitled to summary judgment on this issue.

Although there is no provision in the Mine Subsidence Act which states, *per se*, that a mining applicant must develop a mitigation plan to eliminate risk to human safety, there is ample authority in the Act for requiring an applicant to develop and implement mitigation measures designed to prevent risk to human safety from subsidence damage. Section 9.1 of the Mine Subsidence Act is labeled "Prevention of hazards to human safety..." Pursuant to this section, if the Department determines and notifies a mine operator that a proposed mining technique or extraction ratio will result in subsidence which creates an imminent hazard to human safety, the mine operator may not be permitted to utilize this technique or extraction ratio unless the operator takes measures approved by the Department to eliminate the imminent hazard. 52 P.S. § 1406.9a (a). Whether this provision applies in the present case is a question of fact which cannot be determined from Eighty-Four

Mining's motion for summary judgment. In addition, as discussed in the preceeding section, Section 5 of the Mine Subsidence Act requires a mine operator to provide a detailed description of the manner by which surface structures shall be supported and the measures the operator will adopt to prevent subsidence damage. Thus, a mine operator may be required under the Mine Subsidence Act to develop and implement mitigation measures to prevent risk of imminent harm to human safety. On that basis, we must deny Eighty-Four Mining's motion for summary judgment with respect to paragraph 3.y of the notice of appeal.

Surface Protection

In paragraph 3.df of the notice of appeal, PUSH objects that the permit application did "not include a statement of the method of surface owner protection to be provided under § 6 (a) of the Bituminous Mine Subsidence and Land Conservation Act or 25 Pa. Code § 89.145." This is based on 25 Pa. Code § 89.141 (d) (3) which requires that the permit application include a "statement of the method of surface owner protection to be provided under section 6 (a) of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.6 (a)) or § 89.145 (relating to surface owner protection)."

Section 6 (a) of the Mine Subsidence Act was repealed in 1994 by the Act 54 amendments, prior to the issuance of the 1995 permit revision. Therefore, to the extent that Section 89.141 (d) (3) of the regulations relies on former Section 6 (a) of the Mine Subsidence Act, Eighty-Four Mining's motion for summary judgment is granted.

It is Eighty-Four Mining's further contention that the repeal of Section 6 (a) and the adoption of new provisions pursuant to the Act 54 amendments render 25 Pa. Code § 89.145 (b) no longer effective. PUSH counters that no part of 25 Pa. Code § 89.145 was rendered invalid by the repeal

of Section 6 (a) of the Mine Subsidence Act and asserts that this regulation remains valid and unaffected by the deletion of Section 6 (a).

Section 89.145 reads as follows:

> (a) The operator shall correct material damage resulting from subsidence caused to surface lands including perennial streams as protected under § 89.143 (d) [relating to the protection of perennial streams], to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence.
>
> (b) Within 10 days of being advised of a claim of subsidence damage to a structure or surface feature, either under this section or section 6 (a) of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.6 (a)), the operator shall provide the Department with a report of the claim which shall include the following information:
>
> (1) The date of the claim,
>
> (2) The name, address and telephone number of the owner of the structure, surface feature or surface land claimed to be damaged.
>
> (3) The number assigned to the structure or feature under § 89.142 (a) (6) (relating to maps),
>
> (4) A mine map, scale 1 inch = 100 feet or 200 feet, showing the structure, feature or surface land and the extent of mining either beneath or adjacent to it.
>
> (5) Other information pertinent to the investigation.

25 Pa. Code § 89.145.

We disagree with Eighty-Four Mining's argument that subsection (b) of Section 89.145 was rendered invalid by the repeal of Section 6 (a) of the Mine Subsidence Act. First, Section 89.141 (d) (3) requires a statement of surface owner protection to be provided under Section 6 (a) of the Act *or* Section 89.145 of the regulations. Second, paragraph (b) of Section 89.145 refers to claims of subsidence damage to a structure or surface feature "*either* under this section *or* under section 6 (a) of The Bituminous Mine Subsidence and Land Conservation Act." (Emphasis added) Therefore, the requirement that surface owner protection be provided under Section 89.145 (b) is independent of former Section 6 (a) of the Act. Moreover, although Section 89.145 was amended in December 1995, after the repeal of Section 6 (a), this provision was not deleted. Based on this reasoning, we reject Eighty-Four Mining's argument that 25 Pa. Code § 89.145 (b) was rendered invalid by the repeal of former Section 6 (a) of the Mine Subsidence Act. Therefore, summary judgment is denied with respect to paragraph 3.df of the notice of appeal.

Mining Technique

In paragraph 3.ed of the notice of appeal, PUSH asserts that the Department acted unlawfully by permitting "a proposed mining technique that creates an imminent hazard to human safety." The mining technique approved in the 1995 permit revision is longwall mining with room and pillar mining in the development areas. (Exhibit G, para. 64) The same method was approved in the 1992 permit revision and the 1994 permit transfer. (Exhibit G, para. 64) In fact, longwall mining has been approved for Mine 84 since 1976. (Exhibit G, para. 64) Because longwall mining (with room and pillar mining for development areas) has been approved at Mine 84 since 1976, Eighty-Four Mining argues that this objection could have and should have been raised in an earlier permitting action.

It is true that PUSH could have raised the issue of the safety of longwall mining in an earlier appeal, and this issue is administratively final with respect to the area already permitted by the Department in prior actions. However, PUSH could not have raised this issue with respect to the 1955 acres of new underground acreage added by the 1995 permit revision or 5340 acres added to the subsidence control plan by the 1995 permit revision. Nor could PUSH have challenged the cumulative effect of permitting additional longwall mining on the acreage added by the 1995 permit revision. Because these issues could not have been raised in an earlier action, PUSH may not be foreclosed from raising them at this time. Therefore, Eighty-Four Mining's motion for summary judgment is denied with respect to paragraph 3.ed of the notice of appeal.

Module 24

In paragraph 3.ej of the notice of appeal, PUSH objects to the fact that Eighty-Four Mining did not complete Module 24 as part of its application for permit revision. Module 24 is entitled "Social and Economic Impact Justification" (Exhibit N to Motion, para. 8) This module requires information to implement the provisions of 25 Pa. Code § 95.1 (b) concerning discharges to high quality streams. (Exhibit N to Motion, para. 8) According to the affidavit of Joseph Leone, Module 24 was not applicable to Eighty-Four Mining's request for the 1995 permit revision because the permit revision did not authorize any new or additional discharges to streams. (Exhibit N to Motion, para. 8)

In its memorandum in opposition, PUSH contests Mr. Leone's statement, asserting as follows: "DEP affirms...in its responses to PUSH's second set of interrogatories No. 1 that the activities permitted by the Permit do involve discharges to a high quality stream." (PUSH Memorandum, p. 12)

Pursuant to Pa. R.C.P. 1035.3 (a) (1), a response to a motion for summary judgment must identify issues of fact arising from evidence in the record which controverts the evidence cited in support of the motion. Here, PUSH contends that the Department's responses to its interrogatories controvert Mr. Leone's affidavit. However, the Department's responses to PUSH's "second set of interrogatories No. 1"[7] are not a part of the record in this case since parties are not required to file discovery requests or responses to discovery requests unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board. 25 Pa. Code § 1021.111 (b).[8] Contrary to 25 Pa. Code § 1021.111 (b), PUSH did not submit a copy of the interrogatories and responses with its memorandum.

Once a motion for summary judgment has been properly supported, the burden is on the non-moving party to disclose evidence that is the basis for its argument resisting summary judgment. *Felton Enterprises, Inc. v. DER*, 1990 EHB 42. By failing to properly support its response, PUSH has failed to demonstrate that an issue of fact exists. Therefore, we find that Eighty-Four Mining is entitled to summary judgment on paragraph 3.ej of the notice of appeal.

Parks, Cultural and Historic Resources, and Archeological Sites

Paragraph 3.el of the notice of appeal avers that the permit application was deficient because it failed to identify public parks, cultural and historic resources, and archeological sites overlying

---

[7]There is no entry in the docket for responses by the Department to PUSH's "second set of interrogatories No. 1." Since PUSH did not clearly identify the interrogatories to which it was referring nor state the date on which the interrogatories were served on the Department, we can only surmise that PUSH is referring either to the Department's "Second Supplementary Answers to PUSH's First Set of Interrogatories" or to responses for which no docket entry appears.

[8]A review of the record reveals that the Department submitted to the Board only a copy of the cover letter accompanying its responses to PUSH's interrogatories.

the mining plan or within 1000 feet of any surface activity. Eighty-Four Mining argues that, because the 1995 permit revision did not authorize any new surface activity sites for Mine 84, there were no surface activity sites for Eighty-Four Mining to identify in its permit application. In response, PUSH disputes that this requirement applies only to surface sites and argues that these structures must be identified with respect to underground activities as well.

It is apparent from Eighty-Four Mining's motion that it is requesting summary judgment only on the issue of whether the permit application failed to identify public parks, cultural and historic resources, and archaeological sites within 1000 feet of a surface activity site. As we have already noted, the 1995 permit revision did not authorize any new surface activity. PUSH does not dispute this in its response. Because no issue of material fact exists, summary judgment is granted to Eighty-Four Mining on that portion of paragraph 3.el of the notice of appeal dealing with the identification of public parks, cultural and historic resources, and archaeological sites within 1000 feet of a surface activity site.

Paragraph 3.eq of the notice of appeal avers that the application was deficient because it did not include "information concerning the National Roads and State Heritage Park and State Recreational Areas designated under the Clean and Green program under the Pennsylvania Farmland and Forestland Assessment Act of 1974."

In its motion for summary judgment, Eighty-Four Mining argues that there is no legal obligation created by either the Mine Subsidence Act or the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L.1198, as amended, 52 P.S. § 1396.1 *et seq.*, which would require Eighty-Four Mining to provide information on any parks overlying the 1995 permit revision area in its permit application. It is Eighty-Four Mining's

contention that the provisions of state mining laws concerning mining in the vicinity of parks apply only to surface operations.[9]

In response, PUSH argues that this requirement is found in Chapter 89 of the mining regulations, which contains provisions which address the impact of underground mining on public parks.[10] In particular, PUSH directs our attention to 25 Pa. Code § 89.38 and § 89.141. Section 89.38 deals with archaeological and historical resources and public parks. Subsection (a) requires that the operation plan submitted by the permit applicant [11]describe and identify, *inter alia,* public parks within the proposed permit area and adjacent area. Subsection (b) states that, in the case of a public park that may be adversely affected by the proposed underground mining activities, the operation plan must describe the measures to be used to prevent or minimize adverse impacts. PUSH also directs our attention to 25 Pa. Code § 89.142, which sets forth the information which is to be contained in mining maps submitted with the permit application. Subsection (a) (6) of Section

---

[9]Eighty-Four Mining also disputes that the National Roads and State Heritage Park and areas designated under the Pennsylvania Farmland and Forest Land Assessment Act, Act of December 19, 1994, P.L. 973, 72 P.S. § 5490.1 *et seq.*, are "public parks" or "publicly owned parks." However, Eighty-Four Mining does not base its motion on this argument.

[10]PUSH also asserts that Module 4 of the Department's permit application form requires an applicant to describe measures which will be used to mitigate or prevent adverse impacts to public parks and historic places. However, PUSH failed to provide a copy of Module 4 or an affidavit affirming that Module 4 requires this information in support of its assertion. Because PUSH failed to properly support this contention in its response, we may not consider it.

[11]Pursuant to 25 Pa. Code § 89.31, an application for the underground mining of coal must include an operation plan. The operation plan must include, at a minimum, the information required by Subchapter B of Chapter 89 and must be designed to achieve the performance standards set forth in Subchapter B.

89.142 requires that the permit application include a map of the subsidence control plan area which identifies public parks and historic structures.

Clearly the regulations at 25 Pa. Code § 89.38 and § 89.142 (a) (6) require that an application to conduct underground mining identify public parks located above the area to be mined and within the area of the subsidence control plan. Eighty-Four Mining has not disputed that it is subject to these requirements. On that basis, summary judgment is denied with respect to paragraph 3.eq of the notice of appeal.

Right of Entry

Paragraph 3.gr of the notice of appeal objects to the fact that the permit application did not indicate that a right of entry had been obtained for each parcel of land to be affected by coal mining activities. Eighty-Four Mining argues that a right of entry is required only for areas to be affected by surface mining activities and since the 1995 permit revision did not authorize any new surface activities, no right of entry documentation was required. Eighty-Four Mining notes that a right of entry requirement is contained in Section 4 (a) (2) (F) of the Surface Mining Act, 52 P.S. § 1396.4 (a) (2) (F), while the Mine Subsidence Act contains no such requirement. In addition, Eighty-Four Mining correctly notes that the regulations governing right of entry at 25 Pa. Code § 86.64 require the permit applicant to obtain a right of entry only with respect to surface mining activities. No similar requirement exists for underground mining activities.

PUSH does not respond to this argument in its memorandum, except to assert that surface land is affected by underground mining activities. However, where the language of the regulations is clear and there is no statutory or regulatory requirement to obtain a right of entry for underground

mining activities, there is no legal basis for requiring Eighty-Four Mining to submit landowner right of entry documentation with its application. Because the law is clear on this subject and there is no issue of material fact, summary judgment is granted to Eighty-Four Mining with respect to paragraph 3.gr of the notice of appeal.

Areas Permitted Prior to 1995 Permit Revision

Finally, in paragraph 91 of its motion, Eighty-Four Mining asks for summary judgment on any issue which "is intended or could be construed to apply to areas of the Mine 84 permit which were permitted prior to the September 22, 1995 Permit Revision" and any issue which "is intended or could be construed to apply to areas of the subsidence control plan area which were approved prior to the September 22, 1995 Permit Revision." Eighty-Four Mining is entitled to summary judgment on such issues to the extent set forth in this Opinion. That is, PUSH is precluded from challenging any permitting action which occurred prior to the 1995 permit revision. However, PUSH is not barred from challenging the cumulative effect of adding the acreage covered by the 1995 permit, as discussed in this Opinion.

In conclusion, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**(Consolidated with 95-233-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 27th day of November, 1996, Eighty-Four Mining Company's Motion for Partial Summary Judgment directed against People United to Save Homes is **granted in part and denied in part**. Summary judgment is granted to Eighty-Four Mining Company as set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 27, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Diana Stares, Esq.
Steven Lachman, Esq.
Patience Nelson, Esq.
Southwestern Region

For People United to Save Homes:
Robert W. Thompson, Esq.
Pittsburgh, PA

For PA American Water Company:
Michael D. Klein, Esq.
Harrisburg, PA
Jan L. Fox, Esq.
Pittsburgh, PA

For Eighty-Four Mining Company:
Henry Ingram, Esq.
Thomas C. Reed, Esq.
Stanley R. Geary, Esq.
Stephen C. Smith, Esq.
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	**Issued: December 2, 1996**

OPINION AND ORDER ON PEOPLE UNITED TO SAVE HOMES' MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion for summary judgment is denied where questions of material fact exist. Such questions of material fact must be resolved in favor of the non-moving party. Grounds for summary judgment which are raised solely in a supporting memorandum and not in the motion for summary judgment itself will not be considered.

OPINION

This consolidated appeal stems from the Department of Environmental Protection's ("Department") issuance of a revision to a mining permit held by Eighty-Four Mining Company

("Eighty-Four Mining").[1] Trial of this appeal is scheduled to commence on December 10, 1996.

On May 29, 1996 as amended on July 11, 1996, the Board ordered the parties to file dispositive motions on or before July 16, 1996. Oral argument on the motions was held on September 30, 1996.

This Opinion addresses the motion for summary judgment and supporting memorandum filed by People United to Save Homes ("PUSH") on July 16, 1996. PUSH filed an amendment to its memorandum on July 24, 1996. Eighty-Four Mining and the Department filed responses in opposition to the motion on August 19, 1996. This Opinion deals with only those issues not addressed by the Board in Opinions issued on November 27, 1996.

PUSH's Amendment to its Memorandum

PUSH states that its amendment is based on information contained in the Department's responses to PUSH's second set of interrogatories which were not served on PUSH until 5:00 p.m. on the day prior to the deadline for filing dispositive motions. In addition, the Department's responses referred to documents which had not yet been received by PUSH. In the letter accompanying its motion for summary judgment, PUSH reserved the right to amend its motion upon receipt of the Department's complete response to the interrogatories.

On August 7, 1996, Eighty-Four Mining filed a motion to strike the amendment to PUSH's memorandum. Eighty-Four Mining asserts that the issues raised by PUSH in the amendment could have been raised in its original memorandum and were not dependent on PUSH's receipt of the Department's response to interrogatories. To the extent that any argument raised by PUSH in its

---

[1] Columbia Gas of Pennsylvania, Inc. and the Township of South Strabane also filed appeals from the permit revision. In addition, Eighty-Four Mining filed an appeal objecting to the terms of the revision. These appeals have been settled and are no longer pending before the Board.

amendment was dependent on the Department's response to interrogatories, Eighty-Four Mining asserts that it was to such a small degree that PUSH had sufficient time to include the argument in its original memorandum.

The first new item raised in PUSH's amendment is an issue paper prepared by the Department's District Mining Operations office and dated August 11, 1995. (Exhibit 1 to Amendment) PUSH states in its amendment that the issue paper was "found in DEP files during discovery" and, thus, was not a part of the Department's responses to PUSH's second set of interrogatories. In addition, the issue paper was discussed during depositions which took place in April and May 1996. Because PUSH was aware of the issue paper well in advance of the Department's responses to PUSH's second set of interrogatories, Eighty-Four Mining asserts that PUSH's argument regarding the issue paper could have been raised in its original memorandum.

Although it is clear that PUSH was fully aware of the existence of the issue paper and its contents well in advance of the filing of its motion for summary judgment, no Department personnel who were deposed up to that point either recognized the document or could identify its author. (Exhibits 2,3, and 4 to Amendment) In its response to PUSH's second set of interrogatories, the Department identified the authors of the issue paper and the persons to whom it was distributed. (Exhibit 5 to Amendment) Because the authors of the issue paper were not identified until the Department's response to PUSH's second set of interrogatories, PUSH's argument regarding the issue paper was dependent on its receipt of the Department's response to the interrogatories. On that basis, we will allow PUSH's amendment to its original memorandum with respect to the Department's issue paper.

The second objection raised by Eighty-Four Mining concerns Section III of PUSH's

amendment. This section supplements PUSH's contention in its original motion and memorandum that the Department ignored the request of the Pennsylvania Historical and Museum Commission ("Historical Commission") to protect certain structures. The only new argument added by the amendment is that the Department's reason for ignoring the Historical Commission's request was that it arrived a day after the Department issued the permit revision. PUSH bases this argument on the Department's response to its second set of interrogatories.

Eighty-Four Mining argues that because the amendment adds only one paragraph to the argument contained in the original memorandum, PUSH had sufficient time to include this argument in its original memorandum. We disagree. There is no indication of the length of the responses filed by the Department to PUSH's second set of interrogatories nor the amount of time required for PUSH to examine the responses. It is not clear that 24 hours was a sufficient amount of time for PUSH to fully examine the responses and supplement its original memorandum. Moreover, once PUSH received the responses it acted quickly to prepare and file its amendment. Therefore, we find that PUSH's amendment regarding the Historical Commission's letter was proper.

Finally, PUSH's amendment also supplements Section V of its original memorandum which deals with right of entry and compliance history. Because the issues of right of entry and compliance history were not raised in the motion for summary judgment, they shall not be considered, as discussed below. Therefore, Eighty-Four Mining's motion to strike is granted with respect to that portion of PUSH's amendment to its memorandum dealing with right of entry and compliance history.

Summary Judgment

We turn now to PUSH's motion for summary judgment as amended. Summary judgment

may be entered in whole or in part as a matter of law whenever there is no genuine issue of material fact. Pa. R.C.P. 1035.2. In ruling on a motion for summary judgment, we must examine the record in a light most favorable to the non-moving party. *Penoyer v. DER*, 1987 EHB 131.

In their responses in opposition to PUSH's motion, Eighty-Four Mining and the Department assert that PUSH's motion is inadequate as a matter of law for failure to set forth with particularity in the motion the grounds supporting the motion. The Board's rules at 25 Pa. Code § 1021. 70 (d) require that a motion set forth in numbered paragraphs the facts in support of the motion. In addition, the Board has held that it is insufficient for a moving party simply to rely on representations made in its memorandum in support of the motion. *Cambria Cogen Company v. DER*, 1995 EHB 191; *County of Schuylkill v. DER*, 1990 EHB 1370. In the present case, Eighty-Four Mining and the Department assert that PUSH's motion is defective because it contains only general conclusory statements without any specific or detailed grounds in support thereof. In addition, the motion contains no reference to the attached exhibits.

We agree that PUSH's motion falls short of the degree of specificity anticipated by § 1021.70 (d) of the Board's rules. However, given that the hearing on this appeal is scheduled to begin in one week and in the interest of insuring a speedy and efficient resolution of this matter, the Board will not dismiss the motion on this basis. Pa. R.C.P. 126.[2] In the future, counsel are admonished to strictly comply with Board Rule 1021.70 (d) and with Board precedent in filing motions for summary judgment. In ruling on PUSH's motion for summary judgment, however, we will address only those issues specifically raised in the motion itself. PUSH's memorandum of law contains a

---

[2] Pa. R.C.P. 126 states, "The rules [of civil procedure] shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

number of arguments which do not correspond to the issues raised in the motion. Because these arguments in the memorandum were not raised in the motion, they will not be considered.

We turn now to the grounds for PUSH's motion for summary judgment.

Subsidence Control Plan

PUSH contends that the subsidence control plan approved by the Department is insufficient as a matter of law because it fails to demonstrate how Eighty-Four Mining will prevent subsidence damage to certain features and structures. Eighty-Four Mining argues there is no regulatory or statutory requirement that it provide much of the information sought by PUSH and that, even if there is such a requirement, the subsidence control plan addresses all of the issues raised by PUSH.

This Board's Opinion and Order on Motions for Summary Judgment, issued on November 27, 1996, provides a comprehensive discussion of what is required by the regulations with regard to a mining applicant's subsidence control plan. Pursuant to 25 Pa. Code § 89.141 (d), the subsidence control plan shall describe "the measures to be taken to control subsidence effects from the proposed mining operations." In particular, the plan must provide a *detailed* description of the measures to be taken "to prevent, minimize or avoid subsidence from causing damage or lessening the value or reasonable foreseeable use of the surface land" for the following structures: public buildings and noncommercial structures customarily used by the public, including churches, schools and hospitals; dwellings, cemeteries, municipal public service operations and municipal utilities in place on April 27, 1966; impoundments and other bodies of water with a storage capacity of 20 acre feet or more; aquifers and bodies of water which serve as a significant source for a public water supply system; coal refuse disposal areas; utilities; and perennial streams. 25 Pa. Code §§ 89.141 (d) (2) and 89.143 (b), (c), and (d).

The subsidence control plan submitted by Eighty-Four Mining with its permit revision application and approved by the Department is included with Eighty-Four Mining's response to PUSH's motion. The plan discusses the potential for subsidence and Eighty-Four Mining's proposed technique for preventing subsidence damage from occurring. The method proposed by Eighty-Four Mining in its plan is to extract no more than 50 % of the coal underneath certain enumerated structures and features, thus leaving an area of support in place.

Although this proposal is an acceptable and approved method of subsidence control, there are several problems with the subsidence control plan. First, although the 50 % extraction method is the proposal approved by the Department, the plan leaves open the possibility of Eighty-Four Mining choosing another method of subsidence control. The plan contains the following language:

> As an alternative to protecting these structures by the 50 % by area support technique, Eighty-Four Mining Company reserves the right to employ high extraction mining under these structures upon approval by the Department to implement other measures or protection techniques such as trenching around the structure, tensioning the structure, leveling the structure, and other measures developed or required by specific conditions or circumstances. The detailed protection techniques for protecting these structures from material damage would be provided prior to mining for the Department's review and approval.

(Exhibit 1 to Eighty-Four Mining's Response, page 18-6)

Eighty-Four Mining argues that the fact that the plan contains other measures which it may employ to control the effects of subsidence is not a grounds for granting summary judgment since the only measure which has been approved by the Department at this point is the 50 % extraction method.

We disagree with Eighty-Four Mining's analysis. Although Eighty-Four Mining is correct

in pointing out that the only proposal which the Department has thus far approved for subsidence control is the 50 % extraction method, the plan leaves open the possibility of Eighty-Four Mining choosing another method. It is true that prior approval from the Department would be required before Eighty-Four Mining could employ an alternative method of subsidence control; however, there is no indication of whether the alternative proposal would be subject to the same degree of scrutiny as the original subsidence control plan or whether the public would be afforded an opportunity to comment on the alternative proposal.

Eighty-Four Mining argues that the requirement in Section 89.143 (b) of the regulations that mining activities be planned and conducted in a manner which *prevents* subsidence damage to the structures listed therein is no longer in effect. It is Eighty-Four Mining's contention that this section of the regulations was rendered invalid by the repeal of former Section 4 of the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. § 1406.1 *et seq.*("Mine Subsidence Act"). We rejected this argument in our Opinion and Order on Eighty-Four Mining Company's Motion for Partial Summary Judgment Against People United to Save Homes (hereinafter "Opinion on Eighty-Four Mining's Motion for Summary Judgment Against PUSH"), issued on November 27, 1996. Therefore, Eighty-Four Mining was required to set forth in detail in its subsidence control plan the measures for preventing subsidence to the structures listed in Section 89.143 (b) which exist within the area covered by the plan.

The adequacy of the subsidence control plan with regard to certain structures or features was addressed in our Opinions of November 27, 1996. Unlike the issue involving Pennsylvania American Water Company's water line, determining whether the subsidence control plan meets the requirements of Sections 89.141 (d) and 89.143 with regard to the remaining structures and features

addressed in PUSH's motion involves questions of material fact. Because any questions of material fact must be viewed in the light most favorable to the non-moving party, we cannot find that PUSH is entitled to summary judgment on these issues.

Wildlife, Natural Resources, and Historic, Cultural and Archaeological Resources

In its motion, PUSH asserts that the application for permit revision filed by Eighty-Four Mining failed to include adequate measures for the protection of fish, wildlife, endangered species, natural resources, historic, cultural and archaeological resources, and public parks.

With respect to fish, wildlife and endangered species, Eighty-Four Mining asserts that 25 Pa. Code § 89.65 (Protection of fish, wildlife and related environmental values), cited by PUSH in its memorandum, is a performance standard and, as such, does not set forth what must be contained in a permit application. Eighty-Four Mining further argues that the application does indeed address the impact of mining on fish and wildlife.

With respect to Eighty-Four Mining's first argument, Section 89.7 of the regulations states that, as part of a permit application, the mining operator must include a plan for meeting the performance standards set forth in Chapter 89 of the regulations. 25 Pa. Code § 89.7. Therefore, Eighty-Four Mining was required to address in its permit revision application how it would meet the requirements of 25 Pa. Code § 89.65, with respect to the protection of fish and wildlife. Eighty-Four Mining points to Module 6.7 of its permit application, which it asserts adequately addresses this issue. Module 6.7 of the permit application, attached to Eighty-Four Mining's response as Exhibit 14, is labeled "Fish and Wildlife Protection." In it, Eighty-Four Mining states that the minimum separation between the mine and the surface above the areas of retreat mining is in excess of 400 feet and that no adverse effects on fish, wildlife and related environmental values are anticipated due to

mining.

PUSH argues that, in making this claim, Eighty-Four Mining relied on the Department's Guidance Manual on Perennial Streams, which, according to the Department's Harold Miller, was not written to address possible effects of subsidence on fish, wildlife or related environmental values.[3] In response, Eighty-Four Mining asserts that the Pennsylvania Game Commission, which was given notice of the permit revision application, provided no comments on fish, wildlife or threatened or endangered species. Eighty-Four Mining asserts that, based on a memorandum of understanding between the Game Commission and the Department, the Department may assume that the Game Commission has no adverse comments if it does not respond within 30 days.[4]

Because the parties' motion and response raise questions of material fact and, further, because all such questions of material fact must be viewed in the light most favorable to the non-moving party, we may not grant summary judgment on this issue.

With regard to historic, archaeological and cultural sites, Eighty-Four Mining argues that there is no evidence that any such sites will be affected by mining. According to the affidavit of Michael Berdine, Eighty-Four Mining's Planning Engineer (Exhibit 3 to Response, para. 3), representatives of the Historical Commission, the Department, and Eighty-Four Mining met on February 23, 1995. At the meeting, the Historical Commission concluded that the mining would not have an adverse impact on archaeological sites. (Exhibit 3 to Response, para. 17)

In its memorandum, PUSH discusses a series of letters sent by the Historical Commission to the Department regarding Eighty-Four Mining's proposed permit revision. One such letter was

---

[3] PUSH relies on answer number 25 of Eighty-Four Mining's Answers to PUSH's First Set of Interrogatories and the deposition transcript of Harold Miller, page 155.

[4] Eighty-Four Mining bases its assertions on Exhibits 75 and 76 to PUSH's motion.

dated September 20, 1995. In it, the Historical Commission identified additional properties eligible for inclusion on the registry of National Historic Places and eligible for protection from coal mining activities. This letter was received by the Department after the permit was issued (Exhibit C13 to Department's Answer, page 27-28) and well beyond the 30 day comment period. In its amendment to its original memorandum, PUSH asserts that the Historical Commission's letter would have been sent sooner had the Department responded to a January 6, 1995 letter sent by the Historical Commission to the Department.

It is clear that questions of material fact exist with respect to the issue of whether the Department adequately considered the protection of historic sites in its review of the permit application. On that basis, summary judgment is denied on this issue.

Finally, PUSH contends that public parks within the area of the subsidence control plan which are not shown in the application include the National Road State Heritage Park, parcels designated under Pennsylvania's Clean and Green program, and agricultural reserves as defined under the Farmland and Forest Land Assessment Act, 72 P.S. § 5490.1 *et seq.* Eighty-Four Mining argues that PUSH has failed to demonstrate that the properties in question are public parks, that they are located within the subsidence control area, or that they will be adversely impacted by mining.

A permit application must include a map which designates the location of public parks within the area of the subsidence control plan. 25 Pa. Code § 89.142 (a) (6) (v). A "public park" is defined as "an area dedicated or designated by a Federal, State or local agency for public recreational use, whether or not the use is limited to certain times or days, including land leased, reserved or held open to the public because of that use." 25 Pa. Code § 86.101. Although the National Road State Heritage Park would appear to meet this criterion, it is not clear that the other properties named by

PUSH in its memorandum do so. Moreover, although PUSH states in its memorandum that the National Road State Heritage Park and the other designated properties are located within the area of the subsidence control plan, it provides no documentation in support of this claim. Therefore, PUSH has not demonstrated that it is entitled to summary judgment on this issue.

Filing with Recorder of Deeds

PUSH contends that the Department failed to require Eighty-Four Mining to comply with Section 5 (c) of the Mine Subsidence Act which states, "At the time an application under this Act is filed with the Department, the owner, operator...or other person in charge of or having supervision over such mining operation, shall immediately file a copy of said application with the recorder of deeds of each county where such mining operation is located." 52 P.S. § 1406.5 (c). In this case, a copy of the permit application was not filed with the Recorder of Deeds of Washington County until March 1995, five months after the application was filed with the Department. (Exhibit 89 to Motion)

In its Answer, the Department agrees that the application was not filed with the Recorder of Deeds until March 1995, but asserts that this failure does not provide a basis for sustaining the appeal or granting PUSH's motion. Eighty-Four Mining asserts that, by complying with Section 5 (g) of the Mine Subsidence Act, which requires that an applicant provide public notice of the permit application, 52 P.S. § 1406.5 (g), it complied with Section 5 (c).

We disagree with Eighty-Four Mining's argument that by meeting the public notice requirement of Section 5 (g), it thereby complied with Section 5 (c). The statute unambiguously requires compliance with both provisions, and it is apparent that Eighty-Four Mining failed to comply with the requirement of Section 5 (c). However, we do not find that this is a sufficient basis

for overturning the Department's issuance of the permit revision. As soon as the Department was apprised of Eighty-Four Mining's failure to comply with this provision, it required the mining company to do so. Moreover, as Eighty-Four Mining points out in its response, copies of the permit revision application were available for public inspection at the Department's McMurray District Office as of October 24, 1994 and the Washington County Conservation District Office as of November 10, 1994. (Exhibit 3 to Eighty-Four Mining Response, para. 27) We, therefore, find that this is not a sufficient basis for granting summary judgment to PUSH and overturning the permit.

Subsidence Bond

PUSH asserts that the Department erred in requiring a subsidence bond in the amount of only $10,000 when the Department and Eighty-Four Mining estimated the costs of subsidence damage to be higher. In our Opinion on Eighty-Four Mining's Motion for Summary Judgment Against PUSH, we noted that the Department's policy of requiring a $10,000 bond in all cases could be evidence of abuse of discretion on the part of the Department. However, this issue involves questions of material fact as to whether $10,000 was an inadequate bond amount. Because our finding on this issue depends on the resolution of these material facts, summary judgment is not appropriate.

Conclusion

In conclusion, because material questions of fact exist, we may not grant summary judgment on the issues raised by PUSH in its motion. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**(Consolidated with 95-233-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	

ORDER

AND NOW, this 2nd day of December, 1996, the Motion for Summary Judgment filed by People United to Save Homes is **denied** for the reasons set forth in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 2, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Diana Stares, Esq.
Steven Lachman, Esq.
Patience Robinson Nelson, Esq.
Western Region

For PUSH:
Robert Thompson, Esq.
Pittsburgh, PA

For Pennsylvania American Water Co.:
Michael Klein, Esq.
Harrisburg, PA
Jan Fox, Esq.
Pittsburgh, PA

For Eighty-Four Mining Co.:
Henry Ingram, Esq.
Thomas Reed, Esq.
Stanley Geary, Esq.
Stephen Smith, Esq.
Pittsburgh, PA

mw

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NILES C. LOGUE	:	
	:	
v.	:	**EHB Docket No. 94-177-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 3, 1996**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board upholds the Department of Environmental Protection's rejection of a planning module for land development pertaining to a proposed 3 lot subdivision to be served by on-site wells and sewage disposal systems because nitrate concentrations would exceed the 10 mg/l maximum contaminant level for safe drinking water whether the groundwater levels indicated by sampling in November, 1993 or January 1996 are used in an appropriate mass balance analysis. The appellant's expert testimony that a level less than the required 10 mg/l would be indicated if an appropriate credit were given for the change of the property from agricultural to residential use is not adequate to demonstrate that the Department abused its discretion in rejecting the planning module when the change of use might not result in meeting the required maximum contaminant level for a number of years. The rejection of the planning module is not a "regulatory taking" without compensation since appellant can continue use of the property with or without reasonable alternate treatment facilities.

PROCEDURAL HISTORY

On July 5, 1994 Niles Logue (Appellant) filed a Notice of Appeal seeking review of the Department of Environmental Protection's (Department) June 6, 1994 denial of a proposed revision to the sewage plan of Monroe Township, Cumberland County for the proposed development of a portion of Appellant's property located on York Road (PA Route 74), east of Martin Road and Zimmerman Road.

A hearing was held in Harrisburg on June 5, 1996 before Administrative Law Judge George J. Miller, Chairman of the Board. Both parties were represented by legal counsel and presented evidence in support of their positions. The parties filed their post-hearing briefs on August 21, 1996. On August 29, 1996, the Board granted the Department's request for leave to file a reply brief. The Department filed its reply brief on September 20, 1996.

The record consists of the pleadings, a joint stipulation and a hearing transcript of 230 pages and 19 exhibits. After a full and complete review of the record we make the following:

FINDINGS OF FACT

1. Niles C. Logue (Appellant) is an individual who resides at 1566 York Road, Carlisle (Cumberland County), Pennsylvania 17103 (Notice of Appeal).

2. The Department is an administrative agency of the Commonwealth of Pennsylvania and the agency charged with the duty to administer and enforce the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1 - 750.20a; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 -

691.1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 and the rules and regulations promulgated thereunder.

3. Appellant is the owner of a 40.4 acre tract of land in Monroe Township, Cumberland County, Pennsylvania. The Logue tract is located on York Road, PA Route 74, east of Martin Road and Zimmerman Road (Stip. No. 2)[1].

4. Appellant and his wife purchased the property in 1989 with the intent to "subdivide a portion of it ... and to live on the remainder and lease the remaining farm land for farming ...." (N.T. 10).

5. Appellant leases much of the property, including the proposed three building lots, to a farmer who fertilizes the property and grows corn. Most of the surrounding lands are used for agricultural purposes (Stip. No. 3).

6. Appellant leases 34 of his 40 acres to a farmer for approximately $ 65 per acre (N.T. 13).

7. Appellant proposed to subdivide three lots from the tract; these lots are proposed for new residential development and vary in size from 2.54 to 2.88 acres (Stip. No. 4).

8. Appellant retained Peffer Geotechnical Corporation, a one-man consulting corporation involved in hydrogeology and engineering geology owned by Jeffrey Peffer, located in Lewisberry, Pennsylvania (N.T. 34-35).

---

[1] The following abbreviations will be used: "Stip. ___ for the Joint Stipulation; "N.T. __" for the Transcript, "Appellant's Ex. ___" for Appellant's Exhibits and "Commonwealth Ex. __" for Commonwealth Exhibits.

9. Jeffrey Peffer's education includes a bachelor's degree in geological sciences and a master's degree in engineering science with a specialization in hydrology and soil mechanics (N.T. 35).

10. Appellant filed a planning module with Monroe Township for the three-lot subdivision, which the Department had identified as "Application A3-21916-121-2" and a Preliminary Hydrogeologic Evaluation prepared by Peffer Geotechnical Corporation (Stip. No. 5).

11. Appellant obtained subdivision approval from Monroe Township, subject to approval by the Department of Environmental Resources, now the Department of Environmental Protection (Stip. No. 6).

12. On February 28, 1994, Monroe Township submitted to the Department a sewage facilities planning module, DER Code No. A3-21916-121-2, for the subdivision of three single family residential lots (2.5 - 2.88 acre) from the Logue property (Stip. No. 7).

13. Appellant's planning module proposed that each new lot would be served by on-lot septic systems (Stip. No. 8).

14. Private wells will supply drinking water to the residences of the Logue subdivision (Stip. No. 9).

15. Included with the Appellant's planning module was a Preliminary Hydrogeologic Evaluation for the Logue subdivision, which was submitted as part of the module pursuant to 25 Pa. Code § 71.62(c)(2) (Stip. No. 10).

16. Nitrate concentrations determined by November 1993 water samples taken at four neighboring residences showed the following concentrations - Boyer (11.4 milligrams per liter (mg/l)), Kepner (13.8 mg/l), Kreitzer (10.1 mg/l) and Logue (11.2 mg/l) (Appellant's Ex. 2).

17. The average of the concentrations was 11.63 (Appellant's Ex. 2).

18. The Evaluation used the mass balance equation to determine the nitrate concentration was 14.49 mg/l (Appellant's Ex. 2).

19. By letter dated June 6, 1994, the Department denied the planning module for Appellant's subdivision based on the preliminary hydrogeologic study's representation that pre-development and post-development nitrate levels will exceed the maximum contaminant level for safe drinking water of 10 mg/l[2] (Stip. No. 11).

20. Appellant appealed this on July 5, 1994 (Stip. No. 12).

21. Subsequently, Appellant's expert supplemented the preliminary hydrogeologic evaluation with an Addendum to the Preliminary Hydrogeologic Evaluation for the Proposed Logue Subdivision in December, 1994 (Stip. No. 13).

22. The Addendum determined that due to the change in land use from farming to residential development the nitrate-nitrogen found in the groundwater would be reduced because the total post-development of flux of nitrate-nitrogen to ground water is estimated to be less than the pre-development agricultural use (Appellant's Ex. 5).

23. By letter dated February 16, 1996, Appellant amended the original preliminary hydrogeologic evaluation and submitted additional water sample results from the same residences, which indicated that nitrate-nitrogen levels at the Logue site average 9.35 mg/l (Stip. No. 14; Appellant's Ex. 6).

---

[2] 40 CFR § 141.11 and the Safe Drinking Water Act, Public Law 93-523, 88 Stat. 1660, 42 U.S.C.A. § 300f *et seq.* provide that 10 mg/l is the maximum contaminant level of nitrate-nitrogen for drinking water.

24. The concentrations of the samples were: Boyer (9.3 mg/l), Kepner (11.0 mg/l), Kreitzer (8.1 mg/l) and Logue (9.0 mg/l). The average was 9.35 mg/l (Appellant's Ex. 6).

25. The Department used the new information in the mass balance equation and determined that the nitrate concentrations would be at 12.4 mg/l (Commonwealth Ex. C-10).

26. In response to Appellant's February 16, 1996 submission of water sample results, the Department affirmed its decision denying approval for the installation of on-lot septic systems at the Logue site (Stip. No. 15).

27. If the Department were to give the credit for the change of use from agriculture to residential use, a level below the required maximum contaminant level would be indicated, but that might not be attained for many years (N.T. 74-79).

28. At least two of the alternative methods of sewage disposal proposed by the Department are practical methods of sewage treatment which would permit residential development of the property.

29. Appellant's proposal of a reverse osmosis filtration system at the drinking water faucet in the homes to be developed on the property would not protect down-gradient, neighboring land owners from the impact of nitrates from the ground water beneath appellant's property.

DISCUSSION

Appellant has the burden of proof and the burden of proceeding: 25 Pa. Code § 1021.101(c). To carry its burden Appellant must prove by a preponderance of the evidence that the Department abused its discretion or acted arbitrarily or capriciously when it disapproved Appellant's planning module for on-lot septic systems. 25 Pa. Code § 1021.101(a).

Subdivision Plan

Appellant contends the Department abused its discretion when it denied approval of his Module. Appellant argues that the Department failed to consider that the proposed subdivision would actually reduce the total nitrates in the soil. Appellant also says the formula the Department used to decide contaminant levels is flawed because it ignores the changed land use, and the Department has discriminated against Appellant because the Department approved similar minor subdivisions in the past without studies, and now it requires Appellant to do expansive and expensive studies.

The Department contends that it did not abuse its discretion. The Department argues that its disapproval was consistent with the requirements of the Sewage Facilities Act and the Department's Policy and Procedure on Wastewater Discharges to Ground Water from Individual and Community On-Lot Systems. The Department contends that the modified mass balance equation proposed by Appellant's consultant is fundamentally flawed while the Department's proper mass balance equation indicates that post-development levels of nitrate-nitrogen would exceed the permitted 10 mg/l. In addition, the Department presented evidence that viable alternative methods of sewage disposal exist to facilitate development of the Logue site and that the small size of the subdivision does not exempt Appellant from the requirement of demonstrating that the proposed on-lot septic systems will not elevate post-development nitrate-nitrogen levels above 10 mg/l.

We agree with the Department. Under the regulations, "[I]n approving or disapproving an official plan or official plan revision, the Department will consider: whether the plan or revision meets the requirements of the act [Sewage Facilities Act], the Clean Streams Law and this part [71.32]. ..." 25 Pa. Code §71.32(d)(1). The purpose of the Sewage Facilities Act, Act of January

24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a, is "to protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste." 35 P.S. § 750.3(1). Under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001, it is "unlawful for any person ... to put or place into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined." 35 P.S. § 691.401. Pollution is defined as "contamination of any waters of the Commonwealth such as will ... render such waters harmful, detrimental or injurious to public health, safety or welfare." 35 P.S. § 691.1

One pollutant is nitrate-nitrogen.

The quality of drinking water is protected by the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1 - 721.17 and accompanying regulations. The Department has

> the power and its duties shall be to issue such orders and initiate such proceedings as may be necessary and appropriate for the enforcement of drinking water standards, ... These actions shall include, but are not limited to, the following: ... (3) to do any and all things and actions not inconsistent with any provision of this act for the effective enforcement of this act, rules and regulations or permits issued hereunder."

35 P.S. § 721.5(c). Under the regulations, a public water supply system must comply with primary and secondary maximum level of contaminants. The levels are those set forth in the National Primary and Secondary Drinking Water Regulations. Under these provisions, 10 mg/l is the maximum contaminant level adopted by Pennsylvania. 40 CFR § 141.11(d)

The Department uses a mass balance equation to determine whether the maximum contaminant level for nitrates will be exceeded. When the equation was applied to samples from

four residences in the project area the background levels of nitrate concentration were well above the permitted 10 mg/l. The Preliminary Hydrogeologic Evaluation for the Logue Subdivision, submitted in February 1994, showed that the concentration of nitrate-nitrogen in the groundwater samples averaged 11.63. Predicted post-development nitrate-nitrogen on the smallest lot was 14.49 mg/l, compared to a pre-development average concentration of 11.63 mg/l. Both pre-development and post-development levels exceed the drinking water limit for nitrate-nitrogen (10 mg/l). (Appellant's Ex. 2, pp. 4-5)

Subsequently, Appellant submitted to the Department more recent results of water sampling taken at the same residences. The later tests were based on samples collected on January 31, 1996. These results indicated the nitrate concentrations were on the average of 9.35 mg/l. (Appellant's Ex. 6) Using the newer average in the mass balance equation resulted in a concentration of 12.4 mg/l, which is still higher than the permitted 10 mg/l. Accordingly the Department stayed with its decision of disapproval. (N.T. 136)

Appellant's primary position is that the Department abused its discretion in not giving the Appellant a credit in the mass balance analysis for the change from agricultural to residential use which certainly would reduce nitrate levels to below the maximum contaminant level over time. This contention was set forth in an Addendum to the Preliminary Hydrogeologic Evaluation in December, 1994 and testimony of Appellant's expert, Jeffrey R. Peffer. The contention is that the Department's policy fails to consider that development entails the trading of agricultural sources which are high in nitrate concentrations for residential sources which produce lower nitrate concentrations. The Evaluation states, "[A]s active agricultural lands are converted to suburban residences, sources of nitrate related to the residential development replace sources of nitrate related

to the previous agricultural use. Consequently, development of certain intensely used agricultural lands with a low density of residences served by on-lot sewage systems, as in the case of the proposed Logue Subdivision, is not likely to cause an increase in nitrate levels in ground water." (Appellant's Ex. 5, p. 2) Mr. Peffer submitted appendices to the Addendum with calculations which support his claim that the Department should have a policy change in the way of altering the mass balance equation to reflect a variable that covers land use. He determined that the total current nitrate-nitrogen flux to groundwater under current agricultural conditions is 26 lbs/acre compared to 22.3 lbs/acre under post-development conditions based primarily on a review of literature of studies which document the amount of nitrate which could be expected to pass through from fertilizer applications on land. (N.T. 47-52) Although he testified to a reasonable degree of scientific certainty that such a credit would reduce indicated nitrates to below the drinking water standards (N.T. 57-58), in the accompanying conclusions to his Addendum Report he stated,

> ... Based on a background range of nitrate-nitrogen in ground water of 10.1 - 13.8 mg/l and an average of 11.4 mg/l, it is possible that average nitrate-nitrogen beneath the subdivision would, after development, continue to exceed the drinking water limit of 10 mg/l; and potential home buyers should be made aware of that possibility. However, as this discourse and supporting calculations demonstrate, the conversion of the existing corn fields at the Logue property to 3 large residential lots with on-lot sewage disposal is not likely to further deteriorate average ground water quality. Large agricultural sources of nitrate contamination will be replaced with lesser residential sources; and some improvement in average groundwater nitrate levels is likely to accompany the proposed development.

(Appellant's Ex. 5, p.11) Mr. Peffer testified that he conceded that post-development nitrate-nitrogen levels may exceed drinking water levels for a number of years. (N.T. 100)

Considering all the evidence, we conclude that the Department properly denied the planning module because even if the Appellant were given credit for the change of use based on Mr. Peffer's testimony, nitrate levels would exceed the maximum contaminant levels for at least a number of years. As we said in *Musser v. DER*, 1992 EHB 1534, all subdivisions must be scrutinized for their impact on existing nitrate levels because nitrates released from a number of small subdivisions will degrade groundwater just as surely as those released by one or two major subdivisions.

Appellant's second argument is that the Department discriminated against Appellant when it failed to approve his minor subdivision when it has approved similar minor subdivisions without studies it has required of Appellant. This contention must also be rejected. To support his argument Appellant cites the Board's 1992 decision in *Musser v. DER, et al*, 1992 EHB 1534. This argument is misplaced. In *Musser,* the matter before the Board involved the Department's denial of a planning module for a proposed 12 lot subdivision to be served by on-site wells and sewage disposal systems. The Board upheld the Department's decision to deny approval of the module on the grounds that Musser's preliminary hydrogeologic evaluation failed to prove that nitrates generated by the 12 lot subdivision would not elevate neighboring wells above 10 mg/l. The Board noted in dicta that it was disturbed that minor subdivisions (those not exceeding 10 lots) do not receive the same scrutiny given to larger subdivisions. The Board's opinion said that the subdivision might have been approved if it had contained only 9 lots instead of the 12. The Board believed this was strong evidence that the policy for nitrate control is inadequate. The inequity perceived by the Board in that opinion has been met by the Department's giving closer scrutiny to small subdivisions. The Department's request for studies in this case was appropriate as it was in accordance with the

regulations, which were in effect at the time of the *Musser* decision, and was in response to the Board's concern raised in that decision.

Taking

Appellant argues that even though the Department has not exercised eminent domain powers here, its actions amount to a type of confiscatory or *de facto* taking because any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a "taking" for which compensation must be made to the owner.

The Department argues that a taking has not occurred because Appellant as owner of real property has not been called upon to sacrifice all economically beneficial use in the name of the common good. Furthermore, if there has been a taking it is a *de facto* taking and in Pennsylvania where the Department acts pursuant to its police powers a *de facto* taking does not occur.

We agree with the Department. To constitute an unlawful taking, a regulation must deprive the owner of any reasonable use of property. If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: *Andrus v. Allard*, 444 U.S. 51 (1979), or results in a significant reduction in value: *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The United States Supreme Court has stated that there are two categories of regulatory actions which would be compensable without the "case specific inquiry into the public interest advanced in support of the restraint" that would normally be required in a traditional takings analysis. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The first type involves regulations which compel a property owner to allow a physical invasion of his property and the second category is where regulation denies all economically beneficial or productive use of land. *Id.* As we noted in *Mock v. DER*, 1992 EHB 537, where the Department denied appellants a permit to fill in wetlands on their

property, the Mocks had not suffered an unconstitutional taking because they did not prove that their land was valueless after the Department's permit denial. The Board ruled that although the Department's action may prevent the Mocks from the most profitable use of their property, reduction in value is not enough to find a taking. The Commonwealth Court affirmed the Board's decision on appeal. *Mock v. DER*, 623 A.2d 940 (Pa. Cmwlth. 1993). Subsequently, the Pennsylvania Supreme Court affirmed. *Mock v. DER*, 667 A.2d 212 (Pa. 1995).

The denial of the planning module does not deprive Appellant of all use of his land. The Department's Mr. Sigouin testified that other viable alternative methods of sewage disposal, including spray irrigation, rotating disk technology, constructed wetland technology and recirculating sand filter technology were suitable for the site. (N.T. 142 - 166) We find that at least two of these alternatives are practical methods of sewage treatment and would permit Appellant to continue to pursue residential development of the property with alternative sewage disposal systems. While the required use of these alternate systems may reduce the sale value of the property, the Department's requirement designed to promote the availability of safe drinking water cannot be viewed as a "taking."

The Department's refusal to accept Logue's proposal of a reverse osmosis filtration system which would protect the residents of the subdivision against contaminated drinking water as an alternate to the Department's sewage treatment alternatives cannot be viewed as an abuse of discretion or as an unlawful taking. While this would be a more economic solution for Appellant, it would not fulfill the department's duty to protect down-gradient neighboring land from the impact of nitrates in the groundwater beneath Logue's property.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeal.

2. Appellant has the burden of showing by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in denying approval of Appellant's request.

3. Appellant did not prove that nitrates generated by on-site sewage disposal systems would reduce the nitrate concentrations in the groundwater to below 10 mg/l.

4. The Department was justified in denying approval of Appellant's module.

5. The Department's denial of approval of Appellant's module is not a taking without just compensation under either the Constitutions of the United States or of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NILES C. LOGUE	:	
	:	
v.	:	**EHB Docket No. 94-177-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of December, 1996, it is ordered that the appeal is dismissed.

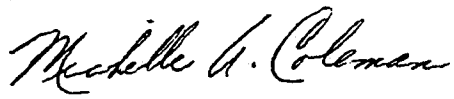
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 94-177-MG



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 3, 1996

c: **DEP Litigation Library:**
Attention: Brenda Houck

For the Commonwealth, DEP:
Gina Thomas, Esq.
Southcentral Region

For Appellant:
David R. Getz, Esq.
WIX, WENGER & WEIDNER
Harrisburg, PA

kh/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

HILLTOWN TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-016-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GEORGE J. BAKER, JR., Intervenor	:	**Issued: December 4, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Department of Environmental Protection has authority under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1 - 750.20a, to consider a private request for, and issue, an order requiring a municipality to amend its Act 537 Plan where all the statutory and regulatory factors for granting the request have been satisfied.

OPINION

The Department of Environmental Protection's (Department) motion for summary judgment arises from Hilltown Township's (Hilltown) appeal challenging the Department's December 14, 1995, order which directed Hilltown to revise its official sewage facilities plan (Plan) to provide for a proposed development of an 8-lot subdivision on approximately 11.6 acres owned by George Baker, Jr. (Baker) and located on Souderton Pike, approximately 1,030 feet east of its intersection with Keystone Drive, in Hilltown Township, Bucks County.

In October 1988, Baker submitted a proposed revision to the Plan for the extension of public sewers for his project because the Plan provides for on-lot sewage disposal systems for this property, and soil testing demonstrated that the parcel was unsuitable for on-lot systems. On January 9, 1989, Hilltown's Board of Supervisors rejected Baker's proposed amendment. On November 3, 1989, Baker requested the Department order Hilltown to revise the Plan. On December 14, 1995 after receipt of the request the Department issued an order requiring Hilltown to revise the Plan to provide for adequate sewage facilities for Baker's property. Hilltown filed its Notice of Appeal on January 19, 1996. The Board granted Baker's petition to intervene on March 4, 1996.

Hilltown's notice of appeal asserts the Department abused its discretion because the Analysis of Alternatives contained a number of errors. The errors claimed include that the site in question is not located within the Hilltown Authority's permitted service area, that the Analysis erroneously stated that a connection to public sewer facilities may be obtained through an existing sewer main located in front of the site, that the Analysis improperly eliminates the use of spray irrigation or package plants as alternatives, and fails to discuss and consider the viability of service to the site through TBA. Furthermore, the notice of appeal alleges the Department abused its discretion in finding that (1) existing sewers extend to the boundaries of the Baker parcel, (2) Baker has demonstrated that the site is not suitable for on-lot disposal, (3) Hilltown and the Authority recognized an inadequacy of treatment facilities in meeting minutes, (4) no action has been taken by Hilltown or the Authority to address the alleged inadequacy of the Official Sewage Facilities Plan Update Revision, and (5) the Plan does not provide adequate sewage facilities for this site.

The Department's motion, as amended,[1] asserts that it is authorized to issue the order because Baker's property is unsuitable for on-lot systems, Hilltown's Plan is inadequate and that Baker's request has satisfied the requirements of obtaining a private request. Baker joined in the amended motion[2] and accompanying memorandum. Hilltown filed an amended response[3] arguing the Department's motion is premature and the matter is not ripe because the necessary information is not before the Board based on the Board's July 19, 1996 order granting an extension for discovery for 30 days. Hilltown further contends that the Department's order is based on erroneous findings by the Department, and that the order for the extension of HTWSA sewers into TBA's jurisdiction violates a court ordered settlement agreement which delineates the respective sewer service territories of HTWSA and TBA.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1 - 1035.5.[4] The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *AH & RS Coal Corporation v. DEP*, 1995 EHB 1074.

---

[1] The Department's motion was originally filed on July 15, 1996. The Department filed an amended version on October 10, 1996.

[2] Baker originally joined the Department's motion on August 9, 1996 and subsequently joined in the Department's amended motion on October 21, 1996.

[3] Hilltown originally filed its response on August 6, 1996 and subsequently filed a response to the Department's amended motion on November 4, 1996.

[4] The motion was filed after July 1, 1996 so the new Pa. R.C.P. rule on summary judgment, which became effective on that date, is applicable.

The undisputed facts are these. The Board of Supervisors of Hilltown Township, Bucks County adopted by resolution, "the Wastewater Facilities Component of the Hilltown Township Comprehensive Plan" as the official sewage facilities plan for the Township. (Department's Amended Motion for Summary Judgment, ¶ 2; Hilltown's Amended Response, ¶ 2) The Department subsequently approved the Plan in June 1982, as the official sewage facilities plan of Hilltown in accordance with Section 5 of the Sewage Facilities Act, 35 P.S. § 750.5. (Department's Amended Motion for Summary Judgment, ¶ 2; Hilltown's Amended Response, ¶ 2) George Baker, Jr. is the owner of an 11.6 acre parcel located on Souderton Pike (S.R. 113), approximately 1,030 feet east of its intersection with Keystone Drive in Hilltown Township. (Department's Amended Motion for Summary Judgment, ¶ 3; Hilltown's Amended Response, ¶ 3) In October, 1988 Baker submitted to Hilltown a proposed revision to the Plan for an eight lot subdivision on his 11.6 acres. (Department's Amended Motion for Summary Judgment, ¶ 3; Hilltown's Amended Response, ¶ 3) The Plan provides that this property is located within the Rural Residential District and is to utilize on-lot sewage disposal systems. (Department's Amended Motion for Summary Judgment, ¶ 3; Hilltown's Amended Response, ¶ 3) On January 9, 1989 at the Hilltown Board of Supervisors meeting, Hilltown voted that it would not amend its Plan for the George Baker Project. (Department's Amended Motion for Summary Judgment, ¶ 4; Hilltown's Amended Response, ¶ 4) On November 3, 1989, Baker requested that the Department order Hilltown to revise the Plan. (Department's Amended Motion for Summary Judgment, ¶ 5; Hilltown's Amended Response, ¶ 5) In December 1989, the Department notified Hilltown of Baker's request for the revision to the Plan. (Department's Amended Motion for Summary Judgment, ¶ 6; Hilltown's Amended Response, ¶ 6) On February 2, 1990, Hilltown responded to the Department's request for written comments about

the Plan revision. (Department's Amended Motion for Summary Judgment, ¶ 7; Hilltown's Amended Response, ¶ 7)

On February 9, 1995, the Court of Common Pleas of Bucks County ordered the Township to approve Baker's preliminary subdivision plan, subject to conditions, one of which is the Department's approval of Baker's private request for revision of the Plan. This order was affirmed by the Commonwealth Court at *Baker v. Hilltown*, 668 A.2d 635 (Pa.Cmwlth. 1995). (Department's Amended Motion for Summary Judgment, ¶ 8; Hilltown's Amended Response, ¶ 8) On December 14, 1995, the Department ordered Hilltown to revise the Plan so as to provide adequate sewage facilities for the Baker property. (Department's Amended Motion for Summary Judgment, ¶ 10; Hilltown's Amended Response, ¶ 10) The Bucks County Planning Commission has evaluated Baker's preliminary subdivision plan and concurs with the determination that the property is unsuitable for on-lot systems for the eight approved lots. (Department's Amended Motion for Summary Judgment, ¶ 11; Hilltown's Amended Response, ¶ 11) Hilltown has admitted that Baker's property is not suitable for on-lot disposal for his 8 approved lots. (Department's Amended Motion for Summary Judgment, ¶ 12; Hilltown's Amended Response, ¶ 12)

Is the filing for a motion for summary judgment premature ?

Appellant contends that the Department's motion for summary judgment is premature and not ripe because the discovery period had not closed when the Department filed its motion.

We must reject Appellant's argument. Under Pa. R.C.P. 1035.2 "any party may move for summary judgment in whole or in part as a matter of law, after the relevant pleadings are closed, but within such time as not to unreasonably delay trial, (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established

property in question is located in the Rural Residential District and is to utilize on-lot sewage disposal systems. (Department's Amended Motion for Summary Judgment, ¶ 3; Hilltown's Amended Response, ¶ 3) The Act 537 Planning Report prepared by Urwiler & Walter, Inc., Engineers & Surveyors, for the Baker property sets forth five possible methods of sewage treatment for the site, including an on-site system. The engineers rejected the on-site system because the soil was unsuitable for any type of on-site system including elevated sand mounds. (Attachment to Department's Ex. C, Urwiler & Walter, Inc., Engineers & Surveyors' October 25, 1989 Act 537 Planning Report, p. 7) In their report the engineers stated that the Bucks County Department of Health investigated the site and performed fourteen deep tests to determine the depth to the limiting zone. In all of the tests the limiting zones were found within 20 inches from the surface. The engineers stated that this limitation ruled out all on-site systems. The Bucks County Planning Commission in their September 14, 1988 memorandum to Hilltown Township Board of Supervisors also stated that the soils on the site were not suitable for on-site systems. (Department's Ex. H)

Did Baker make a request to Hilltown for a revision of the Plan and did Hilltown refuse ?

The Department contends that Baker made such a request and that it was refused by Hilltown. Hilltown does not dispute that Baker made a request for revision but contends that the request was insufficient because (1) Hilltown was not made aware through Baker's proposed revision of the fourteen test pits referenced in Baker's request which were relied upon by Baker as proof that on-lot systems are not viable, (2) the request incorrectly stated where the proposed connection to the HTWSA system would be located and (3) the request failed to indicate that a lift station would have to be installed because any proposed connection to the HTWSA system would be upgradient from the site.

by additional discovery or expert report, ..."[5] In fact, in the accompanying note the drafters stated, "[O]nly the pleadings between the parties to the motion for summary judgment must be closed prior to filing the motion." Therefore, the Department could move for summary judgment prior to the close of discovery.

Was the Department's order appropriate ?

The Department contends that it is entitled to judgment as a matter of law because Hilltown's Plan was inadequate and because Baker satisfied the requirements for making a private request. Hilltown contends the order was inappropriate because the request contained insufficient and incorrect information.

We agree with the Department. Hilltown's Plan was inadequate and Baker satisfied the requirements for a private request. Under the statute,

> ... [a] resident or legal or equitable property owner in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs. This request may be made only after a prior written demand upon and written refusal by the municipality to so implement or revise its official plan ....

35 P.S. § 750.5(b).

Was Hilltown's plan inadequate ?

We find that the Plan was inadequate to meet Baker's request. Hilltown admits that the

---

[5]Baker joined in the motion for summary judgment by filing a motion for summary judgment on August 9, 1996, which was nine days after the close of discovery. Hilltown's failure to file a response to this motion indicates that no genuine issue of fact exists from additional discovery.

We agree with the Department. Under the statutory provisions the request for a Department order "may only be made after a prior demand upon and refusal by the municipality to so revise its official plan." 35 P.S. § 750.5(b). It is clear from the documents that Baker made such a request of Hilltown and it refused a revision to its Plan. Although Hilltown disputes the exact day in October, 1988 it received Baker's proposed revision to the Plan regarding his proposed development, it does not dispute the fact that he did make a demand of Hilltown to revise its Plan. (Department's Amended Motion for Summary Judgment, ¶ 3; Hilltown's Amended Response, ¶ 3) Furthermore, minutes from Hilltown's Supervisors January 9, 1989 Meeting reflect that Baker's attorney, who was present, requested the Board's consideration of an Act 537 revision for the property and the supervisors voted unanimously to deny the revision. (Department's Ex. D).

Did Baker satisfy the private request requirements ?

The Department contends that Baker satisfied all the regulatory requirements for making a private request set forth in 25 Pa. Code § 71.14 which are applicable to the substance of the request because the Department reviewed the request prior to the effective date of the amendments to the Sewage Facilities Act. Hilltown does not address this argument.

Whether we apply the new amendments or the regulations set forth in Section 71.14, we agree with the Department that Baker satisfied all the requirements for a private request. Consequently, we grant the motion on the grounds that the Department is entitled to judgment as a matter of law.[6]

---

[6] The Department argues that Section 71.14 applies even though it was repealed by the 1994 amendments because the Department reviewed Baker's private request prior to the effective date of the amendments to the Sewage Facilities Act and is not bound by these amendments. While that may be true as to the substance of the request, the Board applies the law that is in effect at the time

Under the 1994 amendments to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a, the Department is directed to consider:

> - the reasons advanced by the requesting person;
> - the reasons for denial advanced by the municipality;
> - comments of the planning agencies and county or joint county departments of health;
> - whether the proposed sewage facilities and documentation supporting the proposed sewage facilities is consistent with the department's rules and regulations and the municipality's official plan.

35 P.S. § 750.5(b.1) The Department may not refuse to order a requested revision because of inconsistencies with any applicable zoning, subdivision or land development ordinances, but it may make its order subject to any limitations properly placed on the development of the property by the municipality under its zoning, subdivision or land development ordinances or court orders. 35 P.S. § 750.5(b.2).

The Department as the moving party has the burden to demonstrate that it is entitled to judgment as a matter of law under the new amendments. The Department has satisfied its burden. The Department in implementing the new amendments considered all of the factors set forth and correctly granted the request. As noted earlier, the Department considered evidence of those factors which proved that the Plan, calling for on-lot sewage, was inadequate because soil tests taken by the Bucks County Department of Health indicated that the site was inappropriate for on-site systems.

---

the Department action is taken in determining the validity of the Department's order. Here, the amendments were enacted on December 14, 1994 and were to take effect in 365 days, which was December 14, 1995. Thus, since we consider the date of the action as the basis for determining the applicable law, the amendments are applicable here because the order was issued on the same day as the amendments went into effect.

Even if we consider the present circumstances under the Section 71.14 the outcome is the same. The provisions on private requests set forth in Section 71.14 of the regulations provide that:

> - A person who is a resident or property owner in a municipality may request the Department to order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs. ...
> - Private requests to revise an official plan shall contain evidence that the municipality has refused in writing to revise its plan,....
> - No private request to revise an official plan because of the subdivision of land will be considered by the Department unless the subdivision has received prior approval under municipal or county planning codes being implemented through Article VI[7] of the Pennsylvania Municipalities Planning Code (53 P.S. §§ 10601-10609).

25 Pa. Code § 71.14.

All of these requirements have been satisfied because the plan is deemed inadequate, Hilltown has refused in writing to revise its plan, and by court order, Hilltown was directed to approve the subdivision. *George Baker, Jr. v. the Board of Supervisors of Hilltown Township*, 668 A.2d 635 (Pa. Cmwlth. 1995) (affirming the opinion of the Bucks County Court of Common Pleas No. 89-05462-17-5). Therefore, the Department was correct in issuing the order to Hilltown.

The Board finds it unnecessary at this time to address the other grounds raised in the notice

---

[7] Although Section 71.14(c) refers to approval under codes being implemented through Article VI of the Municipalities Planning Code, that article addresses the enactment, amendment, and repeal of zoning ordinances and contains no requirements that subdivisions be approved. It is Article V of the Municipalities Planning Code, and not Article VI, which empowers municipalities to regulate subdivision and land development. Thus, the reference in Section 71.14(c) to Article VI is a clerical error. The Pennsylvania Supreme Court held in *Lancaster County v. Frey*, 18 A. 478 (Pa. 1889) that "the courts may correct an error even in an act of assembly when, as it is written, it involves a manifest absurdity and the error is plain and obvious." *Doylestown v. DEP, et al* (EHB Docket No. 95-198-MG Opinion and Order issued April 17, 1996). Such is the case here.

of appeal to render a decision on the current motion because technical concerns as well as whether HTWSA or TBA has service jurisdiction to the parcel are immaterial at this stage of the process. *Doylestown v. DEP, et al*, (EHB Docket No. 95-198-MG Opinion and Order issued April 17, 1996). The Department's order only requires Hilltown to submit a revision to the Plan. As the Department's order points out, the lack of consistency of the order with intermunicipal agreements is a function of sewage facilities planning and effecting changes in the agreement and securing any necessary court approval of these changes is an alternative for consideration.

We therefore enter the following order.

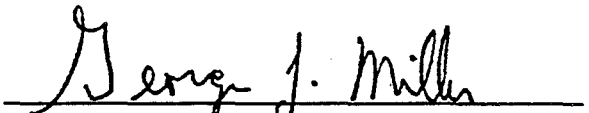
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HILLTOWN TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-016-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and GEORGE J. BAKER, JR.,	:	
Intervenor	:	

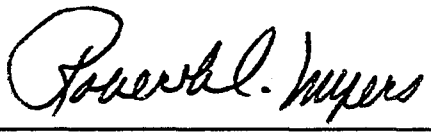
ORDER

AND NOW, this 4th day of December, 1996, the Department of Environmental Protection's motion for summary judgment is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-016-MG

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 4, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Jacqueline A. Hatoff, Esq.
Southeast Region

For Appellant:
Jack D. Wuerstle, Esq.
GRABOWSKI ASSOCIATES, P.C.
Perkasie, PA

For Intervenor:
Emory W. Buck, Esq.
COOPER AND GREENLEAF
Lansdale, PA

kh/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
	:	
v.	:	**EHB Docket No. 96-061-MG**
	:	**(Consolidated with 96-063-MG,**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAGLE ENVIRONMENTAL, Permittee	:	**96-065-MG and 96-066-MG)**
	:	**Issued: December 5, 1996**

OPINION AND ORDER ON MOTION TO COMPEL ACCESS TO LAND UNDER RULE 4009 OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE

By George J. Miller, Administrative Law Judge

Synopsis:

A permittee's motion to compel entry upon land of an appellant is denied for absence of jurisdiction where the appellant files a praecipe for withdrawal of his appeal at the same time the motion to compel access is filed. Rule 4009 of the Pennsylvania Rules of Civil Procedure only authorizes the Board to issue an order compelling entry to land against a party. The permittee in this case is free to proceed in an equity suit in a court of appropriate jurisdiction to compel entry to the land of the former appellant.

OPINION

Background

These consolidated appeals arise from the issuance by the Department of Environmental Protection ("Department") on February 9, 1996 of a solid waste permit to Eagle Environmental, L.P.

("Eagle") for the so-called Happy Landing Landfill proposed to be located in Washington Township in Jefferson County. Numerous appeals were taken from this action and have been consolidated at this docket number. The appeal of Cecil Steele ("Steele"), and many other individual appellants (originally filed at EHB Docket No. 96-063-MG), raised a number of objections including the claim that private water sources within one-half mile of the site were not tested and that the permit area infringed on a wetland area. In addition, this appeal claimed that Eagle had used extreme drought conditions to have perennial streams reclassified as intermittent streams.

On September 25, 1996, the Department suspended Eagle's permit because of the presence of exceptional value wetlands in the area of the proposed landfill. That determination was based in part on the investigation the Fish and Boat Commission ("Commission") conducted in the summer of 1996 as a result of which the Commission concluded that one or more of the streams located on the site of Eagle's proposed landfill were wild trout streams. Eagle's motion states that the Commission reported that it found trout in the streams at points within the boundary of the property owned by Steele.

On November 4, 1996, Eagle wrote to Steele asking for permission for its consultants to enter his property to examine the portions of the streams at issue which had been examined by the Commission. Steele responded by letter dated November 17, 1996 in which he denied Eagle's request and threatened legal action if anyone representing Eagle entered his property.

According to Eagle's motion, on November 20, 1996, counsel for Eagle called counsel for Steele to learn if this dispute over access could be resolved without a formal discovery request. Counsel for Steele responded by saying that Steele again had denied Eagle's request and that Steele had instructed his counsel to withdraw his appeal.

Promptly thereafter, on November 21, 1996, Eagle filed a motion to compel access to Steele's land under Rule 4009 of the Pennsylvania Rules of Civil Procedure and Steele filed a praecipe to withdraw his appeal.

Discussion

The Board's Rules of Procedure at 25 Pa. Code §1021.111 provide that discovery in Board proceedings is to be conducted under the discovery rules of the Pennsylvania Rules of Civil Procedure. Rule 4009 of the Pennsylvania Rules of Civil Procedure authorizes a party to serve on any other party a request to permit entry upon designated land in the possession or control of a party for the purposes of inspecting the property where such an inspection is relevant to the issues involved in the litigation. Under Rule 4019 of the Pennsylvania Rules of Civil Procedure, the Board may order that the inspection be permitted if the responding party is unwilling to permit the inspection. Unfortunately, Rule 4009 does not apply to property owned by persons who are not parties to the litigation. Rule 4009(c), however, states that the rule does not preclude an independent action against a person not a party for permission to enter upon the land.

Eagle's motion states that Steele seeks to withdraw his appeal solely to support the Board's jurisdiction and asks the Board to use its equitable powers in aid of its jurisdiction to order the inspection. The Board would most certainly order Steele to give Eagle access to his land if Steele remained a party because of the claimed presence of wild trout streams near the site of the proposed landfill is a central issue in this litigation. Unfortunately, Steele's withdrawal of his appeal eliminates the only sanction that the Board would have if Steele were not to comply with the Board's order to permit such an inspection.

Under these circumstances, we conclude that the Board has no jurisdiction to order the requested inspection. However, Eagle has the opportunity to file an equity action in a court of competent jurisdiction against Steele to permit the inspection of Steele's property by Eagle and its consultants. That court will have powers of contempt to enforce its order.

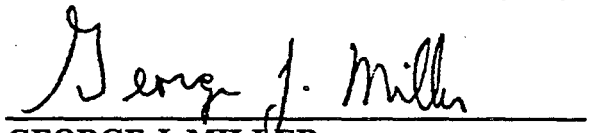
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
	:	
v.	:	**EHB Docket No. 96-061-MG**
	:	**(Consolidated with 96-063-MG,**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAGLE ENVIRONMENTAL, Permittee	:	**96-065-MG and 96-066-MG)**

ORDER

AND NOW, this 5th day of December, 1996, IT IS HEREBY ORDERED that the motion of Eagle Environmental, L.P. to compel access to land owned by Cecil Steele under Rule 4009 of the Pennsylvania Rules of Civil Procedure is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

Dated: **December 5, 1996**

See next page for service list

c: **DEP, Bureau of Litigation**
Attention: Brenda Houck, Library

FOR THE COMMONWEALTH, DEP:
Michael Buchwach, Esquire
Southwest Region

FOR APPELLANTS:
Jefferson County Commissioners
Jeffrey Lundy, Esquire
Punxsutawney, PA
Jefferson County Solid Waste Authority
Robert P. Ging, Jr., Esquire
Confluence, PA
Washington Township
John H. Foradora, Esquire
FORADORA & FORADORA
Ridgway, PA

FOR CERTAIN INDIVIDUAL APPELLANTS:
Richard S. Ehmann, Esquire
Pittsburgh, PA

FOR PERMITTEE:
David R. Overstreet, Esquire
KIRKPATRICK & LOCKHART
Harrisburg, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION	:	**Issued: December 9, 1996**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR RECONSIDERATION

By Thomas W. Renwand

Synopsis:

The Department's Application for Reconsideration is denied. The Department has failed to demonstrate grounds for reversing the Board's Adjudication in this matter. Implicit in the Board's power to adjudicate is the authority to order the Department to issue a permit, license or certification where the Board has determined that the Department abused its discretion in denying an application for a permit, license or certification. Second, the Board's decision in this matter is not inconsistent with its earlier decision in the appeal of *New Hanover Township*. Third, the Department is incorrect in its assertion that the Board failed to address two discharges which will be re-routed in conjunction with the project. Fourth, although the Board's finding regarding low flow level for the Conodoguinet Creek was in error, this did not affect its assessment of a study conducted by the City's expert of dissolved oxygen levels in the creek. Fifth, the Department failed to produce

evidence that the Board's findings regarding the City's dissolved oxygen modeling, the City's failure to conduct a transient analysis, and the City's use of the HEC II model were in error. In any event, the Department's concerns with issuing the certification can be met through its authority to impose conditions on the certification with respect to the effect of the project on water quality.

OPINION

This appeal involves a request by the City of Harrisburg ("City") to construct and operate a hydroelectric dam along the Susquehanna River in the City of Harrisburg. In order to construct the dam, the City is required to obtain certification from the Department of Environmental Protection ("Department"), pursuant to Section 401 (a) of the Federal Clean Water Act, 33 U.S.C.A. § 1341 (a), that the proposed project will comply with applicable provisions of the Clean Water Act and will not result in discharges in violation of the Clean Water Act. The Department denied the City's request for certification and the City appealed. In an Adjudication issued on June 28, 1996, the Environmental Hearing Board ("Board") determined that the Department had improperly denied the City's request for Section 401 certification. *See City of Harrisburg v. DER*, EHB Docket No. 88-120-R (Adjudication issued June 28, 1996). The Board ordered the Department to issue the requisite certification within six months, and remanded the matter to the Department to impose any necessary limitations and monitoring requirements on the certification in accordance with Section 401 (d) of the Clean Water Act, 33 U.S.C.A. § 1341 (d).

On July 18, 1996, the Department filed an Application for Reconsideration and Reargument *En Banc*. The City responded with an Answer on August 7, 1996. On August 28, 1996, the Board held oral argument *en banc* on the Department's Application for Reconsideration. After a thorough review of each of the arguments presented by the Department in its Application, we conclude that

the Department has failed to present grounds for changing the order resulting from our Adjudication in this matter.

In its Application, the Department presents seven grounds for reconsideration of the Board's Adjudication: (1) The remedies ordered by the Board in its Adjudication exceed the Board's authority under the Environmental Hearing Board Act. (2) The Adjudication in this appeal is inconsistent with the Adjudication in *New Hanover Township v. DEP*, EHB Docket No. 88-119-MR (Consolidated) (Adjudication issued June 25, 1996), which was issued three days earlier. (3) Neither the evidence offered by the City at the hearing nor the Board's Adjudication address two new discharges which will result from the project. (4) The Board's finding that flows of 2000 cubic feet per second constitute "low flow" in the Conodoguinet Creek is incorrect. (5) The Board's reliance on modeling and predictions of the City's expert, Dr. Dennis Ford, regarding dissolved oxygen conditions in the Conodoguinet Creek and the Susquehanna River was misplaced. (6) The Board's conclusion that it was harmless error for the City to have failed to conduct a transient analysis is incorrect. (7) The Board misapprehends the Department's argument concerning the City's use of the HEC II model. For the reasons which follow, we dismiss each of the Department's arguments.

Board's Authority

The Department asserts that the Board exceeded the scope of its authority in this matter by directing the Department to issue water quality certification. It is the Department's contention that the Board has no power to order the Department to take an action, such as the issuance of a permit, license, or water quality certification, even where the Board has found that the Department has abused its discretion in denying the request. The Department contends that the Board's role is limited to either affirming the action of the Department or, in those cases where the Board has

determined that the Department has abused its discretion, reversing the Department's action and remanding it to the Department to conduct a second review.

The scope of the Board's power is set forth in the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, as amended, 35 P.S. § 7511 *et seq.*, which established the Board as "an independent, quasi-judicial agency." Historical and Statutory Notes to § 1 of the Act, 35 P.S. § 7511. Pursuant to Section 4 of the Act, the Board has the power to hold hearings and to issue adjudications. 35 P.S. § 7514. "Adjudication" is defined at § 101 of the Administrative Agency Law as "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all parties to the proceeding in which the adjudication is made." 2 Pa. C.S.A. § 101. Thus, the Board has the power to issue an order which affects the personal or property rights, duties or obligations of a party, including the Department.

The Department argues that the Board's order of June 28, 1996 amounts to "equitable relief," in the form of a mandamus, which the Department asserts exceeds the scope of the Board's powers. In support of its argument, the Department cites two decisions of the Commonwealth Court: *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989), and *Costanza v. Department of Environmental Resources*, 606 A.2d 645 (Pa. Cmwlth. 1992) Although these cases address the subject of equitable relief, they do not provide support for the Department's position. In both cases, the Court's ruling turned on the fact that the Department had not taken an action and, therefore, the jurisdiction of the Board did not attach.

In *Marinari* the petitioners had submitted to the Department an application for a modification to their solid waste permit. The Department sent a letter to the petitioners which contained technical

comments on the application. The petitioners filed a petition for review of the Department's letter with the Commonwealth Court. The Department filed preliminary objections contending, *inter alia*, that the applicants had not exhausted their administrative remedy by first filing an appeal with the Board. The Court disagreed that the petitioners' remedy lay in an appeal to the Board since the Department had not taken an appealable action. The Court stated as follows:

> The EHB is not statutorily authorized to exercise judicial powers in equity. Its power and duty are to hold hearings and issue adjudications on DER's orders, permits, licenses or decisions. [Citing Section 4 (a) of the Environmental Hearing Board Act, 35 P.S. § 7514 (a)] Because DER has done none of those things, Petitioners' remedy does not lie with the EHB...

566 A.2d at 387. Thus, the basis for the Court's decision in *Marinari* was that the jurisdiction of the Board does not attach until the Department has taken an appealable action. Prior to that, the Board may not order the Department to act. Once the Department has acted, however, the Board may review that action on appeal and, if it determines that the Department has abused its discretion, order the Department to take a different action.

In *Costanza v. Department of Environmental Resources*, 606 A.2d 645 (Pa. Cmwlth. 1992), the petitioner had filed with the Board a "Notice of Appeal/Petition for Declaratory Relief" seeking a determination from the Board that he was exempt from the payment of certain fees under 25 Pa. Code § 275.222 (d). The Board dismissed the appeal holding that it did not have the power to grant declaratory relief. The Commonwealth Court affirmed. As in *Marinari*, the Board's jurisdiction did not attach because the Department had not taken an action. In conclusion, the Court noted in *Costanza* that "[i]f and when DER attempts to enforce its claim that Costanza is subject to the

administrative fees in question, a final agency action will result. At that time Costanza may appeal to the Board and raise the issue he prematurely presents today." 606 A.2d at 648.

Thus, *Marinari* and *Costanza* do not stand for the proposition that the Board may not order the Department to take a certain action but that the Board may do so only after the Department has acted. Indeed, the Board has recognized that it has the authority to order the Department to issue a permit when the appellant has met its burden of proving that it is entitled to the permit. *Sanner Brothers Coal Co. v. DER,* 1987 EHB 202; *Harman Coal Co. v. DER*, 1977 EHB 1, *aff'd on other grounds*, 384 A.2d 289 (Pa. Cmwlth. 1978). In addition, the Board's rules authorize it to exercise powers in equity once an appeal has been filed. These include the power to grant a supersedeas (25 Pa. Code § 1021.76), the power to grant a temporary supersedeas (25 Pa. Code § 1021.79), and the power to impose sanctions (25 Pa. Code § 1021.124).

The scope of the Board's authority in reviewing actions of the Department was further outlined by the Commonwealth Court in the landmark decision *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). That case involved the Department's issuance of permits for the dredging of sand and gravel along the Upper Allegheny River. The permits contained conditions which limited the days, hours and location in which dredging could occur. Following a hearing, the Board found that the Department had abused its discretion in imposing the conditions in question. The Board reversed the decision of the Department and ordered the issuance of permits to the appellants which did not limit the hours during which dredging could occur and which granted the appellants the right to dredge in a specified area for a period of two years.

Both the Department and the dredging companies appealed the Board's decision to the Commonwealth Court. In its appeal, the Department argued that the Board did not have the power to change the permits issued by the Department or to extend the area into which dredging could occur. The Commonwealth Court disagreed with the Department and affirmed the decision of the Board.

More importantly, the Court in *Warren Sand & Gravel* delineated the extent of the Board's power in reviewing actions of the Department. The Court held as follows:

> [W]hen an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. *If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.*

341 A.2d at 565 (Emphasis added). Because the Department's authority to attach terms and conditions to the permits was discretionary, the Court accordingly found that the Board could properly substitute its discretion for that of the Department and, thereby, order the issuance of permits with different terms and conditions than those originally imposed by the Department.[1]

---

[1] Similarly, in *East Pennsboro Township Authority v. Department of Environmental Resources*, 334 A.2d 798 (Pa. Cmwlth. 1975), the Commonwealth Court upheld the Board's modification of a Department order which prohibited any additional connections to the

Likewise, in the present appeal, the Department's denial of water quality certification to the City was an act of its discretion. Further, as we found in our Adjudication of this matter, it was an abuse of the Department's discretion because of the Department's failure to consider the City's application in a timely fashion and its consequent refusal to consider further information from the City to enable it to meet the one year time limit on the issuance of the certification imposed by Section 401 of the Clean Water Act. As set forth in *Warren Sand & Gravel*, where the Board finds, based on the evidence presented at hearing, that the Department has abused its discretion, as we have determined in this case, then the Board may properly substitute its discretion for that of the Department and order the relief requested. This includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken. If, as the Department argues, the Board's power in this case is limited either to upholding the Department's denial of certification or to vacating the Department's denial and remanding to the Department to conduct a second review of the City's application, then the above-quoted language of the Commonwealth Court in *Warren Sand & Gravel* loses all meaning.

This is further emphasized by the Commonwealth Court's decision in *Young v. Department of Environmental Resources*, 600 A.2d 667 (Pa. Cmwlth. 1991), *alloc. denied*, 609 A.2d 169 (Pa. 1992). That case involved the State Board for Certification of Sewage Enforcement Officers ("Sewage Board"), which reviews actions of the Department certifying or revoking certification of sewage enforcement officers. Like the Environmental Hearing Board, the Sewage Board exercises *de novo* review power over the Department's actions. The issue in *Young* was whether an

---

township's sanitary sewer system. The Board modified the Department's ban and ordered the issuance of up to three permits per month for units requiring connection to the sewer system.

adjudication by the Board which upheld the Department's issuance of a revocation notice to the appellant required a majority vote in accordance with the applicable regulations. The Department argued that the majority vote provisions of the regulations applied only if the Sewage Board decided to "take action" by reversing the Department's action. In dismissing the Department's argument, the Commonwealth Court stated as follows:

> In advancing this convoluted theory...DER ignores the de novo aspect of the hearing before the Board. De novo review involves full consideration of the case anew. *The Board, as a reviewing body, is substituted for the prior decision maker, DER, and redecides the case.*

600 A.2d at 668 (Emphasis added).

Consistent with the Commonwealth Court's holding in *Young*, the Environmental Hearing Board, in exercising *de novo* review power, hears the case anew and may order a different result than that reached by the Department.[2]

Further evidence of the Board's authority to order the Department to take an action is found in Section 1711 of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101 *et seq.*, at § 4000.1711. This section provides for the filing

---

[2] The Liquor Code and a series of cases interpreting its provisions also provide useful precedent in determining what is meant by "*de novo* review." It is the function of the Liquor Control Board to determine whether to grant or deny an application for a liquor license. An aggrieved party may appeal the decision of the Liquor Control Board to the court of common pleas. The Liquor Code states that the court shall hear the application *de novo* and "shall either sustain or over-rule the action of the board and either *order or deny the issuance of a new license...*" 47 P.S. § 4-464 (Emphasis added). In interpreting the *de novo* role of the court in reviewing decisions of the Liquor Control Board, the Pennsylvania Supreme Court held, "Based upon its *de novo* review, it may sustain, alter, change, modify or amend the board's action whether or not it makes findings which are materially different from those found by the board." *Pennsylvania State Police v. Cantina Gloria's Lounge, Inc.*, 639 A.2d 14, 19-20 (Pa. 1994).

of citizen suits by aggrieved persons against any person alleged to be in violation of the Act. Where a citizen suit is brought under this section against the Department, the Board is given jurisdiction over the action. Implicit in this grant of jurisdiction to the Board is the power to order the Department to take the necessary action to insure compliance with the Act.

Finally, the Commonwealth Court has held that an appellant's due process rights are met by a *de novo* hearing before the Board. *Department of Environmental Resources v. Steward*, 357 A.2d 255 (Pa. Cmwlth. 1976). In order to afford an appellant due process, the Board, in hearing the case *de novo*, must have the power to substitute its discretion for that of the Department and order issuance of a permit, license, certification, or other relief requested by an appellant if the evidence introduced at the hearing demonstrates that the statutory and regulatory requirements have been met and that the Department abused its discretion in refusing to issue the relief in question. In contrast, adopting the reasoning of the Department would produce an unfair result, particularly in the present case. According to the Department, even if the Board determined that the Department had abused its discretion in denying water quality certification to an applicant, the Board would have no authority but to remand the case to the Department to conduct a second review. After the one-year review period, if the Department again denies the certification, the applicant would be in the same position as it was one year earlier (or, in this case, eight years earlier). The applicant would have no remedy but to again file an appeal with the Environmental Hearing Board and begin the process anew. This process could continue *ad infinitum* with the aggrieved applicant being afforded no relief. This hardly serves to afford an appellant his right to due process. To enable the Board to grant meaningful relief to an appellant who has been aggrieved by an action of the Department, the Board must have the power not simply to reverse the action of the Department but to order the

Department to take whatever action is necessary to insure that an appellant is afforded his right to due process.

Also implicit in the Board's power to conduct a *de novo* hearing is the ability to consider evidence which was not reviewed by the Department. As stated by the Commonwealth Court in *Warren Sand & Gravel*:

> [W]hen an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, *the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing.* The Board's duty is to determine if DER's action can be sustained or supported by the *evidence taken by the Board.*

341 A.2d at 565 (Emphasis added).

Thus, the Board's power to conduct a *de novo* hearing extends beyond the ability to simply look at the same evidence reviewed by the Department. We are not limited to reviewing only that evidence which the Department considered in taking its action. but are required to consider whether the Department's action can be supported by the evidence presented at the merits hearing before the Board. *Id. See also, Oley Township v. DEP*, EHB Docket No. 95-101-MG (Adjudication issued October 24, 1996); *Hrivnak Motor Co. v. DER*, 1993 EHB 432.

This is particularly evident in *Warren Sand & Gravel*. There, the Department had conducted a factfinding hearing prior to issuing the permits with the conditions which were the subject of the appeal. The purpose of the hearing was to hear testimony relevant to the application to dredge sand and gravel. On appeal to the Board, the Board conducted its own hearing. The hearing was *de novo*

as the Board heard from new witnesses and took new evidence. The Department strongly objected to the Board considering evidence presented by the appellants which had not been presented at the Department's factfinding hearing. The Commonwealth Court affirmed the Board and ruled against the Department on this issue. In upholding the Board's reversal of the Department's action, the Court emphasized that the Board was not to limit its scope of review to the evidence presented at the Department's factfinding hearing but was to consider the evidence presented at the hearing before the Board. If the Commonwealth Court had intended the Board to consider only the evidence reviewed by the Department in taking the appealed-from action, then the Court certainly would have required the Board to do so in *Warren Sand & Gravel* where there was a record of the evidence reviewed by the Department in support of its decision.

In addressing the Commonwealth Court's discussion in *Warren Sand & Gravel* of the Board's ability to consider such "after-acquired evidence," the dissent focuses on the following language: "The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board." The proper interpretation of this language is that the Board may consider after-acquired evidence relevant to the issues presented by the application to the Department, whether or not the evidence supports the Department's action or indicates that the Department's action should be sustained. In *Warren Sand & Gravel*, the Board considered after-acquired evidence in *reversing* the action of the Department, not in upholding the Department's action. The Board's consideration of this evidence in reversing the Department's action was affirmed by the Commonwealth Court. Secondly, were we to allow the Department to introduce after-acquired evidence which supports its action but bar an appellant from introducing after-acquired evidence which demonstrates that the Department's action was an abuse of discretion, we

would be fostering an unfair, one-sided system of litigation before the Board. The Board's role is not to act merely as a "rubber stamp" for Department actions, but to insure that the Department has fulfilled its obligation of providing a fair and impartial review of the matter before it. We cannot properly perform that role unless all parties who appear before us are assured of an equal playing field.

It is especially important in the present case that the Board be allowed to hear evidence which was not considered by the Department in its review of the City's request for Section 401 certification since it is clear from the record that the Department did not even begin its review of substantial portions of the City's application until *after* it had begun to prepare its letter of denial.[3] The record further shows that the Department never informed the City that it required additional information and that it ceased communications with the City during the review period. The Department argues that the Board should not be permitted to hear evidence which was not considered by the Department in its review of the City's application for certification, yet the Department did not ask for additional information and was not willing to consider additional information from the City.[4] The Department

---

[3] The dissenting opinion states in footnote 6 that the Department's preparation of its denial letter prior to completing its review of the City's application is unexceptional because in many cases it will be apparent that an application is defective without the Department having reviewed the entire application. This is not such a case. Here, the Department began to prepare its denial letter in January 1988. Much of what it based its denial on were alleged water quality problems and effects of raised groundwater levels resulting from the project. Yet, according to the testimony of Department personnel, the Department did not even begin its evaluation of the City's water quality modeling or effects of raised groundwater levels until January or *February* 1988. (Adjudication Findings of Fact 16 and 17, p.17)

[4] Indeed, the dissent acknowledges in footnote 5 that the Board may consider evidence which was not reviewed by the Department where such evidence was available to the Department but "which -- for one reason or another -- the Department chose not to consider."

cannot have it both ways. When a citizen submits a request for a permit, a release of a bond, or certification of a project to construct a dam, that citizen must be assured that the Department will look fairly at the request or application. It is clear from the record in the present case that the Department did not do so.

This is very much akin to what occurred in *Warren Sand & Gravel.* There, the Court admonished the Department to set forth clearly in its rules and regulations the specific requirements necessary to obtain a dredging permit. It further criticized the *ad hoc* nature of the permitting process in this area. The Court stated:

> The present system requires a citizen to guess what requirements he may be subjected to upon the filing of an application for a dredging permit, and allows DER, on an ad hoc basis, to subject such citizens to whatever terms and conditions it believes necessary. Such a system is wholly unacceptable...Under such circumstances, due process of law requires government to at least notify all parties concerned on what the rules of the game are.

341 A.2d at 566.

In the present case, there are no specific regulations or guidelines to advise an applicant for Section 401 certification as to the exact type or amount of information required by the Department. If we were to allow the Department to proceed as it did in the present case -- require the City to guess as to what information was required in its application for certification, ignore attempts at communication by the City, and then argue on appeal that the matter should be remanded to the Department because it did not have an opportunity to review all of the evidence presented by the City at the hearing -- we would hardly achieve the goals of fairness and due process envisioned in *Warren Sand & Gravel.*

Moreover, the Board recognized in its Adjudication that four years had passed between the filing of the appeal and the commencement of the hearing on this matter and that technology and data cannot be reviewed in a vacuum. As stated by the Board in *Hrivnak*, 1993 EHB 432, "[W]e cannot consider DER's action in a 'snapshot', based only on the circumstances as they existed when DER took its action." *Id.* at 437. The Board further noted as follows:

> Where there is a long delay between the initiation of DER's action and a hearing on the merits as we had in this matter, it is not surprising that evidence arises showing a change in circumstances more favorable to the appellant than the data upon which DER based its decision to act in the first place...When we are adjudicating an appeal, it is our responsibility to review DER's action based on the evidence put before the Board. Even where evidence was not previously available to DER, we have stated that we have wide latitude in hearing evidence in a *de novo* proceeding on the basis of *Warren Sand & Gravel.*

1993 EHB at 437-38.

At the oral argument on the Department's Application for Reconsideration, the Department argued that such after-acquired evidence was not relevant to the question of whether the Department had abused its discretion in denying the City's request for certification.[5] This position is also adopted by the dissenting opinion, which cites the Commonwealth Court's decision in *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265 (Pa. Cmwlth. 1994) ("*CRY*"). The dissent interprets *CRY* as holding that after-acquired evidence is not relevant in determining whether the Department has abused its discretion in taking an action.

---

[5] The Department did not explain why after-acquired evidence which *supports* its action is relevant but after-acquired evidence which is offered *against* its action is not relevant.

CRY involved an appeal by an environmental group from the Department's issuance of a permit for the construction and operation of a landfill. One of the appellant's challenges to the permit issuance was that the Department had abused its discretion in approving the landfill's liner, which the appellant contended had a high probability of leakage due to its degree of permeability. In an appeal before the Board, the Board upheld the Department's issuance of the permit, finding that although the primary liner was highly permeable and had a high potential for leakage, the liner system was designed in recognition of this fact and in a such a manner as to prevent the migration of leachate into the groundwater. Following the close of the hearing but prior to issuance of the Board's adjudication, the appellant sought to reopen testimony to introduce evidence of leakage due to the liner being torn during its installation. The Board denied the appellant's motion.

On appeal, the Commonwealth Court affirmed the Board's decision not to allow introduction of this testimony. The Court reasoned that evidence of damage to the liner during construction of the landfill was not relevant to the question of whether the Department acted properly in approving the permit. The Court did not hold, as the Department and the dissent contend, that the Board may not hear evidence which is acquired after the Department's action has taken place. In fact, the Court reiterated its earlier holding in *Warren Sand & Gravel, supra*, in stating as follows:

> [W]hen an appeal is taken from a decision of the DER to the EHB, the EHB is required to conduct a hearing *de novo* and is not limited to a review of the evidence received at the DER's fact-finding hearings: when reviewing a discretionary action by the DER the EHB is permitted to substitute its discretion for that of the DER based upon the record before it.

639 A.2d at 1274. The Court's decision rested not on the fact that the evidence was acquired after issuance of the permit, but on the fact that evidence of the liner's tearing during its installation was not relevant to the question of whether the permit was properly issued in the first instance.[6]

Here, all of the evidence considered by the Board centered on whether or not the Department's denial of certification could be upheld and was, therefore, relevant.

With regard to the design changes and mitigation proposals which were not reviewed by the Department, it is certainly within the technical expertise of the Board to review this evidence. *See e.g., Department of Environmental Resources v. Big B Mining Co.*, 554 A.2d 1002, 1005 (Pa. Cmwlth. 1989) ("[W]e are mindful that we must not substitute judicial discretion for administrative discretion in cases involving technical matters within the special knowledge and competence of the Board."); *Harman Coal Co. v. Department of Environmental Resources*, 384 A.2d 289, 292 (Pa. Cmwlth. 1978) (Members of the Environmental Hearing Board and its staff have expertise in the scientific and technical aspects of environmental protection.) Indeed, in the recent decision of *Oley Township v. DEP*, EHB Docket No. 95-101-MG (Adjudication issued October 24, 1996), the Board was required to review evidence of the effect of a proposed project on wetlands which had not been considered by the Department in its review. Based on the evidence, the Board concluded that the Department's failure to consider such evidence in its review of the permit application could not be determined to be environmentally inconsequential and, therefore, it remanded the permit to the Department for further review in accordance with the findings therein.

---

[6] An analogy can be made that evidence of a car seat being torn in the manufacturing process is not evidence that the automobile was defectively designed. In *CRY*, the design *did not* envision the installation of a torn liner.

In the present case, the new evidence consisted of changes in the design of the dam and additional mitigation proposals. The Department asserts that these changes amounted to a wholly different proposal than that submitted to and reviewed by the Department. As such, the Department takes the position that the Board did not have the authority to consider the "revised proposal." Had this been the case, we would agree with the position taken by the dissent. However, as we unanimously found in our Adjudication of this matter, "the changes are not so fundamentally and significantly different as to amount to an entirely new Project proposal." *City of Harrisburg, slip op.* at 13. This evidence was properly considered by the Board within the scope of its *de novo* review power.

In conclusion, we reject the Department's argument that the Board exceeded the scope of its authority by ordering the Department to issue Section 401 certification to the City and remanding the matter to the Department to impose conditions pursuant to Section 401 (d) of the Clean Water Act. Because the Department denied the request for the certification, it did not exercise its authority to impose water quality conditions on the permit. Our order properly gives it an opportunity to impose any water quality conditions it may deem appropriate because the selection of any such necessary conditions involves decisions which the Department should make in the first instance.

Consistency with New Hanover Decision

The Department's second argument in favor of reconsideration is its contention that the Board's decision in this appeal is inconsistent with its decision in *New Hanover Township v. DEP*, EHB Docket No. 88-119-MR (Adjudication issued June 25, 1996), issued three days prior to the Adjudication in the instant case. In *New Hanover*, the Board vacated a solid waste permit issued by the Department which imposed conditions requiring a redesign of the landfill to meet the conditions

of newly adopted regulations so that the Department could not have known what design it was approving when it issued the permit. Of course, since the Department there was acting as the final permitting authority, issuance of the permit authorized pre-construction activities for a landfill whose design could not be known.

Under Section 401 of the Clean Water Act, the Department does not act as the final permitting authority. The issuance of the certification authorizes nothing but the City's right to effectively apply to the Federal Energy Regulatory Commission ("FERC") for a permit for the facility, and the FERC must also evaluate the environmental impact of the project before issuing such a permit. Any conditions imposed by the Department on the certification to protect water quality, however, are binding on the FERC.

We are not persuaded by the Department's argument that it could not issue such a certification because some aspects of the design, including mitigation measures proposed by the City, were changed by the City in its presentation to the Board as compared to its initial application. As indicated above, the Department did not seek this information at the time the application was made for the certification. In the present appeal, the Board recognized that some of the mitigation measures proposed by the City were not in final form. *See, e.g., City of Harrisburg*, slip op. at p. 80-85. However, the Board determined that a final design was not required at this stage of the application process, particularly since the Department was not the final permitting authority as it was in *New Hanover*. This finding was based in part on the testimony of the Department's own hydropower coordinator who acknowledged that "a complete detailed design" of the project would not be completed until "after issuance of the [FERC] license." (Transcript, page 2470) Furthermore, although some of the mitigation designs may not have been in final form, the amount of information

submitted by the City describing the mitigation measures was voluminous. This information, in conjunction with the expert testimony presented at the hearing, contained sufficient detail to assess the effectiveness of the mitigation measures proposed by the City. For these reasons, the Board determined that the mitigation measures proposed by the City provided a sufficient basis for granting Section 401 certification. Furthermore, the Department can exercise its right to review and object to changes made in the design in connection with the City's application to the FERC. Sections 401 (a) (3) and (4) give the Department the right to review any changes and withdraw its certification at that stage of the proceeding as a matter of right.

The Board's remanding of this matter to the Department to impose conditions on the certification was not with the intention of curing defects or deficiencies in the City's proposal, as the Department contends, but, rather, was intended as a means of insuring that the Department could require the adoption and implementation of the mitigation measures as part of the project to insure that water quality requirements will be met. Because the Department denied the request for certification based on water quality objections, rather than exercise its right under Section 401 (d) to impose conditions relating to water quality, our remand gives the Department the opportunity to impose appropriate water quality conditions. In our view, the evidence before the Board with respect to the project gives the Department adequate information on which to base those conditions. As indicated above, if there are changes in the design, the Department can exercise its right to withdraw the certification or impose additional water quality conditions before the FERC takes final action on the City's license application.

For the reasons set forth above, we find that the Department has failed to demonstrate that the Board's decision in the present appeal is inconsistent with that of *New Hanover*.

Two "New" Discharges

The Department's third argument in favor of reconsideration is that the City and the Board failed to consider two "new" discharges which will occur as a result of the project.

The first discharge is from a subdrain behind the cutoff wall which the City plans to construct in conjunction with the project. Groundwater collected in the subdrain will be discharged to the Susquehanna River. This is not a "new" discharge, as the Department asserts, because the groundwater currently discharges to the Susquehanna River. The Department is also incorrect in its assertion that this discharge was not taken into consideration by the City or its experts. In response to the Department's questioning regarding the discharge from the subdrain, the City's expert Yves Pollart testified as follows:

> It would be discharged downstream of the proposed dam, except I'd like to clarify it, at this point, whatever is in the groundwater right now is going out to the Susquehanna River. So we're not changing the groundwater. The groundwater is going to remain the groundwater. So if it's going to the Susquehanna now, we put up a retaining wall, we put up a drain line, it's still going to go to the river.

(Transcript, page 1852)[7]

However, because the groundwater is now being discharged from a single location, there is a question as to whether this will affect the quality of the water being discharged to the river. The quality could be affected if the groundwater contains pollutants which present a problem at a concentrated level. There is no evidence that this is the case. The Department states only that there is nothing in the record "that addresses concerns about the impact of pollutants which *might* occur

---

[7] This testimony is taken from the transcript of the hearing on the merits.

in the groundwater collected in that subdrain and discharged to the Susquehanna." (Department's Memorandum in Support of its Application for Reconsideration, page 16) (Emphasis added)

Moreover, the Department is incorrect in its assertion that this impact was not considered by the City. Thomas Gwozdek testified that, if it is determined that the discharge contains pollutants, the discharge can be easily redirected to the Harrisburg sewage treatment plant. (City Statement No. 4, page 38; Transcript, page 1063) Based on its review of this matter on remand, the Department may impose water quality conditions on the water at the point of this discharge or require that this discharge be directed to the Harrisburg sewage treatment plant.

The second "new" discharge addressed by the Department in its Application for Reconsideration is not a new discharge but, rather, the re-routing of an existing discharge. As noted in the Adjudication, the City of Harrisburg has a combined sewer system. When the capacity of the sewer system is exceeded due to heavy precipitation, "combined sewer overflows" discharge the excess flow from the sewer system into the Susquehanna River. Due to the project, the outfalls of twelve combined sewer overflows will be either fully or partially submerged. The City intends to consolidate eleven of the affected overflows into five pump stations. The twelfth overflow, which currently discharges above the location of the dam, will be re-routed to discharge below the dam. It is this discharge which the Department asserts was not considered by the City or the Board.

Contrary to the Department's assertion, the re-routed discharge was addressed both by the City at the hearing and by the Board in its Adjudication. On page 77 of the Adjudication, the Board found that the re-routing of the twelfth combined sewer overflow will not result in an increase of flow, nor will it change the quality of the discharge, except that bar screens which the City intends to install on the affected combined sewer overflows, are likely to reduce the amount of debris

currently flowing into the river. At the hearing, Yves Pollart testified that there would be no difference after the re-routing of the discharge from that which was occurring pre-project. (Transcript, page 1860) In addition, Thomas Gwozdek testified that the re-routed combined sewer overflow will carry water that is currently diverted to the Susquehanna River during rainfall events, "and the character or loading of pollutants will not increase beyond the levels presently being discharged to the Susquehanna River by the [combined sewer overflows]." (City Statement No. 4, page 44)

Thus, the only difference which will occur post-project is that the location of the discharge will change from upstream of the dam to downstream of the dam. The location of the discharge is, however, a condition which must be taken into consideration. The City's expert, Rex Tolman, testified that, in analyzing the impact of a discharge from a sewage treatment plant, one factor which must be considered is location of the discharge. (Transcript, page 1994) In this case, the location of the discharge is changing from above the dam, where there is a concern about low dissolved oxygen levels, to below the dam, where there is no evidence that low dissolved oxygen levels present a problem. There is no evidence that re-routing the combined sewer overflow discharge below the dam will result in a violation of water quality standards.

We do not view these discharges to be a basis for the denial of the requested water quality certification. These discharges do not introduce any new pollutants into the river so we do not view these discharges as resulting from the construction or operation of the proposed facilities within the meaning of Section 401 (a) (1) of the Clean Water Act. In addition, these discharges are not subject to an applicable effluent limitation imposed by the Department under the sections of the Clean Water Act specified in Section 401 (a) (1). We interpret Section 401 (a) (1) to refer to promulgated effluent

limitations under the specified sections of the Clean Water Act. Section 401 (a) (1) requires the Department in the absence of such a promulgated effluent limitation to so certify to the absence of any such effluent limitation under these circumstances. While such a certification will not be deemed to satisfy Section 511 (c) of the Clean Water Act, 33 U.S.C.A. § 1371 (c), relating to the FERC's ability to establish effluent limitations and the need for an environmental impact statement, the likely existence of these discharges is not a basis for denying the certification altogether. Our order permits the Department to identify discharges in its certification that are not subject to such effluent limitations.

As the Department contends, these discharges may result in violations of water quality limitations. However, the Department is also free under our order to impose appropriate water quality conditions on its certification to uphold its water quality standards.

In conclusion, there is no merit to the Department's argument that the Board failed to consider the discharge from the cutoff wall subdrain and the re-routed combined sewer overflow in its Adjudication of this matter.

Low Flow Conditions in Conodoguinet Creek

The fourth ground on which the Department argues for reconsideration is that the Board erred in finding that a flow of 2000 cubic feet per second ("cfs") constituted low flow in the Conodoguinet Creek. It is true that the Board's finding was in error. The Board's finding was based on the following testimony of David Burgoine: "If the flow in the river is so low that it does not allow power generation to occur, which would normally be a flow of less than about 2000 cubic feet per second, there are two possibilities [with respect to operation of the dam]." (City Statement No. 2, page 13-14) The Department asserts, and the City acknowledges, that Mr. Burgoine's testimony

regarding low flow conditions at less than 2000 cfs applies only to the Susquehanna River and not to the Conodoguinet Creek. However, this finding does not affect the conclusion reached by the Board upholding the studies conducted by the City.

In its post-hearing brief, the Department had raised several criticisms of dissolved oxygen modeling of the Conodoguinet Creek conducted by the City's expert, Dr. Dennis Ford. One criticism was that Dr. Ford's data was not representative of critical, low-flow conditions in the Conodoguinet Creek. The Board considered a set of Dr. Ford's data which came from a July 1988 survey when flow in the Conodoguinet Creek was 120-125 cfs. Because the Board had found that 2000 cfs constituted low flow, it concluded that Dr. Ford's data was representative of low flow conditions. *City of Harrisburg,* slip op. at 51.

What actually constitutes low flow conditions in the Conodoguinet Creek is not clearly stated in the record. The Department cites to page 4-9 of Dr. Ford's study for the figure of 76 cfs as constituting low flow in the Conodoguinet Creek. (City Exhibit 52) Department water pollution biologist Robert Schott considered flows of 110 cfs or lower to be low flows. (Transcript, page 2690) Dr. Ford testified that flows up to 189 cfs could constitute critical conditions in the Creek. (Transcript, page 3310) As evidence of his conclusion that critical conditions in the Creek could occur at flows higher than 110 cfs, Dr. Ford noted that Robert Schott measured dissolved oxygen levels as low as 2.6 when flow was at 148 to 149 cfs. (Transcript, page 3311) Moreover, on page 72 of its post-hearing brief, the Department acknowledged that 124 cfs, the flow level during Dr. Ford's July 1988 data collection, "approximated critical conditions in the Conodoguinet." Thus, although the Board erred in stating that low flow conditions in the Conodoguinet Creek occurred at

flows of 2000 cfs or lower, there is no question that Dr. Ford's data from July 1988 was representative of critical flow conditions in the Creek.

Moreover, although the Department was critical of Dr. Ford's study as not being representative of low flow conditions, it cites to a page in Dr. Ford's report which indicates that Dr. Ford's study did simulate critical flow conditions in the Creek. The Department cites to page 4-9 of Dr. Ford's study for the figure of 76 cfs representing low flow conditions in the Creek. This page of Dr. Ford's study states that "*critical conditions in Conodoguinet Creek were simulated* by lowering the upstream flow rate to the 7Q10 low flow (76 cfs)..." (City Exhibit, page 4-9) (Emphasis added) This is contrary to the Department's argument that Dr. Ford's modeling did not take into consideration low flow conditions in the Conodoguinet Creek.

In conclusion, the Department has failed to present grounds for reversal of our Adjudication on the basis that the statement of low flow in the Conodoguinet Creek was incorrect.

Dr. Ford's Dissolved Oxygen Modeling

The Department's fifth argument for reconsideration is that the Board's acceptance of the City's dissolved oxygen modeling and rejection of the Department's criticisms of that modeling were based on a misreading of the record and an erroneous understanding of the Department's argument.

In this section of its memorandum in support of its Application for Reconsideration, the Department simply attempts to reargue its case. Each of these arguments has been considered and rejected by the Board in the Adjudication. Simply because the Board did not agree with the Department's arguments does not mean, as the Department seems to think, that the Board did not understand them. We clearly understood the Department's arguments and again reject them for the

reasons set forth in our Adjudication. Although we need not respond to these arguments again, we do, however, wish to address two issues raised by the Department in its Application for Reconsideration.

First, the Department again attacks Dr. Ford's modeling of the Conodoguinet Creek on the basis that it fails to replicate actual conditions in the Conodoguinet Creek. This argument was rejected by the Board on pages 51 through 52 of the Adjudication. The Department asserts that the alleged failure of Dr. Ford's modeling to replicate existing conditions impeaches the City's conclusion that discharges from the sewage treatment plants cause a lowering of the dissolved oxygen levels in the Creek. We again reject the Department's argument for the same reasons we rejected it on pages 51 through 52 of our Adjudication. However, in making this argument, the Department ignores the fact that its own water pollution biologist acknowledged that the low dissolved oxygen conditions in the Conodoguinet Creek were due, at least in part, to discharges from sewage treatment plants located along the Creek and recommended that the phosphorous loadings of the permitted discharges be lowered. (Transcript, pages 2775-76, 2836, and 2923-24)

Secondly, the Department argues that the Board erred in its statement that the Acres study to which the Department compared Dr. Ford's modeling was reviewed by the Department. On pages 50 to 51 of the Adjudication, the Board stated as follows:

> Before addressing the Department's challenges to Dr. Ford's modeling, we note that the Department did not challenge the modeling done by Acres for the Conodoguinet Creek. (Department's Post Hearing Brief, p. 67) The Department states that the Acres study was consistent with the analysis and conclusions reached by the Department's water pollution biologist Robert Schott. (*Id.*) It is this

> study, and not Dr. Ford's study, which was reviewed by the Department prior to its denial of certification.

City of Harrisburg, slip op. at 50-51.

Acres performed a variety of studies for the City, some of which were done in conjunction with the application for certification and some of which were done after the Department's denial. One such project was a dissolved oxygen study conducted by Rex Tolman, which was completed in 1988 after the Department had denied the City's request for certification. Although the work performed by Acres in conjunction with the application for certification was presumably reviewed by the Department, the Tolman study would not have been. Whether this study was reviewed by the Department is of little import, however, since this is not the basis for the Department's objection. Rather, it is the Department's contention that the Tolman study was consistent with the analysis and conclusions reached by Robert Schott and was inconsistent with a similar study performed by Dr. Ford. As we noted in the Adjudication, however, the Department's comparison of the studies is incorrect. In fact, the Tolman study and Dr. Ford's study reach similar conclusions with respect to dissolved oxygen violations in the Conodoguinet Creek. *See City of Harrisburg*, slip op. at 50-51. Whether the Tolman study was reviewed by the Department has no bearing on the final result. Dr. Ford's study was consistent with the Tolman study and does not provide a basis for rejecting Dr. Ford's study.

Transient Analysis

In the Adjudication, the Board found that the City should have conducted a transient analysis as part of its groundwater modeling, but that its failure to do so was harmless error. The basis for the Board's conclusion was that, although the City's modeling did not include a transient analysis,

it nonetheless had incorporated mitigation measures into its project to address rising groundwater levels, whether due to transient events or other factors. *See City of Harrisburg*, slip op. at 72.

In this section of its memorandum in support of its Application for Reconsideration, the Department begins by asserting that "[t]he City's Expert testified that a 'transient analysis' is an important part of a good methodology for groundwater analysis. City Statement No. 5, at 8-9." This is an incorrect statement of the cited testimony. The testimony of Bruce Bennett was, in fact, as follows:

> As an additional step, and if it were a concern, I also suggested that once the new steady state modeling effort had been undertaken and was deemed to be satisfactory, a transient modeling effort could be undertaken.

(City Statement No. 5, page 9)

The Department argues that without a transient analysis, "the City proposed mitigation only for those structures which its modeling predicted would be 'adversely impacted by the project'" and "did not take into account the effects of transient events on groundwater levels and flow." (Memorandum of Law in Support of Application for Reconsideration, page 23) The Department asserts that without a transient analysis, the City has not identified all of the infrastructure which would be adversely impacted by the project.

We do not agree with the Department's analysis. First, the record states that the City looked at all structures which could be impacted by the project (City Statement No. 7, page 9-15) and then attempted to further define them (Transcript, page 1817-18). Second, Thomas Gwozdek testified that Acres did "hand calculations" for flood flow or a storm event and its impact on groundwater levels. Based on its calculations, Acres determined that groundwater would be raised somewhat in

the area very close to the shores of the river, but that there would be no impact further away. (City Statement No. 4, page 31-32) Finally, although the Department asserts that the City has failed to take into consideration all structures which will be impacted by the project, it has not identified any such structures. If, however, the Department determines it is necessary that the City take added precautions to insure that infrastructure is not adversely affected by raised groundwater levels as a result of the project, this may be an appropriate condition to impose on the grant of certification to the City.

In conclusion, we reaffirm our earlier holding that the City's failure to conduct a transient analysis as part of its groundwater modeling was harmless error.

HEC II Model

Finally, the Department asserts that the Board misapprehended its argument regarding use of the HEC II model. The Department's argument is that the HEC II model should not be used to calculate velocity for water quality modeling purposes.

This is the same argument which the Board addressed on pages 59 through 60 of the Adjudication. The Department has not demonstrated that the Board misapprehended its argument, but only that the Board reached a conclusion with which the Department did not agree. The Board addressed the Department's criticisms of the HEC II model and dismissed them, noting that despite the limitations of the model, the Department had not suggested a model which it believed would provide more accurate results.

We, therefore, find that the Department has not demonstrated that the Board should reconsider its ruling on the basis of its analysis of the City's use of the HEC II model.

Conditions Imposed on the Certification

We believe that in the case of each of the Department's objections relating to the claimed "new discharges," low flow conditions, dissolved oxygen modeling, transient analysis and the HEC II model, the Department is still free to solve whatever it considers to be objectionable problems by determining whether conditions should be imposed on the certification in accordance with Section 401 (d) of the Clean Water Act, 33 U.S.C.A. § 1341 (d). Areas in which the Department may find it appropriate to impose conditions include, but are not limited to, the following:

Subdrain Discharge - As noted earlier, one of the mitigation measures proposed by the City was the re-routing of the discharge from the subdrain behind the cutoff wall to the Harrisburg sewage treatment plant. As the project currently stands, this discharge will empty directly into the Susquehanna River. If the Department determines that this discharge would be in violation of the applicable provisions of the Clean Water Act, it may condition the City's certification on the re-routing of this discharge to the Harrisburg sewage treatment plant.

Re-routed Combined Sewer Overflow - If the Department determines that the re-routing of this discharge to an area below the dam would present a water quality problem, the Department may direct that the discharge be re-routed to an appropriate location or impose such other water quality limitations as are necessary to insure compliance with Pennsylvania's water quality standards.

Sewage Infrastructure - The City has proposed a number of mitigation measures to insure that sewage infrastructure of surrounding municipalities would not be adversely impacted by the project. These structures include, *inter alia*, on-lot sewage disposal systems in Marysville and East Pennsboro, the East Pennsboro control building and pump station, and wastewater pumping stations in Wormleysburg and Susquehanna Township. The Department may find it appropriate to require

the City to implement some or all of the measures contained in its upstream improvement reports to prevent adverse impacts to these structures. In addition, the Department may condition the certification on the City obtaining the necessary agreements with the affected municipalities, businesses, and homeowners to perform the mitigation work.

Dissolved Oxygen Levels - In order to prevent a lowering of dissolved oxygen levels in the Conodoguinet Creek and the area upstream of the dam, the Department may require the City to implement appropriate mitigation measures proposed by the City for this purpose. These mitigation measures include the following: 1) installation of buffer strips along the stream bank to collect sediment and fertilizers which may contain phosphorous; 2) artificial aeration of the water during low flow conditions; 3) flow augmentation to dilute the water; and 4) modification of habitat in certain sections of the creek to prevent plant growth. In addition, the Department may find it appropriate to require regular monitoring of dissolved oxygen levels in the Susquehanna River both upstream and downstream of the dam.

Sedimentation - In order to reduce the amount of sediment which collects in the Susquehanna River and Conodoguinet Creek, the Department may find it appropriate to require the installation of buffer strips along the river and creek.

Flooding - During periods of high flow, the City's operation plan calls for lowering the gates of the dam and turning off the powerhouse units. In addition, the Department may determine that it is appropriate to require the City to implement other measures to insure that flooding will not occur as a result of construction and operation of the dam.

Conclusion

Based on our review and analysis of each of the arguments raised by the Department in its Application for Reconsideration, we find that the Department has failed to demonstrate grounds requiring the Board to reverse its Order of June 28, 1996. Because the evidence demonstrates that the project will not result in the discharge of a pollutant within the meaning of Section 401 (a) of the Clean Water Act, the Department is required to grant Section 401 certification to the City. As we stated in our June 28, 1996 Order, however, this matter is remanded to the Department to consider the new information submitted by the City and to determine what conditions, if any, are appropriate to impose on the certification to meet water quality requirements.

Therefore, we affirm our decision in this matter and enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION	:	

ORDER

AND NOW, this 9th day of December 1996, the Department of Environmental Protection's Application for Reconsideration of the Board's Adjudication of June 28, 1996 is hereby **denied**. This matter is remanded to the Department to take appropriate action in accordance with the Board's Order of June 28, 1996 and the findings and conclusions of the Board herein.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

Judge Robert P. Myers is recused from participating in this decision.

DATED: December 9, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
M. Dukes Pepper, Jr., Esq.
Mary Martha Truschel, Esq.
Central Region

For the Intervenor:
Dennis T. Guise, Esq.
Harrisburg, PA

For Appellant:
Howard J. Wein, Esq.
Paul Supowitz, Esq.
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	
	:	**EHB Docket No. 88-120-R**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PENNSYLVANIA	:	
FISH AND BOAT COMMISSION, Intervenor	:	

DISSENTING OPINION OF ADMINISTRATIVE LAW JUDGE MICHELLE A. COLEMAN

I respectfully dissent. The majority would not disturb the result reached in the adjudication: it orders the Department to certify a § 401 application never submitted to it, and does so based, at least in part, on evidence unavailable to the Department at the time it reviewed the application the City did submit. Upon reconsideration of the issue, I would reverse our adjudication and determine whether the City had proven it was entitled to certification *of the proposal it submitted to the Department*, and, in making that determination, I would refuse to consider evidence in support of certification which was unavailable to the Department at the time it denied the City's application.

When the Board concluded that the Department erred by denying the City's application for 401 certification, the Board considered a number of factors which had changed from the time the Department reviewed the permit. The first of these changed circumstances concerns post-denial studies and modeling. Much of the City's expert testimony in the hearing on the merits centered on studies and modeling performed after the Department denied the City's application. The second type

of changed circumstances concerns additional mitigation measures. After the Department denied the City's application for 401 certification, the City proposed adding new mitigation measures.[1] Finally, the Board also considered changes made to the proposed dam after the Department denied certification. At the time the application was submitted to the Department, the dam was to have steel gates, but, after the denial, the City revised its project to include movable rubber gates in addition to immovable steel ones.

For the reasons explicated below, I believe that the Board erred by considering evidence offered in support of certification at the hearing on the merits where that evidence was unavailable to the Department at the time it acted. This evidence (hereinafter, "after-acquired evidence) is irrelevant. I also believe that the Board does not have the authority to order the Department to certify the City's revised dam project (*i.e.* the proposal involving the dam utilizing rubber gates in addition to steel ones--hereinafter, "the revised proposal"); we only have authority to rule on the propriety of the Department's action with respect to the application *submitted to the Department* (*i.e.* the proposal involving the dam with only steel gates--hereinafter, "the original proposal").

I. When reviewing a Department action involving the exercise of discretion, the Board does not have the authority to consider evidence unavailable to the Department at the time the Department acted and which is being offered as evidence against the Department action.

In the adjudication, the Board concluded that, by virtue of our *de novo* power, we had the authority to consider the post-denial studies and modeling, and the additional mitigation measures proposed by the City after the denial, as well as the authority to order the Department to certify the

---

[1] For example, the City now proposes a cutoff wall, the implementation of a drainage system, and the reconstruction of an existing retaining wall to prevent flooding and groundwater infiltration in the vicinity of the project.

City's revised proposal. In support of that proposition, we pointed to *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975) and to several Board decisions which purported to apply *Warren Sand & Gravel* and held that the Board could consider evidence unavailable to the Department at the time it acted.

The adjudication suggests that *Warren Sand & Gravel* stands for the proposition that the Board may consider after-acquired evidence whenever the Board reviews a Department action involving the exercise of discretion. But that is an overly expansive reading of *Warren Sand & Gravel*. *Warren Sand & Gravel* does not hold that we may consider after-acquired evidence in *every* instance in which the Department exercises its discretion; it simply holds that the Board may consider after-acquired evidence to determine if the Department's action can be sustained or supported. The language in *Warren Sand & Gravel* is unambiguous:

> In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action *can be supported* by the evidence received at DER's fact finding hearing. The Board's duty is to determine if DER's action can be *sustained or supported* by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.

341 A.2d 556, 565 (emphasis added).

Like *Warren Sand & Gravel*, most of the Board case law holding that the Board may consider after-acquired evidence also addresses the question in the context of whether the Board may consider that evidence *in support of the Department's action. See Township of Salford v. DER*, 1978 EHB 62 (holding that the Board could consider after-acquired evidence in support of a Department decision to deny a surface mining permit); *Snyder v. DER*, 1990 EHB 428 (holding that the Board

could consider after-acquired evidence in support of the propriety of a bond forfeiture); *Al Hamilton Contracting Co. v. DER,* 1992 EHB 1458 (holding that the Board could consider after-acquired evidence in support of the Department's denial of a surface mining permit); and *Harmar Township v. DER,* 1993 EHB 1856 (holding that the Board could consider after-acquired evidence offered in support of a Department decision to issue a surface mining permit).

The Board has issued several decisions holding that it would consider after-acquired evidence offered against a Department action. *See Willowbrook Mining Co. v. DER,* 1992 EHB 303 (holding that, in an appeal of the denial of a surface mining permit, the Board could consider after-acquired evidence offered to show that the appellant was entitled to the permit); *Lower Towamensing Township v. DER,* 1993 EHB 1442 (holding, in a challenge to the Department's denial of a proposed Act 537 plan revision, that the Board could consider after-acquired evidence showing that the appellant was entitled to the plan revision); and *Hrivnak Motor Co. v. DER,* 1993 EHB 432 (holding that, in an appeal of an order, the Board could consider after-acquired evidence tending to show that some aspects of the order were no longer necessary).[2] Each of these cases treated the issue as though it were a straightforward application of the holding in *Warren Sand & Gravel.*

There is good reason to distinguish between these two types of evidence when applying *Warren Sand & Gravel.* In an appeal of a Department action involving the exercise of discretion, the Board cannot substitute its discretion for that of the Department unless it first determines that the *Department abused its discretion.* This is the clear implication of the language in *Warren Sand*

---

[2] The Liquor Code and a series of cases interpreting its provisions also provide useful precedent in determining what is meant by "de novo review." It is the function of the Liquor Control Board to determine whether to grant or deny an application for a liquor license. An aggrieved party may appeal the decision of the Liquor Control Board to the court of common pleas. The Liquor Code states that the court shall hear the application de novo and "shall either sustain or over-rule the action of the board and either order or deny the issuance of a new license . . . ." 47 P.S. § 4-464 (Emphasis added). In interpreting the de novo role of the court in reviewing decisions of the Liquor Control Board, the Pennsylvania Supreme Court held, "Based upon its de novo review, it may sustain, alter, change, modify or amend the board's action whether or not it makes findings which are materially different from those found by the board." *Pennsylvania State Police v. Cantina Gloria's Lounge, Inc.*, 639 A.2d 14, 19-20 (Pa. 1994).

& Gravel regarding the Board substituting its discretion, and a point we made expressly in *Sanner Brothers Coal Co. v. DER*, 1987 EHB 202. In *Sanner Brothers*, an appeal challenging the denial of a mine drainage permit, we wrote:

> The Board must here decide whether DER abused its discretion in denying Sanner's application for a mine drainage permit. By reason of 25 Pa. Code §21.101(c)(1), Sanner bears the burden of demonstrating to the Board that DER abused its discretion. We will not substitute our discretion for that of DER unless Sanner shows by substantial evidence that DER's denial of the permit was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. *Warren Sand and Gravel Co, Inc. v DER,* 341 A.2d 556 (Pa. Cmwlth. 1975). And, the Board will not overturn DER's decision and mandate the issuance of the permit unless Sanner proves that it is clearly entitled to the permit. *Harman Coal Company v. DER,* 1977 EHB 1.
>
> 1987 EHB 202, 221 (emphasis added).

Thus, in light of *Warren Sand & Gravel* and *Sanner Brothers,* three factors must be present before the Board will substitute its discretion for that of the Department and authorize activity which the Department refused to permit. First, the Department's action must have involved the exercise of its discretion. Second, the permit applicant must prove that the Department abused its discretion. And third, the permit applicant must prove that it was clearly entitled to the permit sought.

As a practical matter, given these constraints, permit applicants must establish both (1) that they were entitled to the permit *on the basis of what they submitted to the Department*, and (2) that they are clearly entitled to the permit on the basis of what was submitted during the *de novo* hearing before the Board. If the applicant fails to prove they were entitled to the permit on the basis of what they submitted to the Department, then the Department did not abuse its discretion by refusing the

permit, and it follows that the Board cannot substitute its discretion for that of the Department.[3] If the applicant fails to prove it is entitled to the permit on the basis of the *de novo* hearing before the Board, then the Board will not issue the permit even if it is clear that the Department abused its discretion and turned down the permit for the wrong reason.

Once this is understood, the reason for distinguishing between after-acquired evidence offered against a Department action and that offered in support of a Department action becomes clear. After-acquired evidence offered in support of the Department's action is relevant because it goes to whether the permit applicant has proven it is clearly entitled to the permit on the basis of the evidence adduced at the *de novo* hearing. After-acquired evidence offered against the Department action, on the other hand, becomes relevant only *after* a permit applicant establishes that it was entitled to a permit based on what it submitted to the Department. If the permit applicant fails to prove this, it has failed to prove that the Department abused its discretion by denying the permit.[4] And if the Department has not abused its discretion in denying the permit, then the Board does not

---

[3] Were we to hold that the Board could substitute its discretion even where the Department does not abuse its discretion, permit applicants could effectively make an end-run around the Department's permitting process. Applicants who believed that they might get more favorable permit terms from the Board than the Department could simply submit a facially deficient application to the Department, so that the Department denies the permit, and then appeal the Department's action and present the missing information during their hearing before the Board.

[4] After-acquired evidence is irrelevant for purposes of deciding whether the Department's action was an abuse of discretion; the Department cannot have abused its discretion by failing to adequately consider something which was unavailable for consideration in the first place. *See, e.g., Concerned Residents of the Yough, Inc. v. DER,* 639 A.2d 1265 (Pa. Cmwlth. 1994) (*CRY*) (holding that after-acquired evidence a citizen's group sought to introduce in an appeal of the issuance of a solid waste permit was inadmissible because the information was not available at the time the permit was issued and, therefore, not relevant to whether the Department abused its discretion by issuing the permit).

have the authority to substitute its discretion for that of the Department and whether the permit applicant proved it was entitled to the permit on the basis of the evidence at the *de novo* hearing is irrelevant.

The Board erred in the instant adjudication because it substituted its discretion for that of the Department, and considered the after-acquired evidence offered against the Department's action, without first determining whether the denial was justified based on what was submitted to the Department. Absent a finding that the Department had abused its discretion when it decided to deny the 401 certification, the Board should not have proceeded to the question of whether the City proved it was clearly entitled to the certification at the hearing on the merits.

II. The Board only has the authority to rule on the propriety of the Department's action on the "original proposal"--the application *submitted to the Department.* It does not have the authority to determine whether the Department would have erred had it denied a City application concerning the revised proposal or to order the Department to certify that proposal.

The preceding discussion applies to each of three types of changed circumstances the adjudication considered: the post-denial studies and modeling, the additional mitigation measures proposed by the City after the denial, and the post-denial changes the City has made to what it wants authorized in the certification. In addition to the problems outlined above, there are also a number of problems with the Board ordering the Department to certify the City's revised proposal, as opposed to the proposal submitted to the Department. For the reasons which follow, I believe that the Board does not have the authority to order certification for changes made to the City's proposal after the Department's denial.

a. This is not *de novo* review

The adjudication argues that we have the power to consider the revised proposal--and order

the Department to certify it--by virtue of the Board's power to conduct a *de novo* review of the Department's action. In *de novo* review, however, a tribunal takes a new look at the same issue resolved by another body. *See, e.g., Civitello v. Department of Transportation, Bureau of Traffic Safety,* 315 A.2d 666, 667 (1974) ("*De Novo* review entails, as the term suggests, full consideration of the case another time.") In the adjudication, however, we did *not* take a new look at the same issue decided by the Department--whether the proposal submitted to the Department merited certification. We looked at an entirely *different* issue--whether the proposal *as revised after the denial* merited certification.[1]

It is a cardinal principle of administrative law that administrative agencies have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., Department of Environmental Resources v. Butler County Mushroom Farm,* 449 Pa. 509, 454 A.2d 1 (1982), and *Costanza v. Department of Environmental Resources,* 606 A.2d 645 (Pa. Cmwlth. 1992). The Board has jurisdiction to hear appeals of Department actions by virtue of the Environmental Hearing Board Act, *see* P.S. §7514(a), but nowhere is it given the jurisdiction to rule on requests where the Department has not acted. Indeed, as the majority itself notes in its discussion of *Marinari v. Department of Environmental Resources,* 566 A.2d 385 (Pa. Cmwlth. 1989) and *Costanza v. Department of Environmental Resources,* 606 A.2d 645 (Pa. Cmwlth. 1992), the Commonwealth

[1] The Department did not explain why after-acquired evidence which *supports* its action is relevant but after-acquired evidence which is offered *against* its action is not relevant.

Court has held that jurisdiction of the Board does not attach unless the Department acts. Since the Department never acted with respect to the revised proposal, we do not have jurisdiction to consider it. We may only consider the propriety of the proposal at the time the Department denied it.

b. Ripeness problems

There are also ripeness problems with ruling on the City's revised proposal.

The majority suggests that the Board rule on the propriety of the revised proposal-as opposed to the original proposal-because of idiosyncrasies involved in the Department's review of the original proposal. The majority points, among other things, to the fact that the Department never informed the City that its application was incomplete prior to denying the certification, that the Department stopped communicating with the City during part of the review period, and that the Department started to prepare its denial letter before reviewing the entire application.[2] These are precisely the types of issues, however, which the ripeness doctrine is meant to preclude. The Commonwealth Court summarized the law respecting ripeness and administrative agency decisions in *Gardner v. Department of Environmental Resources,* 658 A.2d 440 (Pa. Cmwlth. 1995). There, it wrote:

> Ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. It has been defined as the presence of an actual controversy. It insists on a concrete context where there is a final agency action so that the courts can properly exercise their function. The doctrine of ripeness is described as a legal

[2] An analogy can be made that evidence of a car seat being torn in the manufacturing process is not evidence that the automobile was defectively designed. In *CRY,* the design *did not* envision the installation of a torn liner.

> principle "instructing courts to review government actions *only when the government's position has crystallized to the point at which the court can identify a relatively discrete dispute."* The doctrine requires a court to evaluate the fitness of the issues for judicial determination, as well as the hardship to the parties of withholding court consideration.
>
> The purpose of the ripeness requirement was also set forth in *Abbott Laboratories* [*v. Gardner,* 387 U.S. 186 (1967)]:
>
> *[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.*

658 A.2d 440, 444 (citations omitted, emphasis added).

It would be less problematic to consider the idiosyncrasies the majority identifies were we ruling on the propriety of the *original* proposal, since that proposal was actually submitted to the Department and the facts the majority cites occurred during the Department's review of that proposal. But, given the ripeness doctrine, those idiosyncrasies are entirely irrelevant to the issue the majority actually decides: whether the Department would have abused its discretion had it denied certification to the City's revised proposal. Consideration of that question is premature until the City submits an application for the revised proposal for certification and the Department acts on that application.

III. *New Hanover* and the Board's power to substitute its discretion for that of the Department.

While I agree with the Department that the Board lacks the authority to issue the order it did in the adjudication, I agree with the majority's conclusion that *New Hanover Township v. DER,* EHB

Docket No. 88-119-MR (Adjudication issued June 25, 1996), is inapposite here.[7] I also reject the Department's suggestion that, under the Environmental Hearing Board Act, the Board lacks the power to substitute its discretion for that of the Department. The Board *does* have that power. We can impose conditions not imposed by the Department, but these conditions must be imposed on the same proposal reviewed by the Department.

(A) the Department has the power to condition permits

When an individual submits an application for a permit or certification to the Department, the Department is not limited to either granting the permit under the precise terms in the permit or denying the application out of hand. In some instances, the applicant will prove that they are entitled to a permit, even if not a permit *with precisely the same terms requested in the application.* For instance, if an applicant submits an application which does not contain limited hours of operation, but the applicant would clearly be entitled to the permit if the hours of operation were limited, then the Department has the authority to issue the permit with a condition limiting the hours of operation. Indeed, when the Department issues permits, it routinely inserts conditions not requested by permit applicants.

(B) if the Department has the power to condition permits, then the Board has the power to substitute its discretion for that of the Department and condition permits itself

Since the Department has the power to condition permits, and *Warren Sand & Gravel* holds that the Board has the discretion to substitute its discretion for that of the Department in permitting

---

[7] I do not, however, agree with the majority's discussion of *New Hanover* to the extent that it suggests that the Board has jurisdiction to issue the order it did in the adjudication because, under section 401 of the Clean Water Act, the Department does not have final permitting authority.

decisions, it follows that the Board has the power to substitute its discretion for that of the Department and can condition permits itself. While *Warren Sand & Gravel* was decided prior to the enactment of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§7511-7514, as the Department points out, the Environmental Hearing Board Act did not reduce the Board's powers to substitute its discretion for that of the Department. Notwithstanding the Department's suggestions to the contrary, *Warren Sand & Gravel* remains good law.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 9, 1996

cc: **DEP Bureau of Litigation:**
(Library Brenda Houck)

For the Commonwealth, DEP:
M. Dukes Pepper, Jr., Esq.
Mary Martha Truschel, Esq.
Central Region

For Intervenor:
Dennis T. Guise, Esq.
Harrisburg, PA

For Appellant:
Howard J. Wein, Esq.
Paul Supowitz, Esq.
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

HAROLD WEISS, et. al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC., Permittee	:	**Issued: December 12, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT, MOTION FOR JUDGMENT ON THE PLEADINGS, MOTION TO PRECLUDE ISSUES and MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board are motions for summary judgment, judgment on the pleadings, to preclude issues and to dismiss certain individual appellants by a permittee in an appeal from the issuance of a noncoal surface mining permit. The motion for summary judgment on the ground that appellants have failed to secure the testimony of expert witnesses is denied. The motion for judgment on the pleadings is granted inasmuch as the notice of appeal seeks review of local zoning matters, but is denied in all other respects. The motion to preclude issues raised in the pre-hearing memorandum that were not raised in the notice of appeal is denied in part and granted in part. The motion to dismiss certain individual appellants is also denied in part and granted in part.

OPINION

These four dispositive motions filed by Martin Stone Quarries, Inc. (Permittee) are the last of many pre-hearing motions which have been filed in this appeal from a noncoal surface mining permit[1] issued by the Department of Environmental Protection for the Gabel Quarry which is located in Washington Township, Berks County. Appellants are a group of individuals who reside in the vicinity of the quarry. We will address each of Permittee's motions in turn.[2]

DISCUSSION

Motion for Summary Judgment

The sole basis for Permittee's motion for summary judgment is that Appellants have failed to properly secure the testimony of expert witnesses to support the allegations made in their notice of appeal. In the alternative Permittee seeks to preclude Appellants from calling expert witnesses at the hearing in this case.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and expert reports, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2; *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991). Summary judgment may be entered only in those cases where the right to judgment in the movant's favor is clear and free from doubt. *Hayward v.*

---

[1] The permit was issued pursuant to the Non-Coal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301- 3326.

[2] The Department joins the motion for summary judgment and the motion to dismiss, but neither joins nor opposes the remaining motions.

Medical Center of Beaver County, 608 A.2d 1040 (Pa. 1992); *SCA Services of Pennsylvania, Inc. v. DER*, 1994 EHB 1.

The bulk of Permittee's motion is devoted to the facts surrounding its depositions of expert witnesses identified by Appellants in interrogatories and in their pre-hearing memorandum, wherein Appellants stated that they would be using the expert witnesses of Washington Township, a former party in this case.[3] When deposed by Permittee these witnesses stated that they had not been retained by Appellants, and would prefer not to testify in the case. (See Permittee Exs. 4-6)

While the Board finds this situation disturbing, the lack of expert testimony alone is not a sufficient basis to grant summary judgment. This is especially true where Permittee has been very vague concerning what facts require expert testimony to enable Appellants to carry their burden. We believe that some of the objections to the permit can be presented through lay witnesses. In addition, Permittee has not provided any exhibits or experts from their permit application relevant to the factual issues of the case which support any judgment in their favor. Accordingly, Permittee has failed in its burden of proving that there are no material facts in dispute entitling it to summary judgment.

In the alternative, Permittee seeks to preclude Appellants from calling expert witnesses at the hearing as a sanction for failing to properly retain their identified witnesses. Although Appellants' identified experts testified at deposition that they were unwilling to testify on behalf of Appellants at a hearing, Permittee nevertheless had an opportunity to question these witnesses about their findings and reports relative to the site, and have not provided the Board with evidence that these

---

[3] For a more complete explanation of the background history of this case, *see Weiss v. DEP*, EHB Docket No. 94-283-MG (Opinion issued March 6, 1996).

witnesses refused to be deposed on these issues. Sanctions are an extreme measure. Appellants did identify the experts who they intend to call and provided notice of the content of their testimony. Permittee had an opportunity to depose these witnesses. At this point, the lack of a contractual agreement between Appellants and these witnesses is solely a matter between the witnesses and Appellants. This motion is also denied.[4]

Motion for Judgment on the Pleadings

Permittee moves to dismiss all of the allegations in Appellants' notice of appeal on the grounds that they have failed to state a claim upon which relief can be granted. Reviewing the notice of appeal and Permittee's motion we find that, with the exception of one objection, Appellants have adequately stated grounds for appeal which are cognizable by the Board, and Permittee has failed to show that the grounds of appeal can not be sustained as a matter of law.

Our standard for granting judgment on the pleadings has often been stated:

> [W]e will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. The facts for purposes of the motion are those framed in the notice of appeal. All of the factual averments in the notice of appeal are viewed as true, and only those facts specifically admitted in the notice of appeal may be considered against the appellant.

City of Scranton v. DER, 1995 EHB 104, 108. Judgment will be entered because a hearing is pointless if the law on the issue is clear. *Florence Township v. DEP*, EHB Docket 95-121-MG (consolidated docket)(Opinion issued March 6, 1996). We must assess the motion in a light most

---

[4] Although we are denying Permittee's motion, this Board has no authority to compel expert testimony. *See , e.g., Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979 (Pa. Cmwlth. 1992)(en banc). Accordingly, Appellants should be on notice that it is very unlikely that the Board will issue subpoenas for the purpose of summoning witnesses to provide expert testimony.

favorable to the non-moving party. *Id.* Obviously, the burden of convincing the Board that it is entitled to judgment in its favor is upon Permittee. *Green Thornbury Committee v. DER*, 1995 EHB 294.

Appellants' notice of appeal is in the form of a letter which consists of seven paragraphs. (Ex. 1) Permittee argues that each of these paragraphs should be dismissed because "Appellants have not stated or shown that the DEP's issuance of the permit to Permittee was arbitrary or amounted to an abuse of discretion." Permittee generally argues that each paragraph of the of the notice of appeal fails to provide an adequate explanation for how each basis of objection translates into an abuse of discretion by the Department.

It is a specious argument that Appellants have no cause of action simply because they have essentially failed to use the words "abuse of discretion" or failed to cite specific statutory references in their notice of appeal. The letter, while inartfully written, clearly objects to the Department's issuance of the permit to Permittee on numerous grounds. Appellants are not required to cite specific regulatory violations or use any particular words to preserve an issue for review by this Board. Pursuant to the Commonwealth Court's decision in *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), objections raised generally in a notice of appeal may be reserved for our review. The fact that Appellants' objections are general, alone, is not sufficient grounds upon which to grant judgment on the pleadings.

The sole exception is the objection raised in the second paragraph of the notice of appeal which objects to the issuance of the permit because "this land use is the result of . . . re-zoning by private contract." Appellants admit in their brief that zoning matters do not belong before this Board. (Appellants' Brief in Opposition to Motion for Judgment on the Pleadings at 4) Because the

Board lacks jurisdiction to decide local zoning disputes, we will grant Permittee's motion for judgment on the pleadings as it pertains to the zoning issues raised in the second paragraph of the notice of appeal. *See South Fayette Township v. DER*, 1991 EHB 900.

Motion to Preclude Issues

Permittee argues in this motion that Appellants have raised issues in their pre-hearing memorandum which were not raised in their notice of appeal. Specifically, Permittee contends that with the exception of Paragraph 6, relating to Appellants' water supply, and Paragraph 12, relating to dust, none of the specific objections found in Appellants' pre-hearing memorandum are encompassed by the objections to the permit raised in the notice of appeal. We deny in part and grant in part this motion.

The language of Appellants' notice of appeal is broad. As we stated above, the Commonwealth Court has held that a broadly worded objection in a notice of appeal is sufficient to preserve a more specific basis of objection to a permit at the hearing stage. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991). Therefore, our role is to determine whether the more specific objections outlined in Appellants' pre-hearing memorandum are within the scope of this language in the notice of appeal. *Newtown Land Ltd. v. DER*, 1994 EHB 856, *affirmed*, 660 A.2d 150 (Pa. Cmwlth. 1995). Any issues not preserved in the notice of appeal must be deemed waived. 25 Pa. Code § 1021.51(e); *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), *reversed on other grounds*, 555 A.2d 812 (Pa. 1989).

Paragraphs 4, 5 and 9 of the pre-hearing memorandum object to the failure of the permit application to consider the impact of the quarry on Appellants' water supply and groundwater.

Appellants notice of appeal expresses concern that there will be "no means to supply residences whose wells might be interrupted . . . ." (Paragraph 5) Appellants specifically charge that the 72 hour pump test was inadequate to gauge the effect of the quarry on area wells, which is more specifically objected to in Paragraph 4 of the pre-hearing memorandum. To the extent that the specific objections in the pre-hearing memorandum relating to these issues are related to Appellants' broad objections concerning their water supply, we decline to preclude litigation of these issues.

Paragraphs 13 and 15 of the pre-hearing memorandum are also included in the objections of the notice of appeal. Paragraph 13 of the pre-hearing memorandum objects to increased truck traffic, which was a concern raised in the fourth paragraph of the notice of appeal. Paragraph 15 of the pre-hearing memorandum simply states that the permit should not have been approved by the Department. Appellants' objection to the permit in paragraph 6 of the notice of appeal which charges that "[t]he issuance of this permit is a cruel corruption of the concept of governments mandate to protect" clearly encompasses this objection.

However, we will grant Permittee's motion to preclude the issues raised in Paragraphs 7 and 8 of the pre-hearing memorandum. These specific objections, while encompassed in the second paragraph of the notice of appeal, relate to local zoning matters over which this Board has no jurisdiction. Because we granted judgment on the pleadings as to the second paragraph we will also preclude Appellants from raising the specific objections in these paragraphs of their pre-hearing memorandum.

We will also preclude Appellants from litigating Paragraphs 1-3, 7, 8, 10, 11, 14, 16 and 17. Specifically, Paragraphs 1-3, 11 and 16 of the pre-hearing memorandum object to the failure of the permit application to adequately address water resources such as wetlands and streams and the

geologic and hydrogeologic characteristics of the area surrounding the quarry. These objections are not fairly encompassed within the concerns raised by Appellants in their notice of appeal and must be excluded from our consideration.

We will also grant Permittee's motion to preclude the issues raised in Paragraphs 10,14 and 17 of the pre-hearing memorandum. Paragraph 10 objects to the adequacy of the bonding for the quarry. Paragraph 14 charges that the Department erred in failing to notify the public concerning modifications which were made to the permit application. Paragraph 17 contends that Appellants were improperly excluded from settlement negotiations between Washington Township and Permittee. We find that none of the objections in the notice of appeal can be said to fairly encompass these specific objections.

Motion to Dismiss

A motion to dismiss at this point in the proceedings is more properly treated as a motion for summary judgment. Accordingly, we will apply the standard for summary judgment explained above.

Permittee first argues that all the individual appellants who did not present themselves for deposition and/or did not submit copies of their deeds should be dismissed from this appeal. Permittee's request for relief is really a request for discovery sanctions. Discovery in this case closed in July 1996. The depositions at issue were scheduled during April and May 1996. While the Board is generally reluctant to dismiss appellants for discovery violations, in this case these individuals were specifically notified by the Board through their spokesperson that failure to appear for depositions would result in dismissal. Accordingly, Permittee's motion is granted.

However, dismissal is too severe a sanction for those individuals who appeared for

depositions, but merely failed to submit copies of their deeds. Accordingly, we will not dismiss those appellants.

Permittee further argues in its motion that Appellant Michael Thrasher should be dismissed for lack of standing. Permittee states that "upon information and belief" that Mr. Thrasher has sold his house in the vicinity of the quarry property.

This motion is denied for two reasons. First, the mere fact Mr. Thrasher may not be a property owner, alone, is not sufficient to support the conclusion that he clearly does not have a direct, immediate, and substantial interest in the outcome of this litigation. Second, Permittee has failed to support its allegations of fact concerning Mr. Thrasher's standing with any evidence from the record but simply makes unsupported assertions. Accordingly, Permittee has failed to demonstrate that it is clearly entitled to judgment in its favor.

Permittee also moves to dismiss all individuals who either executed verifications that they did not wish to participate in this appeal or stated at deposition that they did not wish to participate. Appellants in their brief do not oppose this motion, therefore we will dismiss these individuals from participation in this appeal.

We enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HAROLD WEISS, et. al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC., Permittee	:	

ORDER

AND NOW, this 12th day of December, 1996, it is hereby ordered that:

1. The motion for summary judgment of Martin Stone Quarries, Inc. is hereby DENIED.

2. The motion for judgment on the pleadings of Martin Stone Quarries, Inc. is GRANTED as to the objection raised in the second paragraph of the notice of appeal. The motion is DENIED in all other respects.

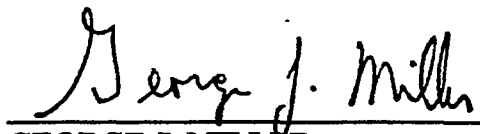
3. The motion to preclude issues raised in Paragraphs 1,2,3,7,8,10, 11, 14, 16 and 17 of the pre-hearing memorandum of appellants is GRANTED. The motion to preclude the remaining issues of the pre-hearing memorandum is DENIED.

4. The motion of Martin Stone Quarries to dismiss Lester Seiders, Peg Seiders, Barry Arndt, Paul Buckwalter, George Clouser, Patricia Kujat, Brian Nowrey, Jean Nowrey, Margaret Meitzler, Charles Meitzler, Grant Fronheiser, Jr., H. Keith Warner, Deb Warner, Phyliss Rohrbach, Michael Rohrbach, Diane Fetterman, Terry Fetterman, Cynthia Pinder, Frank Bahinski, Stephen Soffa, Robert Eshbach, Mary Ann Pinder, Judy Ogin, Terese Mount, Jennifer Wagner, Annette Stephen, and Eva Weller is GRANTED.

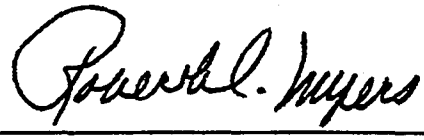
The motion of Martin Stone Quarries to dismiss Helen Yerger, Brian Nowrey, Jean Nowrey, Eliza Bryson, Vincent Haraburda, Mabel Hobart, Frank Derr, Mabel Derr, Bernard Sobjak, Vincent Pettine, Sally Fronheiser, Grant Fronheiser, Raymond Stauffer, Bernice Nestor and Charles Schwager is also GRANTED. The motion to dismiss is in all other respects DENIED.

EHB Docket No. 94-283-MG

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 12, 1996

See following page for service list

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Marc A. Ross, Esq.
Southcentral Region

For Appellants:
Wendy Carr, Esq.
Philadelphia, PA

For Permittee:
Paul R. Ober, Esq.
PAUL R. OBER & ASSOCIATES
Reading, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM DANIEL KUTSEY	:	
	:	
v.	:	**EHB Docket No. 96-057-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 12, 1996**

OPINION AND ORDER ON
MOTION TO DISMISS and OBJECTIONS TO REQUEST
TO APPEAL NUNC PRO TUNC

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal based on dissatisfaction with a mine inspector's final report is granted on the grounds that the Environmental Hearing Board lacks jurisdiction when the appellant exercised his statutory option to have the report reviewed by an appointed commission.

OPINION

The motion to dismiss currently before the Board arises from William Kutsey's (Appellant) March 28, 1996 notice of appeal[1] of the Department of Environmental Protection's August 22, 1995 inspection and the subsequent inspector's final report of Appellant's coal mine operation in Molleystown, Schuylkill County.

---

[1] The appeal was originally filed as a notice for appeal nunc pro tunc on March 11, 1996. By order dated March 13, 1996, Appellant was instructed to perfect his appeal which was completed and filed on March 28, 1996.

Appellant raises numerous objections regarding various compliance orders and continuation forms issued from June 19, 1995 through August 22, 1995 in his appeal. Appellant objects to the August 22, 1995 compliance order and final inspection report claiming that they were inappropriately issued because (1) the ventilation door could not be closed by Appellant due to injuries, (2) the condition that the west gangway does not have any return for approximately 350 feet was not cited in a February 7, 1995 inspection report even though it existed at that time, (3) explosives were received on August 22, 1995 and Appellant did not want them left outside the mine, (4) the violation that timbers were found to be installed on greater than 6 foot centers was not cited in the report written of February 7, 1995, (5) the violation that the pillars under the west gangway do not safely support that working area of the mine also was not complained about in the February 1995 report, and (6) the August 22, 1995 final inspection report stated that the accident was caused by the lack of timber when it was the lack of explosives which caused the accident.

On April 26, 1996 the Department of Environmental Protection filed a motion to dismiss and objections to the request to appeal nunc pro tunc with a supporting memorandum of law. The Department argues, among other things, that the appeal should be dismissed on the grounds that the Board lacks jurisdiction because Appellant requested that review of the inspector's report be handled by a commission and that the request was not in writing.

Appellant filed a response on May 10, 1996. Appellant states among other things that he made a request for a commission but he lacks information as to whether or not it was a written request and he did not verify the date of the alleged request.

We grant the Department's motion to dismiss. The Board does not have jurisdiction over this appeal because Appellant has exercised his option under the law to have a commission review

the matter. Section 70-128 of the Pennsylvania Anthracite Coal Mine Act, Act of November 10, 1965, *as amended*, 52 P.S. §§ 70-101 - 70-732 states:

> The mine inspector shall exercise sound discretion in the performance of his duties under the provisions of this act, and if the operator, superintendent, mine foreman, or other persons employed in or about any mine, shall be dissatisfied with any decision the mine inspector had given in the discharge of his duties, which decision shall be in writing, it shall be the duty of the dissatisfied person to appeal from said decision to the secretary, who shall at once appoint a commission to accompany promptly the mine inspector in the district to make further examination into the matter in dispute. If the said commission shall agree with the decision of the mine inspector in the district, their decision shall be final and conclusive, unless the dissatisfied person shall appeal therefrom.

52 P.S. § 70-128. At the bottom of each Department order the following language appears, "Any person dissatisfied with this Order may request the appointment of a commission pursuant to (Section 128 of Anthracite Coal Mine Act (52 P.S. §70-128)) (section 123 of Bituminous Coal Mine Act (52 P.S. § 701-123)) or appeal this Order to the Environmental Hearing Board pursuant to Section 4 of the Environmental Hearing Board Act, ... A request for the appointment of a commission must be in writing with the Director of the Bureau of Deep Mine Safety. Appeals to the Environmental Hearing Board must be filed with the Board within 30 days of written receipt of this notice or the decision of the commission...."

Initially we will discuss the discrepancy in language between the statute and the Department's order. The Department's order is misleading as it states that the request for a commission must be made in writing, but the statute does not make the same requirement. The statute states, "... if the operator, superintendent, mine foreman, ... shall be dissatisfied with any

decision the mine inspector had given in the discharge of his duties, which decision shall be in writing , it shall be the duty of the dissatisfied person to appeal from said decision to the secretary,...." 52 P.S. § 70-128. The Board has noted that statutory language prevails when there is a discrepancy between language set forth in a statute and language contained in a Department order. The language of the statute does not require a written request. Consequently, Appellant only had to make a request for a commission to review the inspector's report, it did not have to be in writing.

Pursuant to the Anthracite Coal Mine Act, Appellant had to either request review by a commission or appeal. Although the parties do not agree whether Appellant made a written request for a commission, they do agree that Appellant did file such a request. (Appellant's Response, ¶ 16; Department's Motion to Dismiss, Ex. C) Thus, since Appellant opted to pursue review of the report by a commission and not by appeal, the Board lacks jurisdiction to hear an appeal on this matter. Consequently, we grant the Department's motion to dismiss. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM DANIEL KUTSEY	:	
	:	
v.	:	**EHB Docket No. 96-057-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 12th day of December, 1996, we grant the Department of Environmental Protection's motion to dismiss and, therefore, dismiss the appeal.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-057-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 12, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Joseph Cigan, Esq.
Northeast Region
and
Patrick Zaepfel, Esq.
Southcentral Region

For Appellant:
William Daniel Kutsey
R. D. 1, Box 479
Pine Grove, PA 17963

kh/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CHARLES W. SHAY	:	
	:	
v.	:	**EHB Docket No. 92-495-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 17, 1996**

ADJUDICATION

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board sustains the assessment of a $304,500 civil penalty under the Solid Waste Management Act for dumping solid waste without a permit, operating a solid waste disposal facility without a permit, refusing representatives of the Department access to inspect the property and failing to prevent malodors from creating a public nuisance.

BACKGROUND

This matter involves a civil penalty in the amount of $304,500 assessed against Charles W. Shay (Shay) by the Department of Environmental Protection (Department) for activities related to the unpermitted dumping of solid waste and the unpermitted operation of a landfill on a part of his property in Westfall Township, Pike County (Site). A related proceeding found Shay liable for violations upon which the civil penalty is based, including violations of provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-

6018.1003, and the corresponding regulations at 25 Pa. Code Chapter 271. On November 2, 1992, seeking review of the penalty, Shay commenced this matter with the filing of a notice of appeal.

The history of this matter is recounted in the Board's June 16, 1993, Adjudication at 1993 EHB 800 (1993 Adjudication). That proceeding involved the appeal of a September 26, 1989, administrative order[1] which accused Shay of: (1) dumping or permitting the dumping of solid waste onto the surface of the ground without a permit; (2) constructing and/or operating or permitting the constructing and/or operating of a solid waste disposal facility, to wit, a landfill, without a permit; (3) operating a construction/demolition waste landfill without a permit; (4) producing offensive malodors; (5) refusing entry onto the site by Department personnel; (6) continuing to bring new fill onto the Site despite notification from the Department that operations were to cease; and (7) creating a public nuisance.[2] The order was challenged in an appeal to the Board, docketed at EHB Docket

---

[1] In addition to accusing Shay of the various violations, the order also cited his wife, Judith C. Shay, and Don Herzog doing business as Tri-State Land Development Corporation (neither of whom is involved here with this civil penalty).

[2] The violations for each activity were as follows:

nos. 1 and 2 violated 25 Pa. Code § 271.101(a), 301, 302, 303, 501(a), 601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§ 503, 601 and 611 of the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001;

no. 3 violated 25 Pa. Code § 271.101(a), 601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§ 503, 601 and 611 of the CSL;

nos. 4 and 6 violated 601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§ 503, 601 and 611 of the CSL;

no. 5 violated 601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§ 503, 601 and 611 of the CSL; and § 1707 of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101-4000.1904; and

no. 7 violated § 601 of the SWMA; §§ 503 and 601 of the CSL.

No. 89-500, and following a hearing on the merits, was upheld by the Board in the June 16, 1993, Adjudication. In the Adjudication, it was concluded that Shay's conduct and activities established the cited violations, and therefore, the Department's order was a lawful and appropriate exercise of its discretion.

Shay appealed the decision to Commonwealth Court. In the meantime, the proceedings regarding the civil penalty were stayed. Commonwealth Court affirmed.[3]

The civil penalty proceeding, having been further delayed partly due to Shay's involvement with other matters related to Site operations, resumed earlier this year with the scheduling of a hearing.

The afternoon before the hearing, June 3, 1996, Shay submitted a motion for sanctions. The issue was argued at hearing by counsel for both parties and, due to the lateness of its submission, the motion was taken under advisement.

Two days of hearing, on June 4 and 5, 1996, were held in Harrisburg before Administrative Law Judge Robert D. Myers.

On July 30, 1996, the Department filed its post-hearing brief; Shay's post-hearing brief was filed on October 11, 1996. The Department filed a reply brief on November 13, 1996. Issues not raised in the post-hearing briefs are deemed waived. *Lucky Strike Coal Co. v. The Department of Environmental Resources*, 546 A.2d 447 (Pa. Cmwlth. 1988).

The record consists of a Joint Stipulation (Stip.), 426 notes of testimony (N.T.) and 15 exhibits. Findings of fact from the prior adjudication are adopted and included herein by reference.

---

[3] *Herzog v. The Department of Environmental Resources*, 645 A.2d 1381 (Pa. Cmwlth. 1994).

The most relevant will be repeated at length. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Shay is an individual with the mailing address of Box 400, Shay Lane, Matamoras, PA 18336 who owns property located off Rose Lane in Westfall Township, Pike County, Pennsylvania (Site) (Notice of Appeal, Stip.).

2. The Department is an administrative department of the Commonwealth of Pennsylvania charged with the duty and the authority to administer and enforce the provisions of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003. (Solid Waste Management Act); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

3. The Site, which Shay and his wife, Judith C. Shay, acquired in 1984 is wedged between the Delaware River and Interstate 84 at the point where the eastbound lanes of this highway swing toward the southeast to cross the Delaware River bridge. A road paralleling Interstate 84 and known as Shay Lane provides access to the Site. Rose Lane, which abuts the Site on the southwest, has residences along one side. The Borough of Matamoras lies to the north on the opposite side of Interstate 84. (1993 Adj. FF 5)[4]

---

[4] Finding of Fact No. 5 from the 1993 Adjudication. This same abbreviation will be used to refer to other findings of fact from that Adjudication.

4. The Shays have devoted the northeastern-most portion of the Site to use as a campground and docking area. The remainder of the tract is the portion involved here. (1993 Adj. FF 6)

5. In 1988 the Shays began construction of a 750-seat restaurant on the Site and wanted to fill in the Site to create a 200-car parking area. (1993 Adj. FF 8)

6. The Shays arranged with Kelly Wall to bring clean fill to the Site. Instead, Wall hauled in shredded demolition waste, roofing material, construction debris, miscellaneous wood, paper and metal products, foam rubber, automobile tires, recording tape, office waste, newspaper and baled waste. (1993 Adj. FF 9)

7. Responding to complaints of unlawful dumping, Department officials inspected the Site on October 19 and December 5, 1988, found the material described above and issued a Notice of Violation to the Shays on December 6, 1988. (1993 Adj. FF 10)

8. After an inspection on February 27, 1989 revealed that the material was still in place on the Site, the Department issued an Order and Assessment of Civil Penalties on March 6, 1989. The Order cited the Shays for the unlawful disposal of solid waste, directed them to remove the material and assessed them a civil penalty of $ 20,000. (1993 Adj. FF 11)

9. The Shays took no appeals from the December 6, 1988 Notice of Violation or the March 6, 1989 Order and Assessment of Civil Penalties. (1993 Adj. FF 12)

10. The Shays, by their counsel, Randolph T. Borden, requested a meeting with the Department to discuss the March 6, 1989 Order and Assessment of Civil Penalties. The meeting, held on March 23, 1989, was attended by representatives and counsel for the Department, Shay,

attorney Borden, Don Herzog of Tri-State, Ray Ryder of Ryder & Sons and Jerry Dotey of Pike County Engineering, Inc. (1993 Adj. FF 13)

11. The persons at the meeting discussed ways of removing the material dumped on the Site by Kelly Wall in light of the Shays' financial condition. Don Herzog proposed a plan whereby processed construction and demolition waste from transfer stations holding permits from the New York Department of Environmental Conservation would be brought to the Site, converted into unregulated clean fill principally by the removal of all but a de minimis amount of wood and other large items, and used in place of the material dumped by Kelly Wall. This latter material would be dug up and hauled away to an appropriate disposal facility. (1993 Adj. FF 14)

12. Sometime after April 18, 1989, representatives of the Department, accompanied by Herzog, Shay and representatives of the New York Department of Environmental Conservation, visited several New York transfer stations and observed the processed construction and demolition waste. The Department agreed that, with additional removal of wood, (down to no more than 10%), the processed material would be suitable as fill for the Site. (1993 Adj. FF 17)

13. When Department officials visited the Site while dumping operations were being conducted, they observed

(a) a stand high enough to permit an inspector to examine the contents of incoming trucks;

(b) men and equipment picking unacceptable materials out of the new fill;

(c) containers for the deposit of unacceptable materials;

(d) a wood chipper;

(e) the rejection of some truckloads containing large quantities of wood;

(f) the typical quantity of wood to be 10% or less.

(1993 Adj. FF 18)

14. Construction and demolition waste can contain lumber, metal, asphalt, brick, block, wallboard, corrugated container board, electrical fixtures, carpeting, furniture, appliances, nails, paint chips, etc. Screening was expected to remove all but the smallest of these items. Work at the Site was expected to remove additional amounts. (1993 Adj. FF 19)

15. Department officials visited the Site on May 30, 1989, dug a hole in the new fill 18 to 20 inches deep, and discovered large pieces of wood, metals and cloth fragments. A meeting was held the following day between Department officials, Don Herzog and Shay, at which the unacceptable materials at the Site were discussed. A letter, setting forth the results of this meeting, was sent to the parties by the Department on June 7, 1989. Basically, it mandated the complete removal of the old fill by June 21, 1989, the gridding and sampling of the new fill already in place, the sampling of new fill brought to the Site in the future, and the submission by Shay of an application for Beneficial Use of Processed Demolition Waste by June 21, 1989. (1993 Adj. FF 20)

16. An application for Beneficial Use of Processed Demolition Waste was filed by Shay on or about June 21, 1989. (1993 Adj. FF 21)

17. As a result of malodor complaints received from residents of Rose Lane, a Department official inspected the Site on July 8, 1989. Adjacent to several residences, the official detected an odor that he described as "ammonia-like or wet drywall-like." On July 10, 1989, the Department issued Compliance Order 2890030 to the Shays, citing them for producing the malodors and directing them to cease operations for a period of ten days. The Shays took no appeal from this Compliance Order. (1993 Adj. FF 22)

18. Soil samples of the new fill taken by Northeastern Environmental Associates, Inc. and the Department in July 1989 reflected high levels of lead. (1993 Adj. FF 23)

19. Because of the lead contamination, the Department informed the Shays and Herzog on September 15, 1989 that the only activity that would be allowed on the Site would be the removal of the lead-contaminated fill to an approved disposal facility. No more new fill was to be brought to the Site. (1993 Adj. FF 24)

20. The Department again warned the Shays and Herzog on September 20, 1989 that no more new fill was to be brought to the Site and that the only allowable activity was removal of the lead-contaminated fill to an approved disposal facility. This warning was sent because of reports that operations were about to resume. (1993 Adj. FF 25)

21. Attempting to investigate a rumor that the Shays and Herzog had resumed operations, Department personnel were denied entry to the Site on September 25, 1989. (1993 Adj. FF 26)

22. On September 26, 1989, the Department issued the order forming the basis of the appeal at EHB Docket No. 89-500. (1993 Adj. FF 27)

23. Despite receipt of the order, the Shays and Herzog continued to operate. Department personnel went to the Site on September 28, 1989 and videotaped the activities. New fill was being dumped on the Site and leveled off. The fill consisted of soil mixed with wood, plastics, wire, fabric and paper. While two men were picking some of the wood out of the fill and running it through a chipper, most of the items were being buried. (1993 Adj. FF 28)

24. Late in September 1989 the Department received a complaint from the Board of Supervisors of Westfall Township concerning contamination in domestic water wells along Rose Lane. Department personnel visited the residents, took water samples and sent them to the

laboratory for analysis. In one residence the water was black, foamy and very odorous, "the worst water I have ever seen," according to the sanitarian supervisor. (1993 Adj. FF 29)

25. The water samples reflected high levels of iron and manganese in many wells, high turbidity in most wells and arsenic (above the maximum contaminant level) in one well. The Department informed 4 of the residents that their water was not safe to drink. Wells of the other 6 residents were considered potable. (1993 Adj. FF 30)

26. The Department sought and obtained injunctive relief against the Shays and Herzog in the Court of Common Pleas of Pike County in order to force them to cease operations at the Site. Two separate contempt citations have been issued subsequently because of their failures to comply with the Department's September 26, 1989, order. (1993 Adj. FF 33)

27. Because of issuance of the September 26, 1989, order, the lead contamination found on the Site and the chemical contamination in the Rose Lane wells, the Department never acted on Shays' application for Beneficial Use of Processed Demolition Waste. (1993 Adj. FF 34)

28. From March to October 1989 an estimated 429,000 cubic yards of new fill was placed on the Site covering approximately 8 acres. Throughout the operation, Shay and Don Herzog worked closely together and were on the Site nearly every day overseeing operations. A net profit of about $ 1million dollars was realized, of which Shay received $ 164,000 and Don Herzog received $ 195,000. (1993 Adj. FF 35)

29. In July 1990 the Shays and Herzog retained the Center for Hazardous Materials Research (CHMR) to develop a Waste Characterization Sampling and Analysis Plan (SAP) for the Site. After the Department approved the SAP in August 1990, CHMR was retained to implement it. (1993 Adj. FF 40)

30. On or about August 27, 1990 representatives of CHMR and the Department arrived at the Site to begin implementation of the SAP, which provided for the following:

(a) groundwater sampling in the existing monitoring wells;

(b) surface water sampling in the Delaware River;

(c) backhoe trenching for visual characterization of the fill; and

(d) soil auger boring for sampling purposes and measuring gas levels at various depths.

(1993 Adj. FF 41)

31. During August 29 and 30, 1990 CHMR dug 5 trenches and completed 7 soil borings on the northwest portion of the Site while the Department videotaped the activity. This investigation revealed

(a) fill material averaging 8 to 10 feet in depth with no clearly defined fill/soil interface;

(b) fill material consisting of soil, stone, block and brick but mixed with great quantities of wood (including many large pieces) and lesser quantities of sheet metal, plastics, drywall, wire, cable, pipe, rebars and similar items;

(c) methane levels at or above the ignition level; and

(d) hydrogen sulfide (H_2S) levels dangerous to human life.

(1993 Adj. FF 43)

32. CHMR and the Department anticipated high methane readings because of an earlier investigation and report, but both entities were surprised at the H_2S levels which hovered near or somewhat above the threshold level of 20 parts per million (ppm) in most of the trenches and bore

holes but which exceeded the 300 ppm level (immediately dangerous to life and health) in trench #5 and bore holes #5 and #6, going off the meter scale at times. Digging and drilling were interrupted frequently and the work crews withdrawn while the gases escaped. (1993 Adj. FF 44)

33. The high levels of methane and H_2S are indicative of the decomposition of organic material under anaerobic conditions. This material could include, in addition to the fill, the tree stumps and other debris placed on the Site during construction of Interstate 84. (1993 Adj. FF 45)

34. Because of the dangerous levels of H_2S encountered, CHMR recommended (and the Department agreed) that excavation and drilling should be suspended on August 30, 1990 until a safe method of proceeding with the SAP could be devised. (1993 Adj. FF 46)

35. On September 12, 1990 CHMR (with the Department observing) performed two test borings and a test trench to verify the presence of high levels of H_2S and methane. In October 1990 CHMR presented to the Department a Health and Safety Air Monitoring Surveillance Plan as an amendment to the SAP. As approved by the Department, this amendment dispensed with further trenching but provided for continuation of the soil boring and field sampling under heightened safety conditions. These activities were completed on October 22, 1990 and confirmed the revelations in Finding of Fact No. 31. (1993 Adj. FF 47)

36. The fill material excavated during August and October 1990 deviated from the quality of the material the Department had earlier approved in its high wood content, the presence of large pieces of waste and debris that were supposed to be removed, and the presence of toxic contaminants. (1993 Adj. FF 48)

37. As of the date of the hearing leading to the 1993 Adjudication, no fill had been removed from the Site and no other remedial steps had been taken. (1993 Adj. FF 49)

38. On June 16, 1993, the Board issued the 1993 Adjudication sustaining (except for one issue not relevant to Shay) the Department's September 26, 1989, Order. (Stip.)

39. On Shay's appeal to Commonwealth Court, docketed at No. 1663 C.D. 1993, the Board's 1993 Adjudication was affirmed (July 19, 1994). (Stip.)

40. Meanwhile, on September 30, 1992, the Department assessed a civil penalty of $304,500.00 against Shay for the following violations

(1) for dumping or depositing or permitting the dumping or depositing of solid waste without a permit for nine days, on May 30, September 19, 20, 21, 22, 23, 25, 26 and 27, 1989, in the amount of $6,000 for each day, totaling $54,000 - - 25 Pa. Code § 271.101(a) and sections 201(a) and 501(a) of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.501(a);

(2) for dumping or depositing or permitting the dumping or depositing of solid waste without a permit for seven days, on September 28, 29, 30, October 2, 3, 4 and 5, 1989, after the issuance of the Department September 26, 1989, order, in the amount of $13,500 for each day, totaling $94,500 - - 25 Pa. Code § 271.101(a) and sections 201(a) and 501(a) of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.501(a);

(3) for the operation of a solid waste disposal facility without a permit for nine days, on May 30, September 19, 20, 21, 22, 23, 25, 26 and 27, 1989, in the amount of $6,000 for each day, totaling $54,000 - - 25 Pa. Code § 271.101(a) and sections 201(a) and 501(a) of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.501(a);

(4) for the operation of a solid waste disposal facility without a permit for seven days, on September 28, 29, 30, October 2, 3, 4 and 5, 1989, after the issuance of the Department

September 26, 1989, order, in the amount of $13,500 for each day, totaling $94,500 - - 25 Pa. Code § 271.101(a) and sections 201(a) and 501(a) of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.501(a);

(5) for refusing representatives access to inspect the Site on September 25, 1989, in the amount of $6,000 - - section 610(7) of the SWMA, 35 P.S. § 6018.610(7); and

(6) for failing to prevent malodors from creating a public nuisance on July 8, 1989, in the amount of $1,500 - - section 610(4) of the SWMA, 35 P.S. § 6018.610(4).

(Exhibit C-1)

41. William McDonnell, the Program Manager for the Department's Solid Waste Management Program at the time, made the decision to proceed with the assessment of a civil penalty. He based this decision on the fact that (1) dumping activities continued at elevated levels in outright defiance of the Department's authority to regulate; (2) Site activities posed a significant environmental threat since considerable amounts of waste of unknown content and unknown environmental impact were dumped without monitoring; and (3) the Site operated a scam in manipulation of the regulatory system. McDonnell consulted with the Department's Regional Director, the Office of Chief Counsel, the Chief of the Compliance and Monitoring Section, a compliance specialist and a solid waste specialist who had examined Site activities. (N.T. 316, 322-325)

42. Reno Ducceschi, a compliance specialist with the Department's Bureau of Waste Management, was responsible for calculating the civil penalty. He used a guidance document titled "Calculation of Act 97 Solid Waste Civil Penalties," which is based on section 605 of the SWMA and sets forth seven factors for assessing penalties -- the degree of severity, costs incurred by the Commonwealth, savings to the violator, degree of willfulness, promptness of reporting of incident,

past history of violations and duration of violation (guidance document). (N.T. 132-138, 141, 146, 253, 256-257, 328; Exhibit C-11)

43. In calculating the penalty, Ducceschi reviewed and relied upon the Department's regional files including letters, litigation files, personal files of Scott Detwiler (a solid waste specialist who investigated the Site on numerous occasions), drinking water sample results, the July 10, 1989, compliance order and the September 26, 1989, order; as well as conversations with Department personnel familiar with the Site, especially the experience and knowledge of Detwiler. (N.T. 15, 19-20, 147-162, 174, 247; Exhibits C-3, C-4, C-5, C-6, C-7, C-8, C-9 and C-13)

44. Ducceschi also relied upon a weekly listing of materials (weekly summaries). The weekly summaries, as attested to by Don Herzog in a February 8, 1991, deposition, documented which truckers brought waste materials to the Site, the amount of yardage each brought in on particular days and the amount of money each paid to dispose at the Site. Specifically, the weekly summaries indicated material was dumped on September 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30; and October 2, 3, 4, 5, 1989. (N.T. 163-164, Exhibits C-10 and C-10a)

45. Companies that brought clean fill to the Site were not charged and such deliveries were not recorded on the weekly summaries. (Exhibit C-10)

46. In accordance with the guidance document, Ducceschi determined what violations occurred at the Site, evaluated each violation separately and computed the number of days each violation occurred. (N.T. 140-142, 176, 307-308)

47. When calculating the penalty for each violation, Ducceschi considered the factors provided in the guidance document but only assessed for the severity and willfulness factors, as he found no mitigating circumstances. (N.T. 136, 204-207)

48. The guidance document provides for three levels of severity: low, moderate or high, and suggests penalty ranges of $1,000 to $5,000, $5,000 to $12,500 and $12,500 to $25,000 respectively. (N.T. 134-136, Exhibit C-11)

49. The guidance document provides for four behavior levels: accidental, negligent, reckless and willful, and suggests penalty ranges of none, $1,000 to $5,000, $5,000 to $12,500 and $12,500 to $25,000 respectively. (N.T. 137-138; Exhibit C-11)

50. A draft calculation of the civil penalty was made using the maximum penalty ranges; but for the final assessment the Department changed the days and ranges considerably and calculated it using the minimum amounts. (N.T. 176-180; Exhibit C-5 and C-12)

51. In calculating the amount assessed in paragraph (1) of the civil penalty assessment (Finding of Fact No. 40), Ducceschi considered that

(a) on April 12, 1989, when Detwiler observed two loads of material comprising three-quarters construction and demolition waste and one-quarter clean fill being dumped on the Site he had apprised Site officials it was unsuitable and had to be removed;

(b) on May 30, 1989, Department personnel observed unprocessed construction and demolition waste being dumped on the Site;

(c) on the same day, they also discovered that unworked construction and demolition waste containing wood, plastics and metal had been buried 18 to 20 inches below the surface of the fill material;

(d) material on the Site did not conform to that agreed upon as constituting acceptable material in the March 1989 meeting; as Shay readily admitted to Department officials, "you got me there;"

(e) Site officials were immediately informed that only screened and sampled processed construction and demolition waste would be permitted on the Site in the future;

(f) when by August of 1989, split sampling revealed high lead content which Department personnel considered to be approaching hazardous waste levels, Shay was informed that no more new fill was allowed to be deposited;

(g) on September 15 and 20, 1989, both in conversation and by letter it was again explained that no activity was to proceed on Site nor was any more new material to be added;

(h) on September 19, 20, 21, 22 and 23, 1989, additional waste materials were dumped on the Site, according to the weekly summaries and Herzog's deposition; and

(i) on September 25, 26 and 27, 1989, Detwiler observed several trucks at the Site dumping and leveling unprocessed construction and demolition waste containing wood, plastic, metal and fiber content.

(N.T. 32-43, 71-73, 77-79,100, 113, 191-192, 198, 271, 272, 296-297, 372-374, 408; Exhibits C-3, C-6, C-7, C-8, C-10 and C-10a)

52. Ducceschi determined the degree of severity caused by the violations in paragraph (1) to be of low harm to the environment. Analysis of material at the Site indicated that the waste contained high levels of lead averaging 4 parts per million (Shay admitted in the previous appeal that he had dumped material of high lead content). Analysis of drinking water indicated iron and manganese contamination. Based on these results, Ducceschi had initially considered the incident to be of moderate seriousness, but instead adjusted his calculation to the low range and assessed $1,000 per day at the recommendation of the guidance document. (N.T. 187-188, 262, 296, 374; Exhibit C-9)

53. When calculating the degree of willfulness of Shay's behavior for the paragraph (1) violations, Ducceschi assessed $5,000 per day for reckless behavior since the Department had on numerous occasions instructed Shay of the type of construction and demolition waste that was not considered to be clean fill, and warned him if unacceptable material was deposited on Site it would be considered a violation. He further justified this calculation on Shay's history of dealings with the Department and noncompliance, and the Department's satisfaction that Shay understood the ramifications of his actions. (N.T. 189-192, 238, 296-298; Exhibits C-1, C-3 and C-10)

54. The total penalty of $54,000 assessed for the violations in paragraph (1) represents the combined assessment of $1,000 for the severity factor and $5,000 for the wilfulness factor imposed for each of the nine days of violation. (N.T. 190, 191)

55. To calculate the penalties assessed for the violations in paragraph (2) of the civil penalty assessment (Finding of Fact No. 40), Ducceschi considered that

(a) the September 26, 1989, order required removal of all solid waste from the Site and cessation of activities bringing in the new fill;

(b) on September 29, 30, October 2, 3, 4 and 5, 1989, according to the weekly summaries and the February 8, 1991, deposition of Herzog, waste materials were dumped on the Site; and

(c) on September 28, 1989, Department personnel videotaped Site officials dumping new fill consisting of soil mixed with wood, plastics, wire and paper on the Site and burying it into the ground.

(N.T. 193-195; Exhibits C-8, C-10 and C-10a)

56. Ducceschi determined the degree of severity to be low, for the violations in paragraph (2), and assessed the minimum penalty of $1,000 for each of the seven days of violation. (N.T. 193, 194)

57. When calculating the degree of wilfulness, for the violations in paragraph (2), Ducceschi increased the assessment from reckless to willful, considering Shay's actions to be premeditated behavior because he had continued to dump waste onto the Site for seven days after having been ordered by the September 26, 1989, order to cease. On this basis, Ducceschi assessed $12,500 per day. (N.T. 194, 195; Exhibit C-8)

58. The total penalty of $94,500 assessed for the violations in paragraph (2) represents the combined assessment of $1,000 for the severity factor and $12,500 for the wilfulness factor assessed for each the seven days of violation. (N.T. 194, 195)

59. To calculate the penalties assessed in paragraph (3) of the civil penalty assessment (Finding of Fact No. 40), Ducceschi considered, in addition to the considerations in Finding of Fact No. 51, that

(a) on May 30, 1989, Department personnel observed Site officials depositing waste as well as covering it and burying it into the ground;

(b) on September 19, 20, 21, 22 and 23, the weekly listing indicated waste materials were accepted and deposited at the Site; and

(c) Department personnel observed construction and demolition waste landfilling activities on September 25, 26 and 27, 1989.

(N.T. 197, 198, 272, 273; Exhibit C-10 and C-10a)

60. Ducceschi, using the same rationale employed for the violations cited in paragraph (1), determined the degree of severity for the violations in paragraph (3) to be low, and he assessed the minimum penalty of $1,000 for each day of violation. (N.T. 195-197)

61. When calculating the degree of willfulness of the violations in paragraph (3), Ducceschi assessed $5,000 per day for reckless behavior under the same rationale employed for the paragraph (1) violations. (N.T. 196, 197)

62. The total penalty of $54,000 assessed for the paragraph (3) violations represents a combined assessment of $1,000 for severity factor and $5,000 for the wilfulness factor assessed for each of the nine days of violation.

63. To calculate the penalties assessed in paragraph (4) of the civil penalty assessment (Finding of Fact No. 40), Ducceschi considered, in addition to the considerations in Finding of Fact 51, that

(a) the September 26, 1989, order required removal of all solid waste from the Site and cessation of activities bringing in the new fill;

(b) the weekly summaries and the February 8, 1991, deposition of Herzog indicated waste materials were dumped on the Site on September 28, 29, 30, October 2, 3, 4 and 5, 1989; and

(c) the videotape of September 28, 1989, showed men picking through the waste materials and burying most of the items.

(N.T. 194; Exhibits C-10 and C-10a)

64. Ducceschi, again using the same rationale as for paragraph (1), determined the degree of severity of the violations in paragraph (4) to be low, and he assessed the minimum penalty of $1,000 for each day of violation. (N.T. 198, 199)

65. Ducceschi used the same rationale employed in paragraph (2) for raising the wilfulness factor for violations in paragraph (4) to reckless, and he assessed the low range recommended by the guidelines of $12,500 for each of the nine days of violation. (N.T. 194, 195; Exhibit C-8)

66. The total penalty of $94,500 assessed for the paragraph (4) violations represents a combined assessment of $1,000 for severity factor and $12,500 for the wilfulness factor assessed for each of the seven days of violation.

67. When calculating the $6,000 penalty assessed in paragraph (5) (Finding of Fact No. 40) for Shay's refusal on September 25, 1989, to permit Detwiler access to the Site to perform an inspection, Ducceschi determined the severity to be low. Considering the action a direct challenge to the Department's authority and in accordance with Department policy for this type of violation, he assessed the minimum penalty of $1,000. Ducceschi considered the degree of willfulness to be reckless because Shay knew from past dealings that inspectors were allowed on the Site to inspect, and assessed the minimum amount of $5,000. (N.T. 200, 201, 323-327)

68. When calculating the $1,500 penalty assessed in paragraph (6) (Finding of Fact No. 40) for the failure to prevent malodors from creating a public nuisance on July 8, 1989, Ducceschi determined the degree of severity to be low and the degree of willfulness to be negligent, reasoning that while there were no prior warnings that odor would emanate, it was not an accident for malodor

to be coming from illegally disposed waste. He assessed the minimum amounts for both factors, $1,000 and $500 respectively. (N.T. 201-203)

69. Detwiler testified that on six to eight of his visits to investigate complaints that dumping had resumed at the Site, he was told by complainants that Site operations would cease about 20 minutes before his arrival. (N.T. 21-24, 52-53)

70. By May of 1989 Shay knew or should have known what material was acceptable and what material was not acceptable. (N.T. 332, 351, 372)

71. While the Department had been concerned with environmental harm caused by activities at the Site since October of 1988, the concerns were aggravated when the results of material sampling analysis in August of 1989 indicated high lead content. As the activities continued in defiance of Department orders, the Site became an increasing threat to the adjacent properties and the Delaware River. (N.T. 334, 335, 383-393)

72. The Department also was hindered in regulating the Site because, since it was unpermitted, the Department did not possess the geologic and hydrogeologic information that is filed with a permit application. (N.T. 383-393)

DISCUSSION

In an appeal from a civil penalty assessment, the Department bears the burden of proof. 25 Pa. Code § 1021.101(b)(1). It must prove by a preponderance of the evidence that Shay violated the applicable statutes and regulations, and that the civil penalty assessed for the violations is reasonable and an appropriate exercise of discretion. 25 Pa. Code § 1021.101(a). Since the civil penalties assessed here relate solely to Shay's violations of the SWMA determined in the 1993 Adjudication and affirmed by Commonwealth Court, our review of the Department's civil penalty assessment

totaling $304,500 requires only an examination of whether that assessment is reasonable and appropriate. Judge Myers made a ruling to that effect at the outset of the hearing because, prior to hearing, Shay's legal counsel had indicated his intent to produce evidence challenging the findings and conclusions in the 1993 Adjudication. Principles of collateral estoppel[5] prevent the Board from entertaining this attempt to, in essence, reconsider matters adjudicated in the first appeal. *Fiore v. Department of Environmental Resources*, 508 A.2d 371 (Pa. Cmwlth. 1986). The findings of fact and conclusions of law in that proceeding remain binding on Shay in the instant case and we specifically affirm Judge Myers' ruling to that effect.

Shay also claims that sanctions should be imposed upon the Department for its failure to supplement its answers to Shay's interrogatories. Shay made the motion immediately prior to the hearing, seeking to preclude the Department from presenting any evidence. Because of the late filing, Judge Myers took the motion under advisement, deferring a ruling until the time of adjudication.

The Department admits that it filed no formal supplement to the interrogatories but argues that it provided Shay with the same information either in February 1993 when it answered the interrogatories or in April 1996 when it filed a pre-hearing memorandum. Shay does not dispute this or point to any specific evidence or document not disclosed by the Department well in advance of the hearing. Nor does Shay allege that he was deprived of opportunity to depose the witnesses and examine the documents.

---

[5] The doctrine of collateral estoppel is designed to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually. *Keystone Water Co. v. Pennsylvania Public Utility Commission*, 474 A.2d 368, 373 (Pa. Cmwlth. 1984).

We find no prejudice to Shay resulting from the Department's technical failure. Accordingly, his motion for sanctions is denied.

We can understand the dilemma facing Shay's legal counsel. The 1993 Adjudication had established the relevant facts and had determined that they constituted violations of the SWMA and the regulations. Commonwealth Court had affirmed those holdings and Shay could no longer challenge them. Besides, the assessment of the civil penalty was mandated by section 605 of the SWMA, 35 P.S. § 6018.605, because the September 26, 1989, order contained a cessation of activities clause, and by 25 Pa. Code § 271.411(c)(1) and (2) for operating without a permit. The only remaining path over which to challenge the assessment was its reasonableness and appropriateness. That is the only issue before the Board.

In examining the penalty assessment, we need not consider what penalty we would have imposed, nor need we agree with the factors that the Department weighed or the amount it assessed for each factor considered for each violation, *Goetz v. DER*, 1992 EHB 1401, but rather, our job is limited to determine whether there is a "reasonable fit" between each violation and the amount of the penalty assessed. *Wilbar Realty, Inc. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth. 1995); *Chrin Brothers v. DER*, 1989 EHB 1360. Only when it is found that the Department abused its discretion will we substitute our own to modify an assessment. *Milos v. DER*, 1992 EHB 1355.

The Department assessed the civil penalty pursuant to section 605 of the SWMA and 25 Pa. Code §§ 271.411 - 271.414. Section 605 of the SWMA authorizes the Department to assess a maximum of $25,000 for "[e]ach violation for each separate day and each violation of any provision

of this act, any rule or regulation under this act, any order of the department, or any term or condition of a permit." 35 P.S. § 6018.605.

To determine how much should be assessed for each violation, the SWMA guides the Department to consider the "willfulness of the violation, damage to the air, water, land or other natural resources of the Commonwealth or their uses, costs of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors." 35 P.S. § 6018.605. The Department must also consider the seriousness of the violation. 25 Pa. Code § 271.412(b)(1). These factors are set forth in the guidance document that Ducceschi used in calculating the amounts assessed for the different violations. Similar guidelines for assessing civil penalties have been before us previously and approved. *Bolenski v. DER*, 1992 EHB 1716. We will deal with the violations *seriatim.*

Dumping Solid Waste without a Permit

For the 16 days for which penalties were imposed for dumping solid waste on the Site without a permit, as set forth in paragraphs (1) and (2) of the civil penalty assessment, the Department assessed a total of $148,500. The Department arrived at the calculation after determining the degree of severity to be low and Shay's conduct to be reckless for the nine days of violation (in paragraph (1)) prior to the Department's September 26, 1989, order, and his conduct to be willful for the seven days of violation (in paragraph (2)) after the Department issued its order. The calculation utilized $1,000 per day for the 16 days of violation for low degree of severity; plus $5,000 for each of the nine days of violation that were reckless, and $12,500 for each of the seven days of violation that were willful.

In accordance with the guidance document, Ducceschi determined what violations occurred at the Site, evaluated each violation separately and computed the number of days each violation occurred. He found that on those days Department officials had either observed the dumping first hand or ascertained from the deposition of Herzog and the weekly summaries that waste materials had been dumped on the Site. On September 28, 1989, Department officials videotaped the dumping activities which revealed material containing large pieces of wood, and plastic, wire, fabric and paper mixed with soil.

Shay contends the penalty should be dismissed because the Department failed to prove the material dumped on those days constituted a solid waste. He argues the waste may have been either clean fill or construction and demolition waste waiting to be worked as had been permitted by the March plan and agreed by the Department. Examination of the evidence, coupled with the fact that Shay was only permitted to bring processed construction and demolition waste on Site, obviates this argument.

The plan to which Shay refers was a result of the March meeting that contemplated, in part, the substitution of processed construction and demolition materials for the old waste materials on Site. Dumping of unprocessed materials on the Site alone was enough to fall short of the plan. The discovery on May 30, 1989, of unworked construction and demolition waste containing wood, plastics and metal buried 18 to 20 inches below the surface of the fill material established the fact that the material did not conform to that agreed upon as acceptable. When confronted, Shay readily admitted "you got me there." This, combined with his admission that he had dumped high lead containing materials, convinced officials to forbid dumping of additional processed materials unless they had been prescreened and sampled. When by August of 1989, split sampling revealed high lead

content (which Department personnel considered to be approaching hazardous waste levels) Shay was informed that no more new fill was allowed to be dumped. Later, on September 15 and 20, 1989, both in conversation and by letter, it was again explained that no activity was to proceed on Site nor was any more new material to be added.

The Department's evidence showed that: (1) personnel observed further dumping of unprocessed construction and demolition waste on September 25, 26 and 27, 1989; (2) personnel videotaped Site officials dumping new fill consisting of soil mixed with wood, plastics, wire and paper on the Site and burying it into the ground on September 28, 1989; and weekly summaries kept at the Site to log the waste materials dumped and monies received, indicated dumping had occurred on September 19, 20, 21, 22, 23, 29, 30, October 2, 3, 4 and 5, 1989.

Moreover, the Department's reliance on the weekly summaries is not misplaced. Had clean fill been deposited, instead, it would not have been documented because, as Herzog testified, no payment was accepted for it. Although Department officials had not actually observed the waste being dumped on these days, the weekly summaries show that the materials were not acceptable waste.

When calculating the penalty for each violation, Ducceschi considered the factors provided in the guidance document, but only assessed for the severity and willfulness factors, as he found no mitigating circumstances. With respect to the severity factor, Ducceschi considered the environmental harm resulting from the incidents on those days to be of low severity. To determine the seriousness of the violation, the regulations enumerate considerations including: damage to the land or waters of the Commonwealth, the cost of restoration, hazards or potential hazards to the public's health or safety, property damage, interference with a person's right to use or enjoyment of

property, and other relevant factors. 25 Pa. Code § 271.412(b)(1)(i)-(vi). Although the evidence revealed a high level of lead concentration in the waste material and iron and manganese contamination in the drinking water of nearby wells, which could have supported a finding of moderate severity, Ducceschi made a conservative assessment using the minimum amount recommended by the guidance document (which provides a range of $1,000 to $5,000 for low degree of severity) and assessed $1,000 for each of the 16 days. We find no abuse of discretion here.

With respect to the willfulness factor, Ducceschi determined Shay's actions with regard to the violations in paragraph (1) of the assessment to be reckless because he had deliberately violated the SWMA in the face of numerous warnings. The willfulness factor "encompasses a broad spectrum of mental states and is determined by looking at 'the violator's recognition (or lack thereof) of the fact that its conduct may cause a violation of the law.'" *Phillips v. DER*, 1994 EHB 1266, 1275-1276. It includes willful, reckless, negligent and accidental violations. As a basis for finding reckless behavior, the Department considered the various occasions on which Shay had been warned that the material he was dumping was not clean fill but a regulated waste material. On April 12, 1989, when Detwiler observed two loads of material comprising three-quarters construction and demolition waste and one-quarter clean fill being dumped on the Site he had apprised Site officials it was unsuitable and had to be removed. In May, upon again being informed the material on Site was unacceptable, Shay readily confessed his understanding of that fact. On September 15 and 20, 1989, both in conversation and by letter, Shay was told no activity was allowed to proceed on Site nor was any more new material to be added.

We held in the 1993 Adjudication that Shay knew at least by May of 1989 the material found on his Site was unacceptable. He certainly recognized the need for a permit, as he submitted an

application for a beneficial use permit in June of 1989. This blatant violation of the SWMA and continuing noncompliance with the Department's orders provides ample cause for a finding of reckless behavior. *See Delaware Valley Scrap Co., Inc. v. Department of Environmental Resources*, 645 A.2d 947 (Pa. Cmwlth. 1994). We thus conclude, the Department's assessment of $5,000 for each of the nine days of violation for this factor was a reasonable fit and not an abuse of discretion.

For the violations in paragraph (2) of the assessment, the degree of willfulness was increased from reckless to willful. A higher category of willfulness was assessed because Shay had continued to conduct his operations after having been ordered to cease by the September 26, 1989, order. The guidance document states that willful behavior is "a deliberate premeditated action with prior knowledge that the act constituted a violation of environmental statutes, regulations, etc., or a deliberate attempt to circumvent or avoid compliance with same." Shay had known well before the order that dumping constituted a violation, and his continued and deliberate violation after its receipt provides ample basis for a finding of willful behavior. Ducceschi arrived at the $12,500 per violation figure using the guidance document recommendation for the low range for willful behavior which assessment we find reasonably fits those seven days of violation.

As we find the amounts assessed for the violations in paragraphs (1) and (2) of the assessment for the severity and willfulness factors reasonably fit the violations, we find the total penalties of $54,000 and $94,500, respectively, are justified and appropriate.

Operating a solid waste disposal facility without a permit

For the same 16 days for which the Department imposed penalties for the unpermitted dumping of waste, it also imposed penalties totaling $148,500 for Shay's unpermitted operation of a solid waste disposal facility, as set forth in paragraphs (3) and (4) of the assessment. Considering

whether imposition of the penalties for those days was appropriate, we need only find that Shay was operating "[a] facility using land for disposing or processing of municipal waste," on each day. 25 Pa. Code § 271.1. In this context, a facility includes "[l]and, structures and other appurtenances or improvements where municipal waste disposal or processing is permitted or takes place." *Id.*

The Department's evidence showed that the Site was used for disposal of waste on each of the 16 days. On May 30, September 25, 26 and 27, 1989, Department personnel observed Site officials covering and burying waste materials. The September 28, 1989, videotape provided a graphic depiction of the disposal facility operations as new unprocessed construction and demolition materials were buried on Site. On September 19, 20, 21, 22, 23, 29, 30, October 2, 3, 4 and 5, 1989, the weekly summaries documented the intake of materials and money received for their acceptance.

Shay contends the activities were just "a continuation of the depositing activity with the requisite degree of working expected by the [Department] to meet its determination that it was clean fill." This contention might have merit if the material really ended up as clean fill. Instead, it remained unprocessed construction and demolition waste. The SWMA specifically prohibits in separate subsections the dumping of waste and the operation of a waste disposal facility. 35 P.S. § 6018.610(1) and (2). We held in the 1993 Adjudication that these were separate violations of the SWMA and were afflirmed by Commonwealth Court. Accordingly, the Department may impose penalties on each action because each is a distinct violation of the SWMA.

Considering the degree of severity of these violations, the Department determined the resultant harm was low. Ducceschi arrived at $1,000 penalty per day utilizing the rationale employed for the violations in paragraph (1) and considering the amounts recommended in the guidance document for the low range for low degree of severity. We find the assessment minimal

and reasonable, justifying its imposition for the nine days of violation in paragraph (3) and seven days of violation in paragraph (4).

The calculation of $5,000 for reckless behavior for the nine days of violation set forth in paragraph (3) are justified as a continuing violation. Shay had been warned on multiple occasions and was hardly unaware that his activities required the acquisition of a permit. Therefore, we find the $5,000 penalty assessed per day reasonably fits the nine violations on May 30, September 19, 20, 21, 22, 23, 25, 26 and 27, 1989.

Escalation to the next higher category of willfulness was again justified for the seven violations contained in paragraph (4). Shay had continued to operate the solid waste landfill after the Department issued the September 26, 1989, order to cease operations. For his continued and blatant violation of not only the regulations but also the Department's mandate, we find the $12,500 penalty per day reasonably fits the violations on those days.

Having found the Department's assessments reasonably fit the violations in paragraphs (3) and (4) of the civil penalty assessment, we conclude the total penalties of $54,000 and $94,500, respectively, are justified and appropriate.

Refusal of access

Examining the evidence presented for the $6,000 penalty assessment for Shay's refusal on September 25, 1989, to permit Detwiler access to the Site to perform an inspection, we find the penalty appropriate and reasonable. The calculation of $6,000 includes $1,000 for the degree of severity and $5,000 for reckless behavior. Ducceschi arrived at the $1,000 based on Department policy which considers violations of this type to be of low severity. He determined the degree of willfulness amounted to reckless because Shay knew that inspectors were allowed on the Site to

inspect, and nevertheless, chose to disregard the Department's authority. Accordingly, we do not disturb this assessment.

Malodors

The calculations for penalizing the failure to prevent malodors from creating a public nuisance on July 8, 1989, utilized $1,000 for severity and $500 for willfulness. Finding no imminent danger to the environment, Ducceschi determined the degree of severity to be low. He considered the degree of willfulness to be negligent because, while there were no prior warnings that the odor would emanate, the fact that odor did emanate from illegally disposed waste was not an absolute accident. Shay had failed to prevent a situation which he should have recognized carried this risk. The $1,500 assessment for this violation represents the minimum amounts for both factors, and as such we find it reasonable for the violation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeal.

2. The Department has the burden of proving by a preponderance of the evidence that the amount of civil penalty assessed for Shay's violations of the SWMA is reasonable and an appropriate exercise of discretion.

3. The $304,500 civil penalty assessed by the Department is a reasonable fit for Shay's violations of the SWMA and an appropriate exercise of the Department's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHARLES W. SHAY	:	
	:	
v.	:	**EHB Docket No. 92-495-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of December, 1996, the appeal in the above-captioned matter is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 92-495-MR

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 17, 1996

c: **DEP Litigation Library:**
Attention: Brenda Houck

For the Commonwealth, DEP:
Margaret O. Murphy, Esq.
Southeast Region
Michael D. Bedrin, Esq.
Northeast Region

For Appellant:
Richard B. Ashenfelter, Jr., Esq.
POWELL, TRACHTMAN, LOGAN,
CARRLE, BOWMAN & LOMBARDO
King of Prussia, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
BLAIRSVILLE MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 96-023-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	**Issued: December 20, 1996**

OPINION AND ORDER ON CHESTNUT RIDGE CONSERVANCY'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The appellant's motion for summary judgment is denied where the information which the appellant contends should have been included in the permit application would not have resulted in a denial of the permit by the Department of Environmental Protection.

OPINION

This appeal was filed by Chestnut Ridge Conservancy ("Chestnut Ridge") opposing the Department of Environmental Protection's ("Department") grant of a permit to Tasman Resources, Ltd. ("Tasman"). The permit authorizes Tasman to mine limestone at Chestnut Ridge in Westmoreland County.[1]

In its notice of appeal, Chestnut Ridge averred, *inter alia*, that Tasman's permit application was inaccurate and incomplete because it failed to identify all owners, associates, and related parties of Tasman, as required by the Department's application form. On September 16, 1996, Chestnut Ridge moved for summary judgment on this issue. Tasman and the Department filed responses opposing the motion on October 15 and 16, 1996, respectively. In addition to its response, Tasman also filed a cross motion for partial summary judgment on this issue.[2] Oral argument was held on Chestnut Ridge's motion on December 17, 1996.

The permit application states that Tasman is owned exclusively by Clive and Susan Cutler.

---

[1] Appeals were also filed by Hillside Community Association and Blairsville Municipal Authority.

[2] Because of our ruling in this Opinion, Tasman's cross motion is moot.

It is Chestnut Ridge's contention that, at the time the application was filed, two other individuals, Daniel Slavek, Jr. and James Johnson, through their respective companies, were also principals, partners, owners, and/or equity investors in Tasman and should have been identified in the application. Chestnut Ridge bases its contention on evidence that Mr. Slavek and Mr. Johnson had invested substantial sums of money in the permitting and development of the Chestnut Ridge quarry and that Mr. Slavek has participated in the operation of Tasman.

The Department requires information regarding ownership, association and related party status so that it may perform a compliance check in accordance with Section 8 (b) (1) of the Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Act"), Act of December 19, 1984, P.L. 1093, 52 P.S. § 3301 *et seq.*, at § 3308 (b) (1), and 25 Pa. Code § 77.126. Section 8 (b) (1) of the Noncoal Act provides as follows:

> Any person, partnership, association or corporation that has engaged in unlawful conduct, as defined in section 23, or that has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor that has engaged in such unlawful conduct shall be denied any permit required by this act unless the permit applicant demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

52 P.S. § 3308 (b) (1). In addition, Section 77.126 of the regulations sets forth the criteria for permit approval. Pursuant to that section, a permit may not be approved unless the application affirmatively demonstrates to the Department that the applicant or a related party, as indicated by past or continuing violations, has not shown a lack of ability or intention to comply with the Noncoal Act or the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*

It is not necessary for us to determine whether Mr. Slavek, Mr. Johnson, and their respective companies are related parties to Tasman. On or about October 8, 1996, Scott Roberts, the Department's Chief of Permits and Technical Services, performed compliance history checks on Mr. Slavek, Mr. Johnson, and Mr. Slavek's business, Derry Construction Company. The compliance check revealed no violations for Mr. Slavek, Mr. Johnson, or Derry Construction. (Roberts Affidavit, Ex. E to Tasman's Response) In addition, as of the filing of Tasman's response, neither Mr. Slavek nor Mr. Johnson had held a mining permit. (Ex. C and D to Tasman's Response)

It is Chestnut Ridge's contention that regardless of Mr. Slavek's and Mr. Johnson's compliance history, Tasman failed to submit accurate information to the Department in its permit application and this failure, in itself, constitutes unlawful conduct under the Noncoal Act and shows a lack of ability or intention to comply with the Act. On that basis, Chestnut Ridge argues that the permit should be revoked.

Even if we accept the fact that Mr. Slavek and Mr. Johnson are related parties to Tasman and should have been identified in the permit application, we do not find that to be a basis for revoking Tasman's permit. At the oral argument on December 17, 1996, the Department acknowledged that where it receives a permit application which is incomplete or inaccurate, it will provide the applicant with an opportunity to correct the error or provide the missing information. In this case, the Department has not taken a position as to whether Mr. Slavek or Mr. Johnson are owners or principals of Tasman or in some other way related to Tasman. Without taking a position on this issue, the Department has acted on the assumption that these individuals may be related parties to Tasman. Acting on this assumption, the Department did what it would have done if these individuals had been listed in the permit application as related parties; it performed a compliance

check. The compliance check revealed no violations.

If we also act on the same assumption that Mr. Slavek and Mr. Johnson are related parties to Tasman and that Tasman should have provided this information in its permit application, we find no intent on the part of Tasman to mislead the Department by falsifying or omitting information from its permit application. It is evident, based on the Department's subsequent compliance check, that Tasman was not attempting to hide a faulty compliance history. Had these individuals been named in the permit application, the result would have been the same; that is, the permit would have been issued.

Because the Department's compliance check revealed no violations for Mr. Slavek, Mr. Johnson, or Derry Construction and, further, because we find no intent on the part of Tasman to intentionally mislead the Department with respect to the compliance history of Tasman's owners, officers, associates, or related parties, we find that the issue raised by Chestnut Ridge in its motion is moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

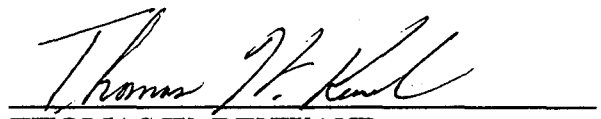
CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
BLAIRSVILLE MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 96-023-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	

ORDER

AND NOW, this 20th day of December, 1996, the Motion for Summary Judgment filed by Chestnut Ridge Conservancy is **denied.**

EHB Docket Nos. 95-022-R; 95-023-R and 95-024-R

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 20, 1996

c: **For Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Zelda Curtiss, Esq..
Michael J. Heilman, Esq.
Western Region

For Chestnut Ridge:
Howard J. Wein, Esq.
Paul A. Supowitz, Esq.
KLETT LIEBER ROONEY & SCHORLING
Pittsburgh, PA

For Blairsville Municipal Authority:
Kevin P. Holewinski, Esq.
JONES DAY REAVIS & POGUE
Pittsburgh, PA

For Hillside Community Association:
Dwayne E. Ross, Esq.
Latrobe, PA

For Tasman Resources, Ltd.:
Joseph K. Reinhart, Esq.
Steven F. Baicker-McKee, Esq.
Laura Schleich Irwin, Esq.
BABST CALLAND CLEMENTS & ZOMNIR, P.C.
Pittsburgh, PA
Harvey J. Eger, Esq.
Jeannette, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

PEOPLE UNITED TO SAVE HOMES, and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R 96-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**Issued: December 23, 1996**

OPINION AND ORDER ON PETITIONS FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis

Petitions for reconsideration of two opinions and orders granting partial summary judgment are **denied**. The petitioners have failed to present circumstances warranting reconsideration.

OPINION

Presently before the Board are Petitions for Reconsideration filed by the Department of Environmental Protection ("Department") and Eighty-Four Mining Company regarding our Opinions and Orders issued on November 27, 1996 on the Summary Judgment Motions filed by the various parties. Pennsylvania American Water Company and People United to Save Homes

("PUSH") oppose the Petitions.[1] After a careful and detailed review we deny the Petitions as they do not raise any relevant issues that we did not earlier fully consider and address in issuing our Opinions and Orders.

The Petitions do not meet the standards for reconsideration of interlocutory orders. Reconsideration of interlocutory orders is strongly discouraged and the Board will only reconsider an interlocutory order in exceptional circumstances. *Magnum Minerals v. Department of Environmental Resources,* 1983 EHB 589. No exceptional circumstances exist here. *Fiore v. Department of Environmental Resources,* 1995 EHB 634.

The issue before the Board regarding the 30-inch water line was whether the Department abused its discretion in issuing the mining permit to Eighty-Four Mining Company because it did not require Eighty-Four Mining Company to set forth in its subsidence plan sufficient measures to minimize damage, destruction, or disruption to the water line. The Department's own regulations require Eighty-Four Mining Company to set forth in its subsidence plans exactly what mitigation measures it will employ *in the mine. See People United to Save Homes v. Department of Environmental Protection,* EHB Docket No. 95-232-R (Consolidated) (Opinion on Motions for Summary Judgment issued November 27, 1996), pp. 5-7. The rules of statutory construction,

---

[1]On December 13, 1996 the Board issued an Order clarifying one of our November 27, 1996 Orders. We directed that the following corrected Order be substituted for our original Order. (The clarifying language is in bold type.) "AND NOW, this 27th day of November, 1996, Pennsylvania American Water Company's Motion for Summary Judgment is granted in part. Eighty-Four Mining Company is prohibited from conducting **longwall** mining under Pennsylvania American Water Company's **30-inch line ("water line")** until it has submitted a revised subsidence control plan and received approval thereof from the Department of Environmental Protection consistent with the requirements set forth in this Opinion or until Pennsylvania American Water Company has provided Eighty-Four Mining Company with permission to mine under its water line."

"which are applicable in interpreting regulations, require that every statute be construed to give effect to all of its provisions. 1 Pa. C.S. §1921; *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia,* 590 A.2d 384 (Pa. Cmwlth. 1991)." *Ambler Borough Water Department v. Department of Environmental Resources,* 1995 EHB 11, 23. Furthermore, it is presumed that every word, sentence and paragraph of a regulation or statute must be given effect. *Id.*

Interestingly, neither the Department nor Eighty-Four Mining Company in their Petitions or Briefs discuss the mandatory language of the regulations. The Department admitted all 45 paragraphs of Pennsylvania American Water Company's Motion for Summary Judgment. The Department's own regulations require that before the Department issues a mining permit, the mining company must affirmatively demonstrate that its application is complete and accurate. We found that by failing to include a subsidence plan as required by the regulations, Eighty-Four Mining Company's subsidence plan was fatally defective. At that point, we could simply have suspended the permit in its entirety and remanded the matter to the Department. *Oley Township v. Department of Environmental Protection,* EHB Docket No. 95-101-MG (Adjudication issued October 24, 1996); *New Hanover Township v. Department of Environmental Protection,* EHB Docket No. 88-119-MR (Consolidated) (Adjudication issued June 25, 1996). Indeed, PUSH argues that the permit should be suspended and the matter should be remanded for a "lawful permit review." *See also Harmar Township v. Department of Environmental Resources,* 1993 EHB 1856.[2]

---

[2] In *Harmar Township,* the Board found that the Department had issued the permit despite the failure of the application to contain certain information required by the regulations. Instead of remanding to the Department to require the necessary information, the Board sustained the appeal and revoked the permit.

This Board issued no injunction. We simply granted in part Pennsylvania American Water Company's Motion for Summary Judgment. We were under no obligation to consider any alleged economic impact once we found as a matter of law that the Department abused its discretion in issuing a permit that did not comply with its own regulations. The alleged economic harm Eighty-Four Mining Company will allegedly suffer by not being able to longwall mine in a small portion of Panel 2 (which is the only mining immediately affected by the Order) was not caused by this Board. Eighty-Four Mining Company could easily have completed an application in accordance with the Department's regulations. Had the company set forth a subsidence plan as required by the regulations and particularly Section 89.141(d), it would not face a disruption of its plans now.

Eighty-Four Mining Company argues that the Board failed to consider the interests of the hard working men and women of the United Mine Workers of America. It is simply wrong. We did consider their interests by fashioning the remedy we did and allowing longwall mining to continue except in a very small part of the mine. Moreover, at the same time, our Opinion and Order gave Eighty-Four Mining Company the opportunity to submit a subsidence plan in accordance with the law or reach an agreement with Pennsylvania American Water Company. Any harm to the United Mine Workers of America was not caused by this Board but instead by their employer.

The Department argues that our Opinion conveys the impression that it ignored its statutory responsibilities. We found that the Department abused its discretion by not enforcing mandatory language in its own regulations. This does not mean that the individuals in the Department's Bureau of Mining are not sincere and dedicated public servants trying to do their jobs. They are. However, where the language of the statute and regulations is clear, it must be followed. In this instance, it was not.

The Department argues that Special Condition 18 gave it the flexibility to safely monitor the mining. We disagree. The Department can not ignore mandatory language in its own regulations under the guise of "flexibility." Moreover, simply because the bypass line evidently worked over the first panel[3] or because it might work does not give the Department permission to ignore its own regulations. Many motorists have likely driven the length of the Pennsylvania Turnpike without wearing their seatbelts, with no ill effect. However, this is no reason to then argue that the mandatory seatbelt law should be either abolished or ignored. Just like the seatbelt law, these regulations are there for an important public purpose.

We find the remaining arguments in the Petitions equally unpersuasive and decline to reconsider our earlier Orders.

---

[3]Even though the 30-inch line may have been heavily damaged by the mining and the bypass line does not appear in Eighty-Four Mining Company's subsidence plan. Indeed, the bypass line was devised by Pennsylvania American Water Company long after the permit was issued and certainly was not taken into consideration by the Department when it issued the permit.

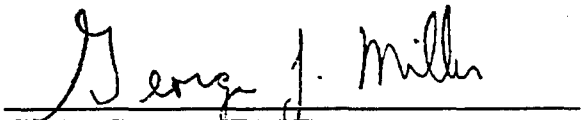
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES, and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R**
	:	**(Consolidated with 95-233-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**96-223-R and 96-226-R)**

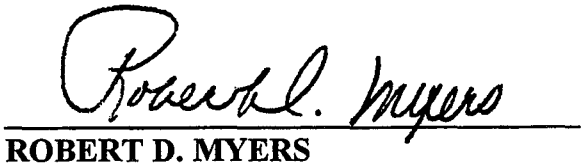
ORDER

AND NOW, this 23rd day of December, 1996, the Petitions for Reconsideration are **denied**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 23, 1996

c: **Bureau of Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Steven F. Lachman, Esq.
Patience Robinson Nelson, Esq.
Diana Stares, Esq.
Western Region

For PA American Water Company:
Michael D. Klein, Esq.
LeBOUF LAMB GREENE & MacRAE, L.L.P.
Harrisburg, PA
Jan L. Fox, Esq.
Julie A. Coletti, Esq.
LeBEOUF LAMB GREENE & MacRAE, L.L. P.
Pittsburgh, PA

For People United to Save Homes:
Robert W. Thomson, Esq.
MEYER DARRAGH BUCKLER BEBENEK & ECK
Pittsburgh, PA

For Eighty-Four Mining Company:
Henry Ingram, Esq.
Thomas C. Reed, Esq.
Stanley R. Geary, Esq.
Stephen C. Smith, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

For UMWA:
Michael J. Healey, Esq.
Claudia Davidson, Esq.
HEALEY DAVIDSON & HORNACK, P.C.
Pittsburgh, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARI

KEVIN SWEENEY	:	
	:	
v.	:	**EHB Docket No. 96-140-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	:	**Issued: December 27, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal from the Department's reissuance of an Order to Permittee correcting a typographical error is dismissed. Pursuant to the doctrine of *res judicata*, the Board is precluded from considering this appeal because the identical issues were decided by a valid judgment in a previous appeal of the Order involving the same parties. The appeal is also barred by the doctrine of administrative finality. A party that fails to take a timely appeal of a Department order is precluded from collaterally attacking the validity or content of that order.

OPINION

On June 26, 1996, Kevin Sweeney (Appellant) commenced this matter by filing a Notice of Appeal challenging the Department of Environmental Protection's (Department) May 29, 1996 reissuance of an October 14, 1994 Order issued to Enlow Fork Mining Company (Enlow). The

Order authorized Enlow to replug an abandoned gas well (Well No. 690) pursuant to Section 13 (c) of the Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. 1069, *codified at*, 58 P.S. §§ 501-518. Appellant owns the surface of the tract of land upon which Well No. 690 is located in East Findlay Township, Washington County.

Appellant had previously contested the Order, in a January 24, 1995, appeal docketed at EHB Docket No. 95-019-E. In his 1995 appeal Appellant argued he was not timely advised of the pending application, provided copies of the permit information and Order, or informed of his right to appeal. He also averred that the Order may have been based upon untrue or inaccurate information. Without addressing these arguments, however, the Board dismissed the appeal as untimely. *Sweeney v. DER*, 1995 EHB 544.[1]

On July 12, 1996, Consol Pennsylvania Coal Company (Permittee), Enlow's successor by merger, submitted a Petition to Intervene in the matter. Intervention was granted, as its status automatically entitled it to become a party to the action.

Simultaneously with the filing of its Petition to Intervene, Permittee filed the present Motion to Dismiss the appeal along with a supporting memorandum of law. The Department filed a response providing additional information in support of the Motion on August 8, 1996, and submitted a Verification the next day. Appellant opposed the Motion on August 9, 1996, and filed a reply to the Department's response on August 18, 1996.

---

[1] This decision was affirmed by the Commonwealth Court. *Sweeney v. Department of Environmental Resources*, 1161 C.D. 1995 (Pa.Cmwlth. December 19, 1995). While that appeal was pending before the Commonwealth Court, Appellant filed with the Board a Petition for Leave to Appeal Nunc Pro Tunc. The Board denied the Petition due to the pendency of the issue in Commonwealth Court. *Sweeney v. DER*, 1995 EHB 1011.

Permittee's Motion asserts, in part, that this appeal is merely an "attempted refiling" of the previous appeal, and *res judicata* bars us from rehearing it. We agree.

The doctrine of *res judicata* may apply in administrative proceedings when there has been a final disposition on the identical cause of action and "the reasons for uses of the rule in court proceedings are present in full force." *City of Mckeesport v. Public Utility Commission*, 442 A.2d 30, 31 (Pa.Cmwlth. 1982) (citation omitted); *see Atlantic Richfield Co. v. City of Bethlehem*, 450 A.2d 248 (Pa.Cmwlth. 1982) (and cases cited therein). For *res judicata* to apply, four conditions must exist: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons or parties to the action; and (4) identity of the quality of or capacity of the parties suing or being sued. *Patel v. Workmen's Compensation Appeal Board*, 488 A.2d 1177, 1179 (Pa.Cmwlth. 1985).

Considering whether the first condition is present, we compare the subject matter of both appeals. The 1995 appeal challenged the Order;[2] the present appeal contests the reissuance of that Order. In his response to the Motion, Appellant contends the reissuance differs from the original Order because it was accompanied by a "temporary road crossing." However, neither the response or his present Notice of Appeal identify that permission, nor is it apparent from the Order. We are not persuaded that the subject matter of the present appeal is in anyway different from that in the first.

The Order, now and when it originally issued, consists of three records: one titled "ORDER" and two attachments referenced in it, the application and proposed alternate method. The Order was

---

[2] In addition, the 1995 appeal had also challenged a similar order issued to Enlow to replug Well No. 695.

subsequently altered to its present form when the Department, while updating the database, noticed that the well registration number for Well. No. 690, referenced in the Order, was incorrect. (Department's Response to the Motion). To correct this error the Department struck the incorrect number on the Order and inserted the appropriate one along with the date the correction was made, May 29, 1996. *Id.* It then provided a copy of the corrected Order to Permittee. Each record of the Order now contains the correction as follows:

*Corrected permit number
*Date issued (May 29, 1996)
I.D. #: ~~37-125-00565-00~~
*37-125-21832-00

Besides this ministerial correction, we conclude the Order otherwise remains the same.

The second condition, inherently dependent upon the first, exists "when in both the old and new proceedings the subject matter and the ultimate issues are the same." *Township of McCandless v. McCarthy*, 300 A.2d 815, 820 (Pa.Cmwlth. 1973). In Appellant's present Notice of Appeal, the first seven objections restate, virtually word for word, all of the objections presented in the previous appeal. To this extent, the ultimate issues raised in both appeals must be identical. The present appeal, though, further avers that the Department deviated from the public notice process in "issuing the alternate method/order to plug, /permit attached hereto;" denied him due process and equal protection; failed to verify the information set forth in the application upon which it relied in issuing the Order; and provided Permittee differential treatment. Having just found the Order reissuance void of any substantive difference from the Order, these allegations, while more verbose than the 1995 appeal, present no new cause of action. They simply seek review of the same records of the same Order. Had the reissuance amended the Order, that amendment may have lacked similarity

with the previous issues to prevent *res judicata*, but that is not the case. Moreover, the present appeal raises no issue with respect to the typographical correction contained in the reissuance, such as, for example, an allegation that the correction created confusion regarding the identity of which well was to be plugged. We conclude the ultimate issues of this appeal are identical to those raised in the previous appeal.

Considering the third and fourth requirements, there is no question that the parties and their respective capacities to the present action are the same as in the 1995 appeal. The Department authorized Enlow to replug Well No. 690 in 1994, and Permittee's succession of Enlow entitled it to the benefits of that authorization making it privy to this action.

Appellant, in his response to the Motion, argues *res judicata* is inapplicable because the merits of the Department's actions that spurred the 1995 Appeal were never adjudicated. We disagree. The doctrine of *res judicata* serves, in the interest of public policy, to protect the integrity of the Board's decisions and to ensure the certainty of final decisions by preventing relitigation of the issues raised, and those issues which could have been raised, but were not. *Township of McCandless v. McCarthy*, 300 A.2d 815 (Pa.Cmwlth. 1973). Once the previous appeal was finally decided, Appellant was precluded from raising those issues again. The fact that his previous appeal was decided on jurisdictional rather than substantive issues has no bearing on our conclusion. Appellant was provided the opportunity to properly raise any issues relating to the Order he now contests in the previous appeal.

Appellant then contends *res judicata* is inappropriate here because it was not plead in a responsive pleading as "new matter" in accordance with Pa.R.C.P. No. 1030. Unlike the Pennsylvania Rules of Civil Procedure, the Board's Rules of Practice and Procedure do not require

parties to answer petitions for appeal of this type. 25 Pa. Code § 1021.64(c). Moreover, because in ruling on a motion to dismiss the Board considers as pleadings the appeal, the motion and the response, Appellant's argument must fail.

Appellant's attempted refiling of the same appeal that he attempted to file in January 1995 is also barred by the doctrine of administrative finality. A party that fails to take a timely appeal of a Department order is precluded from collaterally attacking the validity or content of that order. *Tinicum Township v. Department of Environmental Protection*, EHB Docket No. 95-266-MG; (Opinion issued July 3, 1996) *Martin v. Department of Environmental Protection*, EHB Docket No. 95-190-C (Opinion issued September 24, 1996). Appellant failed to take a timely appeal of the Department's order and thus lost his right to further contest the validity of the Order to replug Well No. 690. *Otte v. Covington Township Board of Supervisors*, 650 A.2d 412 (Pa. 1994). In re-issuing the Order, the Department made nothing more than a ministerial correction of the Order. Therefore, the Department did nothing which would trigger a right to file a new appeal. *See Pittsburgh Coal & Coke, Inc. v. Department of Environmental Resources*, 1986 EHB 704.

In conclusion, the doctrines of *res judicata* and admnistrative finality bar us from considering the issues raised in the present appeal. Accordingly, the Permittee's Motion to Dismiss is granted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN SWEENEY	:	
	:	
v.	:	**EHB Docket No. 96-140-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOL	:	
PENNSYLVANIA COAL COMPANY,	:	
Permittee	:	

ORDER

AND NOW, this 27th day of December, 1996, the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 27, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Gail A. Myers, Esq.
Western Region

For Appellant:
Robert P. Ging, Jr., Esq.
Confluence, PA

For Permittee:
Wesley A. Cramer, Esq.
Washington, PA

cw