COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1982

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1982

Chairman.....DENNIS J. HARNISH

Member.....ANTHONY J. MAZULLO, JR.

Member.....EDWARD GERJUOY

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1982 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1982.

This Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, *as amended*. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1920-A of the Administrative Code, provides as follows:

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* and the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.* and reviews the Department's assessments of civil penalties under Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S. 6018.605 and under Section 13 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, *as amended*, November 30, 1971, 52 P.S. 1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S. 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its

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1. Administrative Code, §472.71 P.S. §180-2.

2. Act of September 2, 1961 (P.L. 1177, No. 525) *as amended* November 8, 1971 (P.L. 535, No. 138).

secretary[3] is appointed by the Board with the approval of the Governor.

The department is a party before the Board in most cases.[4] Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties.

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3. The current Secretary of the Board is M. Diane Smith, who was appointed on April 1, 1976.

4. The one exception has been appeals from decisions of municipalities and county health departments under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*. That exception was eliminated for the future by amendments to the Pennsylvania Sewage Facilities Act enacted July 22, 1974, (Act 208).

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1982 OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOYLE LAND AND FUEL COMPANY : Docket No. 79-175-B

: Surface Mining

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board, January 27, 1982

This matter comes before the Environmental Hearing Board as an appeal by the Boyle Land and Fuel Company (BLF) from a denial by the Department of Environmental Resources (DER) of its application for a permit to operate a surface coal mining operation in Henry Clay Township, Fayette County under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. 1936.1 *et seq.* (Surface Mining Act). The DER denied the application because it believed that the application did not demonstrate that the surface mining operation would not result in a pollutional acid discharge which would degrade the receiving stream, Little Sandy Creek, a high quality cold water fishery that is characterized by a low buffering capacity and thus extremely fragile.

Thirteen days of hearing were held on the appeal and a view was conducted of various surface mines operated by appellant. Both parties submitted post-hearing briefs containing proposed findings of fact and conclusions of law. Based on the aforesaid we hereby find as follows:

FINDINGS OF FACT

1. Appellant is Boyle Land and Fuel Company, a Pennsylvania corporation (BLF) having its principal place of business at 164 Westmoreland Avenue, Greensburg, PA 15601

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, specifically the Bureau of Surface Mine Reclamation, the agency of the Commonwealth authorized to administer the provisions of the Surface Mining Act and The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*; 35 P.S. §690.1 *et seq.*, particularly those provisions relating to mining.

3. On October 19, 1979, the DER acting through J. Anthony Ercole, Director of the Bureau of Surface Mine Reclamation, advised appellant that the DER denied its application and stated the reasons therein as follows:

(1) The information submitted in the form of overburden analysis did not demonstrate that pollution, including acid mine drainage and iron, of the surface and ground waters would not occur.

(2) The applicant had not demonstrated that the existing water quality of the Little Sandy Creek would be enhanced or maintained by the individual or cumulative impact of mining.

(3) The department was not authorized to grant the permit because a portion of the area proposed to be disturbed by the operation was the subject of a final permit denial by the department in 1978, which permit was denied for the same reason as that set forth in paragraph 1 hereof.

(4) The Boyle Land and Fuel Company was at that time in violation of The Clean Streams Law, the Surface Mining Conservation and Reclamation Act, and the rules and regulations of the Environmental Quality Board. Therefore, the department at that time was not authorized to grant this permit.

4. In August, 1978, appellant leased 131.5 acres of surface and coal properties owned by Carl Berardi in Henry Clay and Wharton Townships, Fayette County, Pennsylvania.

5. On April 24, 1979, appellant submitted an application for a mine drainage permit to DER together with water samples and maps, all of which were received by the DER on April 27, 1979.

6. In November, 1978, appellant caused Science Applications, Inc. to submit to DER a preliminary proposal requesting approval of an overburden analysis for the Berardi site.

7. By letter of December 11, 1978, Lou DeLissio, environmental protection specialist at the Bureau of Surface Mine Reclamation, DER, informed Dr. Donald Streib of Science Applications, Inc. that the preliminary proposal for the overburden analysis had been reviewed and approved.

8. On August 23, 1979, BLF president, Arthur J. Boyle, and Dr. Donald Streib met with personnel of DER in Harrisburg. At the meeting, DER requested additional information from Dr. Streib concerning the overburden analysis methods used in the BLF application and also requested new water samples on or near the permit site.

9. The additional information requested by DER at the August 23, 1979, meeting was submitted to DER on September 5, 1979.

10. The BLF application for the Berardi site had engineering and data inconsistencies. For example, the dip of the coal was listed as 1.7% on one page and 2.58% on another.

11. The water quality sample analyses submitted with the application were inconsistent with other sample analyses submitted for the general area of the application.

12. The sedimentation and erosion control plans submitted with the application were incomplete.

13. The DER did not formally notify appellant of the deficiencies listed in findings of fact nos. 10, 11 and 12 because there was a likelihood the permit application would be rejected on other grounds and the expense for correction would be wasted.

14. In the application for a mine drainage permit, the mining plan submitted by BLF was different than the mining plan proposed by either Mr. Boyle or Dr. Streib at hearing. The mining plan in the permit application stated only:

> "Phase I will begin in the area marked first cut on Exhibit 5. Mining of this phase will then proceed toward the eastern limit of Phase I. (Cuts will be by the contour method with the cut running in a general north-south direction.)
>
> Phase II will begin at the first cut (Exhibit 5) and proceed towards the eastern limit of Phase II. (Cuts will be by the contour with the cuts running in a general north-south direction.)
>
> Phase III will begin at first cut (Exhibit 5) and proceed toward the eastern limit of the permitted area. (Mining will be by the block cut method--the first cut will be started from the last highwall of Phase II.)"

15. During the review process of appellant BLF's overburden analysis, the DER indicated, by undated memo signed by J. Anthony Ercole, Director of the Bureau of Surface Mine Reclamation, that overburden analysis reports employing the technique used by appellant, the acid-base accounting technique, were acceptable.

16. The application which is the subject of this appeal sought authority from the DER to operate a mine in the Big Sandy-Little Sandy Creek watershed in Fayette County and to discharge mine drainage to the waters of the Big Sandy and Little Sandy.

17. Big Sandy and Little Sandy watersheds are part of the Monongahela River Basin located in the Allegheny Mountain section of Pennsylvania's Appalachian Plateau Province.

18. The waters of the Big Sandy and Little Sandy Creeks are designated high quality waters, cold water fishery by chapter 93 of the rules and regulations of the DER. The waters are extremely fragile and infertile and are characterized by low buffering capacity. The Big Sandy is stocked with trout by the Pennsylvania Fish Commission.

19. The watershed is composed primarily of heavily forested and agricultural areas.

20. The Big Sandy and Little Sandy watersheds are infertile with minimal biological reproduction as a result of low buffering capacity. One of the characteristics of infertile streams is a wide diversity of organisms.

21. The effect of acid mine drainage on a stream depends on how much of the acid can be absorbed by the stream without changing the pH. Streams such as the Little Sandy and Big Sandy with low buffering capacity are unable to absorb much acid. Acid would have a drastic effect on these streams.

22. The Berardi property proposed to be mined by BLF contains approximately 150,000 tons of recoverable coal on approximately 100 acres.

23. Only approximately 30 acres of the Berardi property is intended to be stripped.

24. The coal proposed to be mined on the Berardi property is a good utility coal and has a value of $21/ton in the pit.

25. The coal proposed to be mined by BLF would cause other coal blended with the proposed mined coal to become more marketable.

26. The mining methodology proposed by Dr. Streib and Mr. Boyle at the hearing is a modified contour or modified block method of stripping in which the topsoil is removed and segregated and stored. The acidic overburden shown by the overburden analysis is removed and stored temporarily in a special storage area with diversion ditches around it. After the coal is mined, the pavement of the pit, i.e. the bottom after coal removal, is covered with an inch or two inches of lime, then ten feet or more of alkaline overburden is placed into the first cut. The toxic material removed from the first cut is then put back into the pit, away from the highwall, and additional alkaline overburden is placed on top of that to the point of restoring approximate original contour.

27. Prior to the August 23, 1979, meeting with DER, BLF had no knowledge of any previous denial of any mine drainage permit on the Berardi property.

28. The preliminary proposal submitted by Science Applications, Inc., on behalf of BLF, for an overburden analysis contemplated the use of the acid-base accounting technique (also known as the Smith method) of overburden analysis.

29. The technique used by Science Applications, Inc. to gather samples for overburden analysis was in accord with approved and established scientific methodology of sample collection.

30. The acid-base accounting technique of overburden analysis has been published in several documents distributed by the Environmental Protection Agency of the federal government.

31. The acid-base accounting technique of overburden analysis takes all of the sulphur in a given sample, which is determined by a known scientific chemical analysis method, converts this by straight mathematical equation into

a maximum acid potential. A split sample of the same material is analyzed for total neutralization potential by the addition of a known strength acid until no further neutralizing is available in the sample material. The unit used to measure it is tons per thousand calcium carbonate or calcium carbonate equivalents. After the chemical analysis and mathematical conversions are done, the numerical values determined for acid potential and neutralization potential are subtracted one from the other depending on which is higher, and the quantity remaining reflects either a net deficiency or a net excess of neutralizer for that horizon which the sample analyzed represented.

32. The horizons were sampled by BLF at one foot intervals to the coal and one foot below the coal. The coal was not analyzed.

33. The acid-base accounting technique of overburden analysis is intended to provide the geologist with a framework from which to determine whether the site is potentially acidic, alkaline, or some combination thereof.

34. The acid-base accounting methodology of overburden analysis converts all of the sulfur into acid and thus is a worst case situation from the acid side of the equation.

35. Three holes were drilled for overburden samples. Holes number 1 and number 2 are within or near the 30 acres intended to be mined.

36. In an undated letter to surface mine operators, Tony Ercole listed three methods of overburden analysis which could be used. They were (1) acid-base accounting method; (2) carrucio leaching method; and (3) ASTM method.

37. The DER does not know of any other technique other than the three techniques described in the Ercole letter that at the present time can be specifically applied to overburden analysis.

38. The Commonwealth's expert indicated that all of the overburden analysis techniques i.e. the Smith acid-base accounting technique, the ASTM

leaching technique, and the carrucio leaching technique, as well as Roger Hornberger's modification of the carrucio leaching technique, are all subject to criticism and should be scrutinized.

39. The federal Office of Surface Mining in administering the small operators assistance program has recommended in its handbook that the acid-base accounting technique of overburden analysis be utilized.

40. The DER has requested funding from the federal government for a study on overburden analysis techniques.

41. The coal proposed to be mined on Berardi strip is a high sulfur coal having a sulfur content which ranges anywhere from 1.5 to 4.0 percent.

42. The level of significance for the neutralization potential or acidity potential of the acid-base accounting technique is five tons per thousand tons.

43. The arbitrary figure of 5t/1000t of material used as a cut-off for toxicity is used primarily because it becomes difficult to keep plants established at toxicities greater than that.

44. The acid-base accounting technique shows the acidic horizons in the area intended to be mined to have one significant zone of toxic or acid producing material immediately above the coal and one immediately below the coal seam.

45. The acid-base accounting technique does not duplicate events that occur in a natural state because of *inter alia*:

(a) crushing sample to minus 60 mesh

(b) addition of hydrocloric acid and heating the sample to boiling

46. Pulverization to a sample to minus 60 mesh increases the surface area available for chemical reactions.

47. The addition of hydrochloric acid and heating the sample tends to make all carbonate minerals appear equivalent.

48. The total neutralization potential equals total neutralizers but may not be equal to the neutralizers available for neutralization.

49. The variations in rock type are not considered by the acid-base accounting method in its determination.

50. The acid-base accounting technique of overburden analysis balances volumes of neutralizing material against volumes of potentially acid material.

51. During a mining operation, not all coal is removed from the site. There are occasionally pit leavings or pit cleanings and reject materials. Had the appellant tested the percent sulfur in the coal, the potential acidity would have been greater.

52. While the Bureau of Mining and Reclamation overburden analysis supplement in use prior to October, 1979, stated that all strata including the coal should be analyzed, the Boyle Land and Fuel overburden analysis report did not include any analyses of the coal.

53. The Bureau of Mining and Reclamation has adopted the position that due to problems in determining the accuracy of overburden analysis techniques, an application for a mine drainage permit cannot be approved if it cannot be demonstrated that the mining operation and overburden handling plan can be accomplished without causing a pollution problem, or without the need to import neutralizing materials to offset recognized deficiencies in the overburden materials naturally occuring on site.

54. Even assuming that the mining plan which was proposed by Boyle Land and Fuel during the hearing had been included in the application, the department would have denied the mine drainage permit because of its policy as set forth in finding 53.

55. Appellant's application for permit provides for some auger mining at the site. The record is uncertain on whether appellant still intends to auger mine.

56. Auger mining leaves the overburden material relatively undisturbed and drills into an exposed highwall to gain additional coal. One could not separate the toxic zones in the auger mined area and the coal which would remain on the site from the remainder of the overburden material.

57. Science Applications, Inc. in its report indicated that no acid water would be produced if the 30 acres proposed to be mined were in fact mined because of the excess neutralizing capability of the geology at that site. It concluded that, therefore, there would be no hydrologic impact upon the stream or water quality of the surrounding watersheds.

58. Heavy metals are not soluble in a medium above a pH of 7; thus unless an acid discharge occurs heavy metals are not a problem.

59. Dr. Streib performed a bench study for neutralization capability of certain soil samples derived from the Berardi drilling. The study showed that there is a substantial neutralization potential available on the Berardi property.

60. Some of the criticisms directed at the acid-base accounting techniques are also applicable to the ASTM and Carrucio techniques.

61. The acid-base accounting technique is useful in planning of overburden management through the identification of alkaline and acid producing strata.

62. The basic criticism made of the various techniques for overburden analysis is that none of these techniques are based upon sufficient post-mining testing or rigorous statistical testing to show them to be accurate predictors, and there are insufficient data to determine which of them predict well over what range of circumstances.

63. The Commonwealth's expert could not express an opinion as to the value which would be determinative in judging whether or not the acidity or the neutralization potential had reached a significant level.

64. The Millrock mining operation, located in Henry Frick Township about one-half mile from the Berardi site, is the closest active mining site to the Berardi site.

65. An overburden analysis done by the acid-base accounting method on the Millrock site concluded that the site could be surface mined without an acid discharge if the site was properly mined.

66. The Millrock operation has had significant acid discharges.

67. The neutralization potential values for the strata tested on the BLF Berardi report ranged from:

(a) 0.2 to 4.0 tons per thousand tons in test hole No. 1,

(b) 0.6 to 26.6 tons per thousand tons in test hole No. 2,

(c) 0.7 to 97.6 tons per thousand tons in test hole No. 3.

While test hole 3 contains the highest neutralization potential values, no coal was encountered in this test hole, and BLF decided that they did not intend to mine this portion of the property.

68. The neutralization potential values for the strata tested on the Millrock site ranged from:

(a) none detected to 51 tons per thousand tons in Hole No. S-1,

(b) none detected to 18 tons per thousand tons in Hole No. S-2,

(c) none detected to 51 tons per thousand tons in Hole No. S-3.

69. Granbay Coal Company operates a surface mine in the adjacent watershed to the Berardi site approximately three miles from the proposed Berardi site.

70. The neutralization potential values for the Granbay site, as found in the overburden analyses report prepared by Dr. Streib, ranged from:

(a) 0.6 to 396 t/1000t in test hole No. 1,

(b) -3.0 to 26.0 t/1000t in test hole No. 2,

(c) 0.8 to 32.6 t/1000t in test hole No. 3,

(d) 2.0 to 5.0 t/1000t in test hole No. 4.

71. The Granbay site has significant acid discharges.

72. Dr. Streib performed an overburden analysis report on the Granbay site by the acid-base accounting method. The report concluded that the site could be mined without an acid discharge provided that the mining was managed properly.

73. Dr. Streib testified that he advised Granbay that there would be an acid discharge around hole No. 4 if that area was mined.

74. The BLF site has similar lithology and similar neutralization potential to that found on Granbay.

75. The Millrock overburden analysis report which employed the acid-base accounting method, appears to indicate an overwhelming excess of neutralizers are available; however, the mining history on the Millrock site has attested that there in fact is not an overwhelming amount of neutralizers.

76. The DER issued permits to surface mine the Millrock and Granbay sites based, in part, on the conclusions stated in the overburden analysis on the sites that there would not be an acid discharge.

77. The Millrock permit required the operator to follow a mining methodology it proposed in order to compensate for toxic strata.

78. The DER has issued several permits in areas where the Smith technique of overburden analysis was employed. On these areas, the overburden analysis indicated extremely high neutralization potentials which were substantially in

excess of the neutralization potentials found in the analysis of the overburden on the BLF site.

79. Dr. Streib has never performed an overburden analysis in Pennsylvania using the acid-base accounting technique of overburden analysis where the mining site had been backfilled and the reclamation completed.

80. The only mine site that Dr. Streib knew of where the acid-base accounting method of overburden analysis was performed prior to mining, and which was now completely reclaimed is the LaRosa Fuel Company site in West Virginia.

81. Dr. Streib had no personal knowledge of the LaRosa site; rather, his knowledge was obtained from conversations with a third party.

82. The inspection data offered into evidence at hearing on the LaRosa site were ambiguous on whether an acid discharge occurred during mining and post-mining.

83. The Berardi site may be characterized as a marginal site in a sensitive watershed, due to the lack of distinctly calcareous, alkalinity-producing strata, and the presence of defined acid zones.

84. The overburden analysis performed by BLF indicates that the site is lacking in calcareous substrata, or strata that are believed to be alkalinity-producing.

85. Dr. Streib's opinion that the mining of the Berardi strip would not cause an acid condition post-mining is based on BLF's ability to comply with a mining technique which was not proposed to the department in writing.

86. The mining technique is critical to mine drainage problems either post-mining or during mining.

87. DER has no policy, or regulation regarding either the amount of neutralization potential required at a site or the method of demonstrating same.

88. There are no surface streams intersecting the BLF site or groundwater flowing thereunder.

DISCUSSION

This dispute has been bitterly contested through 13 days of hearings because both parties perceive that there is a lot at stake. It is also uniquely difficult to decide because it involves predicting the likelihood of a future occurrence and *a fortiori* the review of conflicting expert opinions.

The DER perceives this proposed mining operation to be a serious threat to the life of a fragile and sensitive, high-quality stream. The site of the proposed operation is the Big Sandy-Little Sandy Creek watershed in Fayette County. The watershed is part of the Monongahela River Basin in the Allegheny Mountain section of Pennsylvania's Appalachian Plateau Province. The Little Sandy and the Big Sandy are designated high-quality cold-water fisheries. The waters are extremely fragile and infertile as a result of a low buffering capacity. One of the characteristics of infertile streams is a wide diversity of organisms. The Big Sandy is stocked with trout by the Pennsylvania Fish Commission. Because of their low buffering capacity the waters are unable to absorb much acid. Thus an acid discharge would have a devastating effect on the streams.

The DER is concerned because it believes that the overburden from the proposed mining operation is toxic or acid-producing and will lower the pH of the water percolating there through. Its concern is heightened because two surface mining operations in the area have resulted in acid discharges.

Appellant, on the other hand has secured the rights to mine approximately 50,000 tons of high-quality utility coal worth over one million, fifty thousand dollars. The coal is of sufficiently high-quality to enable BLF to mix it with coal from other sites to increase the other coal's merchantability.

The DER's letter of denial listed four reasons for denying the permit:

"1. The information submitted in the form of overburden analysis does not demonstrate that pollution, including acid mine drainage and iron, of the surface-and-ground waters will not occur.

2. The applicant has not demonstrated that the existing water quality of the Little Sandy Creek will be enhanced or maintained by the individual or cumulative impact of mining.

3. The Department is not authorized to grant the permit because a portion of the area proposed to be disturbed by the operation was the subject of a final permit denial by the Department in 1978, which permit was denied for the same reason as that set forth in Paragraph 1 hereof.

4. The Boyle Land and Fuel Company is presently in violation of the Clean Streams Law, the Surface Mining Conservation and Reclamation Act and the Rules and Regulations of the Environmental Quality Board. Therefore, the Department at this time is not authorized to grant this permit."

The DER never seriously pursued the third reason for the denial. To be bound by an action of the DER a person must be a party to that action or in privity with a party thereto. See *Stevenson v. Silverman*, 417 Pa. 187, 208 A.2d 786 (1965). The DER has not offered evidence of any relationship between appellant and the prior applicant. In fact, it appears that appellant was not even aware of the application and denial referred to by the DER until an August 23, 1979 meeting with the DER.

The fourth reason for the denial, violation of the environmental statutes of the Commonwealth, involves appellant's actions at other surface mining sites it operates in the Commonwealth. The statutory basis for DER's position is Section 3.1(d) of the Surface Mining Act and Section 608 of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. 391.1 *et seq.* Initially, we announced at hearing that we would only

hear testimony on those violations which DER contends continued to exist at the time of the hearing, since violations which cease to exist can no longer form the basis for a denial of a permit. After that ruling the DER presented evidence of two alleged violations. The first incident relates to mining prior to receipt of a mining permit. It appears that appellant had commenced mining operations at a site different from the one at issue here before the DER gave it a permit to do so. However, a DER witness testified that the permit was ready to be issued, and would be issued when someone representing appellant came to his office to pick it up. Mining without a permit is a violation of the Surface Mining Act and should not be countenanced and DER has a myriad of punitive actions it can take to remedy the matter. However, the unsanctioned mining, by itself, does not authorize DER to forever deny a permit to appellant.[1] Since the permit has been issued, appellant is no longer in violation and its mining at that site cannot form the basis for a denial.

As proof of a second violation the DER offered an amendment to a consent decree it had entered into with appellant covering an on-going operation. The consent decree was entered into before the Commonwealth Court to provide for a schedule for abatement of an acid mine drainage discharge. The amendment extended the time period for abatement of the discharge. DER offers it as an admission by appellant that it will be in violation until the compliance deadline set forth in the amendment.

We view the amendment as a mutually agreed upon plan of abatement which constitutes a resolution of a problem rather than an admission of a status of noncompliance. As such we don't believe it precludes DER's issuance of this

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1. We note that DER did not allow the unpermitted mining violation to stand in the way of its issuance of a permit for the very site where the violation occurred.

permit. It is significant that DER's counsel stated in response to a question from the hearing examiner that DER's purpose in proffering evidence on appellant's compliance history was not to show that appellant is incapable of operating the Berardi site.[2]

The real basis for the denial was DER's concern that the operation could result in an acid discharge to Little Sandy Creek. Appellant was apparently aware of the DER's concern for the Sandy Creek area before it filed its application for the surface mining permit as it attempted to alleviate that concern by submitting to DER a proposal suggesting a methodology for analyzing the overburden to determine its acid-producing potential. The proposal specified the location of three sites for drilling and collecting samples for testing and it proposed a testing procedure known as the acid-base accounting method which measures total sulfur to determine potential acidity and measures the amount of carbonates and other alkalines capable of neutralizing the acid. The proposal was approved in total by the DER by letter dated December 11, 1978. The following spring appellant submitted with its permit application an overburden analysis in accord with the approved preliminary proposal. The report was prepared by Science Applications, Inc. under the direction of Dr. Donald L. Streib. The report concluded that there should be no acid discharge from the Berardi site if the overburden is managed correctly during the mining and reclamation.

The DER received the permit application and the report on April 27, 1979. Its initial review found the application to have many defects, examples being inconsistencies within the map and different values assigned to the dip of the coal at different locations in the application. Deficiencies also

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2. N.T. Vol. 6 pp. 946, 947.

existed with the sedimentation and erosion control plan. All of these deficiencies could have been cured with minimal difficulty and none necessitated the denial of the permit. However, the appellant was not notified of these deficiencies because the DER had preliminarily decided that the overburden report did not satisfy its concern over the degradation of the Little Sandy and thus any expense to correct the application deficiencies would be wasted. Instead, DER requested a meeting to give appellant the opportunity to address DER's concerns. The meeting was held on August 23, 1979. After the meeting the DER issued the letter denying the permit.

In order to understand Dr. Streib's report and DER's rejection thereof, is is necessary to understand acid discharges and how the report attempts to quantify the potential of the mining site to produce acid discharges. Acid discharges are caused when a mining operation exposes iron sulfides in the ground to air which results in their oxidation. When water, ground or surface, comes in contact with the oxidized sulfur it becomes acidic. Appellant has the burden of proving that its operation will not cause an acid discharge to area streams or groundwater. See 21 Pa. Code 21.101 and *Harman Coal Company v. DER*, 34 Pa. Commonwealth Ct. 610, 384 A.2d 289 (1978). Appellant attempted to meet the burden by submitting the overburden analysis. The analysis attempts to predict the potential for an acid discharge by determining the amount of acid-producing or toxic material present and the amount of alkalai or neutralizers present in the overburden to neutralize the toxic materials. If the toxic and alkali areas or zones can be identified and the amount of each present can be quantified, then the operators can determine if there is a net excess of toxic materials or neutralizers. Purportedly, if an area has a net excess of neutralizers it will not result in an acid discharge. Of equal significance, if an operator knows the location of toxic zones and neutralization zones he can manage the reclamation

operation so as to place the alkalai overburden in an area which hopefully would neutralize the toxic zones.

The sampling procedure section of Dr. Streib's report involved drilling in areas representative of the entire site to a depth of at least one foot below the mineable coal seam and collecting samples at one foot intervals. Samples were taken from three holes, and analyzed for acid or neutralization potential according to the acid-base accounting procedure.

The acid-base accounting or Smith method of analysis measures total sulfur and neutralizing base and calculates them both as calcium carbonate equivalents. Total sulfur is determined by use of a Leco combustion analyzer. The amount of neutralizer present is determined by treating the earthen material with a known amount of standard hydrochloric acid. The sample is heated to boiling to insure completion of the chemical reaction. The amount of unconsumed acid is determined by titration to a 7.0 pH with a standard sodium hydroxide. From the unconsumed acid one can derive the calcium carbonate equivalent.

The DER was critical at the hearing of the acid-base accounting method of overburden analysis and now argues that it is not an accurate predicter of an acid discharge. Its criticism is two-fold; the method is not reflective of what actually happens in a natural setting and the DER has no evidence, such as a reclaimed operation which was the subject of the method, through which its predictability can be judged. Roger Hornberger, an hydrogeologist for the DER, testified that the preparation of the sample and the neutralization side of the testing method exaggerates the amount of alkali in the overburden. The sample is prepared by pulverization to a minus 60 mesh, i.e., it becomes a fine powder. He notes that the pulverized sample is not representative of post-mining overburden and the much larger sample area resulting from pulverization will cause it to react differently. He also believes that adding hydrochloric acid and

heating the sample to boiling may assure that all the alkali present in the sample is measured, but it does not determine the amount of alkali that would actually react with acid during an on-site, post-mining, condition. He believes that the amount of neutralizer in a sample has no relationship to the amount that will actually react with acid. He suggests that the most representative procedure for measuring neutralization potential would be a leaching type of test whereby distilled water is filtered or leached through rocks and the resulting filtrate is tested for alkalinity.

Dr. Streib, the geologist who prepared the overburden analysis report, responds by asserting that a bench test he performed demonstrates that the alkali measured in overburden samples is available to and will neutralize the potential acid. He also testified that some leeway exists in the measurement of neutralization potential because the acid side of the equation overestimates the amount of toxic present. It measures total sulfur present whereas only pyritic sulfur will form acid. Thus the presence of sulfates and other sulfur forms increases the estimate of potential acid over the amount actually available to produce acid.

Appellant also argues convincingly that it is a bit late for DER to question the use of the acid-base accounting method. The DER had previously approved use of the method when it approved appellant's preliminary proposal. The reason appellant submitted the pre-mining proposal was to avoid this type of confrontation by reaching a concurrence on the methodology to be used before the time and monies have been expended. The DER also sent a letter to all surface mining operators under the signature of Tony Ercole, Chief, Bureau of Surface Mine Reclamation, in which the DER listed the acid-base accounting procedure as one of three acceptable methods of overburden analysis. We also note that federal Environmental Protection Agency published the acid-base accounting

method in a manual entitled "Field and Laboratory Methods Applicable to Overburden and Mine Soils" and the federal Office of Surface Mining in a handbook for the small operators assistance program recommended that the acid-base accounting method be used. For these reasons we dismiss DER's objections to the use of the acid-base accounting method and find that on the facts of this case, appellant was warranted in the use of the acid-base accounting technique.[3]

The DER also disagrees with the conclusion that the appellant derives from the data. The DER believes that the results of the analysis show that the site is marginal at best and that there is a good likelihood that an acid discharge will result from mining the site.[4] DER interprets the data as showing that the overburden on the Berardi site has toxic layers but only minimal potential to neutralize and thus a great potential to produce acidic discharges. There were three holes sampled on the Berardi site. Hole number one and hole number two show two acid-producing levels. Hole number one shows a 10-inch zone above the coal with a calcium carbonate deficiency level of 19.7 tons per 1000 tons[5] and a one foot zone below the coal with a deficiency level of

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3. We do not mean to require DER to utilize the acid-base methodology in any other matter unless its use by other applicants was specifically approved by DER. We recognize, as did Commonwealth Court in *Harman Coal Company, supra*, that science marches on and thus that DER may discard an acid-producing potential test which it used in the past. We merely hold that for DER to discard the test it agreed to in this matter would be arbitrary and capricious. We further stress that DER should not be bound to honor a test method it had agreed to honor if later information conclusively demonstrated the method was inaccurate and decidedly inferior to another practicable test; however, DER has not met these criteria in this case.

4. The DER also argues that the report does not consider whether a discharge from the site will contain heavy metals, contrary to the Surface Mining Act and The Clean Streams Law. However, it is apparent from the testimony of both experts that the acidity of the discharge is determinative of the existence of heavy metals. Heavy metals will dissolve in acid but are not soluble in a medium with a pH of 7 or above. Thus, if BLF does not discharge acid, it wouldn't be discharging metals.

5. The calcium carbonate deficiency value represents the amount of alkali measured in tons of calcium carbonate for 1000 tons of overburden needed to neutralize the area.

54.5 tons per 1000 tons. Hole number two shows a one-foot layer on top of the coal with a deficiency of 44.6 tons per 1000 tons, an adjacent two foot strata with a 7.8 tons per 1000 ton deficiency and a one-foot layer below the coal with a deficiency level of 54.5 tons per 1000 tons. In hole number one the highest neutralizer potential shown below the soil level is only 2.8 tons/1000 tons calcium carbonate. The highest potential neutralizer strata in hole number two is a four-foot zone, one-half of which reads 26.6 tons per 1000 tons and the other half reads 25.4 tons per 1000 tons. Hole number three revealed the highest excess neutralization levels and the highest neutralization deficiencies level; however its results are not pertinent as its depth never reached the coal strata and the appellant has decided not to mine this area because the depth of the coal makes mining economically prohibitive.

It is the significance of these results which is the heart of the dispute. The DER compares them to other sites it has permitted. Although there are no completely reclaimed sites in existence which were the subject of an overburden analysis,[6] there are operating sites at which acid-base overburden analyses had been conducted. Science Applications, Inc. submitted overburden analysis reports on two sites whose prediction of a minimal likelihood of an acid discharge is concurred with by the DER. An analysis on an operation in Mount Pleasant Township, Westmoreland County for the Alice K. Robinson Company by Science Applications, Inc. showed potential neutralizers as high as 462 tons per 1000 tons at one three-foot strata and 423 tons per 1000 tons for another

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6. One exception may be a site in West Virginia known as "LaRosa". It apparently was recently reclaimed and had been the subject of an overburden analysis using the acid-base accounting method. Both parties argue that it supports their position because of inspection reports entered into evidence. The inspection reports are ambiguous on the existance or non-existance of an acid discharge either during mining or post-mining. Since no one familiar with either the site or even the inspection reports testified we gave no weight to the "LaRosa" reports.

strata. An application submitted by Science Applications for a site operated by R.A.S. Excavating Company gave a high neutralization value of 531 tons per 1000 tons as well as values of 435 tons, 432 tons and 264 tons per 1000 tons. The DER concurred with Dr. Streib's conclusion that both sites can be operated without post-mining acid problems if proper management is provided. It concurred because of the dominance of neutralizers at the site. On the other hand, Science Applications, Inc. submitted an application for the Solomon and Teslovich Coal Company. It's highest value for potential neutralizer was 37.2 tons per 1000 tons. Dr. Streib again offered the opinion in his report that the site could be operated without acid discharge problems provided that good overburden management practices were implemented. The DER disagreed and denied the permit. The DER is convinced that sites with results in the range exhibited by the Solomon and Teslovich analysis and the BLF analysis may result in post-mining discharges.

Two mining operations in the same general area as the BLF site known as "Millrock" and "Granbay" appear to corraborate DER's view. The Millrock operation is located in the same watershed, approximately one-half mile away from the BLF site. It is the closest active mining operation to BLF. Millrock is characterized by numerous acid discharges. Some of the acid is caused by the burial of a toxic rider coal seam, but most results from the toxic nature of the overburden. An overburden analysis was performed on the Millrock site using the acid-base accounting method. The report, which was done by a different consultant than Science Applications, Inc. advised that the site could be mined without an acid discharge. Three holes were drilled and analyzed. The neutralization potential results from hole number one ranged from 0 to 51 tons per 1000 tons; hole number two results ranged from 0 to 18 tons per 1000 tons and hole number three ranged from 1 to 51 tons per 1000 tons. Mr. Hornberger testified from hindsight that the DER errored when it issued a permit to mine

the Millrock site; he believes the permit should have been denied based on the data provided by the overburden analysis.

"Granbay" is a surface mining operation conducted by Granbay Coal Company in an adjacent watershed approximately three and one-half miles from the BLF site. Granbay also has acid discharge problems even though an overburden analysis report submitted by Science Applications, Inc. advised that the site could be operated without an acid problem if properly managed. The overburden analysis showed the site to be comparable to the BLF site in the amount of potential neutralization present. Drillings from four holes were tested. The neutralization potential of hole number two ranged from a minus 3.0 to 26.0 tons per 1000 tons. Test hole number three has a range of .8 to 32.6 tons per thousand tons and hole number four has a neutralization potential of from minus 2.0 to a high of 5.0 tons per 1000 tons. Hole number one has a substantially higher neutralization potential as neutralizers dominate but no mining has been conducted in its area.

Dr. Strieb testified that he believes that the Millrock and Granbay results support his opinion. In the case of Granbay he testified that he predicted the occurrence of an acid discharge as he told the operator that if they mined in the area of hole number four an acid discharge would result. Dr. Streib's testimony in this instance lacks credibility since he advised the DER in the overburden report on Granbay that no acid discharge should result from the Granbay operation (including the area of hole number four). As for the Millrock site Dr. Streib testified that if he had issued the report he would have advised that it was a difficult site to operate without acid problems and would have required a complex mining plan. He believes it to be a "negative predictor" in that it predicts the need to plan for future problems. He opined that the acid problems at the Millrock site do not indicate that there will be

problems at the BLF site because the Millrock site has multible toxic zones whereas the BLF site has toxic zones only above and below the coal. Thus, he concludes, the BLF site would be much easier to manage. Moreover, in uncontraverted testimony Dr. Streib testified that there are no surface streams intersecting the proposed BLF site and that said site lies above the seasonal high water table in the area. This itself is a strong distinguishing factor from at least the Millrock site which appears to include a perennial source of water which is presently a carrier for AMD.

Dr. Streib continually emphasized throughout his testimony that a most important aspect of the prevention of acid mine drainage at these sites is the mining plan. He testified that a plan to identify the toxic strata and surround it with neutralizers during reclamation must be utilized at the BLF site. In fact, he stated that if normal surface mining procedures were used at the BLF site, an acid discharge would likely result. Nevertheless the mining plan appellant submitted to DER did not propose any special precautions to compensate for the toxic strata. Instead it includes methods such as auger mining and disposal of tipple refuse in the pit that are inconsistent with plans to separate the toxic overburden. Auger mining precludes the use of the previously described modified block cut method. Also, the coal left behind by augering, along with the tipple refuse, would increase the high sulfur or toxic materials exposed to water and air. Thus, we do not find the DER's denial of the instant application to be arbitrary or to constitute an abuse of discretion, insofar as the application did not include a mining plan containing special precautions to compensate for toxic strata.

Arthur Boyle, president of BLF, testified that he told DER orally of a change in mining methods to compensate for the toxic strata at an August 23, 1979 meeting. He discussed a modified block cut method wherein the overburden from the different cuts would be stored at separate locations depending on

whether the cut contained overburden that was toxic. The toxic material would be stored "high and dry", that is, it would be piled away from water and surrounded by diversion ditches to divert any run-off to a pit for treatment. Lime could also be added to help prevent an acid discharge. When the cut is filled, the alkali material would be placed first, then the toxic material as a second layer and then more alkali material for a third covering layer. Ideally, water percolating through the toxic material would contain neutralizer from the upper layer and would be further neutralized by percolating through the bottom layer of excess neutralizers. The plan also contemplates the addition of agricultural lime to the layer exposed by mining the coal to assist in neutralizing. DER disputes that the meeting included a discussion in any detail over the mining plan but admits to a general discussion.

DER also admits that it would not have reviewed any mining plan amendment for the present site because DER has a policy that unless a site clearly has an excess of neutralizers over acid-producing materials no permit will issue regardless of the mining plan. (See N.T. 904, 5) While this policy may be reasonable where the site is clearly "bad", as were certain of the sites discussed above, by Dr. Streib and Mr. Hornberger, the policy breaks down where the site is no worse than marginal.

It is crucial to note that Mr. Roger Hornberger's interpretation of the acid-base analysis at the BLF site as well as the experience he gained at the Millrock and Granbay sites did not convince him that the BLF site was incontestably unfit for mining. Instead he testified that:

> "...I think the overall problem of the Boyle overburden analysis is that it characterizes the Boyle site to be a marginal site as within a sensitive watershed." N.T. 876

Mr. Hornberger also admitted that there are no regulatory criteria to guide DER and applicants concerning the acid-producing potential of a site.

He testified that:

> "A. To the best of my knowledge, at least with the type of tools I work with, there are no set numbers or no set significant levels which may be attained in demonstrating that. It is site-specific and it is dependent upon the review process and the data we receive and how those of us who review the permits and overburden analyses respond to that data.
>
> We try to do it in a fair and uniform manner, but we haven't set any special standards that have to be met, in terms of neutralization potentials of a certain number, or something like that." N.T. 1164

Given the fact that an applicant has the burden of proving that his site will not produce acid and has no numerical goal to shoot for we feel that he should at least be given the opportunity to demonstrate to DER through his mining plan practices and procedures which would nudge his site from the "marginal" into the "good" column.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of these proceedings.

2. Appellant is not bound by a prior permit denial by the DER for the same site because appellant was not a party to that action or in privity with a party to that action.

3. Violation of the Surface Mining Act or The Clean Streams Law cannot form the basis of a permit denial after they cease to exist.

4. Appellant, as an applicant for a surface mining permit, has the burden of proving that its operation will not cause an acid discharge to waters of the Commonwealth.

5. The DER's denial of appellant's application for a surface mining permit as it appeared did not constitute an abuse of discretion but DER's refusal

to accept an amendment thereto including the proposed mining plan was in the circumstances of this case arbitrary and capricious.

O R D E R

AND NOW, this 27th day of January, 1982, it is hereby ordered that Boyle Land and Fuel Company's application for permit dated October 19, 1979 is remanded to DER for a review consistent with this adjudication. The appellant will be given sixty (60) days from the date of this order within which to amend the mining plan of said application.

ENVIRONMENTAL HEARING BOARD

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DATED: January 27, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ALLEGHENY COUNTY SANITARY AUTHORITY : Docket No. 78-053-H

: Act 339

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Chairman, March 10, 1982

FINDINGS OF FACT

1. In late 1945 the Sanitary Water Board of the Department of Health (SWB) issued orders to over one hundred municipalities in Allegheny County requiring them to cease the discharge of untreated sewage into the waters of the Commonwealth.

2. In 1946 the Allegheny County Sanitary Authority (Alcosan) was created at the behest of various municipalities petitioning Allegheny County to create an authority to address the said sewage needs.

3. In June, 1952, Alcosan submitted an application for a permit for the construction of a system of intercepting sewers and a single sewage treatment plant which had been designed to serve 64 municipalities. The application was submitted to the Department of Health, SWB.

4. The Department of Health encouraged but did not require Alcosan or its constituent municipalities to construct one sewage treatment plant.

5. On or about July 12, 1954, the Sanitary Water Board notified John F. Laboon, the Chairman of Alcosan that it had considered said application at its meeting on June 21-22, 1954 and on August 20, 1954 the SWB issued Alcosan sewage permit 8504-S.

6. Construction of sewage collection and treatment facilities authorized by said permit was completed prior to 1959.

7. Prior to January 30, 1960 Alcosan submitted its 1959 application for state payment under Act No. 339, the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. §701 *et seq.* (Act 339).

8. The 1959 application represented the first Act 339 grant application submitted by Alcosan.

9. Act 339, as originally promulgated, permitted municipalities and municipal authorities to apply for an amount up to two percent (2%) of the costs of acquisition and construction of sewage treatment facilities to control stream pollution, 35 P.S. §701.

10. The costs are based upon standards of eligibility and actual local expenditures for construction.

11. The grant, while measured by construction costs, represents an expenditure by the Commonwealth to defray the cost of operation and maintenance of the sewage treatment plant.

12. The term "construction" when used in Act 339 is defined so as to include:

> "...in addition to the construction of new treatment works, pumping stations, and intercepting sewers which are an integral part of the treatment facilities, the altering, improving or adding to of existing treatment works, pumping stations, and intercepting sewers which are essential to the sewage treatment plant system..."

13. Alcosan, in its 1959 application, applied for eligible costs for the sewage treatment plant, the intercepting sewers along the three rivers, the Ohio River, Monongahela River and Allegheny River, interceptors along Turtle Creek and Chartiers Creek, diversion structures, connecting lines to the diversion structures, downshafts and river crossings.

14. The Ohio River is formed by the confluence of the Allegheny and Monongahela Rivers at a location known as the Point of the City of Pittsburgh.

15. Chartiers Creek is a stream which flows into the Ohio River at Brunot Island.

16. The Alcosan Sewage Treatment Plant is located on the opposite shore of the Ohio River from which Chartiers Creek enters. In addition to the width of the Ohio River, Brunot's Island creates a barrier between the point at which Chartiers Creek enters the Ohio River and the location of the Alcosan sewage treatment plant.

17. Turtle Creek is a tributary of the Monongahela River.

18. The Department of Health reviewed Alcosan's 1959 application and by letter dated August 16, 1960, informed J. F. Laboon, Executive Director of Alcosan, that the intercepting sewers along Turtle Creek and Chartiers Creek could not be considered as main interceptors and were therefore not eligible for payment. The Department of Health also found that any diversion structures, connecting lines to the diversion structures or interceptors, overflow structures and downshafts could not be eligible for payment. The Department of Health also ruled the said river crossings ineligible.

19. Alcosan did not appeal the Department of Health's determination in 1960 to any court but did raise objections to this decision with the department.

20. Alcosan, in 1977, submitted an application to the Department of Environmental Resources, for Act 339 grant funding for the year 1976. The appli-

cation included a request for payment for the Chartiers Creek and Turtle Creek interceptors, downshafts, diversion structures and river crossings.

21. The department, by letter dated March 31, 1978, determined that the request for the Turtle Creek and Chartiers Creek interceptors, downshafts, diversion structures and river crossings, were the same facilities that were previously declared ineligible by the Department of Health in its letter dated August 16, 1960.

22. The department made no new eligibility determination when it issued its March 31, 1978 letter, but rather referred to the Department of Health's determination in 1960 and again refused to find the said structures to be eligible.

23. Subsequent to the appeal filed in this matter, the department conducted a review of the 1976 application and concluded that the questioned facilities were ineligible as not being within certain unpublished criteria.

24. The department observed an error in the 1959 determination, which error related to an interceptor on the back channel of the Ohio River and the river crossing associated with that interceptor. This is identified on contract 28 as the Corliss pump station and interceptor.

25. Prior to April of 1959 when the Alcosan system came into operation, there were over 250 sewers discharging untreated sewage directly into the waters of the Commonwealth in Allegheny County.

26. There are 276 diversion structures in the Alcosan system. These structures function to transfer up to 250% of the dry weather flow of sanitary and storm sewage to the Alcosan sewage treatment plant.

27. When the capacity of the diversion structures is exceeded, a combination of untreated sewage and storm water (all flow in excess of 150% of dry weather flow) is discharged directly into the waters of the Commonwealth.

28. All diversion structures were shown in plans approved by the SWB and were authorized by *inter alia* Special Condition B of the permit issued to Alcosan.

29. Alternatives to the diversion structures include separation of the storm and sanitary sewers throughout Allegheny County, increasing the size of the sewage treatment plant and sewers by 500% or building holding tanks throughout the system to compensate against wet weather peaks.

30. Each of the alternatives to diversion chambers would be (perhaps prohibitively) expensive to implement and would have a negative impact upon the treatment efficiency of the Alcosan sewage treatment plant.

31. The diversion chambers are integral in an engineering sense to the Alcosan system in that they are essential to the proper functioning and completeness of the Alcosan system. But for said diversion chambers sewage would not pass through the system's interceptors to its sewage treatment plant.

32. It is usual practice to connect lateral sewage collection systems into interceptors by manholes, connection structures which include access portals for inspection and maintenance, and a number of such manholes are used in the Alcosan system. Manholes in the Alcosan system were considered eligible under Act 339 by the SWB.

33. In certain portions of the Alcosan system the interceptors were laid up to 110 feet below grade rather than some 8-10 feet below grade which is the common practice.

34. The deeper interceptors in the Alcosan system were utilized to avoid the construction and operating costs of multiple pump stations, i.e., to allow Alcosan to be a mostly gravity system.

35. Because of the deeper interceptors the Alcosan system utilized some 100 downshafts to connect lateral sewers to the interceptors in their deeper

portions. Downshafts are similar to manhole structures but are, of course, longer in the vertical direction (from 8' up to 100'+).

36. Downshafts are integral to the Alcosan system in the sense diversion chambers are integral as discussed in Finding 31 above.

37. Downshafts could have been eliminated from the system by trenching down to the interceptors from the laterals, but this would have created a more expensive project.

38. Each downshaft was shown in the Alcosan plans approved by the SWB and covered by the permit issued to Alcosan by the SWB.

39. Alcosan interceptors follow both banks of several of the rivers in Allegheny County because there are a large number of sewers on each bank. In many of these situations the SWB found each interceptor to be eligible.

40. In four situations, Pine Creek in Aetna, Sawmill Run, Becks Run and Whitaker Run, interceptors did not follow along all portions of each bank. Instead, in these four places the interceptor crossed the river to pickup built-up location(s) on the other side. In each of these situations continuing an interceptor along each bank would have been a more expensive (but apparently eligible) alternate to the river crossing.

41. The river crossings are integral to the Alcosan system in the same sense as diversion chambers and downshafts discussed in Findings 31 and 36 above.

42. Each river crossing was shown on plans approved by the SWB and covered by the permit issued by the SWB to Alcosan.

43. The Chartiers interceptor transports sewage from 18 municipalities directly into the Alcosan sewage treatment plant. It transports 100 percent of the sewage from Upper St. Claire, Bridgeville, Scott Township, Heidelberg, Carnegie, Roslyn Farm, Ingram, Forenberg & Grafton and it transports various

percentages of sewage from 9 other municipalties. This interceptor is some 14 1/2 miles long, has a maximum diameter of 54", and transports between 30 and 41 million gallons per day of sewage to the Alcosan plant.

44. If the flow through the Chartiers Creek interceptor was the only sewage reaching the Alcosan plant, that plant would still be the 5th or 6th largest in Pennsylvania.

45. Chartiers Creek is a direct tributary of the Ohio River and does not comprise 15% of the Ohio River's flow.

46. The Chartiers Creek interceptor is integral to the Alcosan system in the sense used in Findings 31, 36 and 41 above.

47. This interceptor was shown in the Alcosan plans as approved by the SWB and was covered by the permit issued to Alcosan by the SWB.

48. The Turtle Creek interceptor is some 8 1/2 miles long, has a maximum diameter of 54", and transports an average daily flow of 38 million gallons per day. This interceptor handles 100% of the sewage generated in East Pittsburgh, Wilkins Township, Churchill, Chalfant, Forest Hills, Turtle Creek, Wilmerding, Wallborough, Monroeville, Pitcairn and Trafford and takes a percentage of the flow from six additional municipalities.

49. The Turtle Creek interceptor is integral to the Alcosan system in the sense used in Findings 31, 36, 41 and 46 above.

50. This interceptor was shown on the Alcosan plans as approved by the SWB and was covered by the permit issued to Alcosan by the SWB.

51. The Turtle Creek interceptor is a physical extension of the Monongahela interceptor which has been determined to be eligible by DER for funding under Act 339.

52. The Turtle Creek interceptor connects the Penn Hills interceptor to the Monongahela interceptor; physically there is no point of discontinuity

among the three interceptors. The Penn Hills interceptor has been determined to be eligible for funding by DER under Act 339.

DISCUSSION

The instant appeal arises from a letter dated March 31, 1978 in which DER denied part of Alcosan's 1976 application for a state subsidy under Act 339. In 1953, the Pennsylvania legislature passed Act 339, the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. 701 to provide some reimbursement to municipalities for costs to operate and repair sewage treatment plants. Under Act 339, municipalities are eligible for an amount equal to 2% of the costs of acquisition and construction of sewage treatment plants to control pollution. 35 P.S. §701. The costs are based upon standards of eligibility and actual local expenditures for construction. For instance, if a municipality received a 75% grant under the Clean Water Act, (P.L. 95-217, 3, 33 U.S.C. 1251 *et seq.* grant) a municipality could be eligible for up to 2% of the local share (i.e. 25% expended). This grant, while measured by construction costs, represents an expenditure by the Commonwealth to defray the cost of operation and maintenance of a sewage treatment plant.

Act 339 calls for a 2 per centum figure against the costs of construction of sewage treatment plants. The term "construction" is explicitly defined in the Act (35 P.S. §702):

> "Within the meaning of this act, the word "construction" shall include, in addition to the construction of new treatment works, pumping stations and intercepting sewers which are an integral part of the treatment facilities, the altering, improving or adding to of existing treatment works, pumping stations and intercepting sewers which are essential to the sewage treatment plant system..."

Some of the appropriations bills implementing Act 339 have somewhat modified this definition of "construction". In particular, during the years 1957 to 1967, in other words during the time when Alcosan completed construction of its sewage collection and treatment system in or around 1959 and submitted an application for an Act 339 subsidy for the year 1959, the appropriations bills stated:

> "Within the meaning of this act, the word "construction" shall include, in addition to the construction of new treatment works, pumping stations and intercepting sewers which are an integral part of the treatment facilities (including those intercepting sewers of municipalities which collect at least fifty per cent of the sewage of the municipality which enters a public sewage system in the municipality and discharge same into the collection system of the municipality which has constructed the main sewage plant), the altering, improving or adding to of existing treatment works, pumping stations and intercepting sewers which are essential to the sewage treatment plant system."

(See Act No. 77-A, Session of 1957, approved July 15, 1957; Act No. 108-A, Session of 1959, approved November 21, 1959; Act No. 19-A, Session of 1961, approved May 31, 1961.)

Evidently the only significant difference between the definitions of "construction" in Act 339 and in the appropriations bills is the parenthetical inclusion of a limitation of intercepting sewers to those collecting "at least fifty per cent...", the so-called fifty percent rule. After 1967, in other words starting with 1968, the appropriations bills have not redefined "construction", so that the only presently effective definition is that set forth above.

On or about August 16, 1960 the Sanitary Water Board of the Pennsylvania Department of Health (SWB), predecessor to DER, denied that portion of Alcosan's application based upon the Turtle Creek and Chartiers Creek interceptors. The SWB reasoned that the said interceptors were not "main interceptors and therefore are not eligible for payment". The SWB also declared ineligible, without citing any reason, some 100 downshafts, 276 diversion structures and 4 river crossings. Alcosan did not seek judicial review of the SWB decision and it is not clear

whether Alcosan could have obtained administrative review since the EHB did not exist in 1960. Alcosan did, however, object to the SWB ruling and did attend at least one meeting (on September 27, 1960) with SWB officials concerning this matter. An internal memo dated September 29, 1960, shows that the SWB had already changed its position of August 16, 1960 in that it admitted that all Alcosan interceptors were "main interceptors" as defined in SWB's rules and regulations; yet the SWB, nevertheless, continued to deny eligibility for said interceptors, this time on the basis that these interceptors were not "an integral part of the sewage treatment plant".

DER's 1978 denial of Alcosan's 1976 subsidy application was based totally on the SWB's August 16, 1960 determination.

Mr. Tony Maisano, the DER official in charge of the Act 339 program and author of the March 31, 1978 letter, testified that as of the date of that letter he made no independent assessment of eligibility of any of the challenged facilities but rather relied totally upon the August 16, 1960 determination.

Mr. Maisano admitted that after March 31, 1978 he did review the Alcosan application independently, and testified that he agreed with the 1960 declaration of ineligibility. Amazingly, Mr. Maisano's *ex post facto* eligibility determination (which seemed to deal only with the interceptors) was not based upon either the main interceptor nor the integral interceptor theories discussed above but rather upon an unpublished list of four criteria. Indeed, Mr. Maisano admitted that he could not tell a main interceptor from any other type and could not define an integral interceptor.

DER argues strenuously that we shouldn't delve into its decision-making process concerning Alcosan's 1976 Act 339 application. It reasons that Alcosan is barred by the doctrine of res judicata from relitigating here and now issues it might have litigated in 1960. DER has made this argument before in this matter,

via a petition to quash which was denied by the board on February 1, 1979, 1979 EHB 288, but DER notes that this board's February 1, 1979 opinion rested in part on the board's uncertainty as to whether DER in 1978 applied the same legal and factual criteria as it had applied in 1960.

Mr. Maisano, DER's only witness, testified that DER has applied the same criteria throughout. While the board has not the slightest doubt about Mr. Maisano's integrity, we must note that he has only been a DER employee since 1975 and that his understanding of the reasons for the 1960 SWB decision is based entirely upon documents of record in this matter. Consequently, the board has not been convinced by Mr. Maisano that the department's position in this matter has been consistent between 1960 and 1978. Indeed, as discussed above, DER's basis for denial seemed to vary between August and September of 1960. Moreover, as discussed below, DER has changed at least the wording of its own unpublished criteria on or about February 23, 1977. Finally, in this regard, Mr. Maisano conceded, he now would find eligible for funding under Act 339 some of the facilities which were declared ineligible in 1960 (N.T. 170, 171, 220), a concession which certainly suggests that the present criteria do not inevitably lead to the same conclusions as did the 1960 criteria.

Unless the same criteria have been applied there is as per the board's February 1, 1979 opinion no "identity of the thing sued for", an identity which must be established in order to employ the doctrine of res judicata. Moreover, although Alcosan bears the overall burden of proof in this appeal (25 Pa. Code 21.101), DER bears the burden of establishing the elements of res judicata, an affirmative defense (Rules of Civil Procedure Rule 1030; *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 323 A.2d 341 (1974)). On the basis of the reasoning in the preceding paragraph, the board rules that DER has not met this burden, Therefore, the doctrine of res judicata does not bar consideration of DER's March 31,

1978 action.[1]

Having decided that we can review the March 31, 1978 action we could on this record, merely remand to DER. It is clear from Mr. Maisano's testimony (and DER's brief) that DER did not make a new eligibility determination in March 31, 1978. We could remand this matter to DER to require it to make such a determination. This would not seem to be in the interest of the parties, however, since Mr. Maisano also testified that (subsequent to March 31, 1978) he has determined the Chartiers Creek and Turtle Creek interceptors to be ineligible for Act 339 funding by reason of their failure to comport with certain unpublished criteria. We will accept Mr. Maisano's *ex post facto* testimony as supplying the requirement of reasoning for DER's decision and will examine this reasoning in the remainder of this adjudication.

Alcosan argues that DER cannot use unpublished criteria in reaching its eligibility decision. Alcosan notes that under Section 208 of the Commonwealth Documents Law, (act of July 31, 1968, P.L. 1769, *as amended* 45 Pa. C.S. §1101 *et seq.*) an administrative regulation is not valid for any purpose until filed as provided for in said Act. Since DER stipulated that its unpublished criteria do not comply with the Commonwealth Documents Law, Alcosan argues that these criteria are invalid.

We think Alcosan's argument goes too far. We believe that the cited section merely means that the criteria are invalid as regulations. That means

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1. Note that it has not been necessary to rule—and therefore the board has not ruled—on whether the doctrine of res judicata should bar Alcosan's 1976 appeal on the grounds that Alcosan failed to appeal its 1960 denial of funds, even if DER had been able to meet its burden of establishing the identities forming the elements of res judicata.

that these criteria will not be accorded the presumption of validity accorded to regulations. *Commonwealth, DER v. Metzger*, 22 Pa. Commonwealth Ct. 70, 347 A.2d 743 (1975). Instead, these criteria will be considered as an exercise of DER's discretion, for which this board can substitute its discretion *Warren Sand and Gravel v. DER*, 20 Pa. Cmwlth. Ct. 186, 341 A.2d 556 (1975).

In this complicated case it is not even clear which set of criteria we should analyze. DER has presented us with two sets of criteria which on their faces have important and relevant differences in wording. The first set which is undated was, on the testimony of Mr. Maisano, applied by DER from 1971 to 1977. This set appears directly below:

> "The following is the criteria used in determining the eligibility of interceptors for a State subsidy under Act 339.
>
> 1. That portion of an interceptor between the treatment facility and the first connection.
>
> 2. An interceptor along the main stream which picks up existing sewers discharging to that stream.
>
> 3. An interceptor along a secondary stream which picks up existing sewers discharging to that stream if the secondary stream contributes at least 15 percent of the average daily flow of the stream receiving the effluent of the treatment plant.
>
> 4. An interceptor which carries at least 50 percent of one municipality's total sewage to the treatment plant of another municipality. (Eligible the same as under No. 1)
>
> Pump stations and force mains on any of the above interceptors are eligible for payment."

The second set which was prepared by Mr. Maisano on or about February 23, 1977 appears immediately below:

"INTERCEPTORS ELIGIBLE FOR PAYMENT UNDER ACT 339

The following is the criteria used in determining the eligibility of interceptors for a State subsidy under Act 339.

1. That portion of an interceptor between the treatment facility and the first connection.

2. An interceptor along the main stream which picks up existing municipally owned sewers discharging to that stream. The interceptor is eligible from the treatment plant back to the interception of the last raw sewage discharge.

3. An interceptor along a secondary stream which picks up existing municipally owned sewers discharging to that stream if the secondary stream contributes at least 15% of the average daily flow of the stream receiving the effluent of the treatment plant.

4. An interceptor which carries at least 50% of the total sewage flow from the sewered population of the applicant muncipality to the treatment plant or sewer system of another municipality. (Eligible the same as under No. 1)

Pumping stations and force mains on any of the above interceptors are eligible for payment."

Under either set of criteria, an applicant qualifying under any of the four criteria is eligible for Act 339 funds. The differences between these sets of criteria can be appreciated by applying them to the facts of the instant matter. In this case, both the Chartiers Creek and Turtle Creek interceptors carry at least 50 percent of at least one municipality's total sewage to the treatment plant of another municipality, i.e., the Alcosan sewage treatment plant. Indeed, as explained more fully in the findings of fact, each of the said interceptors carries 100% of the sewage from many municipalities to the Alcosan plant. It is thus clear that these interceptors are eligible as part of the Act 339 base by the wording of criterion 4 in the undated list.

The February 23, 1977 list, however, takes what the undated list gives. According to the February 23, 1977 list Alcosan, as owner of the sewage treatment plant would not qualify. (Only the municipalities discharging into Alcosan's system could qualify under this version if they had constructed their portion of the interceptor which they did not.)

Mr. Maisano testified that his intent in drafting the February 23, 1977 criteria was not to vary the undated criteria as actually applied by DER but to express the manner in which they had been applied. Again we have no reason to doubt Mr. Maisano's uncontradicted testimony but again we do not find this testimony to be dispositive.

We are mindful that even the regulations promulgated under an act must conform to the intent of the legislature in passing that act. It follows that the criteria utilized in administering that act must also implement the statutory intent. The statutory intent of Act 339 is spelled out in regulation 25 Pa. Code §103.25(b) promulgated thereunder which reads:

> "(b) The act clearly indicates an intent on the part of the Legislature to have the Commonwealth share in the costs of the Clean Streams Program. Accordingly, such act shall be interpreted to permit payments to municipalities and municipality authorities based on construction which has furthered the Clean Streams Program as long as the construction has been approved by the Department as being in accordance with act of June 22, 1937, P.L. 1987 (35 P.S. §691.1 *et seq.*)."

In the instant matter, all of the interceptors, diversions, downshafts and river crossings in question were approved by DER's predecessor as being in compliance with the Clean Streams Law by its approval of the plans showing these facilities and its issuance of the permit covering said facilities. Moreover, all of these facilities are necessary to the completeness of the Alcosan regional system.

Further, there can be no doubt on this record, that construction of the Alcosan system as a single system has furthered the purposes of the Clean Streams Program, e.g., some 250 separate continuous sources of untreated sewage were replaced by the system which produces a single discharge with a higher degree of treatment downstream from Pittsburgh.

The uncontradicted testimony of Alcosan's highly-qualified expert witnesses demonstrated that by building the system with a single sewage treatment plant the entire system was constructed and can be operated at less cost. Their testimony also showed that Alcosan's treatment plant can maintain a higher and steadier degree of treatment than multiple smaller plants (which would have qualified for Act 339 funding), that due to the size of the Alcosan system slugs of industrial wastes can better be accomodated, that salaries, laboratory facilities, spare parts and all the items going into efficient operation of a sewage treatment system can be provided at a lower per unit cost in the Alcosan system because of its size, and that virtually all the sewage from metropolitan Pittsburgh can be discharged (after treatment) downstream from Pittsburgh.

More specifically, uncontradicted testimony by Alcosan's experts demonstrates that each downshaft, diversion chamber and river crossing was the most cost efficient method of collecting and treating sewage without unduly diminishing the capabilities of the system to collect and treat sewage.

Comparing this list of advantages of the Alcosan facilities in question to the required considerations set forth in Section 5 of The Clean Streams Law, 35 P.S. §691.5, e.g., pollution control on a watershed basis with combined treatment facilities in the most economical manner, virtually requires that Act 339 be interpreted so as to permit payment of Act 339 funds on a base including these facilities. Therefore, we hold that DER's refusal to add these

facilities to eligible construction costs is arbitrary and capricious in the circumstances of this case.[2]

We also add that the only testimony on this record is that all of the above facilities are integral to the Alcosan sewage treatment facilities. DER argues that no interceptor can be integral to a sewage treatment plant and thus DER argues that it has expanded the statutory wording by providing eligibility for any interceptors. We disagree. Act 339 specifically includes in the definition of "construction", intercepting sewers which are "an integral part of the treatment facilities". DER's interpretation would render this wording ineffective and thus is an improper statutory construction. 1 Pa. C.S. §1921(a); *Comm v. Driscoll*, 485 Pa. 99, 401 A.2d 312 (1979).

Moreover, DER's interpretation ignores the difference between the word facilities which is used in the Act and the word plant which is used in DER's brief. Clearly, interceptors are not part of a sewage treatment plant but just as clearly, interceptors can be integral parts of treatment facilities. A sewage treatment facility without interceptors would be a facility without sewage to treat. Thus, any set of criteria which would exclude integral interceptors from eligibility such as DER's February 1977 criteria must fall for lack of statutory support.

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2. We observe that criterion 4 used by DER, especially in its February 23, 1977 version, might be interpreted to exclude some of these otherwise worthy Alcosan facilities, as has been explained above. The fifty percent rule has no basis in present legislation, however, and certainly there is nothing in the present legislation to suggest that the legislature intended that DER be able to exclude Alcosan from payments under Act 339 because of an arbitrarily imposed ownership criterion. In fact, there is nothing in the language of the appropriation bills passed from 1957 to 1967 which justifies imposition of an ownership criterion for deciding eligibility under Act 339.

CONCLUSIONS OF LAW

1. Chartiers and Turtle Creek interceptors are integral parts of Alcosan's sewage treatment facilities and are therefore eligible for Act 339 funding.

2. The dated version of the department's unpublished interceptor eligibility criteria are arbitrary and capricious, and inconsistent with the statutory purpose of Act 339.

3. The dated version of the department's unpublished eligibility criteria are inconsistent with the statutory distinction between: (a) intercepting sewers which are integral to treatment facilities and hence, are eligible for Act 339 funding; and (b) intercepting sewers which are not integral and hence, are not eligible for Act 339 funding.

4. Diversion structures are necessary parts of Alcosan's intercepting sewers and are therefore eligible for Act 339 funding.

5. Downshafts, which are simply elongated manholes, are necessary parts of Alcosan's intercepting sewers and are therefore eligible for Act 339 funding.

6. The four river crossings located at Saw Mill Run, Pine Creek, Becks Run and Whitaker Run, are necessary parts of Alcosan's intercepting sewers and are therefore eligible for Act 339 funding.

7. Alcosan's failure to appeal the Department of Health's 1960 Act 339 eligibility determination does not preclude Alcosan from challenging DER's Act 339 eligibility determinations with respect to Alcosan's 1976 and subsequent applications, because DER has not met its burden of showing that the legal and factual criteria governing the eligibility of sewage facilities applied in 1978 were identical with those applied in 1960.

8. The board has jurisdiction over the subject matter and the parties to this matter.

O R D E R

AND NOW, this 10th day of March, 1982, Alcosan's appeal is granted. DER shall reprocess Alcosan's 1976 application for a state subsidy under Act 339 in accordance with this adjudication.

ENVIRONMENTAL HEARING BOARD

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DATED: March 10, 1982

COMMONWEALTH OF PENNSYLVANIA

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Harrisburg, Pennsylvania 17101
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SOUTHWEST PENNSYLVANIA NATURAL RESOURCES, INC.

Docket No. 81-001-H

Mine Drainage Permit
Bond Forfeiture

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Chairman, March 11, 1982

FINDINGS OF FACT

1. Appellant is Southwest Pennsylvania Natural Resources, Inc. (Southwest or appellant), a Pennsylvania corporation with its principal place of business at 411 Washington Avenue, Charleroi, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (department), which has the duty and responsibility of administering the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (Mining Act), The Clean Streams Law, 35 P.S. §691.1 *et seq.* (Clean Streams Law), and the rules and regulations promulgated thereunder by the Environmental Quality Board.

3. Southwest applied to the department for a mine drainage permit and a surface mining permit for an operation in Grant Township, Indiana County.

4. In response to Southwest's application, the department issued mine drainage permit no. 3976SM3 and mining permit no. 1919-1.

5. Southwest submitted a reclamation plan along with its application for mining permit no. 1919-1. The reclamation plan was approved by the department upon issuance of the permit.

6. Mining permit no. 1919-1 authorizes surface mining on 44.1 acres of land.

7. Surety bond no. CP 29692, executed by International Fidelity Insurance Company, in the amount of forty-four thousand one hundred dollars ($44,100.00) was posted by Southwest in order to secure mining permit no. 1919-1.

8. Southwest commenced surface mining on the permitted site on February 26, 1979.

9. On June 5, 1979, the date of the department's first inspection of Southwest's mining operation, Southwest was mining coal in one open pit and backfilling in a second open pit.

10. From December 5, 1979 to August 25, 1981, no mining or reclamation activities, with the exception of sporadic efforts at pumping pit water accumulations, were conducted on Southwest's mining site.

11. Two open pits and two exposed highwalls remain on Southwest's mining site. The pit on the western portion of the mining site is approximately 70 feet wide and 150 feet long. The pit on the eastern portion is approximately 70 feet wide and 250 feet long.

12. Water accumulations have remained in the two open pits on Southwest's mining site since December 5, 1979.

13. On December 5, 1979 the water in the pit on the western portion of Southwest's mining site was acidic, with a pH of 4.6.

14. No backfilling equipment has been on Southwest's mining site since May 28, 1980.

15. On May 28, 1980, the department cited Southwest as being in violation for backfilling not concurrent with and abandonment of the surface mining operation. These violations remain in effect.

16. On July 31, 1980, the water discharging from Southwest's treatment pond to the Little Mahoning Creek was acidic, with a pH of 4.1.

17. Little Mahoning Creek is classified as a high quality stream and is a state-stocked stream.

18. Approximately 20 acres of land have been affected by surface mining on Southwest's mining site. Of these twenty (20) acres, approximately 15 acres have been mined and 5 acres have been used for support purposes, i.e., for a haul road and sedimentation and treatment ponds.

19. Of the fifteen (15) acres of land that have been mined on Southwest's site, seven (7) acres have been backfilled to rough grade, eight acres have to be backfilled to rough grade; all 15 acres have to be contoured to final grade, and all 15 acres have to be revegetated.

20. The department forfeited surety bond no. CP 29692 on December 1, 1980.

DISCUSSION

This case is before the board on Southwest's appeal from the department's action in forfeiting the surety bond posted by Southwest with its mining permit no. 1919-1. In reviewing the department's action, the board's scope of review is whether the department has committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Company,*

Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), *Lackawanna Refuse Removal, Inc., et al. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 79-024-B (adjudication issued February 3, 1981), *Diehl v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 1979 EHB 105. The board has held that in appeals from the forfeiture of surface mining bonds, the department has the burden of proof to establish that it acted properly. *American Casualty Company of Reading, Pa. v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 78-157-S (adjudication issued January 16, 1981), *Rockwood Insurance Company v. Commonwealth of Pennsylvania, DER*, EHB Docket Nos. 78-168-S and 78-166-S (adjudication issued February 18, 1981).

The statutory requirements concerning surface mining bonds are set forth at Section 4(d) of the Mining Act, 52 P.S. §1396.4(d), which provides:

> "(d) Prior to commencing surface mining, the permittee shall file with the department a bond for the land affected by each operation on a form to be prescribed and furnished by the department, payable to the Commonwealth and conditioned that the permittee shall faithfully perform all of the requirements of this act and of the act of June 22, 1937 (P.L. 1987, No. 394), known as 'The Clean Streams Law...'"

The purpose for requiring the bond is to provide the Commonwealth with the necessary revenue to complete the site reclamation required by Section 4(d) of the Mining Act, 52 P.S. §1396.4(d), if the surface mining operator fails to fulfill this obligation. Accordingly, the Mining Act authorizes the department to forfeit a surface mining bond if an operator fails to conduct his operation in accordance with the statutory requirements. This authority is set forth at Section 4(h) of the Mining Act, 52 P.S. §1396.4(h), which provides:

> "(h) If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond

> forfeited, and shall certify the same to the Department of Justice, which shall proceed to enforce and collect the amount of liability forfeited thereon..."

The department acted pursuant to this grant of authority in forfeiting Southwest's surety bond. The uncontroverted testimony of Mine Conservation Inspector Ronald McCracken and Mining Compliance Specialist Wilson Kreitz and Commonwealth's Exhibits 1 through 9 show that Southwest has failed to comply with the requirements of the Mining Act and the Clean Streams Law. The evidence establishes that Southwest has failed to complete reclamation on its mining site in the manner required by the Mining Act and by mining permit no. 1919-1, that Southwest has abandoned its site since at least May 28, 1980, and that a number of illegal conditions exist on the site. Among these conditions are pit water accumulations, in violation of Section 77.92(d)(1) and (5) of the department's regulations; discharges of acid mine drainage, in violation of Section 315 of the Clean Streams Law and Sections 99.33(a) and (c), 77.92(c)(2) and (4), 77.92(d)(1) - (7), 77.92(e)(1) - (8) of the department's regulations; removal of backfilling equipment prior to the completion of reclamation on the site, in violation of Section 77.92(f)(2) of the department's regulations, and noncontemporaneous backfilling, in violation of Section 77.92(f)(1) of the department's regulations.

Based on this evidence it is clear that the department acted within the bounds of its evidence and in a non-arbitrary fashion in forfeiting Southwest's bond. In light of the mandatory language of Section 4(h) of the Mining Act, 52 P.S. §1396.4(h), and of Southwest's conduct, the department was obligated to forfeit the bond. The department would be remiss in its duties if it failed to do so as Southwest is making no provision for the correction of the illegal conditions on, or for the reclamation of its site.[1]

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1. The propriety of the department's action in forfeiting the entire bond of Southwest is not challenged by the lack of concrete evidence that the costs of reclamation by the department will equal or exceed the bond amount. The board has

The portion of this adjudication set forth above was taken almost verbatim from the Commonwealth's post-hearing brief. We used this material because a) the Commonwealth's brief was excellent, b) after independently reviewing the testimony and exhibits in this matter and the cited law, we agreed entirely with the Commonwealth's position and c) the appellant failed to honor this board's briefing schedule and subsequent notice issued many months after the hearing by filing any brief on its behalf.

The appellant at the hearing did raise two issues which we will address in the remainder of this adjudication.

Appellant asked for a stay of these entire proceedings because appellant had allegedly filed a petition of bankruptcy which petition allegedly acted as an automatic stay of collateral actions. However, an analysis of 11 U.S. Code §362(b)(2) of the Bankruptcy Code indicates that this title does not operate as a stay of proceedings by a governmental unit to enforce its police power. *Commonwealth, DER v. Peggs Run Coal Company*, 423 A.2d 765, (1980) and *Commonwealth, DER v. Ralph A. Veon, Inc.*, 423 A.2d 764. Also, the bonds in question are not "assets" of appellant. If anything they are liabilities of appellant and thus are not protected by Bankruptcy Code.

Thus, we have no trouble rejecting this argument.

Appellant's second argument is that it is not liable to the department for the entire amount of the bond because it did not affect all of the area of land which is subject to mining permit no. 1919-1. Appellant argues that it is liable to the department for only an amount equaling one thousand dollars ($1,000.00) multiplied by the number of affected acres of land.

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1. continued
held that the performance bonds posted pursuant to the Mining Act are penal in nature thus the face amount of each bond is forfeit upon default. *American Casualty Company of Reading, Pennsylvania v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra, Rockwood Insurance Company v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra.*

In formulating this argument, Southwest relies on a clause in the bond form which states:

> "Liability upon this bond shall accrue in proportion to the area of land affected by surface mining at the reat of one thousand ($1,000.00) dollars per acre or part thereof, but in no case shall such liability be for an amount less than five thousand ($5,000.00) dollars,..."

The factual basis of this argument is unassailable. DER's own witnesses admitted that only 20 of the 44.1 acres covered by the forfeited bond had been affected by appellant's mining activities. DER also doesn't deny that the bond in question contains the above-quoted provision.

DER does argue, however, that the quoted language does not limit DER's ability to collect the full and total indemnity under the bond but rather:

> "...The language in the clause explains the method that has been used historically by the Department for calculating surface mining permit bonds. The clause is included in the bond form merely as a recitation of this method." (Commonwealth's post-hearing brief)

There are several problems with DER's argument. First, it rests upon factual assertions not supported in this record. There is no evidence in this record to support DER's construction of the quoted bond language, this is mere argument of counsel. Secondly, even had evidence supporting DER's construction of the quoted language been offered at the hearing it would have been properly objected to as parol evidence. The bond and permit which it forms a part have been consistently characterized by this board as contracts between DER and the operators. It is hornbook contract law that parol evidence may not be introduced to explain unambiguous contractual provisions and DER has failed to point out any ambiguity to the quoted language.[2]

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2. Even if there were some ambiguity to this provision another well known provision of contract law requires that ambiguity be held against the drafter of the contract. The bond in question was drafted by DER. Indeed, it comprises a DER form which was merely filled in by the operator's representative.

The third problem with DER's argument is that the language in question does not appear in the "Whereas" portion of the bond where one would expect to find mere explanatory material but rather appears in the section of the bond specifically dealing with liability.

The fourth problem with DER's argument is that the quoted portion provides for a minimum liability of five thousand ($5,000.00) dollars regardless of the acreage affected. DER's construction of the bond rests upon the assumption that once any acreage covered by the bond is affected, the entire face amount of the bond (in this case forty-four thousand one hundred ($44,100.00) dollars) becomes forfeitable. If DER's construction was accurate there would be no need for the said five thousand dollar minimum so conversely, the presence of the five thousand dollar minimum undercuts DER's position. We thus hold that liability under the bond in question has accrued to the extent of twenty thousand ($20,000.00) dollars.[3]

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter of these proceedings and the parties thereto.

2. The department properly forfeited surety bond no. CP 29692, relating to mining permit no. 1919-1.

3. Southwest is liable to the department for that amount of the bond upon which liability had accrued at the date of forfeiture, the same being twenty thousand ($20,000.00) dollars.

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3. We note for sake of guidance to DER that, in reaching this decision, we have relied upon the bond language only. Section 5 of SMCRA, *as amended* October 10, 1980, 52 P.S. §1396.4(d) which deals with surface mining bonds does not seem to require liability language as set forth in the instant bond.

O R D E R

AND NOW, this 11th day of March, 1982, DER's forfeiture of surety bond CP 29692, relating to mining permit no. 1919-1 is upheld to the extent of twenty thousand ($20,000.00) dollars and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: March 11, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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APOLLO CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-130-G

Clean Streams Law
Surface Mining Conservation and Reclamation Act
Bond Forfeiture

ADJUDICATION

By: Edward Gerjuoy, Member, April 26, 1982

This matter comes before the Board as an appeal from forfeiture by DER, of a surety bond posted by the Apollo Corporation (hereinafter "Apollo"). With the agreement of the parties, who each had filed a pre-hearing memorandum, a hearing on the appeal was scheduled for January 19, 1982. No officer or employee of the Apollo Corporation appeared at this hearing, however, nor did Apollo's attorney D. Keith Melenyzer, of Charleroi, Pennsylvania, put in an appearance. Mr. Melenyzer called DER's attorney shortly before the hearing was scheduled to begin, to inform her he was not coming to the hearing; this intention was confirmed by Mr. Melenyzer a few minutes later, during a telephone conversation with the Board member presiding at the hearing, who phoned

Mr. Melenyzer after learning of his earlier telephone call to DER's attorney. The Board had received no previous indication from Mr. Melenyzer that he would not appear at the hearing January 19, 1982. At no time, either before January 19, 1982, or during his telephone conversation with the presiding Board member, did Mr. Melenyzer request a postponement of the hearing, if only for the purpose of giving Apollo the opportunity to find other counsel.

Therefore the hearing examiner permitted DER to present its case, which it did without cross examination by Apollo, of course. The hearing was terminated at the conclusion of DER's presentation. Thereafter, on January 25, 1982, the Board wrote Mr. Melenyzer, expressing its reluctance to rule on this appeal without giving Apollo the opportunity to present its case, and suggesting to Mr. Melenyzer that he petition the Board to receive Apollo's testimony. The Board has received no response to this suggestion, nor has the Board received Apollo's by now long overdue post-hearing brief.

The surety bond at issue was executed by the Travelers Indemnity Company (hereinafter "Travelers"), a Connecticut corporation licensed to do business in the Commonwealth of Pennsylvania. Travelers also was not represented at the January 19, 1982 hearing. At the request of the hearing examiner, DER's files were checked, and a DER witness testified that Travelers had been notified of the forfeiture by certified mail, and that the return receipt, signed on August 5, 1981, had been received by DER.

FINDINGS OF FACT

1. Appellant is Apollo Corporation, a Pennsylvania corporation with a mailing address of P.O. Box 297, Indiana, Pennsylvania 15701.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER"), which has the duty and the responsibility of administering the Surface Mining Conservation and Reclamation Act (hereinafter "SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq, the Clean Streams Law (hereinafter "CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq, and the Rules and Regulations promulgated thereunder by the Environmental Quality Board.

3. In response to Apollo's application, DER on October 22, 1975 issued Mine Drainage Permit 3975SM16 and Mining Permit No. 1115-3.

4. Mining Permit No. 1115-3 authorizes surface mining by Apollo on 20 acres of land in Grant Township, Indiana County, Pennsylvania.

5. In order to assure reclamation of the site covered by Mining Permit No. 1115-3, Apollo posted surety bond No. 152E5130, executed by the Travelers Indemnity Company in the amount of $11,500.00.

6. On August 3, 1981, DER notified Apollo and Travelers that DER was forfeiting surety bond No. 152E5130 for violations of various applicable Rules and Regulations.

7. Apollo, by its attorney D. Keith Melenyzer, filed an appeal from this bond forfeiture on August 21, 1981.

8. Approximately all 20 acres of the permitted area have been affected by Apollo's surface mining operations.

9. Except for a short period in the fall of 1980, no coal removal has taken place on the Apollo site since January, 1978.

10. The following conditions were in existence on the Apollo mining site on January 6, 1982, and have been in existence since January 5, 1978:

(a) There has been an exposed highwall, with dimensions of 1,000 feet in length and 50 to 60 feet in width.

(b) Backfilling has not been concurrent with mining.

(c) The site has been abandoned.

(d) Backfilling equipment capable of completing the reclamation has not been maintained on the site.

(e) Acid-forming refuse materials have been improperly disposed of on an area of land approximately 30 feet by 50 feet in size.

(f) Inadequate erosion and sedimentation controls have been maintained on the site.

(g) Runoff of surface water into the pit has been inadequately controlled.

DISCUSSION

In this bond forfeiture appeal, the burden of proving the facts that can justify forfeiture falls on DER. Rockwood Insurance Company v. DER, EHB Docket No. 78-168-S (issued February 18, 1981), Ohio Farmers Insurance Company v. DER, EHB Docket No. 80-041-G (issued August 25, 1981). This burden is spelled out in section 4(h) of the SMCRA, which provides in part:

> "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited..."

Reclamation of mining sites is required under section 4(a)(2) of the act.

DER's evidence was clearly presented, accompanied by photographs, and of course uncontradicted by Apollo. We see no reason to disbelieve this testimony, which was more than sufficient to establish the findings of fact listed above. These findings in turn are more than sufficient to meet DER's burden.

Our review of a DER action is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. Commonwealth of Pa., DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), Diehl v. DER, 1979 EHB 105, Ohio Farmers supra. Under the instant circumstances, given the authority of section 4(h) of the SMCRA and the fact that the foregoing findings more than meet DER's burden, DER's action in forfeiting the bond surely cannot be termed an abuse of discretion or an arbitrary exercise of its duties or functions.

CONCLUSIONS OF LAW

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

2. The burden of proving the facts that can justify forfeiture of the bond which is the subject of this appeal falls on DER.

3. On the evidence presented, DER has met this burden.

4. On the evidence presented, DER's forfeiture of surety bond No. 152E5130 was neither an abuse of discretion nor an arbitrary exercise of its duties or functions.

O R D E R

AND NOW, this 26th day of April, 1982, the appeal of Apollo Corporation is dismissed, and Apollo is ordered to make full and prompt payment to DER of $11,500, the face value of surety bond 152E5130.

ENVIRONMENTAL HEARING BOARD

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DATED: April 26, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GENERAL ELECTRIC LANDFILL OPPOSITION COMMITTEE :

Docket No. 80-141-S

v. :

Solid Waste Act
Chapter 75 regulations
Demolition site

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GENERAL ELECTRIC COMPANY, Permittee

ADJUDICATION

By: Dennis J. Harnish, Chairman, April 28, 1982

This matter arises from the appeal of a solid waste permit issued by DER to General Electric for a demolition waste disposal site. The appellant is a citizens group collectively known as General Electric Landfill Opposition Committee.

FINDINGS OF FACT

1. On or about June 20, 1980 General Electric forwarded an application for a Class II Construction and Demolition landfill permit to DER.

2. The site in question is located in Harborcreek Township, Erie County. It comprises approximately 28 acres.

3. The site is on property owned by the Harborcreek School for Boys; it is bounded on the south by the Harborcreek School for Boys and on the east by

a residential street named Villa Sites Road. There is no developed property contiguous to the northern or western boundaries of the site.

4. The site, prior to development, is comprised of shallow soils (less than 6" in places to no more than 3') overlying a very thick shale bed. A perched water table exists on the site with seasonal high water above the land surface in spots. Part of the site has the character of a swamp or wetland.

5. General Electric desires to deposit materials at this site generated by the on-going modernization of nearby manufacturing facilities. These materials include soil, rock, stone, gravel, furnace brick, block and wooden blocks.

6. The wooden blocks,each approximately 6" x 3" x 2 1/2", are pressure impregnated with creosote and are covered with a pitch or tar of unspecified composition.

7. Although creosote in some forms is categorized as a hazardous waste--creosote impregnated wood is not so categorized and there is evidence that the creosote migrating from impregnated wood is quickly decomposed by naturally occuring organisms.

8. On July 21, 1980 DER issued solid waste permit 101219 to General Electric which *inter alia* authorized General Electric to deposit the aforesaid wood block at the site and to deposit furnace brick; said permit was designated as a Class II permit.

9. The said site does not meet the design standards for a Class II site as set forth in 25 Pa. Code §75.33(C).

10. The said application does not contain all the information necessary to support a Class II permit.

11. The said application and site are appropriate for a Class I site.

12. On or about December 18, 1980 the said permit was modified by DER to restrict the said site to Class I waste but DER specifically approved the disposal of wood block and "uncontaminated" furnace brick at the site.

13. To develop the site General Electric must remove its present vegetative cover. General Electric intends to mulch all brush and smaller trees and to cut the larger trees for firewood or other off-site use. The mulched vegetation would form a portion of the final cover.

14. DER is the agency of the Commonwealth empowered to issue permits for solid waste disposal areas pursuant to the Solid Waste Management Act, Act of July 3, 1968, *as amended* 35 P.S. §§6018.101 *et seq.*

DISCUSSION

On or about June 20, 1980, the General Electric Company (G.E.) forwarded an application to the Department of Environmental Resources (department or DER) for a permit to operate a solid waste disposal and/or processing facility permit. The specific classification requested was a Class II Construction and Demolition Waste Landfill as defined in 25 Pa. Code §75.33. Subsequent to notification to the host township, Harborcreek Township, and a determination at the time that the solid waste permit would be the only permit or plan approval required for the facility, the department, on July 5, 1980, published notice of receipt of the application in the Pennsylvania Bulletin at Volume 10, No. 27.

On July 21, 1980, the department issued the above-referenced permit to G. E. approving the disposal of G.E.'s wastes more specifically defined and set forth in the permit application. This permit required G.E. to separate all items described as wood block impregnated with creosote from contact with water

table or potentially with the water table by providing at least 20 inches of broken concrete, concrete block, brick, shale and soil prior to deposition of the wood block.

The issuance of the permit was published in the Pennsylvania Bulletin, Volume No. 10, No. 32 on August 9, 1980. On September 8, 1980, the G.E. Landfill Opposition Committee, appellant, filed its notice of appeal with the Environmental Hearing Board.

Hearings were conducted by the board before Hearing Examiner Louis R. Salamon, on November 26, December 1 and December 2, 1980. During the course of the hearings, the department, with the concurrence of G.E., orally modified the original permit by limiting the waste originally permitted as Class II as defined at 25 Pa. Code §75.33(b)(2) to Class I demolition waste (25 Pa. Code §75.33(b)(1), and further defined the type of waste that could be disposed in the landfill. This oral modification was subsequently reduced to writing and forwarded to the company by document dated December 18, 1980. This modification was subsequently published in the Pennsylvania Bulletin on January 7, 1981, in the Pennsylvania Bulletin, Volume 11, No. 3.

On or about December 22, 1980, the appellant applied to the Environmental Hearing Board for the issuance of a supersedeas. Following a conference among the examiner and counsel for the parties on January 9, 1981, the Environmental Hearing Board issued a supersedeas forbidding G.E. to utilize the site for the deposit of any wastes not Class I demolition material; to utilize the site for the wood or wood blocks impregnated by creosote and commanding G.E. not to utilize the site for the deposit of waste material which results from any land clearing activity until such time as the board ordered otherwise.

The permit as modified on December 18, 1980, states at Condition 2 that the wastes shall be only Class I demolition wastes including soil, rock,

stone, gravel, brick, block including wood block impregnated with creosote and covered with a coating of pitch and uncontaminated furnace brick.

The issues raised by appellant can be classified into five questions: a) is creosote impregnated wood block a Class I waste; b) is furnace brick a Class I waste; c) are land clearing wastes from the site Class I wastes; d) does the site fail to comply with Class II design standards and e) is the application incomplete?

On each of these issues it is quite clear that appellant bears the burden of proof, 25 Pa. Code §21.101(c), and that this board must uphold the challenged permit unless we find that DER has acted in an arbitrary, capricious or unreasonable manner or has violated applicable law. *Agosta, et al. v. DER and City of Easton*, EHB Docket No. 75-208-W (1977).

Wood Block

By virtue of the above discussed modification,[1] the solid waste permit under review is restricted to Class I waste. Class I waste is defined in chapter 75 of DER's regulations under Standards for Construction and Demolition Waste Disposal as follows: "waste materials limited to soil, rock, stone, gravel, brick, block and concrete". 25 Pa. Code §75.33(b). Appellant argues that this definition precludes G.E. from depositing wood blocks pressure impregnated with creosote at the permitted site. G.E. and DER argue that said creosote impregnated wood blocks are included within the Class I definition set forth above under the "block" category and are, in any event, environmentally harmless.

By way of explanation, Mr. Jack Aiton, G.E.'s environmental manager, testified that G.E. decided to develop the demolition site in question in

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1. Appellants do not challenge DER's power to modify the solid waste permit in question.

order to dispose of the wastes generated in the on-going process of replacing the machinery in some twenty of G.E.'s manufacturing and storage buildings located nearby. When machinery is replaced the floor beneath the machinery is taken up. This floor (in most of the buildings) is comprised of a top layer of wood pieces some 2 1/2 inches thick and approximately 3" wide by 6" long. Each such piece (termed throughout the proceedings as a block) was pressure impregnated by the supplier with creosote and was covered on each face with a tar when installed at the G.E. plant.

The wooden blocks are supported by a concrete floor which, in turn, rests upon several feet of native soil and which, in turn, covers a very thick layer of shale. G.E. will remove down all layers to the shale and proposes to deposit all of this material on the site in question.

In deciding this issue of regulatory interpretation we must and do give due deference to DER's interpretation of regulations it administers but for the reasons set forth in the Opinion and Order Sur Application for Supersedeas in this matter (which is incorporated by reference herein) as well as those set forth below we do not find DER's interpretation to be accurate or controlling. Instead, reading §75.33(b) as a whole it seems clear to us that the creosote impregnated wood blocks in question fall under the the definition of Class III wastes, i.e., "waste materials resulting from the construction or demolition of buildings and other structures which may include, but are not limited to...wood..." 25 Pa. Code §75.33(b)

This conclusion is supported by several factors not mentioned in the above-referenced Opinion: a) the uncontradicted testimony of Mr. Arthur M. Kuholski, a registered professional engineer, that the term "block" in the civil engineering field relates to a concrete or cement block and never denotes a wood block; b) the definition of block in Webster's dictionary "a hollow rec-

tangular building unit usually of artificial material." See 1 Pa. C.S.A. §1903; *Township of Derry v. Swatara*, 21 Pa. Commonwealth Ct. 587, 346 A.2d 853 (1975) re: commonly accepted useage as an aid to statutory construction; c) Phase I of G.E.'s site application as incorporated into the permit in question which specifies "block" and "wood block" independently. If the said wooden blocks were merely block as G.E. now argues this separate listing would seem to be an exercise in redundancy and d) the testimony of Mr. Art Provost of DER that to his knowledge creosote impregnated materials are not deposited in a Class I landfill anywhere else in Erie County and, indeed, that no other Class I sites had been permitted by DER in the county.

We also reiterate our finding as expressed in the said Opinion that "[t]here was convincing evidence that there is absolutely no danger that the wood block impregnated with creosote and pitch will leach to the groundwater...", and we take note that the wood blocks will form only about 5% of the total wastes to be deposited at the site. However, if one thing is clear in the environmental law developed over the years before this board and reviewing courts it is that both DER and this board are bound by regulations promulgated by the EQB regardless of the sometimes harsh results which follow the application of such regulations. *Rochez Brothers, Inc. v. DER*, 18 Pa. Cmwlth. Ct. 137, 334 A.2d 790 (1975). Neither DER nor this board has discretion to waive these regulations.

Actually, in the instant matter, we do not anticipate that precluding the wood blocks from this site will impose an undue hardship upon G.E. G.E. could still dispose of some 95% of the proposed materials at the site in question and it was already committed to segregating the wood blocks from other demolition materials by the present permit. Further, G.E. has permits for several other landfills in the area one of which might be able to absorb the wood block.

Furnace Brick

Besides the materials described above G.E. also disclosed an intention to deposit certain furnace bricks at the instant site. Appellant's expert witness, Mr. Kuchosky testified that furnace brick may contain refractories which could have a detrimental effect on the environment. Mr. Jack Aiton of G.E., however, testified that the bricks in question come from the annealing ovens rather than production furnaces in which they could come into contact with refractory materials and therefore that these bricks would pose no danger. Frankly, we feel that neither of these gentlemen, though each has an engineering degree, is particularly qualified to support his opinion concerning the potential hazards of furnace brick but since the burden of proof is upon the appellant, this failure of qualification falls upon the appellant. Moreover, unlike the case with the wood blocks, the term "brick" clearly falls within Class I as defined in §75.33(b).

It should be emphasized that by this holding we do not condone the deposition of contaminated furnace brick at the site but we take note that DER has modified the instant permit to specifically preclude uncontaminated furnace brick. We are concerned that neither G.E. nor DER has conducted a chemical analysis of the furnace brick and thus neither entity has the appropriate foundation to pass upon the pollution potential of this brick. Therefore we will order G.E. to make representative samples of this brick available to DER and we will order DER to conduct such tests and analyzes as it may require to determine the pollution potential of the brick.

Land Clearing

In order to develop the instant 28 acre site for landfill purposes it will prove necessary, over time, for G.E. to remove the trees, brush, stumps and other vegetative cover from the site. G.E. intends to utilize a brushog or

similar equipment in this process so that all vegetation except for the larger trees will be turned into a mulch which will be segregated along with the topsoil to be spread over the site as final cover. The larger trees are slated to be cut for firewood or other off-site use.

We agree with the appellant that "waste materials resulting from land clearing,...which may include trees, brush, stumps, vegetative material..." constitute Class II wastes under §75.33(b) which may not be deposited on a Class I site. However, we also agree with DER that used as stated above the vegetation cleared from the site is not waste material and thus not excluded from the site in question.

Design standards and application information

Both of the latter two issues raised by appellants have been obviated by DER's modification of the instant permit to a Class I site. Appellant's evidence clearly showed that the instant site does not meet the design standards for either a Class II or Class III site as provided in §75.33(c). However, Mr. Art Provost, through uncontradicted testimony, established that the site qualified as a Class I site.

Similarly, while appellant proved that G.E.'s application was deficient for a Class II site, it failed to demonstrate any application omissions or errors applicable to a Class I site.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter of this action and the parties hereto.

2. Wooden blocks, pressure treated with creosote, resulting from the demolition of portions of G.E.'s buildings constitute Class III wastes under 25 Pa. Code §75.33(b).

3. The wooden blocks identified above may not be deposited at a Class I landfill and DER's permit condition to that effect is contrary to 25 Pa. Code §75.33(a) and (b).

4. Uncontaminated annealling oven bricks constitute Class I wastes under 25 Pa. Code §75.33(b).

5. Land clearing materials developed on-site and used on-site as mulch, and off-site as firewood and for other useful purposes are not waste materials within the meaning of 25 Pa. Code §75.33(b).

6. Except as indicated above DER's approval of solid waste permit I.D. no. 101219 is not arbitrary, caprious or in violation of law.

O R D E R

AND NOW, this 28th day of April, 1982, it is hereby ordered that:

a) appellant's appeal is dismissed

b) DER's approval of solid waste permit no. 101219 is approved subject to the following conditions:

(i) wood block impregnated with creosote may not be deposited at this site

(ii) before depositing any additional furnace and/or annealling brick from a particular oven at the site, G.E. shall make representative samples of said brick from that oven available to DER and DER shall promptly conduct all tests it deems necessary to demonstrate that said brick is not contaminated with any substances which may be harmful to the environment or the public health and DER shall promptly make the results of this analysis available to appellant's counsel

3. The wooden blocks identified above may not be deposited at a Class I landfill and DER's permit condition to that effect is contrary to 25 Pa. Code §75.33(a) and (b).

4. Uncontaminated annealling oven bricks constitute Class I wastes under 25 Pa. Code §75.33(b).

5. Land clearing materials developed on-site and used on-site as mulch, and off-site as firewood and for other useful purposes are not waste materials within the meaning of 25 Pa. Code §75.33(b).

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O R D E R

AND NOW, this 28th day of April, 1982, it is hereby ordered that:

a) appellant's appeal is dismissed

b) DER's approval of solid waste permit no. 101219 is approved subject to the following conditions:

(i) wood block impregnated with creosote may not be deposited at this site

(ii) before depositing any additional furnace and/or annealling brick from a particular oven at the site, G.E. shall make representative samples of said brick from that oven available to DER and DER shall promptly conduct all tests it deems necessary to demonstrate that said brick is not contaminated with any substances which may be harmful to the environment or the public health and DER shall promptly make the results of this analysis available to appellant's counsel

c) the supersedeas order issued by the board in this matter on or about January 9, 1981 is hereby repealed and superseded.

ENVIRONMENTAL HEARING BOARD

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BY: DENNIS J. HARNISH
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DATED: April 28, 1982

COMMONWEALTH OF PENNSYLVANIA

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First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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SWATARA CONTRACTORS, INC. : Docket No. 81-037-H

: Solid Waste Act
: Demolition Site Order

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Chairman, April 28, 1982

This matter arises from the appeal of a DER order dated March 4, 1981 issued to Swatara Contractors, Inc. which order revoked Swatara's solid waste disposal permit no. 101157 and required Swatara to take certain remedial action.

A hearing was held in this matter on September 10, 1981 at which hearing Swatara's president appeared and was represented by counsel. At this hearing Swatara's main defense was that its permit should have been suspended rather than revoked. Although, as discussed in detail below, the evidence presented on September 10, 1981 strongly supported DER's order including the revocation of Swatara's permit, the board gave Swatara yet another opportunity to avoid this stringent sanction. The board scheduled a view of the site to be held some 30 days after the hearing and advised Swatara's president and counsel that if the conditions at the site were substantially improved over the conditions shown in

the photographs of the landfill taken in late 1980 and early 1981 and admitted into evidence, the board would lean towards the imposition of a suspension rather than a revocation.

On the date of the view October 9, 1981 conditions at the site were not substantially improved over those demonstrated in the photographs. Although it did appear that some waste shown in the photographs had been covered or removed, it was clear that all refuse on site had not been covered with at least two (2) feet of uniform compacted soil; that the landfill had not been properly graded and that it had not been revegetated. Moreover, neither Swatara's president nor its counsel appeared at this view though both had been notified. Indeed, as of the date of this adjudication, the conditions at the site are still in violation of numerous provisions of DER's regulations and Swatara has still refrained from honoring this board's request for a post-hearing brief.

FINDINGS OF FACT

1. Appellant is Swatara Contractors, Inc. (Swatara), a Pennsylvania corporation with its principal place of business at 7141 Chambers Hill Road, Harrisburg, PA 17111.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), an executive agency which has the duty and obligation to enforce the Solid Waste Management Act, Act No. 1980-97, 35 P.S. §6018.101 *et seq.*

3. Swatara is the permittee of DER permit no. 101157 issued on April 11, 1979.

4. Permit 101157 was issued to Swatara for a "Solid Waste Disposal And/Or Processing Facility" known as the Swatara Landfill in Swatara Township, Dauphin County, PA.

5. Permit 101157 approves the utilization of the Swatara Landfill as a Demolition Waste Disposal Class III facility, subject to certain reservations and conditions therein set forth.

6. Solid waste permit no. 101157 expressly provides that it is subject to revocation or suspension for Swatara's failure to comply "in whole or in part with the conditions of this permit...."

7. Permit Condition 1 provides that Swatara was obligated to submit a "Ground Water Module, Phase II" within sixty (60) days of April 11, 1979.

8. Permit Condition 1 further provides that the "Chemical Analysis Annual Report" was due simultaneously with the Ground Water Module, Phase II and that "Chemical Analysis Quarterly Reports" were due thereafter.

9. Permit Condition 3 provides that Swatara was to provide to the DER certification by a registered professional engineer that site construction at the Swatara Landfill was performed in accordance with the application plans upon which the permit was based.

10. The DER sent written notice to Swatara on six occasions reminding Swatara of its obligation relative to submission of engineer certification.

11. With respect to Permit Condition 1, the Phase II Ground Water Module and Quarterly Reports, the DER sent written notice to Swatara on six occasions that it was failing to comply with the condition.

12. Swatara submitted the Phase II report and one Quarterly Report to the DER on September 19, 1980 but has never submitted any further reports even though they were due on a quarterly basis.

13. Swatara was aware of these noncompliance items as early as 1979.

14. Notwithstanding the repeated notices provided Swatara--including a letter from DER's Francis Fair indicating that the permit might be revoked or suspended--Swatara took no other actions than to submit the Phase II report and one Quarterly Report.

15. Solid waste permit no. 101157 further provides that the Swatara Landfill operation was subject to the department's solid waste regulations.

16. Section 75.33(d)(2)(iv) of the DER's regulations requires firebreaks consisting of a minimum of two (2) feet of soil to be utilized on top of the solid waste at the site at a minimum of once a week.

17. Swatara frequently failed to provide firebreaks as part of its operation at the landfill.

18. DER repeatedly notified Swatara of the firebreak requirement.

19. Demolition wastes depicted in photographs taken at the Swatara Landfill on October 28 and November 21 in 1980 and March 10, 1981, are not covered by firebreaks consistent with the DER regulations.

20. These demolition wastes were still uncovered as of September 9, 1981 and on the date of the view held by Chairman Harnish on October 5, 1981.

21. Firebreaks are important not only for fire control purposes, but also to prevent insect and rodent harborage and to allow some renovation of water leaching through the materials.

22. Swatara further admitted that it was disposing of steel furnace slag at the Swatara Landfill.

23. Steel furnace slag is an industrial waste under the DER's regulations and subject to specific approval and special regulatory treatment. See 25 Pa. Code §75.37.

24. Swatara never requested such approval from the DER.

25. The Swatara Landfill is not permitted for demolition or industrial waste storage or recycling and Swatara never requested DER approval for the storage or recycling activities which it now alleges it conducts there.

26. The DER considered the possibility of suspending and revoking the Swatara permit prior to issuance of the order.

27. The decision to revoke was determined to be appropriate because of the extensive history of continued violations and noncompliance.

28. The conditions imposed on Swatara by the DER's order with respect to covering refuse, grading and revegetation are required by the DER's regulations and are necessary to protect the public health and safety at the site. See 25 Pa. Code 75.33(d)(1)(iii) (grading to prevent ponding if operation inactive more than 15 days or at final grade); 25 Pa. Code §75.33(d)(1)(iv) (revegetation required where operation is completed or suspended for more than six months); 25 Pa. Code §75.33(d)(2)(iv) (firebreaks).

DISCUSSION

This board's responsibility when reviewing an order issued by DER is to determine whether the DER's action was an abuse of discretion or otherwise arbitrary and capricious or in violation of law. *Agosta, et al. v. DER and City of Easton*, EHB Docket No. 75-208-W (1977); *F & T Construction Company, Inc. v. DER*, 6 Pa. Cmwlth. 59; *Diehl v. Commonwealth, DER*, EHB Docket No. 78-037-B (May 14, 1979). The record in this proceeding provides substantial support for the DER order and demonstrates that the contested order was taken well within the department's discretion; a review of the applicable law demonstrates DER's legal authority to issue the order.

The record is simple and straight-forward. Swatara's solid waste permit was issued by the department subject to the express conditions as required by the Solid Waste Management Act, DER's solid waste disposal regulations and various site-specific conditions. Swatara, however, failed to comply with the obligations thus imposed.

The permittee has never supplied the DER with the certification of its engineer that the site was developed according to the specifications of its permit application. With one exception, the permittee has not complied with its obligation to do quarterly water quality monitoring in two and one-half years. Nor has the permittee properly covered the demolition wastes disposed of at the landfill in order to provide firebreaks and eliminate rat and insect harborage.

The department made a concerted effort to lead Swatara's president, Mr. Olszewski, onto the path of compliance. Mr. Pocavich introduced the numerous notices of violation sent to Mr. Olszewski over the past two and one-half years and the repetitive correspondence requesting correction of the same items over and over. Mr. Olszewski testified to the repeated calls the Regional Solid Waste Manager, Mr. Simmons, made to him during the past several years. In fact, Mr. Olszewski testified that Mr. Simmons even called Swatara's consultants in an effort to bring the permitee into compliance.

These efforts were to no avail. It is all too obvious that while Swatara Contractors, Inc., enjoyed the convenience and economy of its own disposal site, it was not prepared to take even the simplest step or the slightest responsibility to operate it properly. As a result, the DER was amply justified and, perhaps, compelled to take back from Swatara the permit it had granted.

Swatara's principle legal argument at the hearing was that the DER abused its discretion by revoking rather than suspending the permit. The board however, is unable to find any support for this position. The board is not here faced with a DER action based on a single, isolated incident. See, *Mill Service, Inc. v. Commonwealth, DER*, EHB Docket No. 74-253-C, modified on appeal, 21 Pa. Cmwlth. Ct. 642, 347 A.2d 503. Rather, Swatara was given notice repeatedly to correct the permit violations and just as repeatedly failed to take necessary

action. Moreover, the violations involved were not simply technical, administrative issues but rather serious violations directly related to the public health and safety of the neighbors of the Swatara Landfill and to the department's ability to monitor the landfill in order to prevent the creation of a public nuisance.

Just by way of example, this site suffered a fire which broke out near the end of December 1980 and continued through January of 1981. Had the site been in compliance with DER's firebreak regulations 25 Pa. Code §75.33(d)(2)(iv) the chances are good that this fire either would not have occurred or at least would have been far less extensive.

By way of defense Mr. Olszewski testified that the material not covered on-site consists mostly of reuseable materials such as furnace slag and tires. As DER points out, however, furnace slag is an industrial waste which Swatara is not permitted to store or dispose of at its Class III demolition site. Moreover, the proceesing or storage of reuseable materials requires a permit from the department: "It shall be unlawful for any person to use--their land--as a solid waste processing [or] storage area without first obtaining a permit from the department..." 35 P.S. §6018.501(a). The Swatara permit was for demolition waste disposal, not storage. Therefore, the board must conclude that the scope of Swatara's violation of the Solid Waste Management Act, *supra*, is increased to the extent that such materials have been stored on the Swatara site.

As to the other materials, the large pile of tires located in proximity to Eisenhower Boulevard, and other assorted debris, this material should have long since been covered or removed. To leave this material where it is and as it is, not only violates the letter of DER's regulations but also the spirit thereof by creating a harborage for rodents and other vectors and a fire hazard. In addition there is a danger of accelerated erosion from the

site due to the lack of grading and revegetation of those portions of the site which have been covered.

Swatara's violations went to the heart of the department's program. Clearly, the department is authorized to order the cessation and abatement of an activity which is directly related to a violation of the Solid Waste Management Act, *supra*, *Mill Service, Inc.*, *supra*.

The applicable sections of the Solid Waste Management Act, *supra*, supply ample authority for the department's action;

> "Any permit...shall be revocable or subject to...suspension at any time the department determines that the solid waste...disposal facility[:]
> (1) is, or has been, conducted in violation of this act or the rules, regulations, adopted pursuant to this act; [or]
>
> * * *
>
> (5) is being operated in violation of <u>any</u> terms or conditions of the permit[.]"

35 P.S. §6018.503(e) (emphasis added). Similarly, Section 503(c) provides:

> "[T]he department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with <u>any</u> provision of this act[;]...or <u>any</u> rule or regulation of the department[;]...or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act...or <u>any</u> rule or regulation of the department or order of the department, or <u>any</u> condition of any permit...as indicated by past or continuing violations."

35 P.S. §6018.503(c) (emphasis added).

Clearly, under the language of these sections, the circumstances of this case could support either a suspension or revocation. The decision to

suspend or revoke a permit is a matter committed to DER's sound enforcement discretion. The decision to suspend or revoke is often an intuitive decision which is made by the program managers and staff who have been personally involved in the permit compliance history and are in the best position to evaluate the rehabilitative potential of the permittee. As such, it is the type of discretionary executive decision to which this board should defer and allow wide latitude. *Cf. Swartwood v. Commonwealth, DER*, EHB Docket No. 79-068-W, Opinion at p. 7.

Finally, the remedial provisions called for in the DER order herein under appeal are all required by the solid waste regulations. For example, the obligation imposed by the order to grade and revegetate all disturbed surfaces at the landfill is a requirement of the operational standards for demolition waste landfills on a minimum of a weekly basis. 25 Pa. Code §75.33(d)(iv). They are, therefore, mandatory on the department and this board. *Bethlehem Township Municipal Authority v. Commonwealth, DER*, EHB Docket No. 80-155-H.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties to and the subject matter of this proceeding.

2. Swatara Contractors, Inc. repeatedly violated an express condition of permit 101157 by failing to supply the DER with certification by a registered professional engineer that the Swatara Landfill was constructed in accordance with its approved plans.

3. Swatara Contractors, Inc. repeatedly violated an express condition of permit 101157 by failing to supply quarterly water quality monitoring reports.

4. Swatara Contractors, Inc., repeatedly violated the DER regulations with respect to utilization of firebreakers, to wit, 25 Pa. Code §75.33(d)(iv), which violation further constituted a violation of permit 101157.

5. DER has the authority pursuant to Section 503 of the Solid Waste Management Act, Act No. 1980-97, 35 P.S. §6018.503, to revoke a solid waste management permit if and when the permittee fails to comply or otherwise demonstrates a lack of ability or intention to comply with the regulations of the DER or the conditions of its permit.

6. Conditions at the site require the remedial actions set forth in the challenged order to protect the public health and safety.

7. DER properly exercised its discretion and authority under the Solid Waste Management Act, *supra*, in revoking permit 101157 and ordering appellant to take steps to close the Swatara Landfill.

O R D E R

AND NOW, this 28th day of April, 1982, the appeal of Swatara Contractors, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

BY: DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: April 28, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

HARRY G. SHEESLEY AND
ALMA JEAN SHEESLEY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EQUITABLE COAL COMPANY, Intervenor

Docket No. 81-061-H

Surface Mining
Release of Bond

ADJUDICATION

By: Dennis J. Harnish, Chairman, April 29, 1982

This case arises from the appeal of Harry and Alma Jean Sheesley (appellants) from the release of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of Equitable Coal Company (intervenor or Equitable) from its planting liability on a surface mining bond, treasurer's check no. 218337 in the amount of $5,750.00, submitted to the department for the site covered by mining permit 1253-4 in Richland Township, Venango County, Pennsylvania. Pursuant to §21.51(g) of the board's Rules of Practice and Procedure, 25 Pa. Code §21.51(g), Equitable was made a party to the proceedings.

A hearing was held before the board on November 4 and 5, 1981 at which all parties presented testimony and evidence and a view of the subject mining permit area was conducted on November 18, 1981.

FINDINGS OF FACT

1. The appellants are Harry G. Sheesley and his wife Alma Jean Sheesley, owners of a tract of land in Richland Township, Venango County, upon which surface mining of coal was conducted by intervenor, Equitable Coal Company, pursuant to mining permit 1253-4 and mine drainage permit 3774SM27.

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, specifically the Bureau of Mining and Reclamation, the agency of the Commonwealth authorized to administer the provisions of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, *as amended*, 52 P.S. §1396.1 *et seq.* (Surface Mining Act), and The Clean Streams Law, Act of June 22, 1937 P.L. 1987, No. 394, *as amended*, 35 P.S. §691.1 *et seq.* (Clean Streams Law), particularly those provisions related to mining.

3. The intervenor is Equitable Coal Company, a partnership which was formerly engaged in the business of surface mining in Pennsylvania and whose address is Drawer F, Knox, PA 16232.

4. Mining permit 1253-4 provided for 9.3 acres of mining area and an additional 9.5 acres for top strata storage area. The total area shall be referred to as the "mine site".

5. Intervenor commenced mining on the mine site on April 1, 1977.

6. Intervenor completed mining and backfilling of the site by May 25, 1978.

7. Intervenor submitted Completion Report No. 5744 to the department on or about May 25, 1978.

8. The department approved the backfilling of the mine site on June 12, 1979.

9. The department released intervenor of its backfilling liability on its surface mining bond on February 27, 1980.

10. Intervenor, through Monty Chapman, a subcontractor, planted the mine site initially in the spring or fall of 1978.

11. On or about October 24, 1978, intervenor submitted a Surface Mine Planting Report to the department for the mine site.

12. The mine site was planted in 1978 utilizing the mixture and amounts of seed, lime and fertilizer set forth in the aforementioned planting plan.

13. In 1979, the intervenor performed additional reclamation and planting on the mining site on two occasions in order to reseed areas which did not catch and to regrade areas of erosion and reseed them.

14. Supplement F of mine drainage permit 3774SM27 which is dated September 25, 1974, discusses intervenor's reclamation plan for the mining site. Part (b) provides.

> "(b) Will topsoil be segregated for later placement over the backfilled area? Yes
>
> If so, what will the minimum depth of topsoil be when distributed over the disturbed area? 12" Top Strata"

15. Supplement F of mining permit 1253-4 which is dated February 24, 1977 also discusses intervenor's reclamation plan for the mine site. Part 1 provides in relevant part:

> "1. Describe the mining processes as to topsoil and topstrata handling, overburden handling, coal seams and/or other mineral deposits to be mined, maximum highwall height and deep mining to be encountered...
>
> Topsoil and/or top strata will be removed and will be stored for later placement over the backfilled area..."

Part 2(B) provides:

> "(B) Will topsoil be segregated for later placement over the backfilled area? Yes
>
> What will the maximum depth of topsoil be when distributed over the disturbed area? 12" topsoil and/or top strata"

Part 2(E) provides:

> "Statement of highest land use prior to mining and proposed subsequent uses.
>
> The highest land use prior to mining was farmland. The proposed land use is maintained grassland."

16. Intervenor's reclamation plan for the mine site, which included the aforementioned provisions, was approved by the department when it issued mine drainage permit 3774SM27 and mining permit 1253-4 to intervenor.

17. Before intervenor mined the mine site there were "pieces of limestone on the surface", "limestone in the top 12 inches of soil all over the property", and there were limestone outcroppings on the site at which there were lumpy and broken up pieces of limestone.

18. Before intervenor mined the mine site, there were large limestone rocks which had surfaced along a cow path which was immediately adjacent to the mining operation.

19. According to the Venango County Soil Survey, the soil on approximately 90% to 95% of the area included in the mining site was Wharton Type C soil and approximately 5 to 10% of the area was Gilpin Silt Loam soil.

20. A characteristic soil profile of Wharton Type C soil would have topsoil to a depth of 9 inches and subsoil to a depth of 40 inches.

21. Wharton Type C soils are shaley.

22. A characteristic soil profile of Gilpin Silt Loam soil would have topsoil to a depth of seven inches and subsoil to a depth of 24 inches.

23. Gilpin Silt Loam soils have shale fragments in the surface layer.

24. Top strata is comprised of both topsoil and subsoil.

25. The mining site has been backfilled to approximately its original contour.

26. There are no depressions to accumulate water on the mine site.

27. The mine site was reclaimed so as to provide adequate provision for drainage.

28. Approximately 90 to 95% of the surface area on the 18.8 acre mine site has been revegetated with permanent vegetation.

29. Kentucky 31 tall fescue, birdsfoot, trefoil, alsike clover and timothy are all permanent species of grasses which were identified in intervenor's planting plan and which have been established on the mine site.

30. Kentucky 31 tall fescue and birdsfoot trefoil are the dominant species on the mine site notwithstanding that they did not comprise the majority of the seed mixture which was planted.

31. There is in the words of the Sheesleys' witness, Mr. Frederick Shook, an "amazingly good catch of vegetation on the mine site" and the vegetation has been just as thick and healthy for at least the last three years.

32. The vegetation on the mine site is adequate to control erosion and sedimentation at said site.

33. There is only minor erosion at the site.

34. There are only a very few erosion rills that are greater than 9 inches deep on the mine site.

35. Maintained grassland is grassland which can be mowed and, if required by the seed mixture, can be cultivated and reseeded.

36. The mine site can be mowed.

37. A proper seed bed was established by intervenor's contractor, Monty Chapman when the mine site was planted in 1978 and by intervenor when portions of the site were reseeded in 1979, as is evidenced by the thick vegetation which is established on the site.

38. A proper seed bed can be prepared on the mine site by plowing and/or disking the site.

39. The mine site can be maintained as a grassland using normal farming equipment.

40. The mine site has been reclaimed adequately to meet the minimum requirements of all applicable laws and regulations and the terms of the mining and mine drainage permits for the site.

DISCUSSION

The instant matter involves DER's release of a mining bond which is, as appellants note, a discretionary action. Therefore the appellants are correct that this board may substitute its discretion for that of DER. However, *Warren Sand & Gravel Company, Inc. v. DER*, 20 Pa. Cmwlth. 186, 341 A.2d 556, (1975), the case cited by appellants, also supports the proposition that this board should only substitute its discretion for DER's discretion if DER committed a manifest abuse of discretion or acted contrary to law.

In addition, the appellants have the burden of proof in this appeal, 25 Pa. Code §21.101(c); *Summit Township Taxpayers Association v. DER*, EHB Docket No. 74-176-C, (issued February 13, 1975), *Agosta v. DER*, EHB Docket No. 75-208-W (issued March 25, 1977). With the above in mind we must review the record to determine whether the appellants have demonstrated that DER committed an abuse

of discretion or acted contrary to law in releasing the bond for the site covered by mining permit 1253-4.

Appellants arguments concerning DER's action will be identified and addressed below in the order they were raised in appellants' brief.

Pit Drainage:

To support their first argument appellants rely upon Section 4(a)(2)K of the Act in effect at the time that the mining permit was issued (52 P.S. 1396.4(a)(2)K which provided in relevant part that:

> "...Failure to prevent water from draining into or accumulating in the pit, or prevent stream pollution during surface mining or thereafter, shall render the operator liable to the sanctions and the penalties provided in this Act and the "Clean Streams Law" and shall be cause for revocation of any approval, license or permit issued by the Department to the operator."

Appellants further noted that the regulations of DER with respect to drainage require that all surface water which might drain into the "pit" must be intercepted by diversion ditches and conveyed to natural water courses outside the surface mining operation (25 Pa. Code §77.92(d)(1) and that the said regulations further provided that drainage courses are not to be interrupted by the surface mining operation unless specifically authorized by the department. Id. §77.92(d)(2).

Finally, in this regard, appellants rely upon paragraph F of the mining reclamation plan which sets forth a proposal for diverting surface water and interim siltation control measures "by constructing adequate diversion ditches above the high wall with outlets to natural drainage courses outside of the area of operation..."

Appellants argue that DER's bond release is contrary to the above-stated law in that said release ratifies Equitable's removal of a french drain which removal allegedly resulted in the creation of a swampy area adjacent to

and downhill from the mined area measuring approximately one hundred feet square.

Appellants' argument fails for lack of both factual and legal support. Factually, there was no evidence pinpointing the location of the french drain, or by hydrology connecting the removal of this drain to the creation of the swampy area. Legally, appellants' argument fails because they have stretched the cited law beyond its meaning. It is clear that the purport of the cited law is that surface courses or channels of conveyance of water which might enter the pit (the actual open area) during active mining must be diverted around the pit to natural drainage courses. In this case there was no testimony that any such water reached the pit during mining in violation of the cited law and indeed no pit remains on the Sheesley property for water to enter since their property was backfilled. Instead, appellants are concerned that water entering the reclaimed mining site by rainfall or sheet runoff from higher ground and percolating down to the water table was not diverted to a natural water course but instead exited at or near the swampy area.

The appellants' construction of the law would require mine operators to intercept rain before it strikes restored mining site; we do not believe that the legislature or the Environmental Quality Board intended such a result.

General Erosion:

Appellants next direct our attention to the erosion from the mining site which, as of the November 18, 1981 view, had created several erosion ditches or rills leading from the site. The intervenor's permit, the Surface Mining Act and DER's regulations concerning erosion, 25 Pa. Code Chapter 102, require that the post-mining contours of the site must approximate pre-mining contours and that the operators planting program must establish a good vegetative cover on the site.

In the instant matter there was abundant testimony and the view confirmed that the mining site had been returned to its approximate original contour. Moreover, even Mr. Frederick Shook, who was offered as an expert witness by appellants agreed that the site was covered over at least 90% by an "amazingly good catch of grass" and the view abundantly confirmed this testimony. Thus, discounting for the moment whether this grass complied with the reclamation plan as maintained grassland it is clear that Equitable did establish on the overall site permanent vegetation adequate to control erosion, i.e., Equitable did take those measures required by its permit 25 Pa. Code Chapter 102 and Section 4(a)(2)(E) of the Surface Mining Act for reducing erosion. Indeed, it is uncontraverted that Equitable, after the original planting, reseeded a portion of the site. While the existance of even one erosion rill is a matter of concern we must be mindful a) that gullying in farm fields untouched by surface mining is a problem throughout the United States and b) that surface mining, like all heavy construction activity, does change the face of the earth, i.e., anyone who expects a reclaimed mining site to look like a manicured lawn is being unrealistic.

Segregation of Topsoil:

Appellants' next argument is based upon DER's regulations which provide that:

> "All top soil and sufficient subsoil shall be removed, segregated, and stored in a readily accessible location to insure ample material for a cover of at least twelve inches after backfilling has been completed."

25 Pa. Code §77.92(f)(5) as well as Supplement F of the aforesaid application dated September 25, 1974, (as incorporated the aforesaid permits) which contains the following commitment by the operator:

> "(b) Will top soil be segregated for later placement over the backfilled area? Yes.

If so, what will the minimum depth of top soil be when distributed over the disturbed area? 12 inches top strata."

The facts bearing on this issue are not hotly contested. All parties agree that there was less than 12" of topsoil across most of the mining site and that Equitable scrapped off and segregated some subsoil along with the topsoil in order to have 12" of material for top dressing the site.[1] Further, Equitable does not deny that it failed to segregate topsoil from subsoil or that it reapplied the aforesaid mixture of topsoil and subsoil during the latter stages of its backfilling but Equitable asserts that its methodology comports with the cited regulation and permit provision.

With regard to the permit provision, (and other uncited portions of Supplemental F,) Equitable is clearly correct: Equitable's only committment under Supplemental F is to return 12" of top strata to the mine site. Equitable carefully differentiated between top strata and topsoil throughout Supplemental F so that it is clear that, in Supplemental F, top strata and topsoil have differing definitions and that top strata includes both topsoil and that amount of subsoil necessary to make up 12" of material.

The cited regulation, 25 Pa. Code §77.92(f)(5), presents a closer question but here too we agree with the Equitable/DER view that this regulation does not require the segregation of topsoil from subsoil but rather requires that a layer of topsoil and such subsoil as is necessary to cover to a depth of at least 12" after backfilling must be removed, segregated and stored and replaced after backfilling. Again, the board is not unmindful of the practical problems encountered in surface mining. Heavy equipment operators who remove the overburden during

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1. Neither the Wharton Type C nor the Gilpin soils on the site contain a topsoil of 12 or greater inches; the average depth of the topsoils being, respectively 9 and 7 inches.

mining are seldom trained as soils scientists so that they could differentiate topsoil from subsoil and appellants' construction of 25 Pa. Code §77.92(f)(5) would practically command such a result.

Permanent Restoration/Maintained Grassland:

Both of these issues relate to the quality of the reclamation and planting on Equitable's mining site. Section 4(a)(2)E of the SMCRA, 52 P.S. §1396.4(a)(2)(E), requires the reclamation plan to include a planting program to permanently restore vegetation on the affected land. In order to comply with this requirement, paragraph (E) of Equitable's application, as incorporated into its mining permit, called for a post-mining land use of "maintained grassland". While the view and testimony clearly demonstrated that the mine site is covered with grassland, there is a dispute as to whether this grassland is maintainable.

DER argues that maintained grassland only meant that grasses rather than trees would be planted on the site. We feel that on this issue DER's characterization is too narrow. DER's forestor admitted that some of the grasses on the site (which mixture had been set forth in Equitable's planting plan and approved by DER) must be replanted within 5 to 10 years and that annual mowing of the site was at least desireable in order to deter the growth of volunteer weeds and saplings. These observations were emphatically supported by the testimony of appellants' expert witness Mr. Frederick Shook. Given these facts we hold that a maintained grassland must be able to be mowed and turned with normal farm equipment.

We also hold, however, that appellants have failed to support their burden of proving that the reclaimed site could not be so mowed and so turned. The testimony of Mr. Sheesley and Mr. Shook in this regard was offset by the opposing testimony of Mr. Kugler and Mr. William Rupert both of whom had exper-

tise in farming in the area of Mr. Sheesley's farm. Moreover, the board cannot ignore the obervations of the Hearing Examiner during the view, i.e., that the catch of grass now on the site was substantially uniform throughout and was so thick in many areas as to make walking difficult. From the present condition of the site we must infer that the site had been turned during the initial planting in 1978 and during reseeding of a portion in 1979 to an extent sufficient to promote this good catch of grass and although there was speculation concerning the condition of the farm equipment which had originally prepared the site during reclamation, the custodian of this equipment testified, without contradiction, that it had not suffered damage.

As to mowing, the demonstration during the view also supported the testimony of Equitable's witnesses other than appellants' witnesses. Substantial swaths of the affected area were mowed to a depth of 2" to 5" from the ground without any apparent difficulty or equipment damage.

As to appellants' assertions that numerous rocks would make disking or plowing impossible, the view again supported the testimony of Equitable's and DER's witnesses as against that of appellants' witnesses. The appellants' witness, Mr. Shook, testified that some 1500 football size rocks were located in the mining site. Equitable's witnesses placed the number of such rocks in the 10 to 20 range. During the view much of the affected area was traversed on foot by the appellants, all counsel, most of the witnesses and the Hearing Examiner, yet not even 10 football size rocks were brought to the attention of the Hearing Examiner. There were some smaller rocks visible on the site but in this respect, the record demonstrated outcroping of limestone on the site before mining and the Gilpin soils on site typically include some shale even in their top layers. Apparently these rocks had not precluded the appellants' farming operations.

Notice:

Appellants' final argument is based upon Section 4(b) of SMCRA, *as amended*, effective October 2, 1980, 52 P.S. §1396.4(b). This section provides that:

> "The applicant shall give public notice of every application for a permit or a bond release under this act in a newspaper of general circulation..."

The appellants argue that this section required DER to give notice of the release of the planting bond at issue which occurred after October 2, 1980 even though the application for release had been received long before that date. The words "applicant" and "application" in the cited section cause us to agree with DER that:

> "[T]he action which this provision applies to is the request for the bond release not the actual bond release. The amendment requires the operator, not the Department, to publish notice of the request for bond release. In this case, as in all others, the Department treated the filing of the completion report as the request [or application] for the release of backfilling liability on the bond and the filing of the planting report as the request [or application] for the release of the planting liability on the bond....[T]he planting report was submitted to the Department in the fall of 1978. After the backfilling was approved by the district mine inspector, the district forester made inspections of the planting in March of 1980 and in June of 1980....Thus the request for bond release had been submitted to the Department and the Department had inspected the site prior to the effective date of the notice requirement. In fact, if it had not been for the Department's action to appease Mr. Sheesley's complaints, the bond would have been released before the amendment became effective, as Mr. Dunkleberger testified that the site was approvable at the time of the June 1980 inspection."[2]

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2. The department also argues "that the notice requirements are not applicable under the facts of this case...based on a long standing rule of statutory construction. The rule is that amendatory statutes are not to be construed as retroactive unless such a construction is clearly intended by the legislature. *Commonwealth v. Scoleri*, 399 Pa. 110, 160 A.2d 215 (1960); *Rupert v. Policeman's Relief and Pension Fund of the City of Pittsburgh*, 387 Pa. 627, 129 A.2d 487 (1957); *S. D. Richmond Sons, Inc. v. Commonwealth*, Board of Finance and Review,

Attorneys fees and costs:

Appellants also rely upon Section 4(b) of SMCRA, 52 P.S. §1396.4(b), to support their claim for attorneys' fees. DER challenges appellants' claim as improperly raised and untimely but neither DER nor Equitable asserts that Section 4(b), *as amended*, does not apply to these proceedings with regard to attorneys' fees.

Setting aside DER's concerns, the board must deny appellants' claim for reasons growing out of the statute. Section 4(b), in relevant part, provides that, "[t]he Environmental Hearing Board upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section." There are no opinions of this board or of any court construing this precise section. However, quite similiar language appears in federal environmental legislation such as, for example, the Clean Air Act of 1977, see especially 42 U.S.C. §37604(d) and 7607(f) and the (federal) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1270 and some cases and materials have been developed pursuant to these acts.

Pursuant to the federal mining act, regulations have been promulgated governing the award of attorney's fees by federal administrative law judges. See 43 C.F.R. §4.1290-4.1296. 43 C.F.R. §4.1294, which sets forth "who may receive an award", is specially instructive. This section essentially provides for payment from

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2. continued
53 Pa. Cmwlth. 110, 416 A.2d 1161 (1980); 1 Pa. C.S.A. §1953. The amended Surface Mining Act does not contain any clear expression of intent that the notice provision should be applied retroactively nor is there even any implication of such application. Since the notice provision requires notice of the request for bond release and not notice of the actual release and since the request for release was made nearly one year before the effective date of the notice provision, it would be inappropriate to apply the notice requirement to the request for bond release." We agree and note that even the appellants do not argue for a retroactive application of the amended statute.

permittees to persons who initiate or participate in proceedings where the administrative law judge determines that a violation of the act, regulation or permit has occurred. In other words, only victorious third parties can obtain attorney's fees from permittees. The section also allows for payments to persons who make a substantial contribution to a full and fair determination of the issues regardless of the outcome but these payments would come, not from the permittee, but rather from the agency.

While 43 C.F.R. §4.1294 is not binding upon this board it does provide some guidance. Additional guidance is provided by an opinion from a neighboring jurisdiction construing the attorney's fees provision of the federal Clean Air Act, *supra*.

In *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem Co.*, 62 F.R.D. 353, aff'd 510 F.2d 969 (3d Cir. 1975) after a complaint filed by the plaintiff citizens group was dismissed by summary judgment, the plaintiff filed the cited action for attorney's fees expended in the original action. When confronted with the argument that only a "prevailing party", could obtain attorney's fees, the court construed language of the Clean Air Act (which like Section 4(b) of SMCRA provides for the payment of attorney's fees to any party in the discretion[3] of the court).

The court reasoned that:

> "[2] The legislative history regarding Section 304 provides little guidance for determining when an award of counsel fees is "appropriate". I think it is fair to conclude from the language chosen by Congress that ultimate success in a citizen's suit was not intended to be a prerequisite to an award. At the same time, however, in light of the absence of any more specific declaration of congressional intent, I believe that "appropriate" should be read in the context of the pre-

3. In the Clean Air Act the courts discretion is involved because it is empowered to award fees in "appropriate cases".

> existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this Court that success or failure must be given substantial weight and that an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor. The exercise of the equitable judgment thus called for must be made in light of all the actions of both parties during the course of litigation as well as during the relevant preceding period." (footnote omitted)

While again this opinion is not binding upon us, this opinion and similiar authority, e.g., *Colorado P.I.R.G. v. Train*, 373 F. Supp. 991, rev'd 507 F.2d 743, rev'd 426 U.S. 1 (1976); *Southeast Legal Defense Group v. Adaurs*, 436 F. Supp. 891 (D. Or. 1971), convince us that success on the merits must be given "substantial weight" in considering the award of counsel fees. Here, appellants have not succeeded on the merits nor does this case present any of the enumerated special circumstances which would cause us to award appellants attorney's fees payable by Equitable.

We do not question appellants' good faith or the fundamental decency of Mr. and Mrs. Sheesley or their counsel, Mr. Montgomery. On the other hand, there is no indication that Equitable has been guilty of any violation of its permit, or other relevant statutory and regulations provisions. Indeed, Equitable is to be complimented for its reclamation effort on appellants' land; if all reclamation was so successful, Pennsylvania would be a much prettier place. Thus, award of attorney's fees against Equitable would be inappropriate. As to an award of attorney's fees against DER we are not unmindful of DER's limited resources and the lack of any specific fund with which to fund litiation. Accordingly, we would only consider an award of attorney's fees against DER in favor of an unsuccessful appellant or intervenor where exceptional circumstances existed. As, for example, where DER's policies and procedures, rules, regulations

or interpretations thereof had been modified by reason of the litigation and where the party seeking attorney's fees had made a substantial contribution to the said litigation. Again, the instant matter does not meet this test so we will not support an award of attorney's fees against DER in this case.

CONCLUSIONS OF LAW

1. The approval of the reclamation of the mine site covered by mining permit 1253-4 and the release of the bond on said site was a discretionary action by the department which may be overturned by the Environmental Hearing Board only if the department committed a manifest abuse of discretion or acted contrary to law. *Warren Sand and Gravel Company, Inc. v. DER*, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); *Pennsbury Village Condominium v. DER*, EHB Docket No. 76-057-C (issued July 22, 1977).

2. A surface mining site must be reclaimed so as to meet the requirements of all applicable laws, regulations and permit conditions. *American Casualty Insurance Company of Reading, PA v. DER*, EHB Docket No. 78-157-S (Opinion issued January 16, 1981).

3. The appellants have the burden of proof in this appeal. 25 Pa. Code §21.101(c); *Summit Township Taxpayers Association v. DER*, EHB Docket No. 74-176-C, (issued February 13, 1975); *Agosta v. DER*, EHB Docket No. 75-208-W (issued March 25, 1977).

4. The appellants have failed to meet their burden of proving that the department committed a manifest abuse of discretion or acted contrary to law in releasing the bond for the site covered by mining permit 1253-4.

5. The mine site covered by mining permit 1253-4 and mine drainage permit 3774SM27 has been reclaimed adequately to meet the requirements of all applicable laws, regulations and the provisions of the permits.

6. The public notice provisions of Section 4(b) of the Surface Mining Act, 52 P.S. §1396.4(b), do not apply to requests for bond release which were filed prior to the effective date of the amendment establishing the notice provisions.

7. In an appeal of the department's release of a surface mining bond by the landowner of a mine site, the permittee is automatically made a party to the proceedings pursuant to Section 21.51(g) of the rules and regulations of the board. 25 Pa. Code §21.51(g).

8. The board has jurisdiction over the subject matter and parties to the instant matter.

9. Attorney's fees may be awarded by this board pursuant to Section 4(b) of Surface Mining Act, 52 P.S. §1396.4(b) payable by either the permittee or DER,but success the merits must be given substantial weight in the award of such fees as payable by the permittee and an award against a successful permittee or against DER must be supported by exceptional circumstances which are absent in the instant matter.

O R D E R

AND NOW, this 29th day of April, 1982, appellants' appeal is dismissed, DER's release of the said surface mining bond to Equitable is upheld and appellants' request for attorney's fees is denied.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

BY: DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: April 29, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOARD OF SUPERVISORS OF SPRINGFIELD TOWNSHIP :

:

Docket No. 80-019-W

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PETER S. MOZINO, Permittee

ADJUDICATION

By: Anthony J. Mazullo, Jr., Member, June 30, 1982

The Board of Supervisors of Springfield Township, Delaware County, Pennsylvania, filed this appeal on January 24, 1980, protesting the grant by the Department of Environmental Resources (DER), Bureau of Dam Safety, of a permit to Peter S. Mozino (Permittee) to construct a private footbridge from land owned by permittee in Upper Darby Township, Delaware County, spanning Darby Creek, to land owned by permittee in Springfield Township, Delaware County.

Evidentiary hearings were held in this matter for two days, and post-hearing memoranda of law were submitted by the parties. Based on the aforesaid, we hereby find as follows:

FINDINGS OF FACT

1. Appellant is a political subdivision of the Commonwealth of Pennsylvania.

2. Permittee is Peter S. Mozino, an individual who is the owner of tracts of land in both Springfield and Upper Darby Townships, Delaware County, through which tracts of land flows Darby Creek.

3. On August 24, 1979 permittee applied to DER for a permit to construct a private footbridge across Darby Creek at a point 68,600 feet from the stream's mouth in Upper Darby, Pennsylvania.

4. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, specifically the Bureau of Dam Safety, the agency of the Commonwealth authorized to administer the provisions of the Flood Plain Management Act, Act of October 4, 1978, P.L. 851, No. 166.

5. On December 17, 1979, DER, through its Division of Obstructions and Flood Plain Management, issued a permit to permittee to construct and maintain a footbridge having a clear span of 59 feet with an underclearance of 7 feet across the channel of Darby Creek. The area wherein the proposed bridge is to be constructed is on a flood plain area.

6. The bridge proposed by permittee will convey a ten (10) year frequency storm.

7. A storm of greater magnitude than a ten (10) year frequency storm will overtop the proposed bridge.

8. The proposed construction will not cause erosion at the site.

9. If the proposed bridge were constructed so as to convey a one-hundred (100) year frequency storm, the abutments would be ten (10) feet high, i.e., ten (10) feet above the existing ground level.

10. A representative of DER suggested to permittee's engineer that the proposed bridge be elevated such that the structure would not raise the base flood elevation by more than one (1) foot.

11. At its widest, the proposed bridge measures eight (8) feet.

12. The one hundred (100) year flood level, at the site, would be 150.3 feet, and should such levels be achieved during a storm, the bridge would be inundated.

13. The mere existence of the structure of the bridge would not affect or change the quantity of flood waters.

14. The bridge structure would not be dislodged by water flow of a storm up to and including a 100-year flood.

15. The bridge would not cause a large collection of debris during flood conditions, since the support beam constitutes only one hundred-fifty (150) square feet of a two thousand (2000) square foot flow channel.

16. The proposed bridge would not raise base flood elevation more than one (1) foot.

17. The proposed bridge will not change or alter the flow of the stream.

18. The construction and maintenance of the proposed bridge will not cause a hazard to the health, safety and welfare of the public, and specifically Springfield Township.

D I S C U S S I O N

In its appeal the appellant asserts, *inter alia*, that the proposed bridge shall, if allowed to be constructed, cause a diversion of water and debris onto lands owned by Springfield Township residents, thereby causing damage to such property owners, in violation of the Dam Safety and Encroachments Act, 1978, Nov. 26, P.L. 1375, No. 325, *et seq.*

Appellant also asserts a violation of the Clean Streams Act, *as amended* 1980, Oct. 10, P.L. 894, No. 157, 35 P.S. 691.1, *et seq.*

There has been no allegation, let alone proof, of pollution by reason of the proposed bridge, therefore the argument of appellant, that the proposed construction of the bridge by permittee will violate the Clean Streams Laws, is baseless and will not be

considered further in this adjudication.

The avowed purposes of the Dam Safety and Encroachments Act (Act) are set forth in 1978, Nov. 26, P.L. 1375, No. 325, §2, effective July 1, 1979, *as amended* 1979, Oct. 23, P.L. 204, No. 70, §1, imd. effective, and permittee's proposed construction falls squarely within such stated purposes. Further, the proposed bridge is clearly defined as a water obstruction in the Act, at 32 P.S. 693.3, and the Act of 32 P.S. 693.4 applies to "all water obstructions...located in, along, across or projecting into any watercourse, floodway or body of water, whether temporary or permanent."

DER is given the authority to issue a permit for the proposed construction of the bridge pursuant to the provisions of the Act, at 32 P.S. 693.6(a), and the regulations promulgated and permittee applied thereunder for and received a permit from DER to construct the bridge.[1]

Appellant, in contesting the grant of the permit by DER, bears the burden of proving that DER acted unreasonably, arbitrarily and capriciously or in violation of law in granting the permit in question. 25 Pa. Code 21.101(c); *F & T Construction Co., Inc. v. DER*, 6 Pa. Comwlth 59. The only evidence produced by appellant at trial was that the bridge would convey only a 10-year frequency storm, and the township engineer "felt" that such an obstruction would cause the diversion of additional water to the Springfield Township side of Darby Creek, causing excessive damage. The township engineer also testified that Springfield Township's flood plain management ordinance required that obstructions in the floodplain must convey 100-year flood frequency storm waters.

---

1. Pursuant to its statutory authority to issue permits for proposed bridge construction, DER caused to be promulgated regulations governing dam safety and waterway management. These regulations are entitled, Title 25, Rules and Regulations, Part I. Department of Environmental Resources, Subpart C. Protection of Natural Resources, Article II. Water Resources, Chapter 105. Dam Safety and Waterway Management, 25 Pa. Code 105, *et seq*, adopted September 16, 1980, effective September 27, 1980, 10 Pa. B. 3843.

The pertinent regulation applicable to the instant appeal is 25 Pa. Code 105.61 entitled "Design Criteria For Construction or Mofification, Hydraulic Capacity". In subsection (a) of the cited regulation, certain criteria are listed which must be complied with in the design and construction of bridges. These design criteria have been complied with in this appeal, as indicated in the findings of fact and conclusions of law contained in this adjudication, and therefore need not be specified in this footnote.

Permittee's engineer testified that although a 100-year frequency storm would top the bridge by 10 feet of water, the bridge itself would not cause debris to be diverted, nor would it cause diversion of floodwaters, due to the narrow size of the beams of the bridge in relation to the size of the channel. He also testified that a 100-year frequency storm would not dislodge the bridge, but would only strip away the decking of the bridge.

In reviewing the testimony produced at the hearings, it was readily apparent the appellant's real concern was to have this board preclude erection of the bridge because of its alleged continuing problems with permittee in his construction, operation and maintenance of a shopping center complex on the Upper Darby Township side of Darby Creek. In this regard, appellant went to great lengths, in its Notice of Appeal, and in its pre-hearing memorandum, to discuss the facts and issues on those matters, which matters were then the subject of litigation in the local court of common pleas. It was also clear that such matters being questions of local land use planning, were not properly grounds for appeal to this board. *Fox v. Central Delaware County Authority,* 381 A.2d 448 (1977).

Appellant also demonstrated that its floodplain ordinance requires that an obstruction in the floodplain convey a 100-year frequency storm, and challenges DER's failure to incorporate that requirement in granting the permit to permittee.

This board has had occasion, in other matters, to consider the application of local ordinances to DER's permit processes.

In *Township of Hilltown v. Comm. of Pa., DER and Haines & Kibblehouse, Inc., Permittee,* EHB Docket No. 79-025-W and 80-035-W. (decided Sept. 30, 1980) the matter of DER consideration of local ordinances in its permitting process was thoroughly reviewed, and based upon relevant decisions, this board reasoned that if the legislation in question preempted local ordinances, DER's permit authority was not conditioned upon the applicant's compliance with local ordinances.

In *Hilltown, supra.,* the board further held that even where the municipalities ordinances were not preempted by the statute in question, DER is not required to consider

those ordinances unless a) the statute in question directed DER to do so, or b) the ordinance embodied a local land use decision which DER was required to consider in its (DER's) role as a trustee of the Commonwealth's public natural resources. *Fox, supra.* The instant statute does not require DER to consider local ordinances when reviewing dams and encroachments permits.

In Section 9 of the Act (32 P.S. 693.9), entitled "Permit issuance and condition", DER is empowered to grant permits if it determines that the proposed project complied with:

> "...all other applicable laws administered by the department, the Pa. Fish Commission and any river basin commission created by interstate compact."

Township and other municipalities' ordinances are therefore clearly not included in the list of governmental entities whose laws must be considered in determining if a permit should be granted by DER. Moreover, the ordinance in question is not a land use ordinance of the type discussed in *Hilltown, supra.*, and *Fox, supra.*, but rather, controls the use if anything, of the waters of the Commonwealth.

Applying the reasoning of the *Hilltown* case to the instant case, appellant's floodplain ordinance, and the status of permittee's compliance therewith, are not matters which DER must consider in its permitting process under the Dam Safety and Encroachments Act, although such subjects may properly be the subject of litigation in the local courts of common pleas. We conclude that DER acted reasonably in its disregarding appellant's floodplain ordinance in granting this permit.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the persons and the subject matter of this appeal.

2. DER did not act unreasonably, nor did it abuse its discretion in granting Permit No. 2379616 to Peter S. Mozino, Permittee, for the construction of a bridge over the Darby Creek.

3. DER has complied with all applicable provisions of the Dam Safety and Encroachments Act, and regulations promulgated pursuant thereto in the issuance of the permit which is the subject of this appeal.

4. The provisions of the Dam Safety and Encroachments Act do not preempt local ordinances with regard to the placement of water obstructions located in, along, across or projecting into any watercourse, floodway or body of water, whether temporary or permanent, but do not require DER consideration of such ordinances and DER is not required to consider such ordinances by Article I, Section 27 of the Pennsylvania Constitution.

5. Permit No. 2379616 was properly granted by DER to Peter S. Mozino.

6. Appellant Springfield Township did not produce evidence sufficient to sustain its burden of proof, and its appeal must therefore be dismissed.

O R D E R

AND NOW, this 30th day of June, 1982, in consideration of the within findings of fact and conclusions of law, the appeal of the Board of Supervisors of Springfield Township to No. 80-019-W is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: June 30, 1982

Edward Gerjuoy

EDWARD GERJUOY
Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LOWER PAXTON TOWNSHIP
AUTHORITY, et al.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 80-205-W

Clean Streams Law
25 Pa. Code Chapter 94
25 Pa. Code §73.91

ADJUDICATION

By Edward Gerjuoy, Member, July 16, 1982

This adjudication has been prepared from the record, under the following circumstances.

This matter first came before the Board on December 12, 1980, when the Lower Paxton Township Authority (hereinafter "LPTA") and Locust Lane (hereinafter "LL") appealed the Department of Environmental Resources (hereinafter "DER") denial of an application by LPTA for a sewer extension to serve a proposed Springford Village development in Lower Paxton Township. Thereafter, the Swatara Township Authority (hereinafter "STA") and Thomas E. Derr were granted permission to intervene, and the two appeals were consolidated under the above caption. In due course, extensive hearings were held before the Honorable Paul Waters, then Chairman of this Board; the hearings terminated August 28, 1981, and briefs were

received by the Board during October 6-8, 1981, by which time Mr. Waters had resigned from the Board.

FINDINGS OF FACT

1. Appellant LPTA is a municipal authority which owns and operates a sewage collection system conveying waste water to the STA Sewage Treatment Plant (hereinafter the "Plant").

2. Appellant LL is a limited partnership which owns the land located in Lower Paxton Township known as Springford Village.

3. Intervenor STA is a municipal authority which owns and operates the STA Plant, situated along Swatara Creek.

4. Intervenor Thomas E. Derr, a private individual, is the developer of the proposed Englewood Heights Development to be located in Lower Paxton Township.

5. Appellee Commonwealth of Pennsylvania DER has the duty and responsibility of administering the Clean Streams Law, 35 P.S. §691.1 et seq., and the rules and regulations promulgated thereunder by the Environmental Quality Board.

6. The Plant operates under an NPDES permit, issued to STA by DER on July 11, 1979.

7. This permit states that the average daily flow of effluent discharged from the Plant shall not exceed 3.0 million gallons per day (hereinafter "mgd").

8. The Plant receives sewage from Lower Paxton Township, Swatara Township and Hummelstown Borough.

9. The maximum volumes and corresponding percentages of flow to the

Plant from these three municipalities were allocated in an Inter-Municipal Agreement dated March 19, 1970, between LPTA, STA and the Borough Council of the Borough of Hummelstown.

10. According to this March 19, 1970 agreement, LPTA's maximum flow allocation is 1.454 mgd, corresponding to 46.90% of the Plant's rated capacity of 3.0 mgd.

11. The March 19, 1970 agreement provided that disputes between the three parties to the agreement should be settled by binding arbitration.

12. DER, on June 29, 1978, had denied a previous application by LPTA for a sewer extension permit.

13. This June 29, 1978 denial was appealed by LPTA to the Environmental Hearing Board, at Docket No. 78-089-W.

14. This appeal at Docket No. 78-089-W was resolved by a settlement in the form of a Consent Decree and Agreement (hereinafter "CD&A"), entered into by DER and LPTA on July 27, 1979.

15. On September 4, 1979, this July 27, 1979 CD&A, which had not been appealed by LL, DER or any other party, was approved and adopted as a final order of this Board.

16. The CD&A provided inter alia, that:

> a. DER accepts the plan of corrective action for reducing infiltration and inflow (hereinafter "I&I") into the LPTA sewer system which was submitted by LPTA...LPTA shall implement the plan in accordance with the schedules contained therein.
>
> b. LPTA may add up to a maximum of 300,000 gallons per day ("gpd") of flow to the STA Plant by means of additional connections to the LPTA system. Within thirty (30) days from the date of this CD&A, LPTA shall submit to DER a plan that demonstrates how LPTA will manage future connections to

the system within the said flow limit, including (a) connections for which permits have already been issued by LPTA, (b) connections for which permits have not yet been issued by LPTA, and (c) connections on sewer extensions for which a water quality management permit will be sought from DER. The plan shall show an estimated rate of connections for the next five (5) years. It may be modified from time to time by LPTA, subject to DER approval.

c. The Authority may obtain from DER approval for additional connections beyond those permitted by the 300,000 gpd above specified upon submission of a written request demonstrating that wet weather flows in the system have been sufficiently reduced by LPTA's I&I program so as to create capacity for additional connections. In this regard, DER agrees that such permission shall not be unreasonably withheld...

d. For the purposes of applying standards to the preceding paragraphs regarding flow and additional proposed connections, one hundred (100) gallons per person per day, or 350 gpd per EDU, shall be used as a guideline for residential development and, in other cases, the guidelines of Title 25 of the Pennsylvania Code, and, in particular, Section 73.91, may be utilized. A "connection" shall mean an individual dwelling unit or the equivalent flow from a commercial or industrial facility.

e. [I]n order to meet its burden to show a decrease in flow, LPTA shall show that the average daily flow in its system has not exceeded the capacity allocated to it by the agreement with Swatara Township during any consecutive three-month period of seasonal wet weather, it being the express intent of this Agreement that in no instance shall any additional connections be permitted which would exceed the demonstrated capacity prorated to LPTA. In support of any application for additional flow, LPTA may also submit new evidence showing errors which may have been made in flow records, annual reports and the like emanating from the treatment facility.

f. DER agrees that LPTA may purchase from Swatara Township and/or Hummelstown Borough any additional capacity which is unused by either of those municipal entities and, upon receiving satisfactory proof of any purchase or acquisition of additional capacity from either of those municipal entities agrees to permit the figure specified [in finding of fact 16b] to be increased by such additional acquired capacity.

17. Norman DeSouza was the General Partner of the limited partnership LL during the time period pertinent to this appeal.

18. Joseph Torok was the manager of LPTA during the time period pertinent to this appeal.

19. As long ago as 1973, Mr. DeSouza had discussed his planned Springford Village development with Mr. Torok.

20. Subsequent to those discussions, on January 22, 1976, LL's engineer sent Lower Paxton Township a planning module for land development for the Springford Village project.

21. This planning module, after revision by LL at Lower Paxton Township's request, was submitted to DER on November 3, 1976.

22. In response to this November 3, 1976 submittal, DER on November 30, 1976 informed Mr. Torok that DER would not act favorably on the Springford Village project until LPTA had supplied DER with an update on LPTA's work to reduce I&I problems in the LPTA system.

23. On December 1, 1976, and on January 13, 1977, LL urged Mr. Torok to satisfy DER's concerns about LPTA's I&I problems.

24. On February 18, 1977, Mr. Torok wrote DER detailing the steps LPTA was taking to reduce I&I.

25. On March 7, 1977, DER approved the Springford Village planning module submitted November 3, 1976, with the provisos that this approval pertained only to the preliminary concepts of the project and that construction could not be started prior to obtaining a sewerage permit from DER's Bureau of Water Management.

26. On January 4, 1978, LL sent a completed application form for this required sewerage permit to Mr. Torok.

27. During January and February, 1978, LL made various corrections to this sewerage permit application, at LPTA's request.

28. Nevertheless, despite frequent urgings, Mr. Torok did not submit the Springford Village sewerage permit application to DER until May 28, 1980.

29. On May 29, 1980, DER returned to Mr. Torok this application for approval of sanitary sewers to serve Springford Village, saying a permit could not be issued because: "This project is not included in the Chapter 94 waste flow management plan as developed by the CD&A between DER and LPTA."

30. DER's brief and testimony have offered various reasons for rejecting the Springford Village permit application, but all its reasons have claimed that rejection was required by the terms of the CD&A.

31. On October 31, 1980, DER wrote Mr. Torok that LPTA was in violation of the CD&A because LPTA had not submitted required I&I progress reports, and because LPTA had exceeded its 1.454 mgd flow allocation during the three consecutive months March, April and May 1980.

32. This same October 31, 1980 letter informed Mr. Torok that because LPTA was in violation of the CD&A, DER was considering a restriction of all future connections to the Lower Paxton system.

33. On November 14, 1980, DER once again returned to Mr. Torok LPTA's application for approval of sanitary sewers to serve Springford Village (which had been resubmitted to DER after the original May 29, 1980 rejection), saying the application could be resubmitted "When the conditions in the Department's October 31, 1980 letter are resolved."

34. This November 14, 1980 letter from DER to Mr. Torok, returning LL's application for approval of sewer connections to Springford Village, was the DER action which has been appealed by LPTA and LL.

35. On or about January 13, 1977, Mr. DeSouza received a copy of a letter

of that date, from his engineer to Mr. Torok, discussing DER's November 30, 1976 refusal to act favorably on the Springford Village project until LPTA had supplied DER with an update on LPTA's efforts to reduce I&I problems in the LPTA system.

36. On or about December 1, 1976, Mr. DeSouza received a copy of a letter of that date, from his engineer to Mr. Torok, urging LPTA to take steps to satisfy DER requirements regarding I&I problems.

37. On May 17, 1978, Derr's application for sewer permits for his proposed development was rejected by DER because of overload conditions at the Plant associated with I&I in the LPTA system.

38. In June of 1978 the reasons for the aforesaid May 17, 1978 rejection of Mr. Derr's sewer permit application were personally explained to Mr. Derr by DER representatives.

39. In January of 1979, Derr intervened in the appeal by LPTA at EHB Docket No. 78-089-W (the appeal which was resolved by the July 27, 1979 CD&A), but withdrew as Intervenor on February 2, 1979.

40. The terms of the CD&A were summarized in the Pennsylvania Bulletin before approval by the Board on September 4, 1979.

41. Neither LL nor Derr nor any other person appealed the CD&A DER and LPTA had signed.

42. There have been no allegations that the CD&A was obtained fraudulently, or by accident, or in any other irregular fashion.

43. Mr. Marrocco, author of the October 31, 1980 letter from DER to Mr. Torok (see Finding of Fact 31), testified on direct examination that DER denied Springford Village its requested permit for sewer connections primarily because the 300,000 gpd of additional flow provided for in the CD&A already was fully

utilized in plans submitted by LPTA for meeting the needs of existing developments in Lower Paxton Township.

44. Under cross examination, Mr. Marrocco somewhat modified the testimony he had given on direct examination (see Finding of Fact 43).

45. On January 23, 1981 Mr. Marrocco, in a letter to Mr. Torok imposing a "prohibition" on additional LPTA connections, offered reasons for this action which in part reiterated--but in part also differed from--the reasons offered in Mr. Marrocco's October 31, 1980 letter (see Finding of Fact 31).

46. Mr. Marrocco's testimony concerning the reasons for DER's refusal to approve the Springford Village permit application was not wholly consistent with his October 31, 1980 and January 23, 1981 letters to Mr. Torok, but agreed with those letters that DER's action relied on the terms of the CD&A.

47. Mr. Torok testified it was his understanding that permits which had been granted prior to the CD&A would not be included in computing the 300,000 gpd limitation (see Finding of Fact 16b) on new connections to LPTA's system.

48. Mr. Torok did not clarify whether the prior granted permits referred to in Finding of Fact 47 were Water Quality Management (hereinafter "WQM") permits from DER or connection permits from LPTA.

49. LPTA cannot issue connection permits unless those connections are first approved by DER in a WQM permit.

50. The applications by LL, returned by DER on May 29 and November 14, 1980, requested WQM approval for 1515 Springford Village sewer connections to LPTA's system.

51. Planning module approval from DER was required before a permit for sewer connections could be obtained from DER's Bureau of Water Quality Management.

52. Had DER approved the WQM permit, LL still would have had to obtain permits for sewer connections from LPTA.

53. LPTA doesn't issue a connection permit until the developer has installed a sewage connection line pursuant to LPTA specifications.

54. At any given time the number of LPTA-approved connection permits may be less than or equal to the number of DER-approved sewer connections, but cannot exceed the number of sewer connections DER had approved when it granted the WQM permit.

55. As of January 31, 1980, there were six developments for which the number of LPTA-approved permits for sewer connections to LPTA's system was less than the number of connections DER had approved in granting a WQM permit.

56. The CD&A is an integrated agreement between LPTA and DER, adopted as a final expression of their intentions.

57. It is possible to give more than one interpretation to the CD&A language specifying the "additional connections" contributing to the 300,000 gpd flow limitation the CD&A imposes on LPTA.

58. DER and STA maintain that any sewer connection made after the CD&A was signed, on July 27, 1979, contributes to the 300,000 gpd limitation the CD&A imposes on additional connections to the LPTA system.

59. LPTA rejects DER's and STA's interpretation of the CD&A's language concerning the 300,000 gpd limitation, but does not clearly state its own interpretation of this language.

60. Springford's Exhibits 21 and 22 refer to a version of the CD&A which preceded the final July 27, 1979 version and contained different language from the July 27, 1979 version.

61. Mr. Krill, the recipient of Springford's Exhibit 21 and the author of Springford's Exhibit 22, though called by LPTA to authenticate these Exhibits, was not asked how the representations in Exhibits 21 and 22 related to the final form of the CD&A.

62. On October 5, 1979, Mr. Torok, pursuant to the CD&A by his own admission, sent DER a schedule of issued and proposed WQM permits involving flow to the STA Plant.

63. For each WQM permit, whether issued or proposed, the aforesaid October 5, 1979 schedule furnished a breakdown into LPTA permits already issued, LPTA permits to be issued, sewer connections already made, and the proposed numbers of future connections in the fourth quarter of 1979 and in succeeding years.

64. The proposed Springford Village development was included in the October 5, 1979 schedule.

65. On November 2, 1979, DER's Mr. Marrocco responded to Mr. Torok's October 5, 1979 letter and schedule.

66. In his response, Mr. Marrocco indicated that connections on sewers already permitted by the Department contribute to the CD&A's 300,000 gpd limitation.

67. In his November 2, 1979 letter, Mr. Marrocco stated that projected flows through 1984 on sewers already permitted by the Department total approximately 265,000 gallons.

68. Mr. Marrocco testified that the 265,000 figure was arrived at by adding the number of connections LPTA proposed to make to its system for the years 1979 through 1984 and multiplying that number by 350 gallons.

69. The total number of preliminary estimated future connections for the years 1979 through 1984--for developments listed in Commonwealth Exhibit 5 as already having WQM sewerage permits but not including developments which as of September 30, 1979 did not yet have WQM sewerage permits--equals 757.

70. Multiplying 757 by 350 gallons yields 264,950 gallons, precisely (within 50 gallons) the 265,000 gallons figure quoted by Mr. Marrocco in his

November 2, 1979 letter.

71. In Commonwealth Exhibit 5, of the developments which already had secured WQM sewerage permits, the last six listed (Meadowbrook through Westford Crossing) were developments for which LPTA had not yet issued all the sewer connection permits it had agreed to issue.

72. In Commonwealth Exhibit 5, of the developments which already had secured WQM sewerage permits, no LPTA permits remained to be issued for the first seven developments listed (from Country Village II through Locust Grove).

73. If connections carrying permits already issued by LPTA are excluded from the tally of preliminary estimated future connections in Commonwealth Exhibit 5, the total number of future connections for the years 1979 through 1984, for developments already having WQM permits, is reduced from 757 (see Finding of Fact 69) to 345.

74. The product of 345 connections and 350 gallons per connection equals 120,750 gallons, far short of the 265,000 figure quoted by Mr. Marrocco in his November 2, 1979 letter to Mr. Torok.

75. There is no evidence that Mr. Torok ever challenged Mr. Marrocco's computation of the 265,000 gallon figure (see Findings of Fact 67-70) in any reasonable time period after receiving Mr. Marrocco's November 2, 1979 letter.

76. Mr. Marrocco's November 2, 1979 computation of the aforementioned 265,000 gpd figure was consistent with DER's and STA's interpretation of the CD&A, namely that any sewer connection made after the CD&A was signed on July 27, 1979 contributes to the 300,000 gpd limitation the CD&A imposes on additional connections to the LPTA system.

77. In November 1979 Mr. Torok was content to accept this DER-STA interpretation of the sewer connection clauses in the CD&A.

78. On February 20, 1980, Mr. Torok, again pursuant to the CD&A by his own admission, sent DER a revised schedule of issued and proposed sewer connections for the quarter ending January 31, 1980.

79. On March 4, 1980, Mr. Marrocco responded to Mr. Torok's February 20, 1980 letter.

80. In his response, Mr. Marrocco analyzed Mr. Torok's February 20, 1980 schedule in a fashion consistent with DER's and STA's interpretation of the CD&A, stating inter alia that as of October 31, 1979 LPTA had 528 connection permits outstanding, representing a potential flow of 184,800 gpd.

81. There is no evidence that Mr. Torok ever challenged Mr. Marrocco's March 4, 1980 analysis of Mr. Torok's February 20, 1980 letter.

82. In March 1980, as in November 1979, Mr. Torok was content to accept DER's and STA's interpretation of the sewer connection clauses in the CD&A.

83. The overall intent of the CD&A was to prevent future overloading of the Plant.

84. Under the CD&A, all future connections, in any of the three categories (a)-(c) listed in Finding of Fact 16b, contribute to the 300,000 gpd limitation the CD&A imposes.

85. The abbreviation EDU stands for "equivalent dwelling unit."

86. Under the CD&A, an EDU contributes 350 gpd of flow.

87. As understood by all parties to this appeal, adding a sewer "connection" means the addition of one EDU to the LPTA system.

88. The CD&A does not specify how to compute the number of EDU's associated with a proposed residential development.

89. Calculation of the EDU's associated with a proposed residential development is complicated and leaves considerable room for error.

90. The numbers of EDU's associated with the already permitted developments listed in Commonwealth Exhibits 5 and 7 were furnished DER by LPTA, and were accepted without modification by DER.

91. The number of EDU's associated with Springford Village was stated to be 1515 by Mr. Torok in Commonwealth Exhibits 5 and 7.

92. LL's expert witness James Haney now calculates the number of EDU's associated with Springford Village to be 893.

93. This 893 figure is based on recent census data and recent flow information not produced at the hearing.

94. Mr. Marrocco's rejection of Mr. Torok's February 20, 1980 schedule involved an objection to LPTA's request for 163 new connections on sewer extensions not yet permitted by DER.

95. The months of March, April, May 1980 were seasonally wet weather months in the LPTA area.

96. DER's computed monthly average daily flows into the Plant from LPTA's system, for the months of March, April and May 1980 obtained omitting those flow readings deemed to be "very erratic," were: 1.711 mgd in March, 2.044 mgd in April and 1.850 mgd in May 1980; the corresponding numbers of included (not "very erratic") days were 25 days in March, 27 days in April and 25 days in May.

97. The decision to term a reading "very erratic" was not biased by any intent to increase the LPTA monthly average daily flows.

98. Failure to omit days whose flows were rated as "very erratic" would have increased, not decreased, the reported LPTA monthly average daily flows.

99. The LPTA flow readings in Commonwealth Exhibit 9, from which DER computed LPTA's monthly average daily flows, were obtained from LPTA's own flow metering equipment.

100. There is no obvious reason why flow meter readings labeled "erratic" should be included when computing average daily flows, while flow meter readings labeled "very erratic" are discarded.

101. If "erratic" as well as "very erratic" readings are discarded, the LPTA monthly average daily flows for March, April, May 1980 become: 1.369 mgd for March, 1.726 mgd for April, 1.812 mgd for May; these averages were obtained using the following numbers of "reliable" (neither "erratic" nor "very erratic") days: 18 for March, 17 for April and 23 for May.

102. The average daily flow in the LPTA system for the entire three-month period March, April, May 1980 (defined as the total flow on "reliable" days divided by the total number of reliable days), computed from the values quoted in Finding of Fact 101 (i.e., computed discarding readings which are "erratic" or "very erratic") is 1.649 mgd; the corresponding average excluding only "very erratic" flows is 1.873 mgd.

103. On July 20, 1981, blockages were observed in Swatara's lines downstream of LPTA's meter.

104. There was only speculative evidence that these blockages affected LPTA's meter readings in April 1980.

105. There was only speculative evidence that the sharp rise in flow at 6:15 P.M. July 21, 1981 could indicate "surcharges" regularly causing erroneously high readings by the LPTA flow meter.

106. The average of the three LPTA monthly average daily flows for March, April, May 1980 equals 1.868 mgd.

107. The LPTA monthly average daily flows during the three-month period April, May, June 1981, computed excluding days for which there were very erratic or no readings, were: 1.515 mgd for April, 1.089 mgd for May, 1.168 mgd for June; the average of these three monthly average daily flows is 1.257 mgd.

108. These averages (see Finding of Fact 107) were computed from readings on 26 days in April 1981, thirty (30) days in May 1981, and 26 days in June 1981.

109. The LPTA average daily flow for the three-month period April to June 1981 (defined as in Finding of Fact 102), computed from the figures in Findings of Fact 107 and 108 (i.e., computed excluding "very erratic" readings but including merely "erratic" readings), is 1.249 mgd.

110. It is only speculation that if LPTA's meter had been in operation, it would have recorded flows exceeding LPTA's allocated 1.454 mgd capacity during February, March, April 1981.

111. During each month of the three-month period April to June 1981, there were days when the reported flow exceeded 1.454 mgd and was not labeled "very erratic."

112. LPTA's flow meter was out of service from July 1980 to the beginning of April 1981.

113. The total rainfall for the three-month period April to June 1981 was 11.25 inches.

114. With 11.25 inches of rainfall, April to June 1981 was a three-month period of seasonal wet weather.

115. The total rainfall for the three-month period March to May 1980 was 14.9 inches, not including 4.95 inches of snow.

116. The flows through LPTA's system into the Plant, and the total flow through the Plant, are strongly--though not perfectly--correlated with the amount of rainfall, with increased rainfall associated with increased flow.

117. DER's brief does not mention LPTA's failure to comply with the I&I schedule in paragraph 1 of the CD&A as a reason for denying the Springford Village sewer permit application.

118. DER's brief does not offer LPTA's failure to submit I&I progress reports as a reason for denying the Springford Village sewer permit application.

119. DER's brief does claim that LPTA has not shown wet weather flows in its system have been sufficiently reduced by LPTA's I&I program to create capacity beyond the 300,000 mgd limitation.

120. LPTA claims that its flow meters have been unreliable ever since they were installed, especially under high flow conditions when the meter readings are even higher than the actual flows.

121. Swatara Township's flow into the Plant is obtained by subtracting Hummelstown's and LPTA's meter readings from the total flow into the Plant as read by the Plant's flow meter.

122. This method of determining Swatara's flow has led to days when Swatara's flow was computed to be negative.

123. Such negative flows are convincing evidence that there is something wrong with the one or all of LPTA's, Hummelstown's and STA's flow meters.

124. The CD&A phrase "the average daily flow...during any consecutive three-month period" is not defined in the CD&A.

125. The parties to the CD&A did not intend that LPTA would have to show its average monthly flow had not exceeded 1.454 mgd during <u>each</u> month of a consecutive three-months period.

126. The parties to the CD&A probably intended that LPTA would have to show its average daily flow had not exceeded 1.454 mgd during at least one month of a consecutive three-month period.

127. Because of the extended period of time that LPTA's meter was out of service, the three-month period April to June 1981 was not much more "recent" than the three-month period March to May 1980.

128. Mr. Marrocco correctly interpreted the CD&A in his March 4, 1980 letter computing the number of remaining additional connections available to LPTA under the CD&A's 300,000 mgd limitation, except that he should have used 35,000 gpd rather than 50,000 gpd as the amount allocated to leachate disposal.

129. Mr. Marrocco's November 2, 1979 letter, which gave an earlier computation of the number of remaining additional connections available to LPTA, inaccurately assumed that as of October 31, 1979 LPTA already was committed to 757 additional connections.

130. As of October 31, 1979, the correct value of LPTA's uncommitted flow allocation (within the 300,000 gpd limitation) was 80,200 gpd, corresponding to 229 uncommitted connections available to LPTA.

131. In a letter of June 20, 1980 to STA's engineering consultant, DER's James D. Miller stated unconditionally that the CD&A allows LPTA to add 300,000 gpd in additional connections.

132. Mr. Torok testified that a number of the developments which already had WQM permits were no longer active, and suggested this fact could be a basis for awarding LPTA additional connections.

133. There is no evidence that LL and Derr were in any way misled by DER in this matter; in particular, LL and Derr were aware, before the CD&A was signed, that DER had been concerned about excessive flow in the LPTA system.

DISCUSSION

A. Legal Significance of the Consent Decree and Agreement

We begin our discussion with an examination of the legal significance of the CD&A between LPTA and DER. The parties are in total disagreement on this issue. LPTA's brief argues that:

> The Department cannot base its denial of a water quality management permit upon provisions of a consent decree existing between Lower Paxton Township Authority and the Department.

DER and STA argue that the CD&A is binding on LPTA and DER, as well as on applicants such as LL and Intervenor Derr who are applying through LPTA for sewer connections to the LPTA system.

Despite LPTA's contention, the Pennsylvania law on this issue is quite clear, and completely supports DER's and STA's claim that the CD&A is binding on LPTA and DER. For example, our Supreme Court recently has written [Pennsylvania Human Relations Commission v. Ammon K. Graybill, Jr., Inc. Real Estate, 482 Pa. 143, 393 A.2d 420 (1978)]:

> Although a consent decree does not represent a legal determination by a court or administrative tribunal of the matters in controversy, it nevertheless has important consequences. A consent decree has a res judicata effect, binding the parties with the same force and effect as a final decree rendered after a full hearing on the merits. In the absence of fraud, accident or mistake, a court has neither the power nor the authority to modify or vary the terms of a consent decree. Nor is such a decree subject to a collateral attack (cites omitted).

Similar statements have been made by the Pennsylvania courts and by this Board in cases involving appeals of DER actions taken in reliance on consent decrees between DER and the appealing parties. DER v. Bethlehem Steel Corp., 469 Pa. 578, 367 A.2d 222 (1976), DER v. Borough of Carlisle, 16 Pa. Cmwlth 341, 330 A.2d 293 (1974),

Alan Wood Steel Company v. DER, 1977 EHB 135. LPTA's brief offers no authority in support of its contention, quoted supra; indeed its arguments are directed primarily not to the legal effect of the CD&A but to the proper interpretation of its terms (which is an important issue to be examined below, but which is wholly separate from the document's legal effect). LL and Derr did not address this issue (of the legal effect of the CD&A) at all. Therefore we rule that the CD&A is binding on LPTA and DER.

DER and STA urge us to also rule that the CD&A is binding on LL and Derr; STA cites Borough of Carlisle, supra, in support of this contention. We do not so read Borough of Carlisle and do not believe the CD&A is binding on LL and Derr--who were neither signatories to the CD&A nor parties to the controversy the CD&A settled--unless the term "binding" is given a rather broader interpretation than is customary. On the other hand, the CD&A certainly does bear on the merits of LL's and Derr's contentions in the instant appeal. The accurate delineation of the legal effects of the CD&A on LL and Derr is, we believe, as follows: LL and Derr must expect that DER--in acting on requests by LL and Derr for additional connections to the LPTA system--will hold LPTA to the terms of the CD&A; moreover, on the authority of Graybill, supra, the terms of the CD&A are not subject to challenge (i.e., collateral attack) by LL, Derr or any of the other parties in the instant appeal.

This ruling concerning the legal effects of the CD&A on LL and Derr is based on the following facts. The July 27, 1979 CD&A, adopted as a final order of this Board on September 4, 1979, was a public document, whose terms were summarized in the Pennsylvania Bulletin; the Pennsylvania Bulletin notice included the statement (Commonwealth Exhibit 2):

> Any person believing himself aggrieved by the above Settlement has a right to appeal to the Environmental Hearing Board, Blackstone Building, First Floor Annex, 112 Market Street, Harrisburg, Pa. 17101. Appeals must be filed within twenty (20) days of this publication. The Environmental Hearing Board is empowered to approve this Settlement if no objection is timely made.

Under the Board's rules, 25 Pa. Code §21.36, and under the general rules governing the publication and effectiveness of Commonwealth documents, 45 Pa. C.S.A. §904, 1 Pa. Code §904, the aforementioned publication in the Pennsylvania Bulletin constituted notice of the CD&A to affected parties such as LL and Derr, each of whom had been discussing sewer connections with LPTA well before July 27, 1979 (N.T., pp. 550-551 and 635-6). Moreover, both LL and Derr were aware before July 27, 1979 that DER would have to approve sewer connections to LPTA's system (Springford Exhibit 9, N.T. pp. 635-6); LL and Derr also were aware before July 27, 1979 that DER had been concerned about excessive flow in the LPTA system (Springford Exhibit 8, N.T. pp. 603 and 635-6). Nevertheless, LL did not appeal or otherwise contest the CD&A; Derr intervened in the LPTA appeal which was resolved by the CD&A, but withdrew as Intervenor well before the CD&A was signed, and thereafter did not appeal or otherwise contest the CD&A.[1]

These rulings on the legal effects of the CD&A make it apparent that many of the arguments and much of the evidence the parties have presented to the Board have little or no bearing on the merits of the instant appeal. In particular, because of the specific language of the CD&A, quoted immediately below, it is unconvincing to argue--as LPTA, LL and Derr all do--that DER has unjustifiably projected itself into the inner workings of the March 19, 1970 Inter-Municipal

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[1] We stress that publication of the CD&A terms in the Pennsylvania Bulletin is the key fact underlying our ruling on the effect of the CD&A on LL and Derr. The other facts recounted in the footnoted and two immediately preceding sentences of the text support the ruling and show it is equitable, but are not necessary for the ruling.

Agreement between LPTA, STA and Hummelstown. The CD&A used the average daily flow allocated to LPTA in the Inter-Municipal Agreement as the standard for deciding whether additional connections to LPTA's system should be permitted. In the language of paragraph 4 of the CD&A:

> Additionally, in order to meet its burden to show a decrease in flow, LPTA shall show that the average daily flow in its system has not exceeded the capacity allocated to it by the agreement with Swatara Township during any consecutive three-month period of seasonal wet weather, it being the express intent of this Agreement that in no instance shall any additional connections be permitted which would exceed the demonstrated capacity prorated to LPTA.

In view of this language, presumably freely entered into by LPTA, DER is entitled to "hold" LPTA to the flow capacity prorated to LPTA in the Inter-Municipal Agreement, namely 1.454 mgd (LPTA's Exhibit 14, N.T. p. 12); accordingly, an attempt by DER to "hold"LPTA to this 1.454 mgd figure specified by the CD&A cannot justifiably be termed an effort by DER "to project itself into the inner workings" of the Inter-Municipal Agreement (the language of LL's brief). We have put the word "hold" in quotes because the precise legal implications of this 1.454 mgd limitation remain to be discussed (see especially Sections D1, D2 and E of this Adjudication).

B. Scope of Review and Burden of Proof

Our review of DER's rejection of LL's request for additional sewer connections to LPTA's system is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975), Diehl v. DER, 1979 EHB 105, Czambel v. DER et al., EHB Docket No. 80-152-G, (issued April 30, 1981). DER has offered numerous reasons for taking the action presently under

appeal, namely the action of rejecting LL's application for sewer connections to LPTA's system. In its brief, DER--citing similar statements in its pre-hearing memorandum--writes:

> When LPTA submitted an application for a permit to extend its collection system to serve the proposed Springford Village development in late 1980, DER refused the application based upon the following:
>
> 1) Springford Village development was not a part of an approved plan to control connections as required by Paragraph 2 of the 1979 CD&A;
>
> 2) Additional flows from this development would exceed the 300,000 gpd in Paragraph 2 of the 1979 CD&A; and
>
> 3) Flows from the proposed Springford Village development would contribute to flows which are presently in excess of the 1.454 mgd allocated to LPTA as exhibited by the three-consecutive-month wet weather period of March, April and May 1980.

On the other hand, in its November 14, 1980 letter rejecting the application (Springford Exhibit 23), DER ascribed the rejection to LPTA's failure to resolve the deficiencies described in DER's October 31, 1980 letter to LPTA (Springford Exhibit 22); these deficiencies were alleged to be violations of the CD&A in that LPTA had exceeded its 1.454 mgd maximum flow allocation and had not submitted required progress reports on I&I. On January 23, 1981, however, in a letter (Appellant's Exhibit 4) responding to LPTA's response (Appellant's Exhibit 5) to DER's October 31, 1980 letter, DER reiterated its claims that LPTA had failed to submit the required I&I progress reports and had exceeded its 1.454 mgd allocation, but additionally alleged that LPTA had not implemented its I&I reduction program as per the schedule provided for in paragraph 1 of the CD&A. This January 23, 1981 letter then concluded as follows:

> Therefore, it is our final determination that flows in LPTA's Beaver Creek sewer system exceeded the 1.454 mgd capacity allocated to it by the service agreement with Swatara Township during the consecutive three-month period of March, April and May, 1980. In accordance with the

> the provisions of paragraph 4 of the June 29, 1978 CD&A, the LPTA must prohibit any additional connections to the Beaver Creek Sewer system. This prohibition must remain in effect until LPTA demonstrates in accordance with paragraph 3 of the CD&A that wet weather flows in the system have been sufficiently reduced by its I&I program so as to create capacity for additional connections.

At the hearing, DER's Mr. Marrocco, Water Quality Manager for DER's Harrisburg Regional Office and the author of the aforementioned October 31, 1980 and January 23, 1981 letters, testified as follows under direct examination (N.T., p. 32):

> Q. Will you then just summarize why the Department denied the sewage extension permit for Springford Village?
>
> A. The Department denied the permit for the Springford Village development because based on our review of the connection control plan, the 300,000 gpd of flow that was provided for in the CD&A was fully utilized in the plan submitted by the Authority LPTA in meeting the needs of the existing developments in the Township.
>
> There was no flow in excess of the 300,000 that could be allocated to any of the projects that presently do not hold permits. Subsequently, we could not issue a permit for those projects.

Under cross examination Mr. Marrocco somewhat modified this testimony to (N.T. pp. 101-102):

> Q. What were the three reasons behind the denial of Springford Village?
>
> A. The 300,000 gallons provided for in the CD&A had been allocated to existing projects and the Township's sanitary landfill leachate flows leaving no flow available for allocation to this project or any other new project in the Township.
>
> Secondly there was no indication that the infiltration/inflow program was being implemented according to the schedule established under the terms of the Agreement...
>
> The third being that I said I indicated this was a follow-up consideration, the flows being exceeded for those three months, meaning that the Township was also in violation of that particular aspect of the Agreement in that they exceeded their flow allocation for the three consecutive months of March, April and May of 1980.

Neither of these answers by Mr. Marrocco is wholly consistent with the November 14, 1980 and October 31, 1980 letters which led to the instant appeal, or with the January 23, 1981 letter imposing a "prohibition" on additional LPTA connections. But in any event--whether these letters (individually or collectively) or Mr. Marrocco's testimony (as phrased in one or the other of his above-quoted answers) are taken to state DER's reasons for rejecting LL's request for sewer connections to LPTA's system--DER is claiming that the rejection was required by the terms of the CD&A. The same claim is made by DER in the above quotation from its brief (which quotation fails to mention the failure to implement or present progress reports on a scheduled infiltration/inflow program, cited by Mr. Marrocco on several above-cited occasions as a reason for denying LL's permit). It surely is not an abuse of discretion for DER to hold LPTA to the terms of a consent decree and agreement between DER and LPTA which has been adopted as a final order of this Board. Therefore, although the discrepancies between these different versions of DER's reasons for rejecting LL's permit application still may have to be straightened out, our review can be limited to deciding whether DER's action was an abuse of discretion under the terms of the CD&A. For this purpose we first must construe the CD&A, because the parties are not fully agreed as to its interpretation. On this issue, and on other issues involved in this appeal, the burden of proving disputed facts is on the appellants, despite LPTA's claims to the contrary. The Board's rules, 25 Pa. Code §21.101(c)(1) clearly state:

> (c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:
> (1) refusal to grant, issue or reissue any license or permit.

The Board has affirmed this rule in numerous adjudications, including adjudications of appeals which--like the instant appeal--challenged DER's refusal to approve

additional connections to a sewer system. Raymond L. Butera v. DER, EHB Docket No. 80-114-H (March 10, 1981), Dover Township Board of Supervisors, et al. v. DER, 1980 EHB 124. LPTA's brief quotes the introductory phraseology of 25 Pa. Code §21.101 while ignoring the more specific and wholly clear language of §21.101's subsection (c)(1) quoted above.

C. Interpretation of the Consent Decree and Agreement

1. Use of contract law principles. The relevant terms of the CD&A have been quoted in Finding of Fact 16 supra. The parties disagree as to the meaning of paragraph 2 of the CD&A (reproduced as Finding of Fact 16b supra); more specifically, the parties disagree about the computation of the maximum 300,000 gpd of additional flow LPTA is permitted under the CD&A. DER and STA maintain that the connections contributing to the 300,000 gpd limitation are those "future connections" the CD&A requires LPTA to list in LPTA's plan for managing future connections, namely:

> (a) connections for which permits have already been issued by LPTA, (b) connections for which permits have not yet been issued by LPTA, and (c) connections on sewer extensions for which a water quality management permit will be sought from DER.

In short, recognizing that LPTA does not issue sewer connection permits until a permit has been received from DER (Commonwealth Exhibit 7, N.T. pp. 365-366), DER and STA maintain that any sewer connection made after the CD&A was signed, on July 27, 1979, contributes to the computation of the 300,000 gpd flow limitation on future connections. LPTA disagrees with this construction of the CD&A, but what LPTA believes is the correct way to compute contributions to the 300,000 gpd flow limitation is far from clear. LPTA's Manager, Joseph Torok,

testified it was his understanding that permits which had already been granted would not contribute to the 300,000 gpd flow limitation (N.T., p. 321). However, Mr. Torok did not explain whether the "permits already granted" included all WQM permits approved by DER before July 27, 1979, or included merely those connection permits authorized by LPTA before July 27, 1979 (N.T. p. 379).

The numbers of DER-approved WQM permits and LPTA-authorized connection permits can differ because of the complicated procedure Springford Village (and other developments) had to follow before sewer connections actually could be completed. First, it was necessary to obtain DER approval for the preliminary concepts of the development, the so-called planning module; the Springford Village development obtained planning module approval on March 7, 1977 (Springford Exhibit 11). Then it was necessary to obtain a sewerage permit from DER's Bureau of Water Quality Management (Springford Exhibit 11); the application for this permit, for 1515 connections to LPTA's system, was rejected by DER on November 14, 1980, thereby giving rise to the present appeal. Had the WQM permit been approved, LL still would have had to obtain permits for sewer connections from LPTA (N.T., pp. 365-366), as already indicated. LPTA doesn't issue a connection permit until the developer has installed a sewage connection line pursuant to LPTA specifications (N.T., p. 366). As a result, at any given time the number of LPTA-approved connection permits may be less than or equal to the number of DER-approved sewer connections, but cannot exceed the number of sewer connections DER had approved when it granted the WQM permit. As a matter of fact, on January 31, 1980 there were six developments for which the number of LPTA-approved permits for sewer connections to LPTA's system was less than the number of connections DER had approved in granting a WQM permit (Commonwealth Exhibit 7).

It follows from the preceding paragraph that if Mr. Torok's phrase "permits already granted" refers to WQM permits, then LPTA is maintaining only future connections in category (c)—of sewer connection categories (a), (b) and (c) listed in the CD&A—contribute to the 300,000 gpd flow limitation. If Mr. Torok's phrase "permits already granted" instead refers merely to LPTA-approved permits, then future connections in categories (b) and (c) contribute to the 300,000 gpd flow limitation (DER, it will be remembered, maintains future connections in all three categories (a), (b) and (c) contribute to the 300,000 gpd limitation). In support of its interpretation of paragraph 2 of the CD&A, but still without clarifying which definition of "permits already granted" it favors, LPTA offers its (Appellant's) Exhibits 21 and 22. DER argues that these Exhibits, which comprise an exchange of letters between attorneys representing LPTA and DER, are barred by the parol evidence rule. Appellant's Exhibits 21 and 22 were admitted into evidence subject to the condition that the Board would rule whether or not the parol evidence rule did bar these Exhibits (N.T., pp. 351-352).

The Superior Court recently has appealed to contract law principles, specifically the Restatement of Contracts, for the purpose of construing a consent agreement. Westinghouse Air Brake Division v. United Electrical, Radio and Machine Workers of America Local 610, ____ Pa. Super. ____, 440 A.2d 529 (1982). This Board previously has stated that a consent order, arrived at after negotiation, must be regarded as a contract. Alan Wood Steel Co. v. DER, 1977 EHB 135. Therefore we will construe the CD&A in accordance with general principles of contract law, as enunciated by Pennsylvania courts.

2. Use of parol evidence rule. The parol evidence rule only applies to written agreements which are integrated. Friestad v. Travelers Indemnity Co.,

260 Pa. Super. 178, 393 A.2d 1212 (1978). Although the CD&A does not so state explicitly, it is clear--from the willingness of LPTA and DER to have the CD&A adopted as a final order of this Board, as well as from the extensive testimony concerning the CD&A at the hearing--that the CD&A is an integrated agreement, adopted as the final expression of the parties' intentions. Consequently the parol evidence rule does apply, and implies that Appellant's Exhibit 22, a letter written April 24, 1979, cannot be used to contradict the terms of the July 27, 1979 CD&A. As our Supreme Court has stated, in American Bank and Trust Company of Pennsylvania v. Lied, 487 Pa. 333, 409 A.2d 377 (1979):

> The usual formulation of the parol evidence rule forbids the entrance of parol evidence of antecedent or contemporaneous agreements, negotiations and understandings for the purpose of varying or contradicting the terms of a contract which both parties intended to represent the definite and complete statement of their agreement.

On the other hand, parol evidence is admissible to resolve alternative possible interpretations of a contract. O'Farrell v. Steel City Piping, 266 Pa. Super. 219, 403 A.2d 1319 (1978). DER's and STA's protestations to the contrary notwithstanding, we find that the language of the instant CD&A concerning "additional connections" contributing to the 300,000 gpd limitation is capable of more than one interpretation. Although DER and STA argue plausibly that the plan for managing "future connections" [Finding of Fact 16b supra] must have been intended to demonstrate LPTA's plan for keeping within its 300,000 gpd limitation, it cannot be gainsaid that the CD&A nowhere explicitly states that future connections in any of the three categories, (a), (b), (c), listed in the plan will contribute to the 300,000 gpd limitation. Even if future connections in category (a) "connections for which permits have already been issued by LPTA" were not meant to be included in the 300,000 gpd limit, the plan could have asked for information on category (a) in order to help DER check the accuracy of the information submitted

in category (b) "connections for which permits have not yet been issued by LPTA."

Consequently we rule that Appellant's Exhibits 21 and 22 are admissible to elucidate the meaning of the CD&A, though not to contradict it. Exhibit 21 is a letter of March 14, 1979 from Robert L. Knupp, LPTA's counsel in this appeal, to John P. Krill, an assistant attorney general in DER's Office of Chief Counsel. Relative to the "future connections" interpretation issue we have been discussing, Mr. Knupp wrote:

> Next, with respect to the entire intent of the Agreement and our previous discussions, it is our understanding that the Agreement is prospective only and would not affect connections which have already been approved and modules submitted and approved by your Department. We would like to have this stated in writing in the Agreement so that there is no confusion as to what is meant in paragraph 5 regarding "future connections pursuant to paragraph 2." We would contend that the term "future connections" applies only to those which have not previously been approved by your Department and hope that this is spelled out in some detail.

Appellant's Exhibit 22 is Mr. Krill's April 24, 1979 reply to Appellant's Exhibit 21. In response to the above quotation from Exhibit 21, Mr. Krill wrote:

> Regarding the status of modules already submitted and approved by the Department, we agree with the statement in your letter. Planning modules previously approved by DER will not have that approval revoked by DER. Likewise, connections for which building permits have already been issued will not be affected by any determination by DER.

Unfortunately, we do not find this exchange between Mr. Knupp and Mr. Krill very helpful toward the desired elucidation of the CD&A. Paragraph 5 of the CD&A, as finally agreed to, reads:

> 5. DER shall immediately issue the Water Quality Management Permit pertaining to the development in which the intervenor, Michael Tulli, also known as Mike Tulli, General Contractor, has an interest. Upon issuance of this and other permits, it shall be the sole duty of LPTA to allocate the connections to its system within the flow limit specified in Paragraph 2 of this agreement.

Evidently Mr. Knupp's March 14, 1979 letter is referring to a version of the CD&A which is quite different from the CD&A finally agreed to on July 27, 1979. There is no way to know precisely how the phrase "future connections pursuant to paragraph 2" was used in that earlier version of the CD&A, nor can we judge how much the meaning of "future connections" may have altered during the negotiations between the parties from April 24, 1979 (the date of Mr. Krill's letter) to July 27, 1979. As DER points out, although Mr. Krill was called by LPTA to authenticate Appellant's Exhibits 21 and 22, he was not asked how the representations in Exhibits 21 and 22 related to the final form of the CD&A (N.T., pp. 308-310). Under the circumstances, we conclude that the language of Mr. Krill's letter, quoted above, is at best very weak evidence against DER's interpretation of the future connections contributing to the 300,000 gpd limitation.[2]

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[2] We have put the matter in this negative way, namely "is at best weak evidence against DER's interpretation" because, as explained above, we are not certain what LPTA's interpretation is. In fact, LPTA's reliance on Mr. Krill's letter, Appellant's Exhibit 22, only further obscures the already clouded problem (recall our analysis of Mr. Torok's testimony concerning "permits already granted") of deciding just what interpretation of "future connections" contributing to the 300,000 gpd limitation is favored by LPTA itself. The last sentence of the above quotation from Mr. Krill's letter speaks of connections for which "building permits have already been issued"; since there is no reason to believe that "building permits" are the same as sewer connection permits, it is totally unclear how the connections Mr. Krill says "will not be affected by any determination by DER" relate to Mr. Torok's connections on "permits already granted." Mr. Krill also states that "planning modules previously approved by DER will not have that approval revoked by DER," but it is far from apparent what bearing this assertion--which makes no explicit reference to connections and seemingly was made by Mr. Krill in response to the first sentence in the above quotation from Mr. Knupp's letter--has on the interpretation of the CD&A's 300,000 gpd limitation. Nevertheless DER's brief seemingly assumes that LPTA--on the strength of this "planning module" assertion in Mr. Krill's letter--is maintaining that future connections in planning modules already approved by DER do not contribute to the 300,000 gpd limit. What LPTA actually does maintain in this regard is uncertain, as has been explained; on DER's assumption, however, LPTA would be maintaining that even some future connections in category (c) [recall the quotation from Finding of Fact 16b supra] must be excluded from the 300,000 gpd limit, because proposed developments can obtain planning module approval from DER well before seeking a WQM sewerage permit (as did Springford Village itself, see Springford Exhibit 11).

3. The extrinsic evidence bearing on the 300,000 gpd limitation clause. As a matter of fact, the weight of the extrinsic evidence bearing on the interpretation of the CD&A's 300,000 gpd limitation clause supports DER's interpretation. On October 5, 1979, Mr. Torok, filing "[P]ursuant to our recent Consent Decree and Agreement," sent DER a schedule of all Water Quality Management Permits issued and proposed as of September 30, 1979 involving flow to the STA Plant (Commonwealth Exhibit 5). For each approved WQM permit this schedule included a breakdown into LPTA permits already issued, LPTA permits to be issued, sewer connections already made, and the proposed numbers of future connections in the fourth quarter of 1979 and in succeeding years; a similar breakdown was provided for developments which had not yet received WQM permits, including Springford Village. DER's Mr. Marrocco replied to Mr. Torok on November 2, 1979 (Commonwealth Exhibit 6), raising inter alia "the following concerns" about Mr. Torok's October 5, 1979 letter:

> 2. Projected flows through 1984 on sewers already permitted by the Department total approximately 265,000 gallons. Considering the fact that Penn Grant Hills and Windsor Manor are not factored into your schedule, this flow closely approximates the 300,000 gallon limitation stipulated in the agreement.
> 3. We are aware that the Township is considering routing leachate flows from the landfill to the Swatara Township sewage treatment plant. If this becomes a reality, an additional 50,000 gallons of capacity will be committed...
> Your projected flow of 265,000 gpd from existing developments plus the 50,000 gpd of landfill leachate will exceed the 300,000 gpd flow limitation stipulated in the agreement...

This language of Mr. Marrocco's unmistakably indicates that connections on sewers already permitted by the Department contribute to the 300,000 gpd flow limitation. Any possible doubt that this meaning attaches to Mr. Marrocco's language is dissipated by Mr. Marrocco's explanation of how he arrived at the 265,000 gpd figure mentioned in his letter. Mr. Marrocco testified (N.T., p. 23):

That figure was arrived at simply by adding the number of connections that the Authority proposed to make to its system for the years 1979 through 1984 and multiplying that number times 350 gallons per connection or EDU.

A relevant portion of the schedule enclosed with Commonwealth Exhibit 5, for developments which already had WQM sewerage permits as of September 30, 1979, reads as follows:

DEVELOPMENT NAME	PRELIMINARY ESTIMATED FUTURE CONNECTIONS					
	4th Quarter 1979	1980	1981	1982	1983	1984
Country Village II	4	5	5	0	0	0
Evbuna Gardens	7	10	10	0	0	0
Fairlane	8	10	10	10	10	0
Heatherfield I	8	20	20	20	10	0
Heatherfield-Lopax Rd Ext	9	20	20	20	10	0
Heatherfield III	100	58	0	0	0	0
Locust Grove	2	6	0	0	0	0
Meadowbrook	4	30	30	30	30	28
Michael Miller	0	8	8	0	0	0
Penn Grant Hills	0	no information available				
Rockford Heights	4	10	10	14	0	0
Windsor Manor	0	no information available				
Westford Crossing	0	26	26	29	29	29

Adding the numbers of preliminary estimated future connections for these DER-permitted developments yields a total of 757 estimated future connections. Multiplying 757 by 350 yields 264,950 gallons, which is within 50 gallons of the

"approximately" 265,000 gallon figure Mr. Marrocco quotes in his November 2, 1979 letter (Commonwealth Exhibit 6).

Examination of Commonwealth Exhibit 5 further shows that for the last six developments listed above, from Meadowbrook through Westford Crossing, LPTA had not yet issued all the sewer connection permits it had agreed to issue; for the remaining sewer developments listed above, no LPTA permits remained to be issued. Therefore, if--as one version of Mr. Torok's intended "permits already granted" would have it--connections for which permits already had been issued by LPTA [category (a) of the sewer connection categories listed in Finding of Fact 16b] were to be excluded from the 300,000 limitation, the estimated future connections for the first seven developments listed above should not have been included in the tally leading to the above 757 total. Excluding these first seven developments (Country Village II through Locust Grove) from the tally would have yielded a total of only 345 estimated future connections, a value which when multiplied by 350 gallons equals only 120,750 gallons,[3] far short of the 265,000 gallon figure Mr. Marrocco quotes. If all already approved WQM sewer permits fall under Mr. Marrocco's "permits already granted" language, then none of the thirteen developments listed above should have been included in Mr. Marrocco's tally; in that event Mr. Marrocco should have confined himself to adding the estimated future connections for developments which, like Springford Village, had not yet received a WQM sewerage permit (these would be future sewer connections in category (c) of the three categories listed in Finding of Fact 16b).

Despite the fact that Mr. Marrocco plainly wrote Mr. Torok (in Commonwealth Exhibit 6) that he was totaling projected flows through 1984 <u>on sewers</u>

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[3] This result follows from application of elementary addition and multiplication to the last six rows of the Table reproduced above, these being manipulations of which we believe the Board is entitled to take official notice.

already permitted by the Department, and despite the added fact that excluding future connections for "permits already granted" (Mr. Torok's own words in his testimony, N.T. p. 321) would have led to a much lower figure than the 265,000 gallons Mr. Marrocco quoted for Mr. Torok's "projected flow...from existing developments," there is no evidence that Mr. Torok challenged Mr. Marrocco's computation of the 265,000 figure in any reasonable time period after November 2, 1979. Mr. Marrocco testified that DER had never received a response from Mr. Torok to Mr. Marrocco's November 2, 1979 letter (N.T., pp. 33-34). Mr. Torok testified that he had responded orally, but not in writing, to the November 2, 1979 letter, but gave no indication that his oral discussions with Mr. Marrocco had objected to Mr. Marrocco's computation of the 265,000 gpd figure (N.T., pp. 330-331).

Mr. Marrocco's November 2, 1979 computation of the 265,000 gpd figure was consistent with DER's interpretation of the CD&A, namely that any sewer connections made after the CD&A was signed--including sewer connections for which permits already had been issued by LPTA--contribute to the 300,000 gpd flow limitation on future connections. We infer that in November 1979, not very long after the CD&A had been signed on July 27, 1979, Mr. Torok was content to accept DER's interpretation of the CD&A.

This inference is bolstered by Commonwealth Exhibits 7 and 8. On February 20, 1980, Mr. Torok--again "pursuant to our CD&A"--sent Mr. Marrocco a revised schedule setting forth proposed connections for this drainage area for the quarter ending January 31, 1980 (Commonwealth Exhibit 7); this letter still said nothing about Mr. Marrocco's computation of his 265,000 gpd figure. The February 20, 1980 schedule was responded to by Mr. Marrocco in a letter to Mr. Torok dated March 4, 1980 (Commonwealth Exhibit 8). This response of

Mr. Marrocco's quantitatively analyzed the January 31, 1980 schedule in much the same way as in Mr. Marrocco's November 2, 1979 analysis of Mr. Torok's October 5, 1979 schedule. In particular, the March 4, 1980 letter states:

> 1. As of October 31, 1979 the Authority had 528 connection permits outstanding, representing a potential flow of 184,800 gpd.

There was no direct testimony by Mr. Marrocco explaining how he arrived at the figures just quoted, but they can be readily derived from the schedule in Commonwealth Exhibit 7. The total number of LPTA permits issued, for developments already possessing WQM permits (the same thirteen developments listed in the Table from Commonwealth Exhibit 5 reproduced above) is given as 4304. The total number of actual connections as of October 31, 1979 is stated to be 3776. The difference between 4304 and 3776 is precisely 528 which, when multiplied by 350 gallons per connection, yields 184,800 gallons. Evidently Mr. Marrocco, on March 4, 1980, again was asserting that future connections of sewers already possessing LPTA permits would contribute to the 300,000 gpd limitation. Again there is no evidence that Mr. Torok challenged this computation of Mr. Marrocco's in any reasonable time period after receiving this March 4, 1980 letter. Mr. Torok testified that he responded orally but not in writing to the March 4, 1980 letter; Mr. Torok did not state that he had challenged the 184,800 gpd figure, although he did challenge Mr. Marrocco's March 4, 1980 assertion that (N.T., p. 331):

> 2. The Authority has allocated 50,000 gpd to the Lower Paxton Township for landfill leachate disposal.

In other words, in March 1980, as in November 1979, Mr. Torok was content to accept the DER and STA interpretation of the CD&A.

4. Construction of the 300,000 gpd limitation clause. As we already have ruled, whatever construction we adopt for the disputed clauses specifying the future connections contributing to the 300,000 gpd limitation must be consistent

with general principles of contract law. In particular, as the Superior Court very recently has stated in Westinghouse Air Brake supra:

> When interpreting a consent decree, or any other agreement, words must be read in context. The decree must be read as a whole, each of its provisions being interpreted together with its other provisions.

Reading the CD&A as a whole, its overall intent clearly was to prevent future overloading of the Plant. Insisting that all future connections, whether previously permitted or not, must be kept within a 300,000 gpd flow limit, is consistent with this intent; if anything, it would be less consistent with this intent to exclude from the flow limit any possibly very large class of future connections. More specifically, excluding projected future connections from the flow limit merely because the corresponding not yet connected sewers had received WQM or LPTA permits before the CD&A was signed obviously risks overloading more than does keeping such future connections within the tally of connections contributing to the flow limit. In other words, if anything the DER and STA interpretation of the 300,000 gpd limitations clause is more consistent with our perceived intent of the CD&A than any of the possible interpretations LPTA may be favoring. The extrinsic evidence bearing on this matter weighs heavily in favor of DER's interpretation, as we have discussed at length. Therefore this Board will adopt DER's interpretation of the disputed 300,000 gpd limitation clauses. To be specific, we find that under the CD&A all future connections, in any of the three categories (a)-(c) listed in Finding of Fact 16b, contribute to the 300,000 gpd limitation the CD&A imposes on LPTA.

5. Construction of the CD&A language concerning gpd per connection.

In computing the additional flow produced by some specified number of future connections, e.g., the 757 future connections listed in the Table reproduced supra from Commonwealth Exhibit 5, it is necessary to have a figure for the expected

gallons of daily flow produced by a single sewer connection. The Figure used by Mr. Marrocco in his analysis of Mr. Torok's schedules (Commonwealth Exhibits 5 and 7) was 350 gpd per connection; in this way, as explained earlier, 757 additional connections were estimated by Mr. Marrocco to yield 265,000 gpd of additional flow. LPTA, LL and Derr have challenged this 350 gpd per connection figure; they claim that Mr. Marrocco should have used a much smaller figure than 350 gpd per connection. This contention, if accepted, would mean that the 300,000 gpd limitation imposed by the CD&A could accommodate many more future connections than DER computes.

As with the issue of the interpretation of the 300,000 gpd limitation clause in the CD&A, the reasons for objecting to this 350 gpd per connection figure are not well articulated by the objectors. Although there was considerable testimony on the issue of how to compute flow per connection, and although LPTA, LL and Derr all had proposed Findings of Fact on this issue (see, e.g., LPTA's proposed Findings of Fact 75-77), neither LPTA, LL nor Derr devoted any attention to this issue in the Argument sections of their briefs. However, we see no way for this LPTA-LL-Derr contention to be meritorious.

The CD&A defines the term "connection" as follows (recall Finding of Fact 16d):

> A "connection" shall mean an individual dwelling unit or the equivalent flow from a commercial or industrial facility.

The phrase "individual dwelling unit" is not defined in the CD&A, nor have the parties devoted any attention to its definition. The parties regularly have employed the term "equivalent dwelling unit," abbreviated as EDU. Moreover, the parties appear to have agreed--as evidenced, e.g., by Commonwealth Exhibits 5 through 8--that the number of available sewer connections in a development equals

the number of permitted EDU's. In other words, the parties appear to agree that whenever LPTA adds a sewer connection, it simultaneously is adding the flow contribution of one EDU to its system. Moreover, there is no room for misinterpreting the CD&A language relative to the flow contribution from one EDU (see Finding of Fact 16d):

> For the purposes of applying standards to the preceding paragraphs regarding flow and additional proposed connections, one hundred (100) gallons per person per day, or 350 gpd per EDU, shall be used as a guideline for residential development...

Therefore, for reasons which have been discussed in connection with the construction of the 300,000 gpd limitation clause, we rule that extrinsic evidence concerning the "correct" value of the flow per EDU is inadmissible in the instant appeal; for example, we rule inadmissible testimony by Harry C. Herbert, an expert witness, that actually measured flows corresponded to less than 190 gpd per EDU (N.T., p. 457. We further rule that Mr. Marrocco's use of the figure 350 gpd per connection to compute the additional flow associated with proposed additional connections was justified, recognizing that the parties have agreed the addition of a sewer connection adds the flow contribution of one EDU.

The CD&A does not specify how to compute the number of EDU's a proposed residential development will produce. Consequently testimony on this question is admissible. There is no doubt that the computation is complicated and leaves considerable room for error; in essence it is necessary to decide how many persons will reside in the development and how many gpd the average person will use (N.T., pp. 94-97 and 615-617; see also Springford Exhibit 24). However, the numbers of EDU's associated with the already permitted developments listed in the Table supra--which numbers formed the underlying basis for the calculations in Mr. Marrocco's letters of November 2, 1979 (Commonwealth Exhibit 6) and March 4, 1980 (Commonwealth Exhibit 8)--were furnished DER by LPTA's Mr. Torok (see

Commonwealth Exhibits 5 and 7). DER simply accepted these numbers of EDU's, without even checking the computations (N.T., pp. 95-97). Consequently it is surprising that LPTA feels it can object to Mr. Marrocco's use of these numbers of EDU's for permitted developments in his flow estimates (Commonwealth Exhibits 6 and 8).

Nevertheless LPTA seemingly does object (though only rather indirectly) to the numbers of EDU's for permitted developments furnished Mr. Marrocco by Mr. Torok. Namely, LPTA--and LL and Derr--point to testimony by Mr. Herbert that many of the EDU's in Lower Paxton Township are associated with apartment units (N.T., pp. 467 and 495-496), with the consequent implication that Mr. Torok's numbers of EDU's are too high; if the numbers of EDU's used by Mr. Marrocco are too high, then his estimate of the flow already committed to previous sewer connections also will be too high. However, the fact that some dwelling units were apartments presumably was taken into account when the numbers of EDU's associated with the permitted developments were computed originally (N.T. pp. 94-97 and 330). No evidence calling into question any of the specific calculations of the numbers of EDU's for permitted developments listed by Mr. Torok in Commonwealth Exhibits 5 and 7 was presented at the hearing. Therefore we rule that LPTA has not met its burden of showing that these numbers of EDU's should be altered; correspondingly, DER's use of these numbers of EDU's for permitted developments in its flow calculations was not an abuse of discretion.

On the other hand, there was considerable testimony that 1515, the originally computed number of EDU's for Springford Village (Commonwealth Exhibits 5 and 7) was much too high and should have been stated as 893 (Springford Exhibit 24, N.T., pp. 615-617).[4] The assumptions concerning numbers of residents and average flow

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[4] Incidentally, the calculation in Springford Exhibit 24 first estimates the number of residents and the average daily flow per resident in various types of residential

(Footnote continued on Page 40)

per resident underlying this new 893 figure are detailed in Springford Exhibit 24, but were not well substantiated by LL's expert witness James Haney—who only could say he was relying on "recent flow information" and "recent census data" not produced at the hearing (N.T., pp. 629-630). But even if LL met its burden of showing the number of EDU's for Springford Village should be 893, which we doubt LL did, the showing is quite immaterial to the instant appeal. As we have explained earlier (see section B supra), DER's reasons for denying the Springford Village permit application have varied, but always have rested on claimed requirements of the CD&A. The fact that the number of EDU's for Springford Village should be 893 rather than 1515, even if proved, would not indict any of DER's reasons for denying Springford Village its WQM permit, nor would that fact modify the reasoning in Mr. Marrocco's March 4, 1980 letter (Commonwealth Exhibit 8) wherein he found objectionable a request for merely 163 new connections on developments (such as Springford Village) not yet permitted by DER; 163 is far smaller than either 893 or 1515.

In summary, we rule that for the purposes of this appeal the additional flow corresponding to one additional sewer connection is 350 gpd, the amount of flow specified by the CD&A for one EDU. We further rule that use of 350 gpd per connection in the calculations performed by Mr. Marrocco in Commonwealth Exhibits 6 and 8, and his reliance on Mr. Torok's numbers of EDU's for permitted developments, did not constitute an abuse of discretion by DER.

(Footnote 4 continued)
units, and then converts this flow to EDU's using the figure 350 gpd per EDU. If this method of computing the number of EDU's for a proposed development was the one employed to obtain each of the EDU values quoted by Mr. Torok in his schedules (Commonwealth Exhibits 5 and 7), then there can be no quarrel whatsoever with the use of 350 gpd per EDU to convert EDU's to gallons of flow; with this method of computing the EDU's for a proposed development, multiplying the number of EDU's by 350 merely recaptures the original flow estimate from which the number of EDU's was obtained via division by 350. Mr. Marrocco, who testified that under all circumstances one EDU corresponds to 350 gpd, probably had in mind this justification for using the 350 gpd figure, but did not unmistakably articulate the basis for his assertion (N.T., pp. 94-96).

D. Alleged Failures to Comply with the CD&A

Much of the evidence presented in the instant appeal already has been discussed. The remaining evidence relevant to the parties' efforts to rebut or support DER's claimed reasons (described in Section B supra) for denying the Springford Village permit application now will be examined. As will be seen, in making this examination we again will be confronted by the need to construe the LPTA, which is unfortunately replete with ambiguities.

1. Whether LPTA's average daily flow during March to May 1980 was excessive.

As discussed in Section B supra, DER's brief, Mr. Marrocco's testimony and Mr. Marrocco's October 31, 1980 letter to LPTA (Springford Exhibit 22) all claimed that LPTA had exceeded the 1.454 mgd maximum flow capacity allocated to LPTA under the CD&A. In support of this claim DER presented records of the daily flow from LPTA's sytem into the Plant during the months of March, April and May 1980 (Commonwealth Exhibit 9, N.T. pp. 120-121). According to DER, these records show that the monthly average daily flow into the Plant from LPTA's system was 1.711 mgd in March 1980, 2.044 mgd in April 1980, and 1.850 mgd in May 1980 (N.T., pp. 124-126 and 144). The months of March, April and May were termed seasonally wet weather periods by DER's witnesses (N.T., pp. 80 and 165-166), a characterization not challenged by LPTA (N.T., p. 304) and borne out by examination of records showing the average rainfall during each month of 1980 (Swatara Exhibit 4). DER therefore maintains it has demonstrated LPTA violated the language from paragraph 4 of the CD&A quoted in Section A supra (see Finding of Fact 16e).

LPTA challenges this conclusion of DER's on a number of counts. First LPTA points out that the just quoted values for the monthly average daily flows in March, April and May 1980 were computed by omitting those flow readings which were deemed to be "very erratic" (N.T., pp. 122-123); LPTA implies this omission makes

the reported monthly averages suspect. However, the decision that a reading was very erratic was made solely by examining the fluctuations in the meter reading (N.T., p. 122). There was no testimony to indicate the decision to term a reading "very erratic" and thereby eliminate it from the monthly average was biased in any way by an intent to increase the LPTA monthly average daily flows; in fact, examination of Commonwealth Exhibit 9 clearly shows that the omitted days almost always were recorded as having very high LPTA flows, so that their inclusion in the average would have produced monthly average daily flows even higher than the values DER cited.[5] Thus this challenge to DER's reported monthly average daily flows for March, April, May 1980, to the effect that the "very erratic" days should not have been omitted when computing the monthly average flows, surely does not meet LPTA's burden, which—in addition to LPTA's general burden to prove disputed facts—here specifically includes LPTA's obligation, according to the CD&A, to:

> show that the average daily flow in its system has not exceeded the capacity allocated to it by the agreement with Swatara Township during any consecutive three-month period of seasonal wet weather.

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[5] This assertion was made by Mr. Marrocco (N.T., p. 58), and is easily verified from Commonwealth Exhibit 9 with the aid of elementary arithmetic which—as we have previously remarked (Footnote 3)—we believe the Board is entitled to employ. In fact, failure to eliminate the "very erratic" days in March 1980 appears to have been the error which caused DER to first report the average flow for that month was 2.118 mgd instead of the correct lower value of 1.711 mgd we have quoted in the text of this adjudication (see N.T., pp. 124-126 and 138 along with Commonwealth Exhibit 9). The total flow of 65.660 million gallons shown for LPTA in March 1980 (in Commonwealth Exhibit 9) yields 2.118 mgd when divided by 31; when this total is reduced by the flows on "very erratic" days and the resultant smaller flow is divided by 25 (the correct number of days to use, see immediately below), the correct value 1.711 is obtained. We also remark that the number of excluded days was not large: six in March 1980, three in April 1980, and six in May 1980, meaning the averages were based on 25 days for March 1980, 27 days for April 1980 and 25 days for May 1980. LPTA's proposed Finding of Fact #30, to the effect that DER's monthly averages were based on only 12 days in March 1980, 18 days in April 1980 and 14 days in May 1980 is a misreading of DER's witness Michael Kreiser's testimony, which in all fairness we must admit was very confusing. Mr. Kreiser did say (N.T., p. 127, line 15) that the number of excluded days in May 1980 was six, as we have stated; that this is the correct number of excluded days for May 1980 can be seen directly from Commonwealth Exhibit 9, which speaks for itself—Mr. Kreiser's testimony was not really needed on this score.

LPTA also maintains that if "very erratic" days are to be excluded from the monthly average daily flow computations, then days labeled "erratic" meter readings should be excluded as well. If "erratic" as well as "very erratic" LPTA flows are excluded, the LPTA monthly average daily flows (as computed by Mr. Haney, a consulting engineer for LPTA called as a witness by LL) become: 1.369 mgd for March 1980, 1.726 mgd for April 1980 and 1.812 mgd for May 1980 (N.T., pp. 177-178); these computations were made using 18 reliable (neither "erratic" nor "very erratic") days for March, 17 reliable days for April and 23 reliable days for May. These average flows for April and May 1980 still are above the 1.454 mgd maximum allowable flow; the value 1.369 mgd for March 1980 is within the permissible limit. LPTA claims (we infer, its brief never explicitly so states) that the 1.369 mgd March 1980 average daily flow figure suffices to make its required showing (paragraph 4 of the CD&A, Finding of Fact 16e) that the average daily flow in the LPTA system has not exceeded 1.454 mgd during a consecutive three-month period of seasonal wet weather.

It can be argued that LPTA is estopped from challenging the "erratic" readings, because the LPTA flow data in Commonwealth Exhibit 9 are obtained from LPTA's own equipment (N.T., p. 121); indeed, during July 1980 to April 1981 LPTA removed its flow meter for servicing, leaving STA and DER with no data whatsoever for LPTA's flow during that period (N.T., p. 131). Even if LPTA is not so estopped, it is LPTA's burden to demonstrate that both "erratic" and "very erratic" readings should be excluded; LPTA did not meet this burden. DER's Mr. Kreiser testified that an "erratic" reading was erratic only during a small portion of a day and therefore would cause very little error (less than one percent) in the recorded daily flow (N.T., pp. 122-123). Although this testimony of Mr. Kreiser's is not

very convincing, it is at least as convincing as the opposing testimony offered by Mr. Haney, a consulting engineer for LPTA called as a witness by LL; all Mr. Haney did was to offer his opinion, without any rationale, that the mere labeling "erratic" made a reading too suspect to be included. Therefore the claim of LPTA's described in the preceding paragraph, based on exclusion of "erratic" as well as "very erratic" readings, must be rejected.

LPTA offered evidence that on July 20, 1981 blockages were observed in STA's lines downstream of LPTA's meter (N.T., pp. 202-206). According to LPTA, these blockages would produce "surcharges" causing LPTA's meters to read a higher flow than the amount of sewage flow actually passing through the meter (N.T., p. 212). However, there was no quantitative testimony as to the magnitude of the "surcharge" effect on LPTA's readings (N.T., p. 218), nor could it be said whether the observed blockages were present in April 1980 (N.T., p. 207). We deem this blockage evidence insufficient to support any reduction of the average monthly flows (1.711 mgd for March 1980, 2.044 mgd for April 1980 and 1.850 mgd for May 1980) whose computations were described supra. The evidence presented by LPTA concerning the possible significance of a very sharp flow rise about 6:15 P.M. June 21, 1981 (N.T., pp. 249-252 and 654-656) is rejected--insofar as it is intended to show the 1.454 mgd limitation was not exceeded in March to May 1980--for similar reasons.

LPTA also raises broader objections (than the blockages just discussed) to the accuracy of the flow data in Commonwealth Exhibit 9; if sustained, these objections would cast doubt on any inferences DER or this Board drew from those data. LPTA, pointing to anomalies in computed Swatara Township flows, argues that its meters were generally unreliable when the March, April, May 1980 flow data were obtained (N.T., pp. 142-143). We believe LPTA well might be estopped from making this objection to data obtained from LPTA's own meters, which when taken were not

identified as "very erratic," i.e., "too unreliable to be used." However, even if this argument of LPTA's is accepted, there is no advantage to LPTA. As we have explained, it was LPTA's burden to show its average daily flow in any consecutive three-month wet weather period, e.g., March, April, May 1980, did not exceed 1.454 mgd; without reliable data to point to, LPTA hardly can meet this burden.

We conclude that insofar as the three-month period March, April, May 1980 is concerned, LPTA has not sustained its burden of showing the average daily flow in the LPTA system did not exceed 1.454 mgd. Rather, we find DER has shown, by the weight of the evidence, that the average daily flow during this three-month period significantly exceeded 1.454 mgd.

2. Whether the results for March to May 1980 should be discounted in the light of flow data for April to June 1981. However, LPTA also has presented evidence on the flows through its system during a later three-month period, namely April through June 1981. During this three-month period, the LPTA monthly average daily flows, computed omitting "very erratic" readings but including "erratic" readings, were 1.515 mgd for April 1981, 1.089 mgd for May and 1.168 for June (N.T., pp. 153-155, Commonwealth Exhibit 10, Appellant's Exhibits 10 and 11). These monthly average daily flows were computed from flow readings on 26 days in April 1981, thirty (30) days in May 1981 and 26 days in June 1981, as is evident from the notations on the faces of these Exhibits. The monthly average daily flows just quoted are well below 1.454 mgd for May and June 1981, and only very slightly above 1.454 mgd (four percent) for April 1981.

To assess the significance of the figures immediately supra, the Board must construe the phrase "the average daily flow...during any consecutive three-month period" employed in paragraph 4 of the CD&A; we need to decide what precisely is LPTA's burden under this phraseology, which is not defined in the CD&A. There are four reasonable possibilities, namely that under the CD&A it is LPTA's burden

to show:

(1) its monthly average daily flow has not exceeded 1.454 mgd during each month of a consecutive three-month period; or

(2) its monthly average daily flow has not exceeded 1.454 mgd during at least one month of a consecutive three-month period; or

(3) the average of the three monthly average daily flows in a consecutive three-month period has not exceeded 1.454 mgd; or

(4) the three-month average daily flow--defined as the total flow recorded by "reliable" readings during a consecutive three-month period divided by the total number of "reliable" readings--has not exceeded 1.454 mgd.

The testimony on this issue during the hearings was confusing and not wholly to the point. In its attempt to show that LPTA's flow during March, April, May 1980 was excessive (discussed in Section D1 supra) DER presented testimony to the effect that LPTA's monthly average daily flow had exceeded 1.454 mgd in each month March to May 1980; DER did not offer evidence on the averages denoted by (3) and (4) above. Thus this March to May 1980 testimony of DER's suggests that DER believed LPTA's burden is the one designated by (2) above, because to counter this burden DER took pains to demonstrate there was no month in the three-months period for which the monthly average daily flow was less than 1.454 mgd. This interpretation of LPTA's burden under the CD&A, namely that LPTA's burden is the one denoted by (2) supra, also is consistent with the plain meaning of the definition of hydraulic overload in 25 Pa. Code §94.1, whose language the CD&A appears to be imitating:

> Hydraulic Overload — The condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a plant, exceeds the average daily flow upon which the permit and the plant design are based during each month of a recent three month period or when the flow in any portion of the system exceeds its hydraulic carrying capacity.

Other testimony presented at the hearing, however (see, e.g., N.T. pp. 457-460 and Appellant's Exhibit 6 as well as STA's brief, p. 26), suggests that the parties may

have believed LPTA's burden under the CD&A was as described by (3) above, or even (4) [which is a more accurate definition of a three-months "average" than the average of three monthly averages which (3) uses].

Based upon the considerations described in the preceding paragraph, we find that the parties to the CD&A did not intend that LPTA's burden under paragraph 4 of the CD&A would be described by (1) above, and probably intended that the burden be as described by (2) above. The monthly average daily flows for April to June 1981, quoted earlier, obviously meet the burden (2), because only for April 1981 did the average flow exceed 1.454 mgd. The flows during April to June 1981 also meet the burdens described by (3) and (4) above. The average described by (3) is 1.257 mgd; the average described by (4)--excluding "very erratic" readings but including "erratic" readings as "reliable," which makes the total number of "reliable" days equal to 82 (26 plus 30 plus 26)--is 1.249 mgd. These last averages have been computed by the Board, again taking official notice of elementary arithmetic.[6]

We conclude that insofar as the three-month period April, May, June 1981 is concerned, LPTA has sustained its burden of showing the average daily flow in the LPTA system did not exceed 1.454 mgd. The question remains: What is the significance of this finding for April to June 1981, in view of our previous finding that the average daily flow for March to May 1980 exceeded 1.454 mgd? Of course,

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[6] We observe that the foregoing considerations and computations for April to June 1981 were not required--and therefore not discussed--for March to May 1980, because the average monthly flows in March to May 1980 each exceeded 1.454 mgd. It is easy to see that in this circumstance (which fails to meet burden (2) by definition), burdens (1), (3) and (4) also cannot possibly be met; rather than prove this general assertion, which we do not require and on which we do not rely, we simply will compute the averages (3) and (4) for March to May 1980, using as always nothing more than simple arithmetic. The average described by (3) is 1.868 mgd, the average described by (4) is 1.873 mgd.

the April to June 1981 data were not available to DER when it wrote the November 14, 1980 letter to Mr. Torok which gave rise to this appeal. However, this Board is not restricted to a review of DER's determination and--because we have conducted a de novo hearing--can render a decision based on the full record before us. Township of Salford v. DER, 1978 EHB 62.

STA's brief (p. 26) asks us to discount the April to June 1981 flow data on the grounds of an analysis leading STA to conclude:

> if LPTA's meter had been in operation, it would have exceeded its allocated capacity during another three month period of seasonal wet weather, in February, March and April of 1981.

The Board dismisses this analysis of STA's as too speculative. DER in its brief (p. 34) appears to be arguing that during any month the occurrence of days when the flow exceeds 1.454 mgd is a fact to be taken into account even if the average flow during that month is less than 1.454 mgd. It is true that in each month of the three-month period April to June 1981 there were individual days when the reported not "very erratic" daily flow through the LPTA system exceeded 1.454 mgd (N.T. pp. 129-130, Commonwealth Exhibit 10, Appellant's Exhibits 10 and 11). We see nothing in the CD&A, however, that requires us to give any weight whatsoever to the occurrences of individual daily flows exceeding 1.454 mgd when deciding whether or not LPTA met its burden under paragraph 4 of the CD&A.

LPTA also argues that LPTA's ability to meet the CD&A's 1.454 mgd limitation burden for the three-month period April to June 1981 should be dispositive, even though this burden was not met for the earlier March to May 1980 three-month period. In support of this argument LPTA appears to be looking toward the language of 25 Pa. Code §94.1 quoted earlier, especially the "recent three-month period" phrase (our emphasis) therein. LPTA argues that the April to June 1981 three-month

period was "recent," whereas the March to May 1980 three-month period was not "recent." The CD&A does not use the "recent three-month period" phrase however. Instead the CD&A (see Finding of Fact 16e) states that LPTA must show the average daily flow is less than 1.454 mgd in any three-month period of seasonal wet weather (our emphasis again). On this basis, our finding that the average daily flow exceeded 1.454 mgd during March to May 1980 is sufficient to show LPTA did not meet its 1.454 mgd limitation burden, whether or not later three-month average daily flows met the 1.454 mgd limitation.

On the other hand, we think the conclusion closing the last paragraph results from too narrow a reading of the CD&A's language; surely it would be contrary to the overall intent of the CD&A--namely to prevent future overloading of the Plant (as we have stated in Section C4 supra)--for DER (or this Board) to refuse to take into account demonstrated improvements in the LPTA system subsequent to May 1980. But LPTA has not met its burden of making this demonstration. LPTA's meter was out of service from July 1980 until April 1, 1981 (N.T. p. 131). Consequently, since the hearings on this appeal began in July 1981, April to June 1981 in essence was the only available three-month period (for the purposes of this appeal) whose average daily flow LPTA could compute following the earlier March to May 1980 "three-month period of seasonal wet weather"; correspondingly, in terms of available flow records, March to May 1980 was not much less "recent" than April to June 1981. We already have pointed out that STA speculates the 1.454 mgd requirement would not have been met in the three-month period February to April 1981. Furthermore, there was convincing evidence that the flow from LPTA's system into the Plant is strongly--though not perfectly--correlated with the amount of rainfall, with increased rainfall associated with increased flow (N.T. pp. 160-161, Commonwealth Exhibit 12). The

total rainfall during the three-month period March to May 1980 was 14.9 inches, even without including 4.95 inches of snow which fell in March 1980 (Commonwealth Exhibit 9). The total rainfall for the three-month period April to June 1981 was only 11.25 inches (Commonwealth Exhibit 10, Appellant's Exhibits 10 and 11), significantly less than in March to May 1980. There was no testimony to the effect that the rainfall in March to May 1980 was so unusually heavy as to be unlikely to recur. Thus it is not possible to infer from the April to June 1981 results that LPTA has sufficiently improved its system, or its metering, to feel confident the amount of rainfall encountered in March to May 1980 would--in three-months periods after June 1981--have resulted in average daily flows within the CD&A's 1.454 limitation.

In sum, we conclude that LPTA's ability to meet the 1.454 mgd limitation burden imposed by paragraph 4 of the CD&A for April to June 1981 does not negate LPTA's failure to meet this burden for March to May 1980. Correspondingly, we conclude that--on all the evidence, including the evidence at the hearing which was not available to DER on November 14, 1980--it is not an abuse of discretion for DER to take whatever actions the CD&A allows and intends DER to take when LPTA has failed to show its average daily flow in a three-month wet weather period is less than 1.454 mgd. On the other hand, this ruling--and other rulings in this adjudication--shall not preclude LPTA, subsequent to this adjudication, from presenting to DER new evidence, for DER's consideration, in support of LPTA's thesis that it now is meeting the CD&A 1.454 mgd average daily flow limitation. We stress that this evidence must be based on reliable actual flow measurements, and that LPTA--though not DER--will be precluded from questioning the reliability of the flow data LPTA itself obtains with its own metering equipment.

3. Whether LPTA has implemented its infiltration and inflow program as required by the CD&A. The CD&A mentions I&I requirements in two different contexts. In paragraph 1 of the CD&A (see Finding of Fact 16a) LPTA is required to implement an I&I plan "in accordance with schedules contained therein"; these schedules were introduced into evidence by DER as Commonwealth Exhibit 4. Then in paragraph 3 of the CD&A (see Finding of Fact 16c) it is stated that LPTA may obtain approval for additional connections beyond those permitted by the previously construed 300,000 gpd limitation (see Section C4 of this adjudication) upon submission:

> of a written request demonstrating that wet weather flows in the system have been sufficiently reduced by LPTA's infiltration and inflow program so as to create capacity for additional connections.

This paragraph of the CD&A goes on to say that DER will not unreasonably withhold permission for additional connections beyond the 300,000 gpd limitation, and that LPTA agrees to submit quarterly I&I progress reports.

DER's varied reasons for rejecting LL's Springford Village permit application have been discussed supra (in Section B of this adjudication). Concentrating now on reasons relating to I&I, we look first to Mr. Marrocco's letters of November 14, 1980 and October 31, 1980 (Springford Exhibits 23 and 22 respectively) to Mr. Torok. In his October 31, 1980 letter Mr. Marrocco wrote:

> The Consent Decree and Agreement also requires LPTA to submit progress reports on Infiltration/inflow and on management of connections on at least a quarter-annual frequency. We have not received any progress reports nor do we feel that your infiltration/inflow program is resulting in any reduction of flow.

Comparing this language of Mr. Marrocco's with the CD&A, it appears that on October 31, 1980 Mr. Marrocco was alleging failure of LPTA to comply with the

requirements of paragraph 3 of the CD&A; although Mr. Marrocco expresses his displeasure with the flow reduction accomplished by LPTA's I&I program, his letter does not allege that LPTA has failed to implement the I&I program in accordance with the schedules referred to in paragraph 1 of the CD&A. In his January 23, 1981 letter (Appellant's Exhibit 4), however, Mr. Marrocco--in addition to repeating the just-quoted allegations of his October 31, 1980 letter--did allege that LPTA had failed to implement the scheduled I&I reduction program (as we have explained in Section B supra).

Nevertheless, in his direct testimony (N.T. p.32) quoted in Section B Mr. Marrocco made no mention of I&I when explaining why DER denied the Springford Village permit application. This deficiency was rectified during Mr. Marrocco's cross examination (N.T. pp. 101-102) also quoted in Section B. In his cross examination, however, Mr. Marrocco made no mention of failure to comply with the requirements of paragraph 3 of the CD&A; instead, Mr. Marrocco complained only of failure to implement the I&I plan according to the schedule established by the CD&A, i.e., in his cross examination Mr. Marrocco cited failure to comply with paragraph 1 of the CD&A as a reason for rejecting the Springford Village application, but made no mention of failure to comply with paragraph 3 of the CD&A.

In the Introductory section of its brief, constituting a recapitulation of the events leading up to the instant appeal, DER has stated the reasons for its denial of the Springford Village application. DER's language (p. 3 of its brief) also has been quoted in Section B. As was noted in that Section, this language--which repeated almost verbatim language in DER's pre-hearing memorandum (paragraph 18)--makes no explicit reference to violations of the I&I requirements in either paragraph 1 or paragraph 3 of the CD&A. However, DER's brief opens its Discussion

section with the language (p. 20 of its brief):

> The issues before the Board in the case are clear and uncomplicated; namely:
>
> a) Whether LPTA has already allocated its maximum of 300,000 gpd of additional flow pursuant to an approved connection plan as provided for in Paragraph 2 of the CD&A;
>
> b) If yes, then whether LPTA has submitted a written request to DER demonstrating that wet weather flows in its system have been sufficiently reduced as a result of implementation of its I&I program (as identified in Paragraph 1 of the CD&A) so as to create additional capacity beyond the 300,000 gpd;...(emphasis in the original).

Evidently this quotation from DER's brief asserts the question whether LPTA has complied with the I&I requirement of the CD&A's paragraph 3 is an important issue before the Board, but says nothing about the issue whether LPTA complied with the I&I scheduling requirements of paragraph 1 of the CD&A.

In view of the way DER's testimony backs and fills on the I&I problem, we conclude that DER's brief's failure to mention compliance with the I&I schedule in paragraph 1 of the CD&A amounts to abandonment and waiver of that issue by DER. In other words, it appears that—despite Mr. Marrocco's testimony on cross examination (N.T. pp. 101-102)—DER is not offering LPTA's failure to meet the I&I schedule of paragraph 1 of the CD&A as a reason for DER's failure to approve the Springford Village permit application. Moreover, insofar as paragraph 3 of the CD&A is concerned, DER's brief no longer is alleging that LPTA's failure to submit I&I progress reports was the basis for DER's action, as Mr. Marrocco alleged in his October 31, 1980 letter. Instead, DER now is asserting merely that LPTA has failed to show its I&I program has reduced wet weather flows in its system sufficiently to create additional capacity beyond the 300,000 gpd limitation.

These findings about the I&I thrust in DER's brief enable us to dispense with detailed consideration of a mass of proffered testimony on whether or not LPTA

had met its I&I schedules (see, e.g., N.T. pp. 283-284 and 288-295). Similarly, we need not give detailed consideration to the testimony concerning whether or not LPTA was in violation of the CD&A paragraph 3 requirement that LPTA submit quarterly I&I progress reports (see, e.g., Appellant's Exhibit 5). We also observe that there is little or no evidence to support a finding that LPTA has shown its I&I program has reduced wet weather flows in its system sufficiently to create additional capacity beyond the 300,000 gpd limitation. The only hard evidence that might support such a showing is the set of April, May, June 1981 flow records discussed in section D2 supra: this evidence is very indirect, however, and its significance for weather as wet as, e.g., in March to May 1980, is questionable, for reasons which have been discussed. The oral testimony at the hearing actually pointed against LPTA's being able to make the aforementioned showing, because this testimony indicated that LPTA had very little quantitative information about wet weather infiltration and inflow into its system (see, e.g., N.T. pp. 290-298 and 340-341). Indeed, even LPTA's own brief does not propose a finding that LPTA has made the showing we have been discussing. Therefore we conclude, as DER maintains, that LPTA has not made the showing--described in paragraph 3 of the CD&A--that wet weather flows in its system have been sufficiently reduced by LPTA's I&I program to create capacity beyond the 300,000 gpd limitation.

4. Whether DER has correctly computed the remaining flow available to LPTA within the 300,000 gpd limitation. In Sections C4 and C5 of this adjudication we have ruled that Mr. Marrocco correctly interpreted the CD&A in computing the number of connections contributing to the 300,000 gpd flow limitation and in using 350 gallons per connection to compute the amount of additional flow associated with a given number of additional connections. However, we have not yet reviewed

Mr. Marrocco's computations to determine the correctness of his figure for the remaining flow available to LPTA within the 300,000 gpd limitation. This we now proceed to do. The cogent computations are those in Mr. Marrocco's letter of March 4, 1980 to Mr. Torok (Commonwealth Exhibit 8). In this letter Mr. Marrocco writes:

> 1. As of October 31, 1979 the Authority had 528 connection permits outstanding, representing a potential flow of 184,800 gpd;
>
> 2. The Authority has allocated 50,000 gpd to the Lower Paxton Township for landfill leachate disposal;
>
> 3. As of October 31, 1979 the Authority had an uncommitted flow allocation of 65,200 gpd, representing 186 new permits.[7]

Mr. Marrocco then went on to say that he therefore could not approve LPTA's February 1980 connection allocation revision request (Commonwealth Exhibit 7) because it asked for approval of 439 new connections, amounting to 153,650 gpd of additional flow, which is some 88,500 gpd in excess of Mr. Marrocco's computed remaining uncommitted allocation of 65,200 gpd.

In Section B3 supra we have explained that Mr. Marrocco correctly computed the 184,800 gpd figure quoted above from paragraph 1 of his letter. This fact understood, and accepting our rulings in Sections C4 and C5, there is no basis for challenging Mr. Marrocco's remaining allocation figure of 65,200 gpd, other than

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[7] These figures are not identical with those given by Mr. Marrocco in his letter of November 2, 1979 to Mr. Torok (Commonwealth Exhibit 6). On the basis of Mr. Marrocco's November 2, 1979 figures, DER's brief argues that LPTA has no uncommitted connections whatsoever, in contradiction with the Board's finding immediately infra. DER assumes, however, that LPTA already had committed itself to 757 additional connections. But these 757 additional connections merely are proposed connections for the period from the fourth quarter of 1979 through 1984, as was explained in Section C3 of this Adjudication. LPTA was not committed to all these 757 connections as of October 31, 1979; indeed, LPTA had not received approval for most of these proposed new connections. Therefore we have rejected DER's analysis based on Mr. Marrocco's November 2, 1979 letter, and have based our analysis on the figures given in Mr. Marrocco's later--and we believe more precisely formulated--March 4, 1980 letter.

the 50,000 gpd he asserts has been allocated for landfill leachate disposal. This figure was challenged by LPTA during the hearing, but for some unfathomable reason this challenge was not pursued in any of LPTA's, LL's or Derr's briefs. However, Mr. Torok claimed that DER had agreed the 50,000 gpd figure could be reduced to 34,000 gpd (N.T. p. 331), and this assertion of Mr. Torok's was confirmed by Mr. Marrocco, who under cross examination said (N.T. pp. 115-116):

> Q. Has there been some discussion about that 50,000 gallon allowance and whether it is actually 50,000 gallons or less than 50,000 gallons between you and Mr. Torok?
>
> A. When we had the discussions with Mr. Torok and he advised us that he was going to make the allocation of flow to the Township for the leachate flows, we discussed the appropriateness of the 50,000 gallon flow.
>
> We, in fact, did review those flows over the short term and determined that we could, for the purpose of the connection plan, reduce that to some 35,000 or 36,000 gallons per day on the trial period...

On this evidence we conclude that LPTA (though it seemingly didn't realize it) has sustained its burden of showing the 50,000 gpd landfill leachate figure used by Mr. Marrocco should be reduced to 35,000 gpd. This has the effect of increasing LPTA's uncommitted flow allocation as of October 31, 1979 by 15,000 gpd, from 65,200 gpd to 80,200 gpd. This latter figure, we rule, is the correct value of LPTA's uncommitted flow allocation (within the 300,000 gpd limitation for new connections) as of October 31, 1979. Dividing this figure by 350 yields the number of uncommitted connections as of October 31, 1979, namely 229 connections.[8]

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[8] This 229 figure is not modified by the fact that Commonwealth Exhibit 7 lists 77 connections "after October 31, 1979." These later connections come out of the already allocated 528 "connection permits outstanding" (see item 1 of the quotation supra from Mr. Marrocco's March 4, 1980 letter) and therefore do not affect his "uncommitted flow allocation" calculation.

E. DER's Refusal to Approve the Springford Village Permit Application

Our analysis of the evidence has led to the following key findings:

(a) LPTA has failed to meet its burden--under the CD&A--to show that the average daily flow in its system during a three-month period of seasonal wet weather has not exceeded 1.454 mgd.

(b) LPTA has not made the showing--described in paragraph 3 of the CD&A--that wet weather flows in its system have been sufficiently reduced by LPTA's I&I program to create capacity beyond the 300,000 gpd limitation.

(c) As of October 31, 1979, LPTA had an uncommitted flow allocation--within the 300,000 gpd limitation--equal to 80,200 gpd, corresponding to 229 uncommitted connections.

We now must decide whether DER's appealed-from action--namely DER's refusal to approve the Springford Village WQM sewerage permit application--was an abuse of discretion in the light of these (and our other) findings.

DER's brief argues that our key finding (a) above gives DER the right--under paragraph 4 of the CD&A--to deny LPTA any additional connections; this claim apparently was being made by Mr. Marrocco in his January 23, 1981 letter to Mr. Torok (Appellant's Exhibit 4) quoted in Section B of this Adjudication. The relevant language of paragraph 4 of the CD&A is our Finding of Fact 16e:

> Additionally, in order to meet its burden to show a decrease in flow, LPTA shall show that the average daily flow in its system has not exceeded the capacity allocated to it by the agreement with Swatara Township during any consecutive three-month period of seasonal wet weather, it being the express intent of this Agreement that in no instance shall any additional connections be permitted which would exceed the demonstrated capacity prorated to LPTA.

DER states that the clause beginning with "it being..." means that in no instance (DER's stress) may additional connections be permitted when the average daily flow

exceeds 1.454 mgd.

We believe, however, that DER mistakes the referent for the phrase "additional connections" in the clause on which DER relies. There is an ambiguity concerning this referent, as amplified below, but little extrinsic evidence to clarify the ambiguity was developed at the hearing.

In fact, what extrinsic evidence can be found does not validate DER's brief's claim; in a letter of June 20, 1980 from DER's James D. Miller to STA's engineering consultant (Springford Exhibit 21, N.T. pp. 417-418), Mr. Miller stated unconditionally that:

> The Agreement allows Lower Paxton to add 300,000 gpd to the treatment plant in additional connections.

Therefore we once again must construe the CD&A, on the basis of general principles of contract law. In particular, the CD&A must be read as a whole, and its words must be read in context (Westinghouse Air Brake, supra, quoted in Section C4 of this adjudication). Paragraph 2 of the CD&A (Finding of Fact 16b) unequivocally says:

> LPTA may add up to a maximum of 300,000 gpd of flow to the Plant by means of additional connections to the LPTA system.

Said paragraph 2 then instructs LPTA to file a plan demonstrating how connections will be managed within the 300,000 gpd limit, but nowhere in paragraph 2 is there any indication that these 300,000 gpd of additional connections are contingent on a demonstration that LPTA is able to show its average daily flow during a three-months period of seasonal wet weather has not exceeded 1.454 mgd. Paragraph 3 of the CD&A (Finding of Fact 16c) then says:

> The Authority may obtain from DER approval for additional connections beyond those permitted by the

> 300,000 gpd above specified upon submission of a written request demonstrating that wet weather flows in the system have been sufficiently reduced by LPTA's I&I program so as to create capacity for additional connections. (our emphasis)

Paragraph 4 of the CD&A defines the standards for the preceding paragraphs 2-3 of the CD&A regarding flow and additional proposed connections. Paragraph 4 first defines the flow per EDU and the meaning of the term "connection" (Finding of Fact 16d); in so doing it is defining standards for paragraph 2 of the CD&A. Then paragraph 4 uses the language beginning "Additionally, in order to meet..." quoted supra and constituting Finding of Fact 16e.

Examining the foregoing quotations from the CD&A, it seems clear that Finding of Fact 16e is setting the standard for paragraph 3 of the CD&A, the standard for paragraph 2 of the CD&A already having been set by Finding of Fact 16d. Finding of Fact 16e begins by explaining that to convince DER LPTA is improving its I&I, LPTA must show its average daily flow in wet weather has not exceeded 1.454 mgd. Consequently the last clause in Finding of Fact 16e quoted above (the clause on which DER relies), which is expatiating on the first clause in the same sentence, must intend that its phrase "additional connections" refers to "additional connections" in paragraph 3 of the CD&A, not in paragraph 2 of the CD&A (Finding of Fact 16b). Certainly it is unreasonable to think that paragraph 4 of the CD&A would limit the additional connections to LPTA in as rigorous a way as DER urges without any indication in paragraph 2 of the CD&A that the additional 300,000 gpd granted to LPTA are conditional on meeting the 1.454 mgd limitation.

Moreover, our construction helps understand the curious phrase "the demonstrated capacity prorated to LPTA" in the clause (Finding of Fact 16e) beginning with "in no instance..." (on which DER relies). Immediately preceding

this clause, in the very same sentence, the phrase "capacity allocated to it by the agreement with Swatara Township" is employed; all the parties agree this phrase equates to 1.454 mgd. DER's belief that Finding of Fact 16e states "in no instance shall additional connections be permitted which would exceed 1.454 mgd" requires that "the demonstrated capacity prorated to LPTA" also be equated to 1.454 mgd. It is not reasonable to suppose that the very same sentence used these two very different phrases to mean the very same quantity, namely 1.454 mgd. It is more reasonable to suppose the different phrases express different meanings. In particular, it is more reasonable to suppose the "demonstrated capacity" phrase in Finding of Fact 16e--like the "additional connections" phrase in the same sentence of the CD&A--refers to paragraph 3 of the CD&A (Finding of Fact 16c) quoted supra. Examining this quotation, we see that it contains the clause "demonstrating...so as to create capacity for additional connections" (our emphasis). In other words, it is reasonable--and completely consistent with our construction of paragraph 4 of the CD&A--to make the construction that the phrase "demonstrated capacity prorated to LPTA" refers to the demonstrated capacity for additional LPTA connections discussed in paragraph 3 of the CD&A, and does not refer to the 1.454 mgd capacity allocated to LPTA by its agreement with Swatara.

We recall our key finding (b) above, to the effect that LPTA has not made the showing required to obtain additional capacity beyond the 300,000 gpd limitation. Therefore we conclude from our construction of paragraph 4 of the CD&A that [now appealing to key finding (c) above] as of October 31, 1979 LPTA was entitled to 229 additional connections, but no more than 229.

We stress that this conclusion does not depend on--and indeed rejects--DER efforts to support its return of the Springford Village application by arguing

that the Plant was experiencing flows in excess of its 3.0 mgd design capacity during periods when LPTA's average daily flow exceeded 1.454 mgd. DER has chosen to justify its action on the basis of the CD&A, not on the basis of its powers under 25 Pa. Code chapter 94 to deny additional connections when such connections are likely to overload the Plant. Consequently the issue whether the Plant has or has not experienced flows exceeding 3.0 mgd is not before us at this time; we need not rule on this issue, and correspondingly need not analyze the extensive evidence offered concerning the total flow through the Plant (see, e.g., N.T. pp. 132-134 and 200-201). Nevertheless we will add gratuitously that we agree with LPTA--and LL and Derr-- that if DER felt the Plant was overloaded or threatened with overloading, then under 25 Pa. Code chapter 34 DER was obliged to refuse additional connections by any of the three municipalities feeding into the Plant (i.e., by Hummelstown and Swatara Township as well as by LPTA); instead, DER did allow Hummelstown and Swatara additional connections while rejecting LPTA's requested additional connections (N.T. p. 92, Appellant's Exhibit 8). On the other hand, DER legitimately could require LPTA to take special remedial measures, not required of Hummelstown and Swatara, if DER believed LPTA's poor I&I controls were the primary source of the Plant's overload or projected overload.

Our ruling that as of October 31, 1979 LPTA was entitled to 229 additional connections also has rejected DER's argument that, under Shrewsbury Township Board of Supervisors v. DER, 1975 EHB 436, DER could not have intended to--and should not be required to--permit additional connections which would result in flows above the amount 1.454 mgd allocated to LPTA under the Intermunicipal Agreement. In Shrewsbury, DER denied additional connections because permitting them would have overloaded the sewage treatment plant receiving the Shrewsbury flow.

As we have explained in the preceding paragraph, DER has chosen not to rely on its powers under 25 Pa. Code chapter 34 to refuse connections if the STA Plant is overloaded. These powers are retained by DER under paragraph 8 of the CD&A, which states:

> Nothing in this agreement shall affect the rights of any parties in the event that an actual hydraulic or organic overload occurs in the treatment plant, the sewer system or any part of it.

LPTA's lines are a "part " of the Plant in the context of this quotation from paragraph 8 of the CD&A. But DER has not offered as a reason for denying the Springford Village permit application--nor argued nor shown--that a flow exceeding 1.454 mgd in the LPTA lines overloads those lines.

F. Conclusion

Springford Village requested a permit for 1515 EDU's, equivalent to 1515 additional connections as explained in Section C5 of this adjudication (N.T. p. 557, Commonwealth Exhibit 7, Springford Exhibit 20). Because this request far exceeds the 229 additional connections to which LPTA at most would be entitled under the CD&A, DER's rejection of the Springford Village permit application was not an abuse of discretion on November 14, 1980 (when the application was returned by DER, Appellant's Exhibit 2) and would not be an abuse of discretion today. Nor would this conclusion be altered if the number of EDU's for Springford Village really should have been 893 rather than 1515 (recall the discussion in Section C5 supra).

It would be and would have been an abuse of discretion for DER, under the CD&A, to refuse an LPTA request for additional connections not exceeding 229 in number, always assuming the request otherwise (i.e., except for its possible contribution to the total LPTA flow) meets DER requirements. LL's witness

Mr. DeSouza indicated DER was informed LL was willing to accept approval of Springford Village connections "on a staged basis," but his testimony was unclear on precisely what was communicated to DER, and was confusing on how many connections fewer than 1515, if any, LL was willing to accept (N.T. pp. 570-572); Mr. DeSouza's testimony does not alter our conclusion that DER's rejection of the Springford Village permit application was not an abuse of discretion. Similarly, it was not an abuse of discretion for DER's Mr. Marrocco--in his March 4, 1980 letter to Mr. Torok (Commonwealth Exhibit 8)--to have rejected Mr. Torok's connection strategy (Commonwealth Exhibit 7) requesting a total of 439 new connections; even excluding developments which had not yet received WQM permits, LPTA was asking for 276 new connections, more than the 229 to which LPTA was at most entitled.

Mr. Torok testified that a number of the developments which already had WQM permits were no longer active, and suggested this fact could be a basis for awarding LPTA additional connections (N.T. pp. 386-389 and 573-577). We agree, to a point. If LPTA can demonstrate that it is foreclosing some of the connections originally included in Mr. Marrocco's 528 "outstanding" connection permits (see Commonwealth Exhibit 8 and recall the discussion in Section C3 supra concerning Mr. Marrocco's March 4, 1980 computations), then those foreclosed connections would become available for new--not previously requested--connections; the number of such foreclosed connections would be available in addition to the previously found maximum number of 229 connections, without causing the 300,000 gpd limitation to be exceeded.

LPTA also may be eligible for additional connections <u>if</u> it can make the so far absent showing [recall key finding (b) in Section E supra] that wet weather

flows in its system have been sufficiently reduced by LPTA's I&I program to create capacity beyond the 300,000 gpd limitation. In this regard, the Board remarks that if poor metering has prevented LPTA from making this showing before today, LPTA has only itself to blame. For years, LPTA has been content with meters which are most inaccurate--and tend to overestimate the flow--under just those circumstances, namely high flows, when LPTA most urgently requires accurate readings to protect itself against charges of excessive I&I (N.T. pp. 244-246 and 346). LPTA also has been content to have STA estimate the flow from Swatara Township's sewers by a subtraction technique (N.T. p. 142) which automatically minimizes Swatara's contribution if LPTA's is overestimated, to an extent that Swatara sometimes is recorded as having negative flows (N.T. p. 143); if Swatara also has I&I deficiencies, it would be difficult to find a more effective way (than this method of calculating Swatara's flows) to direct DER's attention towards LPTA's I&I deficiencies and away from Swatara's.

We stress that the rulings supra in this Conclusion Section F, concerning the number of additional connections to which LPTA is entitled, are based on the assumption that DER will continue to rely on the CD&A for authority to refuse LPTA additional connections. As we have noted at the close of Section E, DER has retained its powers to evaluate LPTA's requests for additional connections under the authority of 25 Pa. Code chapter 34. Finally we remark that we are sympathetic to the financial and other problems of LL and Derr, recounted at the hearing (N.T. pp. 562-570 and 644-645). However, DER's actions in this matter were within its discretion, as we already have ruled, and there was no evidence that DER misled LPTA, LL or Derr in any way; as already pointed out in Section A supra, both LL and Derr were aware, before the CD&A was signed, that DER had been concerned about

excessive flow in the LPTA system.

CONCLUSIONS OF LAW

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

2. The July 27, 1979 Consent Decree and Agreement is binding on DER and LPTA, its signatories.

3. LL and Derr must expect that DER--in acting on requests by LL and Derr for additional connections to the LPTA system--will hold LPTA to the terms of the CD&A.

4. LL and Derr had notice of the CD&A, by virtue of publication of its terms in the Pennsylvania Bulletin.

5. The terms of the CD&A are not subject to collateral attack or other challenge by LL and Derr.

6. In using a figure of 1.454 mgd as a measure of whether LPTA's flow was excessive, DER was not unjustifiably projecting itself into the workings of the March 19, 1970 Inter-Municipal Agreement between LPTA, STA and Hummelstown, because the 1.454 mgd figure had been agreed upon in the CD&A between LPTA and DER.

7. It is not an abuse of discretion for DER to hold LPTA to the terms of a consent decree and agreement between DER and LPTA which has been adopted as a final order of this Board.

8. In the instant appeal, our review of DER's action can be limited to deciding whether DER's action was an abuse of discretion under the terms of the CD&A.

9. In the instant appeal, the burden of proving disputed facts is on the appellants.

10. The CD&A must be construed in accordance with general principles of contract law, as enunciated by Pennsylvania courts.

11. The parol evidence rule applies to the CD&A, which is an integrated agreement; letters written before the CD&A was signed, offered into evidence by LPTA, cannot be used to contradict the terms of the CD&A.

12. The aforementioned letters are admissible to resolve alternative possible interpretations of the language in the CD&A concerning "additional connections" contributing to the 300,000 gpd limitation.

13. Extrinsic evidence concerning the "correct" value of the flow associated with one EDU is not admissible in the instant appeal, because the CD&A unmistakably states one EDU is associated with 350 gpd.

14. Because the CD&A does not specify how to compute the number of EDU's a proposed residential development will produce, testimony on this issue is admissible.

15. LPTA has not met its burden of showing that the numbers of EDU's for permitted developments in Commonwealth Exhibits 5 and 7 should be altered.

16. DER's use of the aforesaid numbers of EDU's for permitted developments in its flow calculations was not an abuse of discretion.

17. Under the CD&A it is LPTA's burden to show that the average daily flow in its system has not exceeded 1.454 mgd during any consecutive three-month period of seasonal wet weather, which includes the three-month period March, April, May 1980.

18. It is LPTA's burden to show that "erratic" as well as "very erratic" readings should be excluded from the calculations of average daily flow during the consecutive three-month period March, April, May 1980.

19. LPTA did not meet this burden (stated in Conclusion of Law 18).

20. LPTA did not meet its burden of showing the average daily flow in its system during the three-month period March, April, May 1980 did not exceed 1.454 mgd.

21. Insofar as the three-month period April, May, June 1981 is concerned, LPTA did sustain its burden of showing the average daily flow in its system did not exceed 1.454 mgd.

22. The CD&A does not require us to give any weight whatsoever to the occurrences of individual daily flows exceeding 1.454 mgd when deciding whether or not LPTA met its burden of showing the average daily flow in a three-month period exceeded 1.454 mgd.

23. It would be contrary to the overall intent of the CD&A for DER or this Board to refuse to take into account demonstrated improvements in the LPTA system subsequent to May 1980.

24. LPTA has not met its burden of demonstrating improvements in its system subsequent to May 1980; in particular LPTA has failed to show that its infiltration and inflow program has reduced wet weather flows in its system sufficient to create additional capacity beyond the 300,000 gpd limitation.

25. LPTA's ability to meet the burden of showing the average daily flow in its system did not exceed 1.454 mgd during the three-month period April to June 1981 did not negate LPTA's failure to meet this burden for the three-month period March to May 1980.

26. LPTA is not precluded, subsequent to this adjudication, from presenting to DER new evidence, for DER's consideration, in support of LPTA's thesis that it now is meeting its burden described in Conclusion of Law 17, but

in so doing LPTA will be precluded from questioning the reliability of data obtained with LPTA's own metering equipment.

27. DER has waived LPTA's failure to comply with the I&I schedule of the CD&A as a reason for DER's failure to approve the Springford Village permit application.

28. DER has waived LPTA's failure to submit I&I progress reports as a reason for DER's failure to approve the Springford Village permit application.

29. LPTA has sustained its burden of showing the 50,000 gpd landfill leachate flow figure used by Mr. Marrocco should be reduced to 35,000 gpd.

30. LPTA's failure to meet its burden described in Conclusion of Law 17 does not--under the CD&A--give DER the right to deny LPTA additional connections falling within the 300,000 gpd limitation.

31. Additional connections, to be tallied when computing whether the 300,000 gpd limitation is being complied with, include all new connections falling within the three categories (a), (b), (c) listed in paragraph 2 of the CD&A.

32. As of October 31, 1979 LPTA, under the CD&A, was entitled to 229 additional connections, but no more than 229.

33. The issues whether the Plant has or has not experienced flows exceeding 3.0 mgd, or is in a state of overload or projected overload, are not before us at this time.

34. Under the CD&A, DER retains its powers under 25 Pa. Code chapter 34 to regulate new connections by LPTA (and the other participating municipalities).

35. DER's rejection of the Springford Village permit application was not an abuse of discretion.

36. Under the CD&A it would have been and would be an abuse of discretion for DER to refuse an LPTA request for additional connections not

exceeding 229 in number, assuming the request otherwise (i.e., except for its possible contribution to the total LPTA flow) meets DER requirements.

37. Under the CD&A, if LPTA can demonstrate it is foreclosing some of the connections originally included in Mr. Marrocco's 528 "outstanding" connection permits, then those foreclosed connections would become available to LPTA for new--not previously requested--connections over and above the 229 new connections to which it already is entitled under the CD&A.

38. Under the CD&A, LPTA also may be eligible for additional connections if it can make the so far absent showing that wet weather flows in its system have been sufficiently reduced by LPTA's I&I program to create capacity beyond the 300,000 gpd limitation.

39. DER's Mr. Marrocco's March 4, 1980 refusal to approve LPTA's connection strategy requesting 439 new connections was not an abuse of discretion.

O R D E R

AND NOW, this 16th day of July, 1982:

1. The appeals of Lower Paxton Township Authority and Locust Lane in this matter are dismissed.

2. Insofar as Thomas E. Derr may have acquired claims as an appellant by virtue of his intervention in this matter, those claims are rejected.

3. Future requests by Lower Paxton Township Authority for new connections shall be evaluated consistent with this Adjudication, if DER

chooses to rely for its evaluation on the terms of the July 27, 1979 Consent Decree between DER and Lower Paxton Township Authority; however, DER is not precluded from also relying, in whole or in part, on the requirements of 25 Pa. Code chapter 94 or of other applicable statutes and regulations.

ENVIRONMENTAL HEARING BOARD

DENNIS HARNISH
Chairman

ANTHONY MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 16, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TIMOTHY AND MERLE KEISTER :

:

Docket No. 81-206-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PANSY HOLLOW CONTRACTORS, INC

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

By: Edward Gerjuoy, Member, July 21, 1982

The relevant facts in this matter have been set forth in the Board's Opinion and Order Sur Request For Continuance, dated May 26, 1982, and need not be detailed again here. Briefly, the Keisters deliberately did not appear at the May 24, 1982 scheduled hearing in this appeal, and offered no acceptable excuse for not appearing.

The other parties did appear at the hearing. No testimony was taken, but the Board--in its Order of May 26, 1982--did offer the Keisters an opportunity to file a brief making their legal arguments. No such brief has been filed, although the scheduled last day for receiving the Keisters' brief is well past.

The burden of proof in this appeal is on the Appellants [21 Pa. Code 21.101(c)(3)]. Appellants, who presented no evidence or legal arguments, have not met this burden.

This appeal is dismissed, with prejudice.

ORDER

AND NOW, this 21st date of July, 1982, the appeal of Timothy and Merle Keister in this matter is dismissed, with prejudice.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: July 21, 1982

cc: Bureau of Litigation
Merle Keister
Timothy Keister
Gary Yeaney
Ward T. Kelsey, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MELVIN D. REINER :

:

Docket No. 81-133-G

:

Surface Mining
Bond Forfeiture

v. :

52 P.S. §1396.1 et seq.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member, July 28, 1982

Melvin D. Reiner ("Reiner"), a surface mine operator, has appealed DER's forfeiture of surface mining bonds posted by Reiner to guarantee reclamation of a number of sites mined by Reiner.

Hearings were held on this matter on January 13 and 14, 1982 and on February 25, 1982. At no time was Reiner represented by counsel, although the hearing examiner urged Reiner to obtain counsel, and offered to postpone the hearing in order that Reiner could get counsel (N.T. p. 3). Briefs were submitted by the parties, and Reiner prepared his own brief despite the hearing examiner's renewed advice that Reiner secure legal assistance (N.T. p. 450).

This matter involves four bonds in all. One was a collateral bond, put up by Reiner personally in the form of a bank Certificate of Deposit. The

other three bonds were surety bonds, put up by the United Surety and Financial Guarantee Co. ("United"), a Pennsylvania corporation. United was notified by certified mail that its bonds had been forfeited, but did not appeal the forfeiture and did not appear at the hearings (N.T. pp. 18-19 and 66).

FINDINGS OF FACT

1. The Appellant is Melvin D. Reiner, who has conducted surface mining operations, as an operator, in Ringgold Township, Jefferson County, Pennsylvania.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth authorized to administer the provisions of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, as amended, 52 P.S. §1396.1 et seq. ("SMCRA") and the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, as amended, 35 P.S. §691.1 et seq. ("CSL"), and the regulations promulgated thereunder.

3. Pursuant to applications submitted by Reiner to DER, Reiner was issued Mine Drainage Permit ("MDP") 3874SM42 on January 16, 1975, which permit was amended on November 26, 1975.

4. Pursuant to applications submitted by Reiner to DER, Reiner was issued Mining Permit ("MP") No. 1277-1 on January 23, 1975, was issued MP No. 1277-1(A) on April 11, 1975, and was issued MP No. 1277-2 on March 4, 1976.

5. The aforesaid MDP and MP's authorized Reiner to conduct surface mining on the areas covered by said mining permits in Ringgold Township, Jefferson County, Pennsylvania.

6. Reiner has submitted the following bonds for the following mining permits to DER to guarantee Reiner's compliance with the SMCRA, the CSL, DER's regulations, and the conditions of the MDP and MP's for the sites covered by the bonds:

Bond	Mining Permit	Amount
Surety Bond No. 10429	1277-1	$5,750.00
Surety Bond No. 10430	1277-1(A)	6,267.50
Surety Bond No. 13475	1277-1(A)	5,000.00
Collateral Bond (Certificate of Deposit No. 1196)	1277-2	5,750.00

7. In a letter dated July 31, 1981, sent to Reiner by certified mail, DER's Richard Boardman, Associate Deputy Secretary for Environmental Protection, notified Reiner that the aforesaid bonds were being forfeited.

8. The notice of forfeiture in this July 31, 1981 letter is the DER action which gave rise to the instant appeal.

9. On July 31, 1981, Mr. Boardman had written that the bonds were being forfeited because Reiner had not corrected the violations cited by letter dated February 4, 1981, and because Reiner had not reclaimed the area affected in the course of surface mining operations.

10. The aforementioned February 14, 1981 letter to Mr. Reiner listed the following violations:

1. Excessive acidic discharge.
2. Excessive iron discharge.
3. Excessive manganese discharge.
4. Excessive suspended solids discharge.

11. DER's pre-hearing memorandum, filed October 13, 1981, contains a "Statement of Facts Which Appellee Intends To Prove."

12. Nowhere in this Statement of Facts is there any mention of the excessive discharges listed in the aforementioned February 14, 1981 letter (see Finding of Fact 10).

13. Instead, for each of the sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2, DER's pre-hearing memorandum alleged that the following conditions exist at the site:

a. The site has been affected by surface mining but has not been backfilled, regraded and revegetated as required.

b. Reiner has failed to develop, implement and install erosion and sedimentation controls as required.

c. Reiner has failed to maintain operable backfilling equipment on the site.

14. In addition, for the site covered by Mining Permit No. 1277-1(A), DER's pre-hearing memorandum alleged that Reiner has allowed water to accumulate in a pit on the site.

15. When Reiner received Mr. Boardman's July 31, 1981 letter (see Finding of Fact 7) he believed he already had corrected the conditions causing the excessive discharges listed in Finding of Fact 10.

16. On February 2 and February 13, 1981, Reiner wrote DER that he had corrected the conditions causing the excessive discharges.

17. Reiner made the same assertion--that he had corrected the conditions causing the excessive discharges--in his Notice of Appeal.

18. Reiner is not an educated man.

19. Reiner concluded from Mr. Boardman's July 31, 1981 letter that DER was forfeiting his bonds primarily because Reiner allegedly had not corrected the excessive discharges listed in Finding of Fact 10.

20. DER's pre-hearing memorandum was filed three months before the hearing on this appeal began, on January 13, 1982.

21. At the hearing, Reiner clearly understood that DER now was pointing to Reiner's alleged failure to reclaim his mining sites as the primary reason for forfeiting the bonds.

22. On January 14, 1982, when Reiner began to present his case in chief, he was prepared to introduce 23 inspection reports, letters and other documents (contained in 19 exhibits) into evidence.

23. The large majority of these 23 documents were concerned with Reiner's reclamation activities, not with whether or not Reiner had caused the excessive discharges listed in Finding of Fact 10.

24. Reiner was not represented by an attorney during the hearing, and prepared his post-hearing brief himself.

25. Reiner's post-hearing brief fully argues that DER has failed to prove the alleged conditions at the mining sites which have been listed supra (see Findings of Fact 13 and 14).

26. Other than very peripherally, DER's testimony was not concerned with the aforementioned excessive discharges.

27. On June 26, 1978, Reiner and DER executed a consent agreement wherein Reiner agreed to perform various specified reclamation activities at the mining sites.

28. In this consent agreement, Reiner agreed that any breach (of the specified reclamation activities he had promised to perform) should result in

forfeiture of the bonds which are the subject of the instant appeal.

29. In January of 1976, Reiner sold his mining business to the Foxmont Coal Company ("Foxmont").

30. Reiner permitted Foxmont to strip Reiner's sites under the authority of Reiner's mining permits, although Foxmont had not obtained—or even applied for—its own mining permits.

31. Foxmont failed to pay its debts and went out of business some time before February 1977.

32. Foxmont engaged in stripping operations on the mining sites covered by MP Nos. 1277-1(A) and 1277-2.

33. All the stripping on the site covered by MP No. 1277-2 was performed by Foxmont.

34. Reiner has affected portions of the site covered by Mining Permit No. 1277-1 (N.T. pp. 163 and 268), and on these affected portions:

(1) Backfilling has been accomplished (N.T. pp. 197-198).

(2) Revegetation has been only partially accomplished (N.T. pp. 86, 103-106, 109 and 360-363, Commonwealth Exhibits 20 and 22).

(3) The planting has not been accomplished in accordance with specifications set forth by Pennsylvania State University (N.T. pp. 352-353).

(4) Erosion is observable on unplanted areas (N.T. pp. 86-87, 159 and 258-259).

(5) As of January-February 1982, conditions had been unchanged for one to two years (N.T. pp. 264 and 339).

(6) There has been no mining since June 1978 (N.T. pp. 129-130 and 354).

35. Reiner and Foxmont have affected portions of the site covered by

Mining permit No. 1277-1(A) (N.T. pp. 255, 271-273 and 356), and on those affected portions:

(1) Backfilling has been only partially accomplished (N.T. pp. 93-94, 111-112 and 365-366).

(2) Operable backfilling equipment has not been maintained (N.T. pp. 202-203 and 260).

(3) Revegetation has been only partially accomplished (N.T. pp. 117 and 122, Commonwealth Exhibits 25 and 28).

(4) The planting has not been accomplished in accordance with specifications set forth by Pennsylvania State University (N.T. pp. 352-353).

(5) There is a pit in which water has accumulated (N.T. pp. 115-116 and 263, Commonwealth Exhibit 24).

(6) Erosion gullies are observable (N.T. pp. 119-120, Commonwealth Exhibit 26).

(7) As of January-February 1982, conditions on the site had been unchanged for a year (N.T. p. 339).

(8) As of January-February 1982, there has been no mining for about a year (N.T. p. 130).

36. Foxmont affected portions of the site covered by Mining Permit No. 1277-2 (N.T. pp. 271-273), and on those affected portions:

(1) Backfilling has been only partially accomplished (N.T. pp. 401-402 and 407-409); pits remain to be filled (N.T. pp. 97-98).

(2) Operable backfilling equipment has not been maintained (N.T. p. 264).

(3) Reiner has not planted vegetation (N.T. pp. 350 and 354).

(4) As of January-February 1982, conditions on the site had been unchanged for two years (N.T. p. 339).

(5) There has been no mining since 1976 (N.T. p. 355).

37. DER's only witness as to conditions at the sites was Edward V. Moore, the surface mining conservation inspector responsible for inspecting Reiner's mining sites.

38. Reiner, the only witness for his side, strongly contested Mr. Moore's testimony.

39. On the whole, however, Reiner's substantive challenges to Mr. Moore's testimony were confined to details; Reiner did not rebut Mr. Moore's basic thesis that none of the mining sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2 had been completely reclaimed.

40. Reiner testified that he "wanted to complete the backfilling" to raise the value of his property, "which is worth almost nothing now in its condition."

41. Under the terms of each bond forming the subject of this appeal, any violation of the associated mining permit, or of applicable rules and regulations, is a default justifying forfeiture of the bond.

42. Reiner alleged that he had sent DER many letters notifying DER of his progress and problems in reclamation, but had not received replies to these letters.

43. However, DER's John Matviya testified that the bulk of the aforementioned allegedly unanswered letters actually were answered, and introduced Commonwealth Exhibits 33-35 in support of this testimony.

44. There was no evidence that the aforementioned alleged lack of

response by DER to Reiner's letters was to Reiner's detriment; if anything, Reiner gained added time which he could have used to accomplish the required reclamation.

45. Reiner claimed that he had sent DER reclamation schedules in conformity with the requirements of the June 26, 1978 consent agreement (see Finding of Fact 27), but that DER had not responded to these proposed schedules.

46. The latest of these aforementioned proposed reclamation schedules was contained in a letter dated January 10, 1980, which stated that reclamation, including planting, would be completed in Fall 1980 on each of the sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2.

47. On January 14, 1981, during an inspection of Reiner's mining sites, Mr. Moore "shut down" Reiner's operation because water was being pumped to "inadequate treatment facilities."

48. Reiner complained that Mr. Moore never acknowledged receipt of the February 2 and February 13, 1981 letters asserting the problem causing the aforesaid "shut down" had been corrected (recall Finding of Fact 16), and further complained that Mr. Moore had never returned to tell Reiner he could start up again.

49. The pumping problem referred to in Finding of Fact 47 pertained to a pit on the mining site covered by MP No. 1277-1(A).

50. Except for a generalized appeal to financial exigency, Reiner does not explain why being ordered to cease operations on the site covered by MP No. 1277-1(A) prevented the completion of reclamation on the sites covered by MP Nos. 1277-1 and 1277-2.

51. Reiner had been having financial problems (including having to pay fines for various violations) since 1977, and had been having difficulties

obtaining a permanent mining license.

52. Reiner had been shut down by Federal inspectors about April 1979 and was again shut down by Federal inspectors some time prior to September 1981.

53. Reiner offered no reasons, other than pure speculation, to support his arguments that his financial problems would have been alleviated sufficiently to permit him to complete his required reclamation on schedule, had he only not been shut down on January 14, 1981.

54. From the record in this appeal, and from Reiner's story in his post-hearing brief (which was not treated as on the record for the purposes of this adjudication), there is no reason to believe DER has treated Reiner harshly or unfairly.

55. During the course of his mining operations, Reiner never saved or escrowed money to provide for reclamation.

56. Reiner filed for personal bankruptcy in June 1981, and was adjudged bankrupt in November 1981.

57. Reiner presently does not have the money to complete backfilling on the sites.

58. Reiner presently doesn't have the money to hire an engineer to submit the necessary water monitoring, blasting and erosion and sedimentation plans required by the new Surface Mining Regulations.

DISCUSSION

In this bond forfeiture appeal, the burden of proving the facts that can justify forfeiture falls on DER, for reasons this Board has explained in

Rockwood Insurance Company v. DER, EHB Docket No. 78-168-S (issued February 18, 1981). This burden is spelled out in section 4(h) of the SMCRA, 52 P.S. §1396.4(h), which provides in part:

> If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited...

The first issue to be decided, therefore, is whether Reiner "failed or refused to comply with the requirements of the act in any respect for which liability has been charged" on the various bonds which DER seeks to forfeit.

A. DER's Reasons for Forfeiting the Bonds

This issue is somewhat clouded by the fact (which we have noticed in other appeals as well) that DER's reasons for its action were not as clearly and consistently articulated to the appellant as this Board or DER should like. Reiner was notified of the forfeiture in a letter dated July 31, 1981, sent certified mail, written by DER's Richard Boardman, Associate Deputy Secretary for Environmental Protection. In this letter, which was the cause of the instant appeal and is attached to the appeal, Mr. Boardman wrote:

> You have failed and continue to fail to correct the violations cited by letter dated February 4, 1981 and to reclaim the area affected in the course of surface mining operations. The violations are not corrected as of inspection conducted at the surface mining operations on May 21, 1981. In accordance with Section 4(h) of the Surface Mining and Reclamation Act, the Department hereby certifies and declares forfeited the following bonds...

The letter dated February 4, 1981 to which Mr. Boardman refers is Commonwealth Exhibit 17. In pertinent part, this letter reads as follows:

> On 1/14/81, an inspection was conducted at the above mentioned mine site by Mine Conservation Inspector Edward V. Moore. The following violations were noted by him.

1. Excessive acidic discharge.
2. Excessive iron discharge
3. Excessive manganese discharge.
4. Excessive suspended solids discharge.

The above stated violations are in direct contravention of the Clean Streams Law and/or Surface Mining Act.

The letter went on to list (as also being violated in contravention of the Clean Streams Law and/or the Surface Mining Act) Standard Conditions 10, 11 and 17 of the Mine Drainage Permit, as well as the Interim Federal Regulations, Title 30, Chapter 7, Part 717.17(A).

DER filed its pre-hearing memorandum on October 13, 1981. The first section of this pre-hearing memorandum is headed "Statement of Facts Which Appellee Intends To Prove." Nowhere in this Statement of Facts is there any mention of the excessive discharges which were the prominent feature of the February 4, 1981 letter to which the July 31, 1981 notice of forfeiture referred. Instead, for each of the sites covered by Mining Permits Nos. 1277-1, 1277-1(A) and 1277-2, DER's pre-hearing memorandum alleged:

> The following conditions exist at the site:
>
> a. The site has been affected by surface mining, but has not been backfilled, regraded and revegetated as required by the Department's regulations and the mining and mine drainage permits for said site.
>
> b. Reiner has failed to develop, implement and install erosion and sedimentation controls as required by the Department's Regulations and the permits for the site.
>
> c. Reiner has failed to maintain backfilling equipment on the site which is operable, in use and capable of reclaiming the site.

In addition, for the site covered by Mining Permit No. 1277-1(A), DER's pre-hearing memorandum also alleged:

> d. Reiner has allowed water to accumulate in a pit on the site and has failed to pump the water to treatment ponds.

It is true that Mr. Boardman's July 31, 1981 letter did say "You have failed...to reclaim the area affected in the course of surface mining operations." It also is true that Standard Condition 17 of the Mine Drainage Permit, listed as being violated in DER's February 4, 1981 letter, reads (see Commonwealth Exhibit 8):

> The permittee's attention is specifically called to the provisions of the Bituminous Coal Open Pit Mining Conservation Act, May 31, 1945, P.L. 1198, as amended, which in coal stripping operations, requires, inter alia, the backfilling of the exposed coal measures, and prevention of pollution forming siltation and mine drainage. Compliance with these provisions of the foregoing Act is expressly made a condition of this permit.

Arguably, therefore, Mr. Boardman's July 31, 1981 letter--with its statement about Reiner's failure to reclaim, and with its reference to Standard Condition 17 of the Mine Drainage Permit Reiner had been granted--did give Reiner notice that his bonds were being forfeited not merely for excessive discharges, but also for reasons of the sort detailed in DER's pre-hearing memorandum.

Nevertheless, we do not fault Mr. Reiner--who by his own admission is not an educated man (N.T. p. 311), and who surely has not been trained to construe legal documents--for concluding from the July 31, 1981 letter that his bonds were being forfeited primarily for having failed to correct the four excessive discharges listed in DER's February 4, 1981 letter. Moreover, when Reiner received the July 31, 1981 letter, he believed he already had corrected the conditions causing the excessive discharges complained of in the February 4, 1981 letter (N.T. pp. 384-385). On February 2, 1981--after receiving a letter from DER dated January 21, 1981 (Commonwealth Exhibit 16 and N.T. pp. 50-51) notifying Reiner that DER's Inspector Moore had found violations during Moore's January 14, 1981 inspection

(the inspection date cited in the February 4, 1981 letter)--Mr. Reiner wrote Mr. Moore on February 2, 1981 (Reiner Exhibit U):

> I am writeing you this letter in accordance with the certified letter from Harrisburg.
> As soon as you left my job, I replaced the pipe in the treatment ponds so water went through second pond instead of leaking into the surface sedimation pond. All-so incomeing pipe in first pond was changed to increase retension time of water. When the above was corrected, it stopped the sedimation from washing into the surface sedimation pond that you observed.

Then, on February 13, 1981, after receiving the February 4, 1981 letter, Reiner again wrote Moore (Reiner Exhibit U):

> I am writeing this letter in compliance with letter I received dated 2/4/81.
> As I stated in my letter of 2/2/81, The things that caused this problem was corrected the same day you were there.

It is not surprising, therefore, that when Reiner filed his appeal he offered, as a reason for challenging the bond forfeitures (see attachment to Reiner's Notice of Appeal):

> In appellee's letter of July 31, 1981, it is stated that I did not correct the violations cited by letter dated February 4, 1981. This is untrue! These violations were corrected and the proper people notified immediately.

It is equally unsurprising that the first page of Reiner's brief complains:

> On October 8, 1981, Mr. Stanley R. Gear, for the Appellee, sent out their pre-hearing memorandum in which they changed their reasons for the bond forfeiture from those given in the original notice Dated July 31, 1981.

Reiner's brief went on to argue:

> Since the appellee's notice of bond forfeiture contains the reasons for the forfeiture, the appellant feels the appellee should be limited to those reason given and not permitted to keep changeing the reasons in order to find one the appellant might have violated. I do not believe the appellees should be permitted to

> go on a fishing expidition till they stumble on to something not here to fore presented.

DER's reply brief gave the following response to the just-quoted argument of Reiner's:

> Appellant argues that the reasons for the bond forfeitures should be limited to those stated in the forfeiture notice dated July 31, 1981, which was mailed to Appellant. The reasons set forth in that notice are the Appellant's failure to correct certain violations and his failure to reclaim the area covered by the subject bonds and affected by Appellant's surface mining operations.
>
> The primary reason the bonds were declared forfeited was Appellant's continued failure to reclaim the sites in question. Appellant had been informed through inspection reports and correspondence of the specific deficiencies with respect to reclamation of the sites. Appellant introduced many documents into evidence containing notice of such deficiencies and warnings that the bonds in question were in jeopardy of forfeiture.
>
> The specific violations referred to in the forfeiture notice of July 31, 1981, were not the basis of the forfeitures. The key reason for the forfeitures was Appellant's failure to reclaim the sites.

This response of DER's is not satisfactory. Irrespective of any prior inspection reports and correspondence, when Reiner received DER's July 31, 1981 letter officially notifying him of the forfeiture, he was entitled to believe that the reasons for DER's forfeiture of his bonds were the reasons stated in that letter. As we have stated supra, it is arguable that the language of the July 31, 1981 letter did give Reiner notice that his bonds were being forfeited for reasons which included Reiner's failure to reclaim the sites. However, if a reasonable man would not read the July 31, 1981 letter as stating that the reasons for the bond forfeitures included failure to reclaim the sites, then Reiner on July 31, 1981 would not have had notice his bonds <u>were</u> being forfeited because of such failure, no matter how many prior inspection reports and letters from DER had warned him failure to reclaim <u>could</u> result in forfeiture. That such notice to

Reiner is a constitutional due process requirement has been vigorously affirmed by Pennsylvania courts and by this Board (see Vince Terrizzi Productions, Inc. v. DER, 1980 EHB 398 and citations therein).

As it happens, on the facts of this appeal it is not necessary for us to construe the import of the July 31, 1981 letter. DER's pre-hearing memorandum, quoted supra, unmistakably listed the alleged conditions at the various sites which, according to DER, warranted forfeiture of the bonds for failure to properly reclaim. DER's pre-hearing memorandum was filed October 13, 1981, three months before the hearings began on January 13, 1982. Reiner filed no pre-hearing memorandum in response to DER's pre-hearing memorandum, and was not subjected to any sanctions for so failing to file, although such sanctions--including dismissal of the appeal or refusal to admit Reiner's exhibits into evidence--would have been legitimate under the terms of the Board's Rule 124, 25 Pa. Code §21.124, and of paragraph 4 of the Board's Pre-hearing Order No. 1, dated September 9, 1981. In particular, Reiner's testimony and exhibits admitted into evidence were limited only on grounds of relevance (and relevance was interpreted very broadly, see, e.g., N.T. pp. 299-338), although DER's counsel complained during the hearing that--because Reiner had not filed a pre-hearing memorandum--DER had not received adequate notice as to Reiner's contentions (see the Commonwealth's Trial Memorandum, submitted on January 14, 1982 at the request of the Board, N.T. pp. 179-183 and 189). Furthermore, Reiner clearly understood that DER now was pointing to Reiner's alleged failure to reclaim as the primary reason for forfeiting the bonds; indeed, on January 14, 1982, when Reiner began to present his case in chief, he was prepared to introduce 23 inspection reports, letters and other documents (contained in 19 exhibits) into evidence, of which documents the large majority were concerned with

Reiner's reclamation activities at the mining sites, not with whether or not Reiner had caused the excessive discharges listed in the February 4, 1981 letter from DER to him (cf., e.g., Reiner Exhibits B, G, I and S, along with N.T. pp. 195-196, 314 and 350). In addition, Reiner's post-hearing brief, although arguing (as discussed supra) that DER's reasons for the bond forfeiture should be limited to the specific violations listed in DER's February 4, 1981 letter, also fully argues in the alternative that DER has failed to prove the alleged conditions--in DER's pre-hearing memorandum (quoted above)--which, according to DER, warranted forfeiture of the bonds for failure to properly reclaim.

For the reasons stated in the preceding paragraph, and because hearings by the Board upon appeal of DER actions are de novo (Warren Sand and Gravel Co. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), Township of Salford v. DER, 1978 EHB 62), we rule that in the instant hearing DER's pre-hearing memorandum gave Reiner his constitutionally required due notice of the alleged conditions at the various sites which DER would seek to prove in order to sustain its burden in the instant appeal. DER's testimony was directed toward establishing its pre-hearing memorandum allegations quoted earlier, and (other than very peripherally) was not concerned with the excessive discharges listed in the February 4, 1981 letter. Therefore, as stated earlier, we need not construe the import of the July 31, 1981 letter to Mr. Reiner, nor need we decide whether or not this letter gave him notice that failure to properly reclaim was going to be DER's primary reason for seeking forfeiture of his bonds. Similarly, we need not decide whether Reiner's belief--when he received the July 31, 1981 letter--that he already had corrected the violations listed in the February 4, 1981 letter (recall the quotations supra from Reiner's Exhibit U and from his Notice of Appeal) was grounded in fact; the

violations listed in the July 31, 1981 letter now have become immaterial to this appeal.

We also are excluding, as immaterial to this appeal, any reasons for forfeiture first offered by DER at the hearing or in its post-hearing brief; new reasons thus offered are inconsistent with the notice an appellant like Reiner deserves and constitutionally is required to have in order to prepare his case against the threatened bond forfeiture. In other words, under the circumstances of this appeal we are limiting DER's reasons for seeking the bond forfeitures to those reasons stated in its pre-hearing memorandum, a limitation permitted under the terms[1] of 25 Pa. Code §21.124 and paragraph 4 of the Board's Pre-Hearing Order No. 1. In particular, we exclude as a reason for forfeiture--and will not consider evidence supporting--the claim that Reiner failed to comply with the terms of the June 26, 1978 Consent Agreement he and DER executed; this claim, which was first raised in DER's Trial Memorandum given to Reiner on the second day of the hearing, January 14, 1982, is argued in DER's post-hearing brief. We stress that lack of sufficient notice to Reiner is the sole problem with permitting DER to use alleged breaches of the Consent Agreement as a reason for the bond forfeiture. When notice is sufficient, it certainly is not an abuse of discretion for DER to enforce a consent agreement against its signer; paragraph 31 of the June 26, 1978 Consent Agreement (Commonwealth Exhibit 32) plainly states:

---

[1] We recognize that we did not employ 25 Pa. Code §21.124 and paragraph 4 of our Pre-Hearing Order No. 1 to limit Reiner's case. There was little reason to think that Reiner's failure to file a pre-hearing memorandum actually had prejudiced DER. Moreover, we are inclined to believe that the notice requirements constitutionally imposed on DER for the benefit of Reiner, the recipient of a DER forfeiture order, are stricter than the corresponding requirements imposed on Reiner for DER's benefit. See Vince Terrizzi, supra and citations therein.

> Any breach of this Consent Agreement on the part of Reiner shall, in addition, result in the immediate cessation of all surface mining operations by Reiner and shall also result in the forfeiture of all surface mining bonds which he has posted with DER to bond the 1277-1 Operation, the 1277-1(A) Operation, and the 1277-2 Operation.

B. The Evidence That Reiner Failed to Properly Reclaim

We now can return to DER's burden, spelled out in the opening paragraph of this adjudication. If proved, any of the conditions at the various sites, listed in DER's pre-hearing memorandum and quoted supra, would constitute a failure to comply with the requirements of the SMCRA justifying bond forfeiture, as is apparent from the terms of the bonds (Commonwealth Exhibits 1-4), the Mine Drainage Permit (Commonwealth Exhibit 8) and the Mining Permits for the sites (Commonwealth Exhibits 10-12). In view of the discussion in Section A supra, therefore, DER's burden has become no more and no less than proving the aforesaid allegations of its pre-hearing memorandum.

DER's post-hearing reply brief to Reiner's post-hearing brief argues that Reiner's own admissions in his post-hearing brief demonstrate that DER has sustained the burden described immediately supra. For example, Reiner's post-hearing brief responded "Admitted" to the following Suggested Findings of Fact in DER's post-hearing brief:

> 9. From at least the date of the declaration of bond forfeiture to and including the dates of the hearing in this appeal, the following conditions, which are violations of the obligations on Surety Bond No. 10429, existed on the site covered by MP 1277-1:
>
> > a. Reiner failed to promptly complete reclamation of the site as required by the reclamation plan in MP 1277-1 and 25 Pa. Code §77.92(d)(9).

> b. Reiner failed to revegetate the site as required by the reclamation plans in the Mining and Mine Drainage permits for the site.
>
> c. Reiner failed to control erosion and sedimentation at the site as required by 25 Pa. Code Chapter 102, as is evident from the erosion rills and gullies on the site.

However, Reiner's "admissions" in his post-hearing brief have not been consistent. In connection with the site covered by Mining Permit No. 1277-1, Reiner's post-hearing brief responded "Denied" to each of the allegations a-c concerning conditions at the site, quoted earlier from DER's pre-hearing memorandum; in fact Reiner responded "Area has been backfilled and revegetated" to DER's pre-hearing memorandum's allegation b for the site covered by Mining Permit No. 1277-1. It is difficult to square this denial response of Reiner's with his "Admitted" response to DER's Suggested Finding of Fact 9b for the very same site. Similarly, although Reiner "admitted" each of DER's Suggested Findings of Fact 9b and 9c for the site covered by Mining Permit No. 1277-1, he responded "Admitted in part and denied in part" to DER's Suggested Finding of Fact 20 for the same site, reading:

> The area covered by MP 1277-1 needs erosion and sedimentation control; it needs to be regraded to correct erosion rills and gullies, and it needs to be revegetated.

These just-quoted responses for the site covered by MP 1277-1 also are difficult to reconcile. Similar discrepancies exist in Reiner's post-hearing brief's "admissions" concerning conditions at the sites covered by Mining Permits Nos. 1277-1(A) and 1277-2.

Therefore, we cannot rely on the "admissions" in Reiner's post-hearing brief, as DER would have us do; we will have to look carefully at the evidence actually developed at the hearing. For reasons explained earlier, the evidence

will be examined solely with reference to the allegations in DER's pre-hearing memorandum; those Suggested Findings of Fact in DER's post-hearing brief which are not included within DER's pre-hearing memorandum's allegations are not before us.

DER's only witness as to conditions at the sites was Edward V. Moore, the surface mine conservation inspector responsible for inspecting Reiner's mining sites since about May 1978. Reiner, the only witness for his side, strongly contested much of Mr. Moore's testimony. Reiner managed to challenge successfully (N.T. pp. 197-198) Mr. Moore's apparent original implication (N.T. pp. 86, 149) that more than minimal backfilling remained to be done on the mining site covered by MP No. 1277-1. On the whole, however, Reiner's substantive challenges to Mr. Moore's testimony were confined to details, such as Reiner's claim that a ditch shown in Commonwealth Exhibit 27 was not an erosion gully on the mining site covered by MP No. 1277-1(A) (as Mr. Moore maintained, N.T. p. 121), but rather the remains of an old road (N.T. pp. 322-325). Reiner did not rebut Mr. Moore's basic thesis that none of the mining sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2 had been completely reclaimed. In fact, Reiner himself said (N.T. p. 314):

> I wanted to complete the backfilling, get at least the value up on the property, which is worth almost nothing now in its condition.

Our findings concerning the conditions on the mining sites, based solely on the evidence (including Exhibits) presented at the hearing, and remembering that DER has the burden of proof, have been itemized in Findings of Fact 34-36. Comparing these Findings with the allegations quoted supra from DER's pre-hearing memorandum, we conclude that for each of the mining sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2 DER has sustained its burden of proving some parts or all of

those allegations. Furthermore, for each of the mining sites, the proved parts of those allegations a-d constitute violations of one or more of:

(1) the SMCRA; or

(2) the CSL; or

(3) the applicable rules and regulations promulgated under these statutes; or

(4) the provisions and conditions of the MDP or MP's granted to Reiner.

In the case of the site covered by MP No. 1277-1, for example, DER did not sustain its burden of showing the affected portion had not been backfilled, but did show that revegetation had not been completed, that the planting had not conformed to the provisions of the MP and that erosion was observable on unplanted areas [see Findings of Fact 34(1) - 34(4)]. Failure to complete revegetation and to replant in accordance with Pennsylvania State University specifications are violations of paragraphs 3 and 7 of the reclamation plan (letter of November 4, 1974 from Reiner to DER) made part of MP No. 1277-1 (Commonwealth Exhibit 10); the presence of erosion is evidence that erosion controls were not properly implemented, in violation of various sections of 25 Pa. Code Chapter 102, e.g., 25 Pa. Code §§102.4 and 102.24. Under the terms of surety bond No. 10429 (Commonwealth Exhibit 1) covering MP No. 1277-1, any violation of the provisions of MP No. 1277-1, or of applicable rules and regulations, is a default justifying forfeiture of the bond. Similar assertions (to those just made concerning MP No. 1277-1) hold for the sites covered by MP Nos. 1277-1(A) and 1277-2, which sites (according to the evidence) were even further from complete reclamation than was MP No. 1277-1.

C. Was DER's Action An Abuse of Discretion

Our review of a DER action is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel, supra, Ohio Farmers Insurance Company v. DER, EHB Docket No. 80-041-G (August 25, 1981). Section 4(h) of the SMCRA, quoted at the outset of our discussion, provides that DER shall forfeit the bond if the operator fails to comply with requirements in any respect for which liability has been charged on the bond. In view of this provision of the SMCRA, and in view of the findings (especially Findings of Fact 34-36) and conclusions discussed supra, the bond forfeitures which are the subject of the instant appeal were not an abuse of DER's discretion nor an arbitrary exercise of DER's duties or functions. It follows that forfeiture of these bonds must be sustained unless Reiner can furnish a successful legal defense, sufficient to negate forfeiture even though DER has met its burden of proving violations justifying forfeiture under section 4(h) of the SMCRA. Ohio Farmers, supra.

Reiner has offered a plethora of defenses, many of which have absolutely no merit. We shall examine those defenses which cannot be rejected out of hand:

1. Lack of notice of reasons for forfeiture. This defense has been examined supra and rejected, for reasons stated.

2. Estoppel (in effect). Reiner alleged that he had sent DER many letters notifying DER of his progress and problems in reclamation, but had not received replies to these letters (N.T. pp. 328 and 337-338); Reiner appeared to claim that this allegation somehow estopped DER from forfeiting the bonds (N.T. pp. 335-336), though--because of his lack of legal training--he was unable to

sensibly articulate the reasons why estoppel would be implied. However, DER's John Matviya testified in rebuttal that the bulk of the allegedly unanswered letters actually were answered, and introduced Commonwealth Exhibits 33-35 in support of this testimony (N.T. pp. 411-421). Furthermore, to establish estoppel, Reiner must show that his reliance on the alleged lack of response by DER was to his detriment. Rockwood Insurance Company v. DER, EHB Docket Nos. 78-168-S and 78-166-S (February 18, 1981), Ohio Farmers, supra. There was no evidence that the alleged lack of response was to Reiner's detriment; if anything, Reiner gained added time which he could have used to accomplish the reclamation he never did manage to complete. This estoppel defense is rejected.

We note that this estoppel defense, and the remaining defenses examined below, are affirmative defenses, in which Reiner bears the burden of proving the facts necessary to establish the defense. Ohio Farmers, supra, and 25 Pa. Code §21.101(a).

3. Ratification of postponed compliance deadlines. This defense is related to the estoppel defense just discussed. Reiner claimed that he had sent DER reclamation schedules in conformity with the requirements of the consent agreement he had executed on June 26, 1978 (Finding of Fact 27), but that DER had not responded to these proposed schedules, which tended to postpone Reiner's deadlines for completing reclamation (N.T. pp. 287 and 296-301). Reiner claims that this alleged failure of DER to respond to his letters ratified his delayed reclamation schedules. There is no basis for this ratification claim. In any event, however, Reiner's latest self-proclaimed schedule, sent to DER in a letter dated January 10, 1980 (Reiner Exhibit I, N.T. pp. 359-350), stated that

reclamation, including planting, would be completed in Fall 1980 on each of the sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2. We have found (Finding of Fact 34-36) that in fact reclamation on none of these sites had been completed by January-February 1982. Therefore this defense is rejected.

4. DER's own unjustified actions caused Reiner's failure to reclaim on schedule. Reiner testified that on January 14, 1981, when Mr. Moore performed the inspection which led to the aforementioned February 4, 1981 letter to Reiner from DER (Commonwealth Exhibit 17), Mr. Moore "shut me down" (N.T. p. 385). This testimony is confirmed by Mr. Moore's own inspection report of January 14, 1981 (Commonwealth Exhibit 19), which stated:

> Only activity at this time, pumping of water to inadequate treatment facilities. Operator directed to cease pumping until corrective actions to facilities are made.

Reiner then wrote the two previously discussed letters of February 2 and February 13, 1981 (Reiner Exhibit U) to Mr. Moore stating that the conditions causing the excessive discharges listed in DER's February 4, 1981 letter to him had been corrected. Reiner complained that Mr. Moore never acknowledged receipt of Reiner's February 2 and February 13, 1981 letters, and never returned to tell Reiner that he could start up again because the problems complained of had been corrected (N.T. p. 385). In his brief Reiner argues that this failure of DER's to let Reiner restart pumping when violations had been corrected prevented Reiner from continuing his backfilling and was the reason that water accumulated in the pit [see Finding of Fact 35(5)].

The pumping referred to in the above quote from Commonwealth Exhibit 19 pertains to the pit on the site covered by MP No. 1277-1(A) (N.T. p. 86); there are no pits remaining on the site covered by MP No. 1277-1 (N.T. p. 149, Finding of

Fact 34(l) . Except for a generalized appeal to financial exigency, Reiner does not explain why being ordered to cease operations on the site covered by MP No. 1277-1(A) prevented the completion of reclamation on the sites covered by MP Nos. 1277-1 and 1277-2; financial exigency is not a defense to bond forfeiture, as further discussed infra.

In addition, there was no credible evidence that Reiner's financial problems were caused by Mr. Moore's "shut down" on January 14, 1981. In the first place, Mr. Moore's inspection report (Commonwealth Exhibit 19) states that the operator was directed to cease pumping only "until corrective actions to facilities are made"; on this evidence, Reiner could have started up again as soon as he had made the necessary corrections, which he very rapidly did according to his own February 2, 1981 letter (Reiner Exhibit U). However, because there was no direct testimony as to precisely what Mr. Moore told Reiner on January 14, 1981, the inspection report is not conclusive. What does appear conclusive is that by Reiner's own account he had been having financial problems (including having to pay fines for various violations) since 1977 (N.T. pp. 271-276, Reiner Exhibits E, J, K and O), that he had been having difficulties obtaining a permanent mining license (Commonwealth Exhibits 19 and 33), that he had been shut down about April 1979 by Federal inspectors (Reiner Exhibits P, Q and R), and that he was again shut down by Federal inspectors some time prior to September 1981 (N.T. pp. 357-358). Indeed, Reiner offered no reasons other than pure speculation to support his arguments that his financial problems would have been alleviated sufficiently to permit him to complete his required reclamation by July 31, 1981 (when DER sent the notice of forfeiture), or even by January-February 1982 (when the hearings were held), had he only not been shut down on January 14, 1981.

Therefore this defense of Reiner's that DER's own unjustified actions caused him to fall behind on his reclamation activities, must be rejected.

5. Financial exigency. This Board has previously ruled that the financial inability of an operator to reclaim a surface mining site is not a defense to bond forfeiture; a purpose of the bonding provisions of the SMCRA is to provide a means of reclamation when the operator is unable to perform the required reclamation. Robert L. and Jessie M. Snyder, et al. v. DER, 1980 EHB 402. Reiner's claims of financial inability to complete reclamation of the three mining sites which are the subject of the instant appeal are no defense to the bond forfeitures.

6. Not responsible for stripping performed by another mining company. Reiner testified that the affected portions of the mining sites covered by MP Nos. 1277-1(A) and 1277-2 were largely (in the case of MP No. 1277-2, wholly) stripped by the Foxmont Coal Company (see Findings of Fact 34 and 35). Reiner argues that he should not be held responsible for failure to reclaim those affected areas of his mining sites which actually had been stripped by Foxmont.

Foxmont was stripping on Reiner's mining sites because Reiner sold his business to Foxmont in 1976 (N.T. p. 271). Reiner had expected that Foxmont would obtain its own mining permits and would release Reiner's bonds in favor of Foxmont's own bonds (N.T. p. 271). In fact, Foxmont never did apply for new bonds; nevertheless Reiner permitted Foxmont to strip the areas covered by his mining permits (N.T. pp. 271-272). After a short time, Foxmont--highly in debt--went out of business, and Reiner took back his mining properties (N.T. pp. 272-273).

Under the above circumstances, Foxmont must be regarded as having been acting as Reiner's agent when Reiner permitted Foxmont to strip without insisting

that Foxmont do so under its own mining permits, not under Reiner's. Reiner cannot avoid responsibility for Foxmont's failure to reclaim. This defense of Reiner's also is rejected.

7. Other defenses. Reiner's very many remaining defenses, not examined in detail supra, either are variants on those defenses already examined or else are completely without merit. We do not believe Reiner's remaining defenses warrant detailed discussion, and simply reject them without further comment.

D. Conclusion

On the basis of the foregoing, the Board rules that DER's forfeiture of the instant bonds was not an abuse of discretion or an arbitrary exercise of DER's powers. We are not happy with this conclusion; we would have much preferred to be able to rule for Reiner. From the record in this appeal (on which this adjudication solely has been based), but especially from Mr. Reiner's post-hearing brief, there emerges a portrait of a sincere hard-working poorly educated though quite intelligent (Reiner, without legal training, put forth every possibly meritorious legal defense that he had) strip miner of high integrity, who just didn't have the capital or the business experience to cope simultaneously with financial reverses (like the Foxmont debacle) and the rigorous requirements of the SMCRA and its rules and regulations. There is absolutely no reason to believe DER has treated Reiner harshly or unfairly; Reiner's story in his post-hearing brief is evidence wholly to the contrary. Ever since 1977, when DER gave Reiner his first notification of bond forfeiture, DER again and again has given Reiner additional chances to succeed, via a consent agreement, via temporary mining licenses, via many conferences trying to work out reclamation time tables, etc.

One has the impression that it might have been greater kindness to Reiner for DER to have gone through with the bond forfeiture in 1977, but DER's 1977 decision to hold the forfeiture in abeyance certainly does not show ill will towards Reiner. DER cannot now be blamed for, in effect, having lost confidence that Reiner ever will manage to extricate himself from his financial difficulties and complete the required reclamation on the instant mining sites. During the hearing Reiner testified as follows under cross examination (N.T. pp. 356-357):

> Q. Did you, during the course of your mining and operation of these sites, save money or escrow money to provide for the reclamation?
> A. No, I did not.
> ...
> Q. Mr. Reiner, isn't it true that in June of 1981 that you filed for personal bankruptcy?
> A. That is true.
> Q. Isn't it true that in November of 1981 that you were adjudged bankrupt in the U.S. Bankruptcy Court for the Western District of Pennsylvania?
> A. That is true.
> Q. Well, isn't it true that you don't have any money then to backfill the sites in question?
> A. At the present time, that's true.
> Q. Mr. Reiner, isn't it true that you don't even have the money to hire an engineer to submit the necessary plans, the water monitoring plans, the blasting plans and erosion and sedimentation plans that are required by the new Surface Mining Regulations?
> A. That is true.

We conclude that, on all the evidence, DER's decision to forfeit the bonds probably was just, not merely justified under the law.

CONCLUSIONS OF LAW

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

2. The burden of proving the facts that can justify forfeiture of the bonds which are the subject of this appeal falls on DER.

3. Irrespective of prior inspection reports and correspondence, when Reiner received DER's July 31, 1981 letter officially notifying him of the forfeiture, he was entitled to believe that the reasons for DER's forfeiture of his bonds were the reasons stated in that letter.

4. If a reasonable man would not read the July 31, 1981 letter as stating that the reasons for the bond forfeiture included failure to reclaim the sites, then Reiner on July 31, 1981 would not have had notice his bonds were being forfeited because of such failure.

5. Proper notice to Reiner of the reasons for the bond forfeiture, so that Reiner could properly prosecute his appeal, is a constitutional due process requirement.

6. Under the facts of this appeal, DER's pre-hearing memorandum did give Reiner his constitutionally required notice of the alleged conditions at the various sites which DER would seek to prove in order to sustain its burden.

7. In view of DER's pre-hearing memorandum and the testimony DER presented, the alleged violations listed in DER's July 31, 1981 letter to Reiner are immaterial to this appeal.

8. Reasons for the bond forfeiture first offered by DER at the hearing or in its post-hearing brief are inconsistent with the constitutionally required notice Reiner must have, and therefore also are immaterial to this appeal.

9. Under the circumstances of this appeal, DER's reasons for seeking the bond forfeitures are limited to those reasons stated in its pre-hearing memorandum.

10. Had Reiner received the aforesaid constitutionally required notice, it would not have been immaterial for DER to offer Reiner's failure to comply

with the June 26, 1978 Consent Agreement as a reason for forfeiting the bonds.

11. Under the facts of this appeal and the preceding Conclusions of Law, especially Conclusion of Law 9, DER's burden has become no more and no less than proving the allegations of its pre-hearing memorandum.

12. Any of the alleged conditions listed in DER's pre-hearing memorandum, if proved for one of the mining sites, would constitute a justification for forfeiture of the bond associated with that site.

13. Reiner's "Admissions" in his post-hearing brief are inconsistent and cannot be relied upon to support DER's case.

14. For each of the mining sites covered by MP Nos. 1277-1, 1277-1(A) and 1277-2 DER has sustained its burden of proof that there have been violations of applicable statutes, or of rules and regulations, or of the provisions and conditions of Reiner's permits, justifying bond forfeiture.

15. From Conclusion of Law 14 it follows that forfeiture of the instant bonds must be sustained unless Reiner can furnish a successful legal defense, sufficient to negate forfeiture even though DER has met its burden of proving violations sufficient to justify forfeiture.

16. Reiner has the burden of proving the facts necessary to establish his various proffered affirmative defenses.

17. Reiner's defenses to forfeiture, including the defenses of lack of notice, estoppel, ratification of postponed compliance deadlines, failure to reclaim on schedule caused by DER's own actions, financial exigency and lack of responsibility for Foxmont's stripping, are unsatisfactory and must be rejected.

18. DER's forfeiture of the bonds was not an abuse of discretion or an arbitrary exercise of DER's powers.

O R D E R

AND NOW, this 28th day of July, 1982, it is ordered that:

1. Reiner's appeal of DER's forfeiture of his surety bonds Nos. 10429 ($5,750), 10430 ($6,267.50) and 13475 ($5,000) and of his collateral bond (Certificate of Deposit No. 1196 for $5,750), is dismissed.

2. Reiner is ordered to make full and prompt payment to DER of the values of the aforementioned bonds, totaling $22,767.50.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: July 28, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

PENNSYLVANIA MINES CORPORATION :

:

: Docket No. 82-176-G

: Gas Operations Well-Drilling
Petroleum and Coal Mining
v. : Act 52 P.S. §2101 et seq.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and Barry D. Einsig, Permittee

ADJUDICATION

By: Edward Gerjuoy, Member, September 9 , 1982

This adjudication has been prepared under unusual circumstances. On July 20, 1982, the Department of Environmental Resources (DER) granted Barry D. Einsig (Einsig) a permit to drill a gas well (the Gardner Well) on surface land owned by L. N. Gardner in Montgomery Township, Indiana County. On July 21, 1982, Pennsylvania Mines Corporation (PMC) filed with this Board an appeal of the aforesaid permit grant. With the appeal, PMC also filed a petition for supersedeas, asking this Board to stay the permit pending a hearing on the merits of PMC's appeal. PMC's petition alleged that a supersedeas was needed because the well could be drilled in a very short time (72 hours) and because completion of the well would subject PMC to harm which--once the well was in place--would be irreparable; the well, if drilled, will penetrate the so-called Upper Freeport

coal seam which PMC owns and presently is planning to mine. The Board's normal practice, following the filing of an appeal, is to allow the appellant and the other parties some 90 days for discovery and the filing of pre-hearing memoranda, after which a hearing on the merits is scheduled. Granting the supersedeas, as PMC requested, would have prevented Einsig from legally drilling the Gardner Well during the extended period (not less than three months) needed for the Board to adjudicate the merits of this matter under its usual procedures.

The Board's rules require the Board to hold a hearing on a supersedeas petition as expeditiously as possible (where feasible within a week of the filing of the petition). 25 Pa. Code §21.76(b). Attempts were made to arrange an expeditious hearing on the supersedeas petition; by August 10, 1982, however, a definite time for the supersedeas hearing, convenient for the Board and all the parties, had not yet been scheduled. Perhaps for this reason (the record does not show), on or about August 10, 1982 PMC filed a Petition for Review "In The Nature Of An Action For Declaratory Judgment And Complaint In Equity Seeking Injunctive Relief" in Commonwealth Court, asking Commonwealth Court inter alia to enjoin Einsig from drilling the Gardner Well.

On August 17-19, 1982, a hearing on the aforesaid Petition for Review, presided over by Senior Judge Paul S. Lehman, was held in Commonwealth Court. During the course of this hearing, the parties (after telephone consultations with the author of this adjudication) agreed--in a stipulation dated August 19, 1982 signed by counsel for PMC, DER and Einsig--that:

1. The testimony taken at the August 17-19, 1982 hearing would be transcribed and submitted to this Board.

2. The Board would hear oral arguments on this matter on August 31, 1982.

3. The August 17-19, 1982 transcript, together with the August 31, 1982 oral argument, would constitute the record in this appeal.

4. The Board would adjudicate the merits of this appeal on the basis of the relevant and admissible evidence in the foregoing record, as determined by the Board.

5. Einsig would not begin any drilling operations on the Gardner property before September 16, 1982.

The motivation for Paragraph 5 supra of the stipulation, and the reason for scheduling oral argument before the Board so soon after August 19, 1982 (requiring preparation of an expedited transcript of the August 17-19, 1982 hearing) is the fact that--according to Einsig--his rights to enter on the land needed to drill the Gardner Well would terminate on September 22, 1982. To be precise, Einsig testified that because of the configuration of the Gardner tract the well could not be drilled without entry onto property owned by Mr. and Mrs. James Scott, neighbors of Mr. Gardner; Einsig's lease from the Scotts, entitling him to enter on their land for the purpose of drilling the well, expires September 22, 1982.

The Board has received the transcript of the August 17-19, 1982 Commonwealth Court hearing, and on August 31, 1982 did hear oral arguments on this appeal. At this August 31, 1982 hearing the parties--at the suggestion of the Board--orally put on the record their further stipulation that they were willing to have the Board adjudicate the merits of this matter on the sole basis of the record made in the August 17-19 and August 31 hearings even though:

a. The parties had not had the opportunity to engage in discovery.

b. Neither the parties nor the Board ever had received any pre-hearing memoranda.

c. The parties might not have the opportunity to file post-hearing briefs.

The Board's rules permit the parties to waive their rights to a hearing before the Board. 25 Pa. Code §21.94(a). Under the circumstances recounted, the parties' stipulations described supra surely constitute such a waiver. The Board therefore has prepared this Adjudication of the instant appeal, from the record made in the August 17-19 and August 31 hearings, with due regard to the parties' stipulations. In so doing the Board has had the benefit of post-hearing briefs filed by PMC and by DER, but not by Einsig, and of proposed Findings of Fact filed by PMC and Einsig, but not by DER; Einsig also filed proposed Conclusions of Law. The somewhat unseemly haste with which this adjudication has been filed--a mere ten days after the August 31, 1982 oral argument and an even shorter time after receiving the August 31 transcript--reflects the Board's desire to cooperate with Judge Lehman, who asked the Board to file its adjudication early enough for the parties to appeal the Board's adjudication to Commonwealth Court (should they wish to file appeals) before September 16, 1982. After September 16, 1982, according to the aforesaid August 19, 1982 stipulation, Einsig will no longer guarantee that he will not begin drilling operations; Einsig testified that in order to meet the September 22, 1982 deadline imposed by the Scotts' lease, it would be very difficult for him to postpone the commencement of drilling operations for more than six days before that deadline.

It is believable that the unusual circumstances which have been described, notably the parties' inability to engage in discovery, their failure to receive pre-hearing memoranda and their lack of adequate time to prepare post-hearing briefs meeting all requirements of the Board, were prejudicial to some or all of the parties' abilities to fully put their cases before the Board; the Board's rules state that all post-hearing briefs shall include suggested findings of fact and conclusions of law. 25 Pa. Code §21.116(b). Moreover, in reviewing the August 17-19, 1982 tran-

script, numerous questions--some of which are raised in the discussion infra--have occurred to the Board; we believe these questions--stemming from our specialized experience--very likely would have been put by the Board to the witnesses had the Board been given the opportunity to preside at the evidentiary hearing, with the result that much of the testimony would have been more conclusive.

For these reasons the Board, although it stands by this final adjudication based on the above-described record in the instant appeal, does not feel that the Findings of Fact and Conclusions of Law herein have been sufficiently thoroughly litigated to merit collateral estoppel effect. In particular, we rule that in the event this Board should have to adjudicate some future appeal, from the grant or denial of a permit to drill some other gas well through PMC's Upper Freeport coal seam, the Findings of Fact and Conclusions of Law in the instant adjudication shall not (in the future adjudication) be used for or against PMC, DER or the future would-be permittee, who may or may not be Einsig himself.

FINDINGS OF FACT

1. Appellant, Pennsylvania Mines Corporation, a wholly owned subsidiary of Pennsylvania Power & Light Company (PP&L), is a Pennsylvania corporation which owns, leases or controls extensive and substantial bituminous coal deposits in this Commonwealth and which operates underground bituminous coal mines.

2. Appellee, Department of Environmental Resources, is the Commonwealth agency charged with the responsibility of administering the Gas Operations Well Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, P.L. 756, as amended, 52 P.S. §§ 2101 et seq. (the Act).

3. The permittee, Barry D. Einsig, is an individual who resides at R.D. #1 Cherrytree, Clearfield County, Pennsylvania.

4. PMC owns and operates, through its division, Greenwich Collieries, an underground bituminous coal mine (the Mine) in Indiana County, Pennsylvania.

5. PMC is the owner of the coal deposits situated under various tracts of land in Indiana County, Pennsylvania together with the mining rights to said coal.

6. The aforesaid tracts include approximately 2900 acres (the Mining Area) containing a coal seam known as the Upper Freeport seam (the seam).

7. Among the aforesaid tracts of surface land overlaying portions of the seam is a farm owned by L. N. Gardner (the Gardner farm).

8. Approximately North of the Gardner farm and adjacent to it, and also overlaying a portion of the seam, is a farm owned by Mr. and Mrs. James Scott (the Scott farm).

9. On January 6, 1982, Einsig acquired rights to the gas situated beneath a portion of the Gardner farm, by a lease from L. N. Gardner.

10. On December 22, 1981, Einsig acquired rights to the gas situated beneath the portion of the Scott farm adjacent to the Gardner farm, by a lease from Mr. and Mrs. James Scott (the Scott lease).

11. The aforesaid leases give Einsig the right to enter upon the Gardner and Scott farms for the purpose of drilling a gas well.

12. The Scott lease will expire on September 22, 1982, unless Einsig exercises his drilling rights on the Scott farm before that date.

13. On or about May 24, 1982, Einsig filed an application with the DER Division of Oil and Gas (the Division) for a permit to drill a gas well on the Scott farm, at a point about 20 feet North of the boundary between the Scott and Gardner farms.

14. The aforesaid proposed location of the well Einsig desired to drill on the Scott farm was made known to PMC by the Division, in accordance with the Act and DER regulations.

15. PMC objected to having a well drilled at the aforesaid proposed location on the Scott farm.

16. Thereafter, in accordance with the Act and DER regulations, a conference was held between Einsig, PMC engineers and representatives of the Division.

17. As a result of this conference, at PMC's suggestion, Einsig agreed to a new site for his proposed well, which now was to be located on the Gardner farm at a point about 250 feet South of the original Scott farm site.

18. PMC preferred the new site to the original site, but continued to object to having a well drilled in the general vicinity of the Gardner and Scott farms.

19. PMC's major objection to the proposed well, whether at the original Scott farm site or at the new Gardner farm site, was and is the fact that at either of these sites the well would be located less than 1,000 feet from existing previously drilled gas wells.

20. Despite PMC's objections, on July 20, 1982 DER granted Einsig a permit to drill a gas well (the Gardner well) at the aforesaid site on the Gardner farm which PMC had found preferable to the original Scott farm site.

21. On July 21, 1982, PMC appealed DER's July 20, 1982 permit grant to Einsig.

22. This appeal is the subject of the instant adjudication.

23. In the Mining Area (see Finding of Fact 6), the depth of the seam below the surface varies from 250 feet to 550 feet, with the average depth about 450 feet.

24. The anticipated depth of the Gardner Well is 3,800 feet.

25. The Gardner Well will penetrate all the way through the seam.

26. There presently are 113 other gas wells in the Mining Area, each of which penetrates all the way through the seam.

27. All but one of these wells were drilled at sites which were at least 1,000 feet distant from previously existing wells.

28. The one well which was sited at a point within 1,000 feet from previously existing wells was drilled by Einsig and is known as the Yeager Well.

29. DER's issuance of the permit to drill the Yeager Well has been appealed to this Board by PMC under Docket No. 82-132-G.

30. This Board has not yet ruled on the merits of the appeal EHB No. 82-132-G.

31. However, on June 23, 1982, this Board refused PMC's petition for a supersedeas which would have stayed lawful drilling of the Yeager Well.

32. The Gardner Well, if drilled on its presently planned site, will be 550 feet from one already existing well and 880 feet from another well.

33. There is an informal agreement, worked out sometime after 1979 between an association representing members of the coal industry and associations representing members of the gas well drilling industry, to space the gas wells in the Mining Area not less than 1,000 feet apart.

34. Heretofore, except for Einsig, gas well drillers in the Mining Area have adhered to aforesaid informal agreement's minimum 1,000-foot spacing.

35. Einsig is a member of one of the organizations that worked out the informal agreement.

36. There has been no contention that the informal agreement is legally binding on Einsig.

37. DER has been informed orally, but not in writing, of the aforesaid informal agreement.

38. There has been no contention that the informal agreement binds DER in any way.

39. In Pennsylvania, there is no legislation establishing a minimum spacing between gas wells drilled through coal seams.

40. Such legislation was drafted by the coal industry, but--because the coal industry had worked out the aforesaid informal agreement--was not submitted to the Pennsylvania Legislature.

41. For many years, long before the bulk of the 113 gas wells presently penetrating the Mining Area were drilled, PMC had been planning mining operations in the Mining Area.

42. These plans have included the preparation of maps showing projected entries into the Mining Area coal, as well as projected routes through which men, mining machinery, air, etc., would penetrate for the purpose of extracting the coal in the seam.

43. The aforementioned plans have had to be modified as wells have been drilled through the seam, in order to take account of the mining constraints imposed by the presence of gas wells.

44. One such constraint is imposed by the Act, which requires PMC to leave a pillar of coal around each gas well.

45. In the seam which is the subject of the instant appeal, the required pillar around each gas well typically contains about 8,000 tons of coal.

46. Despite the constraints imposed by the 113 wells already drilled in the Mining Area, PMC still plans to mine the seam.

47. PMC's present mining operations are being conducted a long distance from the area of the seam directly beneath the proposed site of the Gardner Well.

48. PMC plans to be mining the seam directly beneath the proposed site of the Gardner Well about five years from the date of the hearing (August 1982).

49. Although the presently proposed site of the Gardner Well is on the Gardner farm, the size and shape of the Gardner farm requires Einsig to enter also onto the Scott farm in order to successfully drill the Gardner Well.

50. PMC anticipates that exploitation of the seam in the area approximately below the Gardner and Scott farms will require setting up an underground sump (a reservoir where underground water can be collected and stored, and from which the water eventually can be pumped out).

51. Construction of the sump involves leaving barrier pillars of unmined coal in the seam.

52. PMC preferred the presently proposed site of the Gardner Well to the original site (see Finding of Fact 18) because at the present site the barrier pillar needed for the sump also can serve as part of the legislatively required pillar (see Finding of Fact 44) around the Gardner Well.

53. Therefore the amount of sanitized (unavailable for mining) coal directly attributable to the Act's requirement of a pillar of coal around the Gardner Well will--in the Gardner Well's presently proposed location--be less than the 8,000 tons of sanitized coal typically attributable to the Act-required pillar surrounding a gas well (see Finding of Fact 45).

54. The required coal pillar around a gas well is intended to protect the mine from possible seepage of highly explosive methane into the mine, an eventuality which obviously would be very hazardous to the mine and the workers therein.

55. Evidently, therefore, there can be no mining into the coal pillar surrounding a producing gas well.

56. Although there have been occasions in Pennsylvania wherein abandoned gas wells have been sealed in a fashion permitting safe mining into their surrounding coal pillars, it is unlikely that it ever will be practical for PMC to mine into the pillar surrounding the Gardner Well.

57. Originally, before the bulk of the gas wells presently penetrating the Mining Area had been drilled, PMC had planned to mine the coal in the seam using the so-called longwall method.

58. The presence of the existing 113 gas wells has made mining the seam by the longwall method impractical.

59. The presence of the existing 113 gas wells has not made it impractical to mine the coal in the seam using the so-called room and pillar method.

60. Where longwall mining can be used, it is safer and more economically productive than room and pillar mining of the same coal.

61. Room and pillar mining is a widely used method of mining coal in Pennsylvania coal fields.

62. Wells which are less than 1,000 feet from neighboring wells are termed offset wells.

63. PMC has not appealed any DER permits to drill non-offset wells.

64. PMC (and other mine operators) can tolerate the presence of non-offset wells.

65. PMC concedes that inserting a non-offset well into an area containing previously drilled wells ordinarily will not unduly interfere with or endanger the mine.

66. No clear evidence on the nature or amount of the added costs that might be associated with the offset character of the Gardner Well was introduced into the record.

67. The record does not show any quantitative estimates of the extra coal which would become unmineable because of the offset character of the Gardner Well.

68. The offset character of the Gardner Well will cause added safety problems which--unless PMC is willing to accept significant extra costs--will make unmineable significant amounts of coal in the vicinity of the Gardner Well, that could have been mined if the Gardner Well were non-offset.

69. Irrespective of safety problems consequences, present mining regulations will make unmineable a significant portion of the coal between the Gardner Well and its nearest neighboring well, that could have been mined if the inter-well separation were 1,000 feet or more.

* * * * * *

DISCUSSION

After Einsig filed his May 24, 1982 application to drill the well which is the subject of this appeal, PMC raised objections to the proposed well. In so doing, PMC acted in accordance with the Act. 52 P.S. §2202(a) of the Act gives the mine operator (in this case PMC) the right to file objections when:

> "...the well when drilled or the pillar of coal about the well will, in the opinion of the coal owner or operator, unduly interfere with or endanger such mine."

When the mine operator has filed objections to a proposed well site, DER is required to seek an agreement--between the mine operator and the proposed-well operator--on an alternative site. 52 P.S. §2202(b). If the mine operator and well operator cannot come to an agreement, then DER is empowered to:

> "...determine a location on such tract of land as near to the original location as possible where, in the judgment of the division, the well can be safely drilled without unduly interfering with or endangering such mine."

DER did seek to have Einsig and PMC agree on an alternative site. The site finally selected by Einsig--on the Gardner farm about 250 feet South of the originally proposed Scott farm site--was suggested by PMC and was preferable to PMC than the original site. However, PMC continued to object to the drilling of Einsig's proposed well, whether at the newly proposed Gardner farm site, or at the original Scott farm site, or indeed at any site in the general vicinity of the Gardner and Scott farms, because any such well would be an "offset" well (defined as a well whose distance from some other existing well is less than 1,000 feet). The Gardner Well, if drilled on the presently proposed Gardner farm site, will be 550 feet from one already existing well and 880 feet from another well.

Our review of a DER action is to determine whether DFR has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Co. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), Ohio Farmers Insurance Company v. DER, EHB Docket No. 80-041-G (August 25, 1981). PMC argues that DER's July 20, 1982 grant of a permit for Einsig to drill the Gardner Well on its presently proposed site, despite PMC's continued objections that the Gardner Well would be an offset well, was an abuse of discretion in view of the language quoted supra from 52 P.S. §2202(b). In particular, PMC contends that the well will "unduly interfere with or endanger" its mine. The burden of establishing this contention is on PMC. 25 Pa. Code §21.101(c)(3).

To adjudicate this contention of PMC's, this Board must construe the phrase "without unduly interfering with or endangering such mine" the Legislature used in 52 P.S. §2202(b); concurrent with this task of construction, this Board must decide what sort of evidence is admissible to prove or disprove undue interference with or endangerment of the mine which is the subject of the instant appeal.

Our construction of the aforementioned phrase has to be based on standard principles of statutory construction. In particular, statutes should be interpreted to ascertain and effectuate their legislative intent; every statute should be construed, if possible, to give effect to all its provisions. 1 Pa. C.S.A. §1921. The Legislature intends the entire statute to be effective; it does not intend a result that is absurd or unreasonable. 1 Pa. C.S A. §1922. Non-technical words and phrases must be construed according to their common and approved meanings. 1 Pa. C.S.A. §1903. The words in the phrase "without unduly interfering with or endangering" are not technical. We conclude that not every "interference" with a mine is "undue interference" under the Act; otherwise the Legislature would not have added the qualifier "undue" to "interference". We further conclude that the

Legislature did not intend that the adverse effects on mine operation characteristically associated with drilling a gas well through a coal seam--especially the effects of the pillar of coal the mine operator is required to leave around the well (52 P.S. §2203)--be regarded as "undue interference with or endangerment" of the mine; otherwise the Legislature simply would have wholly forbidden the drilling of gas wells through coal seams (except possibly in exceptionally favorable circumstances for such drilling), and surely would not have made leaving a pillar of coal around the well a statutory command to the mine operator.

The preceding paragraph is consistent with our ruling in Helen Mining Co. v. DER, 1979 EHB 92, where we found that the drilling of two gas wells through an unmined portion of a deep coal mine would not unduly interfere with or endanger the mine. Helen Mining specifically rejected the thesis that the need to employ room and pillar mining, rather than an apparently safer and economically more productive mining method such as longwall mining (in Helen Mining the alternative was "shortwall" mining), of itself implied that a drilled gas well unduly interfered with or endangered the mine. We affirmed this Helen Mining ruling in Pennsylvania Mines Corporation v. DER, EHB Docket No. 82-132-G (June 23, 1982) (the Yeager Well Opinion), where--under facts almost identical to those in the present appeal--we refused PMC's petition for a supersedeas to stay Einsig's permit to drill the Yeager Well (the Yeager Well was the first offset well drilled in the Mining Area; the Gardner Well, if drilled, would be the second). We now reaffirm that ruling here. The testimony in the instant record indicates that room and pillar mining is widely used in Pennsylvania, and can be used safely (Tr. 18, 20-21). Moreover, as we said in the Yeager Well Opinion:

> It is true that the Act originally was passed in 1955, before more modern non-conventional mining techniques (such as the longwall method)

> had come into use. Various sections of the Act have been revised since 1955, however, including amendments as late as 1978 (see 52 P.S. §2502); the Legislature has given no indication that its original intentions to permit gas wells to be drilled and to require wells to be protected by coal pillars had been altered by the development of non-conventional mining techniques. (Parenthetical clause added)

PMC argues, however, that even if the adverse effects of an isolated gas well do not unduly interfere with or endanger the coal mine penetrated by the well, the mine can be unduly interfered with or endangered by adverse effects associated with insertion of a newly drilled well into an area containing previously drilled wells. To be specific, PMC is contending that the Gardner Well will unduly interfere with or endanger its mine because the Gardner Well will be an offset well, distant only 550 feet from one neighboring well and 880 feet from another, in a 2900 acre Mining Area already containing 113 wells. In this connection we note that although PMC obviously would prefer not to have any gas wells in the Mining Area, there is considerable evidence in the record showing that PMC (and other mine operators) can tolerate the presence of wells having a spacing of 1,000 feet or more (e.g., Tr. 96, 115, 134-135); in particular, PMC has not appealed any DER permits to drill non-offset wells. In other words, as we read the record, PMC concedes that inserting a non-offset well into an area containing previously drilled wells ordinarily will not unduly interfere with or endanger the mine. It is the offset character of the Gardner Well (as it was of the Yeager Well) which is the focus of PMC's objections.

The immediately above contention has not been fully addressed in Helen Mining or the Yeager Well Opinion. Helen Mining focused only on the effects of the two gas wells which had been permitted. Our Yeager Well Opinion, although

involving facts almost identical to those in the present appeal, was based on the record developed at a hearing on PMC's supersedeas petition, not on the record following a full hearing on the merits of PMC's appeal of the Yeager Well permit. As such, the evidence presented by PMC in the Yeager Well supersedeas hearing was rather less substantial than the evidence PMC has presented in the instant appeal. Moreover, in our Yeager Well Opinion we primarily were ruling on the likelihood that PMC would prevail on the merits after a full hearing on its appeal, rather than on the actual merits of its appeal of the Yeager Well permit. Therefore, the PMC contention stated in the preceding paragraph requires careful examination here.

PMC offers the Board numerous reasons for accepting the aforesaid contention of PMC's. These reasons, and the evidence in their support, conveniently can be grouped and discussed under two subheadings, namely the economic losses to PMC (and the consequences thereof) and the consequences of safety and other mining regulations. This discussion follows:

1. Economic losses to PMC and the consequences thereof. PMC argues strongly that the economic impacts of the Gardner Well on PMC must be taken into account in assessing whether the Gardner Well unduly interferes with the mine. DER argues that under the Act the economic impact on PMC need not be considered, and indeed should not have been considered, before granting Einsig his permit to drill the Gardner Well. Throughout the August 17-19, 1982 hearing both DER and Einsig objected to the admission of any evidence tending to establish the Gardner Well's economic impact on PMC, on the grounds that such economic evidence was irrelevant to the instant appeal. DER and Einsig also objected to much of this same evidence on the grounds that the offered evidence pertained to the impact of all previously drilled wells, or to the anticipated impact of possible future wells, rather than to the impact of the Gardner Well; according to DER and Einsig, any impact--economic

or otherwise--of wells other than the Gardner Well is outside the subject matter of the present appeal. Because of Paragraph 4 of the August 19, 1982 stipulation (quoted supra), which stipulation apparently was agreed to by Judge Lehman (Tr. 163-165), this Board will rule here on the admissibility of the aforementioned objected-to evidence, although it was Judge Lehman who presided at the August 17-19 hearing.

We agree that the scope of this appeal is limited to whether or not DER abused its discretion in permitting the Gardner Well. Therefore testimony such as that offered by PMC's Chief Mining Engineer John W. Yonkoske--to the effect that the pillars which must surround the 113 existing wells in the Mine Area already have made unmineable almost one million tons of coal in the Mining Area, amounting to about ten percent of the entire recoverable coal contents of the Mining Area seam (Tr. 66)--is inadmissible; the time for challenging DER's discretion in having given permission to drill those other wells (excepting the Yeager Well which is under appeal) is long past. Similarly, the testimony offered for PMC by C. Jeffery Goble, a geologist with an oil and gas producing firm--to the effect that if Einsig is allowed to drill the offset Gardner Well, then Mr. Goble's firm will drill 30 more offset wells, thereby additionally compounding the problems PMC faces in mining the seam--must be termed inadmissible; PMC will have its opportunity to challenge the drilling of each and every one of these threatened 30 wells, which under the Act cannot be drilled through the seam without notice to PMC and permits from DER.

But we do not agree--and did not hold in our Yeager Well Opinion--that the Gardner Well's economic impact on PMC's mining operations is per se irrelevant to this appeal. The business and function of the mine is extracting coal. Dictionary definitions of "interfere" include: to come into collision; to clash;

to be in opposition; to run at cross purposes (Webster's New International Dictionary, 2d Edition Unabridged, 1960). On these definitions and the authority of 1 Pa. C.S.A. §1903, we construe 52 P.S. §2202 to mean that anything which makes more difficult or otherwise impedes the extraction of coal is an interference with the mine under the Act. Furthermore, the seriousness of any such impediment, which will be relevant to whether that impediment is a de minimis interference or an undue interference with the mine, does depend on the added mining costs the impediment directly induces or, in the alternative, on the extra costs needed to remove the impediment. Even if the impediment does not make mining in some area of the mine impossible, its added costs can make mining in that area impractical, thereby causing an inevitable reduction in the amount of coal that can be extracted from the mine, i.e., thereby inevitably constituting what may deserve to be termed an undue interference with the mine.

In the instant appeal, therefore, evidence that the offset character of the Gardner Well will cause mining of the seam in the vicinity of the Gardner Well to be more expensive than if non-offset can be admissible, though this admissibility is conditioned by our ruling supra that the added costs attendant on having to employ the room and pillar method rather than the longwall method in the vicinity of the Gardner Well do not show undue interference with the mine. Unfortunately, no clear evidence on the nature or amount of the added costs associated with the offset character of the Gardner Well was introduced into the record. In particular, no witness was specifically asked how much the fact that the Gardner Well was an offset well would increase the costs of room and pillar mining of the coal in the vicinity of the Gardner Well but outside its surrounding pillar, over and above the costs of mining the same coal were the Gardner Well an isolated well, remote from other wells. However, the record does contain testimony which--though less

apposite than would have been the answer to the question just stated--does suggest that these added costs will be significant. For example, John W. Foreman, a consulting mining engineer, testified for PMC as follows (Tr. 120-121):

> Q. Do you have an opinion as to what the effect will be on the development of this coal seam as a result of the introduction of those 500 foot offset wells?
>
> A. Wherever the 500 foot wells are located it will absolutely preclude any mining within that mine.
>
> Q. Why do you say that?
>
> A. Because of the space that you would have to try to get in between the 500 foot spacing just would not permit economic or feasible extraction of the mineral.
>
> Q. So, what would the effects be then, the overall effects on Pennsylvania Mines Corporation's ability to mine that area?
>
> A. It would be a complete loss.

This testimony of Mr. Foreman's was somewhat weakened on cross examination, however, where in answer to a question concerning the feasibility of developing the Mining Area if the Gardner Well were drilled he replied (Tr. 127):

> A. They could develop the area with room and pillar, and it would be strictly limited in mining around the Gardner well.

Other testimony suggesting that mining in the vicinity of the Gardner Well will be significantly more costly was given by Mr. Yonkoske (Tr. 80), who at that point was indicating that the Gardner Well's offset character would cause severe difficulties in maintaining adequate mine ventilation. Neither Mr. Foreman's testimony quoted supra, nor Mr. Yonkoske's testimony, nor any other PMC testimony suggesting increased mining costs associated with the offset character of the Gardner Well, was at all rebutted by Einsig or DER.

Our willingness to admit some testimony bearing on the economic impact of the Gardner Well, such as the testimony by Mr. Foreman we have just examined, does not imply that we should admit testimony averring that the consequences of drilling the Gardner Well will be decreased profits or actual losses to PMC and/or its parent utility which purchases PMC's coal (Tr. 159-160). PMC believes DER should have weighed these sorts of financial losses to PMC before deciding to grant Einsig his permit to drill the Gardner Well. However, Gardner avers that drilling the Gardner Well will be worth a million dollars to him (Tr. 159-160), which he presumably would lose if the Gardner Well is not drilled. There is no defensible way for DER to balance the financial losses to PMC and to Einsig in arriving at its decision whether or not to grant Einsig his permit. Moreover, as the Board pointed out during oral argument, if the financial losses to the purely private parties PMC and Einsig are to be weighed by DER, then DER should not act on the permit application without also weighing the losses which will accrue to Einsig's lessors (Gardner and the Scotts) from refusing the permit. Correspondingly, if the economic losses to private parties are to be balanced, this Board should not be adjudicating the merits of the instant appeal from the transcript of the August 17-19, 1982 hearing without assurance that Gardner and the Scotts had been given the opportunity to defend their economic interests at that hastily arranged hearing.

Fortunately, there is no need for us to deal with the can of worms whose opening is threatened by the immediately preceding sentence. We completely agree with DER that neither the Act nor other law requires DER to balance the financial disadvantages to the mine operator and to the gas well operator before making its decision whether or not to permit the well. We further agree with DER

that the various cases cited by PMC--e.g., DER v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974), Bortz Coal v. DER, 7 Pa. Cmwlth. 362, 299 A.2d 670 (1973), Rochez Brothers v. DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975), Chartiers Block Coal Co. v. Mellon, 52 Pa. 286, 25 A. 597 (1893) and United States Steel Corp. v. Hoge, No. 682 in Equity (Greene Co. Ct. Com. Pleas, March 24, 1980), affirmed ___ Pa. Super. ___, No. 1072, 1980 (Pgh. District, August 27, 1982)--do not support requiring DER to perform such balancing. We stress that the assertions in this paragraph are consistent with our previous ruling that evidence tending to show the offset character of the Gardner Well will cause mining of the seam in the vicinity of the Gardner Well to be more expensive (than if the Gardner Well were non-offset) can be admissible. It is not DER's task to decide which party will be more severely financially disadvantaged by its decision on the permit application. It is part of DER's task to decide whether the added costs associated with the offset character of the Gardner Well will make the extraction of coal in the vicinity of the well, but outside its surrounding pillar, so unreasonably costly as to be impractical.

In this regard, some further remarks about Hoge, which has been heavily stressed by PMC in its brief and during oral argument, may seem warranted. Hoge was concerned with a suit between private parties, each claiming ownership of the gas within a coal seam. The lower court ruled that the gas within the coal seam was the property of the lessee who had acquired gas drilling rights from the surface owner, and was not the property of the coal seam's owner. The Superior Court affirmed this ruling. Neither the lower court nor the Superior Court had to decide, nor attempted to decide, whether under the Act DER was required to balance the financial disadvantages to the mine operator and to the gas well operator before deciding on a permit application. However, in the course of a very long opinion, the lower court did offer some dicta (wholly ignored by the Superior Court) which suggest

that the added costs of coal extraction should be taken into account by DER. The Hoge opinion was concerned solely with wells which collect gas from within the coal seam, so that strictly speaking the aforementioned dicta do not pertain at all to the instant appeal, which is concerned with gas wells which collect gas from depths far below the coal seam. But even ignoring this point, the Hoge dicta are not inconsistent with the reasoning of our adjudication--we have not excluded all evidence bearing on the added costs of coal extraction, and the Hoge dicta do not favor balancing the financial disadvantages of the parties. On the other hand, the Hoge dicta do contain some language with which we disagree, especially:

> There is considerable evidence before us in this case that the Plaintiff, in its Kirby Mine,...is now employing a method of mining called long wall, named for the type of cutting machine which is used. This is a recently common, although a greatly advanced type of mining, which permits cutting into a block of coal across a 550 foot face, and running the cut for a distance of approximately 4,000 feet in the normal sequence of settings. Different from the former methods of mining which were utilized, where several smaller coalcutting machines were used to cut coal and drive entries and in crosscuts in the coal seam, the long wall method of mining needs large blocks or areas of coal unimpeded to obtain its least expensive and most productive results. It is inconceivable to the Court, therefore, that drilling permits would be issued in any pattern of drilling operations, which would be, by location and frequency, in direct conflict with the present or anticipated future method of mine operations.

With all due respect to the lower court in Hoge, in this adjudication we hold--for reasons we have explained--that under the Act it would have been an abuse of discretion for DER to have refused Einsig a gas well drilling permit merely because the gas well would preclude mining by the longwall method. The last sentence in the above quotation from Hoge, but not the preceding passage, was reproduced in PMC's brief.

It can be argued that even if DER is not in a position to balance PMC's reasonably absorbable financial losses against Einsig's averred million dollars, that DER nonetheless should not ignore calamitous losses to PMC, of a magnitude which might force it to wholly close down its mine. There may be merit to this argument, but we need not rule on it in the instant appeal, because the testimony actually offered by PMC concerning the possibility of such calamities--e.g., the testimony by Michael Vargo, PMC's Controller--was far too speculative to be given any weight. In our Yeager Well Opinion we wrote:

> PMC argues that the offset Yeager Well is akin to the straw that broke the camel's back. In other words, PMC wants the board to believe that drilling the Yeager Well will cost PMC the entire coal field...
>
> We are unconvinced, however, that loss of the energy potential of the entire coal field of 8,000,000 tons ever could be ascribed to the digging of the single additional Yeager Well, which can be isolated from the rest of the Mine by a pillar containing 8,000 tons of coal. We are equally unconvinced that the Yeager Well could be blamed for the loss of the jobs of a thousand miners, even if PMC had standing to raise this issue, which we doubt. Strasberg Associates v. Newlin Township, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980), Campbell v. DER, 39 Pa. Cmwlth. 624, 396 A.2d 870 (1979), Helen Mining v. DER, 1979 EHB 92... Forcing the Mine to close could be construed as undue interference, but--as we have explained several times--on the evidence we are not convinced that any future closing of the Mine will be ascribable to the drilling of the Yeager Well.

With the sole substitution of "Gardner" for "Yeager", the above quotation is completely pertinent to the present adjudication. In connection with that quotation we note that financial losses forcing the mine to close could be construed as undue interference because such closing has an obviously and significantly adverse effect on the mine's business and function of extracting coal; the same assertion cannot be said of any lesser financial losses.

2. Consequences of safety and other mining regulations. PMC argues that even ignoring the adverse economic effects of the Gardner Well on PMC's mining operations, the offset character of the Gardner Well will make it very difficult for PMC to meet applicable safety and other mining regulations when mining in the vicinity of the Gardner Well. Indeed, PMC now appears to believe that its case rests primarily on these expected difficulties in complying with safety and other mining regulations. We are inclined to agree with this belief of PMC's, although regrettably the transcript of the testimony hardly supports PMC's assertion (in its brief, p. 25): "Only a very small portion of the record before this Board deals with economics."

PMC has offered much testimony in support of the thesis that the offset character of the Gardner Well will significantly increase the difficulties of compliance with applicable regulations. We already have mentioned supra Mr. Yonkoske's testimony that the Gardner Well's offset character would severely increase ventilation problems (Tr. 80-81); this testimony on ventilation problems was supported by several other PMC witnesses (Tr. 18-19, 37-38, 119). PMC also offered testimony that the two pillars within 500 feet or so of each other--required to surround the Gardner Well and its neighbor 550 feet away--cause stresses in the roof of the seam which significantly add to the difficulties of preventing hazardous unwanted roof collapses (Tr. 37-38, 100). PMC's witnesses additionally testified that under the applicable regulations considerably less coal would be extractable in the vicinity of the aforementioned adjacent (500 feet apart) pillars than would be extractable with wider separations. We also already have quoted Mr. Foreman's testimony that the 500 foot spacing would severely limit, and perhaps wholly preclude, mining the coal between the two pillars (Tr. 120-121). Mr. Foreman's testimony seemed to be based on considerations of practicality, recognizing

the need to assure proper ventilation and roof safety (Tr. 119). However, Mr. Yonkoske testified that--irrespective of such practicality considerations--present mining regulations to prevent subsidence imply that only 50 percent of the coal between the two adjacent pillars could be extracted (Tr. 74-75).

Again, none of the testimony we have just described was at all rebutted by Einsig or DER. Again there was a regrettable failure to ask the witnesses questions which would supplement the above qualitative testimony with quantitative estimates of the effects of pillar adjacency--specifically, of the added costs needed to deal with the ventilation and roof problems, and of the extra coal tonnage which would become unmineable. Such quantitative testimony would greatly facilitate, and add confidence to, our ultimate decision on whether the offset character of the Gardner Well unduly interferes with or endangers PMC's mine.

We must deal with the record as it stands, however, and on that record we find that PMC has met its burden of showing that the offset character of the Gardner Well will cause added safety problems which--unless PMC is willing to accept significant extra mining costs--will make unmineable significant amounts of coal in the vicinity of the Gardner Well, that could have been mined if the Gardner Well were non-offset. We further find that irrespective of these safety problems consequences, PMC has met its burden of showing that present mining regulations will make unmineable a significant portion of the coal between the Gardner Well and its nearest neighboring well, that could have been mined if the inter-well separation were 1,000 feet or more. In coming to these findings we have not--as PMC urged us to do--drawn the inference that Einsig's and DER's failure to rebut the testimony described in the penultimate paragraph implies that rebuttal is not possible. As we have explained, it is believable that the

procedural irregularities of this appeal were prejudicial to DER's and/or Einsig's abilities to fully put their cases before the Board.

In coming to the findings immediately above, we also have had to weigh a complication not heretofore discussed, namely the projected sump in the neighborhood of the Gardner Well. PMC anticipates that exploitation of the seam in the area approximately below the Gardner and Scott farms will require setting up an underground reservoir (termed a sump) to collect and store water which eventually will be pumped out of the mine (Tr. 91-93). Construction of the sump involves leaving barrier pillars of unmined coal in the seam. PMC preferred the present Gardner farm site to the originally proposed Scott farm site, because at the present site the barrier pillar needed for the sump also can serve as part of the pillar surrounding the Gardner Well required under the Act (Tr. 93-94). In other words, for the Gardner Well, because the sump must be constructed in any event, the amount of coal (in the barrier pillar surrounding the well) whose unmineability is ascribable to the Act's requirement of a pillar of coal around the Gardner Well, will be less than the 8,000 tons of unmineable coal typically contained in the pillar surrounding a gas well. If this reduction in the amount of unmineable coal in the Gardner Well's pillar ascribable to the Act's requirements is sufficiently large, it can make up for the extra unmineable coal ascribable to the offset character of the Gardner Well (which extra unmineable coal was the subject of our findings in the preceding paragraph). If, taking the sump into account, the net loss of coal to PMC resulting from all consequences of drilling the Gardner Well is not significantly greater than 8,000 tons, the Gardner Well will not be an undue interference with the mine, because--as we already have explained--the Act mandates the mine owner to accept the loss of the amount of coal in a typical gas well pillar, namely 8,000 tons, whenever a gas well is drilled.

Once again, in connection with the effects of the sump, we are confronted with a record which is devoid of the needed quantitative estimates. We feel that although the overall burden of proof in this appeal rests with PMC, the argument--strongly urged by DER in its brief--that the sump does mitigate the coal losses which normally would be ascribable to drilling the offset Gardner Well, is in the nature of an affirmative defense. Therefore we hold that once PMC has met its burden of showing that the offset character of the Gardner Well will make unmineable a significant amount of coal, over and above the 8,000 tons typically contained in the pillar surrounding a gas well (a burden PMC has met), it should be up to DER or Einsig to show that the aforesaid significant amount of unmineable coal is mitigated by the sump. This ruling is consistent with 25 Pa. Code §21.101(a) which states that it shall generally be the burden of the party asserting the affirmative of an issue to establish it by a preponderance of the evidence. Indeed, it would not be reasonable to expect PMC to establish the negative proposition that the presence of the sump does not diminish the loss of coal ascribable to the Gardner Well. But neither DER nor Einsig presented any evidence of their own on the effects of the sump; instead they relied solely on the quite vague testimony concerning the effects of the sump offered by PMC's witnesses (on direct and cross examination). We do not believe this limited PMC testimony met Einsig's or DER's burdens with respect to the mitigating effects of the sump. Therewith, in this rather convoluted fashion, which is not wholly satisfactory to us, we arrived at the findings stated in the preceding paragraph but one.

The Test For Undue Interference Or Endangerment

To proceed further, we require a standard for deciding whether or not our Findings of Fact imply the Gardner Well unduly interferes with or endangers PMC's mine. Earlier we have construed 52 P.S. §2202 to mean that anything which

makes more difficult or otherwise impedes the extraction of coal is an interference with the mine under the Act. The terms "unduly" and "endanger" in 52 P.S. §2202(a) are non-technical words whose meanings are well-known and whose dictionary definitions need not be repeated here. We have seen that non-offset wells can be tolerated by mine operators. On these considerations, paying due attention to standard principles of statutory construction, and especially examining the Act as a whole, we believe the following test, usable in fact situations like the instant appeal's, reasonably embodies the Legislature's intent when it enacted 52 P.S. §2202(b). Specifically, we hold that a gas well such as the Gardner Well will unduly interfere with or endanger the mine if:

a. As a direct result of drilling the well, in order to comply with safety or other regulations, there will become unmineable, or impractically expensive to mine, by every commonly employed mining method, including room and pillar, an amount of coal significantly (more than de minimis) greater than the amount of coal that similarly would have become unmineable, or impractically expensive to mine, had the well been drilled at least 1,000 feet from any already existing wells, provided that

b. The mine possesses a "workable coal seam" as defined in 52 P.S. §2102(4).

52 P.S. §2102(4) states:

> "Workable coal seam" means (i) a coal seam in fact being mined in the area in question under this act by underground methods or (ii) one which in the judgment of the division can be and that it is reasonable to be expected will be mined by underground methods.

In the instant appeal, although the testimony contains various dark warnings that the entire mine is becoming unprofitable and may have to be closed,

it seems clear from the bulk of the testimony (e.g., Tr. 82-83)--as well as from the vigor with which PMC is protesting the proposed drilling--that PMC is expecting to mine the seam in the area of the Gardner Well; in fact the mining operations are expected to reach the area in about five years. Consequently proviso b above is fulfilled. Our previous findings imply that condition a above also is fulfilled. Therefore we conclude that the Gardner Well will unduly interfere with or endanger PMC's mine. It follows that DER's grant to Einsig of a permit to drill the Gardner Well was an abuse of discretion which cannot be allowed to stand.

Our task now is almost done, but there still are a few additional things to say. First we note that the above test for undue interference or endangerment is not exclusive. A well which is being improperly drilled, or which is constructed of inferior materials, can endanger a working mine even though condition a above is not fulfilled.

Second, we reiterate our ruling, at the beginning of this adjudication, that the Findings of Fact and Conclusions of Law in this adjudication should not be given collateral estoppel effect in future appeals. We believe our discussion has shown that our holding that the Gardner Well will unduly interfere with or endanger PMC's mine is correct on the record. However, we believe our discussion also has shown that the record could have been considerably more quantitative, which would have increased our own confidence in our findings. In view of the quantitative deficiencies in the record, and recognizing the procedural irregularities which have culminated in this adjudication, we consider it improper to permit this adjudication to bar future litigants in similar appeals from fully presenting their own cases.

Third, PMC's brief urges the relevance of the Pennsylvania Constitution's Article I, Section 27, to DER's decision process under the Act. We examined this

same argument, and rejected it, in our Yeager Well Opinion. We stand here by our analysis of the relevance of Article I Section 27 in that opinion. Without going into details of the analysis, for which the Yeager Well Opinion should be consulted, we simply point out that Article I Section 27 is concerned with Pennsylvania's public natural resources. There is no indication in the case law that Article I Section 27 requires DER to weigh whether privately owned natural resources are being effieiently exploited.

Fourth, we observe that PMC has asked us to hold that the Act is unconstitutional. PMC has made this request of us to protect its rights, knowing full well that under St. Joe Minerals Corporation v. Goddard, 14 Pa. Cmwlth Ct. 624, 324 A.2d 800 (1974), this Board lacks jurisdiction to decide the constitutionality of a statute enacted by the Legislature. Therefore we must decline to rule on the constitutionality of the Act. However, we can rule on PMC's Motion for Leave To Amend its Notice of Appeal, filed August 31, 1982. The amended Notice of Appeal, filed with the Motion for Leave To Amend, seeks to preserve the issue of the constitutionality of the Act, which was not raised in PMC's original Notice of Appeal. The amended Notice of Appeal has been filed after expiration of the 30-day period for filing an appeal under the Board's rules. 21 Pa. Code §21.52(a). However, the Board customarily permits appellants to expand on their reasons for appealing when these appellants file their pre-hearing memoranda. There has been no opportunity to file pre-hearing memoranda in this appeal, as we have explained. The other parties have had notice of this Motion for Leave To Amend and have not objected to it; we do not see how the other parties would be prejudiced by permitting PMC to amend its appeal to preserve the issue of the constitutionality of the Act. Therefore, PMC's Motion for Leave To Amend its Notice of Appeal is granted, and the amended Notice of Appeal is accepted.

Finally, we wish to elaborate on the seeming inconsistency that after relying so heavily on the Yeager Well Opinion, we here have reversed DER's well drilling permit grant to Einsig although in the Yeager Well Opinion, under very similar facts, we denied PMC's petition to stay a well drilling permit granted to Einsig. There is no inconsistency. As we have explained supra, the Yeager Well Opinion primarily was a ruling on the likelihood that PMC would prevail on the merits after a full hearing on its appeal. PMC did not present its full or best case in the supersedeas hearing. But much more importantly, we did not anticipate, we could not have anticipated, that in a full hearing on the merits neither Einsig nor DER would offer any evidence to rebut PMC's testimony that the well would make its mining operations much more difficult, hazardous and costly.

CONCLUSIONS OF LAW

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

2. PMC has the burden of establishing its contention that the Gardner Well will unduly interfere with or endanger PMC's mine.

3. Not every "interference" with a mine is "undue interference" under the Gas Operations Well-Drilling Petroleum and Coal Mining Act.

4. The adverse effects on mine operation characteristically associated with drilling a gas well through a coal seam, especially the effects of the pillar of coal the mine operator is required to leave around the well, are not undue interference with or endangerment of the mine under the Act.

5. The need to employ room and pillar mining, rather than longwall mining, does not of itself imply that a drilled gas well has unduly interfered with or endangered the mine.

6. The scope of this appeal is limited to whether or not DER abused its discretion in permitting the Gardner Well, not any other wells or collection of wells, past or future.

7. Evidence of the Gardner Well's economic impact on PMC's mining operations is not per se irrelevant to this appeal.

8. Anything which makes more difficult or otherwise impedes the extraction of coal is an interference with the mine under the Act.

9. DER is not required to balance the financial disadvantages to the mine operator and to the gas well operator before making its decision whether or not to permit the well.

10. DER's task under the Act includes deciding whether the added costs associated with the offset character of the Gardner Well will make the extraction of coal in the vicinity of the well, but outside its surrounding pillar, so unreasonably costly as to be impractical.

11. Financial losses forcing the mine to close could be construed as undue interference with the mine.

12. Once PMC has met its burden of showing that the offset character of the Gardner Well will make unmineable a significant amount of coal, over and above the 8,000 tons typically contained in the pillar surrounding a gas well, the opposing parties have the burden of showing that the aforesaid significant amount of unmineable coal is mitigated by affirmative defenses, such as the defense that PMC will have to construct a sump whether or not the well is drilled.

13. A gas well such as the Gardner Well will unduly interfere with or endanger the mine if:

a. As a direct result of drilling the well, in order to comply with safety or other regulations, there will become unmineable, or impractically

expensive to mine, by every commonly employed mining method, including room and pillar, an amount of coal significantly (more than de minimis) greater than the amount of coal that similarly would have become unmineable, or impractically expensive to mine, had the well been drilled at least 1,000 feet from any already existing wells, provided that

b. The mine possesses a "workable coal seam" as defined in 52 P.S. §2102(4).

14. The Gardner Well will unduly interfere with or endanger the mine.

15. DER's grant to Einsig of a permit to drill the Gardner Well was an abuse of discretion.

16. The Pennsylvania Constitution's Article I Section 27 does not require DER to weigh whether privately owned natural resources are being efficiently exploited when deciding whether or not to grant a gas well drilling permit.

17. This Board lacks jurisdiction to decide the constitutionality of a statute enacted by the Pennsylvania Legislature.

18. Because of deficiencies in the record, and because of procedural irregularities in this appeal, the Findings of Fact and Conclusions of Law herein shall not be given collateral estoppel effect in future appeals.

O R D E R

AND NOW, this 9th day of September, 1982

1. The appeal of Pennsylvania Mines Corporation is sustained.

2. The permit dated July 20, 1982, granted by DER to Barry D. Einsig for the purpose of drilling a gas well known as the Gardner Well, is voided and withdrawn.

3. Pennsylvania Mines Corporation's Motion for Leave To Amend its Notice of Appeal, filed August 31, 1982, is granted.

4. Pennsylvania Mines Corporation's Amended Notice of Appeal, filed August 31, 1982, is accepted.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
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ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: September 9, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DONALD T. COOPER and
KATHLEEN COOPER

Docket No. 81-032-G

Dams and Encroachments Permit
25 Pa. Code §105.332

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GRAHAM K. SHADDICK
SUCCESSOR TO HEIRS OF CLARENCE
MERCATORIS, Intervenor

ADJUDICATION ON RECONSIDERATION

By Edward Gerjuoy, Member, September 20, 1982

On August 24, 1981, this Board entered an adjudication (the "original Adjudication") in this matter, which involves an appeal from DER's denial of Donald and Kathleen Coopers' (the "Coopers") application for a permit to install a seasonal dock extending into Conneaut Lake in Sadsbury Township (the "Township"), Crawford County. DER denied the permit application because the Coopers had not supplied DER with a release from the owner of the property to which the dock was attached, as required by 25 Pa. Code §105.332 ("Section 105.332"); the Coopers had not complied with Section 105.332 because, despite the Coopers' good faith efforts, no person willing to claim ownership of the property had been found. Our original Adjudication determined that the property in question actually was

owned by the Commonwealth, and remanded the matter to DER for action in accordance with this determination, which removed the need for the release required by Section 105.332.

Subsequently, DER and the Intervenor petitioned for reconsideration, under the Board's Rule 21.122, 25 Pa. Code §21.122. The petitioners argued that the original Adjudication rested on grounds--notably the ruling that the Commonwealth owned the property to which the dock was attached--which had not been considered by any party to the proceeding, and which the parties had not had the opportunity to brief. The petitioners also argued that this Board did not have the power to rule on the ownership of the property in question, but nevertheless requested the opportunity to present further evidence on the ownership issue.

On March 5, 1982, the Board granted reconsideration; on April 5, 1982, the Board granted a rehearing for the sole purpose of presenting new evidence bearing on the ownership issue. This hearing was held on May 11, 1982. At the conclusion of the rehearing, a schedule for briefing the issues raised on reconsideration was set up. This Adjudication on Reconsideration, though based on the entire record of course, rests predominantly on the evidence developed at the rehearing and the post-rehearing briefs. The Findings of Fact below are our complete findings in this matter, and replace the Findings of Fact in our original Adjudication. However, those specific findings which are unaltered from our original Adjudication will not be discussed here. Similarly, the Conclusions of Law herein replace the Conclusions of Law in our original Adjudication. Otherwise, this Adjudication should be regarded as a supplement to our original August 24, 1981 Adjudication; in particular, those portions of our original Discussion which are not inconsistent with the present Adjudication remain valid.

FINDINGS OF FACT

1. Donald T. Cooper and Kathleen Cooper are the appellants in the above-captioned matter.

2. The Coopers own a home in which they live year-round on Oakmere Place in Sadsbury Township, Crawford County, which home is located in the Oakland Beach Allotment (also known as Oakland Beach Golflands) ("Allotment") at Conneaut Lake.

3. The Coopers, like other residents in the Allotment, lease the land they live on through long-term (about 900-year) leases.

4. There are eighty-two (82) long-term property leaseholders in the Allotment and some 188 lots.

5. By application dated May 5, 1979, the Coopers applied to the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the appellee, for a permit to locate a boat dock in Conneaut Lake at the foot of Oakmere Place.

6. Mr. Cooper first put his seasonal dock in the lake in 1979. He has reinstalled it yearly since, despite the lack of a permit from DER to do so.

7. Said dock which extends sixty-eight feet into the lake from the shore is owned by the Coopers and two other men who own homes in the Allotment.

8. Currently, there are four (4) boats using the Coopers' dock.

9. Others have asked Mr. Cooper if they could use his dock, but the Coopers have told them no, because there is not enough room.

10. There are only two docks at the end of Oakmere Place, one of which is the Coopers' dock; the other has been there since about 1975.

11. At most, one more dock could be put in at the end of Oakmere Place, but then it would be too crowded for boats to use any of the three docks.

12. The Coopers claim the right to locate their dock at the end of Oakmere Place by virtue of their lease of their residence property on Oakmere Place; the Coopers neither own nor exclusively lease any lakefront property and they have no agreements with lakefront property owners to allow their dock to be located there.

13. Their lease provides that the Coopers shall have a right to "The use of all streets, parks and docks granted to...Oakland Beach Land Company", as well as to "the use of all streets, parks and bathing grounds" in the Conneaut Lake Area.

14. All of the leaseholders of lots in the Oakland Beach Allotment have a right through their common lessor to "free and uninterrupted use, liberty and privilege of, and passage in and along those certain roads, parcels of land and dock or parts thereof...described as follows, to-wit:

> "5. ...Oakmere Place...and
>
> 6. That certain dock or pier of the D. L. and T. P. McGuire, commonly known as the Oakland Beach Dock for the purposes of entering and leaving boats on Conneaut Lake."

15. On June 23, 1936, the roads in the Allotment, including Oakmere Place, were accepted by the Sadsbury Township Board of Supervisors as public roads, via a resolution consented to by the Crawford County Court of Quarter Sessions.

16. The aforesaid resolution dedicating Oakmere Place to public use describes Oakmere Place as running all the way to the easterly edge of Conneaut Lake.

17. At the end of Oakmere Place the Conneaut Lake Joint Municipal Authority (the "Authority") constructed a sanitary sewage pump station in 1969.

18. The present shoreline at the end of Oakmere Place does not extend into Conneaut Lake significantly (more than de minimis) farther than it extended before the pump station was constructed.

19. Coopers' dock connects to the land at the end of Oakmere Place, in the area where the pump station was constructed.

20. The Township's Solicitor claims that the Township owns Oakmere Place to the point of its original (pre-construction of the pump station) shoreline.

21. Fred C. Kiebort, Jr., a Trustee of the Conneaut Lake Ice Company, claims that the Trustees of the Conneaut Lake Ice Company (the "Trustees") own the title to the dock-adjacent land at the foot of Oakmere Place.

22. As of the date of the rehearing, the Township has refused to give the Coopers a Section 105.332 release on the grounds that the Township does not own the dock-adjacent land presently at the foot of Oakmere Place.

23. As of the date of the rehearing, the Township has not objected to construction of the Coopers' dock at the foot of Oakmere Place.

24. On May 3, 1965, the Township passed an Ordinance authorizing the Authority to construct, maintain and repair the pump station later constructed at the foot of Oakmere Place.

25. The Authority's solicitor therefore claims the Authority has an easement on the land at the foot of Oakmere Place, to construct and maintain the pump station in that location.

26. Robert B. Dornhaffer the Authority's solicitor, testified at the rehearing.

27. Mr. Dornhaffer's testimony gave at best highly speculative reasons to believe that the Authority's enjoyment of its easement would be restricted in any way by the presence of the Coopers' dock or by the traffic of persons to and from the dock.

28. Although there has been another dock at the foot of Oakmere Place since about 1975, the Authority never has had a lawsuit stemming from an injury to someone in the area of the pump station.

29. A document referred to and relied on by Mr. Kiebort (see Finding of Fact 21), recording in 1941 a transfer to the Trustees of properties originally belonging to the Conneaut Lake Ice Company, excepts and reserves unspecified parcels of land previously conveyed by the Conneaut Lake Ice Company.

30. A careful search of the Coopers' chain of title to their own property on Oakmere Place nowhere mentions the Trustees.

31. In 1928, well before the aforesaid document referred to by Mr. Kiebort (Finding of Fact 29) was recorded, various parties who claimed to be owners and lessees of certain adjoining tracts of land in Sadsbury Township granted themselves and their successors the forever free and uninterrupted right of passage along Oakmere Place.

32. The parties who made the perpetual grant described in Finding of Fact 31 included neither the Conneaut Lake Ice Company nor the Trustees.

33. The dedicators of Oakmere Place to the Township, accepted by the Township in 1936 (see Finding of Fact 15), which dedicators describe themselves as owners of the greater portion of the lots in the area, did not include the Conneaut Lake Ice Company nor the Trustees.

34. It is the Board's opinion that the weight of the evidence does not support Mr. Kiebort's claim that the Trustees own the land at the foot of Oakmere Place.

35. The word "use" in the Coopers' lease (see Finding of Fact 13) is quite unrestricted.

36. Although the Coopers' lease contains various specific restrictions on construction by the leaseholder, construction of a boat dock is not ruled out.

37. Mr. Kiebort testified that the Trustees had never conveyed "a piece of land for the purpose of erecting a dock."

38. However, there has been a dock at the foot of Oakmere Place since about 1975 (see Finding of Fact 10), and there was testimony that there are many other docks presently located on the lakeshore, dating back at least to about 1950.

39. There is no indication that the Trustees ever had challenged or intended to challenge the construction of any of the docks mentioned in Findings of Fact 38.

40. At the time the Coopers applied to DER for their permit, the Environmental Quality Board's Regulations, promulgated in 1978, provided:

"§105.312. Riparian property.

> Where the applicant for a permit pursuant to this subchapter does not own all the riparian property behind the proposed structure, notarized and signed releases must be procured from such property owners by the applicant and furnished to the Department." (Original hearing transcript pp. 176-177 and 25 Pa. Code §105.312)

41. In 1980, subsequent to the Coopers' submission of their application, but prior to their permit's denial, the Environmental Quality Board promulgated new regulations pursuant to the Dam Safety and Encroachment Act (see 25 Pa. Code Chapter 105); 25 Pa. Code §105.332 provides:

> "When an applicant proposes location of a structure on or in front of riparian property not owned by the applicant, the applicant shall obtain and furnish to the Department notarized and signed releases from the owners of all affected riparian property."

42. Pursuant to this regulation and by letter dated June 4, 1980, DER sought proof from Coopers of their ownership of the shore behind their dock.

43. The Coopers never responded to DER's letter by establishing either ownership of this land or a release for their dock from any owners of the affected riparian property.

44. DER denied Application No. 2079713 because of Coopers' failure to address this issue as required by the said regulations.

DISCUSSION

The Coopers are appealing DER's refusal to grant them a permit to install a seasonal dock. DER asserts that it has refused the requested permit because the Coopers have not complied with 25 Pa. Code §105.332, which reads:

> When an applicant proposes location of a structure on or in front of riparian property not owned by the applicant, the applicant shall obtain and furnish to the Department notarized and signed releases from the owners of all affected riparian property.

Originally, before we issued our original Adjudication in this matter, DER contended that the Coopers could not have complied with Section 105.332 because no owner who could give the Coopers their required release had been identified; but our original Adjudication concluded that no release was necessary because the Commonwealth owned the "affected riparian property." Now, after the rehearing, DER no longer contends the ownership of the affected property is unknown, but DER disagrees that the Commonwealth is the owner. However, DER continues to assert that the Coopers have not complied with Section 105.332 because (according to DER) the Coopers have not obtained the necessary releases from the newly-identified owners. Therefore, DER argues, continued denial of the Coopers' permit is required by the regulations. The Coopers, on the other hand, insist our original ruling--that the Commonwealth owns the affected property--was and remains correct.

A. Whether We May Rule on the Ownership of the Affected Property

Our review of a DER action is to determine whether the DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Lackawanna Refuse Removal, Inc. v. DER, EHB Docket No. 79-024-B (issued February 3,

1981); Morcoal Company v. DER, EHB Docket No. 79-189-B (issued April 30, 1981); Czambel v. DER, EHB Docket No. 80-152-G (issued April 30, 1981). DER does not dispute this function of ours, but nevertheless maintains that in the instant appeal we should answer "No" to the question (which the parties were requested to address in their post-rehearing briefs):

> Assuming that the parties will continue to dispute the ownership of the property in question, but that the ownership seems clear to the Board, whether the Board may rule on the ownership?

DER's post-rehearing brief argues this issue vigorously, with numerous citations to the case law (as DER had done in its post-hearing brief preceding our original Adjudication). The Intervenor also maintains the answer to the foregoing briefing question should be "No", but relies on DER's arguments; the Coopers have not addressed this issue in either their post-rehearing or post-hearing briefs.

Despite DER's arguments, we rule that the answer to the above question should be "Yes"; in our view, the "No" answer DER favors would be inconsistent with our statutory obligations under 71 P.S. §510-21:

> to hold hearings and issue adjudications...on any order, permit, license or decision of the Department of Environmental Resources.

DER's arguments and citations concentrate on the thesis that this Board's scope of authority is limited to the powers granted under 71 P.S. §510-21; we agree with this thesis. DER then infers that we have no power to determine real estate title; we agree with this inference as well. But, for reasons elaborated below, we do not believe that our agreement with these bald theses of DER's, in particular our agreement with the conclusion that we cannot determine title, implies that we may not form what we regard as a well-founded opinion on the ownership of the dock-adjacent property when without such an opinion we cannot discharge our obligations under 71 P.S. §510-21.

This appeal would not have arisen had DER not been empowered to administer Section 105.332, quoted above. Although we have diligently searched, we have not found any specific written record of the Environmental Quality Board's ("EQB") intent in giving DER this power. In the absence of such specific record, various rules of statutory construction can serve as a guide to this intent of the EQB's, as well as to the extent of DER's powers under Section 105.332. According to the Statutory Construction Act, 1 Pa. C.S.A. §1922:

> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

By virtue of 1 Pa. C.S.A. §1502(a)(1)(ii) and 1 Pa. Code §1.7, the rule of statutory construction we have just quoted applies also to Section 105.332.

We conclude that DER, under Section 105.332, must have some power to decide whether or not a furnished release had been signed by the actual owner of the property in question. Otherwise DER would be bound to accept every signed release which no third party had challenged, even though it was obvious that the signer did not own the "affected riparian property" mentioned in Section 105.332. Similarly, unless DER could make some decision about the validity of a furnished release, any person could indefinitely delay DER's granting of a completely satisfactory permit application, merely by challenging--on however frivolous grounds--the right of the obvious owner of the "affected riparian property" to furnish a release. Under 1 Pa. C.S.A. §1922, outcomes as unreasonable as those just suggested could not have been intended by the EQB when it promulgated Section 105.332.

However, if (as we have just concluded) DER has some power to decide whether furnished releases indeed have been signed by the affected property owners,

then surely this Board--which has the duty to review DER decisions and adjudicate disputes over DER actions such as permit denials, and which is entitled to substitute its discretion for DER's (Warren Sand and Gravel supra)--must have at least equal power. The contrary conclusion about this Board's powers would imply that we must let stand a DER action based on alleged compliance or lack of compliance with Section 105.332 even though we are convinced that DER's action is an abuse of discretion because DER has incorrectly and unjustly decided who are the affected property owners required to furnish releases under that Section. In enacting 71 P.S. §510-21, the Legislature, like the EQB in the preceding paragraph, could not have intended outcomes so unreasonable.

B. The Ownership of the Affected Property.

Under the authority of the conclusions reached in Section A supra, we now proceed to examine the evidence on the record concerning the ownership of the property to which the dock is attached, which in the instant appeal must be categorized as "affected riparian property" of Section 105.332. We stress that any ruling we arrive at in this adjudication concerning the ownership of this property does not quiet title or transfer any property rights; those tasks are the Crawford County Common Pleas Court's, as DER rightly avers. Were the parties to bring an action to quiet title in Crawford County Common Pleas Court, it would be wholly up to that Court whether or not to adopt our Findings of Fact concerning ownership. Were there a pending action to quiet title in the dock-adjacent property before the Crawford County Common Pleas Court, we probably should and would defer this Adjudication until that Court had rendered its decision. There is nothing on the record in this appeal, however, to indicate that any such quiet title action has been instituted, or even is intended. Under the circumstances, our refusal to state what we regard as our well-founded opinion on the ownership issue--thereby further deferring a

final ruling (see 71 P.S. §510-21(c)) on a permit application completed by the Coopers as long ago as May, 1979--would be an unfair (to all the parties involved) dereliction of our duties and responsibilities.

Our original Adjudication contained the key Finding of Fact:

> 18. The pump station's construction caused the shoreline at the end of Oakmere Place to be extended about twenty (20) feet into the lake.

This Finding was the basis for our former Finding of Fact:

> 26. The Commonwealth owns the land to which the Coopers' dock is attached.

Former Finding of Fact 26 was arrived at on the basis of the following reasoning from former Finding of Fact 18:

> Here, however, neither the Authority nor the Township claims ownership of property which, but for the fill, lies below the low water mark of Conneaut Lake. As DER pointed out in its excellent and thorough brief, the Commonwealth owns Conneaut Lake below the low water mark (citation). Thus, under the peculiar facts of this case we find that the Commonwealth owns title to the property in question. (Emphasis added)

The evidence presented at the rehearing has caused us to abandon our previous Finding of Fact 18; indeed we now have come to precisely the contrary Finding that the shoreline at the end of Oakmere Place does not extend into the lake significantly (more than de minimis) farther now than it extended before the pump station was constructed. This new Finding destroys the just-quoted reasoning on which our former Finding of Fact 26 was based, and leads--as elaborated below--to quite different conclusions (replacing former Finding of Fact 26) concerning the ownership of the land to which the Coopers' dock is attached.

Because this reversal of our previous Finding of Fact 18 is so crucial, we feel bound to review here the evidence on this shoreline issue. In our original

hearing, Appellant Donald Cooper testified as follows (H.T. pp. 58-59)[1]:

> Q. Before that pump station was built, when that pump station was built there, did they have to add land onto what was already there to put the pump station on it?
> A. This I don't know. I wasn't there that summer when that was built. We had rented our cottage out.
> Q. Well, were you familiar with the shore of the lake at that point, before the pump station was built?
> A. Yes.
> Q. Was the shore of the lake, at the time the pump station was built, changed in any fashion?
> A. Well, they put two big holes down in the ground, silos I believe they call them, and they removed an awful lot of dirt from these holes, and of course the shoreline was changed.
> Q. Did the shoreline go out further into the lake when they were done?
> A. Yes.
> Q. Do you know how much it went out further into the lake, approximately? ... If you know.
> A. Well, I don't know. I never measured it.
> Q. Well, could you give me an estimate?...Would you estimate that to be 15 feet?
> A. Oh, no. Maybe a little more than that, probably.
> Q. 20 feet?
> A. Yes.
> Q. So they added 20 feet of earth out into the lake when they put the pump station there?
> A. Yes.

This testimony of Cooper's was not wholly uncontradicted even in our original hearing.

Gertrude Weber, one of the other residents in the area, testified (H.T. p. 89):

> Q. Was there any change made enlarging that area when the sanitary authority built, or is it approximately the same today?
> A. I would say it has a little bit in the front now. Other than that, I don't think so.
> THE HEARING EXAMINER: A little what in front?
> A. Like a little wall to keep the water from coming up.

But we felt Mr. Cooper's otherwise uncontradicted testimony was more credible than Mrs. Weber's, and therefore made our former Finding of Fact 18.

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1. We use H.T. to denote the original hearing transcript, and R.T. to denote the rehearing transcript.

At the rehearing, however, DER presented testimony by William D. Rice, who had not been a witness in the original hearing. Mr. Rice is a registered professional engineer who is the Project Manager of the Authority, and who worked on the design and construction of the Oakmere Place pump station (R.T. pp. 4-6). Mr. Rice testified (R.T. pp. 6-8):

> Q. When that pump station was built, was any dirt or fill material added at the point that Oakmere Place reaches Conneaut Lake?
> A. No, sir.
> Q. The land at the end of Oakmere Place was the same configuration as it meets the water, both before and after construction?
> A. Yes, sir.
> Q. Now, since that time was the pump station relocated or moved at all?
> A. No, sir.
> Q. And was the pump station built on dry land as it existed?
> A. Yes, sir.
> Q. Now, has the Authority, after construction of the pump station, done any filling in of the lake at the pump station area?
> A. No, sir. They did not do any filling in...
> The Authority purchased an old barn foundation in the vicinity and hauled the very large cut stones in and placed them just at the water's edge between the pump station and the water to offer protection.
> Q. This was placed on dry land?
> A. Yes.
> Q. This was not placed in the water?
> A. Yes, sir...
> Q. Now, from your recollection, the distance between the cut blocks and the water itself is about what?
> A. Once again--I mean it has been a long time, but I think that the stones are very close to the water's edge at normal elevation.

Mr. Rice was not shaken from the above testimony under cross examination by Appellants' counsel, who questioned him about a photograph (Commonwealth's Exhibit R-1)[2] showing the pump station and the shoreline at Oakmere Place (R.T. pp. 12-13):

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2. We use the prefix "R-" to denote exhibits introduced at the rehearing. Exhibits numbered in the usual fashion, without this "R-" prefix, e.g., Appellant's Exhibit 2, were introduced at the original hearing.

Q. Isn't it true that that is not the original water line of the lake? Isn't it true that it was further back?

A. No, sir, it is not true.

Q. You are saying that this is the original water line of the lake?

A. Yes.

Q. And this material here, where grass is on top, is that fill or the natural boundary of the lake?

A. The natural boundary of the lake.

The only other testimony on the shoreline issue at the rehearing came from Appellant Kathleen Cooper (R.T. pp. 61-62):

Q. Did you watch the construction of it (the pump station)?

A. I watched a portion of it, yes...

Q. Can you describe how it was constructed?

A. When they were constructing it, I walked down to the edge of the wall and stood there and hung on to my kid, because there was approximately a 30 to 40-foot hole dug in.

Q. What went in the hole afterwards?

A. The green pump station

Q. Was landfill put in there?

A. It had to be, the depth of it was approximately 30 feet.

Q. You are saying 30 feet excavation, and the pump station was placed inside; is that your testimony?

A. Yes.

Q. And then it was filled up?

A. Filled up to build up around that certain area there.

Q. Was there anything else done after that?

A. Then they put the hole back, and they put the stone wall up.

Mrs. Cooper's testimony explains that the construction involved an excavation which had to be filled, but does not directly confirm her husband's assertion that after the excavation had been filled the new shoreline extended 20 feet farther into the lake than before construction had begun. Mr. Rice is a trained engineer, who was familiar with the design of the pump station, and who was completely positive that the construction of the pump station had not altered the shoreline. On all the

evidence, therefore, we cannot but find that the disputed Oakmere Place shoreline does not now extend significantly farther into the lake than before the pump station was constructed.

The Finding that the Oakmere Plan shoreline was not significantly altered by construction of the pump station means that the property owners whose releases may be needed under Section 105.332 can be ascertained by tracing the title of this unaltered shoreline, comprising the original natural boundary of Conneaut Lake at the foot of Oakmere Place. At the rehearing, testimony pertinent to this title tracing task was presented by Fred C. Kiebort, Jr., a witness for the Intervenor. Mr. Kiebort is an attorney and a Trustee of the Conneaut Lake Ice Company (R.T. p. 41). In 1826 the level of Conneaut Lake was raised 11 to 12 feet, with the intention of using Conneaut Lake as a feeder for a canal from Beaver to Erie. Raising the level of the lake flooded several hundred acres of land. Eventually the project was abandoned, however, and Conneaut Lake was permitted to revert to its original level (R.T. pp. 41-43). The ownership of the flooded land, which once again became usable when Conneaut Lake reverted to its original level, was settled by the Pennsylvania Supreme Court in Foust v. Dreitlein, 237 Pa. 108, 85 A.68 (1912); the flooded land was judged to have been the property of the Commonwealth at the time the lake reverted to its original level. Therefore, title to the flooded land now resides in those persons who presently are the Commonwealth's successors to the formerly flooded land.

Mr. Kiebort testified categorically, without contradiction at the rehearing, that the Trustees of the Conneaut Lake Ice Company were these successors to the Commonwealth's title. In Mr. Kiebort's own words (R.T. pp. 42-43):

> ...We own all of the overflowed land around Conneaut Lake, and that overflowed land means the land between what was the high level of the lake and the present low level... Whatever title the Commonwealth acquired in the submerged land, passed by various conveyances to us, Trustees of the ice company, for the Conneaut Lake Ice Company, we as Trustees are handling it for the ice company.

Mr. Kiebort's testimony was supplemented by copies of various relevant documents of record in the Recorder's Office of Crawford County (Intervenor's Exhibits R-2 to R-5, R T. pp. 43-47).

On the basis of Mr. Kiebort's testimony, DER no longer asserts that the ownership of the dock-adjacent shoreline at the foot of Oakmere Place is unknown; instead, DER now claims that title to this dock-adjacent shoreline rests with the Trustees. This title, DER further claims, is subject to Sadsbury Township's easement for the use of Oakmere Place as a public road, and is additionally subject to the Authority's easement to construct and maintain the pump station. It follows, DER now maintains, that to comply with Section 105.332 the Coopers must obtain releases from <u>each</u> of the three just-identified entities possessing property rights in the Oakmere Place shoreline, namely the Trustees, the Township <u>and</u> the Authority. The Intervenor agrees that the Coopers must obtain releases from these three entities. The Coopers reject Mr. Rice's testimony and contend our original August 24, 1981 Adjudication correctly decided that the Commonwealth owns the dock-adjacent shoreline.

C. Whose Releases Must Be Obtained

As we already have explained, we do not reject Mr. Rice's testimony; we find it believable. Mr. Rice's testimony destroys the reasoning on the basis of which our original Adjudication found that the Commonwealth owned the dock-adjacent

property. The Coopers' contentions, summarized at the end of the immediately preceding paragraph, are not meritorious therefore.

In fact, we agree with DER that the evidence developed at the rehearing indicates that the Trustees, the Township and the Authority each have property right claims to the dock-adjacent shoreline at the foot of Oakmere Place meriting serious examination. However, we do not agree with DER and the Intervenor that these claims automatically establish each of these entities as property owners whose releases the Coopers must obtain under the terms of Section 105.332. Rather, we conclude--for reasons discussed below--that only the Township's release is required.

The Township's Claim. On June 23, 1936 the Board of Supervisors of Sadsbury Township passed a resolution accepting Oakmere Place, and other roads which had been "dedicated to public use", into the public road system of the Township (Exhibit I of Appellant's Exhibit 4); the Court of Quarter Sessions of Crawford County, on June 23, 1936, consented to this "taking over" by Sadsbury Township of Oakmere Place and the other roads (Exhibit J of Appellant's Exhibit 4). Both these June 23, 1936 documents describe Oakmere Place as:

> Beginning where the center line of Oakmere Place, 50 feet in width or twenty-five feet on either side of the said center line intersects the easterly shore of Conneaut Lake.

At the hearing DER's Lawrence Busack testified that on the basis of the immediately foregoing facts he had concluded that the Township owned the dock-adjacent property, and had inferred that a release to the Coopers from the Township would suffice for the purposes of Section 105.332 (N.T. pp. 113-118). This inference was communicated to the Coopers during the summer of 1980. A memorandum from

Mr. Busack to his superior, dated August 12, 1980 and introduced into evidence as Appellant's Exhibit 9, states:

> I told Mr. Cooper that he would need an agreement from the Township authorizing him to use this land in front of Oakmere Place. With such an agreement, DER could grant a dock permit.

The Township refused to give the Coopers their required release, however, on the grounds that actually the Township did not own the property at the foot of Oakmere Place. The Township did not deny that it had taken over Oakmere Place to its shoreline, but claimed--consistent with our Finding in our original Adjudication--that the present shoreline had been extended beyond the original (at the time of dedication) shoreline. In particular, on November 25, 1980 the Township Solicitor wrote DER as follows (Appellant's Exhibit 7):

> The application of Mr. and Mrs. Cooper was reviewed by the Board of Supervisors on several occasions at public meetings at which time both Mr. & Mrs. Cooper were present. The position of the Township in this case is that they have no standing to object or to consent to the installation of a float dock on Conneaut Lake by reason of the fact that beyond the terminus of Oakmere Place the public street owned by the Township there is an additional parcel of land which is actually the parcel of land from which the dock of Mr. & Mrs. Cooper would extend... It is true that the original Resolution taking over Oakmere Place by the Board of Supervisors indicated that it extended to the East shore of Conneaut Lake. The original Westerly terminus of Oakmere Place is clearly ascertainable by viewing the street as there is a concrete wall marking the Easterly shore line of the Lake and the Westerly termination of Oakmere Place. At the time of the construction of the municipal sewer system there was a dirt buildup beyond the Westerly terminus of Oakmere Place and in that buildup a pumping station was installed by the Municipal Authority.

The Township's Solicitor's assertions about the "dirt buildup beyond the Westerly terminus of Oakmere Place" clearly are hearsay for the purposes of this

Adjudication; in any event we now have determined that in fact the construction of the pump station did not change the location of the shoreline at the end of Oakmere Place. Therefore we conclude, as DER concluded in the summer of 1980 and now again concludes, that the Township possesses property rights in the present dock-adjacent shoreline. The nature of these property rights is not altogether clear: the Township's Solicitor's letter identifies Oakmere Place as "the public street owned by the Township" (our emphasis), whereas DER asserts the Township merely possesses an easement for use of Oakmere Place as a public road. The matter is obscure because what the June 23, 1936 "take over" gave the Township was not unambiguously specified. Probably DER is correct that the Township possesses no more than an easement. It is the law in Pennsylvania that (In re City of Altoona, 479 Pa. 252,388 A.2d 313 (1978)):

> Dedication of a public street does not invest the municipality with a fee title to the land on which the roadway rests. What the municipality acquires is the right to use, maintain, regulate and control that land as a street or road for the benefit of passage. Stated more succinctly, what the public obtains is a right of passage; the fee continues to be in the owner or owners of the land.

Even if the Township possesses no more than an easement, however, it is reasonable that the Coopers should obtain a release from the Township before attaching their dock to the Oakmere Place shoreline. The presence of this dock could interfere with the Township's ability "to use, maintain, regulate and control" Oakmere Place as a street or road; the Township might have plans--e.g., to make Oakmere Place accessible from the shorefront, or to extend the paved portion of Oakmere place down to the shoreline--which would be incompatible with the presence

of the Coopers' dock. In other words, the Township is an affected property owner under Section 105.332, whose release must be obtained by the Coopers in order to receive their desired permit.

There remains the question: What is DER to do if the Township continues to insist that it does not have property rights in the present Oakmere Place shoreline? As we have stressed, this Adjudication has not determined the Township's property rights. The Township is not bound by--and need not accept--our opinion that the Township possesses at least an easement in the present Oakmere Place shoreline. Nevertheless we believe that our opinion concerning the Township's property rights, which opinion DER shares, is well-founded, for reasons we have been at pains to explain. We also have explained that in giving DER the power to administer Section 105.332, the EQB must have intended that DER (and this Board) form such well-founded opinions about the property rights of various persons involved in a permit dispute such as the present appeal. We conclude that under the circumstances of this appeal, as the evidence about the foot of Oakmere Place has unfolded, it would be an abuse of discretion for DER to refuse the Coopers their permit should the Township continue to maintain--as it maintained in its November 25, 1980 letter to DER--that the Township has no standing to object or to consent to the dock. In particular, under the aforesaid circumstances, and assuming the Township will be apprised of the Findings and Conclusions of Law of this Adjudication, the Township's continued refusal to object must be regarded as a release satisfying the requirements of Section 105.332.

The Authority's Claim. On May 3, 1965, the Township passed an Ordinance (Intervenor's Exhibit R-1) authorizing the Authority:

> to lay, construct, maintain, repair and replace in the streets, roads, alleys and rights of way of the said Township the necessary sanitary sewer lines and the required appurtenances thereto to complete the erection and construction of a sanitary sewage collection and treatment system.

Robert B. Dornhaffer, the Authority's solicitor, testified at the rehearing that in his opinion, under the terms of this Ordinance, the Authority did not own the land on which the pump station at the foot of Oakmere Place had been constructed; it was Mr. Dornhaffer's further opinion, however, that the Ordinance had granted the Authority an easement to construct and maintain the pump station on that land (R.T. pp. 19-20). We agree with Mr. Dornhaffer's opinion that the land at the foot of Oakmere Place is subject to this easement of the Authority's; indeed, given the terms of the Ordinance and our finding that the Township possesses at least an easement for use of Oakmere Place as a public road, this opinion of Mr. Dornhaffer's and ours appears to be unavoidable. In fact, DER and the Intervenor subscribe to this opinion, as we already have explained; nor does the Coopers' brief after rehearing challenge the opinion that the Authority has an easement to the land at the foot of Oakmere Place, although (as we also have explained) the Coopers insist that the dock-adjacent land is owned by the Commonwealth.

Therefore the Authority does have property rights in the dock-adjacent land. However, because Oakmere Place has been dedicated to public use (as we have discussed), it can be--and has been--freely traversed by any member of the public. This public right to traverse Oakmere Place includes the right to traverse the Oakmere Place land containing the Authority's pump station, provided such traversal does not interfere with the Authority's enjoyment of its easement on that land. Mr. Dornhaffer's testimony gives at best highly speculative reasons to believe that the Authority's enjoyment of its easement--specifically its ability to use and

maintain its pump station--will be restricted in any way by the presence of the Coopers' dock or by the traffic of persons to and from the dock. Mr. Dornhaffer did testify that the presence of the dock would not be "in the best interest of the Authority" (R.T. p. 21) because people, especially children, walking to and from the dock might clamber onto the top of the pump station and fall off (R.T. pp. 25-26 and 34-35). But Mr. Dornhaffer offered no evidence that the presence of the Coopers' dock will increase or has increased the number of persons, especially children, traversing the Authority's land near the pump station. Although there has been another dock at the foot of Oakmere Place since about 1975 (H.T. p. 11), the Authority never has had a lawsuit stemming from an injury to someone in the area of the pump station (R.T. p. 39).

On the basis of the facts described in the preceding paragraph we conclude that the Coopers' dock would not make the Authority (though an owner of property rights in the dock-adjacent land) an affected riparian property owner under Section 105.332. This conclusion rests on the presumption that under the Board's general rules for determining the burden of proof, 25 Pa. Code §21.101(a), the burden of proof that the Authority's property rights would be affected by the Coopers' dock rests with DER and the Intervenor, who maintain the Authority's release is required under Section 105.332. Although under 25 Pa. Code §21.101(c)(1) the Coopers have the burden of establishing that DER's denial of its permit application was an abuse of discretion, it is not reasonable to require the Coopers to establish the negative thesis that the Authority's rights will not be affected by the dock.

Consequently we rule that the Coopers need not obtain a Section 105.332 release from the Authority in order to satisfy the requirements of DER's rules and regulations, particularly the regulation 25 Pa. Code §105.19(b). In making this

ruling we have been guided by the rules of statutory construction embodied in 1 Pa. C.S.A. §§1921-1922, which apply to Section 105.332 by virtue of 1 Pa. C.S.A. §1502(a)(1)(ii) and 1Pa. Code §1.7. More particularly, we must assume that the EQB, in promulgating Section 105.332 with the adjective "affected" modifying "riparian property", intended that releases would not be required from the owners of unaffected riparian properties. DER and the Intervenor, who insist that the Coopers should be required to obtain a release from the Authority, appear to have overlooked the modifier "affected" in Section 105.332.

The Trustees' Claim. We are not as impressed as DER appears to be with the quality of the Trustees' claim to ownership in fee of the Oakmere Place shoreline. Although Mr. Kiebort asserted categorically that "we own all of the overflowed land around Conneaut Lake", the document introduced in support of this ownership claim, namely Intervenor's Exhibit R-2, makes a much more qualified statement. Exhibit R-2 records a transfer to the Trustees of real estate, purchased at a sheriff's sale, originally belonging to the Conneaut Lake Ice Company. We do not disagree with Mr. Kiebort's assertion concerning Exhibit R-2 (R.T. p. 44):

> This agreement also describes the various parcels of land that were acquired at the Sheriff's sale. It covers all of the lands around the lake.

But Mr. Kiebort did not point out that Exhibit R-2, after describing these acquired properties around the lake, goes on to say:

> EXCEPTING and RESERVING from all the above described land the leaseholds of parts thereof heretofore granted by the Conneaut Lake Ice Company, a Corporation, or its predecessor in title and also excepting and reserving therefrom all the lots of parcels of land included in the foregoing, heretofore conveyed or granted by said Conneaut Lake Ice Company, a Corporation, or its predecessors in title.

Exhibit R-2 does not explicitly state--and we have no way to find out without going back to the Deed Books--what properties were excepted and reserved. However we cannot ignore the fact that what appears to be a careful search of the Coopers' chain of title to their own property on Oakmere Place (Appellants' Exhibit 4) nowhere mentions the Trustees. This search goes back to leases granted in 1929 and 1932 by the Oakland Beach Land Company.

Moreover, in 1928 the Oakland Beach Land Company and various other parties executed an agreement (Exhibit H of Appellants' Exhibit 4) granting the parties to the agreement and their successors the forever free and uninterrupted right of passage along Oakmere Place. The parties, who include neither the Conneaut Lake Ice Company nor its Trustees, describe themselves as

> the respective owners and lessees of certain adjoining tracts of land situate in Sadsbury Township, Crawford County, Pennsylvania.

It is difficult to understand how these parties could have executed such an agreement without reason to believe they owned Oakmere Place. Mr. Kiebort's Exhibit R-2 was executed in 1941, well after Exhibit H of Appellants' Exhibit 4.

Furthermore, the previously discussed June 23, 1936 consent (Exhibit J of Appellants' Exhibit 4)--by the Crawford County Court of Quarter Sessions, to the Township's "taking over" of Oakmere Place--has a preamble identifying D. L. McGuire and T. P. McGuire as "owners of the Oakland Beach Land Company". The preamble to Exhibit I of Appellant's Exhibit 4 reads:

> WHEREAS D. L. McGuire and T. P. McGuire did plot and lay out into lots a certain tract of land formerly owned by them and now owned by the Lamberton National Bank of Franklin, Pennsylvania, and situated on the East side of Conneaut Lake and Sadsbury Township, Crawford County, Pennsylvania, and laid out, constructed, opened, and dedicated to public use, certain roads or streets...

A later paragraph in Exhibit I of Appellants' Exhibit 4 also states:

> WHEREAS The Oakland Beach Company and Stanley Gillespie, who are the owners of the greater portion of the lots,...

Again neither the Conneaut Lake Ice Company nor its Trustees are mentioned. Again it is difficult to understand the parties' actions in the light of the Trustees' ownership claims; one wonders how the Township could have petitioned the Court to accept a dedication of roads to public use without reason to believe that the dedicators owned the roads being dedicated. In fact, the Township's Solicitor believes Oakmere Place is "owned by the Township", as we previously have emphasized (see the quotation supra from Appellants' Exhibit 7).

In our opinion, the weight of the evidence summarized in the immediately preceding paragraphs is against Mr. Kiebort's largely unsupported assertion that the Trustees own the land at the foot of Oakmere Place. Moreover, even if the Trustees do hold title giving them the right to repossess the Conneaut Lake shore properties some 900 years from now,[3] it is dubious that the Trustees' rights include the power to forbid construction of the Coopers' dock in this century. The Coopers' lease (see Exhibits D and G in Appellants' Exhibit 4) gives them the "use of all streets, parks and bathing grounds" in the Conneaut Lake area; the word use is quite unrestricted in the lease, and various specific restrictions on construction by the leaseholder (e.g., the restriction that the leaseholder shall "erect but one dwelling house on each lot herein leased") nowhere rule out construction of a boat dock. Although Mr. Kiebort testified that the Trustees had never conveyed "a piece of land

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3. Mr. Kiebort testified that the original conveyances to owners of lots in the Conneaut Lake area were 999-year leases (R.T. p. 47). The leases in the Coopers' chain of title were for 900 years (see Exhibits D and G in Appellants' Exhibit 4).

for the purpose of erecting a dock" (R.T. p. 48), there has been a dock at the foot of Oakmere Place since about 1975 (H.T. p. 11), and there was testimony that there are many other docks presently located elsewhere on the lakeshore, dating back at least to about 1950 (H.T. pp. 30, 83 and 87-88); there was absolutely no indication that the Trustees ever had challenged or intended to challenge the construction of any of these docks. If Mr. Kiebort is correctly asserting that the dedicators of Oakmere Place to the Township only had a 999-year lease on Oakmere Place, an assertion we doubt, then the dock, constructed without the Trustees' permission, will constitute a trespass on the Trustees' property when the lease expires. We deem it unreasonable and absurd, however, to construe Section 105.332 so that this doubtful possibility of a trespass, some 900 years into the future, can prevent the Coopers from constructing their dock today.

Therefore, for the reasons given in the preceding paragraph, and on the authority of 1 Pa. C.S.A. §1922 via 1 Pa. C.S.A. §1502(a)(1)(ii) and 1 Pa. Code §1.7, we rule that Section 105.332 does not require the Coopers to obtain a release from the Trustees. As always, our aforesaid opinions concerning the Trustees' property rights in the land at the foot of Oakmere Place do not adjudicate the quality of the Trustees' title. But until there is such an adjudication we stand by our opinions which our duties to review DER decisions require us to formulate, as explained supra. We refuse to grant--as DER seemingly insists--that Section 105.332 requires the Coopers to initiate an action to quiet title in the land at the foot of Oakmere Place in order to meet the Trustees' dubious claim of title to this land, a claim put forward for the first time at the rehearing, some three years after the Coopers originally completed their permit application.

D. Other Issues

The Commonwealth grants (p. 15 of DER's post-rehearing brief) that once the Coopers have satisfied the requirements of 25 Pa. Code §§105.332 and 105.19(b), it would be an abuse of discretion for DER to deny the Coopers the necessary easement or lease to occupy the submerged lands of the Commonwealth, needed by the Coopers to construct their dock in accordance with 25 Pa. Code §105.31. Consequently this possible issue needs no further discussion here. The Board's Order of March 5, 1982, granting reconsideration, listed a number of other possible issues which the parties could address in their post-rehearing briefs. Some of these issues, though addressed in one or more of the post-rehearing briefs, have not been discussed supra. However, this adjudication has examined all those issues listed in the Board's Order of March 5, 1982 which--in the light of the evidence developed at the rehearing--are germane to the instant appeal.

In addition, at the rehearing the Board raised the question whether Section 105.332, which specifically refers to riparian properties, pertains to the dock-adjacent lakeshore property that is the concern of the instant appeal. We are convinced by the arguments in DER's and the Intervenor's post-rehearing briefs that--although Black's Law Dictionary prefers the adjective littoral to designate lakeshore property--Section 105.332 was intended to apply, and does apply, to the dock-adjacent land at the foot of Oakmere Place.

CONCLUSIONS OF LAW

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

2. This Board's scope of authority is limited to the powers granted the Board under 71 P.S. §510-21.

3. The Board does not have the power to determine real estate title or to adjudicate property rights disputes.

4. Although the Board does not have the power to adjudicate property rights disputes, the Board has the power and the duty to form well-founded opinions concerning the ownership of the dock-adjacent property which is the subject of the instant appeal, when such opinions are needed to discharge the Board's obligations under 71 P.S. §510-21.

5. In order to enforce 25 Pa. Code §105.332, DER must have some power to decide whether or not a furnished release has been signed by the actual owner of the property in question.

6. The Trustees, the Township and the Authority each have property right claims to the dock-adjacent shoreline at the foot of Oakmere Place meriting serious examination.

7. The existence of these claims does not automatically establish either the Trustees, the Township or the Authority as a property owner whose release the Coopers must obtain under Section 105.332.

8. Probably the Township possesses no more than an easement in Oakmere Place, for the right of public passage.

9. Nevertheless, the Township is an affected riparian property owner whose release under Section 105.332 must be secured by the Coopers.

10. The Township is not bound by--and need not accept--this Board's opinion that the Township's easement in Oakmere Place extends to the present Oakmere Place shoreline.

11. Under the circumstances of the instant appeal, assuming the Township will be apprised of the Findings and Conclusions of Law of this Adjudication, the Township's continued refusal to object to construction of the Coopers' dock must be regarded as a release satisfying the requirements of Section 105.332.

12. The land at the foot of Oakmere Place is subject to the Authority's easement to construct and maintain the pump station at that site.

13. Nevertheless, the Authority is not an affected property owner whose Section 105.332 release must be obtained by the Coopers in order to satisfy the requirements of 25 Pa. Code §105.19(b).

14. The burden of proving the affirmative thesis that the Authority's property rights would be affected by the Coopers' dock rests with DER and the Intervenor, who so maintain.

15. The Coopers have the burden of establishing that DER's denial of their permit application was an abuse of discretion.

16. Under Section 105.332, releases are not required from the owners of unaffected riparian properties.

17. It is unreasonable and absurd to construe Section 105.332 so that the doubtful possibility the dock will constitute a trespass some 900 years into the future can prevent the Coopers from constructing their dock today.

18. Section 105.332 does not require the Coopers to obtain a release from the Trustees.

19. This Board's opinions (as expressed in this Adjudication) concerning the Trustees' property rights in the land at the foot of Oakmere Place do not adjudicate the quality of the Trustees' title.

20. Section 105.332 does not require the Coopers to initiate an action to quiet title in the land at the foot of Oakmere Place in order to meet the Trustees' dubious claim of title to this land.

21. If the Coopers have satisfied the requirements of 21 Pa. Code §105.19(b), including the requirements of 25 Pa. Code §105.332 as per this Adjudication, it would be an abuse of discretion for DER to deny the Coopers the necessary easement or lease needed by the Coopers to construct their dock in compliance with 25 Pa. Code §105.31.

22. Section 105.332 applies to the lakeshore property at the foot of Oakmere Place.

* * * * * *

O R D E R

AND NOW, this 20th day of September, 1982, this matter is remanded to DER for action in accordance with this Adjudication. In particular, the Coopers shall be re-instructed that a release from Sadsbury Township is required, but that failure of the Township to object to the dock will not be construed as a release unless the Township's Solicitor has been apprised of the Findings of Fact and Conclusions of Law arrived at in this Adjudication.

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DATED: September 20, 1982

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COMMONWEALTH OF PENNSYVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

v.

C. DONALD COX

Docket No. 81-083-CP-H

Clean Streams Law
Civil Penalties

ADJUDICATION

By: Dennis J. Harnish, Chairman, December 10, 1982

This matter comes before the board on a Complaint for Civil Penalties filed by the Pennsylvania Department of Environmental Resources (DER) against the individual defendant, C. Donald Cox. This complaint addressed violations of the Pennsylvania Clean Streams Law, Act of June 22, 1987, as amended, 35 P.S. §691.1 *et seq.* and of Title 25, Chapter 102 of DER's regulations promulgated thereunder.

Because of a default judgment entered against the defendant, liability is not an issue in this matter; only the amount of the penalties to be exacted will be addressed. In this regard, the following procedural history is relevant. The Commonwealth's Complaint for Civil Penalties in the instant matter was filed with this board on or about June 4, 1981 and was promptly served upon the defendant. Although the board's rules require that answers to civil penalties complaints must be filed with the board within 20 days after the date of service of the complaint, Mr. Cox has never answered this complaint.

On or about October 30, 1981 DER filed a motion for judgment by default upon Mr. Cox and the board on November 10, 1981, following its standard practice, notified Mr. Cox of said motion and gave him an opportunity to respond thereto on or before November 20, 1981. Mr. Cox admitted receiving copies of the said motion as well as the board's motion letter and still he failed to communicate with the board on or before December 4, 1981 at which time the board entered the default judgment.[1]

Had the Commonwealth's complaint included a stated penalty amount there would have been no need for any additional proceedings, *DER v. Froehlke*, EHB Docket No. 72-341, issued July 31, 1973, but lacking any indication regarding the penalty amount in the Commonwealth's complaint, the defendant was accorded a hearing on Thursday, May 27, 1982 limited to the amount of penalties issue. Following the hearing the Commonwealth filed a post-hearing brief but Mr. Cox, although he was provided an extended opportunity to do so, has not filed any brief.

FINDINGS OF FACT

1. Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), which has the duty to enforce The Clean Streams Law, as amended, 35 P.S. §691.1 *et seq.* and Title 25 Chapter 102 of the erosion and sedimentation regulations promulgated thereunder.

2. Defendant, C. Donald Cox, is an individual, who maintains a business address at R. D. 1, Kirkwood, PA 17536 (Cox).

3. Cox was a subcontractor at a commercial development located off Route 462 east of Columbia in West Hempfield Township, Lancaster County, PA, known as the Columbia Shopping Center (Columbia Shopping Center site).

1. Mr. Cox's testimony and that of the other witnesses as well as the photographic evidence introduced in this matter makes it abundantly clear that Mr. Cox is, in fact, as well as at law, in violation of the erosion and sedimentation regulations at both sites.

4. From approximately July 1979 until May 1980, Cox conducted earth-moving activities at the Columbia Shopping Center site.

5. An erosion and sedimentation control plan, Plan #7719 (E & S Plan #7719), was developed for the Columbia Shopping Center site.

6. E & S Plan #7719 was developed for the purpose of minimizing accelerated erosion and sedimentation and was adequate for that purpose if implemented and maintained.

7. From July 1979 until April 30, 1980, Cox failed to implement or cause to be implemented the provisions of E & S Plan #7719 during said earth-moving activities.

8. From July 1979 to May, Cox failed to implement and maintain erosion and sedimentation control measures capable of effectively minimizing accelerated erosion and sedimentation at the Columbia Shopping Center site.

9. Cox's said failure at the Columbia Shopping Center site resulted in accelerated erosion and sedimentation.

10. The erosion and sedimentation problems occurring at the Columbia Shopping Center site had a moderate impact on the adjacent stream, Strickler Run, which impact was of an intermittent and reversible nature.

11. Based on the nature of Cox's failure to install erosion and sedimentation controls at the Columbia Shopping Center site, the nature of the harm to the stream, the fact that Cox had notice of the deficiency as well as notice of appropriate control strategies by way of E & S Plan #7719, and the costs incurred by DER in enforcing the regulations, DER recommended that a civil penalty of $2,437.00 be assessed by this board for Count II of DER's complaint, derived as follows:

a. $1,000.00 for the willful, intentional nature of the violation of 25 Pa. Code §102.4 established by Count II of DER's complaint,

b. $500.00 for the stream damage; and

c. $937.00 for DER's enforcement costs.

12. Cox was the general contractor at a commercial development located at the intersection of Route 272 and Rothsville Road in Ephrata Township, Lancaster County, PA, known as the K-Mart Development.

13. Cox was responsible for all earthmoving activities at the K-Mart site and was responsible as well for the final stabilization measures on the disturbed areas of the K-Mart site.

14. An erosion and sedimentation control plan, Plan #7837-F (E & S Plan #7837-F), was developed for the K-Mart site.

15. E & S Plan #7837-F was developed for the purpose of minimizing accelerated erosion and sedimentation and was adequate for that purpose if implemented and maintained.

16. From approximately January 1980 until August 8, 1980, Cox conducted earthmoving activities at the K-Mart site.

17. From January 1980 until August 8, 1980, Cox failed to implement or cause to be implemented the provisions of E & S Plan #7837-F during said earthmoving activities.

18. From Janauary 1980 until the present, Cox failed to implement and maintain or cause to be implemented and maintained erosion and sedimentation control measures capable of effectively minimizing accelerated erosion and sedimentation at the K-Mart site.

19. Cox's failure to implement and maintain effective erosion and sedimentation control measures at the K-Mart site resulted in accelerated erosion and sedimentation.

20. From the time earthmoving activities were completed at the K-Mart site until April 16, 1981 when the project was turned back to the developer, Cox failed to stabilize or cause to be stabilized areas of graded or otherwise disturbed

land in order to prevent accelerated erosion. Although it is apparent that Mr. Cox had seeded the K-Mart site prior to April 16, 1981 and that this seeding in large part took effect before June of 1981.

21. Cox was responsible for conducting or causing to be effected all necessary stabilizing measures at the Columbia Shopping Center site.

22. The erosion and sedimentation problems occurring at the K-Mart site as the result of the aforesaid failures by Cox had a moderate impact on the adjacent stream, an unnamed tributary of Cocalico Creek and were of an intermittent and reversible nature.

23. Based on the nature of Cox's failure to install erosion and sedimentation controls at the K-Mart site as well as the nature of Cox's failure to utilize effective final stabilization measures, the nature of the harm to the stream, the fact that Cox had notice of the deficiencies as well as notice of appropriate control strategies by way of E & S Plan #7837-F, and the costs incurred by the DER in enforcing the regulations, DER recommends that a civil penalty of $3,693.00 be assessed by this board for Counts IV and VII of DER's complaint, derived as follows:

a. $1,000.00 for the intentional and willful nature of the 25 Pa. Code §102.4 violation established by Count IV of DER's complaint.

b. $1,000.00 for the intentional and willful nature of the 25 Pa. Code §102.22 violation established by Count VII of DER's complaint.

c. $500.00 for the stream damage; and

d. $1,193.00 for DER's enforcement costs.

DISCUSSION

As this matter involves a civil penalties action brought under The Clean Streams Law our consideration of the appropriate amount of said penalty must begin

with the section of said Act which authorizes this board to set penalties, 35 P.S. §691.605. Pursuant to Section 605 of The Clean Streams Law, in determining the penalty amount, this board is supposed to 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".

In the instant matter the waters of the Commonwealth involved are, respectively, with regard to Columbia Shopping Center and the Ephrata K-Mart site, known as Strickler Run and an unnamed tributary of Cocalico Creek. In each case the type of damage involved was the addition of siltation to each said creek due to accelerated erosion caused by earthmoving activities at each site the flow of which sediment was not adequately retarded by the erosion and sedimentation control measures approved by DER for each site. Photographic evidence introduced at the hearing appears to demonstrate that the erosion was more pronounced at the Columbia site than the Ephrata site.

A rather deep and wide erosion gully (perhaps 4' x 4') was carved at the Columbia site by water exiting from the southeast corner of said site and flowing some 300-600 feet down a steep bank through the disturbed earth overlying a private sewer line which connected the Columbia Shopping Center to a sewer line paralleling Strickler Run.

While no witness was able to quantify the amount of sedimentation which reached the stream along this path, it is relevant that some 70% of the entire shopping center was sloped to the southeast corner, that this area had been graded open by the spring of 1980 and that as of April of 1980 the sedimentation basin designed to intercept sedimentation at the southeast corner of the Columbia site had not been completed. By defendant's admission a heavy rainfall occurred in April of 1980 causing the said gulley. It is true that construction of this basin had been initiated as early as February 1980 but as of the spring of 1980 it was open at the back lower end facing the creek. In effect the partially com-

pleted basin formed a funnel to direct most of the runoff from the Columbia site down the steep bank along earth disturbed by laying a sewer line down to the creek.

At the Ephrata site the erosion path covered by the instant complaint followed a ditch or depression paralleling a highway and entered the said unnamed tributary of Cocalico Creek where said ditch intersected said tributary just upstream of a culvert conducting said tributary under said highway. From photographic evidence and testimony, the unnamed tributary demonstrated excessive sedimentation in the area of the said culvert and for perhaps 100 feet downstream therefrom and while some of this sedimentation was probably due to farming activities adjacent to said tributary some of it was obviously due to accelerated erosion from the K-Mart site.

In both cases the DER witness, Mr. Yohn, characterized stream damage as moderate on a scale ranging from minimal to severe and in both cases he testified that DER was not contemplating any restoration efforts since the creeks would be able to scour themselves clean in the near future.

DER's characterization of moderate stream damage was in line with their suggestion that the penalty for stream damage be five hundred dollars ($500.00) at each stream. Five hundred dollars is indeed moderate when compared to the maximum allowed penalty of ten thousand dollars ($10,000.00) per day authorized by Section 605. Penalties in this range were characterized as "nominal" back in 1974, *DER v. Mount Royal Associates*, EHB Docket No. 72-393-W (issued January 25, 1974). Thus, especially in view of the complete lack of any contradictory testimony on stream damage we have no trouble in supporting this portion of the suggested penalty amount.

We have a greater problem in supporting the amount of its suggested penalty which DER bases upon its administrative costs in investigating and litigating the instant matter. First of all, Mr. Cox raised some substantial questions during the hearing regarding the manner in which these expenses were calculated

by Mr. Yohn, i.e., Mr. Yohn had no time sheets or cards from which to precisely ascertain the amount of time each DER official had spent on either matter. Secondly, there is no break down in these expenses between surveillance expenses which may be appropriate as one of the "other relevant factors" to be considered under Section 605 *DER v. Berks Associates, Inc.*, EHB Docket No. 72-309-B (issued July 31, 1973) and litigation costs which, barring specific statutory authorization, may not be charged against the losing party pursuant to the so-called American Rule, *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). Even as regard to the surveillance costs, they were used by the board in *Berks Associates, supra*, as a gauge of the harm to the stream and here are proffered as a separate item. While not foreclosing the relevance of administrative and surveillance expenses in all future cases we hold that, in this case, DER has not sustained its burden of demonstrating the relevance of these expenses.

The final issue for resolution in this matter involves that amount of the suggested penalty keyed to the defendant's willfulness. DER argued at the hearing, but not in its brief, that since its complaint alleges that willfulness of defendant's conduct his failure to answer and the subsequent default judgment bars our consideration of this issue. However, if our civil penalties decisions teach anything it is that the term willfulness covers a wide range of mental states and conduct bridging the gap from deliberate, intentional acts through "gross negligence", and "wanton misconduct" to "mere negligence". *Commonwealth of Pennsylvania, DER v. Rushton Mining Company, Inc.*, EHB Docket No. 72-361-CP-D issued March 12, 1976. Thus, we must consider the degree of willfulness in order to set an appropriate penalty.

In this case we hold as we did in *Rushton, supra*, which involved violations of a mining permit, that the defendant's conduct is not willful in the sense of being intentional or deliberate. But we also follow *Rushton, supra*, by holding that conduct is willful where the defendant had knowledge that certain consequences

are likely to result if he failed to exercise the care that is required to avoid the likely injurious consequences of his conduct.

With regard to the Columbia Shopping Center site it is clear that Mr. Cox had the requisite knowledge. Not only did he receive copies of notices of violation sent to Mr. Frank Nardo, the general contractor on the Columbia Shopping Center site[2] but also, his own testimony indicates that he knew there was a danger of runoff carrying accelerated erosion passing through the open back of the partially constructed sediment basin and further eroding the steep hillside on its way to Strickler Run.

It is true that Mr. Cox had an excuse for not completing the retention basin--i.e., he was awaiting completion of the private sewer line by another subcontractor but is is also clear that this line was in place long before the rainfall event which gave rise to most of the erosion from this site. Moreover, the $1000.00 figure suggested by DER for this willfullnes does not seem to be out of line. Clearly, one of the purposes of the civil penalty is to deter other persons in the same position as Mr. Cox from violating the Clean Streams Law. *DER v. Bucks County Water and Sewer Authority and The Korman Corporation*, EHB Docket No. 73-030-CP-W. To have prevented the erosion at the Columbia Shopping Center site would have required the construction and maintenance of interim erosion control facilities during construction of the said sewer line. While we have no specific information in this regard we would feel that the $1,000.00 willfulness amount suggested by DER in this case would be sufficient to induce other landscape contractors to take all measures necessary to prevent accelerated erosion.

With regard to the Ephrata site, however, there was no evidence that Mr. Cox even knew in advance that there would be an erosion problem. Indeed,

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2. Cox was the grading subcontractor on the Columbia site; he was responsible for E & S controls but not final stabilization. On the Ephrata K-Mart site he was responsible for both E & S controls and final stabilization.

Mr. Cox stoutly maintained that prior to April 1981 he had already seeded and mulched the area which eroded and photographic evidence and testimony shows a good catch of grass in June of 1981.

Moreover, Mr. Cox's uncontradicted testimony was that after he had finished final grading and seeding at the K-Mart site he returned twice to refill and reseed washouts caused by heavy rains. In view of this record we feel that to exact any willfulness penalty from Mr. Cox at Ephrata would not be likely to promote greater care on his part or upon the part of any other persons but rather would be to add insult to injury.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties hereto and the subject matter of the instant proceeding.

2. The facts set forth in DER's complaint for civil penalties have been established for the purposes of this proceeding on the basis of the default judgment entered by this board on December 4, 1981.

3. Based on the facts so established, Cox committed violation of 25 Pa. Code §102.4 at the Columbia Shopping Center site by failing to implement and maintain erosion and sedimentation control measures necessary to effectively minimize accelerated erosion and sedimentation.

4. Based on the facts so established, Cox committed a violation of 25 Pa. Code §102.4 at the K-Mart site by failing to implement and maintain erosion and sedimentation control measures necessary to effectively minimize accelerated erosion and sedimentation.

5. Based on the facts so established, Cox committed a violation of 25 Pa. Code §102.22 by failing to stabilize the areas disturbed at the K-Mart site so as to prevent accelerated erosion after the earthmoving activities were concluded.

O R D E R

AND NOW, this 10th day of December, 1982, in accordance with Section 605 of The Clean Streams Law, 35 P.S. §691.605, civil penalties are assessed against defendant, C. Donald Cox, in the amount of Two Thousand Dollars ($2,000.00).

This amount is due and payable into The Clean Water Fund immediately. Any and all prothonotaries in the Commonwealth are hereby ordered to enter these penalties as liens against any property of the aforesaid defendant with interest at a rate of 6 per cent per annum from the date hereof. No costs may be assessed upon the Commonwealth to entry of the lien on the docket.

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DATED: December 10, 1982

COMMONWEALTH OF PENNSYLVANIA

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THE NORTH AMERICAN COAL CORPORATION : Docket No. 81-093-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S MOTION TO DISMISS

On or about June 16, 1981 DER issued Mine Drainage Permit No. 3280019 to North American Coal Corporation, which corporation became the appellants herein by appealing certain terms and conditions of said permit on or about July 1, 1981. The parties both filed pre-hearing memoranda and the matter was scheduled for hearing on or about December 8 and 9, 1981 but on November 10, 1981, DER filed a motion to dismiss the appeal and the parties requested a continuance of the appeal pending resolution of the motion. Appellant responded to DER's motion with preliminary objections. Upon due consideration of the said motion and preliminary objections thereto the board enters the following:

Appellant raises three preliminary objections. Appellant first argues that, pursuant to 25 Pa. Code 21.64(a), the board's rules incorporate the Pennsylvania Rules of Civil Procedure (Pa. R. Civ. P.) and since a motion

to dismiss is not expressly recognized in the latter rules it is not a permissable form of pleading before this board. The answer to this argument is that pursuant to this board's rules the Pa. R. Civ. P. are incorporated only to the extent that they relate to pleadings. A motion to dismiss (like a Rule to Show Cause so often used in Pennsylvania's Courts of Common Pleas) is not a pleading and therefore is not governed by *inter alia* Pa. R. Civ. P. 1024(a) and 25 Pa. Code §21.64(b) regarding verification. This fact undercuts appellants' second argument which rests upon the lack of verification of DER's motion to dismiss. In any event, this second argument is now moot in light of DER's subsequent submission of a verfication.

Appellant's final argument, however, which is in the nature of a demuerrer does have force. Essentially, DER's motion rests upon its assertion that the permit presently appealed was amended subsequent to said appeal and that appellant accepted the revised permit so that the appeal is moot as a matter of law. Attached to DER's own motion, however, is the qualified acceptance of the revised permit dated July 1, 1981 by which appellant's counsel expressly reserves the right to maintain this action as to Special Condition 15 and as to the issues raised in paragraph 22(e) of its notice of appeal. It would seem in light of the conditional nature of appellant's acceptance that the matter before this board has not become totally moot but that appellant has waived all but the issues set forth above.

O R D E R

AND NOW, this 11th day of January, 1982, DER's motion to dismiss is denied but appellant's appeal is limited to Special Condition 15 and the matters raised in paragraph 22(e) of its notice of appeal.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Joel Burcat, Esquire
Henry Ingram, Esquire

DATED: January 11, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

CHEMICAL WASTE MANAGEMENT, INC., et al. : Docket No. 81-154-H
(Includes Lyncott Corporation :
81-155-H consolidated at this
docket number.)
v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR CHEMICAL WASTE MANAGEMENT'S PETITION FOR SUPERSEDEAS AND/OR MOTION TO VACATE ADMINISTRATIVE ORDER; THE COMMONWEALTH'S MOTION TO CONSOLIDATE THE ABOVE-CAPTIONED MATTERS AND THE PETITIONS OF GEORGE CAMPBELL, ET AL. AND SUSQUEHANNA COUNTY TO INTERVENE IN EACH OF THE ABOVE-CAPTIONED MATTERS AND LYNCOTT'S PETITION TO STAY DER'S ORDER OF SEPTEMBER 4, 1981

Periodically the paper flow in the above-captioned and related matters exceed the abilities of the board to respond. These events which are analagous to annual inundations of flood plains must, as said floods, be followed by a clean-up period. The above by no means represent all the outstanding motions in this matter but do seem to constitute all the ones which are ripe for review.

To set the stage for disposition of the existing motions the following history of this matter is set forth (largely from the parties' briefs).

On September 4, 1981, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), issued an Order (Order) to Chemical Waste Management, Inc. (CWM) and Lyncott Corporation concerning a solid waste disposal site (Lyncott Site), located in New Milford Township, Susquehanna County, Penn-

sylvania. Based on its findings and determinations, which are set forth in the Order, DER concluded that certain conditions existing at the site constitute violations of Lyncott's permit (Solid Waste Permit No. 101025, issued April 29, 1977); constitute violations of Sections 403(b)(9), 610(2) and 610(4) of the Pennsylvania Solid Waste Management Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.101 *et seq.* (SWMA) constitute a public nuisance under Section 601 of SWMA; and create a danger of pollution to the waters of the Commonwealth in violation of Section 402 of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL).

CWM has appealed from the Order and, in addition, has filed a petition for supersedeas. On October 20, 1981, the Environmental Hearing Board (EHB) held a hearing to consider CWM's petition for supersedeas.

CWM challenges the Order on grounds that CWM is not the type of person subject to the enforcement provisions of either SWMA or CSL; i.e., it questions the *in personam* jurisdiction of DER and this board over it.

No party denies that CWM is a Delaware corporation, with its principal place of business in Oak Brook, Illinois. On the other hand, CWM does not deny that DER has *in personam* jurisdiction over Lyncott Corporation, the owner and "operator" of the New Milford site about which the September 4, 1981 order was concerning. Also undisputed is that CWM and Lyncott are related; CWM admits that before Stabatrol became a CWM subsidiary is had purchased Lyncott. CWM, however, argues and cites authority for the proposition that this corporate relationship *per se* would not impose liability upon CWM. DER and the would-be intervenor's counter with a number of arguments. Perhaps the most forceful argument is that both the Clean Streams Law and the Solid Waste Management Act define person as including any corporation; foreign corporations are not excluded. Since, pursuant to each act, orders may be issued to "persons"

nothing in either act precludes issuance of an order to CWM or indeed to any corporation.

Of course, if there is no nexus between the corporation receiving the order and a place or activity within Pennsylvania the order may constitute an unconstitutional "taking" but CWM had the burden of supporting this constitutional argument by proving a lack of nexus and we feel that it did not sustain the burden. Indeed, the evidence of record actually proves the requisite nexus. Mr. Donald McCombs Regional Engineer for CWM vigorously attempted to convince this board, during a supersedeas hearing (held on April 21, 1981) on an earlier order concerning the same site, that the "old" Lyncott Corporation had been replaced by a "new" Lyncott which was closely connected to CWM and which had access to the technical and financial resources of CWM to correct problems at the site. Quotations from Mr. McCombs appearing at pages 77, 101, 102, 159 and 160 of the notes of testimony of said hearing make the connection between CWM and Lyncott unmistakable. Thus Chemical Waste Management's motion to vacate the September 4, 1981 order against it is denied.

Also denied are Lyncott's (and CWM's) petition for a stay of the September 4, 1981 order; pursuant to this board's statutory authority we cannot grant a supersedeas, however styled, until the opportunity for hearings has passed; the supersedeas hearings in this matter are continuing.

Since we have denied CWM's motion to vacate the said order, CWM and Lyncott are in the same position. Thus, there is no reason not to consolidate the above-captioned matters which we hereby do.

The challenges to the petitions to intervene of George Campbell, et al. are identical to challenges raised and disposed of in related matters and our reasoning for granting intervention in the said other matters is incorporated

herein as if set forth at length. Both the said petitions are granted. While on the subject of intervention, we have temporarily decided that once a party has been granted intervention status that party has all the rights and responsibilities of any other party and need not be a party appellee or party appellant. Our determination in this regard was reached at a meeting of all three of the members of this newly restaffed board but this determination is temporary because it has not yet been the subject of briefing. This order grants each of the intervenors 20 days from receipt hereof to file pre-hearing memoranda in accordance with the attached form order; submission of said pre-hearing memoranda may set the stage for the challenges and briefs necessary to finalize our decision on this matter.

Finally, the Commonwealth is given ten days from receipt hereof to answer with a brief, if any, CWM's motion for protective order concerning the noticed deposition of Frank Krohn and Joe Zorn and their depositions are stayed pending our disposition of said motion.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Stirling Lathrop, III, Esquire
Gerald C. Grimaud, Esquire

DATED: January 20, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

EAST SIDE LANDFILL AUTHORITY
d/b/a EAST SIDE SANITARY LANDFILL :

:

Docket No. 81-209-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

Appellant, East Side Landfill Authority, d/b/a East Side Sanitary Landfill (ESLA), filed an appeal to this Board from an order of the Department of Environmental Resources (DER) dated October 19, 1981.

A notice of appeal was served upon DER on or about November 14, 1981, although the appeal was not filed with this Board until December 29, 1981.

Appellee, DER, filed a Motion to Dismiss the appeal, alleging lack of jurisdiction of this Board to hear the appeal by reason of the appeal having been filed some thirty-nine (39) days after expiration of the thirty-day appeal period.

Appellant filed an Answer to DER's motion, alleging that DER's order of October 19, 1981 was not an adjudication because appellant was not made a party to any proceeding, and was not given an opportunity to be heard, in violation of 2 Pa. C.S. §101 and 504. Appellant also requested this Board to allow the appeal *nunc pro tunc*, on the basis that the appeal was originally misfiled with DER due to counsel's error.

Under the provisions of 2 Pa. C.S. 101, the term "adjudication" is defined as "[A]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights...of any...of the parties to the proceeding in which the adjudication is made". In the same section, the term "party" is defined as "[A]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding".

Appellant does not deny that it was involved with DER in a controversy over the conduct by ESLA of a landfill. ESLA operated the landfill and had a direct interest in the continued operation of the landfill, and strenuously objected to DER's insistence upon conditions demanded by DER to be met if the landfill were to continue in operation. When DER determined that ESLA had not, in the opinion of DER, conducted the landfill in conformity with pertinent statutes and regulations, DER issued its order of October 19, 1981, which order constitutes the basis for this appeal.

The order of DER of October 19, 1981, constituted a final order of that department in that the appellant was therein advised that the order could be appealed to this Board. Any final decision or ruling by an agency affecting personal or property rights of a person in an "adjudication". *Ambron v. Phila. Civil Service Commission*, 422 A.2d 225, Cmwlth. 1980.

In view of the clear statutory language, and the above cited case law, the order of DER of October 19, 1981, was an adjudication.

Appellant further contends that it was not afforded an opportunity to be heard, as required by the provisions of 2 Pa. C.S.A. 504, and as recited in the case of *Fair Rest Home v. Commonwealth*, 401 A.2d 872 (1979). As stated in *Fair, supra*,:

> "The clear language of the statute dictates that no adjudication shall be valid without first there having been given an opportunity to be heard."

The final order of DER of October 19, 1981, was valid only insofar as no appeal was filed within thirty days of receipt of notice of the order by ESLA. The notice to ESLA of the right to appeal the order to this Board satisfied the requirement that

appellant be given reasonable notice of a hearing and an opportunity to be heard.

The final argument of appellant in contesting the motion to dismiss is that the appeal should be allowed *nunc pro tunc*. It is well settled that this Board lacks jurisdiction to hear appeals if the notice of appeal is filed more than thirty (30) days after appellant has received notice of the DER order. *Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 26 Pa. Cmwlth Ct. 478, 364 A.2d 761 (1976), *Toro Development Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 425 A.2d 1163 (1981), unless there is a valid reason allow the appeal *nunc pro tunc*.

To allow an appeal *nunc pro tunc*, the allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the court's operation through... default of its officers, hereby the party has been impaired. In re *Township of Franklin*, 2 Pa. Cmwlth. 496, 500, 276 A.2d 549, 551 (1971). Also, the mere neglect of counsel cannot justify the granting of an appeal *nunc pro tunc*. *W.W. Grainger, Inc. v. Ruth*, 192 Pa. Super. 446, 449, 161 A.2d 644, 646 (1960).

Counsel for appellant admits that the filing of the appeal was his own error, and such a reason is not sufficient to allow *nunc pro tunc* filing according to the above-cited case law.

O R D E R

AND NOW, this 8th day of February, 1982, it is hereby ordered that the appeal of East Side Landfill Authority d/b/a East Side Sanitary Landfill at EHB Docket No, 81-209-M is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 8, 1982

cc: Bureau of Litigation
B. Todd Maguire, Esquire
Lynn Wright, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GEORGE CAMPBELL, et al. : Docket No. 81-164-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CHEMICAL WASTE MANAGEMENT AND LYNCOTT
CORPORATION

OPINION AND ORDER SUR
LYNCOTT'S MOTION TO DISMISS APPEAL

On September 4, 1981, the Department of Environmental Resources (DER) issued an Administrative Order to Lyncott Corporation in respect to its New Milford solid waste disposal site.

On or about October 30, 1981, George Campbell, Chairman of Concerned Citizens of New Milford (Campbell) filed a notice of appeal with this board from DER's issuance of said Order.

Campbell's principle objections to DER's Order is that it does not revoke permanently Lyncott's permits for use of the New Milford site for solid waste disposal.

Campbell lacks standing to appeal this Administrative Order because DER's refusal or failure to revoke Lyncott's permit does not change Campbell's legal status quo *George Eremic v. DER*, (December 2, 1976) 1976 EHB 324;

George Campbell, et al. v. Commonwealth of Pennsylvania, Department of Environmemtal Resources and Lyncott Corporation, EHB Docket No. 79-072, Opinion of February 1, 1980; *Susquehanna County v. Commonwealth of Pennsylvania, DER*, ____ Pa. Cmwlth. ____, 427 A.2d 1266 (1981).

O R D E R

AND NOW, this 9th day of January, 1982, Lyncott's motion to dismiss appeal is granted and the said appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
E. Stirling Lathrop, III, Esquire

DATED: February 9, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

LATIMER BROTHERS :

:

Docket No. 80-137-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

By, Anthony J. Mazullo, Jr., Member

By notice dated July 21, 1980, a Surface Mining Permit, No. 955-7, with conditions attached, was issued to appellant, and received by appellant on July 22, 1980. Appellant filed an appeal from the grant of the permit on August 25, 1980.

Counsel for both parties agreed to countless continuances for the filing of pre-hearing memoranda on the grounds that appellant was attempting to secure documents which would satisfy one of the conditions imposed by the notice of grant of the mining permit.

By notice dated November 20, 1981 counsel for appellant sought to amend its appeal so as to include an allegation of unconstitutionality of one of the conditions of the permit as issued, and a regulation issued pursuant to 52 P.S. §1396.4b(c). The Commonwealth answered this request by objecting to such a late addition to grounds for the appeal, and at the same time, filed a Petition to Quash Appeal. The Petition alleges as grounds for quashing the appeal the failure of appellant to file its appeal within thirty (30) days of receipt of notice of the action of DER.

The Commonwealth Court has held that the Environmental Hearing Board is not a competent tribunal to pass upon questions of the validity or constitutionality of statutes. See *St. Joe Minerals Corporation v. Goddard*, 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974), and this Board is therefore bound by the decision of the Commonwealth Court. Therefore, the request by appellant to add an allegation of unconstitutionality of 52 P.S. §1396.4b(c) and the regulations promulgated thereunder is denied.

Section 21.52(a) of the Environmental Hearing Board rules and regulations governing practice before the Board (25 Pa. Code §21.52(a)) provides that the Board lacks jurisdiction in the instance where an appeal has not been filed "within 30 days after the party appellant has received written notice of such action". In this case the party appellant received notice of the action of DER on July 22, 1980, and it filed its appeal on August 25, 1980. Clearly, the appeal was not filed within thirty (30) days of receipt of DER's notice.

O R D E R

AND NOW, this 9th day of February, 1982, the appeal of Latimer Brothers, EHB Docket No. 80-137-B is hereby quashed and dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 9, 1982

cc: Bureau of Litigation
Ward T. Kelsey, Esquire
Robert D. Douglass, Esquire
David A. Cicola, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

LOVE NORTHEAST, INC. :

:

Docket No. 80-038-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By: Anthony J. Mazullo, Jr., Member

Love Northeast, Inc., appellant herein applied to the Department of Environmental Resources (DER) for a surface mining permit to mine coal, referred to as a Reclamation Project No. 729.

DER denied appellant's application by letter dated February 13, 1980, and appellant filed its appeal on February 23, 1980 thereafter, appellant filed a pre-hearing memorandum.

From the date of the filing of the appeal on February 23, 1980, until on or about February 19, 1981, the parties sought continuances based upon their continuing attempts to amicably adjust the matter.

By notice dated February 20, 1981, this Board was advised by counsel for DER that the appellant had decided, after meeting with representatives of DER, to

withdraw its appeal. However, to date, appellant has failed to withdraw its appeal, or to respond to requests from this Board for status reports in this matter.

On October 21, 1981 DER filed its motion for summary judgment and petition for sanctions with this Board, advising that appellant was served with copies of same. As of February 4, 1982 appellant has failed to respond to said filings, despite requests from the Board, including notice to appellant that failure to respond could lead to the composition of sanctions against appellant, such as dismissal of its appeal.

DER's motion for summary judgment may only be allowed where there is no genuine issue as to any material fact. *Summerhill Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 34 Pa. Cmwlth. Ct. 574, 383 A.2d 1320 (1978), citing *McFadden v. American Oil Co.*, 215 Pa. Super. 44, 48, 257 A.2d 283, 286 (1969). In the instant matter, appellant has alleged, in its appeal and in its pre-hearing memorandum, that DER was in error in basing the denial of appellant' permit upon the"potential of a very large hydraulic head in the area of proposed mining", which head "can only increase the potential of a 'blowout'". (DER letter of denial of February 13, 1980). Pursuant to the standards enunciated in *Summerhill, supra*, appellant, in its appeal and pre-hearing memorandum, has raised an issue as to a material fact, i.e., the potential of the hydraulic head which could increase the potential of a blowout. Since the appellant has raised an issue of material fact, the standards imposed in *Summerhill* have not been met, and therefore the motion for summary judgment is inappropriate in the present posture of this case.

In its accompanying petition for sanctions DER seeks dismissal of appellant's appeal by reason of appellant's failure to respond to this Board's requests for reports on the status of the appeal. In addition to the failure of appellant to respond to the Board requests, there is in the present record an affirmative statement the appellant has failed to refute. Further, a true and correct copy of DER's motion for summary judgment and petition for sanctions was sent by counsel for DER to appellant on October 19, 1981, and this Board has not received any answer to same from appellant.

Since 21.64(d) of the Environmental Hearing Board Rules and Regulations, 25 Pa. Code , provides:

> "Any party failing to respond to a ... petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed...such sanctions may include treating all relevant facts stated in such...motion as admitted."

Because of the failure of appellant to answer DER's motion for sanctions, the Board hereby accepts as admitted all relevant facts alleged in DER's motion.

Section 21.124 of the Environmental Hearing Board Rules and Regulations, 25 Pa. Code , provides that the Board may impose sanctions, including dismissal of an appeal, upon failure of a party to abide by a Board order or Board rule of practice and procedure. Appellant has failed to abide by the Board's rules of practice and procedure in failing to respond to DER's petition and motion. Appellant has also failed to abide by the Board's orders to report to the Board on the status of its appeal. The Board therefore may impose the sanction of dismissal of appellant's appeal by reason of appellant's inaction as specified hereinbefore.

O R D E R

1. The petition of DER for summary judgment is denied.

2. The motion of DER for sanctions is granted and the appeal of Love Northeast, Inc., EHB Docket No, 80-038-M is dismissed and terminated.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 9, 1982

cc: Bureau of Litigation
Mr. John Kosky
Diana J. Stares

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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Harrisburg, Pennsylvania 17101
(717) 787-3483

LOWER PROVIDENCE TOWNSHIP :

:

Docket No. 81-078-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ALTERNATE ENERGY STORE, INC. Permittee

OPINION AND ORDER
SUR
MOTION TO DISMISS

By: Anthony J. Mazullo, Jr., Member

The Department of Environmental Resources, Bureau of Mining and Reclamation (DER) by notice dated May 4, 1981 issued a mine drainage permit, No. 46800301, to the Alternate Energy Store, Inc. Lower Providence Township, appellant herein, filed an appeal from the grant of said permit on June 3, 1981.

The permittee, the Alternate Energy Store, Inc., filed a motion to quash the appeal, and appellant filed an answer thereto.

In its motion to quash, permittee relies upon various cases decided by the Commonwealth Court wherein the court has consistently held that townships and municipalities lacked standing to appeal various actions of DER under the Solid Waste Management Act, Act of July 7, 1980, P.L. 362, No. 97, 35 P.S. §6018.101, *et seq.* (Solid Waste Act) to this Board. See *Franklin Township v. Commonwealth of Pa*, 435 A.2d 675 (1981), citing approval, *Susquehanna County v. Commonwealth of Pa and Lyncott Corporation*, 427 A.2d 1266 (1981) and *Strasburg Associates v. Newlin Township*, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980).

If the above cases apply to the instant appeal they clearly control and this appeal must be dismissed. There are, however, substantial differences between the Solid Waste Management Act which was analyzed in those cases and the Surface Mining Conservation and Reclamation Act, as amended most recently October 10, 1981, 52 P.S. §1396.1 *et seq.* (SMCRA) which governs the instant matter.

The Solid Waste Act provides no separate right for a municipality or indeed any other legal entity to appeal from actions of DER taken under that Act. Therefore, appellants must base their right to appeal from DER actions taken under the Solid Waste Act upon §1921-A of the Act of April 9, 1929, as amended 71 P.S. §510-31. Commonwealth Court long ago established that in order to appeal under §1921-A a party had to demonstrate that he was "adversely affected" or "aggrieved", i.e. he had to meet the tests for standing pursuant to the Administrate Agency Law, the Act of June 4, 1945 (P.L. 1388), 71 P.S. §1710.1 *et seq.*, *Sunbeam Coal Corp. v. DER*, 304 A.2d 160 (1973).

Since Commonwealth Court read the Supreme Court's decision in *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) as requiring that a party have a substantial, immediate and direct interest in the outcome of the litigation to be "adversely affected" under the Administrative Agency Law, the Commonwealth Court, naturally, concluded, in the above cited cases, that a municipality had no standing to appeal from an action under the Solid Waste Act unless and until it could demonstrate such an immediate, direct and substantial interest.

SMCRA, however, unlike the Solid Waste Act, provides a specific right to appeal to this Board from DER's issuance of a mine drainage permit. Pursuant to §5(b) of SMCRA, 52 P.S. §1396.4(b), [a]ny person having an interest which is or <u>may be</u> adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board..." (emphasis supplied). "Person" is defined by §1 of SMCRA, 52 P.S. §1396.3 to include any "instrumentality" or "entity" of *inter alia* state government and there is no doubt that municipalities are mere "creatures of the state" *DER v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974). Thus, it is apparent that municipalities are permitted to appeal pursuant to the above cited section of SMCRA.

Applying the canons of statutory construction, it is also apparent that the above cited section of SMCRA must have been intended by the General Assembly to alter the right of appeal set forth at §1921-A of the Administrative Code. Otherwise the SMCRA section would be redundant and we know that the legislature does not intend any provisions in its laws to be mere surplusage. *Lukus v. Westinghouse Elec. Corp.*, 419 A.2d 431, 447. The difference between the rights of appeal provided by §1921-A and the SMCRA section is also apparent from even a cursosy reading of SMCRA. Whereas, §1921-A requires an appellant to be adversely affected SMCRA also permits an appeal where the appellant " may be" adversely affected. The additional words "may be" in SMCRA are intended to have effect and meaning 1 Pa. C.S. §192(a); *Comm. v. Driscoll*, 485 Pa. 99, 410 A.2d 312 (1979) and we will not ignore them. Instead, we will apply these words by holding that they grant municipalities standing to appeal under SMCRA which they do not enjoy under the Solid Waste Management Act.

O R D E R

AND NOW, this 10th day of February, 1982, the permittee's motion to quash the appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: February 10, 1982

cc: Bureau of Litigation
John Wilmer, Esquire
Marc D. Jonas, Esquire
Richard C. Sheehan, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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Harrisburg, Pennsylvania 17101
(717) 787-3483

CHEMICAL WASTE MANAGEMENT, INC., et al. : Docket No. 81-154-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
APPELLANTS' MOTIONS FOR PROTECTIVE ORDER

DER noticed the depositions of Joseph Zorn and Frank Krohn in Harrisburg. Appellant moved this board for a protective order, requiring, in the alternative, that the depositions be held in respectively, Port Arthur, Texas and Oak Brook, Illinois, the respective homes of the would-be deponents or that the deponents' expenses be paid for depositions in Harrisburg, Pennsylvania. Appellants cited a single Allegheny County court decision in their behalf.

DER in opposition to appellants' motion cites several authorities. DER's authorities have convinced the board that in exercising our discretion in this matter the following factors should be considered:

> "...(1) the importance to the case of the data sought; (2) the importance of having the data in advance of trial; (3) the convenience and inconvenience of the method, place and time chosen for discovery; (4) the cost of discovery; and (5) ability to pay. *Green v. Johnson*, 29 Somerset Legal Journal 35 (CP. Somerset Co., 1973)."

Applying these factors to the instant motions it is clear that we should dismiss the appellants' motion as to Mr. Zorn. The record in EHB #81-038-H does indicate that Mr. Zorn served as General Manager of Lyncott with direct supervisory responsibilities for the day-to-day operation of the landfill. Consequently, his deposition prior to hearing would be important to the instant matter. Also, Zorn "presumably" still is a CWM employee, which corporation clearly has the ability to pay for his travel to Harrisburg. Finally, Harrisburg would not seem to be unduly inconvenient as the locus for the deposition. CWM has been able to assemble experts from New Hampshire and Georgia as well as counsel from Pittsburgh here for a number of days of hearing.

As to Mr. Krohn, however, it is not so clear that his deposition is essential. The circumstances of the acquisition of Stabatrol about which DER would like to depose Mr. Krohn would seem to be mooted by our earlier ruling as cited at footnote 1 of the Commonwealth's memo. In any event, we feel that with regard to Mr. Krohn, DER should follow through on the suggestion set forth at footnote 5 of its memo by using other discovery techniques to obtain information from Mr. Krohn.

O R D E R

AND NOW, this 11th day of February, 1982, the appellants' motion for protective order is denied as to Mr. Zorn, and granted as to Mr. Krohn.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish
DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy
EDWARD GERJUOY, Member

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Gerald C. Grimaud, Esquire
E. Stirling Lathrop, III, Esquire

DATED: February 11, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

AL HAMILTON CONTRACTING COMPANY : Docket No. 81-051-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WOOD KUCK CHAPTER OF TROUT UNLIMITED and
KEYSTONE WATER COMPANY, Intervenors

OPINION AND ORDER SUR PETITIONS TO INTERVENE
OF KEYSTONE WATER COMPANY AND WOOD DUCK CHAPTER OF TROUT UNLIMITED

On or about April 23, 1981 the appellant, Al Hamilton Contracting Company, appealed from DER's denial of its mine drainage permit application no. 14800102. The proposed mining site covered by said mine drainage permit application is purportedly within the watersheds of Clover Run and Cold Stream.

The appellant and DER have engaged in extensive discovery, have attended a pre-hearing conference and have scheduled a hearing on the merits to begin on February 23, 1982. During the week of February 8, 1982, the board received petitions to intervene filed upon behalf of Keystone Water Company and the Wood Duck Chapter of Trout Unlimited.

The Trout Unlimited petition emphasizes its concern over the impact of mining upon multi-recreational use of Cold Stream while the Keystone Water Company's petition centers upon its water purification and supply facility known as Moshannon Valley District.

Appellant asserts that all of the interests raised by both would-be intervenors can be adequately represented by DER and appellant suggests that intervention at this point would be untimely. As to the first argument it is undercut by appellant's assertion that it is near to settlement with DER which settlement would presumably permit mining. Intervenors' flatly oppose mining. Therefore, DER cannot be held to be representing their interest at least to the extent that settlement is achieved.

As to the second argument, our rules provide for intervention at any time up to the first day of hearing thus the would-be intervenors are not legally tardy. Moreover, while we are concerned that appellant have time to investigate intervenors' cases, this order requires them to comply with pre-hearing order no. 1 by March 12, 1982 and we also note that appellant's counsel has admitted that his is aware, to a substantial degree, of the testimony which might be proferred by the intervenors' witnesses and we finally note that appellant has until March 23, 1982 when the second set of hearings is set in this matter within which to perfect its discovery.

O R D E R

AND NOW, this 22nd day of February, 1982, the petitions to intervene of each of the above-identified parties is granted on the condition that these parties submit and serve pre-hearing memoranda in compliance with the attached pre-hearing order no. 1 by March 12, 1982.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Donald Brown, Esquire
William Kriner, Esquire
Bradford F. Whitman, Esquire
Wood Duck Chapter Trout Unlimited

DATED: February 22, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

J & P MINING COMPANY, INC. :

:

Docket No. 81-170-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By letter dated November 2, 1981, Vapco Engineering Company, Inc., by Van G. Plocus, P.E., filed an appeal of the forfeiture of collateral bonds of Andrew H. Smith given by Smith for J & P Mining Company. The letter of appeal was received by this Board on November 5, 1981, and docketed at EHB Docket No. 81-170-H.

On November 10, 1981 the Secretary to this Board advised Andrew Smith and Van G. Plocus of the failure of the letter of appeal to comply with section 21.51 of the Board's rules of practice and procedure, and enclosed a copy of thereof, and further requested that certain information be furnished to the Board within ten (10) days of receipt of the notice, or the appeal could be dismissed.

After a telephone discussion with a member of the Board, Mr. Plocus advised the Board, by letter dated November 20, 1981 that Mr. Smith had retained counsel and a 'formal appeal will be filed next week."

The Board issued its Pre-Hearing Order No. 1 thereafter, and on January 25, 1982 the Board issued a second notice requesting the same information as contained in its notice to Plocus and Smith of November 10, 1981. The Board has not received the

information requested of Mr. Smith in its notices of November 10, 1981 and January 25, 1982. Mr. Smith, and Mr. Plocus, his representative, received the second notice on January 28, 1982.

On February 24, 1982 DER filed a Motion to Dismiss the appeal.

The letter appeal filed by Vapco Engineering Company, Inc., on behalf of Andrew Smith, did not comply with the provision of section 21.51 of the Board's Rules and Regulations, and therefore the appeal has not been perfected pursuant to the provisions of section 21.52 of the aforecited rules of practice and procedure.

An appeal which is not perfected is subject to dismissal, pursuant to the provisions of section 21.52 of the Board's rules. Appellant has failed to perfect its appeal for a period in excess of three months, despite two (2) requests from the Board to do so.

Accordingly, the Commonwealth's motion to dismiss the appeal is granted.

O R D E R

AND NOW, this 3rd day of March, 1982, the Commonwealth's Motion To Dismiss appeal is granted, and the appeal of J & P Mining Company, Inc., at EHB Docket No. 81-170-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

DATED: March 3, 1982

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Mr. Andrew Smith
Mr. Van G. Plocus

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

CLYDE A. TODD :

:

Docket No. 82-022-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By letter dated January 22, 1982, and received by this Board on January 26, 1982, the appellant advised this Board that he was "appealing certain conditions referred to in Permit No. 101252 issued January 13, 1982." In the same letter the appellant requested that the Board "forward appeal forms and regulations governing the procedure."

On February 2, 1982 the Secretary to the Board forwarded to the appellant an Acknowledgement of Appeal and Request for Additional Information, and therein advised the appellant that unless the following information was submitted to the Board within ten (10) days of receipt of said notice, the appeal may be dismissed.

a. Copy of letter and/or order appealed from.

b. Date notice of action appealed was received.

c. Specification of objections setting forth manner in which appellant is aggrieved by the action of the department.

d. Have you notified those persons listed in paragraph number 4 of the enclosed Notice of Appeal form?

The Secretary to the Board also forwarded to appellant a copy of section 21.51 of the Board's rules of practice and procedure.

As of March 1, 1982, appellant has not forwarded to the Board the information required to perfect his appeal.

The letter of appeal received by the Board did not comply with the requirements of section 21.51 of the Board's Rules and Regulations, as hereinabove specified. Since the letter of appeal did not contain the information required under section 21.51, the appeal was not perfected as required by section 21.52 (c) of the Board's Rules and Regulations.

An appeal which is not perfected may be dismissed if the appellant fails to file the required information. Appellant has failed to file the required information for a period in excess of thirty (30) days from the date of the notice requiring him to file the required information.

Having failed to initially file the required information, and having failed to respond to the Board's request that the required information be filed within ten (10) days of receipt of the notice from the Board, the Board hereby dismisses the appeal of Clyde A. Todd being EHB Docket No. 82-022-M.

O R D E R

AND NOW, this 2nd day of March, 1982, the appeal of Clyde A. Todd, EHB Docket No. 82-022-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

DATED: March 2, 1982

cc: Clyde A. Todd
Peter Shelley, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

SOUTHWEST PENNSYLVANIA NATURAL RESOURCES, INC. : Docket No. 81-001-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR MODIFICATION OF ADJUDICATION

On or about March 11, 1982, the board issued an adjudication in the above-captioned matter. On or about March 26, 1982 the board received a motion styled as a motion for modification of said adjudication. No such motion is specifically acknowledged by our rules. However, we shall treat it as a motion for reconsideration as per 25 Pa. Code §21.122.

Under §21.122 reconsideration may be granted where the "...decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief..." or where the decision was based upon a crucial mistake of fact.

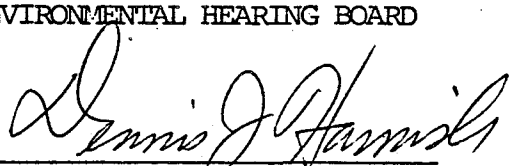
Here, appellant alleges no mistake of fact and appellant though given every opportunity failed to file a post-hearing brief until after the adjudication was issued (some 7 months after the hearing). Thus, clearly, appellant does not qualify for reconsideration under our rules regardless of

the merit of its argument. By way of dicta, moreover, we fail to find any merit in appellant's argument.

It is true as appellant asserts that DER removed the haul road and sedimentation ponds on appellant's site from the reclamation requirements of its restoration plan but this act did not, as appellant asserts, removed these areas from the bond which was eventually forfeited by DER. The "waiver" discussed above was contained in a letter dated January 17, 1980 which was introduced as appellant's Exhibt A. A review of this letter indicates that it is a modification of appellant's restoration plan rather than a waiver of any sort. Neither by this letter nor by any other act or record did DER expressly or by necessary implication release the haul road and ponds from the forfeited bond.

If the bond in question was not penal in nature appellant's argument might have more weight since the modification would reduce DER's cost in reclaiming the site with the proceeds from the forfeited bond. However, the bond in question is penal (see *American Casualty Company of Reading, PA v. DER*, EHB Docket No. 78-157-S, issued January 16, 1981) so that restoration costs are legally irrelevant. Thus, appellant's motion is denied.

ENVIRONMENTAL HEARING BOARD



BY: DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Diana Stares, Esquire
D. Keith Melenyzer, Esquire

DATED: April 6, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOROUGH OF BELLEFONTE and BELLEFONTE BOROUGH AUTHORITY : Docket No. 81-191-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S
MOTION TO DISMISS AND AMENDED MOTION TO DISMISS

As long ago as October 25, 1968, DER's predecessor, the Sanitary Water Board, was, by an administrative order, attempting to require the Borough of Bellefonte to upgrade its sewage treatment facilities to provide tertiary treatment by *inter alia* limiting the discharge of total soluble phosphate and ammonia nitrogen therefrom.

On July 28, 1974, EPA too imposed effluent limits for total soluble phosphrous and ammonia nitrogen upon Bellefonte via a NPDES permit issued on that date. Apparently, neither DER nor EPA took an effective enforcement action based upon these outstanding requirements. Instead, on or about November 16, 1981 DER, to which agency the NPDES program had been delegated, issued a new NPDES permit, to which Bellefonte took a timely appeal.

It is instructive that the cover letter to said permit dated November 17, 1981 specifically acknowledges an unrestricted right to appeal therefrom to

this board. Notwithstanding this letter, however, DER has moved to dismiss the instant appeal on the basis that the 1974 NPDES permit and the 1968 order bar the present appeal (apparently by the res judicata theory). DER asserts that Bellefonte is estopped to contest either the total soulable phosphate or ammonia nitrogen limits in the 1981 NPDES permit by reason of its failure to timely contest the earlier issued permit and order.

Bellefonte denies that it did have an opportunity to obtain administrative review of the 1968 order and that, in any event, the effluent limitations it would challenge in the instant permit differ from those in the older permit and order. DER, by its reply to Bellefonte's answer and its amended motion to dismiss, takes issue with both of Bellefonte's points and requests that this board schedule an evidentiary hearing on the issue of whether the said effluent limits are indeed the same. DER's request assumes that if we found the effluent limits in the instant permit to be identical to those in the earlier permit or order we would *ipso facto* grant DER's motion to dismiss. We feel that DER in this case as in *Allegheny County Sanitary Authority v. DER*, EHB Docket No. 78-053-H, (issued March 9, 1982) is seeking to revive an almost forgotten action of a predecessor agency in order to cut off meaningful review of a recent action.

As we noted in *Alcosan, supra*, we are concerned, in general, with the effect of res judicata in an administrative agency context. In any event, we are not disposed to curtail the right to administrative review provided by §1921-A of the Administrative Code except in the clearest cases. It is far from clear that either the 1968 order or the 1981 NPDES permit represent identical things sued for.[1]

---

1. Because of this holding we do not reach the issue of whether the January 12, 1971 letter of Carl L. Mease constituted grounds for an appeal *nunc pro tunc*.

As to DER's certification of effluent limitations to EPA for the 1974 NPDES permit, we question the legal status of such a certification after the expiration of the permit for which it was made. Moreover, *Sharon Steel Corporation v. Commonwealth, DER*, EHB Docket No. 75-170-C is inapposite here. In *Sharon Steel, supra*, and the other certification cut off cases, the appeal period ran from the date notice thereof was published in the Pennsylvania Bulletin. DER has not alleged any such publication of notice or actual notice in this matter.

DER would also rely on Bellefonte's failure to appeal the 1974 NPDES permit through the federal administrative or judicial review processes to cut off its review rights of the 1981 NPDES permit before this board. Again we question the legal effect of the 1974 NPDES permit and note that even if the operation of federal law precludes a present Bellefonte challenge to the 1974 NPDES permit (which was issued by EPA) this would not be relevant to the present matter.

O R D E R

AND NOW, this 6th day of April, 1982, DER's Motion to Dismiss the instant matter is denied. The date for appellant's submission under pre-hearing order no. 1 shall be May 14, 1982.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Michele Straube, Esquire
David A. Flood, Esquire

DATED: April 6, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOYLE LAND AND FUEL COMPANY : Docket No. 79-175-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S PETITION FOR CLARIFICATION AND RECONSIDERATION

On or about January 27, 1982 this board issued an adjudication in the above-captioned matter. DER filed a timely petition pursuant to §21.122 of our rules, 25 Pa. Code §21.122 for reconsideration and also asked for clarification of the adjudication.

To support its request for reconsideration DER pointed out alleged errors in four of the 88 findings of fact set forth in the adjudication. Appellant's response to DER's petition suggests that the contested findings are irrelevant to the board's decision the gravamen of which is that: where a mining site is classified by DER as having a marginal acid-bearing potential it is an abuse of discretion for DER to refuse to consider a mining plan proposed to isolate toxic and acid-forming materials on site in order to avoid discharges of acid mine drainage from the site. We agree with the appellant that this is so and we note that pursuant to §21.122 in order to justify

reconsideration, the misapprehension must be "crucial" and must be such as to "justify a reversal of the decision". Although, we are concerned about our apparent misapprehension of the status of groundwater on the site we do not feel that this fact standing alone or in conjunction with our other alleged errors would justify a different decision. Thus, reconsideration is not proper in this matter.

We also agree with appellant that DER's request for clarification constitutes a request for an advisory opinion which we are not empowered to give. Our adjudication does cut off any further consideration of the general acid-bearing potential of the site and does mandate that DER review appellant's amended mining plan but whatever other review DER seeks to make of appellant's amended application is up to DER subject to any future appeals to this board.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Diana J. Stares, Esquire
Robert J. Shostak, Esquire

DATED: April 14, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Docket No. 81-081-CP-W

v. :

ENVIROGAS, INC.

OPINION AND ORDER SUR THE COMMONWEALTH'S PRELIMINARY OBJECTIONS TO DEFENDANT'S ANSWER, COMMONWEALTH'S ANSWER TO DEFENDANT'S PETITION FOR DISCOVERY AND MOTION FOR PROTECTIVE ORDER AND COMMONWEALTH'S MOTION FOR SANCTIONS

For at least the fourth time this board is called upon to address a panoply of pre-hearing motions in the above-captioned matter. On December 8, 1981 the board issued its latest order which *inter alia* required defendant to fully comply with the Commonwealth's discovery requests on or before December 31, 1981.

The board received no timely objection to any of the Commonwealth's interrogatories or requests for production but apparently defendant also failed to answer said interrogatories or produce said documents or even arrange an extension of time with DER's counsel within which time to do so. DER has filed a motion for sanctions based upon defendant's failure to comply with our December 8, 1981 order. On the basis of defendant's derelictions we could at this time impose the stringent sanctions DER requests. We will, however, give the defendant one last opportunity to avoid a default judgment by answering

DER's interrogatories and producing the requested documents as provided below but no objections thereto shall be entertained by this board, the defendant having waived its right to raise same.

Since our December 8, 1981 order the defendant has answered the Commonwealth's complaint but DER has filed preliminary objections to this answer. Pa. R.C.P. 1028 which is incorporated into our rules by reference does not provide for preliminary objections to an answer and thus we shall not rule on these objections. This does not imply, however, that we have found paragraphs 8 to 13, 15 and 16 of defendant's answer to constitute legally cognizable defenses; we simply have not yet reached this issue.

The final matter to be addressed by this opinion is the adequacy of DER's response to defendant's petition for discovery as raised by DER's answer thereto and motion for protective order. DER has supplied answers to most of defendant's interrogatories but has objected to the last three 3H, 3I, and 3J, which request, respectively:

> "H. The names and addresses of all persons who participated in the decision to send a Department of Environmental Resources representative to the subject site.
>
> I. The names and addresses of all persons who participated in the decision to file the Complaint by which this action has been initiated.
>
> J. For purposes of determining whether there has been afforded Defendant equal protection of law and due process of law and further authority of the Freedom of Information Act, your Petitioner shall require for inspection and/or copying all other files with the Department of Environmental Resources and with the Erie County Department of Health, with a similar fact situation relative to all counts of the Complaint by which this action is asserted, and further all notes, memorandum, records and any other written materials in which reference is made to this Petitioner, whether or not in reference to this case."

DER objects to all three interrogatories for a variety of reasons including relevancy. While we acknowledge that relevancy is broadly construed during discovery, the interrogatories at issue seek information so far removed from any issue raised by the pleadings (which this board can consider) as to be outside the pale of discovery. The memorandum of DER's counsel objected to by DER in answer to interrogatories 3A and 3B is also protected pursuant to 42 Pa. C.S.A. §5928. Thus, we shall grant DER's motion for protective order as specified below.

O R D E R

AND NOW, this 14th day of April, 1982, upon consideration of the various motions (however styled) identified above it is hereby ordered that:

a) defendant shall make full and complete answer to each of DER's interrogatories and produce each requested document at DER's Erie Office on or before May 7, 1982. Further action on DER's motion for sanctions is delayed pending the request of either party for a ruling thereupon.

b) DER's preliminary objections to defendant's answer are dismissed as not recognized by the board's rules.

c) DER's motion for protective order is granted.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Paul F. Burroughs, Esquire
W. Richard Cowell, Esquire

DATED: April 14, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

HATFIELD TOWNSHIP MUNICIPAL AUTHORITY :

:

: Docket No. 82-081-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Anthony J. Mazullo, Jr., Member

The Department of Environmental Resources, DER, by letter dated February 4, 1982, determined that the sewage treatment facility of Hatfield Township Municipal Authority, appellant, was projected to become hydraulically overloaded, and therefore required appellant to submit a written plan to DER setting forth steps to be taken by appellant to prevent overloading, and to limit new connections based upon remaining available capacity and the aforementioned written plan.

By notice dated March 5, 1982, Hatfield Township Municipal Authority appealed the action of DER in its letter of February 4, 1982.

On March 19, 1982 DER filed a motion to quash appeal, and appellant filed its Answer thereto on April 12, 1982.

The essential, and only issue to be decided herein is whether the February 4, 1982 letter from DER to appellant is an order or decision of DER and therefore appealable.

This board has jurisdiction to consider appeals based upon an order or decision of DER. 71 P.S. 510.21 which is a final action of DER and which affects personal or property rights of the appellant. *Gateway Coal Co. v. DER*, 399 A.2d 802 (1979), *Township of Salisbury*, EHB No. 80-115-W (decided September 19, 1980)

Also, in *Gateway, supra.*, the Commonwealth Court determined that the substance of the communication, and not the form, was controlling in determining if communication for DER was an appealable order or decision.

The test enunciated in *Gateway, supra*, and cited in *Annville Township Sewer Authority*, EHB No. 80-064-W (decided August 21, 1980), is whether or not the action of DER directs compliance with an Act and imposes some liability or otherwise effects the obligation or duties of a person.

DER, in the instant action, has directed appellant to comply with the regulations promulgated in furtherance of the Pennsylvania Sewage Facilities Act, 35 P.S. 750.1 *et seq.* and, more specifically, "Section 94.22 of Chapter 94",25 Pa. Code 94.22.

Further, DER has imposed a liability upon appellant, namely, limiting of new connections to the sewage facilities plant.

Also, DER affected the obligation and duties of appellant by requiring the submission of a written plan which would set forth stays to be taken to prevent overloading.

In view of the change in status of the parties effected by the letter of DER, and the liabilities imposed thereunder, we find an appealable action taken by DER, and enter the following:

O R D E R

AND NOW, this 15th day of April, 1982 the Motion to Quash the appeal of Hatfield Township Municipal Authority is hereby denied.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

DATED: April 15, 1982

cc: J. Scott Maxwell, Esquire-
James D. Morris, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Docket No. 81-114-CP-H

v. :

TERRY E. SCATENA,
a/k/a ELMO SCATENA

OPINION AND ORDER SUR
DEFENDANT'S PRELIMINARY OBJECTIONS

By its complaint for assessment of civil penalties filed on or about August 15, 1981, the Department of Environmental Resources (DER) seeks to assess civil penalties against the defendant for violations of The Clean Streams Law, 35 P.S. §691.1 *et seq.* The defendant has filed preliminary objections to the complaint in the nature of a motion to strike and demurs to the two (2) counts of the complaint. These preliminary objections are now before the board for disposition.

In its complaint DER alleges that defendant violated Section 605 of The Clean Streams Law (CSL) by causing or permitting untreated and inadequately treated industrial waste to be discharged into a borehole on his property on certain dates which entered the abandoned mine workings of the Butler Mine in Pittston Township, Luzerne County, and thereafter drained into the Susquehanna River. Count I of the complaint seeks an assessment of civil penalties in

the specific amount of ten thousand ($10,000) dollars per day for this violation which occurred on certain dates alleged in the complaint.

Count II of the complaint alleges that in violation of Sections 301 and 307 of the CSL the defendant caused or permitted the discharge of industrial wastes into the waters of the Commonwealth, the Susquehanna River, by his activities at the borehole on certain dates, and seeks the assessment of civil penalties in the specific amount of ten thousand ($10,000) dollars per day for each date alleged.

The preliminary objection of the defendant in the nature of a motion to strike asserts that the complaint contains scandalous and impertinent material, fails to conform to law and rule of court, fails to join a necessary party, and alleges that this board is without jurisdiction in this matter.

The demurrers to each of the counts allege that the complaintant has failed to state a cause of action upon which relief can be granted.

I. Motion to Strike

Defendant's first preliminary objection is a motion to strike paragraphs 6, 8, 9, 10, 12, and 17 of the complaint because the paragraphs allegedly contain scandalous and impertinent matter. Each of the paragraphs will be discussed separately below. The defendant has the burden of showing that the paragraphs contain scandalous and/or impertinent matter and that he is prejudiced by the same. See *Galloway v. Cameron Auto, Inc.*, 73 D & C 2d 104 (1974). *Southeastern Pa. Transporation Authority v. Philadelphia Transportation Co.*, 38 D & C 2d 653 (1966). The failure of the defendant to prove both elements has required the board to overrule his objection. See *Goehring v. Harleysville Mutual Casualty Co.*, 73 D & C 2d 784 (1976).

Paragraph 6 of the complaint provides:

> "6. At all times material hereto, Defendant Scatena maintained a borehole on the property of Highway Auto Service which extended approximately one hundred (100) feet below the ground surface."

Defendant argues that since the maintenance of a borehole on one's property is not a violation of The Clean Streams Law, 35 P.S. §91.1 *et seq.* (CSL) or the rules or regulations promulgated thereunder, it is not relevant to this instant action against him for violations of the CSL. The fallacy with this argument is that the borehole in question is the borehole in and through which DER alleges that the defendant knowingly, intentionally and willfully permitted the discharges of untreated or inadequately treated wastes, giving rise to the violations which are the subject of instant complaint. As such, the defendant's maintenance of the borehole is clearly relevant to the action.

Paragraph 8 is also relevant to this action in that it avers the following:

> "8. A drainage tunnel, referred to herein as the Butler Tunnel, was constructed during active operations in the Butler Mine complex to drain liquids collecting in the mine to a discharge point on the Susquehanna River."

Defendant does not state the basis for his allegation of impertinency. The Commonwealth, however, contends and we find that these averments are pertinent to the violations alleged in the complaint in that paragraph 8 sets forth, as foundation, the manner in which the untreated or inadequately treated industrial wastes traveled through the abandoned Butler Mine complex and ultimately discharged to the Susquehanna River.

Paragraphs 9 and 12 provide, respectively:

> "9. At all times material hereto, employees or agents of Newtown Refining Corporation, which was purchased on or about January 10, 1979, by Hudson Oil Refining Corporation, a Delaware corporation having its principal offices at 1 River Road, Edgewater, New Jersey, and subsequent to said purchase, employees or agents of Hudson Oil Refining Corporation, transported tractor-trailer/tanker loads of industrial waste, as defined in Section 1 of The CSL, *supra*, including, but not limited to oils, sludges, solvents, cyanide and other chemicals to Highway Auto Service."

* * *

> "12. Commencing on or about August 3, 1978, and continuing until August 1, 1979, employees and/or agents of Newtown Refining Corporation, and after the purchase referred to in Paragraph 9, herein, employees and/or agents of Hudson Oil Refining Corporation, transported tractor-trailer/taker loads containing industrial wastes, including but not limited to oils, sludges, solvents, cyanide, and other chemicals to Highway Auto Service."

Defendant argues that the fact that employees of a refining corporation hauled industrial wastes to his place of business is not essential to imposing liability on him. We find that the above paragraphs set forth allegations explain how the industrial wastes reached the defendant's borehole and, if proved, help to support the willfullness of the violation.

In summary, the allegations contained in paragraphs 6, 8, 9 and 12 of the complaint all serve to describe the manner, scheme or instrumentality by or through which the activities of the defendant, alone or in concert with others, resulted in violations of the CSL and the DER regulations alleged in the complaint and help to show, if proved, the intentional nature of the violation. As such, they are clearly relevant and material to the complaint. See *Beasting v. Freeman*, 70 D & C 2d 751 (York Co. 1974); *Brennan v. Smith*, 6 Pa. Commonwealth 342, 299 A.2d 683 (1972). On the basis of the above, we overrule defendant's preliminary objection in the nature of a motion to strike with respect to paragraphs 6, 8, 9 and 12.

Defendant also raises a preliminary objection in the nature of a motion to strike with respect to paragraph 10 of the complaint. Paragraph 10 provides as follows:

> "10. On September 19, 1980, after a two week jury trial, Defendant Scatena was found guilty on charges of violation of the CSL, *supra*."

Defendant argues that the above paragraph is scandalous because it alleges criminal conduct on the part of the defendant and impertinent because it is not material to determining whether or not a CSL violation has incurred.

Defendant cites *Cromley v. Gardner*, 385 A.2d 433, 253 Pa. Superior 467 (1976) for the proposition that a conviction upon a plea of not guilty is inadmissible in a subsequent civil action as an admission. DER respectfully submits that defendant's interpretation of *Cromley* is incorrect and his reliance thereon is misplaced.

The *Cromley* case involved a wrongful death and survival action brought to recover damages from the death of a bicycle rider. When the plaintiff attempted to introduce the defendant's guilty plea to driving under the influence into evidence, the lower court held that the plea was prompted solely by expedience and convenience and bore no weight as to the truth of the underlying act, and was thus inadmissible. 253 Pa. Superior Ct. at 470. Upon review, however, the Superior Court held that the lower court erred in not admitting the guilty plea and further held that the plea was admissible as an admission against interest. 253 Pa. Superior Ct. at 473.

In any event, defendant's reliance on *Cromley* is misplaced in the instant action because the issue before this board is not one of the admissibility of a guilty plea, but rather the admissibility of a <u>conviction</u> of guilt. The controlling law in the Commonwealth is *Hurtt v. Stirone*, 416 Pa. 463, 206 A.2d 624 (1965). In that case the Pennsylvania Supreme Court was called upon to decide whether, in a civil suit against a convicted extortioner to recover the extorted money, proof of the extortion conviction was conclusive evidence of the fact of extortion. The court, in holding that the guilty conviction was admissible in the subsequent civil proceeding, gave the following public policy reasons for the decision:

> "The defendant was presented with more than ample opportunity to overcome the charges lodged against him while he was swathed in a cloak of presumed innocence. His case was twice presented to a federal jury which found him guilty of extortion beyond a reasonable doubt, upon the same

> facts which are now urged as the basis for his civil liability. To now hold that the effect of those jury determinations is nil not only would be to fly in the face of reason, but also would be a general indictment of the whole American jury system. We are now prepared to say that the mere technical effect of the doctrines of *res judicata* and collateral estoppel regarding identity of parties is sufficient to overcome the policy which requires us to give conclusive effect to the prior conviction herein. The defendant should not now be heard to deny that which was established by his prior criminal conviction, without proof that his conviction was procured by fraud, perjury or some manner of error now sufficient to upset the conviction itself. Defendant has had his day in court and has failed to instill even a reasonable doubt in the collective mind of his then jury. No valid reason exists why he should be given a chance to try his luck with another jury."
> 419 Pa. at 498, 499.

Other cases which hold that a conviction in a felony or other serious criminal case is admissible in a civil case involving the same issue, question or claim include: *City of Lebanon v. AFL-CIO*, 36 Commonwealth Ct. 422, 388 A.2d 1116 (1978) where the court held that a conviction of criminal mischief, a felony of third degree, is conclusive evidence of the facts established by the verdict in a subsequent civil proceeding, and that a labor arbitrator likewise must accept as true those facts so established; *Kravitz Estate*, 418 Pa. 319, 211 A.2d 443 (1965) where evidence of a wife's criminal conviction for murder was admissible in subsequent civil proceeding to collect from her husband's will; *Pennsylvania Turnpike Commission v. United States Fidelity & Guaranty Co.*, 412 Pa. 222, 194 A.2d 423 (1963) where the court held that the criminal conviction of a bonded defendant was admissible in a subsequent action of assumpsit to recover the penal sum on the bonds.

It is abundantly clear from the above cases that defendant's criminal conviction is admissible in this civil penalties action. Since paragraph 10 is clearly relevant and material to this complaint, the board overrules the defendant's preliminary objection in the nature of a motion to strike with respect to paragraph 10.

Defendant's next motion to strike is addressed to paragraph 17, which provides:

> "17. Defendant Scatena was paid a fee of from one hundred fifty dollars ($150.00) to two hundred dollars ($200.00) by employees and/or agents of Newtown Refining Corporation and subsequently by employees and/or agents of Hudson Oil Refining Corporation for each tractor-trailer/tanker load which Defendant Scatena caused, suffered, or permitted to be discharged into the borehole located on the Highway Auto Service property."

Defendant argues that whether or not a fee was paid for each tractor-trailer load permitted to be discharged into the borehole is not relevant to a determination of a violation under the CSL since liability is imposed without regard to willfulness. DER submits that, while it is true that it is not necessary for the board to find that the defendant acted willfully prior to imposing liability on him, it is proper for the board to consider willfulness and intent when assessing the amount of the civil penalty.[1] To the extent that defendant knowingly and voluntarily accepted payment for participation in the unlawful conduct alleged, DER submits and the board has held that such proof goes to both culpability and amount of the penalty to be assessed. Further, a civil penalty assessment should act as a deterrent not only to the defendant but also to others who may consider violating the CSL. Accordingly, the amount of money that defendant received for his unlawful conduct is clearly relevant and material to the assessment of a penalty. Wherefore, the board overrules defendant's preliminary objection in the nature of a motion to strike with respect to paragraph 17.

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1. Section 605 of the CSL provides, in pertinent part:

> "...In determining the amount of the civil penalty, the Department shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost and other relevant factors."

The second part of defendant's motion to strike seeks to strike paragraphs 8, 9, 10, 12 and 17 because said paragraphs allegedly do not conform to Pa. R.C.P. 1019(a) and 25 Pa. Code §21.57(c). Pa. R.C.P. 1019(a) provides:

> "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

Further, 25 Pa. Code §21.57(c) provides:

> "The complaint for civil penalties shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for civil penalties are based."

The relevance and materiality of the paragraphs at issue have already been discussed above. Moreover, to the extent that any of the allegations contain surplusage under Pa. R.C.P. 1019(a), said surplusage is required under 25 Pa. Code 21.57(c). 21 Pa. Code 21.57(c) clearly requires DER to set forth the circumstances, i.e. background, upon which the request for civil penalties is based. As such the averments contained in paragraphs 8, 9, 10, 12 and 17 are required by the board's rules. Failure to make averments as to background leading to the violations could cause the complaint to be in nonconformance with the board's rules. Wherefore, the board overrules defendant's second preliminary objection in the nature of a motion to strike with respect to paragraphs 8, 9, 10, 12 and 17.

Defendant next argues that because the averments of paragraph 9 are repeated in paragraph 12 and because the averments of paragraph 21 are repeated in paragraph 23, paragraphs 23 and 12 should be stricken for violating Pa. R.C.P. 1019(a). The paragraphs in question are not exact repetitions of each other although they are similar. To the extent that the paragraphs do repeat each other, such repetition is necessary to clearly set forth the cause of actions. Even assuming, *arguendo*, that paragraphs 12 and 23 are unnecessarily repetitious, this board cannot strike them unless defendant shows that he is prejudiced by

by such repetition. See *Southeastern Pa. Transportation Authority Philadelphia Transportation Co., supra*. The defendant has fallen sadly short of showing any prejudice by the repetition. Wherefore, the board overrules the defendant's motion to strike with respect to paragraphs 12 and 23.

The defendant next seeks to strike paragraph 25 because it is allegedly contradictory. Paragraph 25 provides:

> "25. The unpermitted discharge of industrial wastes from the Butler Tunnel into the Susquehanna River has continued from July 29, 1979 to the present and is continuing. Discharges of industrial wastes occurred on at least the following dates..."

Defendant argues that the paragraph is contradictory because it alleges that the discharge of industrial wastes from the Butler Mine Tunnel into the Susquehanna River has continued from July 29, 1979 to the present and is continuing, but then goes on to list specific dates of discharge ending February 4, 1980. DER submits that the paragraph is not contradictory at all. The discharge began on July 29, 1979 and is continuing to discharge. DER asserts that it will offer evidence to prove this at hearing. The dates listed in the paragraph simply identify those days of discharge for which the defendant was found guilty of violating the CSL and rules and regulations promulgated thereunder, by the Luzerne County Court of Pleas jury. As such, the defendant is precluded from challenging the facts supporting those convictions (see discussion pp. 4-7, *supra*). The board overrules defendant's preliminary objection in the nature of a motion to dismiss with respect to paragraph 25.

Defendant next contends that paragraphs 19, 27 and 28 allege ultimate facts and as such usurp the authority of this board and should be stricken. defendant is mistaken in believing that the pleading of ultimate facts are in error. The fact pleading system is designed to compel a concise, orderly state-

ment of the ultimate facts, so that litigation will be expedited, dilatory pleadings eliminated, and the parties will not be forced to depositions in all cases. 2 Goodrich Amram 2d §1019:1. Moreover, the requirement of Pa. R.C.P. 1019(a) that material facts be pleaded requires that all ultimate facts which are essential to the claim be pleaded. 2 Goodrich Amram 2d §1019(a):2. The paragraphs also comply with 25 Pa. Code §21.56(b), which requires DER to set forth the bard's statutory authority to assess such penalties. Therefore this board dismisss defendant's preliminary objection in the nature of a motion to dismiss with respect to paragraphs 19, 28 28.

Defendant next argues that DER's request for a specific amount of penalty for each violation is violative of 25 Pa. Code §21.65(c) and therefore should be dismissed. The board notes there is no such regulation at 25 Pa. Code §21.65(c). Nor could the board identify any regulation that defendant may have been relying on but cited improperly. Clearly, there is nothing in the CSL or the regulations promulgated thereunder that prohibit the department from making a request for a specific amount of penalties. Moreover, such a practice has been followed by DER in numerous civil penalty complaints filed previously with this board. Indeed, this practice has proven very helpful to the board. Wherefore, the board overrules defendant's preliminary objections with respect to the prayers for relief.

Defendant also argues that the civil penalties complaint should be dismissed for failure to join the United States Coast Guard, which he alleges is a necessary party. Neither defendant's preliminary objections nor its brief sets forth any specific reasons why the Coast Guard's interests in the instant matter are such as to make it a necessary party. Since defendant, as the party asserting preliminary objections bears the initial burden in argument, this board summarily rejects defendant's preliminary objection in this regard.

Finally, defendant argues that the instant complaint should be dismissed because DER is preempted by the Federal Water Pollution Control Act, 33 USCA §§1251 *et seq.* (FWPCA). Specifically, defendant argues that Section 1319(b) of the FWPCA imposes a mandatory duty on EPA to commence any appropriate civil action, including a civil penalties action pursuant to Section 1319(d), to obtain relief from any person who has violated the Act as described in Section 1319(a)(1). From this, defendant concludes that DER is preempted from filing this instant action.

DER is clearly not preempted from filing this civil penalties action. Section 605 of the CSL specifically gives DER authority to file a civil penalties action for any violation of the Act or regulation promulgated thereunder. Defendant does not direct this board to any statute or any case which purports to preempt DER in this area. Wherefore, the board overrules defendant's preliminary objection to DER's authority to bring the instant action.

II. Demurrer

Defendant raises two preliminary objections in the nature of a demurrer to Count I of the complaint. Defendant first argues that DER failed to state a cause of action under 25 Pa. Code §97.72 because the complaint alleges that "industrial wastes" were discharged to the borehole rather than "wastes" as used in the regulation. Defendant further argues that "wastes" and "industrial wastes" have two different meanings under the CSL.

Defendant is clearly mistaken. "Wastes" is necessarily included within the definition of "industrial wastes". Section 1 of the CSL defines industrial waste as:

> "Any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, refuse, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations. "Industrial waste" shall include all such substances whether or not generally characterized as waste." (Emphasis added).

"Waste" itself is never separately defined under the CSL. Defendant cites no authority, either statutory or case law, for the proposition that industrial waste and waste have two different meanings under the CSL. This board should therefore dismiss defendant's argument. Moreover, chapter 97 of DER's regulations which contains §97.72 is entitled "Industrial Wastes". Wherefore, the board overrules defendant's first preliminary objection in the nature of a demurrer to Count I.

The second part of the defendant's preliminary objection in the nature of a demurrer to Count I attacks the fact that the complaint only alleges a discharge of untreated or inadequately treated wastes into the borehole but does not allege the date of such discharge. Defendant contends that the latter allegation is required in order to state a cause of action under 25 Pa. Code §97.72.

DER submits and the board finds that the averments contained in paragraphs 13, 14 and 16 are sufficient to state a cause of action under 25 Pa. Code §97.72.[2] Paragraph 13 provides that the untreated or inadequately treated wastes were discharged to the borehole and thereafter flowed into the abandoned mine workings of the Butler Mine Complex (paragraph 14). Paragraph 16 sets forth the dates defendant discharged to the borehole. Further, paragraphs 6 and 7 aver that the borehole, which extends approximately 100 feet below the ground surface, is directly above the abandoned Butler Mine Complex. This is sufficient to state a cause of action under 25 Pa. Code §97.72. Wherefore, the board overrules the second part of defendant's preliminary objection in the nature of a demurrer to Count I.

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2. 25 Pa. Code §97.72 provides:

> "Discharge of inadequately treated wastes, except coal fines, into the underground workings of active or abandoned mines shall be prohibited."

Finally, the defendant raises two preliminary objections in the nature of a demurrer to Count II of the complaint. Defendant first argues that DER has failed to allege that the discharge to the Susquehanna River was not authorized by a permit or regulation of DER, as required by Section 307 of the CSL. Defendant is clearly in error. Paragraph 24 expressly provides:

> "24. The discharge of industrial wastes from the Butler Tunnel into the Susquehanna River is not authorized by permit or rule or regulation of DER."

Wherefore, the board dismisses the first part of defendant's demurrer to Count II.

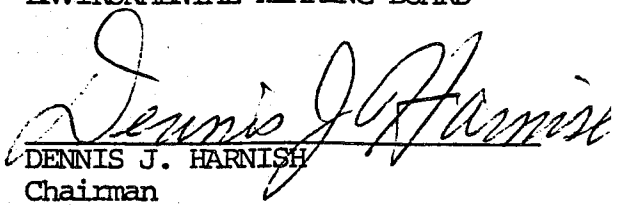
The second part of defendant's demurrer avers that DER has failed to state the dates of discharge to the Susquehanna River or how such discharge occurred. Once again, defendant is in error. Paragraph 25 clearly and expressly sets forth the dates of discharge to the Susquehanna River. Moreover, how said discharge occurred has already been set forth in the complaint and incorporated into Count II by paragraph 20. Such incorporation is consistent with Pa. R.C.P. 1019(a) which requires material facts to be set forth in a concise and summary form. Wherefore, the board overrules the second part of defendant's preliminary objection in the nature of a demurrer to Count II.

O R D E R

AND NOW, this 20th day of April, 1982, upon consideration of defendant's preliminary objections, the Commonwealth's answers thereto and the briefs of each party it is hereby ordered that each and everyone of defendant's preliminary objections is dismissed.

The board shall schedule a hearing upon this matter upon the request of either party.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: April 20, 1982

cc: Bureau of Litigation
Lynn Wright, Esquire
William A. Degillio, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MANOR MINES, INC. :
OLD HOME MANOR, INC.
W.C. LEASURE :

Docket No. 82-005-G
: 82-006-G
82-007-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S MOTION TO AMEND ITS ORDER TO APPELLANTS

On December 23, 1981, DER issued an Order directed mainly to appellant's Old Home Manor and Leasure, but also involving appellant Manor Mines. The three appellants, by the same attorney, on January 7, 1982 filed the three separate appeals which have been docketed as above. Thereafter discovery, and disputes about the scope of discovery, have commenced. On March 5, 1982, while the discovery disputes were pending, DER filed a motion requesting permission to amend its December 23, 1981 Order, citing Rule 1033 of the Pennsylvania Rules of Civil Procedure (hereinafter "R.C.P.") as authority for this request. The appellants have jointly opposed this DER Motion to Amend Order.

The appellants' grounds for opposing the Motion to Amend may be summarized as follows:

1. The Environmental Hearing Board (EHB) lacks the authority to permit amendment of the original Order.

2. Once the original Order has been appealed to the EHB, DER losed authority to amend the Order.

3. Permitting DER to amend the original Order would be tantamount to the Board's having adopted the findings of fact in the proposed Amendment to the original Order.

The contention 3 above is almost frivolous and can be rejected out of hand. As DER argues, permitting DER to amend the Order in no way commits the Board to the findings of fact in the proposed Amendment. The Amendment, if permitted, would be subject to appeal, just as was the original Order. Permitting the Amendment to become part of an Order under appeal no more commits the Board to the findings of fact in the Amendment than the original allowance of appeal committed the Board to the findings of fact in the original Order. In any proceeding, including this one, the Board does not adopt facts--and is not to be presumed as having done so--unless explicit findings of fact are issued by the Board, as in a typical Board adjudication.

The contention 2 above also can be rejected, though not quite out of hand. Appellants base this contention on the argument that the Board, in hearing the instant appeals from the DER December 23, 1981 Order, is acting like an appellate court. Therefore, appellants argue, DER is bound by Rule 1701 of the Pennsylvania Rules of Appellate Procedure (hereinafter "R.A.P."), which begins:

> (a) General rule.
> Except as otherwise prescribed by these rules, after an appeal is taken or a petition for allowance of appeal is filed in a matter or review of a quasijudicial order is sought, the lower court or other governmental unit may no longer proceed further in the matter.

Appellants take R.A.P. 1701(a) to mean DER is barred from amending its original Order, now that the original Order is under appeal to the EHB.

It is highly questionable that DER's actions in the instant appeals are sub-

ject to the R.A.P. As DER notes, the Commonwealth Court has held that in appeals akin to the instant action, "the Board is not an appellant body with a limited scope of review". *Warren Sand and Gravel Company v. Comm., DER*, 20 Pa. Comm. 186, 341 A.2d 556 (1975). But even granting that the R.A.P. pertain, appellants seem to have overlooked R.A.P. 1701(b)(5) which states:

> (b) Authority of lower court or agency after appeal. After an appeal is taken or a petition for allowance of appeal is filed in a matter or review of a quasi-judicial order is sought, the lower court or other governmental unit may:
> (5) Take any action directed or authorized on application by the appellate court.

In the instant appeals, DER is applying to the Board for authorization to amend its Order; if R.A.P. 1701(b)(5) governs, then this Board can give DER such authorization, and the Order can be amended as DER requests.

It follows that appellants' second contention must be rejected. Indeed, it appears that if appellants' argument in this second contention is pursued to its logical end, then appellants' first contention above must be rejected as well, because R.A.P. 1701(b)(5) would give the EHB the authority to permit amendment of the original Order. However, the Board does not believe its authority to permit amendment of the original December 23, 1981 Order should be based on appellants' dubious analogizing of the instant appeals to proceedings before one of Pennsylvania's appellate courts. DER's Motion to Amend assumes, without argument, that this authority resides in R.C.P. 1033, which permits a party, by leave of court, to amend his pleading. On the other hand, appellants' arguments in support of their aforesaid first contention include the claim that R.C.P. 1033 cannot apply because DER's original Order was not a "pleading". Appellants base this claim on the definition in 1 Pa. Code §31.3:

> Pleading---Any application complaint, petition, answer, protest, reply, or other similar document filed in an adjudicatory hearing.

Evidently the term "order" does not appear explicitly in 1 Pa. Code §31.3. Moreover, 1 Pa. Code §35.48, which directly pertains to agency proceedings, permits amendment

of pleadings but also does not mention agency orders. The Board's own rule governing pleadings, 25 Pa. Code §21.64, refers to the pleadings desceibed in the R.A.P., which--notably in R.A.P. 1017--include "complaint" but not "order". Neither "order" not "complaint" is defined in 1 Pa. Code §31.3, but appellants argue with considerable force that an "order" is more than a "complaint".

Nevertheless, appellants' first contention--that the EHB lacks the authority to permit amendment of the original Order--also is rejected. Like the R.C.P. [particularly R.C.P. 126], the Rules of Administrative Practice and Procedure are intended to be "liberally construed to secure just, speedy, and inexpensive determination of the issues presented." [1 Pa. Code §31.2]. Even though an order is more than a complaint, in the procedural context of the instant appeals it is not unreasonable--under the authority of 1 Pa. Code §31.2-- to treat the December 23, 1981 Order like a complaint, to which R.A.P. 1033 or 1 Pa. Code §35.48 would be applicable. Until the Board issues an adjudication in the instant proceedings, the Order appealed from does have much the same status as a complaint in an ordinary civil action, with the Order's findings of fact akin to the complaint's allegations, and with the Order's specific orders to appellants akin to the complaint's prayer for relief. These parallels are not negated by the facts that appellants bear a different burden of proof than the defendant in a civil action, and that the Order may be enforced by DER before the Board renders its adjudication.

For these reasons we would grant the Motion to Amend if we agreed with DER's assertion, made in its Motion, that permitting the amendment will save all parties time and expense. We do not agree with this assertion, however, and therefore do not grant the Motion to Amend, although we explicitly affirm our power to grant it. The proposed Amendment imposes additional duties on appellants, over and beyond those imposed in the original Order. For instance, paragraph 4 of the Amendment states:

> Accordingly, in addition to meeting the requirements of Paragraph 1(H) [of the original Order], Old Home Manor, Inc. and William C. Leasure shall pump

> the water into treatment basins and shall treat the water prior to discharging it to the waters of the Commonwealth, so as to ensure that it meets the effluent criteria set forth in the conditions of Mine Drainage Permit No. 3971BSM2...

Therefore--because the analogy between the instant Order and a pleading cannot be stretched to a point which would violate due process---if the Order is amended as DER requests, then the appellants will have to be given the usual 30-day period to file amendments to their original appeals, contesting (should they so desire) the additional duties newly imposed by the Amendments.

Consequently we do not see why the parties would be saved time and expense if DER amends its original Order rather than--as DER admitted it could--issuing a second order to appellants. Indeed, in view of the wide-ranging discovery appellants have undertaken already, and the disputes which then have ensued, we are inclined to believe permitting the Amendment will lose rather than save time, because progress of the present appeals will have to await completion of possibly also disputed discovery pertinent to the new requirements of the Amended Order. If DER issues a second order, if appellants file new appeals, if these new appeals progress sufficiently rapidly, and if the requirements for consolidation appeal to be fulfilled [25 Pa. Code §21.80], the Board--on its own motion or on the motion of a party--will consider consolidation of these new appeals with the instant appeals.

For completeness we add that the foregoing has not responded to appellants' quite frivolous arguments (1) that permitting the Amendment would be equivalent to promulgation of the Amended Order by the Board, and (2) that the Board does not have the power to issue orders in connection with the enforcement of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act. The argument (1) is illogical on its face; the invalidity of the argument (2) is attested to by even a cursory glance at Orders the Board customarily has issued following its adjudications, e.g., *Toby Creek Watershed Association v. DER*, Docket No. 80-061-H, 1980 EHB 295. The Board's power to issue such orders, which is conveyed by 71 P.S. §510-21 and 2 Pa. C.S. §101, has been affirmed in effect by the *Warren* holding cited *supra*. See also

Commonwealth Borough of Carlisle, 16 Pa. Cmwlth 341, 330 A.2d 293(1974) and *East Pennsboro Township Authority v. DER*, 18 Pa. Cmwlth 58, 334 A.2d 798(1975), wherein the Commonwealth Court upheld EHB modifications of DER orders; such modifications are in substance new orders.

O R D E R

AND NOW, this 12th day of April, 1982, DER's Motion to Amend its December 23, 1981 Order to these appellants is rejected, without prejudice to DER's rights and powers to issue new orders to appellants which may embody the provisions of the rejected proposed Amendment to the December 23, 1981 Order.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED:April 12, 1982

cc: Bureau of Litigation
Diana Stares, Esquire
Dennis W. Strain, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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Harrisburg, Pennsylvania 17101
(717) 787-3483

MANOR MINES, INC.
OLD HOME MANOR, INC.
W.C. LEASURE

Docket No. 82-005-G
82-006-G
82-007-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER SUR
MOTION TO CONSOLIDATE

AND NOW, this 12th day of April, 1982, after due consideration of DER's Motion for Consolidation and Expedited Hearing, and of Appellants' Responses and Joint Brief in opposition to DER's Motion, the Environmental Hearing Board issues the following Order:

1. These three appeals will not be consolidated; they each will retain their separate identities and docket numbers.

2. The hearings on the supersedeas petitions of Old Home Manor and of William C. Leasure, Docket Nos. 82-006-G and 82-007-G, will be consolidated.

3. DER's request for an Expedited Hearing on the merits to be held April 13, 1982 at the time presently scheduled for a hearing in the supersedeas petitions by appellants Old Home Manor and Leasure, is rejected; DER's claim (in its Motion) that by April 15, 1982 the parties will have had adequate opportunity for discovery has proved to be grossly inconsistent with the actual facts.

4. Unless the board rules otherwise at a later date, the full hearings on the merits of the appeals by Old Home Manor and by Leasure also will be consolidated.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: April 12, 1982

cc: Bureau of Litigation
Diana Stares, Esquire
Dennis W. Strain, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

W. C. LEASURE :

:

Docket No. 82-007-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR MOTION TO VACATE ADMINISTRATIVE ORDER OF DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellant is president of Old Home Manor, Inc., a Texas corporation registered to do business in the Commonwealth of Pennsylvania. Old Home Manor is the permittee of a number of mine drainage permits and mining permits issued by DER.

On December 23, 1981, DER issued an Order to William C. Leasure and Old Home Manor, requiring the performance of various measures allegedly necessary to correct conditions existing on the sites of sixteen (16) mining operations; these measures included, e.g., regrading, revegetating and the submission of performance bonds.

The aforementioned Order was captioned, in pertinent part, as follows:

> In the matter of:
> William C. Leasure and
> Old Home Manor, Inc.

The Order was mailed to:

OLD HOME MANOR, INCORPORATED
R.D. #2
HOMER CITY, PA 15748

A single copy of the Order was enclosed in the mailing envelope, addressed as immediately above. The address is the correct business address of Old Home Manor, Inc. Included within the mailing envelope, along with the Order, was a covering letter. This covering letter was addressed to:

Mr. William Leasure, President
Old Home Manor, Incorporated
R.D. #2
Homer City, PA 15748

The Order itself identified Mr. Leasure as the president of Old Home Manor, Inc., and stated that Mr. Leasure is the owner of five of the mining sites forming the subject of the Order. The Order also asserted that Appellant is "a person within the meaning of the Clean Streams Law, 35 P.S. §691.1."

On January 7, 1982, Appellant filed a Notice of Appeal from the Order, accompanied by a petition for supersedeas. The petition (paragraph 8) asserts the order was "received by Leasure on December 24, 1981." On January 18, 1982, Appellant filed a motion to vacate (Appellant's motion actually employs the term "dismiss") DER's Order, insofar as it is directed at Appellant. According to Appellant, the Order should be vacated (insofar as it is directed at Appellant) on either or both of the following grounds:

1. The Order was improperly served on Appellant, in violation of due process requirements.

2. DER does not have jurisdiction over Appellant, and therefore cannot direct an Order to him.

The motion to vacate was accompanied by a petition to Stay the effect of the Order pending a supersedeas hearing. This petition (paragraphs 7 and 9) asserted that although the letter was "received" on December 24, 1981, it was not brought

to Mr. Leasure's attention personally until December 30, 1981.

This opinion deals with the claims 1 and 2 listed above, in support of which Appellant offers various arguments examined herein. We begin with the claim of improper service.

Claim Service Violated Due Process

The averments--that the Order was captioned as stated above, was mailed in single copy to Old Home Manor at R.D. #2 Homer City, and was accompanied by a covering letter addressed as stated above--were made in Appellant's motion to vacate the Order and were not denied in DER's answer to the motion. Therefore we shall take these averments to be true. However, the question remains: Does the truth of these averments constitute improper service of the Order sufficient to warrant vacating the Order insofar as it applies to Appellant? Appellant admits that he had notice of the Order by December 30, 1981. This notice enabled him to consult with his attorney and file an Appeal of the Order on January 7, 1982, well within the 30-day period for filing an appeal under the Board's Rules and Regulations, 25 Pa. Code §21.52(a), even if the 30 days are counted from the December 24, 1981 date when the Order was received at Old Home Manor's Homer City address.

In other words, Appellant's own actions demonstrate that he was given sufficient notice of the existence of the Order and its terms to take whatever legal action was required to prevent DER's Order from becoming final against him. 71 P.S. §510-21(c). This means that the service of the Order on Appellant was consistent with the requirements of due process. See Vince Terrizzi Productions, Inc. v. DER, 1980 EHB 398 and the citations therein, especially Gaudenzia, Inc. v. Zoning Board of Adjustments, et al., 4 Pa. Cmwlth. 355, 287 A.2d 698 (1972). See also Kennedy v. Commonwealth Department of Transportation, 52 Pa. Cmwlth. 619, 416 A.2d 614 (1980), where receiving notice of a hearing by telephone, without

any accompanying written notice, was held not to violate due process. Appellant cites numerous cases in support of his thesis that his due process rights have been violated, including, e.g., Allegheny County Health Department v. Ligons, 16 Pa. Cmwlth. 74, 329 A.2d 878 (1974), Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950), Pennsylvania Coal Mining Association v. Insurance Department, 471 Pa. 437, 370 A.2d 685 (1977), McClelland v. Commonwealth, State Civil Service Commission, 14 Pa. Cmwlth. 339, 322 A.2d 133 (1974). However these citations, insofar as they are germane at all to the instant action, deal with circumstances wherein--unlike Appellant's circumstances--there was no convincing evidence that the manner of service actually succeeded in giving the required notice. Moreover, in Savina Home Industries v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979), which Appellant also cites, the court held that a complaint which featured an incorrect docket number did not violate due process even though it was technically deficient. Reasons for the Savina court's holding included the facts that Savina filed an answer to the complaint, appeared before the Commission's administrative law judge, and contested the alleged violations; these facts do resemble the facts in the instant action.

Appellant's first ground for vacating the Order--that the manner of service violated due process--is rejected therefore. We next examine Appellant's claim that DER does not have jurisdiction over him. This claim of Appellant's is grounded on three alternative sub-claims, namely:

2a. The irregularities in the service of the Order prevented jurisdiction from attaching.

2b. DER cannot exercise personal jurisdiction over Appellant, because Appellant is a domiciliary of Texas, is not the owner of any of the mining sites identified in the Order, and is not the holder of any of the mining permits with thich the Order is concerned.

2c. DER does not have the statutory authority to direct an Order to Leasure merely because he is the the president of Old Home Manor, the permittee of the mining operations with which the Order is concerned.

Claim Irregularities in Service Prevented Jurisdiction From Attaching

Although Appellant argues otherwise, the prescribed form of service of the Order is specified (see infra) by 1 Pa. Code §33.31, which states:

> Orders, notices, and other documents originating with an agency, ...shall be served by the office of the agency by mail, ...by mailing a copy thereof to the person to be served, addressed to the person or persons designated in the initial pleading or submittal at his or its principal office or place of business. When service is not accomplished by mail, it may be effected by any one duly authorized by the agency in the manner provided in 231 Pa. Code §1009 (relating to service of process in actions of assumpsit).

Accepting the aforesaid averments in Appellant's motion to vacate the Order as true, it is clear that the Order was not served on Appellant in strict conformity with 1 Pa. Code §33.31. The mailing envelope was not addressed to Mr. Leasure. Also, although the Order is not a complaint governed by Rule 1009 of the Rules of Civil Procedure, it is reasonable to interpret the 1 Pa. Code §33.31 phrase "a copy thereof to the person to be served" in the same way as the analogous Rule 1009 phrase "a copy to the defendant" has been interpreted. Mamlin v. Tener, et al., 140 Pa. Super. 593, 23 A.2d 90 (1941), cited by Appellant, is authority for the principle that when process is simultaneously served on two defendants, one copy of the complaint must be furnished each defendant. The same ruling has been made more recently, Eaton Corporation v. J & B Produce Consolidators, Inc., 13 D. & C. 3d 491 (1980). On the basis of Mamlin and Eaton,

mailing a single copy of the Order to Old Home Manor--when the Order was intended to apply to the two distinct parties William C. Leasure and Old Home Manor, and was so captioned--was inconsistent with the requirements of 1 Pa. Code §33.31.

Appellant argues that because the rules governing service of process are in derogation of common law and thus must be strictly construed [McCall v. Gates, 354 Pa. 158, 47 A.2d 211 (1946), Neff v. Tribune Printing Company, 421 Pa. 122, 218 A.2d 756 (1966), Sharp v. Valley Forge Medical Center and Heart Hospital, Inc., 422 Pa. 124, 221 A.2d 185 (1966)], the above-described discrepancies between the actual service of the Order and the language of 1 Pa. Code §33.31 preclude DER from gaining jurisdiction over Appellant. We are not convinced by this argument.

In our view, the Pennsylvania cases calling for strict construction of the rules governing service of process predominantly fall into the following two classes:

(1) It is questioned, for instance in an attempt to reopen a default judgment, whether service ever actually was effected.

(2) It is claimed that the party who was served is before the court only because the rules governing service of process were not strictly followed.

For example, in Sharp a default judgment was contested; the court found that the defendant "did not receive actual notice of the institution of the present action until after judgment had been entered against him." McCall involved a non-resident motorist in the days before Pennsylvania had adopted its present and modern long-arm statute, 42 Pa. C.S.A. §§5321-29; the court refused to accept substituted service (sending a copy of the process to the Secretary of

the Commonwealth) or service by registered mail upon the defendant in Michigan, because these manners of service on this defendant were not authorized by the laws then in force. The fact situation in Neff is not altogether clear, but apparently there was some question about which defendants actually were served; the Neff court wrote:

> [I]t cannot be ascertained with any degree of reasonable certainty that the return shows service on one individual other than March and the corporation, or several, or who the other or others were.

In Celane v. Insurance Commissioner, 51 Pa. Cmwlth. 633, 415 A.2d 130 (1980), cited by Appellant, the Insurance Commissioner held an administrative hearing concerning possible imposition of penalties on Celane although Celane did not appear at the hearing and although a certified letter to Celane notifying him of the hearing had been returned unclaimed; the court held that when the Insurance Commissioner was unable to effectuate service by mail he was required (under 1 Pa. Code §33.31 quoted supra) to effectuate service in the manner provided by 231 Pa. Code §1009 (which is Rule 1009 of the Rules of Civil Procedure) before holding the hearing and imposing a penalty on Celane.

The cases discussed in the immediately preceding paragraph illustrate the conclusion to which our examination of Pennsylvania case law has led us: The two classes of cases described above, wherein the calls for strict construction of the rules governing service predominantly are heard, generally make these calls only when failure to do so is likely to violate the due process requirement of proper notice examined earlier in this opinion, or is likely to impose the court's jurisdiction unfairly. Recent cases supporting this conclusion include: Associates Consumer Discount Co. v. Marath,

127 Pitts. Leg. J. 80 (1979), Collins v. Lewis, 5 D & C 3d 517 (1977), and Johnson v. Atlas Van Lines, 274 Pa. Super. 257, 418 A.2d 392 (1980). The cases advanced by Appellant in support of his thesis that his due process rights have been violated, in particular Allegheny County, Mullane, Pennsylvania Coal Mining and McClelland, all discussed and cited supra, also are consistent with our conclusion. Other Pennsylvania cases cited by Appellant, not heretofore discussed in this opinion, are equally consistent. In McLaughlin v. Porter, 2 D & C 3d (1977), the only witness at an evidentiary hearing was the defendant, who testified that "he did not receive notice that the action had been commenced against him, notice of the hearing or notice of the judgment taken against him." In Peterson v. Dickison, 334 F. Supp. 551 (W. D. Pa. 1971), the complaint was personally served on the nonresident defendant in Kentucky although the applicable long-arm statute only authorized substituted service; in this case the court quashed the service of process, but because it believed the long-arm statute would confer in personam jurisdiction--refused to dismiss the complaint (which would be analagous to vacating the Order in the instant action).

Our conclusion has the corollary that when the due process requirements of notice are satisfied, and when imposing the court's jurisdiction would not be unfair, strict construction of the rules governing service of process should not be demanded. This is precisely the point of view which has been espoused persuasively in a recent carefully reasoned opinion. First National Bank and Trust Company v. Anderson, 7 D & C 3d 627 (1977). In First National, the defendant was served at her mother's address in Conneaut, Ohio, under the procedure authorized by Pa. R. C. P. 2079 for nonresident defendants, although the

defendant actually was a resident who did not conceal her whereabouts and who should have been served in conformity with Rule 1009. The First National court noted that the service actually had reached the defendant despite having been mailed to the incorrect address, and pointed out that because the defendant was a Pennsylvania resident there was no injustice in permitting a Pennsylvania court to exercise jurisdiction over her; therefore, the court--saying that "defendant's substantial rights are not impaired or affected"--upheld the service on the authority of Pa. R. C. P. Rules 126 and 130. Rule 126 states:

> The rules 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 such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Rule 130 states:

> The principle that laws in derogation of the common law are to be strictly construed shall have no application to the rules promulgated by the Supreme Court.

The First National court also pointed out that the maxim of strict construction for laws in derogation of the common law has been abolished not only for the Supreme Court rules but also for statutes enacted since September 1, 1937. 1 Pa. C. S. A. §1928, formerly 46 P. S. §558. The pertinence of the First National holding to the instant Appeal is supported by 1 Pa. Code §31.2, of the General Rules of Administrative Practice and Procedure, which reads:

> The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented.

Evidently 1 Pa. Code §31.2 is the analogue--in the Rules of Administrative Practice and Procedure--of Pa. R. C. P. Rule 126.

The First National court's opinion, as well as our own conclusion about the implications of the case law on the construction of the rules governing service, are bolstered by the analysis [in 6 Goodrich-Amram 2d 354, commentary on R. C. P. 2077(a)] of the holdings governing service of process on non-residents:

> In construing the statutes providing for service of process on nonresidents, conflicting principles of construction are met with. On the one hand, the statutes authorize substituted service in derogation of common law, and should therefore be strictly construed. On the other hand, the statutes are remedial and are to be liberally construed to achieve their purpose. In general, the courts of this state and of other states have applied the rule of strict construction to such statutes when the question to be decided was whether the defendant was a nonresident within the meaning of the statutes or had done the acts which, under the statutes, subjected him to the local jurisdiction. Once having decided that the defendant was within the statute, the rule of liberal construction has been applied in order to minimize the effect of minor irregularities in the details of service upon a statutory agent or of notice to the defendant. This is a proper approach to the problem but it has not always been followed and some courts have applied the rule of strict construction to the point of invalidating the service because of a minor irregularity in the notice to the defendant.

A footnote to the last sentence in the above quote cites Bozurich v. Bollinger, 85 Pitts. Leg. J. 795 (1936), a case also cited by Appellant; in Bozurich the court set aside the service on the very technical grounds that the sheriff's return did not specifically state that the writ had the required endorsement by the secretary of revenue. Bozurich does support Appellant's argument, but it is a very old case and--as the quotation from Goodrich-Amram suggests and the foregoing discussion has indicated--is a doubtful guidepost to the main thrust of the modern case law. Moreover, Bozurich was not wholly representative of

the case law even in its own time. In Wax v. Van Marter, 24 Pa. Super. 573, 189 A. 537 (1937), the Superior Court declined to set aside service and strike a default judgment against a nonresident motorist, even though the letter containing the summons, sent to the defendant's last known address, was returned unopened and marked "refused"; the Superior Court explained:

> We are of the opinion that the facts established that the defendant had reasonable notice of the action instituted against him and that he had an opportunity given him to defend it.

Therefore we rule that the aforementioned discrepancies between the actual service of the Order and the language of 1 Pa. Code §33.31 did not preclude DER from gaining otherwise lawful jurisdiction over Appellant.

Claim DER Does Not Have Lawful Jurisdiction Over Appellant

We now return to subclaims 2b-2c, listed supra, which as a body amount to the claim that DER does not have lawful jurisdiction over Appellant and therefore cannot direct an Order to him. Ultimately the burden of demonstrating that there is jurisdiction over Appellant rests on DER. Beary v. Norton-Simon, Inc. et al., 479 F. Supp. 812 (W. D. Pa., 1979). In the present posture of this Appeal, however, Appellant has moved that DER's Order against him be vacated without a hearing; a supersedeas hearing is scheduled for the very near future, but has not yet been held. Under these circumstances, the Board's ruling on the issue of DER's jurisdiction over Appellant must be made on the assumption that DER's factual allegations in its Order to Appellant are true. DER alleges that Appellant is president of Old Home Manor, a corporation doing business in the Commonwealth and maintaining an office in the Commonwealth. DER further alleges that the Appellant, on numerous occasions, has personally represented the corporation in negotiations with DER, and that Appellant is the owner of

five of the mining sites which are being or had been mined by Old Home Manor. The Order also alleges that Leasure as an individual has committed violations of various Pennsylvania statutes and regulations. Taken together, these allegations suffice to satisfy the minimum contacts constitutionally required for exercise of personal jurisdiction over Appellant, under several sections of Pennsylvania's long-arm statute 42 Pa. C.S.A. §5322. We recognize that 42 Pa. C.S.A. §5322 pertains to the jurisdiction of Commonwealth tribunals, rather than Commonwealth agencies such as DER. However, we believe that the standard which limits exercise of personal jurisdiction by a Commonwealth tribunal--namely that traditional notions of fair play and substantial justice not be offended by requiring defense of an action in a Pennsylvania forum [see, e.g., Furnival Machinery Co. v. Joseph T. Bartz Associates, Inc., 470 F. Supp. 735 (1979), Koenig v. International Brotherhood of Boilermakers, et al., 284 Pa. Super. 558, 426 A.2d 635 (1980)] --also must be the standard which limits DER's power to require Mr. Leasure to appear before this Board if he wishes to challenge legitimacy of the instant Order.

Consequently, Appellant's request that we vacate the Order (insofar as it is directed against Appellant) on grounds of lack of jurisdiction over the person is rejected at this time. It is stressed that this ruling is based on the assumption that DER's factual allegations relative to jurisdiction are true. As this Appeal develops, this assumption may prove to be false, in whole or in part; some of DER's factual allegations relative to jurisdiction have been challenged by Appellant, e.g., in an Affidavit in support of his Motion to vacate the Order. Thus our present ruling that there is in personam jurisdiction over Appellant must be regarded as provisional, not yet law of

the case. Appellant's challenge to DER's personal jurisdiction over him, raised at his very first opportunity when he filed his Appeal with this Board, is analogous to the raising of preliminary objections to jurisdiction over the person in conventional judicial proceedings. Rule 1028(c) of the Rules of Civil Procedure authorizes the court to "take evidence by depositions or otherwise" when the preliminary objections raise factual issues. We shall not specifically order depositions on the issue of jurisdiction in the instant action, but we do expect the parties to present evidence on this issue, and will not make our ruling on the issue of personal jurisdiction final until the relevant factual issues can be resolved. In this connection we note that merely acting as president of a foreign corporation doing business in Pennsylvania, without additional personal involvement, may not be sufficient contact to confer jurisdiction over the person. Testa v. Janssen, 482 F. Supp. 1195 (W. D. Pa. 1980).

The immediately foregoing analysis disposes of Appellant's subclaim 2b. His subclaim 2c, that DER does not have the statutory authority to direct an Order to him, is analogous to a preliminary objection that--insofar as the Order to Appellant is concerned--DER lacks jurisdiction over the subject matter. Originally, DER (in its December 23, 1981 Order) appeared to claim that, under the authority of the Clean Streams Law (CSL) 35 P.S. §691.1 and the Surface Mining Conservation and Reclamation Act (SMCRA) 52 P.S. §1396.3 , Appellant was a "person" to whom DER could issue an order. These sections of the CSL and the SMCRA each embody the same definition of a person, namely:

> "Person" shall be construed to include any natural person, partnership, association or any agency, instrumentality or entity of Federal or State government. Whenever used

> in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term "person" shall not exclude the members of an association and the directors, officers or agents of a corporation.

Appellant argues that the last sentence in this definition implies that an officer of a corporation is not a "person" for purposes of an action under authority of the CSL or SMCRA unless a penalty is involved. Therefore, Appellant further argues, the last sentence in the above definition precludes DER from issuing the Order in question against Appellant, because said Order imposes no penalty, i.e., is purely remedial. DER counters that this argument of Appellant's violates the precepts of statutory construction; according to DER there is no reason to suppose the last sentence in the foregoing definition of "person" in any way limits the first sentence.

Although we are inclined to prefer DER's construction (of the definition) to Appellant's, there is no need for us to construe 35 P.S. §691.1 or 52 P.S. §1396.3 at this time, because, as DER correctly has pointed out, the sections of the CSL and SMCRA which authorize DER to issue orders, e.g., 35 P.S. §691.610 or 52 P.S. §1396.4c, do not limit the issuance of orders to "persons". In other words, the foregoing definition of "person" has no relevance to DER's power to issue the Order against Appellant. Furthermore, as pointed out supra in our discussion of Appellant's subclaim 2b, the Order does allege that Leasure as an individual (not merely as president of OHM) has violated the CSL and the SMCRA; even if the foregoing definition of "person" were relevant to sections 35 P.S. §691.610 or 52 P.S. §1396.4c, Appellant's argument would not invalidate issuance of the Order against Appellant unless the Order had been directed against Appellant solely on the basis of his status as president of

OHM. For these reasons we refuse to vacate the Order on the grounds 2c urged by Appellant, namely that DER lacks the power to issue the Order against Appellant.

On the other hand, we do not believe that DER's allegations in its Order, which allegations we again take to be true at this stage of the instant proceedings, incontrovertibly have established DER's power to issue the instant Order against Appellant. Aside from the allegation that Mr. Leasure is a landowner of some of the properties which are the subject of the Order, an allegation Mr. Leasure disputes, DER's main basis for issuing the Order against Appellant appears to be Appellant's failure to take actions required by OHM's permits and by applicable Rules and Regulations. For example, the Order's first illustration of Mr. Leasure's alleged violation of the CSL and SMCRA reads as follows:

> 1. On the mining site covered by Mine Drainage Permit No. 3971BSM2 and Mining Permit No. 615-1(A5) Old Home Manor and Leasure have failed to adequately revegetate the site.

The author of this Opinion also has failed to adequately revegetate the site; he cannot believe this fact, of itself, makes him subject to an Order from DER requiring performance of remedial measures at the site. It is concluded, therefore, that--to establish jurisdiction to direct the instant Order to Appellant--DER must establish Mr. Leasure's explicit or implicit duty to adequately revegetate the site, and to take the other remedial measures called for in the Order, or at the very least to cooperate personally in those remedial measures. It is possible, probable even, that such a duty would not have to be established in emergencies justifying DER's calling upon all available persons, including Mr. Leasure, who could help carry out the Order;

however, there is no indication of such an emergency in the circumstances of the instant Appeal.

DER appears to believe that the aforesaid duty of Mr. Leasure's is established by the mere fact that he is an officer of OHM; in essence, DER is arguing that if OHM has violated the CSL or SMCRA, then Mr. Leasure as president of OHM must have been derelict in his duties. Consequently (DER appears to be further arguing), if OHM indeed has violated the CSL or SMCRA, then Mr. Leasure can be ordered to expend his personal assets--should the assets of OHM not suffice--to carry out the terms of the Order correcting these violations. In support of this argument, DER has cited a number of cases illustrating the thesis that "a corporate officer is personally liable for actions which he performed on behalf of the corporation." However DER has not pointed to any actions warranting liability performed by Mr. Leasure on behalf of the corporation; DER merely has pointed to acts by OHM which allegedly have not occurred, and is trying to infer that these alleged nonoccurring acts by OHM necessarily imply the existence of liability-deserving actions by Mr. Leasure. The cases cited by DER simply do not justify so sweeping an inference.

Specifically, in United States ex rel. Marcus v. Hess, 41 F. Supp. 197 (W. D. Pa. 1941), reversed on other grounds, 127 F. 2d 233 (3d Cir. 1942), reversed 63 S. Ct. 379, 317 U.S. 537 (1943), the corporate officers were liable for making false claims against the government. In Amabile v. Auto Kleen Car Wash, 249 Pa. Super. 240, 376 A.2d 247 (1977), the defendant was held liable for his personal negligent design (of a car wash) which contributed to plaintiff's injury. In City of Philadelphia v. Penn Plastering Corporation, 434 Pa. 122, 253 A.2d 247 (1969), the president of the corporation allegedly knowingly had failed to pay over to the City of Philadelphia wage taxes the

corporation had withheld; the court stressed that under these facts the corporate officer was in effect a trustee of the withheld taxes, with an established duty to turn them over to the city. In McDonald v. First National Bank of McKeesport, Mr. McDonald was held personally liable for misappropriation of funds by a corporation of which he was the president, treasurer and general manager and the only person who could sign checks. In Chester-Cambridge Bank and Trust Company v. Rhodes, 346 Pa. 427, 31 A.2d 128 (1943), the Supreme Court of Pennsylvania refused to hold corporate officers responsible for a "technical breach of trust committed by the corporation," stating:

> It is true that a director or officer of a corporation may have personal liability for damages suffered by third persons when he knowingly participates in a wrongful act. But where, as in this case, directors or officers are charged with nonfeasance, no individual liability attaches. This has always been the rule in this jurisdiction. (cites omitted)

This Chester-Cambridge holding recently has been cited approvingly by the Superior Court. Hager v. Etting, 268 Pa. Super. 416, 408 A.2d 856 (1979). In Metzger v. American Food Management, Inc., also cited by Appellant, the corporate officers were found to be "responsible for selling commercial notes of a company they knew to be insolvent."; the defendants also were found to have "condoned and participated in a scheme to defraud." In fact, of all the cases cited by Appellant only United States v. Park, 421 U.S. 658, 95 S. Ct. 1903 (1975), appears to support the thesis that inaction alone, without some positive participation, can cause a corporate officer to become liable for a corporation's wrongful acts. In Park, a president of a retail food corporation was found criminally liable for not having prevented shipments of rodent-contaminated foods; the liability was imposed under the Federal Food, Drug and

Cosmetic Act, however, and the Court obviously felt the corporation president's duty to prevent contaminated shipments could be found in the public's special interest in the purity of its food.

For the preceding reasons, we shall deal with Appellant's subclaim 2c much as we dealt with his subclaim 2b. At this time we will not vacate the Order (insofar as it is directed against Appellant) on the urged grounds that DER does not have the power to so direct it, but this ruling is to be regarded as provisional, not yet law of the case. To avoid ultimately having the Order against Appellant vacated, DER must show that Mr. Leasure--either by virtue of his own acts or by virtue of public policy for a corporate officer whose corporation has violated the CSL and/or the SMCRA--has acquired an explicit or implicit duty to take the remedial measures called for in the Order, or at the very least to cooperate personally in carrying them out. We add that the analysis in the three immediately preceding paragraphs suggests that in the instant appeal DER's ability to demonstrate the minimum contacts constitutionally required for exercise of personal jurisdiction over Appellant will imply DER's ability to justify what we have termed jurisdiction over the subject matter, and vice versa. There is no reason for us to pursue this suggestion, however. It suffices to reiterate that DER will have to show that it is empowered to direct the Order against Appellant, and that there is no violation of due process in requiring Appellant to undertake the instant Appeal if he believes the Order is illegitimate.

We conclude this discussion of DER's jurisdiction to issue the Order against Appellant with the remark that for at least some landowners the aforementioned requisite duty to undertake remedial measures is explicitly established as a matter of public policy under the CSL, 35 P.S. § 691.316. Moreover,

under the authority of Ryan v. DER, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1977), remedial orders may be directed against former landowners. Of course, DER's powers to direct the particular terms of the instant remedial Order against Appellant--not as a corporate officer but as a landowner or former landowner, assuming DER's allegations that Appellant is or was the owner of some of the mining sites stand up--will have to be weighed in the light of applicable decisions. See, e.g., Ryan supra and Philadelphia Chewing Gum Corporation v. DER, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), order of Commonwealth Court affirmed 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 101 S. Ct. 47 (1980).

Claim There Are No Rules Governing DER's Service of the Order

Finally we shall deal brusquely with a contention to which Appellant's memorandum of law in support of his motion devotes fourteen pages, but which nevertheless is essentially meritless. Appellant argues that 1 Pa. Code §33.31, quoted supra, does not prescribe the form of service of the Order, because DER's rules and regulations include 25 Pa. Code §1.5, which states:

> Except as otherwise provided in this title or as adopted by any departmental Board or Commission, the following provisions of General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.1-32.251, shall not apply to proceedings before the Department: ...(3) 1 Pa. Code §33.31 (relating to service by the agency).

However, 1 Pa. Code §31.3, whose application is not excluded by 25 Pa. Code §1.5, defines:

> Matter or proceeding--The elucidation of the relevant facts and applicable law, consideration thereof, and action thereof by the agency with respect to a particular subject within the jurisdiction of the agency, initiated by a filing or submittal or an agency notice or order.

It is the plain reading of 1 Pa. Code §31.3 that a "proceeding" is more than an "agency order"; a proceeding is "an elucidation of the relevant facts and applicable law.. initiated by...an agency order." Evidently, therefore, 25 Pa. Code §1.5 pertains not to the applicability of 1 Pa. Code §33.31 to service of the Order, but rather to the applicability of 1 Pa. Code §33.31 to the service of documents in the instant Appeal, which is the proceeding intended to "elucidate the relevant facts and applicable law" which was initiated by DER's Order. 25 Pa. Code §1.5 is intended to permit this Board to have its own specially tailored rules for the service of documents in appeals the Board considers. These rules of service in proceedings before the Board are embodied in 25 Pa. §§21.31-32, and--as it happens--are quite consistent with 1 Pa. Code §33.31. The rule for service of an order by DER is unaffected by 25 Pa. Code §1.5 and remains 1 Pa. Code §33.31.

O R D E R

AND NOW, this 12th day of April, 1982, it is hereby ordered that:

1. Appellant's motion to vacate DER's Order of December 23, 1981, insofar as said Order was directed to Appellant individually, is rejected at this time.

2. The aforesaid motion may be granted at a later date, should DER (during the course of the litigation on this Appeal) fail to make the

showings, consistent with this Opinion, that there is jurisdiction over Appellant's person, and that DER is empowered to direct its December 23, 1981 Order against him.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Diana Stares, Esquire
Dennis Strain, Esquire
Robert J. Shostak, Esquire

DATED: April 12, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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GEORGE WISNIEWSKI and
SHIRLEY WISNIEWSKI

Docket No. 82-045-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

On January 16, 1982, notice that a permit for operation of a demolition waste landfill had been granted to Walter Kuhl was published in the Pennsylvania Bulletin, p. 353. George and Shirley Wisniewski, the appellants in this matter, have appealed this permit grant; their Notice of Appeal was filed with this Board on February 16, 1982. On April 16, 1982, DER filed a notice to dismiss the appeal, or in the alternative to limit the issues therein.

DER asks that the appeal be dismissed as untimely filed. The Board's Rules and Regulations, 25 Pa. Code §21.52(a), state that jurisdiction of the Board shall not attach to an appeal unless the appeal by a third party (as in this instance) is filed within 30 days after notice of the action

appealed from has been published in the Pennsylvania Bulletin. February 16 is 31 days after January 16. However, as the appellants point out in their answer to DER's motion, February 15, 1982 was a legal holiday, Washington's birthday. The Board's rules for counting time are governed by 1 Pa. Code §31.12, which states that a time period which ends on a legal holiday is extended to the next day. Therefore, the appeal was timely filed and DER's motion to dismiss the appeal is rejected.

In the alternative DER also asks, in the alternative, that the appeal be limited to the grounds stated in paragraph 3(a) of the Notice of Appeal. This paragraph reads:

> (a) Walter Kuhl does not have access to the land upon which landfill is to be operated. Claimed access route does not correspond with deed descriptions for a period of over twenty years.

Appellants have answered that DER has refused to make necessary documents available to them, and that they must conduct discovery "in order to determine which issue they will pursue on appeal." In this connection Appellants refer to their Interrogatory No. 2 directed to DER. This Interrogatory, and DER's answer thereto, read as follows:

> If you will do so without a Motion to Produce, please attach a copy of all reports, letters, maps, memos, documents, and all other material from all sources in the department's file pertaining to Walter Kuhl's application and permit.
>
> The Department refuses to produce the documents without first receiving a Request for Production of Documents pursuant to Pa. R.C.P. 4009 with more specificity than as set forth in Interrogatory No. 2.

A request for production of documents was duly filed by Appellants on April 19,

1982, to which DER has not yet responded. In its motion, DER argues that

> The claimed reason for requiring discovery to determine other issues for the appeal is without foundation.

In their arguments concerning this motion to limit the grounds of the appeal, neither appellants nor DER make reference to paragraph 3(b) of the Notice of Appeal, which under the reasons for appeal states:

> (b) Other reasons to be specified after discovery procedures.

In the Board's judgment, this paragraph has reserved possible reasons for appeal beyond the specific reason given in paragraph 3(a) quoted above. Therefore, on this basis alone, as well as for reasons detailed below, DER's motion to limit the appeal to the grounds stated in paragraph 3(a) of the Notice of Appeal must be rejected too at this time.

On the other hand, for reasons also detailed below, the appellants will be required to file a supplement to their notice of appeal, in the nature of a more specific pleading, articulating their objections to DER's grant of a permit to Walter Kuhl in sufficient detail for DER and Mr. Kuhl to ascertain the nature of appellants' objections and to prepare rebuttals to these objections. The Board makes this ruling under its general prehearing authority, Rule 21.82(c), on the considerations: (i) that an appeal falls within the definition of a pleading in 1 Pa. Code 31.3; (ii) that the appeal in the instant proceedings is analogous to a civil complaint against DER; (iii) that Pennsylvania Civil Procedure Rule 1017(b)(3) taken together with the Board's Rule 21.64(a) provides justification for requiring a party complainant to file a more specific pleading; and (iv) that a more specific complaint normally will be required in a civil

proceeding if the averments of the complaint are insufficient to enable the defendant to prepare his defense [see 2 Goodrich Amram 2d 1017(b):9, page 66].

In so ruling, this Board remains mindful of its Rule 21.51(e), which reads:

> ...Any objections not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

Rule 21.51(e), adopted June 12, 1979, effective August 1, 1979 is a revision of the Board's former Rule 21.21(c), which stated simply: "Any objection not raised by the Appeal shall be deemed waived." Therefore our rulings based on the former Rule--such as Wrightstown Township v. DER, 1977 EHB 312, wherein testimony on an issue not raised in the original appeal was held inadmissible--are a doubtful guide to the motion to limit the issues in the instant appeal. Moreover, the former seemingly strict Rule 21.21(c) was construed by us as not mandatory but only "very strong directory" [Wrightstown, supra, footnote 13].

Evidently it is the intent of the new Rule 21.51(e) that the Board now shall have even greater discretion than heretofore to hear objections which had not been raised in the original appeal. Nevertheless, we do not believe the language of Rule 21.51(e) requires us to accept an appeal which unabashedly postpones stating many or all of its objectives to the appealed--from DER action until a broad ranging discovery has been completed. We recognize that when the appeal is filed an appellant may not be able to give a precise formulation of his objections to the DER action. The new Rule 21.51(e)

permits an appellant, on good cause shown, to refine and correct his original imprecise objections, and even to raise new objections; moreover, good cause includes information obtainable only through discovery of the basis for DER's appealed-from action.

Under the Board's Rule 21.111, however, discovery by a party is governed by Pennsylvania Civil Procedure Rule 4003.1, which states that discoverable information must be "relevant to the subject matter involved in the pending action." Indeed, unless an appeal states its objections to DER's action sufficiently specifically to circumscribe what information is relevant, DER cannot be expected to prepare rebuttals to these objections. Appellants' Notice of Appeal paragraph 3(b)--"other reasons to be specified after discovery procedures"--makes it impossible for DER to decide what information lies within the scope of discovery, and makes it correspondingly impossible for DER to properly prepare its case. An appeal must be more than a fishing expedition. To permit appeals to run their full course on the basis of objections like appellants' paragraph 3(b) would encourage the filing of frivolous appeals, expensive and time-wasteful for DER and this Board. We are disinclined to furnish such encouragement.

* * * * * *

O R D E R

AND NOW, this 10th day of May, 1982, it is hereby ordered:

1. DER's Motion to Dismiss Appeal is rejected.

2. DER's alternative Motion to Limit the Issues in this appeal is rejected at this time.

3. Within 10 days of the date of this Order, appellants shall file with this Board, with copies to DER and the permittee, a supplement to their notice of appeal, stating--in the format prescribed by our Rule 21.51(e)--the specific objections they have to the action of DER other than the objection previously stated in paragraph 3(a) of their Notice of Appeal filed February 16, 1982.

4. DER's right to resubmit its Motion to Limit the Issues in this appeal, in the light of appellants' rephrased objections to DER's action and the way the appeal evolves, is reserved.

EDWARD GERJUOY
Member

DATED: May 10, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

SAMUEL HOSTETLER :

:

: Docket No. 82-024-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR -

MOTION TO QUASH APPEAL

On November 20, 1981, DER notified Appellant that it was forfeiting Appellant's collateral bond of $5,000 posted in connection with Special Reclamation Project No. 607, for failure to properly reclaim the area. The notification was sent by certified mail, and--according to the return receipt sent back to DER--was received by Appellant on November 23, 1981.

On December 22, 1981 a written Notice of Appeal by Appellant from the bond forfeiture was received by DER's Bureau of Litigation. Appellant did not send a copy of the Notice of Appeal to this Board, nor did he in any way inform this Board that he was appealing the aforesaid bond forfeiture. On January 27, 1982, however, this Board received a copy of the Notice of

Appeal, sent by Richard S. Ehmann, an attorney for the Commonwealth who regularly is employed in the Bureau of Litigation Pittsburgh office. The received Notice of Appeal was accompanied by a letter of transmittal from Mr. Ehmann, dated January 22, 1982, explaining that:

> Mr. Hostetler sent a copy of this document [the Notice of Appeal] to the Department but apparently failed to send one to your Board as required.

The Notice of Appeal duly was docketed by the Board on January 27, 1982, and the usual pre-hearing order--informing him that he must file a pre-hearing memorandum with this Board on or before April 20, 1982--was sent to Mr. Hostetler on February 3, 1982. DER responded, on February 10, 1982, with a Motion to Quash the Appeal (filed with this Board on February 16, 1982). DER claimed that the appeal had been untimely filed with this Board; these grounds for a motion to quash the appeal had been specifically reserved by Mr. Ehmann in his January 22, 1982 letter transmitting Appellant's Notice of Appeal. A copy of the Motion was sent to Appellant by regular mail.

On March 17, 1982, because no response to this Motion to Quash the Appeal had been received from Mr. Hostetler, this Board wrote Mr. Hostetler as follows:

> The Board has received a Motion to Quash Appeal filed by the Commonwealth...This is to advise you that you must file an answer, if you desire to do so, on or before March 29, 1982.

Nevertheless, as of this date, no answer to the Motion has been filed by Appellant, nor has Appellant filed his pre-hearing memorandum due April 20, 1982. In the meantime, on April 13, 1982, Mr. Ehmann has urged this Board to act on his unopposed Motion, in a letter to the Board which was copied to Mr. Hostetler. We agree with Mr. Ehmann that further delay in acting on his Motion would be

inappropriate. Therefore we have reviewed this matter, and have decided to grant the Motion to Quash, although we do so reluctantly, for reasons explained below.

Rule 21.52(a), 25 Pa. Code 21.52(a), of this Board's Rules and Regulations for the filing of appeals states:

> (a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action...

As the Rule itself states, and as our courts and this Board have held, the requirements of Rule 21.52(a) are jurisdictional, and must be strictly construed. Joseph Rostosky Coal Campany v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), Lebanon County Sewage Council v. DER, 34 Pa. Cmwlth 244, 382 A.2d 1310 (1978), Thomas E. Siegel v. DER, 1980 EHB 334. There is no doubt that Mr. Hostetler failed to comply with the letter of Rule 21.52(a). The Notice of Appeal was in writing, but was not received by the Board until January 27, 1982, which was 65 days after Mr. Hostetler had received notice (on November 23, 1981) DER was forfeiting the bond. It is true that the Notice of Appeal did reach DER's Bureau of Litigation within the requisite 30-day period (December 22, when the Bureau of Litigation received the Notice of Appeal, was 29 days after November 23, 1981). In the past, however, the Commonwealth Court and this Board have held that filing an appeal with DER within the statutory period did not remedy the jurisdictional defect of failure to file with the Board within the required 30 days. Rostosky, supra,

Bellefonte Borough v. DER, 1977 EHB 250.

In the light of the preceding paragraph and the fact that Mr. Hostetler has neither answered the Motion nor filed his pre-hearing memorandum, we feel we have no recourse but to quash this appeal. We are mindful of the following additional facts, however:

1. This Board is a part of DER for budgetary and other administrative purposes.

2. Filings of Appeals with DER rather than with this Board have occurred in the past (vide Rostosky and Bellefonte, supra).

3. Because the Bureau of Litigation office in Harrisburg is only a few blocks from this Board's office, the failure to comply with Rule 21.52(a) might have been avoided--even for a filing with DER as late as the 29th day--had DER's Bureau of Litigation promptly checked with this Board to ascertain whether we had received Mr. Hostetler's Notice of Appeal.

4. Rule 751 of the Rules of Appellate Procedure, and 42 Pa. C.S. 5103(a) give statutory authority to the modern view that a party who files an otherwise timely appeal in the wrong tribunal should not for that reason alone be barred from presenting his case.

5. This modern view has received support in recent court decisions. Kim v. Heinzenroether's Estate, 37 Pa. Cmwlth. 328 (1978), 390 A.2d 874 (1978), Commonwealth v. Carter, 36 Pa. Cmwlth. 574, 389 A.2d 241 (1978).

Because of these facts, the precedential value of past rulings such as Rostosky and Bellefonte, supra, may bear re-examination, especially under circumstances wherein--unlike the instant action--the appellant manifests a sincere intention to prosecute his appeal.

O R D E R

AND NOW, this 22nd day of April, 1982, the Commonwealth's Motion to Quash the appeal is granted, and the appeal of Samuel Hostetler, at EHB Docket No. 82-024-G, is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 22, 1982

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Mr. Samuel Hostetler

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

AL HAMILTON CONTRACTING COMPANY : Docket No. 82-046-H
and FREDA L. LUDWIG, Intervenor :
v. :
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION TO INTERVENE

The above-captioned matter arises from DER's denial of Al Hamilton's mind drainage application 17800158 covering a site located in Lawrence Township, Clearfield County.

On March 26, 1982 the board received from Freda L. Ludwig a petition to intervene in the above-captioned matter. This petition alleged that Freda L. Ludwig is the owner of two parcels of real estate located in Lawrence Township, Clearfield County comprising part of the site covered by the Al Hamilton application. Petitioner further avers that she has an economic interest in the instant matter in that if a mine drainage permit covering the said Lawrence Township site is not issued to Al Hamilton, petitioner will cease receiving income from Al Hamilton (presumably pursuant to a coal lease). DER has answered and opposes the instant petition.

In line with this board's policy liberally to grant intervention to parties having substantial, immediate and direct interests in the outcome of matters before this board we shall grant the instant petition notwithstanding DER's objections but we agree with DER that petitioner's participation should be limited to the presentation of evidence supporting the averments set forth in paragraph 3 of the petition.

O R D E R

AND NOW, this 25th day of May, 1982, petitioner's petition to intervene is conditionally granted. Petitioner may present relevant, material and competent evidence which is otherwise legally admissable directed to the matters set forth in paragraph 3 of the petition.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Stanley R. Geary, Esquire
William C. Kriner, Esquire
Freda L. Ludwig

DATED: May 25, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROGER E. GERHART AND GERHART ROAD MATERIALS, INC. : Docket No. 82-093-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION TO DISMISS

On or about February 23, 1982 DER issued an administrative order to Roger E. Gerhart and Gerhart Road Materials, Inc. (hereinafter collectively, Gerhart). Gerhart received said administrative order on February 25, 1982 as evidenced by return receipt card no. 484959.

Gerhart filed the instant appeal from said order on March 31, 1982, which is more than thirty days from the date it received said order. In fact, the appeal was filed only two days later than the last day for appeal pursuant to our rules (25 Pa. Code §21.51) which was March 29, 1982.

On or about April 7, 1982, DER filed a motion to dismiss Gerhart's appeal on the basis of Gerhart's failure to comply with 25 Pa. Code §21.52(a).

Pursuant to an agreement between counsel Gerhart was to have filed an answer to DER's motion on or before April 19, 1982. However, as of the date of this order the board has received neither an answer from Gerhart or a request for a continuance of time within which to file such an answer.

The board does not look with favor upon motions to dismiss based upon untimeliness especially where the appeal was filed only two days late; we feel that it is our duty to hear appeals rather than to dismiss them. Nevertheless, the law on this subject as handed down by Commonwealth Court is clear. According to *inter alia, Rostosky v. Commonwealth, DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976) we simply have no jurisdiction over tardy appeals absent a showing which would support an appeal *nunc pro tunc* and therefore we are unable to exercise discretion in the Gerhart's behalf.

ORDER

AND NOW, this 27th day of May, 1982, the appeal filed at the instant caption is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Michele Straube, Esquire
Kent D. Mikus, Esquire

DATED: May 27, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

APOLLO CORPORATION :

:

: Docket No. 81-130-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
NOTICE OF STAY PENDING BANKRUPTCY REORGANIZATION

On January 19, 1982, the Board held a hearing on the above-captioned matter, which involves Apollo's appeal from a DER Order forfeiting an $11,500 surety bond posted by Apollo. On or about April 7, 1982, the hearing examiner decided the forfeiture should be affirmed, and commenced preparing an adjudication explaining the bases of this affirmation. On April 16, 1982, when this adjudication largely had been completed, the Board received a letter from counsel for the Debtor-In-Possession, advising the Board that on March 25, 1982, the Apollo Corporation had filed a Voluntary Petition for Reorganization under Chapter 11 of United States Code Title 11, in the United States Bankruptcy Court for the Western District of Pennsylvania at Docket No. 82-1030. This letter further advised the Board that a Notice of Stay in Proceedings had been filed

with the Bankruptcy Court enjoining the Appellee (DER) from various acts, including continuation of legal proceedings or attempts to recover prior claims against Apollo.

By April 26, 1982, the Board had completed the aforesaid adjudication. In the meantime, on May 3, 1982, this Board received DER's Answer to the Notice of Stay in Proceedings. DER argued that it was not bound by the stay, and asked this Board to issue an Order stating that the instant proceedings are not stayed. The Board is convinced by DER's arguments, which cite holdings by the Commonwealth Court and this Board itself, as well as by the United States District Court for Western Pennsylvania. Commonwealth v. Peggs Run Coal Company, 55 Pa. Cmwlth 312, 423 A.2d 765 (1980), Southwest Pennsylvania Natural Resources, Inc. v. DER, EHB Docket No. 81-001-H, adjudication issued March 11, 1982, Zacherl Coal Company, Inc. et al. v. J. Edward Smith et al., Civil Action No. 81-22 ERIE (March 17, 1981), Memorandum Opinion by the Honorable Judge Gerald J. Weber.

However, we see no reason to issue the order DER requests, because the Notice of Stay enjoins DER, not this Board, and because Apollo has not formally requested us to honor the stay even though only DER is enjoined. In any event, under the instant circumstances it would be unseemly for this Board to interpret an order issued by the United States District Court in a case over which that Court retains jurisdiction. Therefore we merely reaffirm our previous adjudication and associated order in this matter. We order Apollo to pay DER the value of the forfeited bond, believing this order is within the law. It is up to DER to enforce this order.

O R D E R

AND NOW, this 2nd day of June, 1982, this Board's Order of April 26, 1982 in this matter is reaffirmed; in particular, Apollo is ordered to make full and prompt payment to DER of $11,500, the face value of surety bond 152E5130.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Michael J. Henny, Esquire
Diana Stares, Esquire

DATED: June 2, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GEORGE CAMPBELL, et al. : Docket No. 81-052-H and 81-053-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYNCOTT CORPORATION, Permittee

OPINION AND ORDER SUR
COMMONWEALTH'S PETITION FOR RECONSIDERATION

From October 10, 1979 through January 28, 1981, DER issued a number of letters to Lyncott Corporation which was then operating a solid waste disposal area located near New Milford in Susquehanna County. These letters constituted DER approvals of various so-called waste streams which were deposited at the said disposal area.

As the debate over the New Milford site intensified first the Susquehanna County Board of Commissioners and then the individual instant appellants filed appeals from said waste stream approvals with this board. These appeals and a number of related appeals concerning the same site have consumed a considerable portion of this board's energies over the last year and one half. These proceedings have included frontal assaults on multiple fronts, retreats and counter-attacks including repeated attempts by the permittee of the site (sometimes joined by DER) to dismiss the appeals of the instant appellants as well as Susquehanna County.

One such attempt resulted in the Opinion and Order issued by this board on October 6, 1981, which Order denied the permittee's motion to dismiss the instant appeal on the grounds of untimeliness. On October 26, 1981, DER petitioned the board to reconsider its October 6 order citing alleged inconsistency between the October 6, order and adjudications of the board in *Stanley Vernovage v. DER*, EHB No. 78-122-W (June 1, 1979) and *Samuel E. and Lois F. Shull v. DER, et al.*, EHB Docket No. 75-090-W (April 22, 1979). The board granted reconsideration because the said adjudications had not been presented to it during its deliberations on the motion to dismiss and had not been independantly considered by the board. The permittee and appellants have briefed the issue of the applicability of the said adjudications to the instant matter and DER has advised the board that it is relying upon the permittee's brief.

Upon consideration of the said briefs and a thorough reading of the adjudications, the board has concluded that the result reached in its October 6, 1981, Opinion should not be altered. As a starting point it must be noted both *Shull, supra* and *Hernovage, supra*, dealt with a set of regulations which has been superseded by the regulations governing the instant action. The October 6, 1981 Opinion construed §21.52 of the present rules of this board while the cited adjudications discussed §21.21 of the old rules. A comparison of §§21.21 and 21.52 demonstrate marked differences.

To be fair, however, §§21.21(a) and 21.52 do contain some similar language at the relevant point. Both sections 21.52 and 21.21(a) specially call for the appeal period to begin within 30 days from receipt of written notice yet this board, at least in *Vernovage, supra* chose to allow actual notice plus publication of written notice in the Pennsylvania Bulletin to substitute for written notice specifically directed to the appellant therein.

Vernovage, supra and *Shull, supra* struck a fair balance between the rights of permittees and those who would content DER-issued permits. Since §21.21(a) did not provide that publication in the Pennsylvania Bulletin iniated the 30-day appeal period there was, at the time of *Vernovage, supra* and *Shull, supra* no simple and clearly effective manner in which to terminate the appeal period. A permittee would and in the above cases apparently did, provide actual notice to nearby landowners but unless this notice was considered to be the equivalent of a written notice from DER the appeal period would still run.

Under §21.52(a), by contrast, publication of notice in the Pennsylvania Bulletin begins the 30-day appeal period against all third parties. We believe that in §21.52(a) the Environmental Quality Board (EQB) struck a careful balance between the interests of permittees and third party appellants. As the proposed amendment to §21.21 published at 4 Pa. Bulletin 2553 demonstrates the EQB could have provided that the 30-day appeal period was commence to run from actual notice. This they did not do and we are reluctant (and probably unable) to add language to our rules which the EQB chose to delete.

O R D E R

AND NOW, this 2nd day of June, 1982, DER's motion for reconsideration is denied, Lyncott and DER are directed to comply with the board's pre-hearing order No. 1 within 30 days from the date of this order.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish
DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy
EDWARD GERJUOY, Member

DATED: June 2, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HOWARD W. MINNICH : Docket No. 82-047-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NORTHERN YORK COUNTY REGIONAL JOINT SEWAGE
AUTHORITY

OPINION AND ORDER SUR DER'S
MOTIONS TO DISMISS AND FOR SANCTIONS

On January 16, 1982, DER published a "state Municipal Discharge Inventory of Municipal Sewage Construction Needs" (inventory) in the Pennsylvania Bulletin, 12 Pa. Bull. 313. According to the notice which accompanied it, this inventory did not constitute a priority list for award of construction grant funds but rather the inventory was to be used by DER in preparing such an annual project priority list. Indeed, DER's stated purpose in publishing the inventory was to solicit input from municipalities and other interested parties with regard to the projects on this list.

The appellant, on February 16, 1982, filed an appeal from DER's placement of the Northern York County Regional Joint Sewage Authority Project on the said inventory, and DER's assignment of total rating points and priority status to this project.

On or about March 10, 1982 DER filed a motion to dismiss the instant appeal as well as brief in support thereof. This board notified appellant's counsel of its receipt of said motion and brief and ordered appellant to file an answer on or before March 22, 1982. Appellant's response was not submitted to the board until April 9, 1982 following a DER letter requesting that the assertions of its motion to dismiss be accepted as true. On this basis DER has filed a motion for sanctions requesting that appellant's response to DER's motion to dismiss be stricken.

Because we are granting DER's motion to dismiss in spite of appellant's response thereto, we do not feel it necessary to rule upon DER's motion for sanctions. Similarly, we do not feel that it is necessary to go beyond the first argument set forth in DER's motion and therefore we will refrain from ruling upon DER's justiciability and standing arguments.

It is clear to us that the action appellant has attempted to appeal in the instant action is not a final action of DER nor does it affect the personal or property, rights, privileges, immunities, duties, liabilities or obligations of the appellant. Indeed, appellant's response ignores the stated distinction between the published inventory and a project priority list but argues why a project priority list may be an appealable action. Appellant's other argument merely emphasizes that the inventory in question is not a project priority list.

The case law cited by DER, including, but not limited to, *Standard Lime and Refractories Company v. DER*, 2 Pa. Commonwealth Ct. 424, 279 A.2d 383 (1971) and *Commonwealth, DER v. New Enterprises Stone and Lime Company, Inc.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976) supports the proposition that only final DER actions which affect those rights listed above properly come within the jurisdiction of this board.

O R D E R

AND NOW, this 2nd day of June, 1982, DER's motion to dismiss is granted and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: June 2, 1982

cc: Bureau of Litigation
Robert W. Adler, Esquire
Thomas W. Scott, Esquire
Harry L. McNeal, Jr., Esquire
Jack Stover, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF HARRISON :

:

Docket No. 82-092-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On March 31, 1982, the Township of Harrison, hereinafter "Appellant", filed an appeal from an Order directed to Appellant by DER, dated March 9, 1982. Said Order, inter alia, ordered Appellant to submit a supplement to its Official Sewage Facilities Plan (hereinafter the "Plan"), to provide sewage disposal service to meet the needs of a proposed Village Green development (hereinafter the "Development"). The Order found that the Development was to be constructed by the National Development Corporation ("NADCO"), which on June 17, 1981 had received a building permit for the Development from Appellant. Paragraph 3 of the Order stated that the aforesaid supplement to Appellant's Plan:

> shall provide for the furnishing of capacity in the Township's existing sanitary sewage system to accommodate the flows to be generated by the development, or, in the alternative, shall allow the utilization of the aerated detention facility which has been proposed by NADCO.

On May 14, 1982 DER wrote NADCO, stating:

> The plans and specifications which your engineer submitted for the proposed aeration detention facility have been reviewed. We have no objection to the construction of this facility as proposed.
>
> Please note that we are not issuing a permit for the facility because it will be privately owned by NADCO who will be responsible for the maintenance, operation, and safety of the proposed facilities.

On June 7, 1982, Appellant filed an Amendment to its original Notice of Appeal, protesting the action taken by DER in its May 14, 1982 letter to NADCO. Shortly thereafter, the Board received from NADCO a Motion to Quash Appellant's Appeal, together with a Motion (presumably in the alternative) to Expedite Disposition of the instant Appeal. The Motion to Quash alleges that Appellant has failed to comply with the requirements of this Board's rules and regulations. According to NADCO, Appellant did not serve a copy of its March 29, 1982 appeal upon NADCO, thereby failing to perfect its March 29, 1982 appeal in the fashion required by 25 Pa. Code §21.52(b). The Motion to Quash also claims Appellant lacked standing to bring its appeal.

With respect to NADCO's Motion to Quash, the Board notes that Appellant the Township of Harrison was the direct recipient of DER's March 9, 1982 Order, and therefore certainly had standing to appeal that Order. Moreover, Appellant's appeal from an Order directed to Appellant does not obviously constitute an appeal from an "approval" which, under the terms of 25 Pa. Code §21.52(b), would require Appellant to have filed a copy of its original Notice of Appeal with NADCO. Therefore NADCO's Motion to Quash is rejected, for the present at any rate. Should NADCO be able to reinstitute this Motion, (see infra), the Board's ruling will be guided by its holding in Czambel v. DER, 1980 EHB 508.

The Board further notes that NADCO's standing to raise the Motion to Quash and the Motion to Expedite Disposition of the Appeal is dubious. NADCO has not been made a party to this instant Appeal; NADCO has not petitioned to intervene; NADCO has not convinced the Board that it has the right to expect service of a copy of the Notice of Appeal under 25 Pa. Code §21.51 (f)(3). Therefore the Board will not presently rule on NADCO's Motion to Expedite. However, the Board does note that it is reluctant to accelerate disposition of the instant Appeal, which involves issues only indirectly related to NADCO's economic interests but of very considerable direct importance to the residents of Harrison Township. In particular, paragraph 1 of the Order states:

> 1. On or before March 22, 1982, the Township shall submit to the Department a written plan,...setting forth the actions the Township intends to take to reduce the hydraulic overload upon its sanitary sewage system and to eliminate any future occurrence of basement flooding. The plan shall include a schedule...

Consequently the Board--though sympathetically aware of financing problems if resolution of this Appeal is not achieved very soon--doubts that NADCO's arguments will justify measures preventing Appellant from developing its case in an orderly unhurried fashion, including completion of discovery (which Appellant already has begun, with Interrogatories and a Request for Production of Documents directed to DER on June 4, 1982).

We now turn to Appellant's Amendment to its original Notice of Appeal. It is not clear to this Board that DER's May 14, 1982 letter, which explicitly stated it was not issuing a permit and merely informed NADCO that DER had no objection to construction of the facility, was an appealable action under 25 Pa. Code §§21.2(a) and/or 21.51(f)(3). If this action by DER is appealable, then NADCO would be a required recipient of a copy of the Notice of Appeal under

25 Pa. Code §21.51(f). As discussed supra, NADCO alleges it was not served with a copy of the original Notice of Appeal.

Therefore the Amendment is rejected. If Appellant wishes to appeal DER's May 14, 1982 letter, it is advised to file a new appeal, properly served on all required parties. Thereafter, if the new appeal is not quashed, a Motion to Consolidate this new appeal with the instant Appeal at Docket No. 82-092-G may be in order and will be duly considered by the Board. Because the procedural situation is complicated, the Board will regard Appellant's Amendment as a skeleton appeal and permit the new appeal, if promptly filed, to relate back to the June 7, 1982 filing date of the Amendment. The Board believes this ruling will be fairest to all parties concerned, is in the interests of justice, and is consistent with the intent of 1 Pa. Code §31.2.

* * * * * *

O R D E R

AND NOW, to wit, this 15th day of June, 1982, it is hereby ordered as follows:

1. NADCO's Motion to Quash the instant appeal and NADCO's Motion to Expedite Disposition of the instant appeal are rejected, without prejudice to NADCO's rights to renew these motions should NADCO be able to demonstrate it should be made a party to the instant appeal.

2. Appellant's Amendment to its original Notice of Appeal is rejected, without prejudice to Appellant's right to incorporate this Amendment in a new independent appeal; should such a new appeal be filed, its filing date will relate back to June 7, 1982, the filing date of the proposed Amendment.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Linda H. Jones, Esquire
Michael Arch, Esquire
Joel P. Aaronson, Esquire

DATED: June 15, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROBERT J. JOHNSTON :

:

Docket No. 82-008-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By notice dated December 7, 1981, the Bureau of Mining and Reclamation of the Department of Environmental Resources (DER) advised Robert J. Johnston (appellant) that because of his failure to correct violations and to reclaim the area affected in the course of surface mining operations on Reclamation Project No. 464 located in Allegheny Township, Butler County, Pennsylvania, appellant's surety bond No. B-11505, executed June 14, 1977 in the amount of $20,000.00 with Selected Risks Insurance Company was forfeited.

On January 7, 1981 Johnston filed an appeal with this Board alleging, *inter alia*, that the violations had been satisfied and the project had not been abandoned.

By notice dated January 12, 1982 this Board requested that appellant file a pre-hearing memorandum on or before March 29, 1982. Upon failure of appellant to file the memorandum by March 29, 1982, a notice dated May 12, 1982 was sent to appellant, and was received by a representative of appellant on May 24, 1982 advising

of appellant's failure to file the requested pre-hearing memorandum, and that sanctions may be imposed if appellant did not file his pre-hearing memorandum on or before June 1, 1982.

Appellant has not responded to the Board's notices of January 12, 1982 and May 12, 1982. The record in this matter reveals that Selected Risks Insurance Company was notified by certified mail of the action being taken by DER, but this Board has not received any correspondence from said in this matter.

Under the provisions of §21.124 of the rules of practice and procedure of this Board, sanctions may be imposed upon a party for "...failure to abide by a Board order...". One such sanction authorized is dismissal of an appeal for failure to abide by a Board order.

Appellant has, in this appeal, failed and refused to abide by this Board's orders to file a pre-hearing memorandum. On two occasions this Board has issued orders to appellant and on both occasions the appellant has failed and refused to respond. While we are reluctant to enter a final ruling without the benefit of a full hearing on the merits which would afford a party ample opportunity to present his case, we shall not tolerate a consistent refusal on the part of a party to conform to the standard required in the prosecution of appeals before this Board.

Accordingly, the appeal of Robert J. Johnston, at EHB Docket No. 82-008-M is hereby dismissed.

O R D E R

AND NOW, this 17th day of June, 1982 the appeal of Robert J. Johnston, at EHB Docket No. 82-008-M is dismissed and stricken.

ENVIORNMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

DATED: June 17, 1982

cc: Bureau of Litigation
Patti J. Saunders, Esquire
Robert J. Johnston

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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PENNSYLVANIA MINES CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BARRY D. EINSIG, Permittee

Docket No. 82-132-G

Well-Drilling and Coal Mining
Act 52 P.S. §2101 *et seq.*

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

The Department of Environmental Resources (DER) has granted Barry D. Einsig (Einsig) a permit to drill a gas well (the Yeager Well) on the surface property of J. L. Yeager in Montgomery Township, Indiana County, Pennsylvania. This well will penetrate subsurface coal seams owned by the Pennsylvania Mines Corporation (PMC). PMC has appealed issuance of the permit, and has petitioned for a supersedeas as well. After two days of testimony at hearings in the supersedeas petition, the parties--in view of the need, amplified below, for a rapid decision on the petition--agreed they would forego briefs and merely present oral arguments on whether or not supersedeas should be granted. Oral argument was completed June 17, 1982, and the transcript thereof was received by the board on June 18, 1982. The board now rules with equal dispatch, having reviewed the oral argument transcript, the parties' legal citations and the hearing examiner's notes on the evidence presented.

FACTS

The relevant facts are as follows. PMC operates the presently active Greenwich Collieries No. 1 Mine (the Mine). Although the Mine's operations today are some 9000 feet and 5 years away from the location of the Yeager Well, nevertheless projected entries and routes into the coal underneath the Yeager property already have been mapped by PMC; moveover, such long range planning is desirable for efficient use of the available capital and natural resources. PMC is primarily concerned about--and confined its evidence to--the effects of the Yeager Well on PMC's projected mining operations in the so-called Upper Freeport coal seam (the seam), which in the neighborhood of the Yeager Well lies about 350 feet below the surface. Under the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. §§2101 *et seq.* (the Act), the presence of the Yeager Well will require PMC to leave a pillar of coal around the well shaft, 52 P.S. §2201(b); PMC estimated, without challenge, that it would have to leave a square pillar 160 feet on a side, thereby removing from the seam approximately 8000 tons of coal it otherwise would be able to mine. Furthermore, the presence of this pillar will prevent PMC from following its original plan of using longwall mining in the vicinity of the Yeager Well; longwall mining, PMC asserts (again without challenge) is safer than conventional mining and enables the operator to exhaust a higher percentage of the coal in the seam than is possible by conventional mining.

The just-described effects of the Yeager Well in mining operations are those which could result if the Yeager Well stood alone, with no gas wells in its neighborhood. Actually there already are 111 gas wells in the extensive seam area PMC is planning to mine during the next 5 years; the Yeager property covers just a small portion of this extensive area. Each of these already existing wells also requires a protective coal pillar, and the gas pipelines from these wells require

additional pillars. As a result, longwall mining probably already has become impractical in the mining area containing the Yeager Well. Indeed, it is questionable (according to PMC's own witness, Mr. Foreman) whether the Mine is worth exploiting even by conventional mining techniques; Mr. Foreman believes the coal field became a poor risk for capital investment after about 50 wells had been drilled. There was evidence that even PMC's present mining operations, away from the gas wells, are unable to produce coal at costs which are competitive in today's market.

It happens that the already-drilled wells have been spaced about 1000 feet apart; this spacing preserves the possibility of reasonably efficient mining, according to PMC. However, there is no statute or regulation which requires the 1000 feet spacing, or any minimum spacing between gas wells. The Yeager Well will be an "offset" well, not in the regular 1000 foot spacing grid occupied by the previous wells; the Yeager Well will be 500-600 feet from a neighboring already-drilled well. According to PMC, this offset feature of the Yeager Well will require even thicker pillars (along the line between the Yeager Well and its nearest neighbor) than the 160 feet previously quoted, and will in other ways make coal mining even more hazardous and less economical than if the Yeager Well were placed 1000 feet from other wells.

As legal basis for its appeal, PMC cites the Act. 52 P.S. §2202(a) of the Act gives the mine operator (in this case PMC) the right to file objections when:

> "...the well when drilled or the pillar of coal about the well will, in the opinion of the coal owner or operator, unduly interfere with or endanger such mine."

When the mine operator has filed objections to a proposed well site, DER is required to seek an agreement--between the mine operator and the proposed-well operator--on an alternative site, 52 P.S. §2202(b). If the mine operator and well operator cannot come to an agreement, then DER is empowered to:

> "...determine a location on such tract of land as near to the original location as possible where, in the judgment of the division, the well can be safely drilled without unduly interfering with or endangering such mine."

In the instant matter, PMC objected that Mr. Einsig's originally proposed location would "unduly interfere with or endanger" the Mine. Mr. Einsig attempted to meet PMC's objections by moving his proposed well from its original location; he moved the well to the boundary of the Yeager property, along the direction (from the original site) Mr. Einsig thought PMC favored. However, PMC would not approve this new site; Mr. Einsig could not move past the boundary of the Yeager property because he had no drilling rights in the adjoining property. Thereupon DER, acting pursuant to 52 P.S. §2202(b), determined that the well could be drilled at the new site "without unduly interfering with or endangering" the Mine, and granted Mr. Einsig his permit to drill the Yeager Well. From the evidence presented at the hearings, it is doubtful that PMC would have been willing to approve Mr. Einsig's proposed well even if he could have moved across the boundary of the Yeager property; there is no site anywhere in the vicinity which would keep the well from being an "offset", of the sort to which PMC so strenuously objects.

PMC claims, for reasons described *supra*, that the Yeager Well--in the language of 52 P.S. §2202 quoted above--will unduly interfere with or endanger the Mine; therefore, PMC urges, it was an abuse of discretion for DER to approve the permit. Mr. Einsig, whose lease to the Yeager property expires on July 1, 1982, seeks a swift resolution of this matter; he stated he would begin drilling by June 25, 1982 unless the board ordered a supersedeas of his permit. PMC seeks a supersedeas on the grounds that the harm to the mine, once the Yeager Well is drilled, will be irreparable. The thesis that the harm to the mine will be irreparable was not challenged in the hearings; the gravity of the harm was a subject of dispute as further discussed *infra*. These considerations--that Mr. Einsig's lease will expire July 1, 1982 and that the harm to the Mine will be irreparable--have led the

parties to agree to an expedited ruling on the supersedeas petition, based on oral argument (and transcript thereof) and the hearing examiner's notes concerning the testimony, without briefs or the transcripts of the testimony.

DISCUSSION

The board's rules state in 25 Pa. Code §21.78:

> "(a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner
>
> (2) the likelihood of the petitioner's prevailing on the merits; and
>
> (3) the likelihood of injury to the public.
>
> (b) A supersedeas shall not issue in cases where nuisance or significant (more than *de minimis*) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect."

The parties and this board agree that neither the granting nor the withholding of the supersedeas will threaten even *de minimis* injury to the public during the years before the Mine reaches the seam in the vicinity of the Yeager property; certainly there will be no threat during the period of time needed to render a decision on the merits of this appeal. Therefore this board's ruling on the supersedeas petition can be based solely on a balance of factors (1) and (2) quoted *supra*. We have weighed these factors, and rule that the petition for supersedeas is dismissed, for the reasons which follow.

Although the harm to the petitioner will be irreparable, as explained above, petitioner has not met his burden of showing he will suffer significant harm. On PMC's own evidence, the Mine never may be extended to the vicinity of the Yeager

Well, because of the mining difficulties engendered by the 111 wells already in being; in this event, PMC will have suffered no harm from the drilling of the well number 112, the Yeager Well. If the Mine is worked, it is highly unlikely that the decision to use conventional mining rather than the more efficient (higher percentage of coal recovery) longwall mining method will depend on the fact that the Yeager Well has been drilled. PMC argues that the offset Yeager Well is akin to the straw that broke the camel's back. In other words, PMC wants the board to believe that drilling the Yeager Well will cost PMC the entire coal field containing the other 111 wells. PMC presented considerable evidence along this line at the hearing, and in oral argument its counsel stated:

> "What is at stake here is the loss of the energy potential of over 8,000,000 tons of coal, substantial revenue to the community in which appellant, Pennsylvania Mines Corporation's facilities, mine facilities, are located, and ultimately the jobs of a thousand miners."

We are unconvinced, however, that loss of the energy potential of the entire coal field of 8,000,000 tons ever could be ascribed to the digging of the single additional Yeager Well, which can be isolated from the rest of the Mine by a pillar containing 8,000 tons of coal. We are equally unconvinced that the Yeager Well could be blamed for the loss of the jobs of a thousand miners, even if PMC had standing to raise this issue, which we doubt. *Strasberg Associates v. Newlin Township*, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980), *Campbell v. DER*, 39 Pa. Cmwlth. 624, 396 A.2d 870 (1979), *Helen Mining v. DER*, 1979 EHB 92. We do agree that the loss of the profit from mining 8,000 tons of coal would be harmful to PMC, but--even if it were unquestioned that in the next five years PMC will be mining the seam in the vicinity of the Yeager Well--we are reluctant to regard this purely economic harm as grounds for a supersedeas, in view of the fact that the Legislature, in passing the Act, plainly contemplated and approved the requirement that coal pillars be left around drilled gas wells, 52 P.S. §2203(b).

We also do not believe petitioner has met his burden of showing his appeal is likely to prevail on the merits. We see very little likelihood petitioner can prevail on the merits. Arguments very similar to these presented by PMC were thoroughly examined and rejected by this board in *Helen Mining, supra*. In *Helen Mining* the board did grant a supersedeas staying the drilling of a gas well, pending the adjudication of the mine operator's appeal of the permit. But after a full hearing on the merits, the board's adjudication dismissed the appeal. As in the instant appeal, the mine operator in *Helen Mining* argued that the well would "unduly interfere with or endanger" his mine by forcing him to use conventional mining techniques in the vicinity of the coal pillar surrounding the well. Our response to this argument in *Helen Mining* remains apposite here:

> "In Pennsylvania, mining around producing or inactive gas wells is a fact of life for the mining industry...No one contends that mining should be prohibited in the area of these wells because they preclude the use of shortwall mining (which like longwall mining is claimed to be more efficient and less hazardous than conventional mining). Conventional mining is and will continue to be the predominant and most important method of mining in Pennsylvania. It would be imprudent and contrary to the weight of the evidence to say that its use will so endanger the men working in the Helen mine that the gas wells which would cause its use must be prohibited. (parenthetical clause added)...
>
> Helen also contends that the locations of the gas wells, because they preclude Helen from using shortwall mining at the site of the gas wells, will "unduly interfere with" the operation of the Helen Mine...
>
> Again, conventional mining is the predominant method of mining in Pennsylvania...We do not believe a gas well, because it mandates its use, can be considered as causing undue interference with the operation of the mine. The Gas Operations Act presupposes that gas wells will be drilled in active mines and coal reserves. Its purpose is to insure that the gas wells are located at sites as compatible as possible with the physical layout of a mine. However, some interference is expected. We cannot abrogate the drilling of gas wells in coal seams because shortwall mining cannot be performed around the wells."

PMC could not cite any authority which construed the Act's phrase "unduly interfere with or endanger" in a fashion consistent with PMC's claim that the need to resort to conventional mining in the vicinity of the Yeager Well was undue interference or endangerment. PMC's counsel argued ably that the Act's disjoint phrases "unduly interfere" and "endanger" must imply that "undue interference" pertains to economic impacts on the Mine, but we are not convinced by his argument and he could not cite any source which found that such a construction of the Act was consistent with the legislative intent. It appears to us that PMC's construction of the Act would permit very few or no wells to be drilled in active or potentially active mines (mines possessing a "workable coal seam" as defined in 52 P.S. §2102(4)); the Act plainly does not contemplate any such result. It is true that the Act originally was passed in 1955, before more modern non-conventional mining techniques had come into use. Various sections of the Act have been revised since 1955, however, including amendments as late as 1978 (see 52 P.S. §2502); the Legislature has given no indication that its original intentions to permit gas wells to be drilled and to require wells to be protected by coal pillars had been altered by the development of non-conventional mining techniques. Forcing the Mine to close could be constru as undue interference, but--as we have explained several times--on the evidence we are not convinced that any future closing of the Mine will be ascribable to the drilling of the Yeager Well. PMC has urged us to grant a supersedeas, as we did in *Helen Mining*, in order that we may hear the fully prepared testimony on the merits of the appeal, but we have heard nothing in oral argument to suggest PMC's additional testimony at a full hearing on the merits would be materially different or more compelling than PMC's two days of testimony at the supersedeas hearing.

PMC also urges us to hold that the Pennsylvania Constitution's Article I, Section 27 requires DER to refuse the permit because drilling the well necessarily will cause the coal reserves of the Commonwealth to be less efficiently exploited,

whereas the Yeager Well probably is not needed for full exploration of the gas field; in the alternative, if the Yeager Well is needed to fully explore the gas field, its drilling could be delayed until the coal seam under Yeager's property had been mined (this is an argument PMC's counsel did not make, but is an obvious implication of his other remarks). We are sympathetic to this argument because we agree that the Commonwealth's and this nation's energy resources should be efficiently exploited. Future generations will pay dearly for our present profligacy.

However, Article I, Section 27 reads:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." (Emphasis added)

Our reading of *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed 468 Pa. 226, 361 A.2d 263 (1976), which construed Article I Section 27, gives no indiation that Article I Section 27 requires DER to weigh whether privately owned natural resources are being efficiently explored; nor do the progeny of *Payne* give any such indication. In other words, there is no indication that Article I Section 27 was intended to regard inefficient use of privately owned coal mines and gas fields as environmental incursions affecting all the people, including generations yet to come. Under the law as we read it, we cannot term DER's refusal to weigh the effect of drilling the Yeager Well on the total recoverable energy resources from the coal seam and gas field beneath the Yeager property an abuse of discretion. Similarly, as DER argues, we cannot term DER's refusal to consider the effects of drilling the Yeager Well on PMC's economic well-being an abuse of discretion. There is nothing in the Act which charges DER to take such economic effects of well drilling into account; where DER has been required to take economic impact into account, the authority for so requiring has been statutory language (e.g., *DER v. Borough of*

Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974), which involved The Clean Streams Law instruction to consider economic impact, 35 P.S. §691.5(a)(5)).

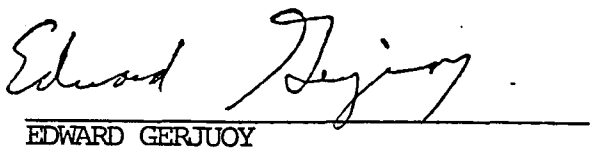
PMC urges us to substitute our own discretion for DER's, as we are entitled to do. *Warren Sand and Gravel v. DER*, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975) But the board lacks DER's technical expertise. It seems unwise for us to substitute our discretion for DER's, therefore, unless we find that DER has abused its discretion. Indeed, relying on *Ramey Borough v. DER*, 466 Pa. 45, 351 A.2d 613 (1976), (even though *Ramey* was concerned with the scope of review for appellate courts, not of a factfinding body like this board), this board previously has expressed its reluctance to substitute its discretion for that of DER's when DER has not abused its discretion. *Wilmington Township v. DER*, EHB Docket No. 80-166-H (May 22, 1981). We see no reason to alter this conservative policy of ours, which realistically recognizes the board's limited resources. Furthermore, the recent holding in *Borough of Moosic v. Pennsylvania PUC*, 59 Pa. Cmwlth. 338, 429 A.2d 1237 (1981) implies that if neither the Act nor Article I Section 27 imposes on the board the duty to examine the economic impacts of the Yeager Well drilling on the private parties involved in the dispute, then it would be an abuse of discretion for the board to base its adjudication in this matter on such impacts (see also *Community College of Delaware County v. Fox*, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975)).

In sum, we feel that in asking us to substitute our discretion for DER's and to sustain PMC's appeal on the merits, PMC desires this board to reach a policy decision the Legislature has been unwilling to make. This board, with its limited powers, cannot reach that far.

O R D E R

AND NOW, this 23rd day of June, 1982, the petition for supersedeas filed by Pennsylvania Mines Corporation in this matter is rejected.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: June 23, 1982

cc: Bureau of Litigation
Justina Wasicek, Esquire
Henry Ingram, Esquire
Timothy E. Durant, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

J. ROBERT MELANA, et al. :

:

Docket No. 82-039-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DICK ENTERPRISES, Permittee

OPINION AND ORDER
SUR MOTION FOR SANCTIONS
AND MOTION FOR REMAND AND CONTINUANCE

On January 13, 1982, DER issued Permit No. 300711 to Dick Enterprises for the operation of a flyash, bottom ash and fixated scrubber sludge site. This action was appealed on February 10, 1982 by J. Robert Melana and other citizens in the neighborhood of the site under Docket No. 82-039-G, and was independently appealed on February 19, 1982 by William Fiore under Docket No. 82-059-G. On February 16, 1982 Melana was ordered to file his pre-hearing memorandum by May 3, 1982; on March 9, 1982 Fiore was ordered to file his pre-hearing memorandum by May 24, 1982. Fiore's pre-hearing memorandum was filed on May 26, 1982; Melana has not yet filed his pre-hearing memorandum. On June 9, 1982, the Fiore and Melana appeals were consolidated under the above caption; Fiore remains an independent party appellant.

On May 28, 1982, Melana (who had been granted an extension to June 3, 1982 for filing his pre-hearing memorandum) filed a Motion for Remand and Continuance, asking this Board to remand this matter for public hearing and further DER evaluation; the Board also was asked to order DER to supply Melana with copies of a long list of documents. Fiore joined in the Request for Remand and Continuance. DER, joined by the permittee Dick Enterprises, opposes the Motion for Remand and Continuance. In the meantime DER, on June 11, 1982, filed a Motion for Sanctions against Fiore, requesting that Fiore be compelled to file a more specific pre-hearing memorandum. Fiore has not responded to this Motion. This Opinion and Order will deal with these two Motions, for Remand and Continuance and for Sanctions.

The request to remand is denied. As DER argues, remand on the appellant's terms would amount to final adjudication in favor of appellants without giving DER or the permittee the opportunity to present their cases at a formal hearing. DER argues that this Board is not empowered to render final relief without a hearing on the merits; the Board does not agree with this blanket assertion, and DER offers no authority to support it. However, the circumstances of this case certainly do not warrant denying DER and Dick Enterprises a formal hearing.

The request for a continuance is another matter. This Board traditionally has been liberal in granting continuances so that the parties may fully prepare their pre-hearing memoranda. Therefore we will grant Melana a continuance for filing its pre-hearing memorandum, even though Melana's Motion for Remand and Continuance did not specifically ask a continuance for this purpose. We will not order DER to furnish the documents listed in the Motion for Remand

and Continuance. The proper procedure for obtaining documents is stated in the Board's Rules and Regulations, specifically 25 Pa. Code §21.111. The Board notes that although it now is almost five months since Melana filed its Notice of Appeal, Melana has not made any formal request for documents, or pursued any other form of discovery permitted by the Rules of Civil Procedure. According to 25 Pa. Code §21.111(a), discovery requested subsequent to 60 days after the appeal has been filed is available only upon leave of the Board. This leave herewith is granted to Melana. The Board now expects Melana to embark upon discovery without any further delay; without very good cause shown, the Board will be reluctant to grant Melana any further continuances for filing its pre-hearing memorandum. In this connection, Melana's attention is called to the Board's Rule 25 Pa. Code §21.124. Melana also is advised to take note of our ruling on DER's Motion for Sanctions, immediately infra.

We now turn to DER's Motion for Sanctions against Fiore. Paragraph 4 of DER's Motion alleges that Fiore has failed to comply with Paragraph A of the Board's Pre-Hearing Order of March 9, 1982, in that Fiore's Pre-Hearing Memorandum does not include a statement of the facts Fiore intends to prove. We have examined Fiore's Pre-Hearing Memorandum and agree with DER that his "Statement of Facts" mainly lists conclusions; only paragraph 1 of Fiore's can be termed a "fact." DER also alleges that Fiore has failed to comply with Paragraph B of the Board's Pre-Hearing Order, in that his Pre-Hearing Memorandum makes no reference to specific sections of the statutes or regulations upon which he relies; we agree with DER. We also agree that Fiore has failed to list the specific documents he intends to introduce into evidence, as required by Paragraph E of the Board's Pre-Hearing Order.

Fiore therefore is ordered to file a more specific Pre-Hearing Memorandum, to be prepared in light of the preceding remarks. We shall grant Fiore as much time for this purpose as we have granted Melana to file his original Pre-Hearing Memorandum. Fiore is given leave to pursue discovery during this interim period before his more specific Pre-Hearing Memorandum is due.

O R D E R

AND NOW, this 6th day of July, 1982, it is ordered that:

1. Melana's request to remand this matter to DER is denied.

2. Melana's request that we order DER to furnish documents to Melana is denied.

3. The time for filing Melana's pre-hearing memorandum is extended; it shall be filed on or before September 3, 1982.

4. Fiore shall file a more specific pre-hearing memorandum on or before September 3, 1982, prepared in the light of this opinion.

5. The time for filing DER's pre-hearing memorandum is extended to fifteen days after both Melana and Fiore have filed as required by paragraphs 3 and 4 supra, but not later than September 20, 1982.

6. Melana, Fiore and the other parties will be permitted to engage in discovery without requesting leave of the Board, provided that the discovery can be completed on or before September 3, 1982 without conflicting with the time periods specified in Rules of Civil Procedure governing discovery, Rules 4001 et seq.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Patti J. Saunders, Esquire
Roger J. Peters, Esquire
Franklin L. Bialon, Esquire
Francis J. Carey, Esquire

DATED: July 6, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHEMICAL WASTE MANAGEMENT, INC., et al. : Docket No. 81-154-H
and
LYNCOTT CORPORATION : 81-155-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SUSQUEHANNA COUNTY and GEORGE CAMPBELL, et al.

OPINION AND ORDER SUR
APPELLANTS' PETITIONS FOR SUPERSEDEAS

Procedural History

On September 4, 1981, the Department of Environmental Resources (DER) issued an order (the order) directing Chemical Waste Management, Inc., (CWM) and Lyncott Corporation (Lyncott) to engage in remedial work at the Lyncott landfill in New Milford, Pennsylvania. The order modified an earlier order of March, 1981, and required CWM and Lyncott to commence certain other clean-up procedures. CWM and Lyncott have both appealed the order in separate appeals at Docket Nos. 81-154-H and 81-155-H. Susquehanna County and George Campbell, on behalf of the Concerned Citizens of New Milford, sought and were granted intervenor status. CWM and Lyncott have each sought a supersedeas in their appeals.

After hearing CWM's jurisdictional arguments for judgment on the supersedeas, the Environmental Hearing Board (the board) denied CWM's motion to dismiss the appeal

vacating the order against it and granted the Commonwealth's motion to consolidate the appeals and the supersedeas of CWM and Lyncott. Testimony was taken with respect to those supersedeases for a period of over five months. At the close of CWM's and Lyncott's case on the supersedeas, the DER, Susquehanna County and George Campbell all moved for dismissal of each request for supersedeas. The board denied those motions and requested the Commonwealth to present its case.

The Commonwealth then called several witnesses to testify on the likelihood of the petitioners' success on the merits in the ultimate adjudication of this appeal, and an expert witness to testify on the imminence of the hazard posed by the conditions on site.

The Environmental Hearing Board then directed all the parties to brief the issues that had been presented at the supersedeas hearing. Subsequently, CWM and Lyncott petitioned to reopen the record to submit additional testimony, but this petition was denied by the board.

Legal Criteria for Supersedeas

Since the instant matter arises from the filing by appellants herein of a petition for supersedeas from DER's order of September 6, 1981, it is important to note the legal requirements set forth in the board's rules regarding the grant or denial of such petitions. As set forth at 25 Pa. Code §21.78, they are as follows:

> "(a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) Irreparable harm to the petitioner.
>
> (2) The likelihood of the petitioner's prevailing on the merits.

(3) The likelihood of injury to the public.

(b) A supersedeas shall not issue in cases where nuisance or significant (more than *de minimis*) pollution or hazard to health or safety either exists or is threatened during the priod when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a bond or other security."

Description of the Site

In order to apply these legal criteria to the facts established during the hearings in this matter it is first necessary to describe the facilities and site in question. This site (which is located in New Milford Township, Susquehanna County) was first permitted on or about July 1, 1976 through the issuance by DER to Arthur H. Scott, an individual residing in New Milford, of Solid Waste Management Permit No. 101025. In essence, though not at law, the said permit was transferred to Lyncott Corporation, one of the appellants herein on or about April 29, 1977.[1] Permit 101025 was issued for a sanitary landfill and did not discuss in any way the storage or deposition of industrial and/or hazardous wastes at the site and, indeed, the site was operated as a sanitary landfill until this portion of the site was closed in March of 1979. Thus, the seventy-acre site contains a relatively small portion of perhaps two acres comprising the closed sanitary landfill. This area has been covered and planted and is vented to the surface and while it has experienced continuing seepage problems it is not the main source of concern at the site.

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1. A discussion of the early history of the site is contained in a partial adjudication issued on November 19, 1981 in *Lyncott Corporation v. DER and Susquehanna County*, EHB Docket No. 81-038-H which is incorporated herein to the extent relevant. The partial adjudication dealt with part of an appeal from DER's March 31, 1981 order concerning the instant site.

The main concern at the site arises from a change in the mode of operation of the site which apparently began during 1978. During the period of approximately one year Lyncott requested DER's approval to receive and deposit a variety of industrial wastes at least some of which may now be classified as or have the characteristic of hazardous wastes. DER indicated its approval of each waste stream in a separate waste stream approval after it had reviewed Lyncott's plans for developing storage areas on site for said wastes.

As described more fully below, the said industrial wastes were to be stored in vaults constructed by excavating holes on the site and lining the bottom and sides thereof with various layers of low permeability including a concrete-like layer to be formed with native materials and cement by the so-called terra-tite process. After the vaults were filled a similar liner was to be placed over the waste which in theory would cut off all sources of infiltration of water into and leachate from said vaults.

At present, two vaults have been constructed at the site and partially filled with wastes. Temporary caps of native topsoil cover these vaults. Vault 1 contains wastes in 55 gallon drums while vault 3 contains waste in sludge form. The site also includes a storage pad for other industrial wastes, a storage area for stabilized IBM sludge and two storage barns containing wastes in 55 gallon drums. The relative size and spacing of these areas can be apprehended with reference to appellants' Exhibit C, a scaled map of the site admitted in the companion case at EHB Docket 81-038-H, a copy of which is appended hereto.

Testimony and a view of the premises established that the site is located near the top of a wooded hill that falls off generally to the southeast. The area adjacent to the site is a very lightly populated rural and wooded area. Few, if any homes, can be seen from the site itself.

The geology and hydrogeology of the site were the subject of much expert testimony, in part contradictory in nature, but with regard to the general site

conditions, John Petura and Richard Kraybill, who testified on behalf of the appellants, and Barrett Borry, who testified on behalf of DER, evinced a substantial amount of agreement. All of these witnesses acknowledged that the surficial material at the site was glacial til which was underlain at depths varying from a few feet to over one hundred feet by native bedrock. Glacial til, they all agreed, consisted of predominantly fine grained clayey soils but they further agreed that glacial til was definitely not homogeneous and also contained cobbles and boulders deposited by retreating glaciers.

Further, all of the said witnesses noted that there were numerous springs at the perimeter of the site, and that there was considerable runoff being conveyed from the eastern portion of the site towards the southeast. Indeed, these experts even drew the same conclusions from the above-described wet conditions at the site, i.e., that the site had multiple water levels or water tables including one or more perched water tables which fed the springs.

The unusal amount of agreement among witnesses for contending parties continued with respect to conditions at the site. With regard to the storage barns Mr. Petura agreed with DER's inspector John Leskowsky that one of the storage barns had no aisleways at all and the other had only a center aisleway without cross aisles so that it would be difficult if not impossible to remove leaking 55 gallon drums or even to inspect their condition. Mr. Petura also agreed that the barns had dirt floors and were not surrounded with berms so that surface flow could get into the barns and any leachate generated in the barns had an unobstructed path to groundwater.

Moreover, Mr. Petura expressed concern over the paint-like vapors in the storage barns and the storage of possibly incompatible wastes cheek to jowl. While Mr. Petura didn't agree that immediate removal of the some 5,000 to 10,000 drums was merited by the conditions he did suggest, in the fall of 1981, that the drums should be removed within 6 to 9 months.

Condition of the Vaults

The condition of vaults 1 and 3 was also a subject of substantial agreement between the parties. Liners around the vaults were supposed to form essentially watertight capsules around the wastes deposited therein. The liners encapsulating the vaults were to be constructed with a terra-tite process. Appellants' Exhibit A from EHB 81-038-H shows a schematic cross section of the liner system approved by DER for vault 3. A copy of this drawing is attached hereto. According to Exhibit A, the liner was supposed to comprise, from the waste down, 14 inches of compacted earth, a 6 mil polyethylene liner, a 12 inch monitoring and flow zone of native materials including a perforated pipe grid connected to non-perforated pipe leading to a sump located outside the vault and a 6 inch terra-tite liner coated on top with MC-30. The liners for vault 1, while differing in certain respects from those in vault 3, were also supposed to contain the 6 inch terra-tite layer and flow zone.

As early as November of 1980 DER began to be concerned that the terra-tite liners had not been constructed and/or were not operating correctly. Leachate had been observed exiting from the flow zone through the perforated pipes from one of the vaults even though the flow zone was supposed to be kept completely free of leachate by the terra-tite and other layers overlying it. In fact, this was one of the reasons supporting DER's order of March 31, 1981.

In May of 1981 DER's worst fears concerning the lack of liner integrity were confirmed. On May 7, 1981 the sump for vault 1--a 55-gallon plastic drum--was removed. It was full of liquid and the soil surrounding it was muddy. Moreover, the piping leading from the vault to the sump was not correctly installed; pipe joints were not glued together, a 5-foot length had been crushed and some pipe tilted back towards the vault rather than, as the design called for, towards the sump.

A clear liquid and an oily liquid emanated from the pipe. Perhaps the most disturbing observation was that perforated pipe was encountered before any indication of a liner was encountered. One would have to infer from this either that perforated pipe exited from the liner or that the liner was not completed at its outside edge. Very similar conditions were observed at vault 3 where, in addition, a 1 1/2 foot section of pipe was completely missing.

Spurred on by the discoveries of May 7, 1981, on May 15, 1981 trenches were dug in the as yet unfilled portions of vaults 1 and 3 to ascertain the status of the liners underlying the wastes deposited in said vaults. These excavations were made with appellants' equipment, in the presence of appellants' agents and with the common concurrence of all present that the liners at the points excavated were representative of the liners throughout the site. The excavations in each vault demonstrated that the liner *in situ* was far different from the liner design approved by DER.

In vault 1 the sequence of layers from the vault floor down was 2 inches dirt, black plastic liner, 0-3 inches of a soft, friable material and 2 1/2 feet of dirt in which perforated pipe had been laid. In vault 3 there were two layers of soft, friable material and the thickness of these layers was approximately 3 to 4 inches but here too as in vault 1 the so-called terra-tite material in no way resembled the 6-10 inches of concrete-like terra-tite material called for in the designs and submitted as a sample by Lyncott to DER.

Far from contesting this deplorable state of affairs, both of appellants' witnesses tacitly agreed that the liners in both the vaults were entirely useless to contain leachate. Both witnesses testified that in their opinions they had assumed the liners to have no integrity.

Appellants' witnesses also failed to refute Mr. Leskowsky's testimony concerning leaching of an arsenic containing liquid from the soil packed around

the drums in vault 1 (which he observed in June of 1981)[2] or his testimony that some of said drums were tilted and that soil had not been packed around other drums (in May of 1981) or his testimony concerning the overflows and seeps from the sediment basin for vault 3 (which he observed in July and October of 1981). Indeed, it was Mr. Petura who brought up the presence of arsenic and chromium in the thousands of gallons of water in the sedimentation basin of vault 1 and the presence of arsenic, chrome and cyanide in soils samples taken throughout the site.[3] Mr. Petura also noted the lack of any top liners for vaults 1 and 3 and the unprofessional liner on top of the storage pad.

In sum, neither Mr. Petura nor Mr. Kraybill denied that there were real environmental problems at the site. They both admitted that. What these gentlemen objected to was the timing of DER's September 4, 1981 order which required removal of wastes from vaults 1 and 3 within one month. They suggested that a thorough study of groundwater conditions on the site be completed (which study would take 5 to 7 months) before any remedial actions would be undertaken. They justified this additional time period by arguing that the low permeability of the glacial til underlying the site would restrain the outward and downward flow of any leachate generated at the vaults.

Applying §21.78 Standards to Facts of Record

A. Likelihood of Success on the Merits

DER and the intervenors argue that even assuming that the permeability of th glacial til is as uniformly low as anticipated by appellants' experts, appellants have, nevertheless, failed to meet their burden of proof on the issues set forth in

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2. A soils analyses from the site of this seep demonstrated 1,521 ppm arsenic.

3. The arsenic level in the basin of vault 1 exceeds the federal safe-drinking water standards by a thousand times.

§21.78. Specifically, it is argued that, far from proving the likelihood that they will prevail on the merits, appellants have proven that DER will prevail on the merits by acknowledging the very real problems at the site. We think that this argument goes too far. The removal mode and the removal schedule set forth in DER's order are clearly acts of discretion which might conceivably be considered precipitious, even in the face of environmental problems at the site, if there was a virtual certainty that leachate generated at the vaults and barns would be contained by the soils on site and if the off site remedial alternative selected by DER was clearly unreasonable.

Having held that appellants are not precluded from proving that they will prevail on the merits it is still necessary to determine if they have shouldered their burden of proof on this issue. A more lengthy discussion of the likelihood of leachate generation and transportation off-site appears below. For present purposes it should be sufficient that the board has held that the seepage rate through the glacial til, while low in general, is not uniformly low because the til is not uniform, i.e., appellants have not proved that the leachate (which even they admit is being generated at the vaults and entering the glacial til surrounding said vaults) will be contained at or near the sites of said vaults.

As to DER's requirements that the waste be removed from the site appellants apparently conceded that the waste had to be removed from vaults 1 and 3 at least during discussions with DER personnel, however, appellants argued that they should have been permitted to prepare new terra-tite lined vaults on the present site for depositing the removed wastes. DER considered this proposal but at last rejected it, according to Gary Galida, in part because of the demonstrated ineffectiveness of the terra-tite system. Appellants' introduced no evidence that they could install an effective terra-tite or alternative liner system on premises and, clearly, from the evidence discussed above, the present terra-tite system has failed. Thus,

appellants' have not demonstrated DER's decision to require removal of wastes off-site to be arbitrary or capricious.

With regard to the timing of the order, the one month provided in DER's order for removal does seem rather short. However, the seriousness of the problem is recognized. Moreover, according to Mr. Galida, DER's time period was calculated by reference to actual experience at other sites especially the ARMCO site where 200,000 cubic yards of materials are to be removed in 6 months. According to Mr. Galida's own estimates it would take 23 shipments a day to evacuate vaults 1 and 3 within one month which seems a rather substantial effort. In addition, this estimate is based upon Mr. Galida's opinion that there are 40,000 cubic yards of waste deposited at the site as shown in Lyncott's operating records as opposed to the 100,000 cubic yards of waste projected by Mr. Petura. It is clear that some on site soils have been contaminated so that it is not inconceivable that even if 40,000 cubic yards of waste have been deposited, 100,000 cubic yards of waste and soil would have to be removed. In spite of these concerns we must acknowledge that DER has established at least a *prima facie* support for the one month removal period in its order. Appellants' failure to counter DER's order with any meaningful removal period testimony by its witnesses simply means that appellants have failed to shoulder their burden to obtain a supersedeas; they have another opportunity to address this issue on the merits.[4]

B. Irreparable Harm to Appellants

We also agree with DER and the intervenors that appellants have failed to meet their burden on the issue of irreparable harm to the appellants. To be sure, Mr. Petura estimated that there are 100,000 cubic yards of waste in both

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4. This opinion could end here since a party seeking a supersedeas must prevail on all three of the §21.78 standards. However, for the sake of completeness the other two standards will be discussed below.

vaults (as well as the IBM storage pad) and that removal of this waste off site in a short period of time would cost "tens of millions of dollars".

The board takes official note that in these tight times no individual or corporation can afford to invest "tens of millions of dollars" in an unproductive facility without suffering irreparable harm. And the board believes that Mr. Petura's expertise includes the design and costing out of remedial measures. Thus his testimony on cost was within the realm of his expertise. However, even an expert must do his homework. Mr. Petura admitted that he had not designed, yet alone costed out, remedial measures for this site and he didn't explain his estimate by relation to other completed clean-ups. In contrast, Mr. Gary Galida, the Chief of DER's Division of Hazardous Waste testified that he was familiar with hazardous waste clean-ups throughout the Commonwealth including at least 12 closure plans within the last 8 to 10 months which involved removal of wastes to another suitable location. He cited specific examples, e.g., 200,000 tons removed from ARMCO Steel's Butler County site and a large removal of waste from the Enterprise Avenue site in Philadelphia to demonstrate the feasibility of removal at the Lyncott site. Moreover, Mr. Galida listed certain Pennsylvania disposal sites as well as the SCA Services site in Niagra Falls, N.Y. the CECES site in Ohio and even a Chemical Waste Management site in Alabama which could receive the waste. This is the type of analysis Mr. Petura should have undertaken to support his estimate of removal costs. In the absence of such an analysis Mr. Petura's estimate must be considered a wild guess which clearly does not support the grant of a supersedeas.

C. Likelihood of Injury to the Public

The final issue to be addressed is whether conditions at the site constitute significant pollution or a hazard to health or safety during the period

of the supersedeas, i.e., likelihood of injury to the public. As discussed above, even appellants' experts acknowledged that site did have environmental problems, not the least of which is the 100,000 to 200,000 gallons of arsenic-laced water in the sedimentation basin to vault 1, but appellants argue that these problems would be attenuated by the low permeability of the glacial til in which the vaults and sediment basin thereto had been constructed.

DER's hydrogeologist, Barrett E. Borry, did not disagree with appellants' witnesses that the permeability of the glacial til on site in general, would be low and thus, in general, that the seepage velocity of liquids passing therethrough would be low. However, he suggested that the other experts' estimates failed to take into consideration the kind of discontinuities and lack of homogeneity one associates with a glacial til. Indeed, he opined that the fragipans, and the perched water tables identified by Messers Petura and Kraybill, provided a good avenue for lateral migration of leachate off site while the columnar faces in the til noted in the Meiser and Earl report could provide a good avenue for vertical migration to the more permeable bedrock underlying the til.

To quote Mr. Borry:

> "Both Mr. Kraybill and Mr. Petura testified to observing large quantities of water on the site. I also have observed large quantities of water, free-flowing seeps, on the site. Any situation where you have large quantities of water in such close proximity to a hazardous waste, you have a potential for that water to come in contact with that hazardous waste and carry it off the site.
>
> In this particular case there are a number of pathways, a number of ways this could happen. The first way would be rainfall falling into the vault areas, dissolving or physically transporting water as runoff.
>
> The second possibility would be for some of the shallow soils water, innerflow, entering the vaults, either from the bottom or from the sides, coming in contact with this waste, coming in contact with the drums, dissolving it, carrying it laterally along a discontinuity, such as a fragipan, to surface seeps and there, through overland flow, off the site; or also

vertically down to some of the deeper flow zones and there, into a more permanent groundwater table and from there off the site.

So, especially in view of that kind of situation where there is all this free-flowing, uncontrolled water and the lack of viable containment on the site--there is no viable containment of this water, either geologic or manmade, on that site."

Appellants failed completely to rebut this testimony. Thus, it cannot be denied that at least the potential for a serious pollution problem exists on the site. Furthermore, even appellants' experts admit that in the absence of removal of waste, leachate plumes will continue to develope (driven by the 132,000 gallons/year of rainfall on each uncapped vault plus any contribution from groundwater and runoff) and that the development of these plumes will make eventual remedial action more difficult and costly.

Finally, it was developed through Mr. Galida's uncontradicted testimony, that during the summer of 1981, at negotiating sessions, the appellants' representatives agreed with DER officials that the wastes could not stay in the storage barns or in vaults 1 and 3[5] due to the environmental dangers posed by the said wastes. It is now a full year later. It is nine months since Mr. Petura gave his cautious opinion that the site wouldn't cause an imminent hazard to the public health for six months. To grant the requested supersedeas would be to extend the threat of pollution and health hazards into the indefinite future. This I cannot and will not do.

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5. Vault 2 has not been constructed.

ORDER

AND NOW, this 20th day of July, 1982, upon due consideration of the petitions for supersedeas of the appellants in the above-captioned matter the same are hereby denied.

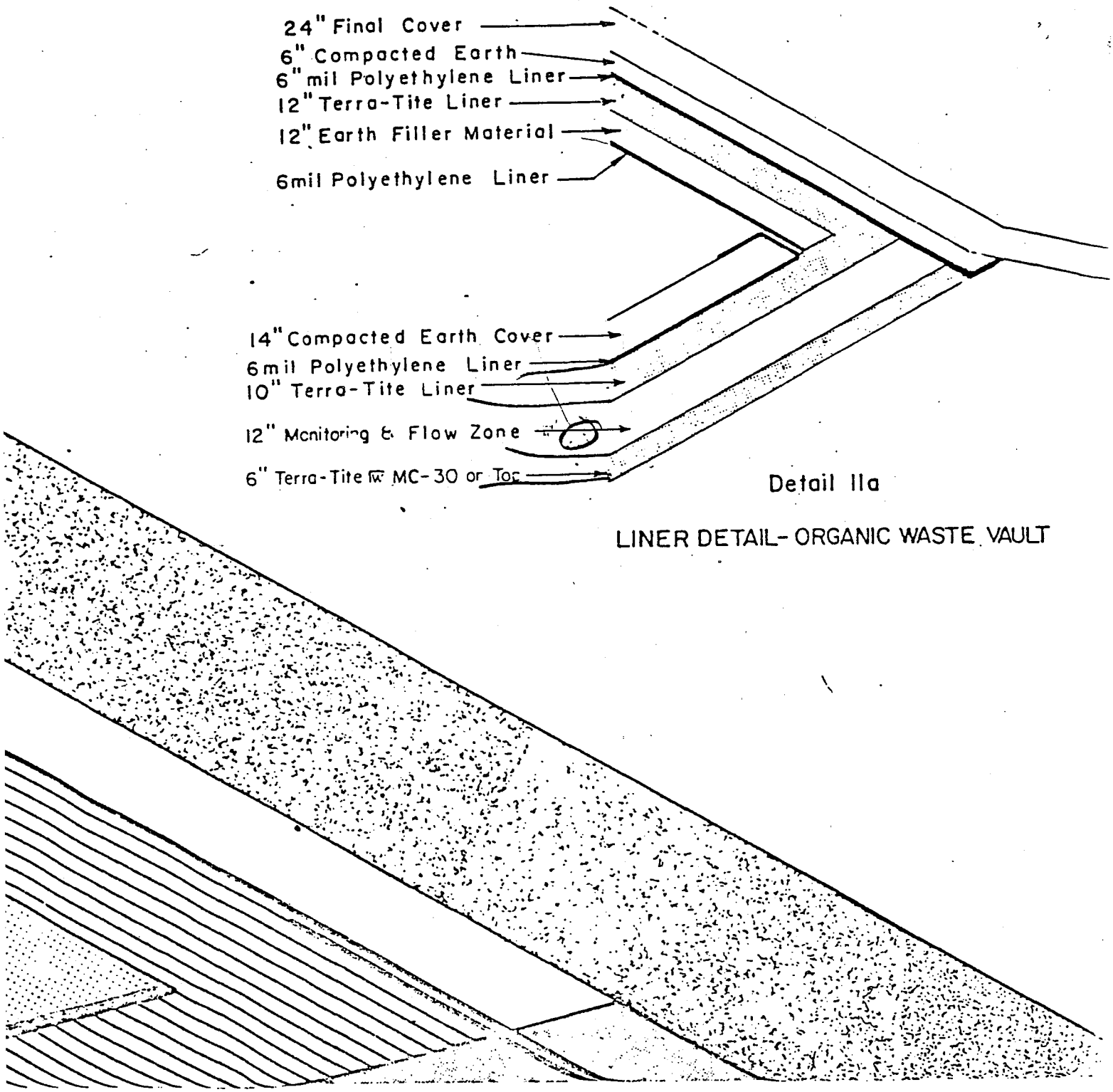
ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Gerald C. Grimaud, Esquire
Stirling Lathrop, Esquire

DATED: July 20, 1982



Detail IIa

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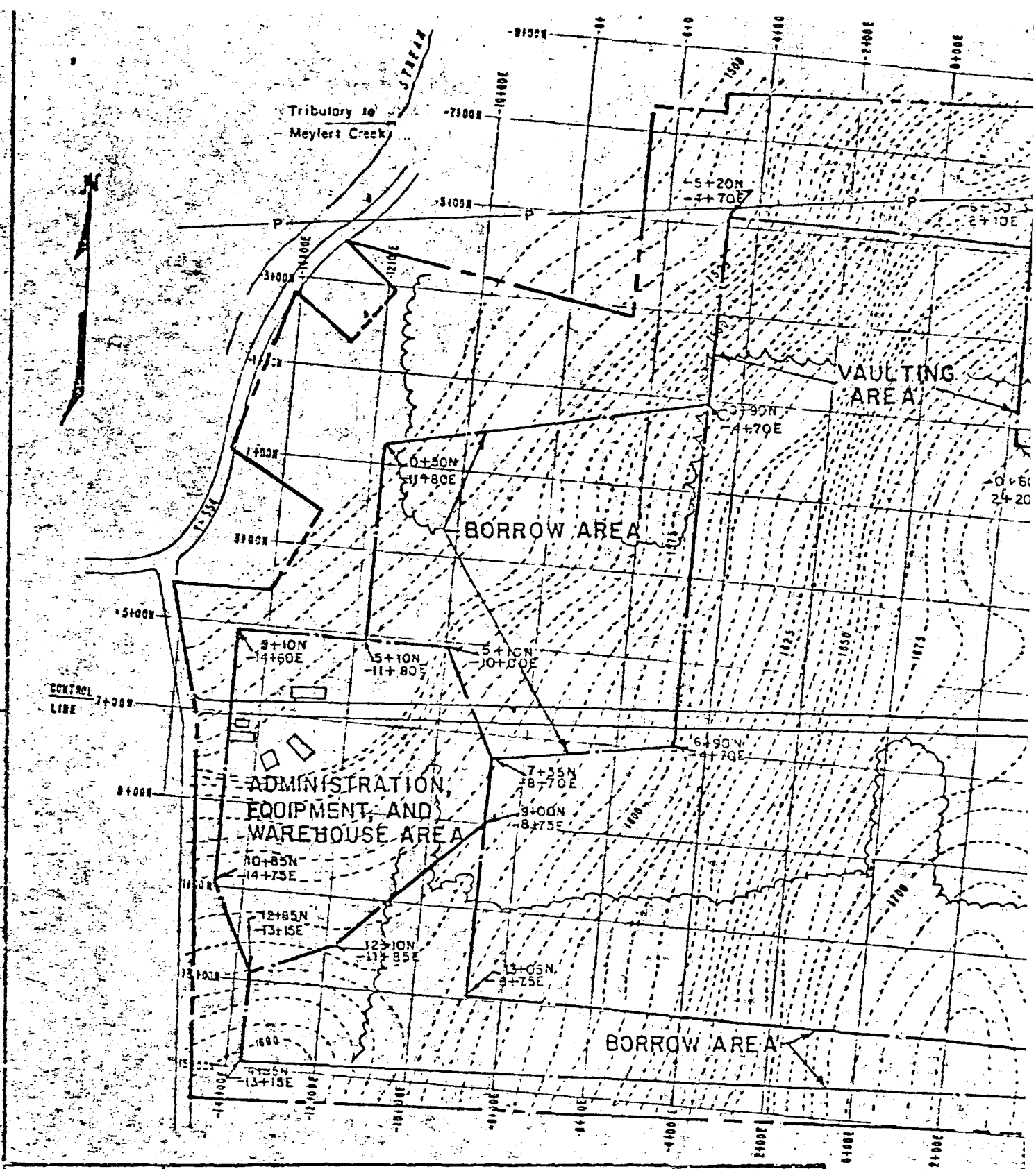

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NEW MILFORD TOWNSHIP SUSQUEHANNA COUNTY

LYNCOTT CORPORATION

NEW MILFORD PENNSYLVANIA 18834

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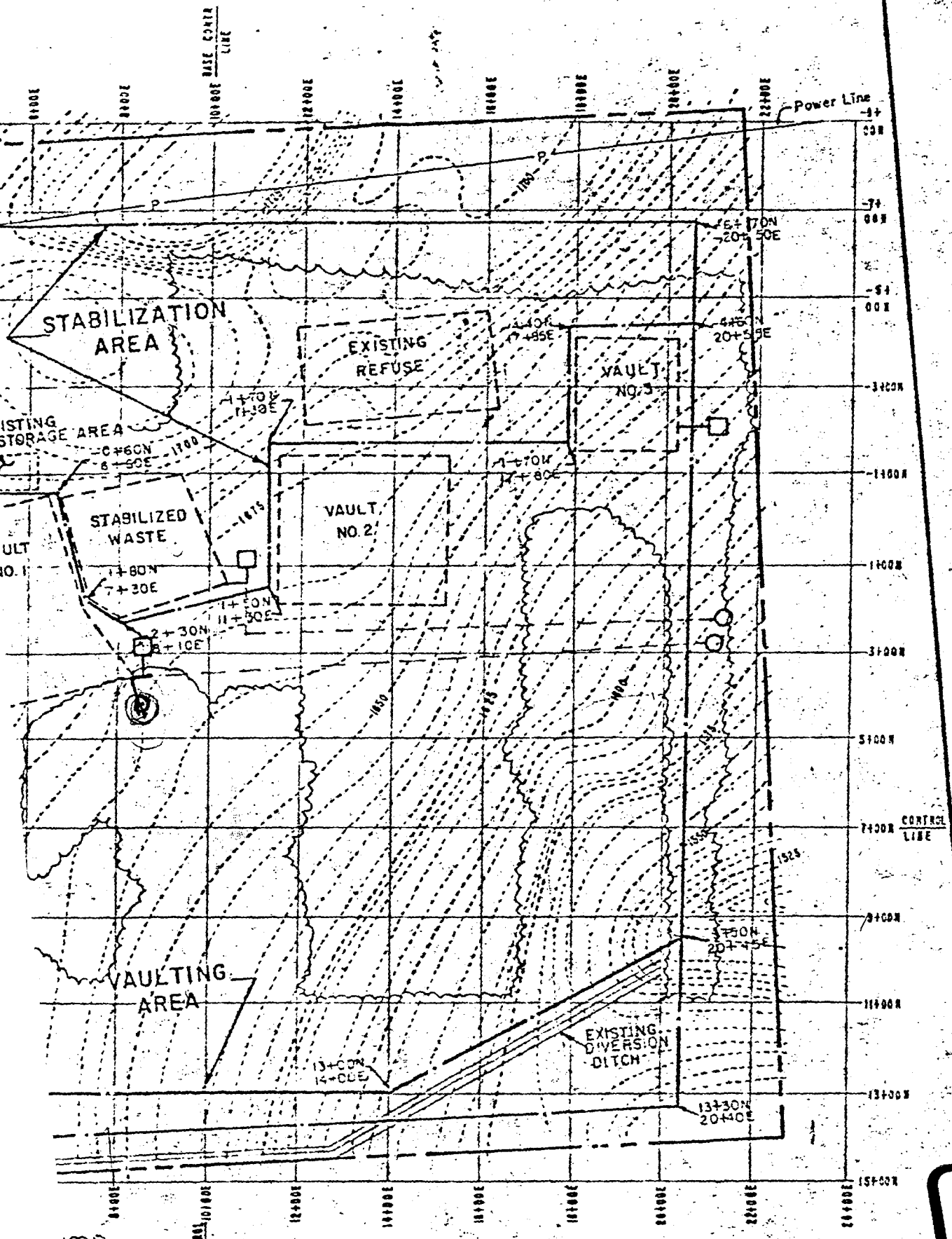

Appeal Ex. C 4/12/18

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SHEET 1 OF 22

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
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HOWARD W. MINNICH, et al. : Docket No. 81-149-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
INTERVENOR'S REQUEST FOR A STAY

Following the closing of the record in the above-matter and the submission of briefs on behalf of appellants and the authority, the authority requested an indefinite stay in the instant proceedings. Appellants concurred in a temporary 2-week stay. On June 22, 1982, the authority requested a continuation of the stay and on July 19, 1982 this board received appellants' objection to a continuation of said stay.

Appellants point out that if the EPA, following its study of the authority's project, fails to fully defund that project, appellants would still desire to press forward with their appeal. Appellants also note that the only unfinished business in this matter is affording the authority an opportunity to reply to appellants' second brief, so that the cost to the authority to place this matter in a posture for decision would be minimal.

Although the board is reluctant to undertake the extensive review of the record in this matter in order to issue an opinion which may be mooted by events,

it is our duty to address issues properly raised before us unless all affected parties agree to a continuance or settlement. Thus, we will grant the authority an additional post-ponement until August 19, 1982 within which to submit a reply brief.

ENVIRONMENTAL HEARING BOARD

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Chairman

cc: Bureau of Litigation
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Harry C. McNeal, Jr., Esquire
Glen R. Grell, Esquire

DATED: July 22, 1982

COMMONWEALTH OF PENNSYLVANIA

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221 NORTH SECOND STREET
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SUNNY FARMS, LTD., et al. : Docket No. 81-046-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and OUCH, INC., Intervenors

OPINION AND ORDER SUR INTERVENOR'S
PETITION TO INTERVENE AND APPELLANTS' MOTION TO DISMISS

On or about April 1, 1981 DER issued a letter suspending permit no. 300710 which DER had issued (on or about December 17, 1979) to Sunny Farms, Ltd. (SFL) for a solid waste disposal facility proposed to be located in North Codorus Township, York, County. SFL filed a timely appeal from said letter with this board which was captioned as set forth above.

On or about October 20, 1981 OUCH, Inc. and certain named individuals petitioned to intervene in the above-captioned matter.

The permittee moved to quash the would-be intervenors' petition on the basis that OUCH, Inc., et al. have no recognizable interest in this proceeding, or in the alternative, any interest OUCH, Inc., et al. may have is adequately represented by DER.

DER answered the said petition to intervene and noted that while it does not, in general, object thereto, it does object to the extent that the intervenors, once granted intervention status, would raise issues or challenges against DER.

On January 19, 1982 the board invited the permittee and DER to submit briefs on the issue of the status of an intervening party before the board and said briefs were duly submitted.

On or about March 29, 1982 the permittee filed a motion to dismiss DER's administrative order. DER filed an answer and new matter to permittee's motion on or about April 14, 1982. Neither party has requested leave to file a brief related to said motion and the board has not solicited any such brief.

Turning first to permittee's motion we find that although it is styled as a motion to dismiss it is, in actuality, a motion for summary judgment. This motion characterizes DER's order as being solely based upon the relationship of the permittee to Lyncott Corporation and argues that nothing in the Solid Waste Management Act, the Act of July 7, 1980, P.L. NO. 97, 35 P.S. §§6018.101 *et seq.* authorizes DER to suspend the permit of a corporation solely on the basis of its relationship to another corporation (like Lyncott) which has allegedly committed past violations of the said Act.

DER's answer to permittee's motion denies that its order was based solely upon corporate relationship. Instead DER avers that the interrelationship between corporate officers between permittee and Lyncott as well as similiarities of technical design, construction and disposal methodology and operational plans between the Lyncott facility and permittee's proposed facility justifies its order.

Without making any final rulings we note the §6018.503(c) of the Act specifically authorizes DER to deny a license to a corporation (or suspend same) if it finds that "a principal of the corporation was a principal of another corporation which committed past violations of the act". The word "principal" as used in §6018.503 (c) is not defined in the Act, but on the present state of the record we cannot say that Richard Valiga as alleged president of both the permittee and Lyncott is and/or was not a principal of both corporations.

Perhaps the permittee will be able to show that he is not a principal of either or both corporations but this need for proof demonstrates clearly that there are outstanding factual issues which preclude the issuance of a summary judgment.

Moreover, we perceive DER's suspension to be based, at least in part, upon its fear that the construction and disposal methodology and operation which have been discredited at Lyncott will not work any better at Sunny Farms. Surely, if DER could demonstrate a sufficient nexus between the existing Lyncott facilities and those proposed at Sunny Farms, it would have the authority under *inter alia* §6018.104(13) to preclude the creation of another environmental and public health problem. Of course, the permittee might be able to demonstrate crucial distinctions between the Lyncott facilities and those proposed for Sunny Farms, but again, this would require a hearing on the merits and precludes the entry of summary judgment.

Since we have denied the permittee's motion to dismiss DER's order, and it seems that the present proceedings will continue, it becomes incumbent upon the board to determine if, and to what extent, the would-be intervenors may participate in this process.

Only the permittee totally opposes the proposed intervention of OUCH, Inc. DER objected to the petition to intervene to the extent that the prospective intervenor might seek to raise issues which improperly expand the scope of the matter. Permittee's reason for its per se objection to intervention is that OUCH, Inc. (allegedly) has failed to demonstrate that its interests are inadequately represented by DER. In this regard it is noted that burden of making such a showing should be treated as minimal. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972) and that intervention should be allowed where the intervenor's involvement will benefit the trier of fact *Commonwealth Edison Company v. Train*, 71 F.R.D. 391 (N.D. Ill. 1976) and this is espcially true where the proceedings before a federal court become analogous to those before an administrative tribunal *U.S. v. Reserve Mining*, 56 F.R.D. 408 (D. Minn. 1972).

In view of above authority we hold that OUCH, Inc. and the individuals named in the petition to intervene may intervene in the instant proceedings.

We further hold that as parties to this proceeding the intervenors may raise any issue which could have been raised by an appellant on the date the petition to appeal was filed with this board. We have reviewed the authority cited DER and permittee from which they argue for a narrow role for intervenors but we do not find this authority compelling. These cases require an intervenor to take the action "as he finds it" but what does this mean. In the context of a hearing before this board we belive this means that an intervenor cannot change an appeal from DER's suspension of a permit into an appeal from its issuance thereof but this is not the same as saying that an intervenor is restricted to the issues raised by the original appellant. Indeed, permissive intervention in a federal court action has been granted because the intervenor raised new and significant issues relevant to the dispute *Environmental Defense Fund v. Castle*, 79 F.R.D. 235 (D.D.C. 1978) and even where intervenors were in general limited to argument on issues already in the case there were, nevertheless, allowed to address additional areas wherein they had specialized knowledge such as knowledge of local conditions *California v. Bergland*, 13 ERC 1797 (E.D. Cal. 1979).

As stated above we agree with DER and the permittee that an intervenor may not make an end run around §21.52 of our rules by intervening, i.e. an intervenor is estopped as any other party would be if the DER action he would attack falls within §21.52. The way to attack this problem, however, is not by refusing intervention but by limiting issues pursuant to a motion for same filed after the intervenors file their pre-hearing memorandum.

O R D E R

AND NOW, this 9th day of August, 1982, the permittee's motion to dismiss DER's administrative order is denied and the intervenors' petition for intervention is granted.

Intervenors shall file a pre-hearing memorandum in accordance with Pre-Hearing Order No. 1 issued in this case within thirty (30) days from receipt of this Opinion and Order.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: August 9, 1982

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Howard J. Wein, Esquire
Bruce S. Katcher, Esquire
Michael Q. Davis, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROGER E. GERHART AND GERHART ROAD MATERIALS, INC. : Docket No. 82-093-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
APPELLANT'S PETITION FOR RECONSIDERATION

The procedural history of this matter was rehearsed in the Opinion and Order Sur DER's Motion to Dismiss issued in the above-captioned matter on or about May 27, 1982 which Opinion is incorporated herein as if fully set forth. The Order of May 27, 1982 dismissed appellant's appeal on the basis of appellant's failure to answer DER's motion to dismiss on or before April 19, 1982 which the board understood to be the date by which appellant would respond pursuant to an agreement of counsel. The board's (mis)understanding arose from its copy of a letter dated April 7, 1982 from DER's counsel in this matter to appellant's counsel.

Because of this letter the board did not follow its normal practice of sending appellant's counsel a "motion letter" giving appellant a set period within which to respond to DER's Motion to Dismiss. Rather, the board waited for more than a month beyond this supposed answer date and then issued the above described Opinion and Order.

On or about June 2, 1982 appellant filed an Application for Reconsideration. Appellant's counsel admitted receipt of both DER's motion and the letter from DER's counsel but appellant's counsel further averred that he understood, pursuant to a telephone conversation with M. Diane Smith, Secretary to the EHB, that he would be receiving a motion letter from the board and he concluded that his answer to DER's motion to dismiss need be filed on or before April 19, 1982 or as set by motion letter, whichever date was later. Ms. Smith verifies Mr. Mikus' recollection of their phone conversation and I remember her asking me whether we would send out a motion letter to which I replied we wouldn't send one out due to the supposed agreement of counsel.

It seems that there has been a misunderstanding regarding the timing of appellant's response, the blame for which, like most misunderstandings, can be spread around. Certainly one would have expected Mr. Mikus to have contacted the board within the almost two month period following receipt of DER's Motion to Dismiss and preceeding the board's Opnion and Order. On the other hand, perhaps the board should have alerted Mr. Mikus that no motion letter would be issued in this matter. Under the circumstances, it seems unfair to penalize the appellant by refusing to consider his answer to DER's Motion to Dismiss and thus we grant reconsideration.

Turning to the merits, the simple fact is that appellant's appeal from DER's order of February 23, 1982 was filed with this board on March 31, 1982, i.e., 32 days from appellant's receipt thereof. Thus, this appeal is untimely pursuant to 25 Pa. Code §21.52(a) of our rules and this board has no jurisdiction over said appeal the application of barring application of *nunc pro tunc* principles, *Rostosky v. Commonwealth, DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

As we noted in *Albert M. Comly and Elizabeth H. Steele v. DER and Wichard Sewer Company, Inc.*, EHB Docket 80-160-H (issued May 13, 1981) and *Sharon Steel Corporation v. DER*, EHB Docket 75-150-C (issued October 11, 1978), an appeal *nunc*

pro tunc can rest upon the unintentional misleading of a would-be appellant by an authorized DER official.

In his Application for Reconsideration appellant's counsel first alleges that he was misled by his own client. Clearly, this averment would not constitute grounds for the application of the *nunc pro tunc* doctrine under existing case law. The Application for Reconsideration, however, further sets forth allegations which bear closer scrutiny in light of our opinions. Essentially the application, and Mr. Mikus' affidavit, avers a conversation occurring on March 29, 1982 between Ms. Straube and Mr. Mikus in which he understood her to tell him that the time to perfect an appeal had run sometime during the previous week. In fact, Mr. Mikus could have and, he avers, would have filed a timely appeal on March 29, 1982 but for his reliance upon Ms. Straube's statement.

DER's Reply to New Matter and Ms. Straube's Affidavit substantially confirm Mr. Mikus' version of the March 29, 1982 phone call but with certain important qualifications. As Ms. Straube stated in her Affidavit:

> "On or about March 29, 1982, I received a phone call from Kent Mikus, attorney for Roger E. Gerhart and Gerhart Road Materials, Inc. The purpose of his call was to discuss the possibility of settlement and was not for purposes of determining the end of the statutory appeal period. Without consulting any notes or a calendar, I told him that based upon my recollection of when Mr. Gerhart had told me he had received the Order, it was my impression that the appeal period had probably already run. I did caution Mr. Mikus, however, that his client would know best when he actually received the Order and that the appeal period should be calculated from that date."

Mr. Mikus' affidavit denies that Ms. Straube indicated to him that she was basing her statement that the time period within which to perfect an appeal had already run on any information supplied to her by the appellant. We are reluctant to attempt to ascertain which version of the March 29, 1982 conversation more accurately reflects its contents. We certainly don't question the veracity of either

counsel but note in passing that memory appears to suffer distortion under the pull of interest not unlike the deflection of light beams due to the gravity of massive stars. Fortunately, we do not feel it necessary to choose between the affidavits of counsel. This is because we believe that even if we accept Mr. Mikus' affidavit for the sake of argument a case for appeal *nunc pro tunc* is still not made out.

This is because we do not believe that Mr. Mikus was entitled to rely upon Ms. Straube's statement concerning the appeal period even as he remembered it. We feel that it was incumbent upon him to investigate this matter with his client as was suggested by Ms. Straube (which he apparently did). If Mr. Mikus' client gave him an erroneous response which prevented a timely filing of an appeal this certainly cannot be held against the Commonwealth.

Moreover, we note that Ms. Straube, as per the undisputed portion of her affidavit, alerted the appellant early and often regarding the need to obtain counsel and/or to file an appeal to perfect his rights. Yet, Mr. Mikus avers that he was first contacted by the appellant on March 29, 1982. Clearly, the blame in this matter resides in neither counsel but rather in the appellant who rested a little too long on his rights.

O R D E R

AND NOW, this 17th day of August, 1982, the Commonwealth's Motion to Dismiss is granted and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 17, 1982

cc: Bureau of Litigation
Michele Straube, Esquire
Kent D. Mikus, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ACCO INDUSTRIES, INC. : Docket No. 82-139-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S
FIRST AND SECOND MOTIONS TO STRIKE

Pursuant to Section 605 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, Act 97, 35 P.S. §6018.605, DER has the power and authority to assess civil penalties for violations of said Act and the rules and regulations promulgated thereunder. On or about May 4, 1982, DER issued a written civil penalty assessment under said Act in the amount of twenty-one thousand ($21,000.00) dollars to Acco Industries, Inc. (Acco or appellant). On or about June 2, 1982, Acco filed a notice of appeal from said assessment with this board at the above-caption. In paragraph 3(a)(5) of said notice of appeal Acco alleged that as late as July 15, 1981 appellant was informed by DER that it sought $13,000.00 in penalties and would settle for $10,000.00.

On or about June 22, 1982 DER filed a (First) Motion to Strike the allegations contained in paragraph 3(a) and 5 of Acco's notice of appeal. DER characterized these allegations concerning "offers of settlement and evidence regarding settlement

negotiations and cited authority for the proposition that such evidence is not admissible in a civil proceeding. On or about July 12, 1982 Acco filed a response to DER's motion including a "Statement of Facts" and on or about July 12, 1982 DER moved this board to strike the "Statement of Facts" contained in Acco's response.

At DER's request oral argument was held on its First Motion to Strike on August 2, 1982 and at which time the board received Acco's response to DER's Second Motion to Strike and DER's brief in support of its First Motion to Strike.

As a starting point, we feel that DER's Second Motion to Strike is unnecessary since, however styled, the "Statement of Facts" in Acco's response has no legal significance in the case in chief, we shall therefore deny this second motion. As to the first motion, we would note that since a notice of appeal is not a pleading, the motion to strike is probably not the correct response to allegedly impertinent statements made therein. A preferred procedure would be to file a motion limiting issues following receipt of appellant's pre-hearing memorandum.

DER's Motion to Strike does raise a legitimate point, however, and is supported by substantial citation of authority. This board is reluctant to chill settlement negotiations. Thus, we would have no trouble granting DER's motion except for two arguments raised by appellant: first, that the conduct described in paragraph 5 of the notice of appeal does not constitute a settlement offer but rather an initial assessment and secondly, that DER's cited legal authority does not apply to situations where DER, rather than some independent tribunal, has the ultimate authority to assess penalties.

In light of these uncertainities we cannot grant DER's First Motion to Strike at this time. We shall, however, not deny it at this time either. Rather, we will defer consideration of this motion until after a hearing on the merits, by which time the context (and, indeed, the existance) of the alleged DER statements can be determined.

O R D E R

AND NOW, this 19th day of August, 1982, action upon DER's First Motion to Strike is deferred pending adjournment of a hearing on the merits in this matter and DER's Second Motion to Strike is denied.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Michele Straube, Esquire
John C. Uhler, Esquire

DATED: August 19, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NICK ZDRALE : Docket No. 82-172-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S MOTION
TO DISMISS PETITION FOR SUPERSEDEAS

On or about June 15, 1982, DER issued an administrative order to the appellant closing appellant's landfill and requiring, as per a schedule, certain remedial measures. On or about July 16, 1982 appellant's attorney filed with this board a Notice of Appeal and a Petition for Supersedeas. In conformance with the policy and rules of this board, the board staff attempted to schedule a supersedeas hearing within 6 days of receipt of said petition. However, despite repeated efforts, our staff was unable to contact either the petitioner--appellant or his attorney. Subsequently, on August 3, 1982, DER filed a motion to dismiss the said petition for supersedeas for failure to allege facts relevant to 25 Pa. Code §21.78 of the board's rules, which section governs the grant or denial of supersedeas. A review of the said petition indicates that it is devoid of any allegations which would entitle petitioner to a supersedeas.

O R D E R

AND NOW, this 19th day of August, 1982, the appellant's petition for supersedeas is dismissed without prejudice.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Howard J. Wein, Esquire
Dante G. Bertani, Esquire

DATED: August 19, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LAWRENCE COAL COMPANY : Docket No. 82-043-H and 81-101-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

This matter involves the petition for supersedeas of Lawrence Coal Company (Lawrence) filed in Lawrence's appeals at docket nos. 81-101-H and 82-043-H.

The appeal at 81-101-H is from an order of the department, dated June 19, 1981, directed to Lawrence. The order required, *inter alia*, that Lawrence treat all discharges of mine drainage at its mining site and the order amends the mine drainage permit for the site to provide that no additional mining could be conducted at the site unless and until Lawrence demonstrated to the department that additional mining could be conducted without producing more acid mine drainage.

The appeal at 82-043-H was from the department's letter of January 18, 1982, informing Lawrence that Lawrence had failed to demonstrate that additional mining could be conducted at its site without creating more acid mine drainage and advising Lawrence to backfill its site.

Upon Lawrence's request at the supersedeas hearing, the hearing was limited to a consideration of whether Lawrence should be allowed to conduct additional mining at its site.

DESCRIPTION OF THE SITE

Lawrence was authorized by Mine Drainage Permit 3376SM15 and Mining Permits 1063-5 and 1063-5A to conduct surface mining operations on a site located in Springfield Township, Fayette County. The site lies at the downhill (western) end of a tongue of higher ground defined by the valleys formed on the north by the Middle Fork and on the south by Buck Run (and an unnamed tributary thereto) and on the west by Laurel Run to which both Buck Run and Middle Fork report. The orientation and dip of this site is roughly from higher ground in the southeast at approximately 2300 feet (above sea level) to a low point in the northwest of approximately 1480 feet. Prior to mining, the entire tongue was overlain by a fairly uniform layer of sandstone some 40 to 60 feet thick which rested directly upon the mined coal. Various impervious layers especially of shale underlie the coal so that (the experts apparently agree) the majority of ground water flow across the site is controlled by the orientation of the pavement below the removed coal.

The eastern (uphill) portion of the tongue was mined by Marsolino Coal and Coke under the instant mine drainage permit but a different mining permit. Marsolino also began mining operations on Mining Permit 1063-5 and had mined approximately one or two acres on this tract prior to the transfer of said mine drainage and said mining permit to Lawrence. Lawrence has continued to mine on Mining Permit 1063-5 from the Marsolino cut (uphill) in an eastern direction until its operations were ceased by the above-referenced order. Lawrence has also mined and backfilled on Mining Permit 1063-5A which is contiguous to and north of 1063-5.

The road system in the area of the tongue roughly parallels the watersheds. On the south of the tongue, Township Route 683 (T683), also known as the Pirl Spring Road, parallels the south edge of mining on the Lawrence and Marsolino permits. The mining sites are located north and uphill from T683 and some hundred feet away from T683 while an unnamed tributary of Buck Run is located south of and downhill from T683 at a distance varying from 20 feet up to several hundred feet from said road. Buck Run proper lies south of the unnamed tributary. A series of seeps, some out of the bank defining north side of T683, cross T683 at certain culverts and report eventually to the unnamed tributary of Buck Run.

At the bottom of the hill, in an area known as Rogers Mill, the unnamed tributary joins Buck Run and Buck Run promptly joins Laurel Run which flows off to the northeast. T683 joins Township Route 687 at the same point. T687 (which parallels Laurel Run) is located at the bottom of the steep hill which comprises the western terminus of the Lawrence operation. This hillside includes a number of seeps, a discharge from an abandoned deep mine known as the Porterfield Mine and the north and south entries to another deep mine which had been originally sealed by the WPA. Laurel Run at this location is utilized as a fish hatchery, so that T687 is also known as the Fish Hatchery Road. To complete this description of the site, a haul road designated as T685 comes off T683 and runs uphill essentially west to east through the site to the location of the present highwall; T685 divides Mining Permit 1063-5 from Mining Permit 1063-5A.

THE PROBLEM DESCRIBED

As set forth above, the issue for discussion in this matter is whether Lawrence should be permitted to make three additional cuts on the area covered by

Mining Permit 1063-5. At present Lawrence's latest cut is near to the high ground which divides the Middle Fork watershed on the north from the Buck Run watershed on the south. However, DER's hydrogeologist, Joseph Schueck agreed with Dr. Donald Strieb, the hydrogeologist who testified on behalf of Lawrence, that the present highwall was located wholly in the Buck Run watershed. Moreover, both hydrogeologists agreed, on the basis of structure contour maps of the pavement below the mined coal, which they had independently prepared, that any underground drainage from the present cut and three additional cuts, if restricted to the Buck Run side of the hill, would not flow toward the Middle Fork either as surface flow or as groundwater. Further, DER did not contradict the testimony of Mr. James Filiaggi, Lawrence's superintendant, that the additional cuts would cover no more than 6 acres as compared to the approximately forty acres already mined on Mining Permits 1063-5 and 1063-5A so that, as he further testified, the additional mining would add only approximately 10% to the mined area and to the drainage from the site.

Finally, DER did not contest Mr. Filiaggi's testimony that the additional cuts would yield approximately 20,000 tons of coal, that Lawrence had a ready market for this coal, that mining this coal would provide approximately 6 jobs for three months or that Lawrence has approximately one million dollars worth of equipment standing idle on the site.

If these were the only facts in the case DER's refual to allow additional mining on Mining Permit 1063-5 would certainly seem to be suspect. Granted, the lost employment opportunities about which Mr. Filiaggi testified cannot be considered to demonstrate irreparable harm since only 3 months employment is at issue which employment may await decision on the merits and granted, further, that there is a question as to whether Lawrence has standing to raise this issue; nevertheless, it is at present uncontradicted that Lawrence cannot move the $1,000,000.00 worth of equipment on site with out incurring an irreparable loss and that use of this equip-

ment will not compensate for its present idleness. Thus, we think that Lawrence has sustained its burden on irreparable loss so as to satisfy one of the three §21.78 criteria for obtaining a supersedeas.

The other facts established in the record in this matter do not as strongly support Lawrence's petition. The most damaging fact is that acid mine drainage is presently seeping (and occasionally gushing) from at least two general areas of the site (the breakout and the toe of spoil ditch). The breakout of acid mine drainage which gave rise the DER's closure order of March 1981 was described and dealt in with the opinion and order of this board in *Lawrence Coal Company v. DER*, EHB Docket No. 81-031-W (issued May 7, 1981). This breakout has been addressed by Lawrence with a series of treatment ponds but this breakout continued, up to the date of hearing, to fail to meet all applicable effluent standards. Moreover, both Dr. Strieb and Joseph Schueck agreed that the majority of mine drainage from the 3 additional cuts and indeed from the entire Lawrence site follows the downhill dip of the pavements to the vicinity of the breakout (which is located on Mining Permit 1063-5A near the western or lower edge of the site). Thus, the additional cuts could exacerbate the breakout problem.

In addition, the toe of spoil discharge along T683 which is also being collected and treated by Lawrence, at another set of treatment ponds, could also feel the impact of the additional cuts. Mr. Schueck's structure contour map demonstrated a roll in the coal directed towards T683 which could divert some flow from the three additional cuts from a northwesterly direction to a southwesterly direction, i.e., towards T683. It is interesting that this roll is depicted as exiting at the exact location of the toe of spoil discharge and it is practically dispositive that Mr. Schueck's testimony (which was based upon coal mapping) was supported by the eyewitness observations of Mr. James Filiaggi, Lawrence's superintendant, who certainly had no interest in supporting Mr. Schueck' testimony. Finally, in this regard, Dr.

Strieb did not dispute the existance of the roll in the coal and agreed that if it existed it could divert water in the manner described by Joseph Schueck. While the toe of spoil discharge is apparently being treated at present to applicable standards, its pre-treatment quality is clearly indicative of acid mine drainage and so that any failure of treatment or cessation of treatment could produce additional acid mine drainage (AMD) from the site.

In sum, there is no serious dispute that the Lawrence site is now producing AMD which but for Lawrence's collection and treatment could exit the site and pollute the waters of the Commonwealth. Indeed, Lawrence's own expert witness, Dr. Strieb, admitted that the overburden on the site had produced AMD and that further mining would produce further AMD.

The Commonwealth suggests that these facts are dispositive. Relying upon our opinion and order in Lawrence 81-031-W, *supra* and the authority of *PA P.U.C. v. Israel*, 356 Pa. 400, 52 A.2d 317 (1947); *Commonwealth of PA, DER v. Coward*, ____ Pa. ____, 414 A.2d 91 (1980), DER argues that any further production of acid mine drainage is contrary to law and thus evidences *per se* harm to the public such as to preclude the granting of a supersedeas pursuant to §21.78 of our rules. We agree with the Commonwealth that we cannot permit any increased discharge of AMD to the waters of the Commonwealth but we do not agree that the mining of three additional cuts will necessarily increase the discharge of AMD to the waters of the Commonwealth.

Lawrence has, as a result of DER's continued vigilence, installed collection and treatment facilities to address both the toe of spoil and breakout discharges described above. The discharge from the toe of spoils facility has apparently met DER effluent standards over time as evidenced by a thorough DER sampling program which is in evidence in a companion case, *DER v. Lawrence Coal Company*, EHB Docket No. 81-021-CP-H, of which we take official notice. Thus, we must state, that as of this point in time, and while this facility continues to operate, no additional AMD

will be discharged via the toe of spoil route regardless of whether or not three additional cuts are taken.

The breakout discharge route presents a more difficult situation. The above-referenced sampling program, and Lawrence's admission, make it abundantly clear that until recently the breakout discharge wasn't collected or treated at all and that even now Lawrence's treatment of this discharge has failed to attain the required effluent standard for manganese. Moreover, DER asserts, though Lawrence denies, that AMD exits from the Lawrence site also contributes to the discharge of AMD from the south seal of the old deep mine adjacent to T687 and it is uncontradicted that this water is not treated at all.

The suggestion of Lawrence's counsel that a supersedeas would have to be conditional upon Lawrence's meeting all applicable effluent standards at both treatment facilities seems to resolve the board's concern regarding effective treatment of the breakout discharge although we do believe that a track record of successful treatment is necessary before any additional cuts are taken and this is provided for in the order below.

As to the south seal problem, we feel that, at this point, the hydraulic connection, if any, between the Lawrence site discharge and the south seal has not been demonstrated. The Commonwealth's evidence to support this alleged hydraulic connection comprised a WPA deep mine map which Joseph Schueck transposed on to his structure contour map as well as James Filiaggi's admission that Lawrence encountered a void which was possibly a deep mine tunnel while mining on Mining Permit 1063-5A.

We cannot place much credence on the mining map; first because Mr. Scheuck admitted that these maps were notoriously inaccurate in themselves and secondly, because of difficulties he testified to in scaling up from the mine map to the structure contour map. Similarly, Mr. Filiaggi's admission gives little support to DER's theory because neither Mr. Filiaggi nor anyone else testified as to the

orientation or extent of any mine workings which might have been encountered. There is simply no evidence connecting this mine void to the south seal.

We do not mean to preclude further evidence on this point, perhaps based upon the chemical signature of the south seal discharge, but, at this point, we cannot allow the possibility of the existance of a hydraulic connection between the south seal and the Lawrence site to stand in the way of conduct which we feel may improve conditions at this site. In conclusion of this portion we do not feel that the production of AMD on the Lawrence site during mining need necessarily preclude additional cuts so long as the above-described discharges of AMD are collected and treated according to law.

We do not agree with Lawrence, however, that this should be the end of our inquiry; we are concerned about post-mining discharges of AMD too. Dr. Streib testified that even though he expected that backfilling and revegetation of the Lawrence site would minimize post-mining discharges of AMD such discharges would still occur. Therefore, unless permanent treatment and/or abatement techniques are utilized at this site the three additional cuts could be expected to exacerbate post-mining discharges by some 10%.

Fortunately, Dr. Streib testified, with the concurrence of DER officials, that techniques for abatement and/or permanent of AMD are available. It would seem that implementation of the permanent treatment techniques at the site would be premature at this time since the construction of these facilities requires assignment of responsibility for *inter alia* the breakout discharge and the south seal discharge to Lawrence Coal and Lawrence vigorously denies responsibility for either discharge. Installation of permanent treatment must await a hearing on the merits.

On the other hand, Dr. Streib testified that the most effective abatement technique on this site would be the construction of an underground diversion channel located at the uphill end of the Lawrence operation to divert groundwater away from

the mined and reclaimed portion of the Lawrence site so as to preclude the production of AMD by precluding contact of said groundwater and the overburden on the site.

It would seem that such a diversion channel could be constructed at the same time and with the same equipment and personnel used to make the three additional cuts and, if properly designed and constructed, could only help to minimize (or perhaps eliminate) the need for permanent post-mining treatment.

We believe that if construction of a properly designed diversion channel accompanies excavation of the three additional cuts, the present pollution-producing potential of the site will be reduced even though the extent of mined area will be increased by some 10%. Moreover, by permitting the three additional cuts we will also be maximizing use of the coal resource and setting the stage for complete reclamation of the site.

Dr. Streib has testified that closing the present open pit and revegatating the site could, in itself, reduce infiltration to and AMD production on the site. Clearly, the sooner this is done the better.

O R D E R

AND NOW, this 8th day of September , 1982, DER's order of June 19, 1981 and DER's letter of January 18, 1982 are superseded to the extent and upon the conditions set forth below:

A) Lawrence may make three additional cuts on Mining Permit 1063-5 provided that: 1) these cuts are restricted to the cross-hatched area shown on attached Exhibit A;

2) these cuts are kept on the south side of the crest of the hill dividing the Middle Fork and Buck Run watersheds;

3) The effluent from the toe of spoil and breakout treatment ponds, at all times from the date of this order, complies with all applicable limits subject to deviations caused by standard force majuere conditions;

4) The location of each cut must be approved by DER to ensure compliance with requirements 1, 2 and 3 above and DER's mine inspector may cease operations for violation of any of the said requirements;

5) before making any of the authorized additional cuts Lawrence must obtain DER approval, which may not be unreasonably withheld, of the underground diversion channel described above, as well as any additional facilities necessary to handle the diverted flow, and

6) Lawrence shall construct the said underground diversion channel as soon as feasible during its additional mining operations but in no event later than opening the third cut;

7) this order will be superseded by an adjudication following a hearing on the merits.

ENVIRONMENTAL HEARING BOARD

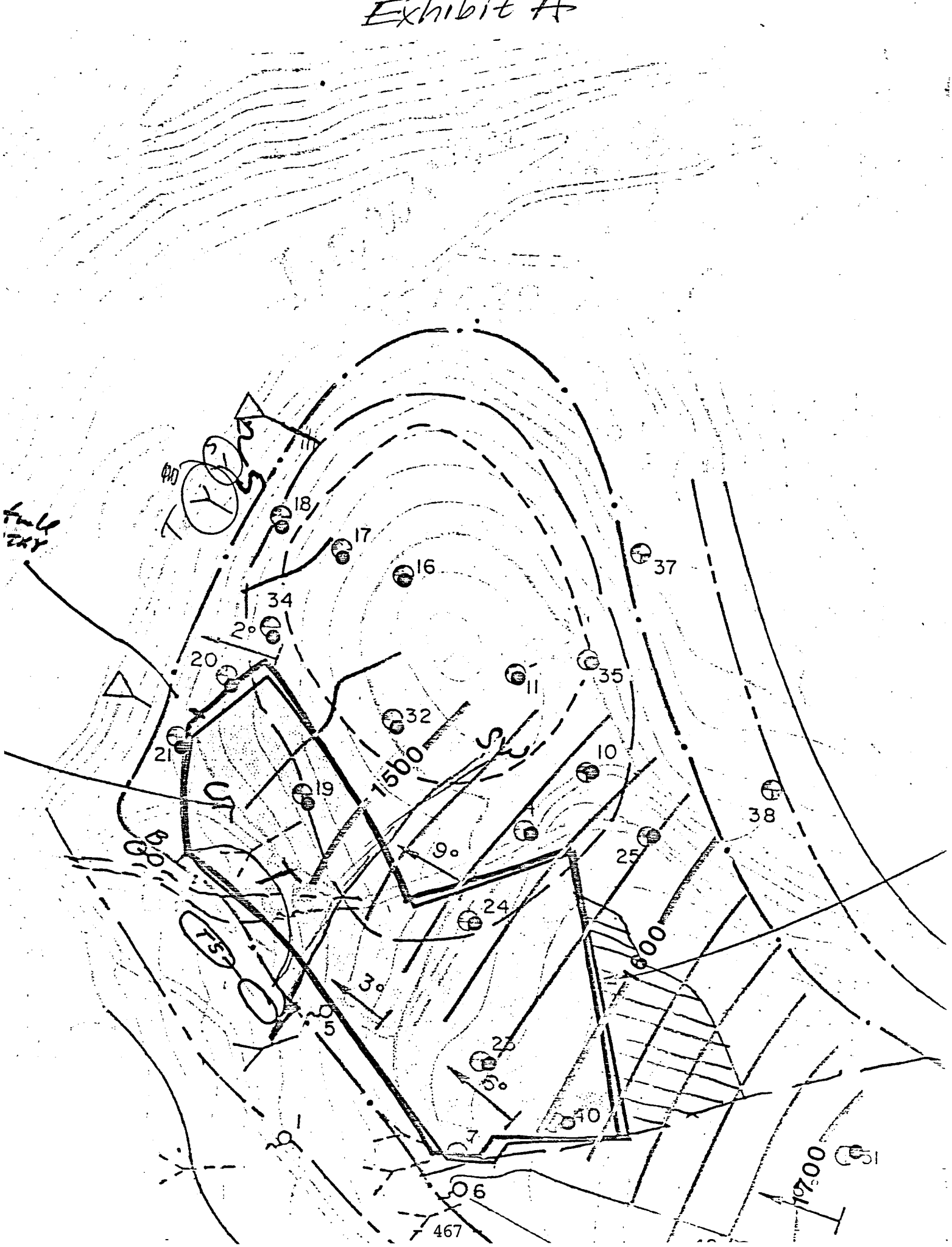
BY: DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: September 8, 1982

Exhibit A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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WESTERN PENNSYLVANIA WATER COMPANY : Docket No. 81-210-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HEPBURNIA COAL COMPANY, YINGLING COAL COMPANY,
STOUT COAL COMPANY and P&N COAL COMPANY, Permittees

OPINION AND ORDER

AND NOW, this 9th day of September, 1982, in consideration of the motion for extension filed on behalf of the permittees in each of the above-captioned matter and in consideration of DER's answer thereto and in order to provide a reasonable extension of the time to file pre-hearing memoranda so that settlement negotiations may continue yet to obtain for DER a timely adjudication of said permits, should said negotiations fail, it is hereby ordered that discovery in this matter shall be concluded within 45 days from the date of this order and that the appellant shall comply with the board's Pre-Hearing Order within 60 days from the date of this order.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Anthony P. Picadio, Esquire
Stout Coal Company
Bradford F. Whitman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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TOWNSHIP OF INDIANA	:	Docket No. 82-099-G
and	:	
CONCERNED CITIZENS OF RURAL RIDGE, Rae Ann Tabis, Secretary, Trustee ad Litem	:	Docket No. 82-100-G
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DUQUESNE LIGHT COMPANY, Permittee		

OPINION AND ORDER SUR PERMITTEE'S
PRELIMINARY OBJECTIONS

On March 24, 1982, The Department of Environmental Resources (DER) awarded Duquesne Light (Duquesne) a permit to operate a solid waste disposal and processing facility (the facility) in Indiana Township, Allegheny County. On April 22, 1982, Indiana Township (the Township) filed with this Board a timely appeal of this permit issuance, which was docketed at 82-099-G. On the same day, April 22, 1982, the Concerned Citizens of Rural Ridge (Citizens) also appealed issuance of this permit; the Citizens' appeal was docketed at 82-100-G. The Township and the Citizens each offered identical reasons for their appeals, namely:

(1) The dumping of fly ash, particles of which contain heavy metal poisons, upon active springs and and a mountain stream, despoils the environment and threatens the health and safety of the residents of Indiana Township.

(2) Air pollution will inevitably occur at the dump site to the detriment of the residents living in the area.

(3) No alternate sites to the dumping of fly ash have been considered.

(4) There is no regular inspection and monitoring of the site for residual hazardous wastes, such as PCB's previously dumped on land adjacent to the site, during construction.

(5) Depending on exact chemical content and concentration fly ash has varying degrees of carcinogenicity, the dumping of which threatens the health and safety of the residents of Indiana Township.

(6) There is no prescribed monitoring of the safeguards set forth in the permit by the Dept. of Environmental Resources.

(7) Duquesne Light Company's past performance at dump sites indicates an inability and/or lack of desire to abide by local and state requirements.

On June 4, 1982, Duquesne filed preliminary objections to the Township's appeal. Duquesne alleged the Township's appeal should be dismissed because:

a. The Township lacks standing.

b. The Township's stated reasons for its appeal (items (1) to (7) supra) would require DER to consider factors DER has no obligation to consider.

On June 4, 1982, Duquesne also filed preliminary objections to the Citizens' appeal. Duquesne alleged the Citizens' appeal should be dismissed for the same two reasons a and b just quoted. However, in the case of the Citizens, Duquesne further alleged the appeal should be dismissed because also:

c. The Citizens had not complied with the Pennsylvania Rule of Civil Procedure 2152 (R.C.P. 2152) with regard to actions by unincorporated associations.

In both sets of preliminary objections, Duquesne also asked the Board to order the appellants to file a more definite statement than the appellants'

aforementioned reasons (1)-(7) for appealing, in the event that the Board refused to dismiss the appeals.

Standing

Duquesne argues that in order to have standing to appeal, the Township must have an interest in the subject matter or particular question litigated (in this case DER's permit grant to Duquesne) which is "substantial, immediate and direct". This asserted test for standing is a correct statement of Pennsylvania law. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), Susquehanna County v. DER, 58 Pa. Cmwlth. 381, 427 A.2d 1266 (1981) and ____Pa. Cmwlth. ____, 443 A.2d 870 (April 13, 1982). The Township's claim that the permit grant "threatens the health and safety of the residents of Indiana Township" (see reasons (1) and (5) supra from the Township's Notice of Appeal) is insufficient to confer standing under the authorities just cited. In particular, the Township lacks standing merely "to assert the rights or claims of individual property owners" against DER. Strasburg Associates v. Newlin Township, 52 Pa. Cmwlth 514, 415 A.2d 1014 (1980). Rather, as the Strasburg Court said, the Township must show that the action appealed from:

> has either adversely affected its municipal purpose in carrying out local government functions or acted in some way to affect rights or claims of individual property owners against the Department in which the Township would act as Trustee.

The Township's Notice of Appeal does not allege facts which could make such a showing. This Board consistently has followed the Strasburg ruling. Wayne J. Busfield et al. v. DER, 1980 EHB 179, Borough of Jefferson v. DER, 1980 EHB 288, Lower Providence Township v. DER, EHB Docket No. 81-078-M Opinion and Order (February 10, 1982).

On June 24, 1982, the Township filed its response to Duquesne's Preliminary Objections. Its response to Duquesne's claim that the Township lacked standing asserted:

> The Township can demonstrate that...Duquesne Light Company has caused problems in the past with respect to road maintenance and traffic enforcement and can further demonstrate that the burdens caused by this permit will directly affect the Township's ability to render municipal service.

On its face, this assertion meets the Strasburg test (quoted supra) for the Township's standing to appeal. Nonetheless, Duquesne, citing Strasburg, still urges us to dismiss the Township's appeal for lack of standing, on the grounds that the just-quoted assertion is not supported by facts, and is otherwise too speculative to confer standing. Duquesne further argues that the Township has had the opportunity to file an affidavit setting forth the needed facts, and has not done so; nor has the Township amended its Notice of Appeal to include its just-quoted allegation of standing. Therefore, Duquesne concludes, dismissal of the Township's appeal is required under the Pennsylvania Rules of Civil Procedure (Pa. R.C.P.).

We disagree that dismissal is required at this stage of the instant proceedings. Duquesne's arguments assume that a Notice of Appeal filed before this Board is closely analogous to the initial pleading in a Pennsylvania civil court action. But a Notice of Appeal to us is not closely analogous to a complaint in a civil court action. For example, if a Notice of Appeal were to be treated as a complaint pleading under Pa. R.C.P. 1017(a), then we would expect (under Pa. R.C.P. 1026) that DER would have to file an answer to the Notice of Appeal within 20 days. Yet 25 Pa. Code §21.64(c) specifically states:

> Due to the nature of appeal proceedings, unless otherwise ordered by the Board, neither the Department nor a permittee shall be required to file an answer to an appeal from an action of the Department.

Furthermore, this Board customarily permits appellants to offer arguments and testimony concerning objections (to DER's complained-of action) which have not

been listed in the original Notice of Appeal, provided proper notice of such arguments and testimony has been given in appellant's pre-hearing memorandum (see the Board's Pre-Hearing Order No. 1 in 82-099-G). This Board practice is consistent with the letter and intent of 25 Pa.§21.51(e), which recognizes that in appeals to this Board--which so often involve highly technical issues--the appellant frequently cannot be expected to fully articulate the grounds for his appeal until he has had the opportunity for discovery. Indeed, the Township's Pre-Hearing Memorandum, filed July 12, 1982, asserts it will show that specified special conditions of the permit will create an "undue enforcement burden on the Appellant"; such a showing could be enough to meet the Strasburg test for standing.

1 Pa. Code §31.2 of the General Rules of Administrative Practice and Procedure (the analogue--in the Rules of Administrative Practice and Procedure--of Pa. R.C.P. 126) reads:

> The rules in this part shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

Under 25 Pa. Code §21.1(c), this just-quoted rule pertains to the Board's proceedings. Consequently, especially in view of the discussion in the preceding paragraph, we hold that the Township's contention in its response to Duquesne's preliminary objections--that the burden caused the Township by Duquesne's permit "will directly affect the Township's ability to render municipal service"--is properly before the Board at this time although this contention has not formally been embodied in an amendment to the Township's Notice of Appeal. As of this date it is not clear that the Township will not be able to prove facts demonstrating this contention, which if demonstrated would show the Township does have standing under the Strasburg test. At this time, therefore, we reject Duquesne's preliminary objection that the Township lacks standing, without prejudice to Duquesne's right to renew this preliminary

objection at a later stage in these proceedings, in the form of a motion to dismiss for lack of standing. In effect our ruling agrees with DER's assertion, in its June 21, 1982 Response to Duquesne's Preliminary Objections, that the issue of the Township's standing should be deferred until a sufficient factual record has been developed.

The foregoing discussion of standing pertains also to Duquesne's objection that the Citizens lack standing. Here we are inclined to agree with Duquesne. The Citizens' Notice of Appeal does not allege injury to its individual members or to itself as an association (see reasons (1)-(7) quoted supra), and this deficiency is not remedied in the Citizens' Answer to Duquesne's Preliminary Objections. The Citizens cannot--as the Township can--allege that the action appealed from will affect their ability to render municipal service. The Citizens' Pre-Hearing Memorandum, filed July 28, 1982, does state that it will prove:

> 13. The individuals making up the Appellant, Concerned Citizens of Rural Ridge, will suffer a direct adverse economic impact resulting from a fly ash dump.

However, under the authorities we have cited supra, this alleged fact--the only alleged fact in the Citizens' Pre-Hearing Memorandum which speaks of injury to individual members of the association--is insufficient to confer standing on the Citizens; injury to the association itself as an association appears to be required, and the Citizens nowhere have made such an allegation. Duquesne's Memorandum of Law in Support of its Preliminary Objections correctly points out that Community College of Delaware County v. Fox, 20 Pa. Cmwlth 335, 342 A.2d 468 (1975), cited by the Citizens, actually supports Duquesne. As for Warth v. Seldin, 422 U.S. 490 (1975), also cited by the Citizens, no reasons have been offered why this opinion, addressed to the question of standing in the federal courts under the Federal Civil

Rights Act of 1968, in any way should control the Pennsylvania decisions on standing to appeal to the EHB from actions of DER.

Nevertheless we are reluctant to foreclose the Citizens' participation in this appeal, especially because some members of the Citizens' association probably would have had standing to appeal had they done so within the requisite 30-day period. 21 Pa. Code §21.52(a). Under 21 Pa. Code §21.52(a), we earlier have had no choice but to refuse the Citizens' July 24, 1982 petition for leave to amend their appeal to add individual property owners as parties (see Paragraph 6 of our Order in 82-100-G dated July 2, 1982). Even if the Township ultimately demonstrates it deserves standing (and it is by no means clear it can do so), dismissing the Citizens' appeal will mean that those persons most immediately affected by the proposed facility, namely those persons residing in its immediate vicinity, will have lost their chance to have their own counsel participate directly in the presentation of the case against the permit grant to Duquesne. Therefore, we will give the Citizens until October 1, 1982 to supplement their Pre-Hearing Memorandum with a statement of additional facts, if any, which the Citizens intend to prove and which (in combination with the facts already alleged) could confer standing on the Citizens. In fairness to Duquesne, to ensure these supplemental alleged facts indeed are likely to be proved, the facts averred in this supplement to the Citizens' Pre-Hearing Memorandum shall be verified by the Citizens' Trustee ad Litem, as per Pa. R.C.P. 1024(a); this supplement shall not contain averments which are inconsistent in fact. We will rule on the Citizens' standing to appeal shortly after receiving this pre-hearing memorandum supplement of theirs.

Relevance of Appeals to DER's Obligations

Our review of a DER action is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and

Gravel v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), Czambel v. DER et al., EHB Docket No. 80-152-G (issued April 30, 1981), Lower Paxton Township Authority v. DER, Docket No. 80-205-W (issued July 16, 1982). Duquesne argues that the appeals--of the Township and of the Citizens--should be dismissed because (according to Duquesne) the reasons (1)-(7) for the appeals, quoted supra, even if proved would not justify the conclusion that DER abused its discretion or arbitrarily exercised its duties or functions.

We are not convinced by this argument of Duquesne's. Although far from artfully pleaded, the aforementioned reasons (1)-(7) for the most part are concerned with factors (e.g., water pollution and air pollution) which DER was required to consider before granting the instant permit. 35 P.S. §6018.503. Therefore we shall reject Duquesne's second preliminary objection, in the nature of a Motion to Strike, which was described in Paragraph b supra. Assuming one or both of the parties can demonstrate standing, the hearing on the merits will determine which, if any, of the aforementioned reasons (1)-(7) are supported by evidence sufficient to show DER abused its discretion or arbitrarily exercised its duties or functions.

Failure to Comply With Pa. R.C.P. 2152

This preliminary objection of Duquesne's (described in Paragraph c supra), was well-grounded, but has been rendered moot by Paragraph 5 of our July 2, 1982 Order in 82-100-G. Therefore we herewith dismiss this preliminary objection.

Motion for a More Definite Statement

Duquesne has asked us to order the Appellants to file more definite statements of the reasons for their appeals, in the event we do not grant Duquesne's requests that the appeals be dismissed. We have not dismissed the appeals. However,

we will not order the Appellants to supplement their Notices of Appeal with more definite statements of their reasons for doing so. As our discussion of the standing issue has indicated, the details of an appellant's case frequently are not clarified--to the appellant himself as well as to the other parties--until the appellant is able to file his pre-hearing memorandum. Both Appellants now have filed their pre-hearing memoranda. At this stage in the proceedings, therefore, it would be pointless to ask the Appellants to make their Notices of Appeal more definite. Duquesne now must look to these Pre-Hearing Memoranda for the Township's and the Citizens' statements of their respective cases.

Consequently we shall not grant Duquesne's Motion for a More Definite Statement. However, Duquesne--in its Memorandum of Law in Support of its preliminary objections--also has asked the Board to permit Duquesne "reasonable discovery" in the event Duquesne must await Appellants' pre-hearing memoranda before ascertaining the Appellants' detailed bases for their appeals. Duquesne has made this request more specific by filing--on August 6, 1982 in 82-100-G--a request to conduct additional discovery. This request still is pending. The Citizens have agreed to this request for additional time to conduct discovery; DER has neither consented to nor opposed these requests. In the meantime the Board has given Duquesne a number of extensions of time to file its pre-hearing memoranda in these two appeals; both pre-hearing memoranda now are due September 20, 1982.

The Board's Rules permit discovery without leave of the Board for a period of 60 days after the appeal has been filed. 25 Pa. Code § 21.111(a). Our Pre-Hearing Order No. 1, which gave each appellant 75 days to file its pre-hearing memorandum, and then gave Duquesne another 15 days (after receipt of Appellant's pre-hearing memorandum) to prepare Duquesne's pre-hearing memorandum, obviously expected that Duquesne would conduct some discovery during the time it was awaiting

receipt of Appellants' pre-hearing memoranda. We do not feel that the aforementioned reasons (1)-(7) given by Appellants as their reasons for appealing were so vague that Duquesne was wholly unable to conduct effective discovery before receiving Appellants' pre-hearing memoranda. Indeed, Duquesne did engage in discovery within the 60-day period mentioned in 25 Pa. Code §21.111(a).

We have examined the Township's and the Citizens' Pre-Hearing Memoranda. The Township's Statement of Facts it intends to prove, called for in Paragraph 2A of the Board's Pre-Hearing Order No. 1, is wholly unsatisfactory. The Township's "facts" are purely conclusory. Moreover, the Township's "facts" appear to bear no relation to its reasons (1)-(7) supra for appealing. The Township is not required to state facts in its pre-hearing memorandum which will support each of its original reasons for appeal; however, the Township's attention is called to Paragraph 4 of Pre-Hearing Order No. 1 for the possible consequences of failure to state such facts. We will give the Township until October 1, 1982 to file a new pre-hearing memorandum curing the just-described deficiencies of the pre-hearing memorandum already filed.

The Citizens' Pre-Hearing Memorandum is more in the nature of a brief than a typical pre-hearing memorandum. Nevertheless, this Pre-Hearing Memorandum appears to be in compliance with the requirements of Pre-Hearing Order No. 1, except possibly for Paragraph C of Pre-Hearing Order No. 1, which requires a summary of the testimony of each expert witness. It is not apparent that such a summary, for each intended expert witness, has been included in the Appendix to the Citizens' Response to Pre-Hearing Order No. 1. Therefore, on or before October 1, 1982, the Citizens shall supplement their Pre-Hearing Memorandum with any summaries of expert testimony not already filed; for those summaries already filed, locations in the Pre-Hearing Memorandum shall be specified. The Citizens'

attention is called to Paragraph 4 of Pre-Hearing Order No. 1.

The expected new filings by Appellants on or before October 1, 1982, taken together with our earlier discussion of Duquesne's Motion for a More Definite Statement and its pending discovery requests, have convinced us that Duquesne should be given the time to complete its discovery and to file its pre-hearing memoranda. Therefore we herewith extend the due date for Duquesne's pre-hearing memorandum, in each of these two appeals, to October 20, 1982; DER's due date to file its pre-hearing memoranda in these appeals is similarly extended. In the interim, we shall order the Citizens to answer Interrogatory No. 3 of Duquesne's Interrogatories to the Citizens dated August 4, 1982; if the Citizens have not already answered this Interrogatory, the answer is due not later than October 1, 1982. This Interrogatory No. 3 is a request for information which Duquesne should have in order to prepare properly for its hearing on the merits; however, Duquesne could not reasonably have been expected to make this request before seeing the Citizens' pre-hearing memorandum. On the other hand, if the Citizens have not already answered Interrogatories Nos. 1 and 2 of the set dated August 4, 1982, we shall not order them to do so. Both of those Interrogatories could have been directed to the Citizens within the 60-day period when leave of the Board is not required. Much of the information requested in Interrogatory No. 1 already is contained in the Citizens' Pre-Hearing Memorandum, or will be so contained after October 1, 1982 (recall our discussion supra); the information requested in Interrogatory No. 2 largely is beyond what is required of the Citizens in our Pre-Hearing Order No. 1, and also appears to be somewhat outside the scope of permissible discovery under Pa. R.C.P. 4003.1-4003.5. We see no reason why, at this late date, we should order the Citizens to answer these Interrogatories Nos. 1 and 2 without giving the Citizens the opportunity to file objections in accordance with Pa. R.C.P. 4006(a)(2).

O R D E R

AND NOW, this 15th day of September, 1982, it is ordered that:

1. Duquesne's preliminary objection to the Township's appeal at 82-099-G for lack of standing is dismissed, without prejudice to Duquesne's right, at a later stage in these proceedings, to move dismissal of the Township's appeal for lack of standing.

2. On or before October 1, 1982, the Citizens shall file a supplement to their Pre-Hearing Memorandum, stating additional facts, if any, which they intend to prove and which (in combination with the facts the Citizens already have alleged) could confer standing on the Citizens.

3. The facts averred in this supplement to the Citizens' Pre-Hearing Memorandum shall be verified by the Citizens' Trustee ad Litem, in accordance with Pa. R.C.P. 1024(a); this supplement shall not contain averments which are inconsistent in fact and which could be verified in accordance with Pa. R.C.P. 1024(b).

4. The ruling on Duquesne's preliminary objection to the Citizens' appeal at 82-100-G for lack of standing is deferred until receipt of the supplementary facts called for in Paragraph 2 above.

5. Duquesne's preliminary objections to the Township's and the Citizens' appeals--in the nature of a Motion to Strike for failure to state reasons which, if proved, could justify the conclusion that DER abused its discretion or arbitrarily exercised its duties or functions--are dismissed.

6. Duquesne's preliminary objection that the Citizens' appeal fails to comply with Pa. R.C.P. 2152 is dismissed.

7. Duquesne's Motions for a More Definite Statement, in each of the appeals at 82-099-G and 82-100-G, are dismissed.

8. On or before October 1, 1982, the Township shall file a new pre-hearing memorandum fully complying with the requirements of our Pre-Hearing Order No. 1.

9. On or before October 1, 1982, the Citizens shall supplement their Pre-Hearing Memorandum with any summaries of expert testimony not already filed, in order to ensure full compliance with Paragraph C of our Pre-Hearing Order No. 1; for those summaries already filed, locations in the Pre-Hearing Memorandum shall be specified.

10. The date for filing of Duquesne's pre-hearing memorandum, in each of these appeals, is extended to October 20, 1982; the due dates for DER's pre-hearing memoranda also are extended to October 20, 1982.

11. By October 1, 1982, the Citizens shall answer Interrogatory No. 3 of Duquesne's Interrogatories dated August 4, 1982, if they have not already done so; the Citizens need not answer Interrogatories Nos. 1 and 2 dated August 4, 1982.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Ward T. Kelsey, Esquire (For DER)
Ira Weiss, Esquire (For Township of Indiana)
David R. Morrison, Esquire (For Citizens)
Harley N. Trice, II, Esquire (For Permittee)

DATED: September 15, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHEMICAL WASTE MANAGEMENT, INC., et al. : Docket No. 81-154-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SUSQUEHANNA COUNTY AND GEORGE CAMPBELL, et al.

OPINION AND ORDER SUR
APPELLANTS' PETITION FOR RECONSIDERATION EN BANC

On or about July 20, 1982 this board issued an Opinion and Order Sur Appellants' Petitions for Supersedeas denying same. On or about August 9, 1982 appellants' petitioned this board to reconsider its supersedeas denial en banc. On or about September 7, 1982 DER moved this board to quash appellants' petition and on the same day both the County and the individual intervenors, through their respective counsel, filed answers to said petition urging this board to deny same.

A complete discussion of the (unverified) factual averments of the petition and the various answers thereto will not be attempted in this opinion for the reason that the board agrees with DER that the petition is not in conformity with our rules.

Rehearing or reconsideration is provided for in the board's rules as set forth at 25 Pa. Code §21.122, however, the board interpretates this section as only providing for reconsideration or rehearing following final decisions of the board.

The decision questioned here, denial of supersedeas petition, being interlocutory in nature, does not merit for reconsideration under §21.122.

The board feels that its interpretation of §21.122 is compelled both by the internal logic of the §21.122 and by the principle of construction set forth at Pa. R.C.P. 126, i.e., "...to secure the just, speedy and inexpensive determination of every action..."

As to the internal logic of §21.122, we note that its purpose is to ensure that the parties have had ample opportunity to present all relevant facts to the board and to discuss the legal grounds upon which the board's decision will rest.

Following a final decision, the need for a procedure as outlined in §21.122 is quite apparent. But for §21.122, after an adjudication, the parties would have no further opportunity to amend the record or address the legal issues before this board. But even in this circumstance §21.122 is careful to limit reconsideration of facts to evidence which could not with due diligence have been offered at the time of hearing and likewise §21.122 is careful to limit reconsideration of the law to legal arguments which the parties had no opportunity to brief. Thus, it is clear that the key to obtaining a re-hearing or reconsideration, under §21.122, is the lack of opportunity to brief a legal issue or to introduce relevant facts.

A supersedeas decision, in sharp distinction to adjudications of the board does not close the record. Appellants here may still introduce (legally admissible) evidence at the hearing on the merits including evidence (if legally admissible) to support the averments set forth in their complaint. Similarly, appellants have yet to file a post-hearing brief and therefore they have a full opportunity to brief any and all legal grounds.

We feel that the above legal analysis demonstrates that §21.122 was not meant by its framers to apply to supersedeas decisions and we so hold. If we had any doubt in this regard the circumstances of the instant matter would have never-

theless commanded the same result. The instant matter involves two DER orders, the later of which is over a year old. Appellants' proposed construction would have us continue the pre-hearing phase of this matter indefinitely. We do not see how such a delay could conceivably be considered to be "speedy" or "inexpensive" as suggested by Pa. R.C.P. 126 nor would such a delay in the circumstances of this case be "just" to any of the parties.

Having concluded that §21.122 of our rules does not suppport appellants' petition, we need not discuss whether their petition demonstrates "compelling and persuasive reasons" for granting reconsideration and, of course, we do not reach the merits.

O R D E R

AND NOW, this 17th day of September, 1982, appellants' Petition for Reconsideration En Banc is denied.

ENVIRONMENTAL HEARING BOARD

BY: DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: September 17, 1982
cc: Bureau of Litigation
Louis A. Naugle, Esquire
Bruce S. Katcher, Esquire
Gerald C. Grimaud, Esquire
E. Stirling Lathrop, III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHEMCLENE CORPORATION, et al. :

:

Docket No. 81-168-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By letter dated October 1, 1981, the chief of the Division of Hazardous Waste of the Bureau of Solid Waste Management of the Departmental Environmental Resources (DER) informed Chemclene Corporation, and other hazardous waste transporters who have also appealed or intervened in this appeal (appellants), that appellants would be required to submit, *inter alia*, a collateral bond within ninety (90) days of of said letter, as a precondition to the issuance by DER of a license to transport hazardous waste in the Commonwealth of Pennsylvania after July 7, 1982.

On October 30, 1981, Chemclene appealed the bonding provisions of DER's letter of October 1, 1981, and as other appeals were filed by other transporters of hazardous waste, the later appeals were consolidated with that of Chemclene. Subsequent petitions for intervention were also consolidated with Chemclene's appeal.

After two (2) pre-hearing conferences, the parties agreed that the proceedings would be bifurcated so as to allow, in the first phase of proceedings, the expeditious review of the issues raised as to the constitutionality of the statutory basis of

the collateral bonding provisions for hazardous waste transporters, and the constitutionality and reasonableness of DER's regulations, policies and procedures establishing and administering the said collateral bond program. The parties also agreed that a stipulated record would be presented to the Board for first phase review of these appeals.

On the basis of the stipulated record, appellants filed a Motion for Summary Judgment seeking relief from the bonding requirements of the statute in question, the regulations promulgated in pursuance of the said statute, and DER's policy in assessing the amount of each transporter's collateral bond. The original Motion for Summary Judgment was later supplanted by an Amended Motion for Summary Judgment.

After submission of briefs, the Board heard oral argument thereon *en banc*, after which reply and supplemental briefs were filed.

The appeals filed in this matter raise significant issues concerning constitutionality of state statutes, and regulations promulgated pursuant to such statutes, as well as the reasonableness and validity of DER "policies" in the assessment of each individual transporter's collateral bond in furtherance of its bonding program for transporters of hazardous waste.

The question of the constitutionality of the statute in question must first be addressed, since regulations and departmental policies can only emanate from constitutionally enacted legislation.

The pertinent statute in question is Section 505(e) of the Solid Waste Management Act (SWMA), 35 P.S. §6018.505(e), which section requires that,prior to issuance of a license an applicant must file a collateral bond made payable to the Commonwealth in an amount not less that $10,000 or more if the Secretary of DER determines that a greater amount is required to guarantee compliance with the Act (SWMA).

Appellants argue strenuously that the bond requirement is unconstitutional on the grounds that, *inter alia*, such requirements have been preempted by federal legislation and federal judicial precedent. While this Board is impressed by the analysis and

reasoning employed by appellants in their exposition of the issue of constitutionality of Section 505(e), we are nevertheless cognizant of the jurisdictional limitations imposed upon the Board in this area.

Despite appellants' demonstrated desire to have the Board rule on the constitutional question, and despite appellants' assertion that this Board has jurisdiction to decide the constitutionality of state legislation the consideration of constitutional issues related to legislation is beyond the scope of review granted to this Board. Only courts, not executive tribunals, have the authority to decide constitutional issues. There is no doubt that this Board is an executive tribunal, despite the fact that it exercises quasi-judicial functions. However, the exercise of such quasi-judicial functions has not thereby endowed this Board with the jurisdiction requisite to decide constitutional issues. The limitation suggested by DER, i.e., the Board's exercise of jurisdiction to to decide constitutional issues, was first enunciated in the case of *St. Joe Minerals Corporation v. Goddard*, 14 Pa. Commonwealth Ct. 624, 628-629, 324 A.2d 800 (1974). The case was followed by *Delaware Valley Apartment House Owners' Assn. v. Department of Revenue*, 36 Pa. Commonwealth Ct. 615, 620 fn. 4, 389 A.2d 234 (1978).

Since Commonwealth Court rendered those decisions, this Board has consistently held that it lacks jurisdiction to decide such issues. For specific citations of the Board's decisions the Board's yearly edition of Adjudications and Opinions will provide many instances of this view on the subject, see, e.g., *West Penn Power Company v. DER*, EHB Docket No. 73-330-D, 1977 EHB 328, at 332.

It should also be noted that DER, in its pre-trial brief, makes mention of Board member Mazullo's approval of appellant's presentation of its constitutional arguments for consideration by the Board. At first blush one might surmise that such so-called "approval" was a presumptuous effort to assert jurisdiction over the constitutional issues involved herein. However, the intent in so doing was solely to provide appellants the assurance that they would have the opportunity to preserve their constitutional issues should they decide to appeal this Board's decision to an appellate court of this Commonwealth; under the authority of *Tancredi v. State Board of Pharmacy*, 54 Pa. Commonwealth Ct. 394, 421 A.2d 507 (1980), citing 2 Pa. C.S.A. §703(a), this approval was unnecessary

for the purpose of preserving the constitutional issue, but surely did no harm; for the Board to have risked denying appellants the opportunity to present the constitutional issues would have constituted palpable error, despite the Board's equally firm opinion that it possesses no jurisdiction to declare legislation unconstitutional.

In view of the above cited precedents we hold that, for purposes of this opinion, and any relief granted hereunder, Section 505(e) of the SWMA is deemed to be constitutional and binding upon appellants.

Appellants further argue that regulations which were adopted by the Environmental Quality Board are unconstitutionally vague, and are arbitrary, capricious and constitute an abuse of discretion on the part of the Secretary of DER.[1] The above authority clearly spells out the power of this Board to address such questions.

The pertinent regulation is found at 25 Pa. Code §75.263(i)(3) as follows:

> "The amount of the bond shall be $10,000 at a minimum and shall be in an amount sufficient to assure that the licensee shall faithfully perform all of the requirements of the act, the rules and regulations promulgated thereunder, the terms and conditions of the license and a Department order issued to the licensee." 25 Pa. Code §75.263(i)(3).

Regulations which are properly adopted and promulgated by DER are accorded a presumption of validity. *Allegheny County Sanitary Authority v. Department of Environmental Resources*, EHB Docket No. 78-053-H (Dated March 10, 1982). No attack has been made upon the process of adoption of the above cited regulation, therefore we will look only to the regulation in question, on its fact to determine if it is a proper exercise of authority by DER.

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1. Appellant also asserted that Section 105(j) of SWMA (35 P.S. 6018.105(j)) required that the Environmental Quality Board set standards, by regulations, based on the degree of hazard. This argument is without merit since the cited section states unequivocally that "Regulations...may...establish classes of hazardous waste...". (Emphasis added). Clearly, there is no legislative mandate to promulgate regulations wherein classes of hazardous waste *must* be provided for.

The authority of DER under the regulation to require a bond in the minimum amount of $10,000 is in direct response to the legislative requirement of Section 505 (e) of SWMA. There is no question that the requirement in the regulation of a bond in the minimum amount of $10,000 is a proper exercise of authority by DER.

Section 263(i) also authorizes DER to require bonds of amounts in excess of $10,000 to the extent that said larger bond amounts are necessary to ensure compliance with the act (SWMA). DER relies upon this section to support that bonds in question each of which is in excess of $10,000. We hold DER's reliance upon section 263(i) to be misplaced.

In essence Section 263(i) merely paraphrases the relevant portion of 35 P.S. §6018.505(e) which provides that "[t]he deparment may require additional bond amounts if the department determines such additional amounts are necessary to guarantee compliance with the act." Neither Section 263(i), nor the act, requires DER to set a bond amount higher than $10,000. This case is not analgous to *Rodrez Bros., Inc. v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790(1975) wherein both DER and this Board were bound by DER's mandatory regulations, but, rather, is more similar to *Warren Sand & Gravel*, infra, wherein DER exercised its discretion. In short, we hold that Section 263(i), standing alone, no more supports DER's action of assessing bonds in excess than $10,000 than does the Act.

This is not to say, however, that DER is therefore prohibited from assessing bonds in excess of $10,000. We hold only that the regulation, standing alone, does not provide DER with the necessary authority to assess bonds in excess of $10,000.

In order that assessments of bonds in excess of $10,000 be upheld as a proper exercise of discretion by DER, DER established a policy, or program, to determine which transporters would be required to post bonds which would exceed $10,000.

The bond assessment program, admitted by DER to be unpublished, and not a regulation, is therefore not accorded a presumption of validity, and this Board may substitute its discretion for that of DER when considering the bond assessment program. *Warren Sand & Gravel, et al. v. DER*, 20 Pa. Commonwealth 186, 341 A.2d 556 (1975). The record dis-

closes that the bond assessment program was established by DER to implement the legislation and the regulations promulgated pursuant to the legislation. (Section 505(e) of SWMA and 75 Pa. Code 263(i)(3). It consists of a bond table and a bond matrix. The appellants' and all other transporters' bonds were assessed by DER pursuant to application of these devices to the kind, quality, and amount of wastes to be transported by haulers per year.

By establishing this procedure, the Secretary of DER exercised the discretion authorized by the legislation and the regulations, and the record clearly establishes that the bond assessment program was established by the Secretary to implement the mandat of statutory and regulatory requirements.

The varying amounts of bonds to be assessed under DER's program is an interpretation by the Secretary that "the kind and quality of waste transported was an important factor in interpreting the proper bond amount to be assessed to assure compliance with the Act (SWMA)". In further justification of the bond assessment program, DER asserts that its basis for distinguishing between different waste categories for purposes of deriving a deterrent bond figure was: "the hazards associated with the different categorie of waste".

The Secretary has also reserved, according to the record, the right to adjust each bond assessment up or down depending on the characteristic of the applicant. In addition, the Secretary may take compliance history into account when an appropriate data base is avialable; may make exemptions and deviations for small quantity transporters; and may make other adjustments.

Appellants contend that the bond assessment program established by DER is rule-making, and because the policy was not promulgated in accordance with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, 45 P.S. 1101, *et seq.*, the program is unenforceable assessment. Their basis for this argument is their assertion that the bonding program is of general application and future effect and therefore subject to the regulatory enactment procedure. Appellants further argue that the program assessed bond amounts based solely upon the matrix and the additional amounts table which were hard and

fast requirements, and therefore the program is not an exercise of interpretive regulation but a statement which set absolute standards which must be met. [See the discussion of difference between regulations and policy statements in *Pa. Human Relations Commission v. Norristown Area School District*, 20 Pa. Commonwealth Ct. 555, 343 A.2d 464 (1975)].

A fair reading of the record does not support appellants' assertion that the implementation of the bond assessment program constitutes rulemaking and is therefore unenforceable, since the rulemaking process was admittedly not employed by DER in the establishment of the program.

The record clearly reveals that exceptions, adjustments, deviations and exemptions in the bond assessment are available to individual transporters in the assessment of each bond. In providing for flexibility in the assessment for each bond, DER has given each transporter the opportunity to present to DER such information as will enable DER to tailor the amount of each transporter's bond to the needs of each situation. Such flexibility distinguishes the program from which is of general application setting absolute standards which must be met. (Emphasis supplied). *Pa. Human Relations Commission, supra.*

The record on summary judgment must be read in the light most favorable to the non-moving party, *Lehigh Electric Products Co., Inc. v. Pennsylvania National Mutual Insurance Company*, 257 Pa. Supreme Ct. 198, 390A.2d 781(1978).

In requiring, at this stage of the proceeding, that the record be read in light most favorable to the non-moving party, we find that:

1. Section 505(e) mandated that a mechanism be established to determine when bond amounts in excess of $10,000 should be assessed which would assure compliance with the act (SWMA).

2. A regulation was promulgated (75 Pa. Code 263(i)(3) pursuant to the legislation, which regulation failed set standards for assessment of bonds in excess of $10,000.

3. DER interpreted the regulation as requiring the establishment of standards upon which to base assessment of bonds in excess of $10,000.

4. Pursuant to the mandate of the legislation (Section 505(e) SWMA) and the regulation (75 Pa. Code 261(i)(e) DER adapted the bond assessment program to interpret and establish guidelines in the assessment of bonds for transporters subject to SWMA.

5. The bond assessment program provides a flexible framework to guide DER in the individual assessment of bonds in excess of $10,000.

6. The bond program, on its fact, is rationally related to the purpose of insuring compliance with the act, SWMA.

In light of the above findings, we hold that DER did not act arbitrarily or capriciously in the establishment of the bond assessment program.

Appellants have also argued that DER has failed to appropriately use said exceptions, adjustments, deviations and assessments to properly tailor the amounts of their particular bonds. We do not reach this issue at this point in the litigation. Each appellant will be permitted to address this issue at the hearing on the merits.

The final issue raised by appellants which would require decision by the Board concerns the bond form used by DER in the bond assessment program. Specifically, appellants assert that the bond form requires compliance with various legislative enactments, which compliance is beyond the limits established by Section 505(e).

Section 505(e) provides, in pertinent part, as follows:

> "...Such bond shall be payable to the Commonwealth and conditioned upon compliance by the licensee with every requirement of this Act, rule and regulation of the department, order of the department and term and condition of the license."

The legislative mandate is clear and unambiguous in terms of what a licensee's bond is conditioned upon. DER, however, has required a bond conditioned upon faithful performance of:

> "...all of the requirements of (1) the "Solid Waste Management Act" (2) "The Clean Streams Law," Act of June 2, 1937, P.L. 1937, No. 394, as amended, (3) the "Air Pollution Control Act," Act of January 8, 1969, P.L. 2119 as amended, (4) "The Dam Safety and Encroachment Act," Act of November 26, 1978, P.L. 1375, No. 325, (5) Any other state or federal statute

> relating to environmental protection or to the protection of the public health, safety and welfare, (6) the applicable rules and regulations promulgated thereunder, (7) any order of the Department and (8) the provisions and conditions of the license issued thereunder and designated in this bond."

There is no boubt that DER acted arbitrarily and capriciously in requiring a bond conditioned upon compliance with laws, rules and regulations which were not provided for, or specified in, the legislation authorizing a bond to be required of hazardous waste transporters.

The record reveals that a DER employee used a bond form required for a permit to store, process, or dispose of hazardous waste as a guide for the transporters' bond at issue here. It is readily apparent that lack of DER staff expertise in the formulation of bond requirements is the basic reason for the transparently improper difference between statutory conditions for bonding compliance, and DER's proposed bond form.

DER also argues that this language (in the bond) is not ripe for review, because the appellants will have the opportunity to appeal a bond forfeiture based upon the bond language. However, an appellant under bond should not be expected to ignore language in the bond on the basis that the language eventually might be ruled unlawful. The language of the bond is an appealable action of DER, and we believe it is appropriate to review it in the context of the present appeal.

A sub-issue on the bond form is the assertion by appellants that forfeiture of the bond is not specifically provided for in the legislation requiring a bond to be posted, and therefore forfeiture of the bond may not be effected by DER for violation of conditions of the bond.

DER admits that there is no specific mention of forfeiture procedures in Section 505(e) of the act (SWMA).

While appellants have cited several cases as precedent for the proposition that "it is not for the judiciary to add to a statute that which the legislature did not seet fit to include", we are of the opinion that the cited decisions are inappropriate in the context of this appeal. Rather, we accept the argument of DER, that courts will

construe a statute so as to give effect to all its provisions (1 Pa. C.S. §1921(A)(a)), and that all powers necessary and incidental to make legislation effective are included by implication. *United States v. Sischo*, 262 U.S. 165 (1923); *2A Sutherland Statutory Construction*, §55.04).

To hold that bond cannot be forfeited renders the bond requirement meaningless and defeats the intent of the legislature. The Department promulgated a regulation providing for bond forfeiture (25 Pa. Code 75.263(i)(9) under its implied authority to effect the stated purposes of the act, namely, to protect the public health, safety and welfare of Commonwealth citizens from the danger of transportation of hazardous wastes. (35 P.S. §102(4)). See *City of York v. Commonwealth*, 26 Pa. Commonwealth Ct. 603,364 A.2d 978(1976). *Commonwealth v. J.& A. Moeschlin, Inc.*, 314 Pa. 34, 170 A.119(1934), and *Commonwealth v. Eclipse Literary and Social Club*, 117 Pa. Superior 339 (1935).

We therefore hold that the inclusion by DER of a forfeiture provision in the bond forms required to be executed by hazardous waste transporters is a valid exercise of authority by that agency.

Accordingly, we enter the following:

O R D E R

1. Appellants motion for summary judgment is denied.

2. Discovery shall commence upon receipt of this Order by the parties and shall be completed within seventy-five (75) days of the date of this Order, unless extended upon written cause shown.

3. DER is directed to delete from its bond form any requirement that transporters comply with any acts or regulations not clearly enunciated by Section 505(e) of the Act (SWMA).

4. DER may not condition bond upon faithful performance by hazardous waste transporters of any legislation other than the Solid Waste Management Act, 35 P.S. 6001, *et seq.*, and any bond provision contrary to this prohibition is void and unenforceable.

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DATED: September 21, 1982

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CONCERNED CITIZENS OF RURAL RIDGE,
Rae Ann Tabis, Secretary, Trustee
ad Litem :

: Docket No. 82-100-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DUQUESNE LIGHT COMPANY, Permittee

OPINION AND ORDER SUR APPELLANT'S
STANDING TO APPEAL

On September 15, 1982 this Board issued an Opinion and Order in this matter and in the related appeal of the Township of Indiana, EHB Docket No. 82-099-G. The aforesaid Opinion and Order detailed the history of these appeals to September 15, 1982, which history therefore need not be repeated here. The same Opinion and Order also dealt with Duquesne's preliminary objections to the Concerned Citizens of Rural Ridge (Citizens) standing to appeal. We ruled that Duquesne's preliminary objections had merit, but that we would give the Citizens the opportunity to file a "statement of additional facts, if any, which the Citizens intend to prove and which (in combination with the facts already alleged) could confer standing on the Citizens." We declared that we would rule on the Citizens' standing to appeal shortly after receiving their statement of additional facts, which was to be filed on or before October 1, 1982.

The Citizens' statement of additional facts has been timely filed. In pertinent part, it reads as follows:

> Appellant shall prove the following facts at the hearing:
>
> A) That the Concerned Citizens of Rural Ridge was organized solely for the redress of grievances affecting its members with respect to Duquesne Light Company's plans to create an ash dump adjacent to the Village of Rural Ridge.
>
> B) That the "Concerned Citizens" is not a corporation with an independent existence, but is an unincorporated association whose members are personally liable for its torts or breaches of contract.
>
> C) That if the Association is denied access to the courts, its reason for existence will be a nullity.
>
> D) That the Association itself will suffer a direct adverse economic impact by reason of the construction of an ash dump.

We now rule that the above "facts" A - C, even if proved, cannot confer standing on the Citizens, for reasons thoroughly explained in the aforesaid September 15 1982 Opinion and Order. To have standing, the Citizens must allege facts showing that the action appealed from--in this case DER's grant of the permit to Duquesne--adversely affects the Citizens as an association. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), Susquehanna County v. DER, 58 Pa. Cmwlth. 381, 427 A.2d 1266 (1981) and ____ Pa. Cmwlth. ____, 443 A.2d 870 (April 13, 1982), Strasburg Associates v. Newlin Township, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980). The above "facts" A - C do not satisfy the requirement just stated. In particular, the "fact" (really a conclusion)--"That if the Citizens Association is denied access to the courts (to protest the permit grant), its reason for existence will be a nullity"--does not give the Citizens an interest in the permit grant which is "substantial, immediate and direct" in the intended sense of the William Penn court (see supra). A DER action which does not otherwise injure the Citizens is not converted into an injurious action conferring

standing by the claim that denying standing to protest the action nullifies the Citizens' Association's reason for existence.

"Fact" D above parallels the allegation contained in the Citizens' Pre-Hearing Memorandum filed July 28, 1982, namely that:

> 13. The individuals making up the Appellant, Concerned Citizens of Rural Ridge, will suffer a direct adverse economic impact resulting from a fly ash dump.

In our September 15, 1982 Opinion and Order we explained that this allegation could not confer standing on the Citizens, that an allegation of "injury to the association itself as an association appears to be required." However, we do not believe it is a fair reading of our September 15, 1982 Opinion and Order that our requested statement--"of additional facts, if any, which the Citizens intend to prove and which (in combination with the facts already alleged) could confer standing on the Citizens"--could be satisfied merely by dropping the reference to individual members of the Concerned Citizens Association in the above-quoted allegation 13 from the Citizens' Pre-Hearing Memorandum. The Citizens' new "fact" D is much more nearly a conclusory restatement of the claim that the Citizens have standing than a fact. Clearly what is required, and what we believe obviously was intended by paragraph 2 of our September 15, 1982 Order, is a statement of the particular facts--which, if proved by the Citizens, will justify the conclusion that "the Association itself will suffer a direct adverse economic impact by reason of the construction of an ash dump." "Fact" D, as stated, definitely fails to satisfy this requirement.

Nevertheless, because "Fact" D, if properly backed up by provable particularized facts can confer standing on the Citizens in the instant matter, and because (as explained in our September 15, 1982 Opinion and Order) we are

reluctant to foreclose the Citizens' participation in this appeal, we will once again, but for the last time, give the Citizens an opportunity to file a statement of facts which, if proved, could confer standing on the Citizens. Such facts have not yet been alleged. The Citizens will note that our rulings on the Citizens' standing issue have been consistent with Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975), cited by the Citizens themselves in their Answer to Duquesne's Preliminary Objections. In particular, Warth states (at 501):

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party...(citation omitted)...At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

The relevance of this quotation to the instant proceedings is not negated by our holding, in our September 15, 1982 Opinion, that Warth v. Seldin's affirmation that an association has standing in the federal courts when the association is asserting the rights of its members does not control Pennsylvania court rulings (e.g., Concerned Citizens of Greater West Chester v. Larson, 48 Pa. Cmwlth. 241, 409 A.2d 511 (1980)) that merely asserting the rights of its members does not give an association standing under Pennsylvania law.

O R D E R

AND NOW, this 12th day of October, 1982, it is ordered that:

1. On or before October 25, 1982, the Citizens shall file a second supplement to their pre-hearing memorandum, stating with a particularity

consistent with this Opinion those additional facts, if any, which they intend to prove and which (in combination with the facts--not conclusions--the Citizens already have alleged) could demonstrate that "the Association itself will suffer a direct adverse economic impact by reason of the construction of an ash dump."

2. The facts averred in this second supplement to the Citizens' Pre-Hearing Memorandum shall be verified by the Citizens' Trustee ad Litem, in accordance with Pa. R.C.P. 1024(a); this second supplement shall not contain averments which are inconsistent in fact.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

cc: Bureau of Litigation

For the Commonwealth:
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For the Appellant:
David R. Morrison, Esquire

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For the Permittee:
Harley N. Trice, II, Esquire

Ira Weiss, Esquire

DATED: October 12, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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PERRY BROTHERS COAL COMPANY : Docket No. 82-122-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S
MOTION TO DISMISS AND STAY PROCEEDINGS

The Commonwealth of Pennsylvania, Department of Environmental Resources (department), appellee in the above-captioned matter, by its attorney, has moved this board to dismiss the above-captioned appeal for the reasons that the board lacks jurisdiction over the appeal and the matter is moot. In support of this motion, the department averred and this board finds as follows:

1. On or about May 5, 1982, the department sent a letter entitled "Violation Notice", to Perry Brothers Coal Company (Perry Brothers), from which Perry Brothers took the instant appeal.

2. The letter which is the subject of this appeal informed Perry Brothers that an inspection conducted by the department at a company mine site in Slippery Rock Township, Butler County, revealed that the company was in violation of several permit conditions. These alleged violations were set forth in the letter. Perry Brothers was informed in the letter that the violations of its

permit conditions also constituted violations of the Surface Mining Conservation and Reclamation Act (52 P.S. §1396.1 *et seq.*), and The Clean Streams Law of Pennsylvania (Act of June 22, 1937, as amended, 35 P.S. §691.1 *et seq.*). The letter informed Perry Brothers that it was required to immediately comply with all conditions in its permit and inform the department of the type of action the company would take to correct the violations. Further, the company was advised that if a satisfactory written statement outlining proposed corrective measures was not received by the department within seven days, the matter would be reviewed and suspension or revocation of the permit could be a likely result.

3. The last sentence of the May 5, 1982 letter sent by Mining Specialist John Haluszczak states that no new permits will be issued to Perry Brothers until all violations are corrected. This statement was apparently intended to notify Perry Brothers of the potential effect of the continued violations on pending permit applications pursuant to Section 3.1(b) of the Surface Mining Conservation and Reclamation Act (Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.3a(b)). Section 3.1(b) states that the department shall not issue or renew any surface mining permits if it finds, after investigation and opportunity for an informal hearing, that the applicant has failed and continued to fail to comply with any provisions of the Act.

On the basis of the aforesaid facts all of which are of record in this matter and the applicable law we find that the board lacks jurisdiction to hear this appeal. The Violation Notice sent to Perry Brothers, which is the subject of the instant appeal, does not constitute an appealable action of the department. The notification was not an "order, decree, decision, determination or ruling by the department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of (Perry Brothers)." 25 Pa. Code §21.2(a)(1). See:

Perry Brothers Coal Company v. Commonwealth, DER, EHB Docket No. 81-137-H (issued November 6, 1981); *Sunbeam Coal Corporation v. Department of Environmental Resources*, 304 A.2d 169 (Pa. Cmwlth. 1973); *Standard Lim and R. Company v. Department of Environmental Resources*, 2 Pa. Cmwlth. 434, 279 A.2d 383 (1971).

This matter is governed by *Sunbeam Coal v. Department of Environmental Reosurces*, 304 A.2d 169 (Pa. Cmwlth. 1972). In *Sunbeam Coal, supra*, the department sent a letter notifying the appellants that they were violating certain provisions of the Surface Mining Conservation and Reclamation Act. Appellants appealed the letter, and the Commonwealth Court affirmed a decision by the Environmental Hearing Board granting the department's Motion to Dismiss on the grounds that the letter did not constitute either an "adjudication" under Administrative Agency Law, 71 P.S. §1710.2, or an "action" within the meaning of 25 Pa. Code §21.2. *Perry Brothers Coal Company v. Commonwealth, DER*, EHB Docket No. 81-137-H (issued November 6, 1981) also controls. In this matter the board found that a department letter setting forth alleged violations of the Surface Mining Conservation and Reclamation Act and a proposal for a settlement payment was not a final action and thus not appealable.

Moreover, the letter of May 5, 1982 is not an order or an adjudication affecting appellant's personal or property rights and is therefore not an appealable action within the meaning of 25 Pa. Code §21.2(a)(1). The letter constitutes a notification to Perry Brothers that it is in violation of conditions set forth in the company's existing permit. In the analogous case of *Standard Lime and R. Company v. Department of Environmental Resources*, 304 A.2d 169 (Pa. Cmwlth. 1973), the court stated that:

> "A letter from a government departmental head that in his opinion the appellant has not complied and therefore the matter will be referred to the agency's counsel, is not an adjudication from which an appeal may be taken." 279 A.2d at 386.

Perry Brothers acknowledges the legal authority cited above but attempts to distinguish the instant matter from the strict notice of violation cases discussed above. Perry Brothers' argues that the last sentence of the May 5, 1982 letter constitutes an action by the department refusing to issue other permits. However, the letter itself did not act to withhold the issuance of any specific permit, but instead notified the company of the possibility that in the future a permit could be withheld based upon the violations cited in the Violation Notice. A notification of the potential effect of continued uncorrected violations upon a permit application is not a final action by the department. Rather the permit application denials themselves would be the final actions.

Since we have decided the jurisdiction issue in favor of DER we need not and shall not reach the mootness issue.

O R D E R

AND NOW, this 13th day of October, 1982, upon consideration of DER's Motion to Dismiss and apellant's Answer thereto and for the reasons set forth above DER's Motion to Dismiss is granted and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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ANTHONY J. MAZULLO, JR.
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cc: Bureau of Litigation
Ward T. Kelsey, Esquire
Leo M. Stepanian, Esquire

DATED: October 13, 1982

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J. ROBERT MELANA et al.

Docket No. 82-039-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DICK ENTERPRISES, Permittee

OPINION AND ORDER ON MOTION TO DISMISS APPEAL

On January 13, 1982, DER issued Permit No. 300711 to Dick Enterprises for the operation of a flyash, bottom ash and fixated scrubber sludge site. This action was appealed on February 10, 1982 by J. Robert Melana and other citizens in the neighborhood of the site under Docket No. 82-039-G, and was independently appealed on February 19, 1982 by William Fiore under Docket No. 82-059-G. On June 9, 1982, the Fiore and Melana appeals were consolidated under the above caption, with Fiore remaining an independent party appellant.

Fiore filed his pre-hearing memorandum on May 26, 1982, pursuant to this Board's Pre-Hearing Order No. 1 (dated March 9, 1982). On June 11, 1982, DER filed a Motion for Sanctions against Fiore, protesting that Fiore's pre-hearing memorandum did not comply with this Board's Pre-Hearing Order No. 1, and requesting that Fiore be compelled to file a more specific pre-hearing memorandum, in full compliance with our Pre-Hearing Order No. 1.

On July 6, 1982, this Board, agreeing with DER complaints about Fiore's pre-hearing memorandum, issued an Opinion and Order which, inter alia, ordered:

> 4. Fiore shall file a more specific pre-hearing memorandum on or before September 3, 1982, prepared in the light of this opinion.

On September 13, 1982, Fiore's more specific pre-hearing memorandum not having been received, this Board sent counsel for Fiore a certified letter, return receipt requested, reminding him that this Board had not received the pre-hearing memorandum due September 3, 1982. This letter further stated:

> Please be advised that unless there is compliance by September 20, the Board may apply sanctions under its rule 21.124. Those sanctions may include dismissal of an appeal or a default adjudication against the party in default.

The return receipt for the aforesaid letter, signed by Fiore's counsel's agent on September 14, 1982, has been received by the Board.

On October 1, 1982, DER filed a Motion for Sanctions to dismiss Fiore's appeal for failing to comply with the Board's orders. This Motion was accompanied by a certificate of service on Fiore's counsel. As of this date, Fiore's more specific pre-hearing memorandum has not been filed, nor has there been any response from Fiore to DER's Motion for Sanctions.

In view of the foregoing facts, DER's Motion for Sanctions is granted, and Fiore's appeal is dismissed for failure to comply with this Board's Orders, under the authority of 25 Pa. Code §21.124.

Although Fiore's appeal has been dismissed, Melana's appeal remains active, under the same Docket No. 82-039-G.

O R D E R

AND NOW, this 18th day of October, 1982, it is ordered as follows:

1. The appeal of William Fiore, originally docketed as 82-059-G, which on June 9, 1982 was consolidated with the appeal of J. Robert Melana et al. under the Docket No. 82-039-G, is dismissed.

2. The appeal of J. Robert Melana and other citizens (listed in Addendum 1 to their Notice of Appeal filed February 10, 1982) remains active under the caption heading this Opinion and Order.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH, Chairman

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Patti J. Saunders, Esquire
Franklin L. Bialon, Esquire
Francis J. Carey, Esquire
Roger J. Peters, Esquire

DATED: October 18, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MERIT METALS PRODUCTS CORPORATION :

:

Docket No. 81-024-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR APPELLEE'S
MOTION TO DISMISS APPEAL

Merit Metals Products Corporation (Merit) appealed to this board from a letter dated January 28, 1981, from the Department of Environmental Resources (DER) which found "unacceptable" merit's plan "to recover and treat groundwater contaminated with trichlorethylene (TCE)".

DER filed a motion to dismiss the appeal on the grounds that the subject letter was not an appealable action of DER. Merit filed an answer to the motion to dismiss. Both parties filed memoranda of law on the legal issue involved herein.

Both sides agree, as does the board, that the board has jurisdiction to hear an appeal from DER action which is final, and that final action means DER action which imposes some liability or otherwise affects the obligations or duties of a person. *Gateway Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 399 A.2d 802 (Cmwlth. Ct. 1979).

DER cites *Standard Line and Refractories Co. v. DER,* 2 Pa. Cmwlth. Ct. 434, 270 A.2d 383 (1971) as the basis for their motion to dismiss. In that case, the action of DER which was appealed was a letter wherein the appellant's "compliance timetable

was" found to be "unacceptable" and the matter was being referred to "legal counsel for approrpiate action". *Standard Line, supra.*

Merit contends that *Standard Line* is not controlling since the final action was to be considered by legal counsel in that case.

The precise issue was considered in *Gateway* and there the Commonwealth Court held that the letter which found Gateway's proposal unacceptable was a final action of DER and therefore appealable.

In the instant appeal, DER found Merit's plan unacceptable, and ordered Merit to formulate another plan to include test borings. The letter imposed a liability upon Merit (to revise their plan to take into consideration the possibility of contamination of Merit's plant) and affected, thereby, Merits duties with respect to the contamination problem.

Accordingly, we hold that the DER letter of January 28, 1981 is a final action of DER and therefore appealable.

O R D E R

AND NOW, this 19th day of October, 1982, upon consideration of the motion to dismiss, and the answer filed thereto, it is ORDERED that the motion to dismiss be denied.

Appellant shall file a pre-hearing memorandum within 20 days after receipt of this ORDER.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

DATED: October 19, 1982

cc: Bureau of Litigation
John R. Embick, Esquire
Victor S. Jaczun, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

VIK-KEL CORPORATION : Docket No. 82-200-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

The above-caption covers two separate appeals filed by appellant, Vik-Kel Corporation, from two separate DER actions. Vik-Kel appealed DER's denial of its Hazardous Waste Transporter License Application as contained in a letter of July 6, 1982 executed by DER official Gary R. Galida. Vik-Kel also appealed DER's return of its I.W. Permit Application 6580202 as contained in a letter dated June 30, 1982 executed by DER official Deborah McDonald.

Appellant's Notice of Appeal avers that the license denial letter was received by appellant's counsel on July 13, 1982 and the I.W. return letter was received by appellant's counsel on July 12, 1982. Appellant's Notice of Appeal from each action was received in the board on August 16, 1982 which is beyond the 30-day appeal period provided for in the board's rules 25 Pa. Code §21.52(a). This appeal period has been determined by Commonwealth Court to be binding upon this board *Lebanon County Sewage Council v. Commonwealth, DER*, 35 Pa. Commonwealth Ct. 244, 382 A.2d 1310 (1978); *Rostosky v. Commonwealth, DER*, 26 Pa. Commonwealth Ct. 364 A.2d 761 (1976).

DER moved on the basis of this tardy filing as evidenced by the face of the record to dismiss each of said appeals as tardy. Appellant answered by withdrawing the license denial appeal and questioning the procedural compliance of DER's motion to dismiss.

DER responded to appellant's answer by noting that, pursuant to Pa. R.C.P. 102 and 25 Pa. Code §21.64(b), its motion did not need to be verified since all the facts contained therein were of record. We agree. Moreover, DER correctly pointed out that contrary to appellant's assertion, DER's motion to dismiss covered both the license denial and permit return actions (note especially, paragraph 6 thereof which calculates separate time periods for each action).

ORDER

AND NOW, this 19th day of October, 1982, upon due consideration of DER's motion to dismiss and appellant's answer thereto and for the reasons set forth above, DER's motion to dismiss is granted and both appellant's license denial and permit return application both of which are captioned above are dismissed.

ENVIRONMENTAL HEARING BOARD

BY: DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Patti J. Saunders, Esquire
John R. McGinley, Jr., Esquire

DATED: October 19, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHEMICAL WASTE MANAGEMENT, INC., et al. : Docket No. 81-154-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SUSQUEHANNA COUNTY and GEORGE CAMPBELL, et al.

OPINION AND ORDER SUR APPELLANTS' PETITION TO AMEND THE BOARD'S ORDERS

On or about July 20, 1982 the board denied appellants' Petitions for Supersedeas of the DER order of September 4, 1981. On August 7, 1982 appellants filed with the board a Petition for Reconsideration En Banc of the July 20, 1982 order. On September 17, 1982 the board en banc refused to reconsider its decision not to issue a supersedeas in this matter.

On October 6, 1982 appellants filed the instant petition by which they are attempting to obtain immediate Commonwealth Court review of the aforesaid board orders.

As a starting point of our analysis it is unquestioned that a decision by this board either to grant or to deny a supersedeas is an interlocutory decision *Borough of Baldwin v. DER*, 330 A.2d 582 (Commonwealth Court 1975). Thus, an appeal from such a decision is premature unless the question is certified by the EHB pursuant to 42 Pa. C.S. §702(b) and accepted by Commonwealth Court.

Section 702(b) is quite specific with regard to what issues are proper for interlocutory certification. Only where *inter alia* the interlocutory "...order involves a controlling question of law as to which there is substanial ground for difference of opinion..." may the order be properly certified. Appellants' petition fails to identify any question of law for review by Commonwealth Court let above a controlling question of law resolution of which would resolve this matter.

The board is unaware that any such legal issue exists in this matter. To the contrary, it seems to us that in this matter the facts rather than the law form the focal point of litigation. We believe that the framers of Section 702(b) intended such factual matters to be fully litigated before this board so that Commonwealth Court would not have to waste its valuable time acting as a trial court.

Essentially, appellants' petition rests upon its assertion that it will be denied due process if it cannot immediately present its case on the merits to Commonwealth Court. An identical allegation was deemed unworthy by Commonwealth Court in *Baldwin Borough, supra*, by which opinion this board is controlled.

In closing it must be noted that there have been hearings held in this matter over a five month period during which appellants presented substantial testimony. Moreover, appellants have not requested that any additional days of hearing be scheduled since our July 20, 1982 order. Had they done so there is every reason to believe that the hearings on the merits could have been concluded by this time.

O R D E R

AND NOW, this 25th day of October, 1982, appellants' Petition to Amend the board's orders of July 20, 1982 and September 17, 1982 is denied.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Pamela S. Goodwin
Gerald C. Grimaud, Esquire
Stirling Lathrop, Esquire

DATED: October 25, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

PERRY BROTHERS COAL COMPANY : Docket No. 82-174-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ERNEST J. RIEHL, Intervenor

OPINION AND ORDER
SUR VARIOUS MOTIONS

As the time for the hearing scheduled in the above-captioned matter draws neigh (November 16 and 17, 1982) the appellant and the DER have peppered each other with a plethora of petitions and answers thereto; many requesting some action by the board.

Mindful of the legitimate discovery needs of the parties and the brief remainder of the pre-hearing period, the board has attempted to resolve these pre-hearing disputes in a practical manner.

A) DER's Motion for Imposition of Sanctions on Appellant for Failing to Comply with Pre-Hearing Order No. 1 is dismissed.

B) Appellant shall file a Supplemental Pre-Hearing Memorandum which fully complies with the board's Pre-Hearing Order No. 1 on or before November 8, 1982. Failure to comply with Pre-Hearing Order No. 1 shall be sufficient reason for excluding evidence at the hearing.

C) Appellant's Motion for Protective Order with regard to DER's Initial Motion for Protective Order is denied. Appellant shall provide full and complete answers to all of DER's Initial Interrogatories and shall produce all the documents requested by DER's Initial Motion for Production of Documents on or before November 8, 1982. Appellant is not required to prepare any additional documents for DER merely for the purpose of answering DER's interrogatories but it may cross-reference documents it has prepared for hearing and attached to its supplemental pre-hearing memorandum to the extent that these documents would provide clear answers to said interrogatories. Also appellant may reference those documents within DER's possession in lieu of producing same.

D) DER's Petition for Discovery filed October 4, 1982 is denied.

E) DER's Motion for Protective Order is granted. DER need not answer the Second Set of Interrogatories to Appellee propounded by appellant or respond to appellant's Motion for Production of Documents.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Leo M. Stepanian, Esquire
Robert P. Ging, Jr., Esquire

DATED: October 28, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CAMBRIA COAL COMPANY : Docket No. 82-109-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION TO
DISMISS AND STAY PROCEEDINGS

Sometime prior to April 15, 1982 Cambria Coal Company applied to DER for mine drainage permit 11810109 covering a site in Reade Township, Cambria County. On April 15, 1982 Mr. P. J. Shah, P.E., Chief of the Permit Review Section of DER's Ebensburg Office notified Cambria Coal (by letter) that an agreement between Cambria and third parties was unacceptable as proferred compliance with section 4.2(f) of the SMCRA. This letter directed Cambria to supply an acceptable agreement "...or document the availability of a replacement supply of equal or better quantity and quality."

Cambria promptly appealed DER's April 15, 1982 action, generally on the basis that DER had no legal authority to require Cambria to replace a water supply prior to mining, and a hearing was scheduled for November 30, 1982 and December 1, 1982. On November 16, 1982, 2 1/2 months after the hearing was scheduled and two weeks before it was to be held DER submitted a motion to dismiss

and stay proceedings. DER's motion to dismiss is apparently based upon two separate theories although they were not so articulated in its motion.

DER initially argues that the letter of April 15, 1982 was neither an "action" as defined by 25 Pa. Code §21.2(a) nor an "adjudication" under the Administrative Agency Law, 71 P.S. §1710.2. We disagree. In the April 15, 1982 letter DER made a legal determination that §4.2(f) of SMCRA requires either an agreement or some other indicia that a certain water supply which would apparently be affected by Cambria's proposed mining could and would be replaced by a supply of equal or better quantity and quality. DER also declared that the mine drainage permit Cambria sought would not be issued "until this problem...is resolved."

We think that DER's decision did change the legal status quo; Cambria is now required to submit an agreement or certain information which, it claims, it is not required by SMCRA and as to the finality of this action it is clear from the appealed letter that DER had resolved not to issue Cambria the permit it seeks unless or until DER's requirements are met.

Of course, DER might argue, persuasively perhaps under other acts, that its final action with regard to permit application is rejection of that application which has not yet occurred in the instant matter. However, under §4(d) of SMCRA, 52 P.S. §1396.4(d) an interested party may appeal to this board not just from DER's rejection of a permit but also from "...the failure of the department to act upon an application for a permit..." Thus, under SMCRA the instant action may be considered final.

DER's second argument rests upon the doctrine of mootness, a doctrine which has been applied to appeals before this board *Silver Spring Township v. DER*, 368 A.2d 866 (Commonwealth Ct. 1977). Here DER argues that since it received the information it requested in its April 15, 1982 letter by way of Cambria's answers

to interrogatory No. 12 which was propounded by DER during discovery in this matter, the matter is now moot.

Although the board stands in awe before the ingenuity of DER's argument, this awe has not swayed the board from strict application of the principles of the doctrine of mootness. As we understand the teaching of *Silver Spring Township, supra*, a matter is moot when and only when the tribunal can no longer deliver the relief requested. Here DER may have achieved its purposes in issuing the April 15, 1982 letter by receiving the answers to its interrogatory No. 12 but it is not the party seeking relief from this board; Cambria is. Cambria would have this board declare that DER may not reject its application regardless of the outcome of DER's review of Cambria's information. We could grant Cambria this relief and thus this matter is not moot.

Notwithstanding the above, we do agree with DER's request for a stay of the scheduled hearings for it appears to the board that the issue in dispute between the parties, i.e. DER's legal authority to obtain the information and/or agreemtns requested in its April 15, 1982, is a legal question.

O R D E R

AND NOW, this 18th day of November, 1982, DER's motion for a stay of the hearings scheduled for November 30, 1982 and December 1, 1982 is granted; DER's motion to dismiss is denied.

Cambria shall file its brief addressing the above described legal issue on or before 20 days from the date hereof and DER shall file a responding brief within 10 days from its receipt of Cambria's brief.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH, Chairman

cc: Bureau of Litigation
Donald Brown, Esquire
Leo M. Stepanian, Esquire
DATED: November 18, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ORVILLE RICHTER d/b/a
RICHTER TRUCKING COMPANY

Docket No. 80-106-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO CONTINUE

Beginning in August of 1978 appellant, Orville Richter d/b/a Richter Trucking Company conducted surface-mining operations on a site in Springfield Township, Fayette County which site was covered by mine drainage permit 3377SM34 and mining permit #1463-3. This site is located on a steep hillside which comprises one wall of the canyon formed by the Youghiogheny River and is within the visual corridor of that river.

Because Richter (according to DER) failed to comply with the terms and conditions of said permits by *inter alia* creating an unsafe condition by piling spoil on a steep bank located uphill from a busy B & O railroad and further because Richter went out of business and was therefore unable to correct said violations corridor, DER, in May of 1980, forfeited the surety bonds covering said site. (Other bonds and another site were also included in DER's action.)

Richter appealed DER's forfeiture on or about June 23, 1980 and following a number of continuances requested by the parties, a hearing was held in December

of 1981. A post-hearing brief was subsequently received from Richter and the board began preparation of an adjudication when the parties (on March 11, 1982) requested that the matter be continued until November 15, 1982 pending settlement negotiations. The board granted this continuance.

On November 12, 1982 DER again moved this board to continue its obligation to submit a brief pending settlement negotiations and counsel for Richter joined in the motion. Ordinarily, when counsel for both (or all) parties to a matter agree to a continuance, it is granted as a matter of course by the board. However, in this matter wherein numerous continuances have already been granted and wherein DER has based its forfeitures, in part, upon an imminent safety hazard, the requested additional extension until December 31, 1982 is too long.

O R D E R

AND NOW, this 16th day of November, 1982, DER's motion for continuance is granted in part. DER shall file its post-hearing brief or the parties shall submit to the board a full and complete settlement agreement on or before December 10, 1982.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Patti J. Saunders, Esquire
Gregg M. Rosen, Esquire

DATED: November 18, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CONCERNED CITIZENS OF RURAL RIDGE,
Rae Ann Tabis, Secretary, Trustee
ad Litem :

: Docket No. 82-100-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DUQUESNE LIGHT COMPANY, Permittee

OPINION AND ORDER SUR APPELLANT'S
STANDING TO APPEAL

This Board has issued previous Opinions and Orders in this matter, on September 15 and October 12, 1982. On these previous dates we have ordered the Concerned Citizens of Rural Ridge (Citizens) to allege facts sufficient to confer standing on them in this matter, under the threat that should the Citizens fail to do so their appeal might be dismissed for lack of standing, as requested in Duquesne Light Company's (Duquesne's) preliminary objections filed June 4, 1982, on which we have not yet wholly ruled.

On October 25, 1982, the Citizens, in response to our Order of October 12, 1982, have filed a Statement alleging new (not heretofore alleged) facts. In particular, the Citizens now allege, and have verified in accordance with Pa. R.C.P. 1024(a), that:

1. In the fall of 1978 the Citizens entered into an oral lease with the owners of land adjacent to the proposed fly ash disposal facility which is the subject of the instant appeal.

2. The terms of this lease permit the members and officers of the Citizens association to enter upon the leasehold land, and to conduct various recreational activities thereon.

3. Construction of the disposal facility will adversely affect the ability of the Citizens to use and enjoy their leasehold.

The foregoing allegations, if proved, would be sufficient to establish that the Citizens, as an association, will suffer a direct adverse impact as a result of construction of the fly ash disposal facility. It is not entirely clear that the adverse impact would be economic, but adverse economic (i.e., pecuniary) impact is not a prerequisite for standing. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Paragraph 2 of our October 12, 1982 Order, which asked for facts which could demonstrate that "the Association itself will suffer a direct adverse economic impact" used the word "economic" only because we were quoting directly from what the Citizens themselves claimed they would be able to establish (see paragraph D of the Citizens "Supplement to Concerned Citizens Pre-Hearing Memorandum," filed October 1, 1982).

We therefore rule that Duquesne's Preliminary Objection I, filed June 4, 1982, requesting dismissal of the Citizens' appeal for lack of standing, is rejected. Of course, the Citizens will be required to substantiate any allegations purportedly conferring standing at later stages of these proceedings, as Duquesne has recognized in a letter of November 1, 1982, addressed to this Board. This letter asked the Board to defer ruling on the aforesaid Duquesne's Preliminary Objection I until Duquesne could file a brief; according to Duquesne, the Citizens' allegations quoted above, even if true, are insufficient to confer standing as a matter of law. We see no need for briefs at this stage, however, without any prejudice to Duquesne's right to renew its objections to the Citizens' standing at a later time, after

evidence has been taken. For instance, in Cablevision - Division of Sammons Communications, Inc. v. Zoning Hearing Board of City of Easton, 13 Pa. Cmwlth 232, 320 A.2d 388 (1974), a permit to erect a cable television tower was challenged by a neighboring landowner, who alleged the tower would be visible from her property and thereby would adversely affect her enjoyment of her property. The court held this unsightliness was too unsubstantial an interest to confer standing under what would later become the William Penn "substantial, immediate and direct" test. But the Cablevision court based its conclusion on the evidentiary record; at present there is no record from which we properly could conclude that in the instant appeal the Citizens' interest, though immediate and direct, could not possibly be sufficiently substantial to confer standing. Adverse effects on the recreational use of land also were regarded as possibly sufficient to confer standing in Community College of Delaware County v. Fox, 20 Pa. Cmwlth 335, 342 A.2d 468 (1975).

The Citizens' October 25, 1982 Statement also alleged that:

> 4. The Citizens Association is an agent of various named individuals owning and/or occupying property adjacent to the proposed facility, authorized to exclusively represent their rights before the Environmental Hearing Board.
>
> 5. Some of the aforementioned individuals presently suffer from lung ailments, and will be adversely affected from airborne fly ash from the proposed facility.
>
> 6. Other individuals who have made the Citizens their agent will suffer diminutions of property values, or decreased enjoyment of their property, or pollution of their water supply, or other such adverse effects, as a result of the fly ash facility.

Duquesne's November 1, 1982 letter also claims that these just-quoted allegations related to agency cannot confer standing. In this respect we agree with Duquesne; again no brief by Duquesne is required. We recognize that Committee to Preserve Mill Creek, et al. v. Secretary of Health and Shires Swim Club, 3 Cmwlth Ct. 200, 281 A.2d 468 (1971), says:

> The Committee...is on an entirely different footing. It is not the owner of land near the site and it is not the authorized agent of any such owner and cannot, therefore, in the legal sense be aggrieved by the grant of the permit...

This language does suggest that an agent can have standing to sue, but we do not believe the agency relationship listed in paragraph 4 above--between the Citizens Association and individuals owning and/or occupying property adjacent to the proposed facility--is of the sort contemplated in Mill Creek. Does counsel for the Citizens, who presumably has been authorized by the Citizens to represent the Citizens Association's rights before this Board, believe he could have brought this appeal in his own name?

In a Memorandum of Law accompanying their October 25, 1982 Statement, the Citizens continue to insist that the Supreme Court of Pennsylvania has adopted liberalized views on standing enunciated by the U.S. Supreme Court--in, e.g., Sierra Club V. Morton, 405 U.S. 727 (1972) and Warth v. Seldin, 422 U.S. 490 (1975) --which permit an association to sue on behalf of some of its members when those individual members would have standing to sue in their own names. As authority for this proposition, the Citizens cite William Penn, 464 Pa. 168 at 195. The Citizens' Memorandum of Law then goes on to complain:

> To reverse the long held prudential doctrine of standing...and hold that when parties who have standing suddenly lose it when they combine to file what is in essence a consolidated action is to introduce a hypertechnical pleading requirement without any logical foundation (citing a similar phrase in William Penn at 187).

We agree with the Citizens that it is illogical to refuse standing to an association which seeks to prosecute the grievances of association members who individually would have standing. This Board must be guided by established law, however, even when seemingly illogical. The Citizens never have cited any Pennsylvania authority which supports their contention that an association has standing if its members individually have standing. William Penn says nothing about this contention, one way or the other. Nor have we come across any Pennsylvania Supreme Court case which rules on this issue. Duquesne, in its Memorandum of Law in Support of its Preliminary Objections, cites a number of Pennsylvania Commonwealth Court decisions in support of Duquesne's argument that the Citizens lack standing. Among these cited cases is Mill Creek, supra, which we have quoted. That quotation certainly seems to imply that the Mill Creek court would have refused to grant the Citizens Association standing merely because its individual members might have standing. Admittedly, Mill Creek is a comparatively old case, from a period which thereafter has seen considerable evolution and liberalization of court views on standing. But the Citizens have failed to point to a single Pennsylvania case which clearly indicates that Mill Creek no longer would be followed by Pennsylvania courts.

The Board's own research has uncovered such cases, however. In Pennsylvania Petroleum Association v. Pennsylvania Power and Light and Pennsylvania PUC, 32 Pa. Cmwlth 19, 377 A.2d 1270 (1977), Judge Bowman's concurring opinion (which was not the opinion of the Court) states in a footnote (note 4 of the concurring opinion):

> PP&L has also questioned the standing of PPA, as an association, to assert the individual interests of its members. Prior law, which required the assertion of a "legal right," would have denied PPA "party standing"...The modern trend is different (citing Warth v. Seldin, but not William Penn).

Judge Bowman embodied this view in the undissented-from opinion he wrote for the Commonwealth Court in Concerned Taxpayers of Allegheny County v. Commonwealth of Pa. and Grace Sloan, State Treasurer, 33 Pa. Cmwlth 518, 382 A.2d 490 (1978), where however standing was denied to the Concerned Taxpayers. But some two years later the Commonwealth Court, in Tripps Park Civic Association v. Pennsylvania PUC, 52 Pa. Cmwlth 296, 415 A.2d 967 (1980), did grant standing to an association wtih the unequivocal statement:

> First, as to Tripps Park's standing as an association, we follow our own recent pronouncement (in Concerned Taxpayers, supra), wherein the late President Judge Bowman, in ruling on the Commonwealth's preliminary objection that a non-profit corporation of "concerned taxpayers" had no right to bring a taxpayer's suit in its own behalf, concluded that even in the absence of injury to itself, an association may have standing solely as the representative of its members. Thus, we recognize that Tripps Park has representational standing to assert the rights of its individual members.

This rule now has been adopted also by the Superior Court. 1000 Grandview Association v. Mt. Washington Associates et al., 290 Pa. Super. 365, 434 A.2d 796 (1981), Fay v. Bohlin and Powell, ___ Pa. Super. ___, 444 A.2d 179 (1982).

Although these recent Pennsylvania cases upholding the representational standing of an association have not involved environmental issues, and have not explicitly overruled previous rulings on standing in environmental cases such as Mill Creek supra, we nevertheless believe that these recently cited cases show the Commonwealth Court now would rule that the Citizens Association does have standing to represent its members in the instant appeal to this Board, if some of those members themselves would have standing to appeal. Therefore we now rule that--irrespective of our previous rulings in the aforementioned September 15 and October 12, 1982 Opinions and Orders, and independently of our earlier ruling in this Opinion concerning Duquesne's Preliminary Objection I--that this preliminary

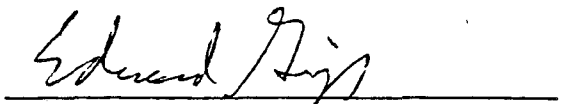
objection of Duquesne's is rejected because individual members of the Citizens Association apparently would have standing to appeal under the William Penn standard. Of course, as stated previously, the Citizens Association will be required to substantiate any alleged standing of its individual members at later stages of these proceedings; correspondingly, our present ruling again is without prejudice to Duquesne's right to renew its objections to the Citizens' standing after evidence has been taken.

We close by making it clear that insofar as this Opinion is at odds with our previous Opinions of September 15 and October 12, 1982, the present Opinion takes precedence.

O R D E R

AND NOW, this 22nd day of November, 1982, Duquesne's Preliminary Objection to the standing of the Citizens to prosecute the instant appeal is dismissed, without prejudice to Duquesne's right to renew its objection to the Citizens' standing after evidence has been taken.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY, Member

cc: Bureau of Litigation
Ward T. Kelsey, Esquire
David R. Morrison, Esquire
Harley N. Trice II, Esquire
Ira Weiss, Esquire

DATED: November 22, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CONCERNED CITIZENS AGAINST SLUDGE :

:

Docket Nos. 82-220-G
82-221-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF PHILADELPHIA, Permittee

OPINION AND ORDER

These matters concern two permits granted to the City of Philadelphia (Philadelphia) by the Department of Environmental Resources (DER) Bureau of Solid Waste Management, allowing Philadelphia to dispose of sewage sludge--from its Northeast and Southwest Water Pollution Control Plants--on two land reclamation sites. Permit No. 602201 pertains to a 72-acre site identified as Arcadia No. 1, in Grant and Montgomery townships, Indiana County. Permit No. 602124 pertains to a 155-acre site identified as Benjamin Coal Company Mines 11 and 11B, in Banks Township, Indiana County.

On September 20, 1982, the Concerned Citizens Against Sludge (Citizens) appealed these permit grants. The appeal of permit No. 602201 was docketed as EHB 82-220-G; the appeal of permit No. 602124 was docketed as EHB 82-221-G. Thereafter preliminary objections, requesting inter alia that these appeals be dismissed, were filed by Modern Earthline Companies, Inc. (Earthline); Earthline

identifies itself as a party appellee who is:

> an agent of the City of Philadelphia authorized to utilize digested municipal sludge to reclaim strip mines and to obtain permits for this activity.

The Citizens and DER have responded to these preliminary objections. Before we can rule on them, however, a number of procedural irregularities must be straightened out. Not the least of these, measured by the amount of confusion engendered, is the fact that the labeling on filed documents has not always been consistent with the Board's Docket Numbers--82-220-G for permit No. 602201, 82-221-G for permit No. 602124. The parties are requested to be more careful about this potential source of confusion in the future.

Section 21.52(b) of the Board's Rules and Regulations, 25 Pa. Code §21.52(b), states:

> No appeal from the granting of a permit, license, approval or certification shall be deemed to be perfected unless and until the recipient of the permit, license, approval or certification is served with a notice of appeal in accordance with §21.51 of this title (relating to commencement, form and content of appeals).

Section 21.51(f)(3) provides:

> Within ten days after the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:...
>
> (3)where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof.

These quoted sections of our Rules and Regulations mean that the two appeals which are the subject of this Opinion and Order have not been perfected unless Philadelphia was served with copies of the notices of appeal.

The Citizens' notices of appeal in these two appeals certify that Philadelphia was served by mail at the address:

City of Philadelphia
Municipal Services Building
Philadelphia, PA 19107.

This is the address listed on the permits from which the Citizens have appealed, and also is the address to which the permits were mailed by DER's Bureau of Solid Waste Management. In this respect, the Citizens' notices of appeal were served on Philadelphia in conformity with the requirements of the Board's Rules and Regulations (see 25 Pa. Code §21.32(d)). Therefore we hold that the instant appeals indeed have been perfected. On the other hand, it is far from clear that a political subdivision as large as Philadelphia can be presumed to have received notice of these appeals via a mailing addressed as above, not marked attention any particular individual or department. In fact, neither Philadelphia nor any attorney representing Philadelphia has filed a notice of appearance or any other documents in these appeals (see 25 Pa. Code §21.23).

Therefore the Board is reluctant to take any further action on these appeals, including ruling on the aforesaid preliminary objections, until we are certain Philadelphia actually has received notice of these appeals and has had the opportunity to be heard concerning them. In the interests of expeditiously resolving this problem, the Board has contacted the office of the Philadelphia Solicitor, and has been informed that documents pertinent to these appeals may be served on

Frank Thomas, Esq.
Deputy City Solicitor
1530 Municipal Services Building
Philadelphia, PA 19107.

All parties presently before the Board in these appeals are requested to make certain that Mr. Thomas has copies of all documents the parties have filed with the Board, including the notices of appeal. The Board is sending Mr. Thomas a copy of this Opinion and Order, along with copies of our Pre-Hearing Order No. 1 in each of Nos. 82-220-G and 82-221-G.

Next we turn to the problem of Earthline's status in these proceedings. Although the Citizens served Earthline with copies of the notices of appeal, there is nothing before the Board to show that Earthline is a party appellee, or has any other status permitting it to file preliminary objections. Earthline is not mentioned on either of the aforesaid permits; we do not see any basis for finding that Earthline is the "recipient of a permit, license, approval or certification" who becomes a party appellee after being served with a notice of appeal (see 25 Pa. Code §21.51(g)).

Therefore, despite the fact that neither the Citizens nor DER objected to Earthline's having filed preliminary objections, we shall not rule on Earthline's preliminary objections until Earthline has shown that it has the rights of a party appellee; such a showing will require Earthline to file appropriate factual allegations and/or a supporting Memorandum of Law. Of itself, the agency relationship (quoted supra) to Philadelphia alleged by Earthline cannot make Earthline a party appellee, nor can it give Earthline the right to represent the acknowledged party appellee Philadelphia in these matters. In the alternative, Earthline may wish to petition to intervene; although the Board cannot and does not commit itself to a favorable ruling on such a petition at the present stage of these proceedings, it does seem that Earthline should be able to satisfy the requirements for intervention. 25 Pa. Code §21.62.

An Order, consistent with this opinion, follows.

O R D E R

AND NOW, this 1st day of December, 1982, it is ordered that:

1. All parties, including Earthline, promptly shall ensure that Frank Thomas, Esq. (see our Opinion supra for his address) has copies of all documents which have been filed in these proceedings; the Board is sending a copy of this Opinion and Order to Mr. Thomas.

2. On or before December 17, 1982, Philadelphia--presumably but not necessarily through its counsel--shall enter its appearance in these matters (see 25 Pa. Code §§21.21-21.23).

3. On or before December 17, 1982, Philadelphia shall file whatever petitions for continuance it presently deems necessary to protect its rights in these appeals, including, e.g., petitions to extend the due date for its pre-hearing memoranda, to extend the period of discovery (see 25 Pa. Code §21.111(a)), etc.; the Board is sending Mr. Thomas copies of the Pre-Hearing Order No. 1 issued in these two appeals.

4. Petitions for continuance filed by Philadelphia pursuant to paragraph 3 supra, if relying on not having received copies of the notices of appeal on or about September 20, 1982 (when the Citizens filed their appeals), shall be accompanied by affidavits stating when and how notice was received, and explaining why the Citizens' actual mailing did not suffice to give notice.

5. If Earthline wishes the Board to consider its preliminary objections in these appeals, it shall file factual allegations and/or a Memorandum of Law in support of its claimed right to enter preliminary objections, on or before December 17, 1982.

6. In the alternative, Earthline may petition to intervene in these appeals, which it may do any time prior to presentation of evidence in these proceedings. 25 Pa. Code &21.62(a).

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Howard Wein, Esquire (for DER)
Chere Winnek-Shawer, Esquire (for Appellant)
Frank Thomas, Esquire (for Permittee)
Benjamin G. Stonelake, Jr., Esquire (for Earthline)

DATED: December 1, 1982

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CITY OF NEW CASTLE :

:

Docket No. 82-270-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On October 28, 1982, the City of New Castle ("City") filed a Notice of Appeal in the above-captioned matter. The Notice stated the City was appealing from an Order dated September 14, 1982, addressed to the City, issued by James E. Erb, Regional Water Quality Manager of DER's Bureau of Water Quality Management.

On October 29, 1982, the Board, consistent with its regular procedure, acknowledged the Notice of Appeal. The acknowledgment asserted, however, that the Notice of Appeal was deficient in two respects:

1. A copy of Mr. Erb's Order had not been furnished the Board; and

2. The City had not stated when it had received notice of Mr. Erb's Order.

On November 16, 1982, the Board docketed a letter dated November 9, 1982 from Thomas M. Piccione, the City's Solicitor. Mr. Piccione's letter enclosed

the requested copy of Mr. Erb's Order. But in response to the request that the City state when it had received notice of Mr. Erb's Order, Mr. Piccione wrote merely:

> Your letter also requests that I notify you of the date notice of the action appealed from was received. Unfortunately, I cannot verify that date. I do know the critical nature of that date, in that the appeal to be timely must be filed within thirty days of receipt. Unfortunately it was not received by my office but I believe by the Mayor's office. We do not have any means of ascertaining when the appeal was received. I can only speculate that it was received after the 14th and hopefully not more than thirty days from when I filed the Notice of Appeal.

On November 17, 1982, DER filed a Petition to Quash this appeal. This petition alleged that DER's Order was sent to the City via United Parcel Service, and that the United Parcel Service receipt (embodied in the Petition) indicated the City had received the Order on September 20, 1982. DER therefore concluded that the appeal had not been timely filed, and requested the appeal be quashed.

On November 22, 1982, the Board wrote Mr. Piccione, informing him that the Petition to Quash had been received, and advising him that the City was to file an answer to the Petition, if it desired to do so, on or before December 12, 1982. As of this date (December 20, 1982), the City has not answered the Petition.

As DER points out in its Petition, under the Board's Rules, notably 25 Pa. Code § 21.52(a), the Board lacks jurisdiction over an appeal which is filed more than 30 days after notice of the action appealed from has been received. This strict jurisdictional requirement has been stressed by the Commonwealth Court. Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Under the circumstances--which include Mr. Piccione's November 9, 1982 letter quoted above, and the City's failure to answer DER's allegation that the

City received notice of the Order on September 20, 1982, more than thirty days before the City filed its Notice of Appeal--the Board has no choice but to grant DER's Petition to Quash.

O R D E R

AND NOW, this 30th day of December, 1982, the above-captioned appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Richard S. Ehmann, Esquire (for DER)
Thomas M. Piccione, Esquire (for Appellant)

DATED: December 30, 1982